TOWARDS AN IMPROVEMENT OF THE LEGAL FRAMEWORK GOVERNING OCCUPATIONAL HEALTH AND SAFETY IN THE EUROPEAN UNION

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Abstract

This thesis addresses the complex issue of what action could be taken by the EU to improve OHS standards across the Member States (MS). More specifically: what can be done at the EU level? Why should action be taken and under what conditions? To address these questions, the thesis is structured around two main focal points: in order to think about what could be done to develop EU OHS standards, it is first necessary to assess what has been done in the past.

In the first chapter, a socio-legal perspective is adopted to chart the evolution to date of OHS law within the EU. Relevant primary sources are analysed, including all EU OHS directives, and a review of the secondary literature is complemented by a series of semi-structured interviews with stakeholders who participated in the drafting or negotiation of the main Framework Directive 89/391/EEC. In order to assess the impact of EU OHS standards within the MS, a comparison is then drawn between French and UK OHS law, with a focus in each case on the changes that were made to national law in response to developments in EU law. In the second part of the thesis, the enquiry turns to consider *how* the EU institutions might act to improve OHS standards. The jurisprudence of the Court of Justice of the EU (CJEU) is analysed in a detailed, schematic manner and the nature and activities of Labour Inspectorates is considered, both within MS and at the EU level, with a critical review here of the role and function of the recently created European Labour Authority.

Given the current political stalemate in the EU in respect of social policy, the main conclusion of the thesis is that the most viable route towards the improvement of workers' health and safety lies not with new legislation but with the improved application and enforcement of the existing body of EU OHS standards. This could be effected through (i) European-level coordination of the way LIs enforce existing standards at the national level, and (ii) a programme of strategic litigation before the CJEU to cover existing gaps and develop 'new' rights; for example, the right to reasonable accommodation in the workplace for injured or unwell workers.

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This thesis is dedicated to my late grandfather, Jean Villaumé, to whom I promised fifteen years ago that “one day, I will be a doctor”. I have never specified the field.

Author's declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

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List of Abbreviations

ACAS	Advisory, Conciliation and Arbritation Service
ACSH	Advisory Committee for Safety and Health at Work
ANACT	Agence Nationale pour l'Amélioration des Conditions de Travail
BTS	Bureau Technique Syndical
CBI	Confederation of the British Industry
CFDT.	Confédération Française Démocratique du Travail
CGT	Confédération Générale du Travail
CHSWC	Committee of Hygiene, Safety and Working Conditions
CIWC	Commissions to Improve the Working Conditions
CJEU	Court of Justice of the European Union
CNPF.	Conseil National du Patronat Français
CSE	Comité Sociale et Economique
DE	Department of Employment
DEP	Department of Employment and Productivity
DG	Directorate Generals
DTI	Department of Trade and Industry
EA	Emloyment Act
EC	European Community
ELA	European Labour Authority
EP	European Parliament
EPSR	European Pillar of Social Rights
EPSU	European Public Service Union
ESC.	Economic and Social Committee
ETUC	European Trade Union Congress
EU	European Union
EU-OSHA	European Agency for Health and Safety at Work
FO	Force Ouvrière
HSE	Health and Safety Executive
HSW	Health and Safety at Work
ILO	International Labour Organisation
IR	Industrial relations
LI	Labour inspectorates
LREM	La République En Marche
MHSW	Management Health and Safety at Work
MS	Member state
NCB	National Coal Board
OHS	Occupational health and safety
OMC	Open Method of Coordination
OPC	Open public consultation
OSH	Occupational safety and health
QMV	Qualified Majority Vote
RHS	Revitalising Health and Safety
RI	Rational institutionalist
SEA	Single European Act
SLIC	Senior Labour Inspectorates Committee
SME	Small and Medium Entreprise
SRSC	Safety Representatives and Safety Committee
TEEC	Treaty of the European Economic Community

TU	Trade unions
TUC	Trade Unions Congress
UK	United Kingdom
WG	Working group

CHAPTER 1

Introduction

The European Union (EU) is shaped by the dynamic of the European social model that aims to protect workers' rights, and by the dynamic of the single market with the freedom of movement of goods, capital, services, and labour. There are two central dimensions to the challenges of developing European social policy: first, the relation between liberalised market freedoms and social protection, and second, the distribution of regulatory competencies between the supranational and the national levels.[1] In the first years of the EU, decision-making in respect of social policy was shaped by a belief that standards would improve 'automatically' as a result of the removal of barriers to trade and mobility and consequent economic growth. This was easier for sovereign countries to agree upon than a programme of positive integration through the establishment of common institutions.[2] Negative integration in the EU and its internal market has since exposed national social policies to high pressure and competition, using the mobility of the capital as a threat.[3] This problem relates to the concept of social dumping that has always figured prominently in the literature on European integration.[4] Occupational health and safety (OHS) constitutes an exception to negative integration and is the only social field where there has been positive action by the EU early on. However, the OHS field is still impacted by social dumping; a limited understanding of European requirements can lead to a prioritization of cost-cutting over health and safety which can impact on the price of products and services. This approach can distort the market on the account of variable health and safety costs.[5]

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[1] Eichhorst, W., 1998. *European social policy between national and supranational regulation: Posted workers in the framework of liberalized services provision* (No. 98/6). Max Planck Institute for the Study of Societies.p.7

[2] *See* Scharpf, F., 1998. Negative and positive integration in the political economy of European welfare states. In *The Future of European Welfare*. Palgrave Macmillan, London. pp. 157-177

[3] Eichhorst, W., 1998. *European social policy between national and supranational regulation: Posted workers in the framework of liberalized services provision* (No. 98/6). Max Planck Institute for the Study of Societies.p.11

[4] The phenomenon of social dumping can have two illustrations: one is company in search of lower labour costs, the second is a competitive disinflation to hold down social expenditure and labour regulations to stay competitive – *See* Ericksno, C.L. and Kuruvilla, S., 1994. Labor costs and the social dumping debate in the European Union. *ILR Review*, *48*(1), pp.28-47.

[5] Wright, F.B., 1992. The Development of Occupational Health and Safety Regulation in the European Communities. *International Journal of Comparative Labour Law and Industrial Relations*, *8*(1), p.33; Neal, A.C., 1998. Regulating health and safety at work: Developing European Union Policy for the Millennium. *International Journal of Comparative Labour Law and Industrial Relations*, *14*(3), p..218

The risk of a limited understanding of the EU's OHS standards is real, not only due to new risks (e.g., « technostress »)[6] for which new directives should be adopted, but also due to the cutting of resources at the national level, which weakens the labour inspectorates' capacity to enforce EU OHS standards. Therefore, the question of whether the EU should take action regarding OHS, and to what extent, is part of the current debate.[7]

The existing body of EU OHS standards is contained in more than 30 directives, most of them based on the Framework Directive, 89/391/EEC, which covers all workers in the EU regardless of sector. This body of law has led to major improvements in workers' health and safety by creating OHS standards, which can be of two types - either a specification standard or a performance standard.[8] A specification standard is a 'self-explanatory' standard which requires little interpretation by the duty-holder, e.g. employers. For example, one of the first EU OHS Directives explicitly provides that "*the value corresponding to the alarm threshold shall not exceed (...) 15 parts per million for mean values measured over a period of one hour".*[9] OHS specification standards have been well developed from 1977 to 1989. With the adoption of the Framework-Directive 89/391/EEC, the focus shifted towards performance standards which specify the outcome of the OHS improvement but leave the concrete measures at the discretion of the duty-holder. One example could be the employers' duty to *"take measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means".*[10] Here, the broad and general EU OHS standard is the protection of workers' health and safety. The Directive specifies that it will be through preventive measures but does not detail what these measures should be. Most of EU OHS standards created by the currently applicable OHS Directives are performance standards.

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[6] Popma, J., 2013. *The Janus face of the 'New ways of Work': Rise, risks and regulation of nomadic work*. Working Paper ETUI, p.10

[7] *See* Vogel, L., One swallow doesn't make a summer—European occupational health policy at a crossroads. *Social policy in the European Union: State of play 2018*, pp.135-152; Regulations, W.T., 2013. Will Europe still fly the flag for workers' safety? *LABOUR RESEARCH*. pp.17-18

[8] Gunningham, N., 1996. From compliance to best practice in OHS: The role of specification, performance, and systems-based standards. *Australian Journal of Labour Law*, *9*(3), p.222

[9] Article 6.2. Directive 78/610/EEC of 29 June 1978 on the approximation of the laws, regulations and administrative provisions of the Member States on the protection of the health of workers exposed to vinyl chloride monomer

[10] Article 6.1. of the Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

However, this large legal framework often comes under attack, both at that national and EU level, on the basis of the claim that it overprotects the workers and limits competition. The most recent example of an EU-level attack was the REFIT programme, intended to simplify EU law by removing unnecessary burdens and adapting existing legislation without compromising on policy objectives.[11] This assumption was wrong as various reports and studies prove that developing OHS contributes to competition.[12]

Beyond its economic aspects, OHS has a significant human element, and work is, unfortunately, still dangerous. It is undeniable that there has been an improvement of the working conditions and a considerable decrease in fatal accidents, but there is still a high number of occupational diseases due to musculoskeletal disorders and psychosocial risks being reported. The recent French court case on the management practices of France Telecom, which pushed 69 workers to commit suicide between 2008 and 2011, is a striking example of the connection between economic pressure for competitiveness and the psychosocial risk and direct impact on workers' lives.[13] Therefore, there is a pressing need to improve the OHS legal framework to ensure the health and safety of workers in the future.

Even assuming that the EU ought to take new steps to improve OHS in the Member States (MS), the question arises of the appropriate nature of such steps. This is often debated, especially because the social field is deeply rooted at the national level; it might even be qualified as part of the identity of the MS.[14] In this doctoral study, I attempt to address the complexity issue of how the OHS legal framework might be improved in the EU. One of the essential questions is which European institutions might be the right actors to do it. What can be done at the EU level? Why should action be taken and under what conditions? To answer these questions, it is first necessary to understand the existing legal framework and the rationales and circumstances that shaped its evolution. Both its construction and its impact must

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[11]https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

[12] European Agency for Safety and Health at Work (2007): Facts 76/EN National economics and occupational safety and health. Bilbao, Spain: European Agency for Safety and Health at Work, ISSN 1681-2123; European Agency for Safety and Health at work (2007): Facts 77/E? The business benefits of good occupational safety and health, Bilbao, Spain, ISSN 1681-2123

[13] *See* Chabrak, N., Craig, R. and Daidj, N., 2016. Financialization and the employee suicide crisis at France Telecom. *Journal of Business Ethics*, *139*(3), pp.501-515; Alemanno, S.P. and Cabedoche, B., 2011. Suicide as the Ultimate Response to the Effects of Globalisation? France Télécom, Psychosocial Risks, and Communicational Implementation of the Global Workplace. *Intercultural Communication Studies*, *20*(2), pp.24-40

[14] Streeck, W., 1995. Neo-voluntarism: A new European social policy regime? *European Law Journal*, *1*(1), pp.39-40

be assessed and we must ask what can we achieve in terms of national convergence with an EU action. Addressing the construction and impact of the legal framework, in addition to the study of the existing provisions, will allow us to predict what can we expect from the EU in terms of OHS standards and under what conditions.

Additionally, improvement of OHS standards might not necessarily come from the creation of new norms or directives; it could also come from implementing and enforcing what already exists in new or different ways. In that respect, complementary issues have to be addressed, such as the question of whether we enforce or apply EU OHS standards at the EU level. If yes, how and to what extent? What is the impact of EU enforcement and application at the national level? These questions raise the more general question of the share of competences between the national and the European level in the social policy field. What can or should be delegated from the national to the EU level in order to improve OHS standards across the EU?

With these questions addressed, it will be possible to understand the current situation and possible ways to proceed (e.g., adopting a new OHS directive at the national or European level by agencies, labour inspectorates, or courts). On this basis, it might be possible to adjust future OHS strategies by making the best out of the current situation. This analysis may also provide support for a reform of the institutional Treaties regarding the share of social competencies between the national and European level or a rethinking of the principle of subsidiarity and proportionality. At a time of increasing Euroscepticism, it is fundamental to highlight the necessary complementarity between the European and the national levels to improve social policy, with the health and safety of workers as a central concern. Economic integration in the EU creates new risks for the workers; however, action by the EU without enforcement at the national level would be as useless as an isolated strategy at the national level.

The thesis is structured around two main focal points: in order to think about what could be done to develop EU OHS standards in the EU, it is first necessary to assess what has been done. In the second chapter, the existing EU OHS legal framework is contextualised amongst broader OHS policies at the EU level. Its evolution over time, starting with the foundation of the European Economic Community in 1957, will also be discussed. A socio-legal perspective is central in this historical approach in order to understand the overall evolution as well as the reasoning behind some decisions (e.g., previous literature recognises the Framework Directive,

89/391/EEC, as a turning point in the EU OHS approach. Why did the EU decide to operate such a change in its approach in 1989?). The core of this study is based on a close analysis of primary sources related to the OHS field, including Council Decisions and Resolutions, Commission's Recommendations, Social Action Programmes, and Community programmes concerning safety, hygiene, and health at work between 1957 and 2018. This study is also based on the European Treaties, and how they impacted the evolution of OHS, especially the Single European Act 1986. All EU OHS directives have been examined, and an in-depth analysis of the Framework Directive, 89/391/EEC, has been conducted. To understand the challenges raised by the adoption of this directive, all the available archives relating to this have been investigated (e.g., the different drafts submitted by the European Parliament and the Commission). The understanding of the overall transformation of EU OHS has been strengthened by a review of secondary sources (mainly academic literature).

Based on the findings of these preliminary investigations, interviews were designed to target the existing gaps in the literature highlighted during the first phase of the study. The thesis then draws empirically on three interviews conducted with stakeholders who were part of or witnessed the EU OHS decision-making process at the end of the 1980s: Alexandre Berlin, who was a civil servant for the Commission in the Director Generals (DG) V tasked with developing EU OHS policies between 1970 and 2004, Marc Sapir, the first director of the *Bureau Technique Syndical*, and Jean Lapeyre, the secretary general of the European Trade Union Congress at the end of the 1980s. Due to their crucial positions within the European bodies at the end of the 1980s, these qualitative interviews provide original, empirical data that allow for a better understanding of the political rationales leading to the development of the EU OHS legal framework.

The third and fourth chapters investigate the impact of the existing framework using a comparative methodology by focusing on one of the turning points: the implementation of the Directive 89/391/EEC. The implementation of the directive in two MS (i.e., France and the UK) is compared as well as its impact through an analysis of OHS legal framework at the national level before the implementation and the way it in which it was implemented and subsequently integrated.

Only a wide historical lens — 1970 to 2019 — can capture the overall effect of the EU action at the national level. Therefore, it is crucial to understand the national dynamics to see if

these conflicted at all with the EU approach. Thus, in addition to the historical methodology, a socio-legal approach is used to compare the impact of the Framework Directive in France and the United Kingdom (UK). The selection of these two countries is based on various factors. First, these countries illustrate two of the main "parent legal families" constituting the EU: the Anglo-Saxon system based on the common law tradition and a Latin system belonging to the civil law tradition.[15] These countries have also been selected due to their relationship with the EU: France has always appeared to encourage European integration, while the UK has expressed more reticence (as illustrated by the Brexit vote). Moreover, their industrial relations (IR) are deeply divergent: the French system is strongly institutionalised and regulated by the state, while the UK IR were built upon the idea of *collective laissez-faire*, which then shifted towards more deregulation. Because of these differences, a comparison between the two countries promises to reveal whether the implementation of EU OHS Directives created a phenomenon of convergence among MS. To supplement the existing literature, five semi-structured interviews were conducted: Jean Lapeyre, a worker representative of the *Confédération Française Du Travail* (CFDT)[16] in France during the 1970s, Jean Auroux, minister of labour in France from 1981 to 1984, Patrick Kinnersly, a UK journalist and involved in the workers' rights and author of a pamphlet about the *Robens Report*, and Phil James and David Walters, experts on the socio-legal development of OHS in the UK for more than 30 years. These testimonies supplement the existing literature in valuable respects.

The fifth and the sixth chapters explore how EU OHS standards could be improved by focusing on new applications and better enforcement of existing law through two main channels: the Court of Justice of the European Union (CJEU) and the labour inspectorates (LIs). The CJEU has a fundamental role in the application of EU OHS standards, considering that its decisions are legally binding and applicable in all the MS. Its broad impact and competences designate the CJEU as an institution that has the potential to influence the way EU OHS standards are applied. Chapter 5 constructs a hypothesis regarding the role that the CJEU might play in the development of a new understanding of the EU OHS legal framework. The main hypothesis concerns its potential role in developing a right to adapt the workstation in return-to-work situations for injured or unwell workers excluded by disability protection. The first part

[15] Rambaud, T., 2014. *Introduction au droit comparé: Les grandes traditions juridiques dans le monde*. Puf. pp.43-52.
[16] French Democratic Confederation of Labour

of Chapter 5 is based on a qualitative analysis of OHS jurisprudence of the court that examines all the judgements held by the CJEU that relate to one of EU OHS directives between 1957 and 2017. A more detailed review of the jurisprudence around the concept of disability at work is also provided.

Chapter 6 focuses on the second potential channel to improve the enforcement of EU OHS standards by investigating how the EU could strengthen the LI at the national level and what should be done at the EU level. The enforcement of OHS legislations by the LIs falls under the national competencies of the MS. Therefore, the first part of the chapter highlights the main differences at the national level that constitute a challenge to the coordinated enforcement of EU standards. The main material investigated was reports authored by the European Public Service Union (EPSU) and COWI. It also addresses common obstacles that the national LIs face, especially in the context of a European labour market. The second part of Chapter 6 presents a critical assessment of the future role of the European Labour Authority and whether it could contribute to the more harmonious enforcement of EU OHS standards at the national level.

The interviews undertaken during the course of the research provided valuable indication regarding the political context within which legal and policy decisions were made. My intention while conducting these interviews was (i) to discuss the 'incoherency' or the 'missing' elements identified during the examination of the primary sources which might contribute the 'full picture' of the development of OHS legal frameworks in the EU, UK and France, (ii) to identify the personal experiences and approach of those who helped draft, negotiate and comment on the legislation. The aim of these interviews was to collect personal testimonies and memories regarding official and legal events, such as the adoption of European directives or national pieces of legislation.

The high positions and extensive knowledge necessary to be able to contribute or to influence the development of OHS legal acts in the EU, UK and France made recruitment to the interviews difficult. For example, some people who have worked for the Commission or the European Institutions, or in the Governments may still be subject to confidentiality agreements even after they have retired. Nonetheless, I have identified and contacted a small number of stakeholders during the examination of the primary sources and secondary literature. After a first contact had been made, identification of additional participants proceeded according to a

'snowball' logic. However, due to professional circumstances (e.g., Confidentiality agreements) or personal beliefs (e.g. refusal to sign the consent agreement, refusal to participate due to lack of time and/or resources) exchanges that I had with six people do not fall within the scope of the ethical approval of this study and could not be used as official sources for this thesis. In order to respect the wish of anonymity of these people, and to respect the trust that I have established with them, no further details will be provided regarding their identities, or current or past positions. Eventually, I succeeded in interviewing seven individuals. These participants represent a small, unrepresentative sample for each legal system examined in this doctoral study: the EU, France and UK.

Once agreement was reached with the participant concerning their intentions to contribute to the research and the day of the interview, I prepared a list of questions corresponding to the time and the legal system relevant for their personal experience. Shortly before the interview, I sent them by email the information sheet,[17] the consent form[18] and the questions. Whenever it was possible, I met in person with the participant to conduct the interview, otherwise the interview was conducted by phone or via videoconferencing. The length of each interview was decided by the participants, and they ranged from 40 minutes to almost 2 hours. All the interviews were audio-recorded with the consent of the participant. Based on these audio recordings, the interviews were transcribed, and the transcriptions sent to the participants who then had an opportunity to amend them. The transcripts are now stored in a University of Glasgow databased.[19] The conditions of storage and of access for future re-use have been detailed in the ethical approval granted from the College of Social Sciences Research Ethics Committee of the University of Glasgow.[20]

Regarding the analysis of the interviews, I have gathered and questioned the participants on their visions of past events. It means that their statements represent their individual and personal experience. Therefore, their statements and opinions cannot and should not be generalised. Additionally, I acknowledge that the sample achieved is small and that all interviewees have a similar perspective, i.e. they are broadly sympathetic to the interests of workers. I am fully aware of this imbalance of perspectives among the social partners and I did

[17] Both in French and in English; *see* Appendices n°3 and n°4
[18] Both in French and in English; *see* Appendices n°1 and n°2
[19] Restrict Access with the DOI: 10.5525/gla.researchdata.891
[20] Application No: 400 160 108

my best to take it into consideration during the analysis of the empirical data. However, despite this conscious effort, this imbalance and the number of participants might limit the overall value of the data; in the event of further studies focusing on personal perspectives on the evolution of the OSH legal framework in the EU and MS, this should be addressed. Also, all the participants were in their seventies or eighties, and memory might have been an issue for some of them, especially regarding events which happened 30 to 40 years ago. I have, therefore, taken into careful consideration the reliability of my participants.

The results of my investigation into the evolution and understanding of the EU OHS legal framework are presented in the first part of the thesis. What emerges is the consistent role of the Commission as a coordinator of the MS, whose aim was to find a consensus and compromise accepted by all the MS no matter what the institutional changes involved. As a result of the adoption of legal norms at the European level, there was a phenomenon of theoretical convergence with the adoption of broad and general OHS principles; however, applications of these concepts diverged depending on the legal tradition and the political context at the national level.

As I explain in Chapter 2, the concepts of consensus and compromise shaped OHS decision-making in the EU. The ways in which these concepts are applied and in what institutional and political contexts have changed over time. The current study analyses three distinct periods: the early development of OHS in the European Community from 1957 to 1985, the turning point of the Delors Commission in 1985 and the adoption of the Single European Act and the Framework Directive, 89/391/EEC, and the adoption and evolution of OHS principles in 1989 under commissions with different economic agendas.

At first, the development of OHS rules was seen as necessary to balance the collateral damage of economic construction. From 1957 to 1985, the degree of commitment to and framing of OHS varied considerably depending on the personality and ambitions of the President of the Commission. However, even ambitious commissions, such as the Jenkins and Thorn Commissions, reached institutional limits when they tried to develop a set of OHS directives determining limits to exposure to toxic products at the workplace. Indeed, until 1985, unanimity was required to adopt new OHS directives. The Delors Commission was a turning point in the EU, with the adoption of the Single European Act (SEA) 1986 and the aim of establishing the single European market. The SEA introduced Art. 118A, requiring only the

qualified majority to vote the adoption of new OHS directives. In theory, this new provision could have made the concepts of consensus and compromise less relevant; however, the interviews conducted for the current study, combined with a review of the literature on the qualified majority vote, show the importance of the informal dynamics behind the decision-making behaviours in the OHS field.

Therefore, in chapter 2, I argue that despite the significant institutional change of the Article 118A with the SEA, the former dynamic of consensus and compromise that was applicable under the unanimity rules still existed but in an informal manner. The adoption of the Framework Directive and its individual directives (also called 'daughter directives') was also due to a specific circumstance: the establishment of the single market. These directives were necessary to ensure the functioning of the market. I illustrate this argument by underlining that even if certain aspects of Directive 89/391/EEC embodied real change compared to the previous generation of OHS directives, the quantitative approach and the idea of consensus and compromise were visible during the discussions that led to its adoption. The general phrasing of the rights and obligations embodied in Directive 89/391/EEC was a turning point compared to the narrow obligation regarding the maximal value of exposition to chemicals, e.g. Directive 80/1107/EC. However, the Commission continued to insist upon the importance of reaching a consensus accepted by everyone even if it meant less clarity.

In the last part of Chapter 2, I argue that these concepts of compromise and consensus, which were at the heart of the decision-making process at the time of the adoption of most of EU OHS Directives, are no longer appropriate in the current setting. In the past, compromise and consensus were possible because the positions of the various stakeholders had relatively the same importance. Trade unions have been significantly weakened over the past two decades, which means that compromise and consensus are not possible (or only at the costs of the TUs' claims). Additionally, the EU considerably expanded during the 1990s. At the end of the 1980s, a common position between MS was possible because most of the MS had a common idea of the role of the EU. This is no longer the case, particularly in the field of social law. It is now more complicated to find commonality and agreement to move forward. This chapter emphasises the importance of the context at the moment when most of the EU OHS legal framework was adopted. It shows that the current context might not be favourable for the adoption of new OHS directives. Therefore, the focus of the rest of the thesis is on the existing

legal framework, its impact at the national level, and the various ways it can be enforced and applied.

As is shown in the comparative study presented in Chapters 3 and 4, the implementation of the Framework Directive 89/391/EEC prompted reforms at the national level even in MS with well-developed OHS legal frameworks, e.g., France and the UK. Both MS had to amend their national legislations to implement EU OHS principles. Interestingly, France and the UK changed parts of their legislation on which they had previously diverged. This proves that EU activity in the field of OHS initiated a theoretical convergence with the adoption of common principles and concepts. However, this comparative study highlights also the importance of the national political context and the existing IR as factors that influenced the way the Directive 89/391/EEC was implemented and integrated at the national level. In the UK, for example, IR were initially characterised by the notion of voluntarism or *collective laissez-faire.* Additionally, when the directive was implemented, the Conservatives were at the head of the government and were opposed to any regulatory dynamic, especially in the social field and influenced by the EU. Implementation of Directive 89/391/EEC was consequently minimal.

On the other side, in France, the IR were mostly regulated and centralised. Moreover, between 1981 and 1995, the Socialist Party was at the head of the government, and it was in favour of the political and social development of the EU. As a result, the implementation of Directive 89/391/EEC was not only an opportunity to reform the French OHS legal framework but also to clarify it in order to align with EU concepts while respecting national legal traditions. These examples also illustrate the general idea that action taken at EU level can have an impact at the national level only if the national governments and relevant authorities relay it. The EU OHS principles can lose their consistency and potential if they are not applied and enforced coherently among the MS, leading to deep practical divergences as is currently the case.

The second half of the thesis focuses on how to improve the EU OHS legal framework through an extensive, novel application of existing OHS principles before the CJEU (Chapter 5), and better enforcement of EU OHS standards by the LIs (Chapter 6).

In Chapter 5, I explore whether or not, in the context of legal paralysis at the EU level, litigation before the CJEU has the potential to improve workers' OHS. The chapter is structured in two parts: the first section provides an overview of what has been done in terms of strategic

litigation before the CJEU in the field of OHS in the form of both infringement proceedings and preliminary rulings. Analysis of all the Court decisions that rely on one OHS directive confirms the politicised behaviour of the Commission to initiate infringement proceedings and shift towards a decentralised channel to enforce EU OHS standards with an argument based on individual rights for the workers.[21] It stresses that the infringement proceeding channel might not lead to major improvements in the current political context. In the meantime, it shows the potential for developing a litigation strategy via preliminary rulings. Indeed, the CJEU has positively influenced and extended workers' rights regarding working time and protections for pregnant workers. However, the claims that seem to be suitable for action before the CJEU are the claims based on individual rights. Individual rights are rare in the OHS legal framework, which has a reflexive nature aimed at changing procedures and encouraging self-regulation. Nevertheless, one aspect of OHS might benefit from a CJEU ruling. Therefore, the second part of chapter 5 explores, from a more hypothetical perspective, the kind of arguments that might be developed before the CJEU to expand the scope of current OHS directives to include the situation of injured or unwell workers returning to work after sick leave that was taken for occupational reasons.

Currently, there is a right to a reasonable accommodation in the workplace, but this is strictly limited to disabled workers. The concept of disability does not cover injured or unwell workers who cannot work at their full potential but are not (yet) disabled; their protection varies considerably depending on the MS. Therefore, I argue that it might be possible to advocate for an expansive application of Article 6.d of Directive 89/391/EEC based on the idea that the employer's obligation of prevention is not limited to the situations *prior* to a workplace accident or occupational disease. In the occurrence of a workplace accident or occupational disease, this obligation continues, and the employer has an obligation to adapt the workstation to prevent aggravation of the impairment (which can lead to long-term disability for the worker). The phrasing of this right to adaptable workplaces would be inspired by the existing framework.[22] It would be restricted to cases where impairment is due to a fault by the employers; considering the national differences in terms of employers' liability in OHS, the application of this right will be different depending on the MS. The possibility of defending this argument before the

[21] A total of one 161 cases have been collected, and then classified according to: the year of the decision, the type of action before the CJEU (i.e., Infringement proceeding or preliminary ruling), the Member States involved, and the OHS Directive's topic

[22] *See* Art. 5 Directive 2007/78/EC and Art. 5.1. Directive 92/85/EEC

CJEU might also be restricted due to limited resources of the parties involved and the constraint of admissibility to go to the CJEU. Nevertheless, such argumentation can open a debate on the general idea of filling legal gaps by developing an innovative understanding of the existing legal framework.

In Chapter 6, I examine whether it would be possible to improve EU OHS standards through better enforcement by the LIs. According to the Treaties, LIs are bound to ensure that common EU social standards are respected.[23] At the same time, labour regulation has historically been a matter of domestic law and control.[24] It is assumed that the EU will not interfere, and that enforcement will remain a national matter.[25] LIs enforce EU OHS standards with their differences but also similarities. The differences regarding enforcement revolve around the central concept of sanctions and can be organised in three sub-categories: the nature of the sanctions, the proportionality of the sanction, and the balance between legally and non-legally binding sanctions or way of enforcement. The analysis of the common obstacles revolves around the idea of "lacking": lack of human and material resources and lack of support and cooperation that led to non-enforcement at the national level made worse due to the common market. These observations underline the existence of common dysfunction at the national level and raise the potential need for European action to provide support for the lack of assistance and resources — especially with respect to cross-border employment. Thus, the second part of Chapter 6 focuses on the EU level and which bodies and agencies have an impact on the enforcement of EU OHS standards.

A close examination of the Senior Labour Inspectorates Committee (SLIC) shows a paradox between the awareness of the national need for European action and the Commission agenda, delegating enforcement to the national level. Overall, the study of the four main European actors[26] not only underlines their support and advisory role to the Commission but also their lack of independent executive power. For this reason, the final part of the chapter contains an assessment of the European Labour Authority (ELA), which has been presented as

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[23] Art. 4.3 TFEU

[24] Kolben, K., 2011. Transnational labor regulation and the limits of governance. *Theoretical Inquiries in Law*, *12*(2), p.407

[25] Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), p.809

[26] i.e., The Senior Labour Inspectors Committee (SLIC), the Advisory Committee for Safety and Health at work (ACSH), the European Foundation for the Improvement of Living and Working Conditions and the European Agency for Safety and Health at Work

an independent authority in charge of enforcing the rules on workers mobility (one of the problems facing the national LIs).

An examination of the three scenarios suggested in the impact assessment published by the Commission for the establishment of the ELA shows that this authority is an illustration of the current limitation in terms of improvement of EU OHS standards.[27] Some options that could have led to a real improvement at the EU level have been discussed but because of the choice of a stakeholder to maintain its sovereignty over its authorities — thereby maintaining unbalanced scope between the enforcement of EU OHS and market freedoms — the ELA will be an upgraded version of the existing mechanisms, such as networking and mediations, but without real novelty or innovation. This example demonstrates that improving the enforcement of OHS in the EU does not only depend on what would be legally possible but also on the political will of the main actors, starting with the MS.

[27] *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a European Labour Authority* COM(2018) 131

CHAPTER 2

The Development of Occupational Health and Safety in the European Union: From Privileged to Ignored Topic

2.1. Introduction

Whether the EU should take action regarding OHS, and to what extent, is central to the current debate.[28] The existing literature provides an overview of the current legal framework by describing the evolution of the approach applied to the EU OHS law-making activity through different stages:[29] first, the prescription of technical standards, then a shift towards a goal-orientated approach with Directive 89/391/EEC, and finally the development of an approach based on social dialogue.[30] This evolution has taken place within the broader development of the European project, and links between the OHS Directives and the broader EU policies have been successfully established, especially the importance and the central attention given to the single market and the economic development of the Community.[31] However, there have been only a few studies that have investigated the internal processes of the adoption of the Directive to explain the logic of the evolution that has been described previously.[32] Most of the previous research has focused on the 'outcome' of the evolution, not the dynamics and the factors of these changes over time.

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[28] *See* Vogel, L., One swallow doesn't make a summer—European occupational health policy at a crossroads. *Social policy in the European Union: state of play 2018*, pp.135-152; Regulations, W.T., 2013. Will Europe still fly the flag for workers' safety?. *LABOUR RESEARCH*.

[29] Gagliardi, D., Marinaccio, A., Valenti, A. and Iavicoli, S., 2012. Occupational safety and health in Europe: Lessons from the past, challenges and opportunities for the future. *Industrial health*, *50*(1), p.8; *see* Wright, F.B., 1992. The Development of Occupational Health and Safety Regulation in the European Communities. *International Journal of Comparative Labour Law and Industrial Relations*, *8*(1), pp.32-57.

[30] *See* Liu, K. and Liu, W., 2015. The Development of EU Law in the Field of Occupational Health and Safety: A New Way of Thinking. *Management and Labour Studies*, *40*(3-4), pp.207-238.

[31] *See* Vogel, L., 2015. The machinery of occupational safety and health policy in the European Union. *History, institutions, actors, Brussels, ETUI*.; *see* Neal, A.C., 1998. Regulating health and safety at work: Developing European Union Policy for the Millennium. *International Journal of Comparative Labour Law and Industrial Relations*, *14*(3), pp.217-246.

[32] Note that the general decision-making in the European Union in fields other than OHS has been broadly covered. *See* Peterson, J. and Bomberg, E., 1999. *Decision-making in the European Union*. Macmillan International Higher Education; Peterson, J., 1995. Decision-making in the European Union: Towards a framework for analysis. *Journal of European public policy*, *2*(1), pp.69-93.; Richardson, J., 2006. *European Union: Power and policy-making*, Routledge

Thus, a series of questions need to be raised to complete the existing literature. The primary research question is: which rationale or rationales have shaped decision-making in the EU in the field of OHS law? Two subsidiary questions should also be considered: How might we assess the impact of this rationale on the EU OHS legal framework? Is this rationale still important today when it comes to decision-making with respect to OHS? By addressing these questions, the current chapter investigates the logic behind the legal decision-making of EU OHS Directives by identifying the underpinning concepts and factors that have tailored the evolution of the EU OHS.

Using an historical and socio-legal approach, the chapter follows a chronological analysis of the development of the OHS legal framework and policies in the EU and is structured around three main periods: the early development of OHS in the European Community from 1957 to 1985, the turning point that came with the Delors Commission in 1985 and the adoption of the SEA and the Framework Directive, 89/391/EEC, and the OHS principles adopted in 1989, which evolved under Commissions with different economic agendas. Placing the legal evolution of the OHS legal framework within a broad historical scale — a span of more than 60 years — it is possible to contextualise it within the general institutional and political evolution of the European project. This is fundamental because, depending on the agenda of the Commission, the place and the importance of OHS changes, and thereby the willingness of the MS to agree to adopt innovative directives.

Therefore, the core of the current study is based on a close analysis of primary sources related to the OHS field, such as Council Decisions and Resolutions, the Commission's recommendations, social action programmes, and Community programmes concerning safety, hygiene, and health at work between 1957 and 2018. This study is also based on the European Treaties and how they impacted the evolution of OHS — especially the SEA 1986. All EU OHS Directives were examined for this study, and an in-depth analysis of Directive 89/391/EEC was conducted. This Directive — also called the 'Framework Directive' — is the basis for the current OHS legal framework and provides general right and duties for both the employer and the workers. The main idea is that employers have a general obligation regarding the health and safety of their workers and have to evaluate and prevent risks at the workplace. On the other side, the workers have an individual responsibility to take care of their own health and safety. To understand the challenges raised by the adoption of this Directive, related

archives available were carefully investigated, e.g., the different drafts submitted by the European Parliament and the Commission.[33]

The understanding of the overall transformation of the EU OHS field has been strengthened by secondary sources — mainly academic literature. Based on these elements, it was possible to tailor interviews targeting the gaps highlighted during the first phase of the study. The study empirically draws on three interviews with stakeholders who were part of or witnessed the EU OHS decision-making at the end of the 1980s: Alexandre Berlin was a civil servant with the Commission in the Directorate General (DG) V tasked with developing EU OHS policies between 1970 and 2004; Marc Sapir was the first director of the *Bureau Technique Syndical;* and Jean Lapeyre was the secretary general of the European Trade Union Congress at the end of the 1980s.

Based on a broad overview of the changes made to the OHS legal framework and policies in the EU since 1957, I argue that there is a continuity of the Commission's role as a coordinator among the MS with the aim of finding a consensus and compromise accepted by all the actors. However, as shown in the final part of this chapter, an analysis of the current situation shows that a consensus or compromise between the MS and the social partners appears to be difficult to reach. This may mean that the concepts that have contributed to the current OHS legal framework are not suitable to the current context; this might partially explain the difficulty in adopting additional directives to cover new risks. The identification of these elements might help the debate to consider not only what action the EU should, in theory, take regarding OHS but also what, in practice, it is reasonably possible to achieve. Under the current institutional setting, it seems unlikely that compromise and consensus leading to new significant OHS directives will be found.

2.2 Occupational Health and Safety in the Early Development of the European Union: 1957 to 1989

Analysis of the actions of the various European Commissions in OHS from 1958 to 1985 highlights that, in the initial institutional context, the possibilities for developing OHS

[33] *See* Official Journals of the European Communities No C-326/78, No C-326/83, No C-326/89, No C-158/131, No C-158/135, No C-175/22 and No C-175/24

policies evolved in parallel alongside the more general evolution of the European project. Three periods can be distinguished related to these various Commissions. First, the Hallstein Commission (Hallstein Commission I 1958–1962, Hallstein Commission II 1962–1967), which was the first Commission, had an ambitious vision of the European project. Its approach reflected OHS as a necessary field of action to complement economic development. The second period, from the Rey Commission (1967–1970) to the Masholt Commission (1972–1973), is the decade of non-intervention of the Commission in OHS. Then, starting with the Ortoli Commission (1973–1977), the European Commissions started to develop the OHS legal framework in a broader dynamic of a general reflection over the building of Europe.

2.2.1. The Hallstein Commission

The action on OHS filed at the time of the first Commission shows interesting initiatives. It underlines the special role of OHS and its link, from an early stage, with the freedom of workers and the single market. It also shows the initial role of the Commission as a coordinator and the Council providing general political direction.

Under the presidency of Hallstein, the first Commission was particularly active and had political ambitions beyond the provisions of the Treaty of European Economic Community (TEEC). The Hallstein Commission was in favour of a more positive form of European integration and saw the role of the Commission as minimising the economic divergence within the Community.[34] Because OHS was seen as a side effect of economic integration, the Commission did not hesitate to use the institutional provisions at its disposal to operate in that field. Two main actors were involved in framing OHS: the Council and the Commission. With the Decision on Mines Safety, the Council made the Commission coordinator between MS in charge of information and communication of the progress made in the different MS.[35] The Council Decision aimed to define a general political direction for the MS. With the three Recommendations adopted by the Commission between 1962 and 1966, it appears that its role

[34] Cini, M., 1996. *The European Commission: leadership, organisation, and culture in the EU administration*. Manchester University Press. p.45

[35] Decision adopted the 9 July 1957 concerning the terms of reference and rules of procedure of the Mines Safety Commission [487/57]

was expressly to promote close collaboration between the MS.[36] The Recommendation on occupational disease aimed at the adoption of a harmonised and uniform list of occupational disease ended up being indicative and not mandatory. This harmonisation was seen as useful and necessary for the free movement of workers to ensure the same protection for all workers in the EC. These goals were ambitious and had a direct connection with OHS; however, by being embodied by non-legally binding provisions, their implementation has been sharply limited[37] and has had little impact on the national legislation.

The role of the Commission was to suggest ideas to the MS for working together on a voluntary basis. The Commission never intended to take direct European action; it hoped that executing a coordinated action by the MS would be enough. Moreover, it has been emphasised that this early stage of activity was mainly due to the leadership of Hallstein, and it changed considerably with the next Commissions.[38]

2.2.2. Post-Hallstein Commission

The initiatives and commitment of the Commission before 1967 contrast starkly with the Rey Commission and others following 1967 which adopted nothing specific regarding the social aspect of the European Community and OHS.[39] After the Hallstein Commission ended in 1967, there were eight years of complete inactivity in that field. Despite no official or legal activity, there was a change of mentality both at the European and national level.[40] One illustration at the European Level was the Paris summit Declaration in 1972:

> *"6. The Heads of State or Heads of Government emphasized that they attached as much importance to vigorous action in the social fields as to the achievement of the Economic and Monetary Union. They thought it essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community. They invited the Institutions, after consulting labour and management, to draw up, between*

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[36] [2188/62] Commission Recommendation to the Member States on the adoption of a European list of occupational diseases, 23 July 1962; [66/462/EEC] Commission Recommendation to Member States on the conditions of compensation for the victims of occupational diseases, 20th July 1966; [66/464/EEC] Commission Recommendation to the Member States on the medical control of workers exposed to particular risks, 27th July 1966

[37] Vogel, L., 1994. L'organisation de la prévention sur les lieux de travail. *Un premier bilan de la Directive-cadre communautaire de 1989*. BTS.TUTB.TGB. p.68

[38] Cini, M., 1996. *The European Commission: leadership, organisation, and culture in the EU administration*. Manchester University Press. p.51

[39] Malfatti Commission (1970-1972); Mansholt Commission (1972-1974)

[40] For some countries like France, it was even a broader political critic.

now and 1 January, 1974, a programme of action providing for concrete measures and the corresponding resources particularly in the framework of the Social Fund, based on the suggestions made in the course of the Conference by Heads of State and Heads of Government and by the Commission.

This programme should aim, in particular, at carrying out a co-ordinated policy for employment and vocational training, at improving working conditions and conditions of life, at closely involving workers in the progress of firms, at facilitating on the basis of the situation in the different countries the conclusion of collective agreements at European level in appropriate fields and at strengthening and co-ordinating measures of consumer protection."[41]

Additionally, some scholars consider some of the national social protests as a complementary factor for restarting the European social action in 1974.[42] The economic situation was also a factor that changed the approach. Indeed, following the 1973 economic crisis, the initial belief that economic growth would have an automatic positive impact on the social aspect was heavily challenged.[43] Thus, the Community started to realise the necessity for a social path independent of the economic one.[44]

Within this context, the level of commitment and activity restarted under the Ortoli Commission with the adoption of two Council decisions.[45] From a legal perspective, both were legally enforceable and represented the first legally binding acts at the European level on OHS. Even if the Commission had the necessary power to control the implementation at the national level of the rules laid out by the Council in these decisions, no further action by the Commission has been observed on these specific topics. The impact of these decisions has been relative; there was a theoretical commitment but not a willingness to be directly responsible for the enforcement.

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[41] Art.6 of the Paris Summit Declaration 1972

[42] Vogel, L., 1994. L'organisation de la prévention sur les lieux de travail. *Un premier bilan de la Directive-cadre communautaire de 1989*. BTS.TUTB.TGB. p.69

[43] Dinan, D., 2004. *Europe recast: a history of European Union* (Vol. 373). Basingstoke: Palgrave Macmillan.p.12

[44] Venturini, P., 1989. *1992, the European social dimension*. European Communities. p.16; Berlin, Alexandre. Interview, November 08, 2017. Archives, University of Glasgow p.2

[45] Council decision on the setting up of an Advisory Committee on Safety, Hygiene and Health Protection at Work[74/325/EEC]; Council Decision on the extension of the responsibilities of the Mines Safety and Health Commission to all mineral-extracting industries [74/326/EEC]

2.2.3. The Jenkins and the Thorn Commissions

The next step was made with the Jenkins Commission (1977–1981) and the Thorn Commission (1981–1985), when OHS started to emerge as a topic on its own, as illustrated by the first action programme devoted exclusively to health and safety at work by the Council. As recognised in the literature, the improved OHS had a substantial economic impact.[46] Many studies have underlined the positive impact of good working conditions on economic productivity.[47] This element was discussed in interviews conducted with former European civil servant Alexandre Berlin. According to Berlin, the emergence of OHS as an autonomous field of action can be explained by the general political context of that time. Indeed, this modification of approach happened in the broader context of a discussion on the relationship between the economic and the social domains at the European level. At that time, some members of the Commission concluded that the social area was not only complementary to the economic field but was just as crucial. Berlin stated that "*Without the social, the economic is too abstract"*.[48] This may have been an important reason the EU institutions decided to engage in a legislative process on health and safety.

The first illustration of this new mindset was the first wave of legally binding acts and Directive focused on quantifiable factors. The first OHS directive was Directive n°77/576/EEC on the harmonisation of national laws on safety signs in the workplace. Following a European scandal about the effect of the vinyl chloride,[49] Directive 78/610/EEC on the harmonisation of occupational exposure limits to vinyl chloride monomers was adopted. It was the beginning of a more significant movement of directives determining the limits of exposure to toxic products at the workplace. This determination of limits could be seen as a quantitative and normative approach. This policy was illustrated by a Framework Directive adopted in 1980 that framed the risks of exposure to chemical, physical, and biological agents,[50] which was the basis for further directives. Three other Directives on OHS were adopted under the Thorn Commission.

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[46] *See* Burton, W.N., Conti, D.J., Chen, C.Y., Schultz, A.B. and Edington, D.W., 1999. The role of health risk factors and disease on worker productivity. *Journal of Occupational and Environmental Medicine*, *41*(10), pp.863-877; ILO, 2003. Safety in Numbers: Pointers for a Global Safety Culture at Work.p.17

[47] https://healthy-workplaces.eu/previous/all-ages-2016/en/news/benefits-osh-reduced-costs-business-and-better-conditions-workers-all-ages

[48] Berlin, Alexandre. Interview, November 08, 2017. Archives, University of Glasgow. p.2

[49] Livock, R., 1979. Science, Law and Safety Standards: A Case Study of Industrial Disease. *British Journal of Law and Society*, *6*(2), p.173

[50] Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work

They concerned major accident hazards of specific industrial activities,[51] protection from exposure to metallic lead,[52] and protection from exposure to asbestos.[53]

The reason to focus on the quantifiable approach might have been that these topics covered pragmatic problems. Berlin stated that it was the most "reasonable subject" to start with to find a consensus among the MS.[54] In that respect, OHS was easily quantifiable: if there was no workplace accident, the OHS improved.[55] During his interviews, Berlin provided further details on the variety of origins of the three OHS Directives initiatives.[56] Indeed, all the partners showed eagerness to initiate the discussion that led to the adoption of an OHS Directive.

The problem of motivating the discussion on the lead Directive 82/605/EEC contained a particular example of an initiative by an MS government: the economic problem of octane in fuel.[57] At the time, a substantial part of the German economy relied on the car industry. Cars produced were powerful and required a high-octane ratio in the fuel. Therefore, the EU had to find a solution to the German problem, and it had consequences in other countries.[58] There were two ways to increase the octane level in the fuel: either by changing the composition of the fuel or by increasing the lead rating. The latter was the cheaper. Modifying the composition of the fuel would have implied modifications of the production process — it was not reasonable at the European level. Thus, a discussion started to increase the level of lead in the fuel to raise the octane ratio. The direct consequence was the emission of lead into the air. Consequently, the challenge was to mitigate economic and OHS problematics.[59] This was an underpinning problem throughout the development of the EU OHS framework. Everybody agreed on the need to have OHS rules; the challenge was to find the acceptable scope of action for the EU

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[51] Council Directive 82/504/EEC of 12 July 1982 amending Directive 78/663/EEC laying down specific criteria of purity for emulsifiers, stabilizers, thickeners and gelling agents for use in food
[52] Council Directive 82/605/EEC of 28 July 1982 on the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work (first individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)
[53] Council Directive 83/477/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC); All of them referred to the Framework Directive of 1980 and the action programme of 1974. They were based on Art. 100, Art. 117, and Art. 235 of the TEEC.
[54] Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.10
[55] *Ibid* p.7
[56] *Ibid* p.18
[57] Council Directive 82/605/EEC of 28 July 1982 on the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work (first individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)
[58] Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.8
[59] *Ibid* p.5

(while balancing the economic interests). This testimony is in line with the findings of some scholars who argue that domestic preferences determine the intergovernmental bargaining behaviour of EU members.[60]

As we can see, the commitment and level of action of the Commission and the Council in the OHS field have changed over time. At first sight, this wave of legally binding Directives could be seen as a change in the approach to OHS at the EU level when compared to previous actions. However, the Framework Directive of 1980 had conditional content.[61] It meant that even if implementation was mandatory, the method of implementation was flexible and did not match with the expressed aim of harmonisation. Once again, general directions were given to the MS, more as a way to coordinate the actions at the national level. Initially, more particular hazards should have been subject to a directive, but the impossibility of finding common ground for the Directive on benzene stopped the entire policy of determining exposure limits for workers.[62] The institutional obligation to adopt a directive unanimously weakened the content of legally binding instruments considerably, and so marked the end of this quantitative approach. The following Delors Commissions (Commission-Delors I 1985–1988, Commission-Delors II 1988–1992, Commission-Delors III 1992–1995) made further steps in terms of commitment in the OHS field, as well as in European social development in general through the first major institutional change with the SEA.

2.3. The Delors Commissions: 1985 to 1992

The previous European activity of adopting OHS directives stopped due to a lack of consensus in the decision-making process.[63] This illustrates a bigger problem that the Thorn Commission had faced: immobilism, which could have been a sign of the limits of the unanimity processes.[64] Therefore, when Jacques Delors was appointed head of the Commission,

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[60] Hosli, M.O., 1996. Coalitions and Power: Effects of Qualified Majority Voting in the Council of the European Union. *JCMS: Journal of Common Market Studies*, *34*(2), p.255; Schneider, G. and Cederman, L.E., 1994. The change of tide in political cooperation: A limited information model of European integration. *International Organization*, *48*(4), p.644

[61] Directive 80/1107/EEC, Art. 3.1. *"In order that the exposure of workers to agents be avoided or kept at as low a level as is reasonably practicable Member States shall, when they adopt Provisions for the protection of workers, concerning an agent, take the measures (...)"*

[62] Vogel, L., 2015. The machinery of occupational safety and health policy in the European Union. *History, Institutions, Actors,* p.15

[63] *Ibid*

[64] Delors, J., 2004. *Mémoires*, Paris. pp.213-214

his mission was to restart the European dynamic. Delors thought that the best way to achieve a European dynamic was to move forward with economic integration through a single market. The economic priority appears clearly in the white paper that his Commission presented in 1985, alongside various speeches made during his presidencies.[65] The establishment of the single market was the absolute priority, and all the other proposals revolved around it, including social development and OHS.[66] In that respect, there were only a few remarks on the social construction of the EC.[67] To overcome the previous paralysis and to establish a single market, some substantial modifications had to be made to the TEEC. These profound changes were made with the SEA in 1986. Among the various revisions, one dealt directly with the problem of paralysis caused by the unanimity vote: Art. 118A, which extended the qualified majority vote (QMV) of the Council to directives on the working environment. Future directives would combine positive and negative integration, relying upon minimum rather than exhaustive harmonisation. Therefore, the aim was not to have an identical situation everywhere, but equivalent circumstances based on minimum standards. These directives were intended to set minimum requirements and be gradually implemented.

To explore if the introduction of the Article 118A and the extension of QMV to working conditions changed the decision-making behaviour of OHS directives, it is necessary to examine to what extent the QVM changed general EU decision-making. It is then possible to illustrate previous theories on the impact of the QVM in the OHS filed with data collected through interviews. Finally, an in-depth analysis of the Framework Directive 89/391/EEC — especially a comparison between the different drafts provided by the Commission and the European Parliament (EP) — shows a certain continuity with the previous OHS Directives, despite the overall appearance of a major shift.

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[65] Müller, H., 2017. Setting Europe's agenda: the Commission presidents and political leadership. *Journal of European Integration*, *39*(2), pp.136-137

[66] Commission of the European Communities, 1985. *Completing the Internal Market: White Paper from the Commission to the European Council* (Vol. 85). Office for Official Publications of the European Communities. point 20

[67] The first one was reinforcing the communication with governments and the social partners so that the opportunities of the establishment of the single market to be completed by appropriate measure to achieve goals. Delors was conscious of this "unbalance" between the social and the economical aspect of his programme, so to compensate he organised the Val Duchess Summit at the end of January 1985 (*See* Endo, K., 1999. *The presidency of the European Commission under Jacques Delors: The politics of shared leadership*. Springer.p.135). This was the beginning of so-called Social Dialogue at the European level involving both sides of the industry.

2.3.1. The institutional context: Did the qualified majority vote change the dynamic in occupational health and safety?

The extension of the QMV to new fields was supposed to facilitate and increase the efficiency of the decision-making process. This led to some doctrinal debates around the various models of the decision-making behaviour at the EU level, especially among the Council of the EU. There was an opposition between two main approaches. The first focused on the formal, institutional procedures in the Council based on the arguments of the rational institutionalist (RI) and the power index models. The second focused on the continued use of consensus decision-making.

First, the method focusing on institutional decision-making dynamics with the power index model is used by intergovernmentalists to deduce the ability of individual governments to influence Council decisions by computing a function of the portion of all mathematically possible winning coalitions to which each government is pivotal.[68] At the end of the 1980s, QMV was the dominant rule in decision-making within the Council of the EU.[69] According to Hosli, the QVM opened a new dynamic based on MS' preferences, leading to the formation of coalitions within the EU. Thus, mathematical foundations of the original power index and the extension were used to establish *a priori* probabilities of coalition formation.[70]

However, this approach has been strongly criticised by Garrett and Tsebelis.[71] They have two main concerns regarding the power indices method. First, according to them, by taking into consideration only the Council, this model underestimates the power to set the agenda that varies according to the EU's different decision-making procedures.[72] For them, as RI scholars, it is as crucial to examine the initiation of the legislative process as it is the outcome of it.[73] The

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[68] *See details on the Power Index Model with* Brams, S.J. and Affuso, P.J., 1985. New paradoxes of voting power on the EC Council of Ministers. *Electoral Studies*, *4*(2), pp.135-139; Hosli, M.O., 1993. Admission of European Free Trade Association States to the European Community: effects on voting power in the European Community Council of Ministers. *International Organization*, *47*(4), pp.629-643; Johnston, R.J., 1995. The conflict over qualified majority voting in the European Union Council of Ministers: An analysis of the UK negotiating stance using power indices. *British Journal of Political Science*, *25*(2), pp.245-254.

[69] Sloot, T. and Verschuren, P., 1990. Decision-making Speed in the European Community 1. *JCMS: Journal of Common Market Studies*, *29*(1), p.81

[70] *See* Hosli, M.O., 1996. Coallitions and Power: Effects of Qualified Majority Voting in the Council of the European Union. *JCMS: Journal of Common Market Studies*, *34*(2), pp.255-273.

[71] *See* Garrett, G. and Tsebelis, G., 1999. Why resist the temptation to apply power indices to the European Union? *Journal of Theoretical Politics*, *11*(3), pp.291-308.

[72] *Ibid* p.279

[73] *Ibid* p.272

second concern was that the method did not consider the policy preferences of MS governments in Council decision-making.[74] They also underline that the likelihood of coalition depends on the topic discussed.[75] In other words, the RI models analyse the dynamics and connections between the various institutions of the EU, depending on the political agenda and the procedures.[76]

These two models, focusing in one way or another on the institution, are contested by scholars focusing on the informal dynamic behind the decision-making. Indeed, some scholars give some attention to the importance of the informal norms of decision-making[77] and stress the significance of the informal norms of consensus as modes of decision-making.[78] Heisenberg suggests that an analysis of power within the Council based on an MS's importance in a number of coalitions was likewise impacted by consensus. She criticises the methods focusing only on formal decision-making, arguing that they rely on the assumption that "*any EU legislative proposal can be classified on a linear scale from "less integration to more integration"*", and that they focus more on the interinstitutional dynamics than the substance of the proposal.[79] According to Heisenberg, despite the formal change made by the SEA, the informal culture of consensus persisted.[80] She argues that, in their search for agreement on an issue, MS need to meet the demand for another legislative act on that issue.[81] In other words, the topic discussed goes beyond one negotiation or one act.

In the context of OHS — especially concerning the adoption of the Framework Directive, 89/391/EEC — some aspects and the findings and hypothesis of the latter method

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[74] *Ibid* p.272
[75] *Ibid*, p.278
[76] *See* Tsebelis, G. and Garrett, G., 2001. The institutional foundations of intergovernmentalism and supranationalism in the European Union. *International organization*, *55*(2), pp.357-390.
[77] *See* Steinberg, R.H., 2002. In the shadow of law or power? Consensus-based bargaining and outcomes in the GATT/WTO. *International Organization*, *56*(2), pp.339-374; Lewis, J., 1998. Is the 'hard bargaining' image of the Council misleading? The Committee of Permanent Representatives and the local elections directive. *JCMS: Journal of Common Market Studies*, *36*(4), pp.479-504; Lewis, J., 2000. The methods of community in EU decision-making and administrative rivalry in the Council's infrastructure. *Journal of European public policy*, *7*(2), pp.261-289; Elgström, O. and Jönsson, C., 2000. Negotiation in the European Union: bargaining or problem-solving?. *Journal of European Public Policy*, *7*(5), pp.684-704.
[78] 81% of decisions are made by consensus according to Heisenberg, D., 2005. The institution of 'consensus' in the European Union: Formal versus informal decision-making in the Council. *European Journal of Political Research*, *44*(1), p.66.
[79] Heisenberg, D., 2005. The institution of 'consensus' in the European Union: Formal versus informal decision-making in the Council. *European Journal of Political Research*, *44*(1), pp.79-80
[80] *Ibid,* p.68
[81] *Ibid,* p.70

are reflected in interviews with various former European stakeholders. The importance of consensus despite the possibility of using the QMV in OHS was a theme in three interviews conducted in the current study: one with Alexandre Berlin, a former European civil servant working in the DG V and in charge of health and safety from the 1970s to 2004, and two with former members of the European Trade Union Congress (ETUC): Jean Lapeyre and Marc Sapir.

Berlin stated that to have successful discussions in the OHS field, there had to be a consensus between all the partners involved, especially between the employers and the workers.[82] He believed that a consensus and the right balance between the interests of these three partners was the best way to achieve something positive. Some studies have noted the leading role of the Commission in establishing a system of multi-level IR in Europe in which unions and employers have influential voices on working conditions.[83] According to Berlin's experience as chair of numerous working groups for the OHS Directives and based on the interviews, it is possible to underline two main components of what was necessary to reach a consensus. The first feature of the consensus was to be reasonable. He stated: *"What would have been desirable and what was reasonable are two different things. It is necessary to be reasonable and realistic".*[84] He recognised that sometimes the idea that would have been desirable was not reasonable and supporting these ideas would have blocked the development of the EU OHS framework at a crucial moment.

The second element is that it should be a unanimous consensus despite the possibility of a qualified majority. Berlin kept trying to find an "*absolute consensus*" even though it was not mandatory. His motive was to guarantee the highest support possible from all the MS. He thought that with the qualified majority, the MS that were against a provision would have found a way not to apply the directive.[85] Sapir has also mentioned the general context of consensus during his interview.[86] However, according to Sapir, the compromise found during the

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[82] i.e., Governments, employers and trade unions – *See* Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow, p.3

[83] Keune, M., 2015. The effects of the EU's assault on collective bargaining: less governance capacity and more inequality. *Transfer: European review of Labour and Research, 21(4)* p.477; *see* Keune, M. and Marginson, P., 2013. Transnational Industrial Relations as Multi-Level Governance: Interdependencies in European Social Dialogue. *British Journal of Industrial Relations*, *51*(3), pp.473-497.

[84] Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.10

[85] Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.11

[86] Sapir, Marc. Interview June 14, 2017. Archives, University of Glasgow. p.8

consensus led to "*blurred aspects*" of the OHS legal framework: in order to avoid offending anyone, the meaning of certain parts were not thoroughly discussed.[87] Further studies support this argument by stating that an opposition pattern during the transposition is possible when the government did not want the directive in the first place.[88] Additionally, Lapeyre mentioned the importance of the consultative committee of Luxembourg during the discussion on the content of the Framework Directive, 89/391/EEC.[89] It was during one of these meetings with the Luxembourg Committee that the ETUC — represented by Lapeyre — underlined the importance of having a pyramidal approach to OHS: the basics with a Framework Directive, and then individual directives setting up the specificities. According to Lapeyre, the key to the Framework Directive had to be the principle of responsibility of the employers. The ETUC played a crucial role in the qualitative approach of the Framework Directive, ensuring that the technicalities were set-up in the following individual Directives.[90] They saw the Framework Directive as an embodiment of principles that would last through the years and the individual Directives as specific norms that would evolve depending on scientific evidence and knowledge. These statements emphasised the importance of non-institutional behaviour in the decision-making of OHS Directives at the end of the 1980s and beginning of the 1990s.

The global dynamic of decision-making and the fact that more than one negotiation was involved was echoed by both Lapeyre and Sapir. Both mentioned the strong connection between the adoption and the discussions of Framework Directive 89/391/EEC and Directive 89/392/EEC.[91] Indeed, to achieve a single market and the free movement of goods, it was necessary to have common standards in the methods of production. This led to technical normalisation: Directive 89/392/EEC. The corollary principle was to frame the use of the machines and thereby the health and safety of the workers.

It is in this context that the Framework Directive on OHS (i.e., Directive 89/391/EEC) was discussed and adopted. Indeed, this link with Directive 89/392/EEC appears clearly in the third section on workers' obligations, which has only one article.[92] Two aspects are important

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[87] *Ibid.* p.20
[88] Falkner, G., Hartlapp, M., Leiber, S. and Treib, O., 2004. Non-Compliance with EU directives in the Member States: Opposition through the Backdoor?. *West European Politics*, *27*(3), p.465
[89] Lapeyre, Jean. Interview June 14, 2017. Archives, University of Glasgow. p.7
[90] *Ibid.* p.8
[91] Sapir, Marc. Interview June 14, 2017. Archives, University of Glasgow p.1 and p.16
[92] This shows the emphasis placed on the employer's behaviour towards the workers in this new OHS strategy

in the workers' obligations. First, the stress on the responsibility of each worker for his own safety and the persons affected by his acts. Second, the particular focus on the use of machinery and equipment. Sapir also mentioned the importance of establishing common principles to establish the single market in the 1980s.[93] Lapeyre mentioned that during a discussion with Sapir and Delors, he underlined the fact that there was a lot of work done regarding the technical normalisation of the market, but nothing was in place regarding the social aspect of that normalisation.[94] For Lapeyre, it was evident that the technical normalisation of the machines and way of production would affect the working organisation and the health and safety of the workers. Thus, there was a need "*to make the technical and the social coincide in terms of health and safety"*.[95] According to Lapeyre, Delors understood and supported this idea with the creation of the *Bureau Technique Syndical (BTS)* and Directive 89/391/EEC, which is the cornerstone of the current EU OHS legal framework.

To conclude, two main approaches to examining the influence of the QVM on the decision-making dynamic have been covered in the literature: the RI, focusing on the institutional decision-making dynamics with the power index model, and the scholars, focusing on the importance of the informal dynamics behind the decision-making behaviours. The latter has been illustrated by interviews and shows the importance of consensus and compromise during discussion in the OHS field. The importance of the informal dynamics in OHS also supports the argument of the continuous role of the Commission as a coordinator between the various stakeholders. However, even if consensus and compromise were necessary to secure the application of European principles in the national legal systems, they also led to some confusion regarding the content of the obligations and how to fulfil them. The difficulty was to find the balance between compromise and detailed provisions without having a counterproductive effect — either by being too detailed and risking the opposition of certain MS or by being too general and risking having considerable differences in the way the European obligations are enforced. Considering the general context of the EU development and the goal of establishing a single market, it seems that the need for broad European integration won and flexible principles were favoured over clear provisions.

[93]Sapir, Marc. Interview June 14, 2017. Archives, University of Glasgow p.11
[94]Lapeyre, Jean. Interview June 14, 2017. Archives, University of Glasgow p.6
[95] Lapeyre, Jean. Interview June 14, 2017. Archives, University of Glasgow p.6

Based on these considerations, it is possible to argue that despite the crucial institutional change of Article 118A with the SEA, the former dynamic of consensus and compromise that were applicable under the unanimity rules still existed in an informal manner. Therefore, we can hypothesise that despite the novel appearance of the adoption of the Framework Directive, 89/391/EEC, the same rationale and dynamic of consensus that was applicable with the previous OHS Directives was still applicable during its adoption and discussion but in an informal way.

2.3.2. Directive 89/391/EEC: A new framework built with old tools

The new function of the European institutions in the social fields and the special attention given to the OHS was also confirmed by the adoption of the Community Charter of Fundamental Social Rights of Workers. An entire section underlines the importance of improving living and working conditions.[96] Article 7 of the Charter recalls the importance of social development through the completion of the internal market, and so links with the statement of the Paris Summit in a more formal way. Article 19 addresses the question of OHS precisely; it emphasises the aim of a "*harmonisation of conditions […] while maintaining the improvement made*".[97] This statement corroborated the dynamic to the top emphasised in Directive 89/391/EEC. The Charter also expressly mentions measures "*for the training, information, consultation, and balanced participations of workers as regards the risks"* in the workplace, also embodied in the Directive.[98] Considering that similar workers' rights were mentioned both in the Charter and the Directive, it might mean that these rights can be considered as fundamental workers' rights. There is also a reference to the implementation of the internal market and the interconnection between these two fields. However, the Charter has no legal value but a strong political one; added to the legal value of Directive 89/391/EEC, it increased the chance of being effectively implemented in the MS. However, all the MS signed the Charter (except the UK, which waited until 1997 to do so). This fact can be seen as the start of a divergence of the perspectives on the new social role of the European institutions that the UK would fight for years.

[96] The Community Charter of Fundamental Social Rights of Workers, Art. 7 to Art. 10
[97] *Ibid*, Art.19
[98] *Ibid*, Art.19

These tensions illustrated the importance of the Framework Directive as the central piece of OHS, extending social rights. The significance of the Directive has also been widely acknowledged in the literature.[99] So far, attention has been given mostly to the final version of the Framework Directive and its content. However, this section shows that the various drafts submitted during its adoption can provide an additional element regarding the logic behind (and during) its adoption. Therefore, I argue that a close examination of the suggestions submitted by the EP and the European Social Committee (ESC) compared to the final version chosen by the Commission and the Council reveals that, despite certain aspects of novelty[100] (e.g., general duties and rights, certain characteristics of the former decision-making rationale, the consensus and compromises of a quantitative approach) were still applicable.

2.3.2.1. New balance between OHS and economic consideration – the first novelty of the Directive 89/391/EEC

The novelty of Directive 89/391/EEC appears in the preliminary statements of the Directive, which state that competition should not be done at the expense of OHS, and at the same time, OHS should not be subordinate to purely economic considerations. In addition to the new balance between OHS and economic considerations, the nature of the obligation changed. Indeed, the major innovation was that the Directive planned the implementation of the minimum standards through general principles and general guidelines for the implementation of the said principles.[101] This approach contrasts with the previous strategy of determining exposure limits. There was a shift from a quantitative to a qualitative approach.

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[99] Ales, E. ed., 2013. *Health and safety at work: European and comparative perspective*. Kluwer Law International. p.15*; See* preface of Vogel, L., 1998. Prevention at the Workplace. *Brussels: European Trade Union Technical Bureau for Health and Safety*.; Aires, M.D.M., Gámez, M.C.R. and Gibb, A., 2010. Prevention through design: The effect of European Directives on construction workplace accidents. *Safety science*, *48*(2), p.249; Leka, S. and Jain, A., 2014. Policy approaches to occupational and organizational health. In *Bridging occupational, organizational and public health* pp. 238-241. Springer, Dordrecht.; Eichener, V., 1997. Effective European problem-solving: lessons from the regulation of occupational safety and environmental protection. *Journal of European Public Policy*, *4*(4), p.593

[100] Liu, K. and Liu, W., 2015. The development of EU law in the field of occupational health and safety: A new way of thinking. *Management and Labour Studies*, *40*(3-4), p.222; Barnard, C., 2012. *EU employment law*. OUP Oxford. pp.511-512; Valdés de la Vega, B. Occupational Health and Safety: An EU Law Perspective. In Ales, E. ed., 2013. *Health and safety at work: European and comparative perspective*. Kluwer Law International. p.15

[101] Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, Art. 1.2

In this Directive, the principles covered and implemented were connected to the national laws and practices. [102] There was an implied reference to what has been done previously at the national level, but also to the legal tradition. Thus, the role of the European institutions was to establish minimum requirements, so that the MS could pursue higher standards.**[103]** It is mentioned that the European Community (EC) encourages improvements to guarantee a better level of OHS protection,[104] even if the EP proposed the formula where "*the health and safety of workers should be protected at the highest possible level".*[105] Additionally, the Directive stressed the individual responsibility of the MS to encourage improvements in OHS in its territory. The remainder of the MS' responsibilities coincided with the continuous role of the Commission to coordinate and encourage the MS to have a common collective behaviour.

2.3.2.2. The embodiment of general OHS definitions and concepts – the first novelty of Directive 89/391/EEC

The novelty of Directive 89/391/EEC appears also in the embodiment of general definitions and concepts. However, the willingness to innovate varies depending on the institutions, i.e. the Commission and the EP. Overall, the EP and the ESC advocated for a more innovative approach in the nature of the obligations whereas the Commission tried to keep the previous approach of quantifiable risks and focused on a new way of phrasing the obligations. This idea can be illustrated by various examples, as will be explored in the following paragraphs.

First, the ESC advocated for homogeneity of definitions with the International Labour Organisation (ILO) conventions.[106] However, one definition disappeared through the consultation process. Indeed, the EP added the definition of "*health in the context of work shall encompass not only the absence of sickness or disease but also all physical and mental factors*

[102] i.e., The prevention of occupational risks, the protection of OHS, the information, the consultation, the balanced participation, and the training of the workers.
[103] According to the competences provided by Art 118A(2) of the Single European Act
[104] Directive 89/391/EEC, Art. 1.1.
[105] Official Journal of the European Communities No C 326/78 19 Dec 1988. Amendment n°1 of proposal for a directive COM(88) 73 final
[106] Official Journal of the European Communities No C 175/22 4 July 1988. Opinion on the proposal for a Council Directive on the introduction of measures to encourage improvements in the safety and health of workers at the workplace (88/C175/09) S.2.2

affecting health and directly related to safety and health at work".[107] Thus, the question of why this definition was deleted was addressed during the interviews conducted during the current study. The definition suggested by the EP would have expressively covered the mental aspect of OHS, which was already acknowledged by the ILO.[108] According to the interview with Berlin, the reason for this initiative might have been that the role of the EP was to suggest ways forward; whereas it was the role of the Commission to adopt a more conservative position in order to take national positions into consideration.[109]

In addition, the Commission advocated for consistency with the previous Directives by focusing on the quantifiable aspect of OHS. It was willing to have a more general directive-framework but on quantifiable elements. The reason why the psychological or mental aspect of the workers' health was discarded was that the Commission wanted to concentrate on concepts that were easier to define and relatively objective. The psychological or mental aspect of the workers' health might be understood differently depending on the national contexts. Therefore, it was not a suitable topic for a European debate at this stage. According to Berlin, it might have compromised the achievement of a consensus and the adoption of the Directive.

Other examples within the Framework Directive can be found, particularly in the employers' obligations.[110] The general provision emphasised that the employer has a duty to ensure the safety and health of workers in every aspect related to the work.[111] However, the Directive opens the possibility for MS to exclude or to limit the employers' culpability in cases of unusual and unforeseeable circumstances. This means that European institutions recognised the existence of the responsibility but allowed MS to determine the limits of its applicability.

The Directive coordinates the MS without imposing a detailed obligation on them. The divergence of opinions is apparent with the provision of the risk assessment, which is one of the employers' obligations. Indeed, the employer shall be in possession of a health and safety at work risk assessment, including those facing groups of workers exposed to particular risks.[112] The ESC advocated for further detailed provisions concerning the element contained in the risk

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[107] Official Journal of the European Communities No C 326/83 16 Nov 1988. Amendment n°26 of proposal for a directive SCOM(88) 73 final
[108] Art. 3I Occupational Safety and Health Convention, 1981 (No.155)
[109] Berlin, Alexandre. Interview, November 08, 2017. Archives, University of Glasgow p.6
[110] The employers' obligations represent the main body of the directive.
[111] Directive 89/391/EEC, Art. 5.1
[112] Directive 89/391/EEC, Art. 9.1(a)

assessment.[113] Overall, the opinion of the ESC and the amendment made by the EP formed a more detailed version than the final version. In the end, the Commission opted for a more generic version. During his interview, Berlin expounded that a more detailed version could have compromised the adoption of the Directive. The more detailed is the text, the more difficult it is to find a compromise.[114] He was convinced that the Framework Directive needed to be general and generic as a first step; only with specific directives, was it possible to enter into the details.

Another example of the tensions between the European institutions was Article 14, *Health surveillance.* The EP added an entire section, "Medical care at work",[115] with three sections that were more detailed than the current Art. 14. This provision was subject to amendment a second time by the EP.[116] This version was still more detailed.

Further examples can also be found in the second part of the employers' obligations: information of workers,[117] consultation and participation of workers,[118] and training of workers.[119] Overall these rights were new because they were addressed to workers and not employers, their MS, external agencies, or committees, as was the case before. The concept of information was not too problematic: duty to communicate the appropriate information to the worker so they know the risks of their work and can act accordingly. However, the concept of consultation embodied by Article 11 has been subject to modification during the debate. In the beginning, the Commission underlined only the consultation aspect of this obligation. Both the ESC and the EP asked for more emphasise on the participation of workers, alongside consultation.[120] The EP added a considerable number of amendments to develop the concept of cooperation beyond consultation. In that respect, the EP extended the provision to open the

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[113] Official Journal of the European Communities No C 175/22 4 July 1988. Opinion on the proposal for a Council Directive on the introduction of measures to encourage improvements in the safety and health of workers at the workplace (88/C175/09) S.2.4.1
[114] Berlin, Alexandre. Interview, November 08, 2017. Archives, University of Glagsow p.6
[115] Official Journal of the European Communities No C 326/89 19 Dec 1988. Amendment n°254 of the proposal for a directive COM(88) 73 final
[116] Official Journal of the European Communities No C 158/131 24 May 1989. Amendment n°50 n°51 of the proposal for a directive COM(88) 73 final
[117] Directive 89/391/EEC, Art. 10
[118] Directive 89/391/EEC, Art. 11
[119] Directive 89/391/EEC, Art. 12
[120] Official Journal of the European Communities No C 175/24 4 July 1988. Opinion on the proposal for a Council Directive on the introduction of measures to encourage improvements in the safety and health of workers at the workplace (88/C175/09) S.2.9.; Official Journal of the European Communities No C 326/89 19 Dec 1988. Amendment n°73 to n°82 of proposal for a directive COM(88) 73 final

possibility of workers proposing new measures. Similarly, the notion of workers representatives was detailed in the Parliament draft, specifying that they should be elected.[121] At the second reading, the EP was more flexible and inserted, *"in accordance with the procedures and/or legislations existing in the MS",* but maintained the importance of balanced participation and cooperation.[122] However, in the final version, this notion of balanced participation disappeared from the title, and most of the provisions were lightened in comparison of the version submitted by the EP. Berlin clarified this point, saying that the notion of participation is closely linked to the national understanding, and it would have been complicated to find an agreement.[123]

Once again, this underlines the intention of the Commission to pursue a general framework with generic quantifiable concepts as a common step in the EU OHS development. It also emphasises the position of the Commission as a coordinator of the national legal systems. The obligation to train workers corresponds to the global tendency to involve more workers and to make them more responsible.

To conclude**,** even if certain aspects of Directive 89/391/EEC were a real change compared to the previous generation of OHS Directives, the former patterns were visible during the discussions that led to its adoption. The general phrasing of the rights and obligations embodied in Directive 89/391/EEC was a turning point compared to the previous OSH Directives with detailed provisions on maximal value of exposition. However, the Commission maintained its logic to reach a consensus accepted by everyone even if it meant less clarity. The innovative approach of the EP and the ESC was opposed by the traditional and quantitative approach of the Commission. Nevertheless, the fact that the duties were general and broad gave later some opportunity to extend its application to unquantifiable risks, such as psychosocial risks and emerging risks.[124] Thus, it is important to underline that the application and the reading of the Directive we now have changed over time and do not correspond to their initial role. It opens the possibility to keep working on the general concepts and extend them to the

[121] Official Journal of the European Communities No C 326/89 19 Dec 1988. Amendment n°82 of the proposal for a directive COM(88) 73 final
[122] Official Journal of the European Communities No C 158/135 24 May 1989. Amendment n°41 to n°78 of proposal for a directive COM(88) 73 final
[123]Berlin, Alexandre. Interview, November 08, 2017. Archives, University of Glasgow p.8
[124] Leka, S., Jain, A., Zwetsloot, G. and Cox, T., 2010. Policy-level interventions and work-related psychosocial risk management in the European Union. *Work & Stress*, *24*(3), p. 99 ; Richard-Molard, R.,2013. La Directive Cadre 89/391/CE du 12 Juin 19 89: Application aux risques psychosociaux, in Lerouge L. *Les risques psychosociaux en Europe Analyse jurisprudentielle,* L'Harmattan. pp. 13-15

OHS situation that needs to be covered nowadays.[125] Not only has the understanding of rights and obligations changed over time, but the overall approach of OHS within the construction of the European model has changed since 1989.

2.4. The Changing Relationship Between the EU Economic and OHS Construction: 1989 to 2018

Since its adoption, the Framework Directive, 89/391/EEC, has been considered the cornerstone of the OHS legal framework in the EU. In its continuity and based on its general principle more than 30 Directives have been adopted. Thanks to its dynamic and flexible structure, the Framework Directive has opened opportunities to cover new risks, such as psychosocial risks.[126] However, the adoption of these individual Directives, framework agreements, and the role of Directive 89/391/EEC strongly depended on the general social policies of the Commissions since 1989. After examining of the Commissions' action programmes and the adoption of OHS Directives, it seems that the Commissions often justified their OSH positions based on economic considerations. Two scenarios are then possible, either the OSH and economic fields complement or compete with each other.

2.4.1. The development of an OHS legal framework as necessary to economic development

In the early 1990s, the Framework Directive, 89/391/EEC, constituted a new basis for the adoption of additional OHS directives. In a white paper, Delors gave priority to the establishment of the single market and integrated the social policy within this context.[127]

[125] This idea will be developed further in the second part of the CH5 of this thesis, pp.150-161

[126] Illustrated by the adoption of the European autonomous framework agreement on work-related stress in 2004 and the framework agreement on harassment and violence at work in 2007. *See* Leka, S., Jain, A., Iavicoli, S., Vartia, M. and Ertel, M., 2011. The role of policy for the management of psychosocial risks at the workplace in the European Union. *Safety Science*, *49*(4), pp.559-560; Ertel, M., Stilijanow, U., Iavicoli, S., Natali, E., Jain, A. and Leka, S., 2010. European social dialogue on psychosocial risks at work: Benefits and challenges. *European Journal of Industrial Relations*, *16*(2), pp.169-183

[127] Completing the Internal Market. White Paper from the Commission to the European Council (Milan, 28-29 June 1985). COM (85) 310 final, 14 June 1985

Therefore, the Commission programme concerning safety, hygiene, and health at work focused on the program's provisions relating to the completion of the market.[128]

Under the Delors Commissions, the vast majority of OHS Directives affiliated with the Framework Directive, 89/391/EEC, were adopted.[129] However, over the three Delors presidencies of the Commission, a decline in the number of acts adopted is noticeable after the ratification of the Maastricht Treaty in 1992.[130] It can be hypothesised that this first generation of daughter Directives might have been adopted to facilitate the functioning of the internal market: to prepare it before the Treaty and then to ensure its functioning. The development of the OHS was then necessary for the economic development and expansion of the Union.

The Prodi Commission (1999–2004) continued the idea of the Delors Commission by basing its action on the substantial *acquis* of many decades of Community policies centred around the Framework Directive, 89/391/EEC. In the programme adopted by the Prodi Commission, the normative approach for adapting existing standards and adopting new ones remained essential. Its approach was built upon Article 31 of the Charter of Fundamental Rights that states, "*Every worker has the right to working conditions which respect his or her health, safety and dignity".* For the Commission, the involvement of social partners was important to promote progressive approaches. However, the addition to the legislative framework was minimal and did not change the rationale explained above.

2.4.2. The development of the OHS soft framework as an addition to economic development

Some Commissions, like the Santers Commission (1995–1999), focused on non-legislative measures and marked a break from the Delors era. The fourth Community programme concerning safety, hygiene, and health at work for 1996 to 2000 clearly stated that

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[128] *88/c28/02* Commission Communication on its programme concerning safety, hygiene. At work, 21 December 1987. The aims were: to improve the safety and ergonomics at work; to lower the exposure of workers to physical factors, biological organisms and chemical substances; to provide information on all the substances for which directives are proposed in the field of health and safety; to develop the training resources; to adapt the legal provisions to small and medium-sized enterprises and to develop the dialogue between the two sides of industry in OHS based on Article 118B of the Single Act.

[129] 68% of the daughter's directives excluding the Directives codifying or reviewing existing directives; 52% including all the directives

[130] Under Delors Commission I: 7 Directives based on 89/391/EEC; Under Delors Commission II: 5 Directives based on 89/391/EEC; Under Delors Commission III: 1 Directive based on 89/391/EEC.

the adoption of new OHS directives was the last option, only when there was no alternative possible. [131] One of the main points of the non-legislative OHS policy was the creation of the SAFE programme (Safety Actions for Europe). The SAFE programme was intended to

> *support measures to ensure proper implementation of Community directives on health and safety at work, to continue to promote high standards in health and safety at work in the Community and to ensure effective involvement of the two sides of industry in developing, formulating and implementing Community policy initiated by the Commission on protection of the health and safety of employees*.[132]

However, the programme never became a reality. Therefore, the Commission decided to transfer its missions to the European Agency for Safety and Health at Work and the European Foundation for the Improvement of Living and Working Conditions.[133]

The development of alternatives was also illustrated by the extension of the actors in charge of OHS in the EU with the creation of the SLIC, which was the result of close cooperation between its members and the Commission.[134] The action programme focused on the evaluation of the previous legislation, in cooperation with the MS and social partners, to identify the enforcement problems, effectiveness, and socio-economic impact of the health and safety legislation. This action plan was complemented by the increasing attention given to social dialogue in the establishment of OHS policies. Indeed, the Santers Commission period corresponded to the overall increase in social dialogue.[135]

It was during this period that the first sectoral agreement on health and safety was adopted and was then implemented through Council Directive 1999/63/EC.[136] Paradoxically, for Lapeyre — who has been in charge and the ETUC representative for the dialogue between the social partners at the EU level for more than ten years — OSH was not a suitable topic for social dialogue because it is not something that should be the subject of bargaining and

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[131] COM(95) 282 final
[132] COM(95) 282 final, p.13
[133] COM(1998) 511 final; Mid-term report on the community programme concerning safety, hygiene and health at work. pp.2-3
[134] An in-depth analysis of the SLIC will be provided in the CH6 of this thesis, pp.186-190
[135] *See figure 4 in* Degryse C., 2015. The European sectorial social dialogue: An uneven record of achievement? *Brussels, ETUI*, Working Paper 2015.p.11
[136] Directive 1999/63/EC concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Ship-owners Association and the Federation of Transport Workers' Unions in the European Union

compromise.[137] This tendency of using non-legislative tools to frame OHS is confirmed from a more general perspective. Indeed, in March 2000, the Lisbon Treaty introduced the open method of coordination (OMC), presented as a suitable instrument for identifying and pursuing common European concerns while respecting legitimate national diversity by committing MS to working together towards common goals, without seeking to homogenize their national practices.[138] Here, the Commission reinforced its role as coordinator — or even simple adviser — of MS.

When the Santers Commission adopted legislative measures, it was to ensure the implementation of the existing framework. It reserved the adoption of new legislation only in the fields of high risks activities. Additionally, the Commission underlined the importance of approaching Community OHS legislation from a global point of view. Considering that OHS requirements were at a crossroads and might overlap with different fields and strategies, it was necessary to ensure there were no duplications with another field before adopting a new directive. These considerations had the effect of limiting the scope of action considerably for the Commission and might have been an illustration of the limited ambitions of the Santers Commission in the adoption of new OHS directives. As a result, the Commission adopted only two Directives based on 89/391/EEC between 1995 and 2000, and they indeed covered high risks.[139] The overall tendency was a distancing from Directive 89/391/EEC and the previous Delors Commissions. This approach of the legislative action must be placed in the bigger political context. Under the Prodi Commission in June 2002, in the context of the European Commission's Better Regulation programme, the Commission started to implement an impact assessment process, which would examine the potential social, economic, and environmental impacts of European Commission proposals.[140] This requirement not only encouraged the development of non-legally binding action at the EU level but also reduced the capacity of

[137] Lapeyre, Jean. Interview June 14, 2017. Archives, University of Glasgow p.9; For him, only the organisation of work – that might have an impact on OHS (e.g., the working time, psychosocial risks, etc.) – can be subject to negotiation.
[138] Zeitlin, J. and Trubek, D.M., 2007. A Decade of Innovation in EU Governance: The European Employment Strategy, the Open Method of Coordination, and the Lisbon Strategy. *Perspectives on employment and social policy coordination in the European Union*, p133
[139] The Council Directive 98/24/EC on the protection of the health and safety of workers from the risks related to chemical agents at work; The Council Directive 1999/92/EC on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres.
[140] Robertson, C., 2008. Impact assessment in the European Union. *Eipascope*, *2008*(2), p.1

action of the European Commission in the OHS field by making the initiative and legitimisation process more complex.[141]

2.4.3. The OHS legal framework as a barrier to economic development

During the Barroso Commissions (Barroso Commission I 2004–2009; Barroso Commission II 2009–2014), a new relationship between the economic field and OHS was developed: OHS was a threat to the economic competitiveness. The Barroso Commission was paradoxical in its approach, by officially emphasising the importance of the current OHS framework and at the same time trying to reform and reduce it to a minimum because this same framework was a burden for competitiveness.

In support of the existing OHS and social construction, Barroso said, "*Economic and social progress are two parts of the same, European whole. Europe has always rested on an economic pillar and a social pillar […] Open markets and social solidarity are not, and should not be, contradictory"*.[142] This position was illustrated with the sixth action plan on OHS, entitled "Improving quality and productivity at work",[143] which recognised that the lack of adequate protection to ensure health and safety at work has a considerable human dimension but also a major negative impact on the economy.[144] The Commission also recognised the positive impact of the OHS Directives on levels of protection at the national level as well as the considerable disparities regarding the quality and coverage of the law transposing Directive 89/391/EEC.[145] Thus, for the Commission, it was fundamental that national legislatures implement the OHS Directives effectively and in a uniform manner to guarantee comparable levels of protection in MS. In that respect, the Commission stressed that in its role as "*guardian*

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[141] *See* Kirkpatrick, C.H. and Parker, D. eds., 2007. *Regulatory impact assessment: Towards better regulation?* Edward Elgar Publishing; Allio, L., 2007. Better regulation and impact assessment in the European Commission. *Regulatory impact assessment: towards better regulation*, pp.72-105; Meuwese, A.C., 2008. *Impact assessment in EU lawmaking* (Vol. 61). Kluwer Law International BV; Radaelli, C.M. and Meuwese, A.C., 2010. Hard questions, hard solutions: Proceduralisation through impact assessment in the EU. *West European Politics*, *33*(1), pp.136-153.

[142] Barroso, J.M., 2006, December. The new social reality of Europe. In *Speech to Conference on Global Europe-Social Europe* (Vol. 5).

[143] Community Strategy 2007-2012 on Health and Safety

[144] CEC, 2007. Improving quality and productivity at work: Community strategy 2007–2012 on health and safety at work. p.2

[145] CEC, 2007. Improving quality and productivity at work: Community strategy 2007–2012 on health and safety at work.

[145]https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly"

of the Treaties", it would ensure the appropriate and effective implementation of OHS Directives. Therefore, with this action plan, the Barroso Commission aimed to guarantee the proper implementation of the EU legislation, support the Small and Medium Enterprises (SMEs) in the implementation of the legislation in force, adapt and simplify the legal framework to changes in the workplace, and promote the development and implementation of national strategies. If we look only at the action plan, it seems that the Barroso Commission valued the OHS *acquis communautaire* and wanted to improve them.

In comparison, if we look at the general policy of the Commission and its impact on OHS, the perspective changes considerably. The Commission aimed to simplify OHS legislation. This simplification was part of a larger political agenda called "*Better Regulation*" and *REFIT,* the Commission's regulatory fitness and performance programme aimed at making EU law simple by removing unnecessary burdens and adapting existing legislation without compromising on policy objectives.[146] In 2017, the Commission branch of REFIT concerned with OHS announced its intention not to proceed with proposed OHS Directives for musculoskeletal disorders and display screens, and the new carcinogens and mutagens Directives.[147] The Commission also initiated a review of the Framework Directive and 23 related Directives hoping to justify centralising all of them in one text with annexes.

The REFIT programme has been a major concern for TUs as an illustration of the Commission abandoning a cornerstone of European social policy.[148] Some scholars have seen this policy as a real threat to EU OHS.[149] Indeed, Vogel qualified the strategy as "*pre-emptive justification for Community inaction*", and that the terminology has been used in the action plan since 2002 to justify a withdrawal by the Community institutions and the Commission in particular.[150] This description of the Commission's positions corresponds to the more general analysis from scholars. Indeed, the Barroso Commission and its president are considered to

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146 https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly"

147 COMMISSION STAFF WORKING DOCUMENT SWD (2017) 10 final. Ex-post evaluation of the European Union occupational safety and health Directives (REFIT evaluation)

148 "EU Commission's REFIT policy promises lighter OSH laws", The Newsletter of the European Network of Safety and Health Professional Organisations, 2014, issue 1

149 *See* Schömann, I. 2015. EU REFIT machinery "cutting red tape" at the cost of the acquis communautaire. *ETUI Policy Brief,* N°5/2015.; Van den Abeele, E. 2009. The Better Regulation agenda: "new deal" in the building of Europe. *ETUI Policy Brief*, N°1/2009; Vogel, L. and Vand den Abeele, E. 2010. Better regulation: A critical assessment. *ETUI Report.*N°113

150 Vogel, L., 2010. Barroso I: A 5-year standstill on health and safety at work, autumn-winter 2010/HesaMag# 02. *Brussels, ETUI*.p.8

have had a more liberal and "economic" orientation than the previous one.[151] Some other scholars have noticed that the EU level is becoming increasingly politicised and that the Commission itself has become more right-wing in the 2000s.[152] To conclude, it seems that there are apparent disparities between what the Commission said and did. Despite proclaiming support of the OHS legal framework, the Barroso Commission has been the first Commission to act aggressively toward OHS.

2.4.4. Conclusion

The examination of the action programmes of the Commissions and their legislative behaviours with the adoption of OHS Directives demonstrates the different balance that can exist between the development of the OHS legal framework and economic considerations. Right after 1989 and during the entire Delors era, the adoption of OHS Directives was a way to achieve the establishment of the single market and ensure its functioning. The centrality of the EU OHS action around the Framework Directive was confirmed by the Prodi Commission, which also saw OHS as an important factor of economic development. For these Commissions, OHS and economic development complemented each other. Under the Santer Commission, OHS was still important but more as a soft coordinating tool than a powerful motor for economic growth. The Santer Commission focused on enforcing the existing framework and opened the way to legitimatise limiting the adoption of new directives, arguing that it can be counterproductive. Under the Santer Commission, OHS could be beneficial to the economy if it was not too limiting. Finally, under the Barroso Commission, the extensive OHS framework was described as too constraining and needed to be lightened because it was a burden to competition. Here the OHS and the economic field were competing with and challenging each other.

To conclude, it is clear that the development and the approach of the OHS legal framework are highly political, and their connections with economic considerations is crucial. However, with the European elections in June 2019, a new Commission has been appointed. One may ask if, under these new conditions, developing the OHS legal framework would be

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[151] Mailand, M., 2011. *Slowing down Social Europe? The role of coalitions and decision-making arenas*. Working Paper 118. Copenhagen, Employment Relations Research Centre Department of Sociology University of Copenhagen.p.3

[152] Wille, A., 2012. The politicization of the EU Commission: Democratic control and the dynamics of executive selection. *International Review of Administrative Sciences*, *78*(3), p.394

possible within the current context. In other words, is the rationale that was in place from the "golden age" of legal development of the OHS until 1995 still applicable today?

2.5. The Limits of Applying Former Logic to Modern Challenges

As previously described in this chapter, the analysis of the Commissions' OHS programmes over the past 50 years, and the interviews explaining the rationale of the decision-making, stress the importance of consensus and compromise, as well as the importance of enforcement. However, it might be necessary to question if these elements are still suitable to the current situation. Therefore, this section highlights the possible limits to consensus between stakeholders and MS. The difficulty of having effective enforcement mechanisms — both at the national and European level — is stressed. This is essential because these mechanisms are the basic requirements to give meaning to the OHS legal framework.

2.5.1. Consensus between social partners weakened by the imbalance of power

Consensus between partners is currently weakened by an imbalance in power due to the economic crisis.[153] Even if the Commission has played an essential role in establishing multi-level, IR in Europe, some authors argue that its position has changed dramatically since the start of the crisis.[154] The DG Economic and Financial Affairs depicted collective labour relations as obstacles to market coordination and hence to economic and employment growth.[155] This is a significant difference compared to the testimonies provided by stakeholders who were working during the 1990s. As Dimitrakopoulos argues, the Commission should be considered to be both an actor and an arena in which different Directorates General (DGs) vie for attention and support for their sectoral policies.[156] Thus, it should not be assumed that the Commission and Parliament are forever tied to an "ever closer" and ever deeper union, nor that the position

[153] *See* Erne R (2012) European industrial relations after the crisis. In: Smismans S (ed.) The European Union and Industrial Relations. Manchester University Press, pp. 225–235; Busch, K., Hermann, C., Hinrichs, K. and Schulten, T., 2013. Euro crisis, austerity policy and the European Social Model. *International Policy Analysis, Friedrich Ebert Foundation, Berlin*. pp.7-13

[154] Keune, M., 2015. The effects of the EU's assault on collective bargaining: Less governance capacity and more inequality. *Transfer: European review of Labour and Research, 21(4)* p.477

[155] DG Economic and Financial Affair's 2012 Labour Market Developments Report (European Commission, 2012: 104)

[156] Dimitrakopoulos, D.G., 2004. *The changing European Commission*. Manchester University Press. p.7

within the Commission is homogenous.[157] Indeed, the position of the DG Economic and Financial Affairs in 2012 corresponded to the position defended by the Barroso Commissions (2004–2014): answering the crisis with severe austerity and increasing market liberalisation.[158] With the adoption of five Regulations and one Directive on "economic governance", the EU reinforced its authority over national economic policies.[159] Meanwhile, unions are struggling and put under massive pressure by the economic crisis.[160] Collective bargaining mechanisms have been weakened.[161] Some researchers have focused on crisis-related developments in collective bargaining in the private sector across the EU since the onset of the crisis in 2008.[162] The researchers focus on the influence of economic factors, IR institutions, and public policy to support collective bargaining.[163] It has been suggested that the changing economic situation may affect the power balance between the workers and employers.[164]

The 2008 crisis and the neo-liberal turn operated from 2004 affected the crucial variable of balance between partners' perspectives that has been the keystone of EU OHS development. Even if a future Commission reconnected with the previous position of the EU, national reforms have been conducted, and it will not be possible to return to it. Therefore, the current settings are not based on a balance of power between European partners but between a weakened partner (i.e., TUs), a strong partner (i.e., employer, benefiting from some national reforms) and a neutral partner (i.e., the Commission).

2.5.2. Consensus between Member States weakened by different visions of the EU

Currently, there is also a limit of consensus within the broader union. The vote for Brexit is an example of an MS seeking to leave the EU. In less absolute terms, the history of the EU

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[157] Gravey, V. and Jordan, A., 2016. Does the European Union have a reverse gear? Policy dismantling in a hyperconsensual polity. *Journal of European Public Policy*, *23*(8), p.1184
[158] Erne R., European Industrial Relations after the Crisis. A postscript. *In Smismans, S. (ed.), 2012. The European Union and Industrial Relations: New Procedures, Net Context*. Manchester University Press. pp.350-351
[159] Degryse, C., 2012. The new European economic governance. *ETUI Working Paper 2012.14* pp.28-29 ; Council of the European Union, Press Release 4 October 2011, 14998/11
[160] Erne R., European unions after the crisis. *in Burroni, L., Keune, M. and Meardi, G. eds., 2012. Economy and society in Europe: A relationship in crisis*. Edward Elgar Publishing. p.132
[161] Keune, M., 2015. The effects of the EU's assault on collective bargaining: Less governance capacity and more inequality. *Transfer: European review of Labour and Research, 21(4)* p.480
[162] *See* Glassner, V., Keune, M., and Marginson, P., 2011. Collective bargaining in a time of crisis: Developments in the private sector in Europe. *Transfer: European Review of Labour and Research, 17(3),* pp.303-321.
[163] *Ibid,* p.306
[164] *Ibid,* p.308

shows examples of MS trying to opt out of specific areas of decision-making.[165] The debate on a multispeed EU started after the adoption of the Maastricht Treaty in 1992.[166] Since then, continuous controversy about what the nature of European integration should be has been dominated by two integration theories: intergovernmentalism and supranationalism (now constructivism).[167] Underlining the divergences of cultural heritage and national preferences in economic, political, and social policy led to developing the *multispeed model* theory.[168] However, some scholars are opposed to the development of a "twin-track" Europe, and warn that encouraging the "two-speed Europe" might lead *"the current integration of Europe to total ruin, entailing dangerous economic and political consequences resulting from the collapse of the integration project"*.[169] Recently, some academics have questioned the concept of integration, arguing that we are at the institutional limits of the EU.[170] At the moment, non-integration, further integration, and divided integration all seem at risk. The EU appears to be at an impasse where the "*politically feasible policies appear to be ineffective and illegitimate*", and "*radical policy changes seem to lack political feasibility*".[171]

The tension among the MS about the reform of the posted workers Directive is an example of the different expectations of the EU's role and the scope of integration. **.**[172] Regarding the OHS field, there has been a period of legislative paralysis at the EU level. There have been no significant OHS directives between 2004 and 2014. Those Directives adopted were mainly to revise or provide details on former Directives. The political climate during that time might

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[165] Jensen, C.B. and Slapin, J.B., 2015. The politics of multispeed integration in Mazey, S., (ed). *European Union: Power and Policy-making*. Routledge. p.64

[166] *See* Towers, B., 1992. Two speed ahead: Social Europe and the UK after Maastricht. *Industrial Relations Journal*, *23*(2), pp.83-89.

[167] Schimmelfennig, F. and Rittberger, B., 2015. The EU as a system of differentiated integration. *European Union: Power and Policy-making, Routledge*, p.34.

[168] Pera, J., 2017. A two-speed Europe–a risk of total disintegration, or an opportunity for the development of the European Union? an attempt at a projection. *Political Science Review,* p.27

[169] Pera, J., 2017. A two-speed Europe–a risk of total disintegration, or an opportunity for the development of the European Union? an attempt at a projection. *Political Science Review ,* p.33; *See* Hvidsten, A.H. and Hovi, J., 2015. Why no twin-track Europe? Unity, discontent, and differentiation in European integration. *European Union Politics*, *16*(1), pp.3-22.

[170] *See details* Majone, G.., 2016. European Union. The limits of collective action and collective leadership. *The end of the Eurocrats' dream. Adjusting to European diversity*, SEP Policy Brief n°6.

[171] Scharpf, F.W., 2015. After the crash: A perspective on multilevel European democracy. *European Law Journal*, *21*(3), p.397

[172] *See* Dhéret, C. and Ghimi, A., 2016. The revision of the Posted Workers Directive: towards a sufficient policy adjustment? EPC Discussion Paper, 20 April 2016 ; Broughton, A. 2016. *EU-Level: Posted workers proposal gets « yellow card » from Member States.* Eurofound. Accessible in March 2020 at : https://www.eurofound.europa.eu/fr/publications/article/2016/eu-level-posted-workers-proposal-gets-yellow-card-from-member-states

explain this inertia. José Manuel Barroso was the president of the European Commission from 2004 to 2014. During that period, he orchestrated a "liberal turn" of European orientation, especially to the European social model.[173] However, the legislative gap might also express an unwillingness or demand from the MS to move further in that field. It might suggest that one of the prerequisites of the approach that was applied at the time of the construction of the EU OHS framework (1970–2004) does not exist anymore. Even if it has sometimes been difficult to find common ground in the past, we might have reached the point where no new common ground can be — or wants to be — found between MS. [174]

2.5.3. The impact of EU OHS standards weakened by the lack of enforcement at the EU level

Another challenge is the lack of sanction when an MS refuses to apply the norms adopted by a majority. During the interviews conducted during the current study, the question of the effectiveness and the feasibility of sanctioning MS was raised. Berlin recognised that, in fact, it is complicated to condemn an MS when it refuses to implement directives.[175] In theory, the Commission can take legal action via an infringement procedure against an EU country that fails to implement EU law. Recently the Commission has described MS compliance with EU law as "*not yet good enough"*.[176] Despite the increase in open infringement cases in 2016 (up by 21%), the impact of the CJEU's decisions might be limited.[177] Due to its lack of administrative infrastructure, the effectiveness of the Court's role in the enforcement of European law is contingent upon the support of national judiciaries, and it may vary across national judicial cultures.[178] Some authors have underlined the importance of the political context of the CJEU rulings, and the pressures that can be applied by the MS.[179] Additionally, it is fundamental to remember that the CJEU has the power that the MS give it. The effectiveness of the Court's decision will strongly depend on the support of national judges and

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[173] Ter Haar, B.P. and Copeland, P., 2010. What are the future prospects for the European social model? An analysis of EU equal opportunities and employment policy. *European Law Journal*, *16*(3), pp.287-290
[174]Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.5
[175]Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.20
[176] European Commission – Press release 06.07.2017, Member States compliance with EU law: Not yet good enou–h - http://europa.eu/rapid/press-release_IP-17-1846_en.htm
[177] *See* Chapter 5 of this thesis, pp.155-156
[178] Scharpf, F.W., 2012. Perpetual momentum: Directed and unconstrained? *Journal of European Public Policy*, *19*(1), pp.127-139
[179] *See* Carrubba, C.J., Gabel, M. and Hankla, C., 2008. Judicial behavior under political constraints: Evidence from the European Court of Justice. *American Political Science Review*, *102*(4), pp.435-452.

authorities, and it might vary considerably depending on the country.[180] Furthermore, only the Court's vision of the meaning of the Treaty and EU law is binding, but it is not the case for the opinions on particular cases that represent most of the preliminary rulings.[181] In the current context of mistrust towards European institutions, at a time where nationalist parties are gaining power in the EU, it is important that

> *the Court might be aware that the ultimate success of EU law depends on national judicial support, and that excessive bossiness and doctrinal overreach could be counterproductive.*[182]

This development resonates with Berlin's vision regarding the necessity of having the support of all the MS despite the institutional possibility of adopting an OHS directive with the qualified majority. It underlines the practical necessity to avoid having opposite positions. However, with respect to the two arguments developed above, it also confirms that the situation might currently be blocked.

2.5.4. The impact of EU OHS standards weakened by the lack of enforcement at the national level

The last challenge is the limits of the EU's action concerning the enforcement at the national level illustrated by the case of the national LIs. On this latter point, the Barroso Commission stressed that it is fundamental that LIs are seen as facilitating compliance with legislation rather than an obstacle to business activity.[183] Interestingly, the Commission said that "*there are around 20,000 labour inspectors in the EU — approximately one inspector per 9,000 workers covered by relevant national labour inspectorates.*[184] Considering that the ILO threshold is one LI for 10.000 workers, it gives the impression that there are enough LIs in the EU to cover the enforcement of EU OHS standards. However, an examination of the number of LIs per number of workers in each MS shows that in 2012, the majority of MS did not meet

[180] Scharpf, F.W., 2012. Perpetual momentum: Directed and unconstrained? *Journal of European Public Policy*, *19*(1), p.128
[181] Davies, G., 2012. Activism relocated. The self-restraint of the European Court of Justice in its national context. *Journal of European Public Policy*, *19*(1), p.79
[182] *Ibid*. p.87
[183] CEC, 2007. Improving quality and productivity at work: Community strategy 2007–2012 on health and safety at work.
[184] COM(2014) 332 final on an EU Strategic Framework on Health and Safety at Work 2014-2020 p.8

the ILO threshold and were above the 1/10 000 ratio.[185] This means that even if the Commission communicates the idea that there are enough resources, in practice, it is not the case.

Recently, under the Juncker-Commission (2014–2019) a "social summit" was held on November 17, 2017. The discussions between heads of state or government at the summit showed a lot of common ground on the need for Europe to be equipped with a substantial and tangible social dimension.[186] The European Pillar of Social Rights (EPSR) was launched at the summit as one of the ten priorities presented by Juncker before the EP.[187] The EPSR drives the EU's social agenda at all levels and aims to help the EU move towards upwards social convergence in the single market. It is about delivering new and more effective rights to citizens to ensure equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. The EPSR is designed to be a compass for a renewed process of convergence towards better working and living conditions across the EU.[188]

The EPSR is a recent and rare initiative that aims to support rather than deregulate labour market and welfare systems.[189] Some researchers emphasise that the EPSR on its own does not necessarily change much but can have a meaningful impact if the stakeholders allow it to.[190] It is a tool, and its effectiveness depends on how it is used. One project of the EPSR has been to establish the European Labour Authority (ELA), presented as a tool to improve the enforcement of employment standards and relying on the LIs. Even if this project seemed like a good option to improve OHS standards, an in-depth analysis of the Commission's impact assessment document shows that it might be a missed opportunity.[191]

Overall, the fact that in most MS, OHS rules are mainly driven by carrying EU OHS Directives into national legislation while labour inspection has remained the responsibility of

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[185] *See* Appendix n°5– in 2012 14 MS were above the 1/10 000 ratio (54%) and 12 MS were under (46%)
[186] Europe's social dimension: President Juncker and Prime Minister Löfven present way forward after the Social Summit. European Commission – Press release, 28 November 2017. https://europa.eu/rapid/press-release_IP-17-4973_en.htm
[187] Juncker JC., 2014. *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change*. Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session. p.6
[188] Commission impact assessment – Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final
[189] Rasnača, Z., 2017. *Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking*. Working Paper 2017.05, ETUI, Brussels. p.5
[190] *Ibid*. p.8
[191] *See* details Chapter 6 of the thesis pp.201-221

the MS raises considerable difficulties.[192] Thus, the question is where the responsibility of the EU institutions stops with regard to the enforcement of EU OHS standards in the MS. During an interview conducted in the current study, Berlin underlined the importance of respecting the diversity of the national LI authorities[193] while supporting and organising meetings with national LIs so they can exchange their perspectives and best practices.[194] The meetings are formalised with the functioning of the SLIC. However, their actions remain limited, based on a soft approach, so the national divergences persist. It leads to a non-harmonious way of enforcing EU OHS standards, which is particularly problematic for cross-border employment situations.

To conclude, we can see that the crucial concepts of compromise and consensus that were at the heart of decision-making at the time of the adoption of most of EU OHS Directives are profoundly challenged today. In the past, compromise and consensus were possible because the positions of the various stakeholders had relatively the same importance. Considering the crisis and the weakening of the TUs, compromise and consensus are no longer possible (or only at the costs of the TUs' claims). Moreover, it was previously possible to find a common position because most of the MS had a common idea of the role of the EU. After the latest extension of the EU, as recent national elections show, there are significant divergences among the MS regarding the role of the EU, especially in the social field.[195] This means that it is now more difficult to find agreement to move forward. Meanwhile, these recent national elections also show a rise in Euroscepticism, challenging the authority of European institutions.[196] The application of the EU OHS legal framework relies on enforcement at the national level, which implies that national courts will follow the ruling of the CJEU. This is no longer guaranteed. Enforcement at the national level is also challenged by the lack of resources and coordination of the national LI authorities. Based on these considerations, it is unlikely that new OHS directives will be adopted in the near future. This means that the only way to improve the OHS

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[192] Vogel, L. 2007. Inspection still a weak link in most national preventive strategies *HESA Newsletter* p.23
[193]Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.21
[194]Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.12
[195] For general discussions on the rise of nationalism in the EU, see: Postelnicescu, C., 2016. Europe's new identity: The refugee crisis and the rise of nationalism. *Europe's journal of psychology*, *12*(2), pp.203-209; López-Alves, F. and Johnson, D.E. eds., 2018. *Populist nationalism in Europe and the Americas*. Routledge ; BBC News, *Europe and right-wing nationalism : A country-by-country guide.* 13th November 2019, available at : https://www.bbc.com/news/world-europe-36130006
[196] For general discussions on the rise of Euroscepticism see: Leonard, M., 2013. The rise of Euroscepticism and how to deal with it in the EU. *Norwegian Institute of International Affairs*, *9*(1), pp.1-4; Ignacio, T.J. and Mark, L., 2013. The Continent-Wide Rise of Euroscepticism. *Berlin, European Council on Foreign Relations*.

in the EU is to focus on the enforcement of the existing Directives. The following chapters of this thesis map the similarities and differences of enforcement of the Framework Directive in different MS.[197] How enforcement in front of the courts[198] and by the LIs might be improved in the EU is then explored.[199]

2.6. Conclusion

To conclude, the rationale that has framed the EU's legal decision-making regarding OHS can be observed and analysed over three distinctive periods: 1957 to 1985, 1985 to 1989, and since 1989. As I have shown in this chapter, throughout these different phases, the Commission has always been a coordinator between the MS, attempting to find a consensus and compromise accepted by all the actors. However, its involvement and approach to OHS has changed over time.

First of all, between 1957 and 1985, the Commission emphasised its role as coordinator of OHS policies between MS. The degree of commitment depended on the president of the Commission. It appears that during this period, OHS was developed primarily as a corollary of economic construction. However, the early development of the European economy — also due to the various crises in the 1970s — shows that social construction is as important as economic development. From a political perspective, OHS began to be recognised as an "independent topic", or at least as different from other social policies. From a legal point of view, the first legally binding OHS Directives focused on quantifiable risks. As illustrated in the interviews conducted for the current study, the origins of these Directives vary. However, the compromises and the consensus among MS and actors (e.g., TUs, employers, and Commission), have been two continuous factors. This approach reached an institutional limit due to the requirement of the unanimous vote, so an essential institutional change was made with the SEA coming into effect in 1987. In it, Article 118A introduced the QVM, which proved to be a turning point for framing the working conditions and underlining the unique role of the OHS. However, the findings of this chapter corroborate the idea that, despite the possibility of using the QVM,

[197] *See* Chapter 3 (pp.64-98) and Chapter 4 (pp.100-133)
[198] *See* Chapter 5 (pp.134-173)
[199] *See* Chapter 6 (pp.174-220)

consensus and an informal unanimity were still required to ensure the transposition of the Directive and its enforcement at the national level.

There was a continuity in the logic behind the adoption of the Directives, despite the institutional change. This idea of continuity has also been observed regarding the general approach to OHS. With the adoption of the Framework Directive, 89/391/EEC, there was a recognition of general concepts, rights, and duties. That aspect was an innovation and a crucial turning point; it opened possibilities for a more comprehensive and broad understanding of OHS in the decades that followed the adoption of Directive 89/391/EEC. However, the interviews conducted suggest that the European actors were still initially pursuing a quantitative approach through the establishment of general concepts and duties. Therefore, even if nowadays we can apply the principles of Directive 89/391/EEC to the non-quantifiable aspect of OHS (such as the psychosocial risks), there was a continuity in the aim and the rationale at the moment of its adoption.

Building upon the Framework Directive, more than 30 individual Directives and some framework agreements were subsequently adopted. However, the legislative activity was not continuous over the years. Indeed, this chapter shows that these variations can be contextualised in the broader OHS action plan, which changed depending on the Commission. An analysis of the Commission programmes shows three different trends, depending on the president of the Commission: (1) seeing OHS as a motor for the economic construction that justifies the adoption of a European legislative framework, (2) seeing OHS as a valuable part for the economic development that should be encouraged through the adoption of non-legislative tools and reserving the legislative action as a last resort, or (3) seeing the OHS legal framework as a burden to competition that needs to be reduced.

Considering that the third scenario is the most recent one (under the Barroso Commissions), it may explain why there has been no significant legislative change in the OHS legal framework since 2004. Another complementary explanation could be that the key rationale and concepts that have been applied at the moment of the adoption of most of the European OHS Directives are no longer applicable. Indeed, based on the interviews conducted for this study, it appears that the concepts of consensus and compromise between the MS and partners were key during the discussions. However, considering the current setting, a consensus and a compromise between the MS and between the social partners appears to be difficult to

reach. All these elements show that the likelihood of adopting more OHS directives in the near future is low. It means that the improvement of the OHS legal framework has to be approached by improving the enforcement of the existing framework, both at the European and national level.

CHAPTER 3

National Resistance to the European Union's Influence on Occupational Health and Safety: The United-Kingdom

3.1. Introduction

In the UK, OHS regulation has its roots deep in the history of IR, starting as far back as the 19th century with the Factory Acts.[200] This series of Acts was consolidated and reformed in 1974 with the adoption of the Health and Safety at Work (HSW) Act, which is now the cornerstone of the UK OHS legal framework. The HSW Act was based on the philosophy of Alfred Robens and had a basic and enduring principle: the responsibility for taking action lies "*with those who create the risks and those who work with them"*.[201] When the UK Government had to implement Directive 89/391/EEC within the national legal framework, there was already a strong national OHS framework. Additionally, former Prime Minister Margaret Thatcher never hid her hostility towards closer European integration. Therefore, the leadership of the Conservative Party in early 1990 has influenced the implementation of the Framework Directive.[202]

This chapter aims to consider whether EU legislation changed the initial rationale of UK law-making and the development in the OHS field and, if so, to what extent. It is structured in two parts. First of all, considering the centrality of the HSW Act in the UK OHS legal framework, it is fundamental to understand the rationale that led to its adoption by studying the *Robens Report*. This allows us to see how these ideas were legally translated at a time of the specific context of the Social Contract under the Labour Party in the 1970s. In the second part of this chapter, a study of the political context at the time of the implementation of Directive 89/391/EEC shows the national reluctances to reform and embrace the European OHS standards, which led to a minimal implementation of the Framework Directive. This reluctance towards the EU dynamic in the OHS field also appears in recent reports and reforms advocating

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[200] https://osha.europa.eu/en/about-eu-osha/national-focal-points/united-kingdom; The Factory Acts were a series of acts adopted in the early 19th century to improve and regulate the conditions of industrial employment. *See for example* Health and Morals of Apprentices Act 1802, Factories (Health of Women, & c.) Act 1874

[201] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office.p.6

[202] *See* Garry, J., 1995. The British Conservative Party: Divisions over European policy. *West European Politics*, *18*(4), pp.170-189.

for “cutting the red tape” and sometimes blaming the EU OHS legal framework for some controversial aspects of the existing system.

The core of this chapter is based on a close analysis of primary sources related to the UK OHS legal framework, such as the *Robens Report,* the Bills which turned into the HSW Act 1974, the SRSC Reg.1977 and the MHSW Reg 1992 (and its amendments). All of this material illustrates the idea of self-regulation in the OHS field has been constructed and its development over the years; and especially how it has been adjusted to match with EU OHS requirements of Directive 89/391/EEC. The understanding of the evolution of the OHS approach in the UK has been strengthened by secondary sources – mainly academic literature. Based on the analysis of the primary and secondary sources available, it was possible to tailor interviews targeting the gaps highlighted previously. The study is completed by three interviews with people who have witnessed the evolution of the OHS legal-framework in the UK since the 1970s: Partick Kinnersly was a journalist, a TU member in the 1970s and is the author of a pamphlet on the *Robens report*[203], Phil James and David Walters are both Professors who have conducted extensive research within the fields of both industrial relations and occupational health and safety over the past 40 years.

The principal argument of this chapter is that even though the UK had a well-developed legal framework prior the implementation of the EU OHS Directive, some changes were still made despite the national agenda to deregulate IR and the reticence towards further socio-political European integration. It illustrates that the EU legislative action had an impact at the national level. However, this impact was theoretical and minimal; the Conservative Government only changed the national legislative provisions when they were at high-risk of condemnation by the CJEU without compromising on its core philosophy: OHS should be self-regulated and the employer shall prevent OHS risk as far as *reasonably practicable*. Therefore, the subsidiary argument of this chapter is that the national political agenda, and the relations between the MS and the overall European project, impacted the way the EU OHS Directive was implemented and applied at the national level.

[203] Kinnersly, P. 1973. *Hazards of work: how to fight them* (vol.1) ed. Pluto.

3.2. The Development of Occupational Health and Safety in the UK: From Fragmented to Centralised Legislation with the Health and Safety at Work Act 1974

In the UK, the principal Act in the OHS field is the HSW Act 1974, which has been completed by Regulations, among them the Safety Representatives and Safety Committee Regulations (SRSC) 1977. Before the adoption of this new framework, there was an extensive and fractured corpus of rules. The Factories Acts 1961 were ones of the main pieces of legislation. The approach adopted in the HSW Act 1974 was entirely different from the previous one. It represented a turning point from a normative and quantitative approach towards a more qualitative understanding; the enactment of general standards and the significant development of the voluntary approach. In order to understand to what extent, the EU action influenced the UK OHS legal framework, it is necessary to understand the rationale behind the reform in the UK in the 1970s. Only then will it be possible to assess the impact of the EU understanding of OHS within the UK.

3.2.1. The context in the 1970s and the necessity for legislative action

In British history, OHS had a special place compared to general IR. Some studies have underlined that health and safety were relatively uncontentious.[204] The consensual approach around OHS is illustrated by the appointment of the National Joint Advisory Council for Industry in 1954. This Council was a place where the Confederation of Employers, the TUC and the Minister of Labour were discussing industrial problems on a monthly basis.[205] One reason that can explain this difference between the OHS and the other IR topics is that the TUs insisted that the employer should be the only responsible for the management of the OHS matters.[206] It was only in 1964 that TUC changed its approach to OHS by officially launching a campaign for legislation and asked, among other things, for more compulsory provisions for safety delegates.[207] Additionally, the UK has not been marked by significant worker protests

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[204] Sirrs, C., 2016. *Health and Safety in the British Regulatory State, 1961-2001: the HSC, HSE and the Management of Occupational Risk* (Doctoral dissertation, London School of Hygiene & Tropical Medicine). p.77
[205] O'Brien, T., 1954. Trade unions and responsibility. *Blackfriars*, *35*(410), p.206
[206] Glendon, A.I. and Booth, R.T., 1982. Worker participation in occupational health and safety in Britain. *Int'l Lab. Rev.*, *121*, p.409 ; Crouch, C., 1978. The intensification of industrial conflict in the United Kingdom. In *The Resurgence of Class Conflict in Western Europe Since 1968*. Palgrave Macmillan Uk. pp.191-256
[207] *Ibid.* p.409

regarding OHS. In the 1960s, the protest issues related to raising wages rather than OHS and working conditions. Indeed, even if some workers' representatives tried to bargain for better protection, they sometimes had to face negative reactions from the workers who would rather have a bonus than better protection.[208]

On a factual basis, an increasing number of workplace accidents marked the 1960s.[209] After years of decrease, the number of workplace accidents plateaued and represented a high number of accidents.[210] According to Duncan, in 1969, two or three people were killed at their workplace in the UK every day.[211] Throughout the 1960s, there were between 600 and 700 fatalities and over 300.000 accidents reported per year. As noticed by Beck, at that time workplace safety increasingly gained political importance.[212]

In reaction to these dramatic numbers, a first 'wave' of proposals was addressed to reform the OHS legislation in 1967 but left the existing fragmented framework unchanged.[213] There were continuous tripartite consultations in 1968 but without any success. In 1969, the Department of Employment and Productivity recognised that a more radical approach was necessary to change the situation. Barbara Castle, MP and Secretary of State for Employment and Productivity at that time, was convinced that an independent committee was required to provide a significant break with the previous system.[214] She was also persuaded that the size of that committee was the key to its independence and future efficiency: small with only a few members. Therefore, the committee ought to represent both sides of industry, with

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[208] James, Phil. Interview 25 July, 2017. Archives, University of Glasgow p.1

[209] There was an increase in all accidents at work, but an overall decrease in the fatal accidents at work, in the UK between 1961 and 1970. *See tables in* Robens, *Safety and Health at Work,* (vol1) pp. 161-162

[210] Sirrs, C., 2015. Accidents and Apathy: The Construction of the 'Robens Philosophy'of Occupational Safety and Health Regulation in Britain, 1961–1974. *Social history of medicine*, *29*(1), p.73 - Archives, University of Glasgow p.1 – See Archival records of these organisations are kept at The National Archives (TNA) in Kew, Surrey (for government records), and the Modern Records Centre at the University of Warwick for the TUC and BEC/CBI. For archival records of the Robens Committee, see TNA LAB 96; confirmed by interview with Walters David, Interview 25 Mai, 2017. Archives, University of Glasgow p.1

[211]Duncan, K.P., 1971. Occupational health and safety in Great Britain, 1969. *British Journal of Industrial Medicine*, *28*(2), p.201 - Annual Report of H.M. Chief Inspector of Factories for 1969 (1970). H.M.S.O., London

[212] Beck, M. and Woolfson, C., 2000. The regulation of health and safety in Britain: From old Labour to new Labour. *Industrial Relations Journal*, 31(1) p.37

[213] Sirrs, C., 2015. Accidents and Apathy: The Construction of the 'Robens Philosophy'of Occupational Safety and Health Regulation in Britain, 1961–1974. *Social history of medicine*, *29*(1), p.77 ; Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office p.188

[214] TNA LAB 96/447, Memorandum by the First Secretary of State ; Doc 1, summary of replies to Sir Derek Barnes' letter of 5 September 1969.

representatives from political parties, the academic sphere, and the fieldwork and science fields.[215] The aim of this committee was to

> *review the provision made for the safety and health of persons in the course of their employment and to consider whether any changes were needed in: (1) the scope or nature of the major relevant enactments, or (2) the nature and extent of voluntary action concerned with these matters.*[216]

Lord Alfred Robens was appointed as the head of this Committee. He was a former TU official, a Labour MP, and was also minister of labour for few months in 1951. Since then, he had been the shadow minister of labour and was one of the leading figures of the Labour Party.[217] In 1960, the Conservative Prime Minister Harold Macmillan offered him the chairmanship of the National Coal Board (NCB), which he accepted. At that time, this appointment was very controversial and was a significant disturbance in the inside organisation of the Labour Party.[218] Lord Robens also served as a member of the Donovan Commission, appointed in 1965, with the report published in 1968.[219] Considering his knowledge of IR, both sides of industry respected him, and his value was recognised by both the Labour and the Conservative Parties. Lord Robens' previous functions — especially his experience as chair of the NCB and the Donovan Commission — influenced his vision of OHS and the recommendations made. However, one might raise questions regarding the appointment of Lord Robens at the head of the Commission in charge of reforming the OHS legal framework considering that he was the chair of the NCB at the time of one of the biggest industrial disasters in the 1960s: the Aberfan disaster. Some scholars argued that contrary to what Lord Robens said,[220] the NCB had the technology to prevent the disaster[221]. The reason for his appointment,

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[215] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office, v; the final composition of the Committee appointed on the 29th May 1970 was Lord Alfred Robens as the Chair of the Committee; John C. Wood, a law professor; Anne Shaw, a management consultant; Mervyn Pike, a Conservative MP; Sir Brian Windeyer, a radiologist; Sydney A. Robinson, a trade unionist; and George H. Beeby, an industrialist

[216] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office – see preface

[217] Tweedale, G., 2010. Robens, Alfred, Baron Robens of Woldingham (1910-1999). *Oxford Dictionary of National Biography*

[218] Robens, A., 1972. *Ten year stint*. Cassell. p.3

[219] Report of the Royal Commission on Trade Unions and Employers Associations (Donovan)

[220] Lord Robens said that "*there must have been some human error*" and that "*it was impossible to know*" this risk – See Robens, A., 1972. *Ten year stint*. Cassell. pp.249-251

[221] Sirrs, C., 2016. Risk, Responsibility and Robens: The Transformation of the British System of Occupational Health and Safety Regulation, 1961–74. In *Governing Risks in Modern Britain*. Palgrave Macmillan, London. p.267

according to Phil James, might be that it was particularly important to have someone from the NCB because they were the main opposition to the previous attempt of reforms.[222]

3.2.2. The basis of the OHS approach in the UK: The Robens Report and philosophy

In July 1972, the Committee published the *Robens Report* divided into 19 chapters with broad coverage.[223] Not all chapters are examined in this thesis; only the sections analysing the weaknesses of the previous system and the modifications of the legislative framework will be covered. Such an analysis will give an understanding of the reasons of what were aspects which were important to reform (e.g., apathy at work) and why the Committee recommended to develop a self-regulated system based on a legal framework with general duties and rights.

3.2.2.1. The Robens Report

The Report starts with a close examination of the weaknesses of the UK OSH legal framework.[224] For the committee, there was a paradox between society as a whole that keenly reacted to major disasters[225] and apathy at work.[226] According to the inquiry conducted by the committee, the workers "*argued that standards would be improved if workplaces were visited much more frequently by inspectors*".[227] The committee analysed this statement as a sign of apathy and workers' reliance on external agencies to improve OHS. Thus, one of the crucial points of the report was to place the responsibility of acting in the field of OHS "*with those who create the risks and those who work with them"*.[228] Consequently, it concluded that there was a "*need of a more effectively self-regulating system"*.[229] This idea would lead to the establishment of systems where the organisation of safety included more initiatives from the management and more involvement by workers themselves. Here, the committee intended to

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[222] James, Phil. Interview 25 July, 2017. Archives, University of Glasgow pp.2-3
[223] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1).
[224]Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office. pp.1-13
[225] Such as the Aberfan
[226]Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office. p.1
[227] *Ibid.* p.7
[228] *Ibid.* p.7
[229] *Ibid.* p.12

increase the non-legal responsibility of the management and the workers through a voluntary approach.[230]

On the legal side, the committee recommended the establishment of a statutory duty for every employer to consult his employees and their representatives at the workplace regarding measures promoting OHS and to provide arrangements for their participation. However, to address the need for flexibility specific to each workplace, the form of such consultation and participation would not be specified in the details. The committee also raised the question of the employees' safety representatives, who should be appointed via elections by employees among the recognised TU, or through works groups as appropriate. Here, there was no reference made to the potential exclusivity of the TU competences to appoint the safety representatives. On that point, the committee said that the employees' safety representatives could be appointed either under a statutory provision or by voluntary agreement. Meanwhile, the TUC advocated for a legal obligation of employers to meet TU requests for the appointment of workers' safety representatives (and joint safety committees).[231] On the other side, the Confederation of British Industry (CBI) insisted that the success of such collaboration could only be achieved through a common desire of the actors to work together, not by law.

The second point addressed by the Committee was the obsolescence of the former set of laws applying to OHS. Overall, the previous legislation was seen as the emergence of a "*piecemeal fashion decade after decade*" and was due to an empirical approach to OHS standards.[232] After explaining to what extent the former statutory arrangements were counterproductive, the Committee advocated for a unified field of legislation and administration.[233] One of the crucial features of the suggested unifying statute was its limitation to matters that were not likely to require further amendment.[234] The details would then be provided through more flexible instruments, and so be adaptable depending on needs. The Committee thought that this division between general provisions and flexible specificities would help to provide a better mechanism for balancing voluntary and statutory activities.[235]

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[230] *See details in* Robens, *Ibid*. pp. 14-24
[231] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 2). HM Stationery Office.p.552
[232] *Ibid.* p.4
[233] *Ibid.* pp.31-39
[234] *Ibid.* p.40
[235] *Ibid.* p.30

These recommendations aimed to take the opposite approach to the previous *ad hoc* method of adopting Acts. The idea developed by Robens was the continuity and stability of the principles enacted by Parliament.[236]

3.2.2.2. Limits of the Robens Report

The two aforementioned aspects of the report have been very controversial. Even if the *Robens Report* led to undoubted improvement, some scholars highlighted the limits of the report.[237] One work, in particular, is examined in detail in this section: the pamphlet published right after the publication of the report as an answer by Theo Nicols and Peter Armstrong in 1973 called *Safety or Profit?*[238]

The authors acknowledged that the unification of the statutory framework was not controversial; however, the persistent tendency of the committee to advocate for a voluntary approach rather than legal restraint was.[239] They argued that the apathy theory on which the report was based was nothing more than an unsubstantial assumption.[240] They also questioned and were opposed to the assumption of "*greater natural identity of interest*" between both sides of industry regarding OHS.[241] These two mains assumptions of the report might not be appropriate if the general pressure in factories for profit and continuous production were taken into consideration.[242] Indeed, after Nicols' and Amstrong's investigations in factories, they highlighted the difference between "safety before production" in theory, and "production before safety" in practice. Based on testimonies from workers who had been victims of workplace accidents, they concluded that these workers put themselves in dangerous situations to try to maintain or restore the production. It was not by ignorance or because they did not care about their health and safety; the problem of production and the pressure by the management was a

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[236] *Ibid.* p.41
[237] *See* Simpson, R.C., 1973. Safety and health at work: Report of the Robens Committee 1970-72. *The Modern Law Review*, *36*(2), pp.192-198.; Woolf, A.D., 1973. Robens Report-the Wrong Approach. *Indus. LJ*, *2*, p.88-95; Sirrs, C., 2016. Accidents and Apathy: The Construction of the 'Robens Philosophy' of Occupational Safety and Health Regulation in Britain, 1961–1974. *Social history of medicine*, *29*(1), pp.66-88.; Moffat, G., 1978. UK Health and Safety at Work Act-A Reaction to Apathy, The. *Legal Service Bull.*, *3*, pp.27-30; Kinnersly, P. 1973. *Hazards of work: how to fight them* (vol.1) ed. Pluto.
[238] Nichols, T. and Armstrong, P., 1973. Safety or profit. *Bristol: Falling Wall Press Nichols Safety or Profit*. (copy in: Nichols, T., 1997. *The sociology of industrial injury*. Burns & Oates. pp.35-60)
[239] Nichols, T., 1997. *The sociology of industrial injury*. Burns & Oates. p.40
[240] Nichols, T., *Ibid*. pp.42
[241] Kinnersly, Patrick. Interview March 14, 2017. Archives, University of Glasgow. p.6
[242] Nichols, T.,*Ibid*. p.43

factor of insecurity. Paradoxically, these elements were mentioned in the *Robens Report*: "*Good intentions at board level are useless if managers further down the chain and closer to what happens on the shop floor remain preoccupied exclusively with production problems*".[243]

Another problem regarding the voluntary approach was the fact that it was impossible to separate the OHS field from the rest of the industrial relationship. Indeed, by tradition, the industrial relationship is based on an imbalance of power between management and workers.[244] This imbalance might be compensated by a legal intervention to protect the workers, or by a strong collective organisation of the workers that can bargain and defend the workers' interest.[245] The consequence of the Robens recommendation seemed to take away the possibility of having some protection through litigation by the workers so that they had to rely on the influence and power of their safety representative to obtain tangible improvements at their workplaces.

Another limit regarding the novelty of the report appears after an examination of the evidence submitted to the committee.[246] Some contributions influenced the choice of developing the voluntary approach and how to reform the legislative framework. The contributions examined in this section are as follows: the Department of Employment, the Department of Trade and Industry, the Law Commission,[247] and the TUC and CBI. There is strong evidence that some of the main ideas of the *Robens Report* — considered innovative at the time — originated from the government (the Department of Employment (DE) and the Department of Trade and Industry (DTI)). For example, the intangibility of the legislation and the lack of flexibility due to legislation dealing with special hazards had been raised by the

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[243] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office. p.15

[244]Davies, P.L. and Freedland, M., 1983. *Kahn-Freund's: Labour and the Law*. Stevens ans son.p.15; Hogbin, G., 2006. *Power in employment relationships: Is there an imbalance?*. New Zealand Business Roundtable; Taylor, S. and Emir, A., 2015. *Employment law: an introduction*. Oxford University Press, USA. p.13

[245] Deakin, S., 1986. Labour law and the developing employment relationship in the UK. *Cambridge Journal of Economics*, *10*(3), p.229

[246] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 2). HM Stationery Office.

[247] Which was asked by the DEP in 1967 for advice concerning a review of the form and scope of the Factories Act 1961 and the Offices, Shops and Railway Premises Act 1963.

DE.[248] In one of their conclusions, they even asked for "*a system whereby a basic statute is supplemented by codes of practices*".[249]

The DTI also advocated for the unification of legislation.[250] However, when it came to the way to reform the legislation, the Law Commission had a different point of view; it recognised the strength of having separate legislation in certain fields. Conscious of the need and demand for flexibility, it recommended completing the legislation with "parent statutes" via the adoption of regulations. If the approach of the Commission had been followed, that would have guaranteed for the TUs that the former OHS standards would not have been lowered.[251] They did not mention the voluntary approach.

Meanwhile, the CBI and the TUC assessed the need for the industry to continue to develop systems of joint safety consultation voluntarily. [252] Nevertheless, the TUC insisted on the fact that a statutory framework for the development of safety organisations within industry was the only way to secure real and lasting improvement.[253] Therefore, the TUC explicitly asked that future legislation would define standards as a minimum threshold. When necessary, these standards would be completed by subordinate regulation. They clearly stated that they did "*not accept the arguments of those who advocate replacing the specific requirements imposed by existing legislation, by a general duty of care".*[254] They were worried about the implication of such a general duty regarding the enforcement and extent of the employer's liability. It seems that the position of the TUC was closer to the Law Commission, with one single Act completed by regulations with a legal value that framed the OHS structure. If the position of the TUC and the Law Commission had been followed, the voluntary approach would have been understood as a space for dialogue between workers and management to take into consideration the specificities of the workplace, but with the guarantee of minimum legal protection. Meanwhile, the approach of the government (with the example of the positions of the two departments

[248] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 2). HM Stationery Office. pp.172-173
[249] *Ibid* p.176
[250] *Ibid* p.367
[251] *Ibid* p.552
[252] *Ibid*.p.154
[253] *Ibid* p.672
[254] *Ibid*.p.681

mentioned) and the CBI was a single statute with general duties, completed by non-legislative, voluntary tools, which was closer to the *collective laissez-faire* ideology.[255]

It seems that the Robens Committee followed the latter recommendations and went against those of the TUC, which might have raised questions regarding its independence and innovation. It seems that the committee was more of a way for the government to justify an action that it intended to conduct regardless.[256]

3.2.3. Adoption of the Health and Safety at Work Act 1974

From a political perspective, the *Robens Report* reached a consensus between the Conservative and the Labour Party.[257] The Heath Conservative Government, under the supervision of Mr William Whitelaw, was the first government to attempt to pass a Bill based on the *Robens Report* in January 1974.[258] Due to the defeat of the Conservative Party and the election of the Labour Party in February 1974, the Bill introduced by the Tories was not debated further. However, in April 1974, the Labour Government reviewed the Conservative Bill in order to submit it for a second reading.[259] The similarity between the two drafts of the Bill was utterly recognised.[260] Mr Whitelaw acknowledged that the Bill submitted by the Labour Government was "*basically the same except for one provision"*.[261]

Two points were subjected to modification and discussion. The first was that, although the Conservative Party was not against a statutory duty for employers to consult their employees on matters of health and safety, they questioned to what extent the legislation should prescribe the terms and conditions of the joint consultation.[262] The Conservative Party also expressed its opposition and concerns about clause 2(4), concerning the employees' representative appointment that would be possible only with the "*recognised trade unions*".[263] From their

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[255]For more details on the "collective *laissez-faire"* paradigm see Kahn-Freund, O., 1959. 'Labour Law', in M Ginsberg (ed.) *Law and Opinion in England in the 20th Century.* Stevens, pp.215-63
[256] Walters, David. Interview 25th May, 2017. Archives, University of Glasgow p.4
[257] Wilson G.K. Legislation on occupational safety and health: a comparison of the British and American experience. *European Journal of Political Research*, *14(3),* p.295
[258] HC Deb 24 January 1974 vol 867 cc1904-5
[259] HC Deb 03 April 1974 vol 871 cc1286-394
[260] *Ibid* cc1287-394
[261] *Ibid* cc1306-394
[262] *Ibid* ccl 1303-394
[263] *Ibid* cc1304-394

perspective, the draft presented by the Labour Government was too rigid on these two points and might damage the entire voluntary approach defended by the *Robens Report*.[264] Despite the Conservative Party's concerns, the Bill presented by the Labour Government was enacted by the HSW Act 1974. During the parliamentary debates, it was admitted that most of the matters covered in the *Robens Report* were incorporated into the Act.[265] However, the government insisted on going further on certain aspects. The current subsection highlights the connections between the socio-political context and the legal provisions in order to compare them with other national systems. Therefore, a study of all the provisions of the Act is unnecessary. Only Part 1, "*Health, Safety and Welfare in connection with work, and control of dangerous substances and certain emissions into the atmosphere*", will be covered in this study, specifically the sections that correspond to the problems raised above.

The influence of the *Robens Report* appears in the beginning of the Act with the establishment of *general duties* for the employer towards the employee or any person who might be affected by how he conducts his undertaking.[266] Concerning relationships with employees at the workplace, every employer has to ensure, so far as is reasonably practicable, the health, the safety, and the welfare at work of all employees.[267] The concept of "reasonably practicable"[268] is fundamental, but also controversial, and leads to an important series of cases with respect to its interpretation, allowing economic considerations to be taken into account in deciding the scope of the duty to ensure health and safety.[269] Additionally, the employer must provide information and training as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of employees.[270]

On the employee side, every employee shall take *reasonable* care of his or her health and safety and that of others who may be affected by his or her acts or omissions at work.[271]

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[264] *« It is surely a negation of philosophy of the Robens Report, and of the principles in other parts of the Bill, to insist upon one particular method of employee representation which will deny millions of employees the opportunity to participate directly* or indirectly with their employers in health and safety matters. » HC Deb 03 April 1974 vol 871 cc1305-394
[265] HC Deb 03 April 1974 vol 871 cc1287-394
[266] HSW Act 1974, s.3(3)
[267] HSW Act 1974, s.2(1)
[268] Originating from *Edwards v. National Coal Board* [1949] 1 KB 704 (CA).
[269] James, P. and Walters, D., 2005. *Regulating health and safety at work: an agenda for change?* Institute of Employment Rights. p.28
[270] HSW Act 1974, s.2(1)(c)
[271] *Ibid* s.7(a)

Employees must also cooperate with their employer so far as is necessary.[272] The use of words such as "reasonably practicable" and "necessary" could be seen as the translation of the balance between legal prescription and the importance given to the voluntary approach. Indeed, these words allow a subjective reading of the law that might vary from one situation to another. This is what the Labour Government meant by "*unity but not uniformity"*. However, this approach might lead to uncertainty in the way that the courts and LIs enforce the Act.

Concerning the safety representatives, the Act provides that only recognised TUs would appoint them amongst the employees. Those representatives would represent the employees in consultations with the employers.[273] The consultation of those representatives is an employers' duty, aiming to establish collaborations between them to develop and promote OHS.[274] The Safety Representatives and Safety Committee Regulations (SRSC Reg) 1977 provided more information and precisions on the methods of appointment. These specific provisions of the HSW Act were subject to controversy during its adoption due to their opposition to the Robens recommendations. The adoption of these provisions was the result of a long TU campaign for such statutory rights that started back in 1963.[275] Some members of the Labour Party had defended this position before the publication of the *Robens Report*. In addition, the HSW Act and the SRSC Regulation were adopted within the particular context of the social contract between the Labour Government and the TUC.[276] This is also the reason why the Employment Protection Act 1975 removed s2(5) of the HSW Act 1974. This section opened the possibility of having a regulation to choose safety representatives from among the employee via elections. In order to ensure the monopoly of the TUs on that field, this option was disregarded, limiting the existence of health and safety representatives to workplaces with recognised TUs.

One part of the Act dealt with the question of the connection between health and safety Regulations and approved Codes of Practice. The function of the Health and Safety Commission in this respect is essential as it approves and issues the Codes of Practice that complete the Regulations and statutory provisions. However, the Commission needs the consent of the Secretary of State to approve a Code of Practice. The role of the Secretary of

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[272] *Ibid*, s.7(b)
[273] *Ibid*, s.2(4)
[274] *Ibid*, s.2(6)
[275] James, P. and Walters, D., 2002. Worker representation in health and safety: options for regulatory reform. *Industrial Relations Journal*, *33*(2), pp.147
[276] *Ibid* p.143

State is to make health and safety Regulations.[277] The legal values of these Codes of Practice are, without a doubt, not legally binding.[278] Therefore, a failure to fulfil the requirements of the provisions cannot itself make someone liable in any civil or criminal proceedings. Here, the Robens philosophy of using flexible and non-legislative tools is respected. However, it also confirms Nichols' worries that none of these codes is of any help or support for employees if employers do not respect their duties.

To conclude, the HSW Act 1974 is a crucial turning point in the construction of the OHS legal framework in the UK. However, the principle that it carries that the responsibility to take action lies "*with those who create the risks and those who work with them"*[279] was not limited to the TUs in the Robens philosophy. The integration of the provision giving TUs a monopoly on health and safety representatives' appointments was due to particular circumstances: a Labour Government and strong TUs. The result of having general legal principles that relied on workers and the employers to apply them, and the presence of TUs at the workplace, aligned the OHS approach with the rest of British IR at that time. Like the rest of these IR, despite an impression of legal continuity, the application of the OHS legal framework was affected by the political turn at the end of the 1970s with the election of Margaret Thatcher as Prime Minister.

3.3. The Impact of Directive 89/391/EEC in the UK Legal System

Although the HSW Act 1974 is still the cornerstone of the OHS framework in the UK, some authors observe that the EU action has been a "*main driving force in UK occupational health and safety law since the late 1980s".*[280] Therefore, to explore if the EU has been a factor of convergence, we must examine the impact of Directive 89/391/EEC in the British legal system. Thus, it is necessary to review the industrial policies regarding TUs that were conducted under Prime Ministers Thatcher and Major. Only then will it be possible to understand the context of the adoption of the Management Health and Safety at Work Regulation (MHSW

[277] HSW Act 1974, s.15(1)
[278] *Ibid*, s.17
[279] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office. p.6
[280] Bell, M. Occupational Health and Safety in the UK: At a Crossroads? in Ales, E. ed., 2013. *Health and safety at work: European and comparative perspective*. Kluwer Law International. p.416

Reg.) 1992 that transposed the Framework Directive. After this review, a close examination of the provisions of these Regulations is conducted.

However, to complete the assessment of the impact of Directive 89/391/EEC, we must also examine how this regulation has been integrated into legal strategy before the civil and the criminal courts. The current study emphasises the crucial role of LIs in the enforcement of the MHSW Reg. Finally, this section will show how enforcement in front of the courts is linked to available resources and is, therefore, subject to the approach and reforms adopted by the government. In that respect, the approach adopted by the various governments in power since 1997 has had a detrimental effect on OHS in the UK in one way or another.

3.3.1. The minimal legislative implementation of Directive 89/391/EEC in the UK

3.3.1.1. The national political policy as a protection of the British tradition against the European dynamic

Since the adoption of the HSW Act 1974 and the SRSC Regulation 1977, the political background in the UK has changed substantially. One of the most important turns in British political history was the election of Margaret Thatcher as prime minister in 1979. Her policies were considerably different from those of both the former Conservative and Labour Governments. Her election was the results of a special meeting of circumstances: first, the Labour Party failed to control inflation with its Keynesian approach, and this forced them to turn toward a monetarist approach in the middle of the 1970s.[281] The Labour Party conducted a deflationary economic policy, which restraining wages. The consequence was the so-called "Winter of Discontent" in 1978/79, with a series of strikes by public sector TUs.[282] This led to bad publicity of TUs and the development of a common idea that they were too powerful. These events and the economic situation of the UK led to the election of Margaret Thatcher.

The belief that TUs were too powerful legitimated the Thatcher government policies on IR. Three mains themes characterised the industrial policies conducted in the 1980s: the reversal of corporatism and de-politicisation of TUs, the empowering of employers to resist TU

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[281] Evans, E.J., 2013. *Thatcher and Thatcherism*. Routledge. p.12
[282] *See* Thomas, J., 2007. 'Bound in by history': The Winter of Discontent in British politics, 1979-2004. *Media, Culture & Society*, *29*(2), pp.268-269

demands, and the reduction of the solidarity and collective actions of the TUs by encouraging individualistic behaviours.[283] The OHS laws and Regulations were not targeted directly by the Thatcher government's industrial policies.[284] This was surprising because, at the time, some people expected her to do so, but it was more "politically correct" to avoid changing the OHS provisions.[285] However, Thatcher's policies did have an indirect impact on OHS. The first notable change came with the adoption of the Employment Act (EA) 1980, especially the provision of unfair dismissal. According to section 6 of the EA 1980, tribunals were required to consider the employer's size and resources to qualify an unfair dismissal. This situation covered the case of safety-related dismissals, and it also changed and lessened the employer burden of proof for "reasonable" action. Here, the lack of clarity of what was considered "*reasonably practicable"* in the 1970s turned in favour of the employer in the 1980s. The interpretation of this notion included the idea of cost-benefit analysis, which can be dangerous in a period of economic crisis and recession. The principle of involving the workers in OHS only through TUs and taking some distance from the external agencies was also damaging in the long-term. Indeed, the EA 1980 massively reduced the TU industrial power[286] — one such limiting action taken by the EA was to repeal of statutory recognition procedure.[287] This meant that the presence of safety representatives, which was linked with the recognition of TUs, was no longer guaranteed. The last source of protection for employees was the LIs. However, studies have shown that the cuts to the workforce and resources of the inspectorate after 1979 had a severe effect on the occupational accident rate.[288]

In addition to change at the national level, there was also fundamental change at the international level. In 1974, the United Kingdom joined the European Community. As was underlined in Chapter 2, no major steps were taken in the period up to 1985 regarding the social dimension. Therefore, when Delors was appointed head of the Commission, the direction he gave to the European project did not match the "expectations" of the Thatcher Government. In that respect, it is necessary to distinguish two aspects of the relations between the UK and the

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[283] Davies, P.L. and Freedland, M., 1993. *Labour legislation and public policy*. Clarendon Press. pp. 427-428
[284] Beck, M. and Woolfson, C., 2000. The regulation of health and safety in Britain: From old Labour to new Labour. *Industrial Relations Journal*, *31*(1), p.43
[285] Walters, David. Interview May 24, 2017. Archives, University of Glasgow. p.8
[286] Davies, P.L. and Freedland, M., 1993. *Labour legislation and public policy*. Clarendon Press. pp.441-469
[287] Employment Act 1980, SCHEDULE 2 Repeals
[288] Tucker, E., Dawson, S., Willman, P., Bamford, M. and Clinton, A., 1989. Safety at Work: The Limits of Self-Regulation. Cambridge University Press. p.255

EC. Indeed, the position of the UK was different regarding the overall development of the social dimension and the adoption of the Framework Directive 89/391/EEC.

Tensions regarding the development of the social aspect of the European Community arose already with the opening of discussions concerning the adoption of Article 118 in the Single European Act – especially the provisions regarding Qualified Majority Voting (QVM). The main concern was that QVM would endanger or "damage" the sovereignty of the UK. This idea can be illustrated by the intervention of Lord Stoddart of Swindon, in 1986:

> *"What on earth does that paragraph mean? Does it mean that the Government of this country will now be obliged to set standards in this regard by majority vote of other countries within the EC? If so, and it can be done not by unanimity but by qualified majority, is it not the case that other countries – not our own Parliament, but other countries in the EC acting with the European Parliament – will be able to impose financial burdens on this country to which our own Parliament has not agreed? That is the worrying point. Here again the control of the British Government, even over internal expenditure, will now be qualified by other countries whose backgrounds and whose history in these matters may be completely different from ours. In fact, our own Parliament could have imposed upon it expenditure for which they would have to tax but over which they would have no control. I hope Members of the Committee understand what I am getting at because the objectives of these articles are not in dispute. It is the effect of them that worries me".*[289]

One element that might have contributed to the eventual acceptance of Article 118A is that QVM covered "only" the field of OSH. Therefore, the position of the UK Government was different regarding the Framework Directive 89/391/EEC: "*The Government supports the aim of ensuring that decent comparable standards of health and safety apply through the European Community*".[290] The reasoning for this support might have been due to the enduring and straightforward idea that UK OSH standards were already amongst the highest in Europe, and the existing legal framework (i.e., HSW Act 1974) already covered the principles embodied in the Framework Directive 89/391/EEC.[291] Therefore, the UK Government was not opposed to this directive based on the belief that the national legal framework would not be affected. For these reasons, the UK Government lobbied on two points: (1) the new directive should not be

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[289] Lord Stoddart of Swindon, HL Deb 8 October 1986 vol 480 C340, *European Communities (Amendment) Bill*
[290] The Minister of State, Department of Employment (Mr John Cope), HC Deb 14 November 1988 vol 140, *Health and Safety*
[291] See first mentioned by Baroness Young, HL Deb 8 October 1986 vol 480 C340, *European Communities (Amendment) Bill*; See also the interventions of the Minister of State, Department of Employment (Mr John Cope), HC Deb 14 November 1988 vol 140, *Health and Safety*, e.g. "*Much of the directive is consistent with requirements in the Health and Safety at Work etc. Act and the subsidiary legislation."*

a burden on the competitiveness of the companies,[292] (2) the respect of the "*reasonably practicable*" approach.[293] As Cope emphasised: "*We must be careful to ensure that the legislation* ***suits*** **us**". Indeed, the UK Government managed to protect the national approach of *reasonably practicable* even when the Commission argued that in doing so it was not implementing the Framework-Directive 89/391/EEC effectively.[294]

When it came to discussions concerning the Social Chapter of the Maastricht Treaty, the political consensus founded upon OHS (and Art 118A) disappeared, and the divergence of views between the UK and the EU/EC reappeared. As emphasised during the Parliamentary debates by one Labour MP:

> "*It* (i.e. The Social Chapter) *is important because it illustrates perhaps more graphically than any other issue* ***the awesome gap that stands between the Government's vision and ambition for Britain and for Europe*** *and that of all other European Community countries."*
>
> *"****The Tory party's lonely vision of Europe is of a marketplace alone*** *and its myopic ambition is to dominate it by low wages, low standards and down-market, service-based activities. The market exclusively will matter to the Tory party. Commerce will count,*

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[292] *"There are problems with the proposals as they stand, and the United Kingdom is playing a full part in the negotiations in Brussels in order to improve them. Many of the changes that we want to see are by way of clarification and the removal of excessive detail. We are conscious of the importance of not imposing unnecessary burdens on industry and of the fact that new requirements can sometimes bear particularly hard on smaller businesses. The United Kingdom was instrumental in securing the inclusion of a requirement in article 118A that health and safety directives should not constrain the creation and development of small and medium-sized companies. We will do our utmost to ensure that the requirement is fully respected. We do not seek special exemptions for the employees of smaller businesses, but we are looking for provisions that are flexible and sensible enough to be applied to all workplaces."* - The Minister of State, Department of Employment (Mr John Cope), HC Deb 14 November 1988 vol 140, *Health and Safety*

[293] "*We are still working hard on one important problem. We need to ensure that the directive encompasses the concept of "so far as is reasonably practical". This concept runs all the way through the Health and Safety at Work etc. Act, the subsidiary legislation and the guidance under the Act. The problem with these documents is essentially legal, stemming from the absence in United Kingdom law of the continental concept of proportionality. Our courts must apply the law exactly as it is enacted by Parliament. Continental courts apply the law only as far as it is proportionate to the circumstances. Proportionality therefore allows continental member states to couch their health and safety law in absolute terms. They enforce the to a standard equivalent to "so far as is reasonably practicable", but it is crucial that we find an acceptable way for the United Kingdom to implement the directive using "as far as is reasonably practicable," where appropriate, and in line with our tradition of enforcing the letter of the law.* ***We shall continue to try to persuade the Commission and other member states of the importance of this issue and gain their co-operation in reaching a solution***."- The Minister of State, Department of Employment (Mr John Cope), HC Deb 14 November 1988 vol 140, *Health and Safety*

[294] C-127/05 Commission of the European Communities v United Kingdom of Great Britain and North Ireland. While Irish experience falls outside of the scope of this thesis, it is worth underlining that prior to the requirement to implement the Directive by 31 December 1992, the Irish statutory position was identical to that in the UK. However, whereas the UK contested the Commission's vision of the OSH employers' duties before the ECJ, the Irish provisions were amended to reflect the working of the Framework Directive 89/391/EEC.

money will rule and people will be kept in their place – at the bottom of the rights league."[295]

The problem was broader than the social aim of the EC; it also concerned the European model and the shared competences, and so the delegation of national sovereignty.[296] The issue could be summarised as such: "*where rules have to be made, who makes those rules?"*.[297] For the UK, there was a considerable number of topics that should be left at the national level. This position was clearly expressed through the speech that Prime Minister Margaret Thatcher gave in Bruges in 1989.[298] It ended with the historical opt-out of the UK from the Social Chapter and the European Social Charter of Fundamental Rights.[299]

The adoption of the Working Time Directive increased the divergence between the UK and the EU. The legal basis for the adoption of the Directive was Art 118A, meaning that the Commission legally justified this initiative as an improvement of health and safety. For the UK Government, this legal basis was an abuse of Article 118A, and the treaties.[300] The UK Government argued the legal basis of the directive before the Court of Justice of the European Union, which in its ruling adopted a broad understanding of health and safety, and of working conditions – and rejected the claim of the UK Government.[301] Following the decision of the CJEU, Directive 94/104/EC was implemented in the UK in the form of the Working Time Regulations 1998. However, even after the election of New Labour in 1997 and the implementation of the Directive and the ratification of the Social Chapter, the UK Government pursued an essentially neo-liberal approach, advocating that the social development of the EU be kept to a bare minimum.[302]

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[295] Mr Robertson, HC Deb 22 April 1993 vol 223, *Commencement (Protocol On Social Policy)*
[296] Subject to the principles of subordination and proportionality as stated in article 5 of the TFEU
[297] Lord Aldington, HL Deb 22 July 1993 vol 548, *European Communities (Amendment) Act 1993: Protocol on Social Policy*
[298] Thatcher, M., 1988. Speech to the College of Europe. *The Bruges Speech*; e.g., *"That is not to say that our future lies only in Europe, but nor does that of France or Spain or, indeed, of any other member. The Community is not an end in itself.", "My first guiding principle is this: willing and active co-operation between independent sovereign states is the best way to build a successful European Community. To try to suppress nationhood and concentrate power at the centre of a European Conglomerate would be highly damaging and would jeopardise the objectives we seek to achieve."*
[299] *For more details, see* Barnard, C., 1992. A social policy for Europe: politicians 1, lawyers 0. *International Journal of Comparative Labour Law and Industrial Relations*, *8*(1), pp.15-31.
[300]Viscount Ullswater, HL Deb 24 June 1993 vol 547, *European Communities (Amendment) Bill.;* Mr Davies, HC Deb 27 November 1996 vol 286 C324
[301] C-84/94 *United Kingdom vs Council* (1996)
[302] *See* Fella, S., 2006. New Labour, same old Britain? The Blair government and European treaty reform. *Parliamentary Affairs*, *59*(4), pp.621-637; Jessop, B., 2003. From Thatcherism to New Labour: Neo-

To conclude, the provisions of the HSW Act 1974 and its Regulations were broad enough to provide general duties to promote prevention at the workplace with the participation of workers through decades, but its flexibility made its effectiveness heavily dependent on the political context and the state of IR, which were particularly prone to change. The theoretical approach of the HSW Act 1974 proved to be stable through time but fluctuant in its enforcement. In 1990, John Major succeeded Margaret Thatcher as head of the Conservative Party, which won the general election. Major's Government pursued a deregulation approach. In this context, the Deregulation Unit was created.[303] It was evident that the regulatory dynamic of the EU and its adoption of directives did not coincide with the national dynamic. The national position of the government strongly influenced the way Directive 89/391/EEC was implemented. First, the British Government maintained the position that they did not have to reform much to implement the Framework Directive as most of the European provisions were already explicitly or implicitly included in the HSW Act 1974.[304] So, Major's Government adopted Regulations to extend employers' obligations in the OHS field. Six Regulations were adopted to transpose the Framework Directive and its sub-directives ("six-pack").[305] For the purpose of this study only the Regulation that implemented the Framework Directive – i.e., the MHSW Regulation 1992 – will be examined. According to Taylor and Emir, "*in practice the 1992 six-pack regulations actually do little more than put some flesh on the bones already established in 1974".*[306] The Regulation that implemented the Framework Directive was the MHSW Regulation 1992. The action of minimum transposition can be analysed in different manners: as an opposition to European action or as a protection of the British legal order and tradition. [307]

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liberalism, workfarism, and labour market regulation. *The Political Economy of European Employment London, Routledge*, pp.137-154; Adnett, N. and Hardy, S., 2001. Reviewing the Working Time Directive: rationale, implementation and case law. *Industrial Relations Journal*, *32*(2), pp.114-125.

[303] Beck, M. and Woolfson, C., 2000. The regulation of health and safety in Britain: From old Labour to new Labour. *Industrial Relations Journal*, *31*(1), pp.44-45

[304] Walters, D. ed., 2002. *Regulating health and safety management in the European Union: A study of the dynamics of change*. Brussels: PIE-Peter Lang. pp.251-258

[305] The Management of Health and Safety at Work Regulations 1992; The Workplace (Health, Safety and Welfare) Regulations 1992; The Provision and Use of Work Equipment Regulations 1992 (known as PUWER) ; The Personal Protective Equipment Regulations 1992 ; The Manual Handling Operations Regulations 1992 ; The Display Screen Equipment Regulation 1992. It should also be noted that **six ACOPs** were issued by HSC/HSE in conjunction with the respective Regulations: HSG65 Managing for Health and Safety, L22 Safe Use of Work Equipment, L23 Manual Handling, L24 Workplace Health, Safety and Welfare, L25 Personal Protective Equipment at Work, and L26 Work with display screen and equipment.

[306] Taylor, S. and Emir, A., 2015. *Employment law: an introduction*. Oxford University Press, USA. p.370

[307] James, P. and Walters, D., 1999. *Regulating Health and Safety at Work: The way forward*. Institute of Employment Rights.

3.3.1.2. Transposition of the European provisions of the Framework Directive for better compliance with British tradition

The general aim of the Framework Directive was already embodied within the HSW Act 1974.[308] However, the Framework Directive was explicit in details, and some concepts were new to UK law. The transposition of the Framework Directive was an opportunity to clarify the general conditions of the HSW Act 1974, according to European standards.

There were some obvious similarities in the content of the MHSW Reg. 1992 and the framework directive: eight articles were transposed almost word for word from the Framework Directive. Some commentators observed the evident impact of EU law on the UK OHS framework, considering the inclusion in Schedule 1 of the MHSW Reg. of "general principles of prevention" that must be the basis for employers' protective measure and are a reproduction of Art. 6(2) of the Framework Directive.[309] However, a close examination of the Regulations shows that the implementation was meant to be broad, and some of the transposition omitted significant ideas of the Framework Directive that might have been contrary to the British tradition.

Among the new concepts implemented in the UK legal system, regulation 3 requires the employer to make a risk assessment. As in the Framework Directive, this obligation is vague. The provision is written as follow:

> *3.(1) Every employer shall make a suitable and sufficient assessment of —*
>
> *(a)the risks to the health and safety of his employees to which they are exposed whilst they are at work; and*
>
> *(b)the risks to the health and safety of persons not in his employment arising out of or in connection with the conduct by him of his undertaking,*
>
> *for the purpose of identifying the measures he needs to take to comply with the requirements and prohibitions imposed upon him by or under the relevant statutory provisions and by Part II of the Fire Precautions (Workplace) Regulations 1997.*

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[308] Neal, A.C., 1990. The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?. *International Journal of Comparative Labour Law and Industrial Relations*, *6*(2),p.86

[309] Bell, M. Occupational Health and Safety in the UK : At a Crossroads? in Ales, E. ed., 2013. *Health and safety at work: European and comparative perspective*. Kluwer Law International. p.390

Details are provided in the ACOP Code of Practice, which is a useful tool for employers but not legally binding as such.[310] Indeed, they may be admissible in evidence and – under specific circumstances – the court may take them into account when judging whether a legally binding rule (e.g. a statutory rule contained in the HSW Act 1974 or the MHSW Reg. 1996/1999) has been breached.[311] However, "*a failure on the part of any person to observe any provision of an approved code of practice* ***shall not of itself*** *render him liable to any civil or criminal proceedings".*[312] Therefore, it is difficult to prove the failure of this obligation in front of the judges in the context of civil claims, and it must be considered on a case-by-case basis. Interestingly, although these provisions are broad, they are the ones most often used in civil legal strategy.[313] It should be underlined that the proof of the breach of the Reg. 3(1) is different for criminal trials. By virtue of s.33(1) of the HSW Act 1974, it is a criminal offence to contravene the terms of MHSW Regulation (1996/1999). Additionally, s.40 of the HSW Act 1974 places the burden of proof on an accused in offences consisting of a failure to comply with a duty or requirement embodied in the Act.

One other significant change to the British OHS system as a result of the Framework Directive was regulation 7, which covers the procedures for serious and imminent danger and dangerous areas. The idea is similar to the Framework Directive, but some key wordings are missing in the MHSW Reg. 1992. For example, the protection of workers from being "*placed at any disadvantage because of their action and must be protected against any harmful and unjustified consequences, in accordance with national laws and/or practices".*[314] The Directive clearly established that action by workers who — in the event of serious, imminent or unavoidable danger — leave their workstation or a dangerous situation, *"shall not place them at any disadvantage, unless they acted carelessly or there was negligence on their part".*[315] However, the protection of the worker after they have used their right in these conditions is not mentioned anywhere in the MHSW Reg. 1992. It was necessary to wait until the adoption of

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[310] E.g. The HS(G)65 « Managing for health and safety » issued by the Health and Safety Executive, where it is mentioned that « *Following the guidance is* ***not compulsory****, unless specifically stated, and you are free to take other action. But if you do follow the guidance you will normally be doing* ***enough to comply with the law****. Health and safety inspectors seek to secure compliance with the law and* ***may refer*** *to this guidance ».*

[311] See s.17(2) of the HSW Act 1974: *« Any provision of the code of practice which appears to the court to be relevant to the requirement or prohibition alleged to have been contravened shall be* ***admissible in evidence in the proceedings ».***

[312] s.17(1) HSW Act 1974

[313] *See* further details p.89 of the thesis

[314] Article 8.4 of the Directive 89/391/EEC

[315] Article 8.5 of the Directive 89/391/EEC

the Employment Right Act (ERA) 1996 to have complementary provisions to guarantee this protection. Indeed, s.44 of the ERA 1996 provides that:

> *"An employee has the right not to be subject to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that –*
>
> *(d) in circumstances of danger which the employee* ***reasonably believed*** *to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
>
> *(e) in circumstances of danger which the employee* ***reasonably believed*** *to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger".*[316]

According to s.100 of the ERA 1996, under these circumstances, the employee also benefits from protection against dismissal by its employer. (Here, the notion of "*reasonably believed*" resonates with the *"reasonably practicable"* for the employer's duty.) Prior to the adoption of the ERA 1996, some authors have underlined the possibility that the application of this right, in the former context of the British statute, might lead to dismissal of the workers – in the event where the workers leave its workstation with the honest belief that there is a serious imminent risk, but it turns out to be a "false alarm".[317] The transposition of this aspect of the Framework Directive took place in a two-step process and combined secondary and primary legislation, which shows the influence of the Framework Directive on this aspect of the UK legal framework.

The concept of consultation,[318] which was one of the fundamental concepts of the directive during the debate, is another example of vague transposition in an attempt to preserve the British tradition. Indeed, transposing the concept of *consultation* was problematic because it was not usual in the British industrial relation.[319] In Regulation 9 of the MHSW Reg. 1992, the concept of consultation was replaced by *cooperation* and *coordination,* which are slightly different. Indeed, the European directive highlighted consultation, but also balanced

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[316] S.44 Employment Right Act 1996
[317] Neal, A.C., 1990. The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?. *International Journal of Comparative Labour Law and Industrial Relations*, *6*(2), p.90
[318] Article 11 of Directive 89/391/EEC
[319] Neal, A.C., 1990. The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?. *International Journal of Comparative Labour Law and Industrial Relations*, *6*(2), p.97

participation.[320] Importantly, the MHSW Reg. 1992 imposed an obligation of coordination with other employers, but not with workers, as was set in the Framework Directive. In that respect, it can be argued that the MHSW Reg. did not transpose Article 11 of Directive 89/391/EEC. However, this non-transposition might be because the obligation of consultation was already embodied in previous Regulations, such as the HSW Act 1974 or the SRSC Regulation 1977.

In the SRSC Regulation 1977, the concept of consultation is mentioned briefly twice.[321] Both provisions refer to the general obligation of consultation that can be found in the HSW Act 1974, expressed as follows:

> *It shall be the duty of every employer to consult any such representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures.*[322]

Two observations can be made. First, it is only one sentence, and the overall disposition with the SRSC Regulation and the MHSW Reg. 1992 is far from what is expressed in the Framework Directive. Second, the consultation is limited to the health and safety representatives who are, according to SRSC, subordinate to TUs. Some authors rightfully noticed that up to the reform in 1999, worker participation in the area of health and safety was utterly dependent on the employer's discretionary decision regarding whether or not to recognise a TU.[323] However, in the first half of the 1990s, the CJEU adopted a series of cases that overturned UK law's traditional reliance on recognised TUs as the "single channel" of employee representation.[324] The cases were about the duty to consult workers' representatives framed by the EU directive on collective redundancies and the transfer of undertaking. The Court held that to exclude workers for whom no union was recognised was to deprive them of the legal Community right to have informed and consulted representation.[325]

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[320] Article 11.1. Directive 89/391/EEC
[321] Safety Representatives and Safety Committee Regulation 1977, Regulation 4 and Regulation 9(1)
[322] Health and Safety at Work Act 1974, section 2.1.
[323] Neal, A.C., 1990. The European Framework Directive on the Health and Safety of Workers: Challenges for the United Kingdom?. *International Journal of Comparative Labour Law and Industrial Relations*, *6*(2), p.98
[324] Case C-382/92, *Commission v UK* (1994) ECR I-2435; *Commission v. UK* (1994) ECR I-2479
[325] Davies, P. and Kilpatrick, C., 2004. UK worker representation after single channel. *Industrial Law Journal*, *33*(2), p.122

This rationale was the same as with the health and safety workers' representatives, prompting the Major government to adopt the Health and Safety (Consultation with Employees) Regulations 1996 to prevent any future condemnation by the Court. [326] The regulation placed an obligation on employers to consult employees not covered by TU safety representatives. These consultations could be conducted either through elected representatives or directly with individual employees. In practice, the direct channel with individual employees was preferred by the employers, but also led to abuses.[327]

The transposition of the concept of consultation is also revealed in the implementation of the "workers' obligations" in "employees' duties".[328] The regulation partially transposed the European provisions: the informational part was included, but the provisions about cooperation from the workers were neglected. Additionally, Bell noticed that these provisions do not fit with the contemporary trends in the labour market. For example, in the private sector, only 15,1% of workers are members of TUs, meaning that the majority of workers are only covered by the lower standards of the 1996 Regulations. [329] Moreover, research suggests that a strong legislative foundation is a crucial prerequisite to effective worker participation in health and safety.[330] The question is how much progress can be made in the absence of willingness to consider legislative reform.

The MHSW 1992 was reformed in 1999. However, the reform did not change its substance; it mostly completed the previous legislation by extending the scope to the "risk group" mentioned in Art. 15 of the Framework Directive. Consequently, the regulation was extended to cover children and expect mothers. Moreover, Schedule 1 of the MHSW Reg. added a direct reference to Art. 6 of the Framework Directive. The main idea stayed the same; the New Labour Party did not take this opportunity to explain or to improve compliance with Directive 89/391/EEC and shared the minimalistic approach of the Tories.

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[326] Howes, V., 2007. Workers' involvement in health and safety management and beyond: The UK case. *International Journal of Comparative Labour Law and Industrial Relations*, *23*(2), p.256
[327] Walters, D. and Nichols, T. eds., 2009. *Workplace health and safety: International perspectives on worker representation*. Springer. p.21; Walters, David. Interview May 24, 2017. Archives, University of Glasgow p.11
[328] Regulation 12, MHSW Reg. 1992
[329] *See* Achur, J., 2009. Trade Union Membership 2009, Department for Business, Innovation and Skills.
[330] Walters, D., Nichols, T., Connor, J., Tasiran, A. and Cam, S., 2005. *The role and effectiveness of safety representatives in influencing workplace health and safety*. Health and Safety Executive, Research Report 363, pp.33-36

3.3.1.3. Integration of the Management Health and Safety at Work Regulations in the UK as a tool of compensation, not prevention.

First, it is important to emphasise that the MHSW Reg. 1992/1999 (and the HSW Act 1974) presents obligations for employers on the basis of criminal law and does not open rights for civil claims. According to the British legal system, criminal law related to health and safety is enforced through the activities of inspectorates.[331] These activities are shared between local authorities, environmental health officers, and inspectors working for one of the Health and Safety Executives (HSEs).[332] Only they can prosecute employers who breach the MHSW Reg. 1992; workers and TUs cannot. The health and safety representatives can report what they have noticed when they inspect the workplace, but they cannot prosecute even if they notice a breach of the law.[333]

In theory, the MHSW Reg. 1992/199 is not useful in civil claims. However, an examination of the case law where the MHSW Reg. 1992/1999 is mentioned in the period between 1992 and 2018 shows a different trend (see Figure 1).[334] The main observation is that, other than during the first four years, there were more civil claims brought than criminal ones. Regardless of the nature of the jurisdictions, almost all the cases have at least one mention of regulation 3 of the MHSW dealing with the risk assessment.[335] Before the civil courts, claimants usually use this regulation to reinforce a tort claim based either on negligence by the employer

[331] De Baets, P., 2003. The labour inspection of Belgium, the United Kingdom and Sweden in a comparative perspective. *International Journal of the Sociology of Law*, *31*(1), p.37
[332] *See* the Health and Safety (Enforcing Authority) Regulations 1998 for further details.
[333] Bell, M. Occupational Health and Safety in the UK: At a Crossroads? in Ales, E. ed., 2013. *Health and safety at work: European and comparative perspective*. Kluwer Law International. p.380
[334] In total, 161 case laws were examined with no distinction of jurisdictions (administrative cases have been excluded) based on the Westlaw UK and LexiNexis databases.
[335] Reg.3 of the MHSW Reg. was mentioned in 115 of the 161 cases, representing 71% of the jurisprudence analysed.

or a breach of the duty of care. At first, the claims were related to physical injuries, and, over time, psychiatric injuries due to stress, violence, and harassment were also covered.

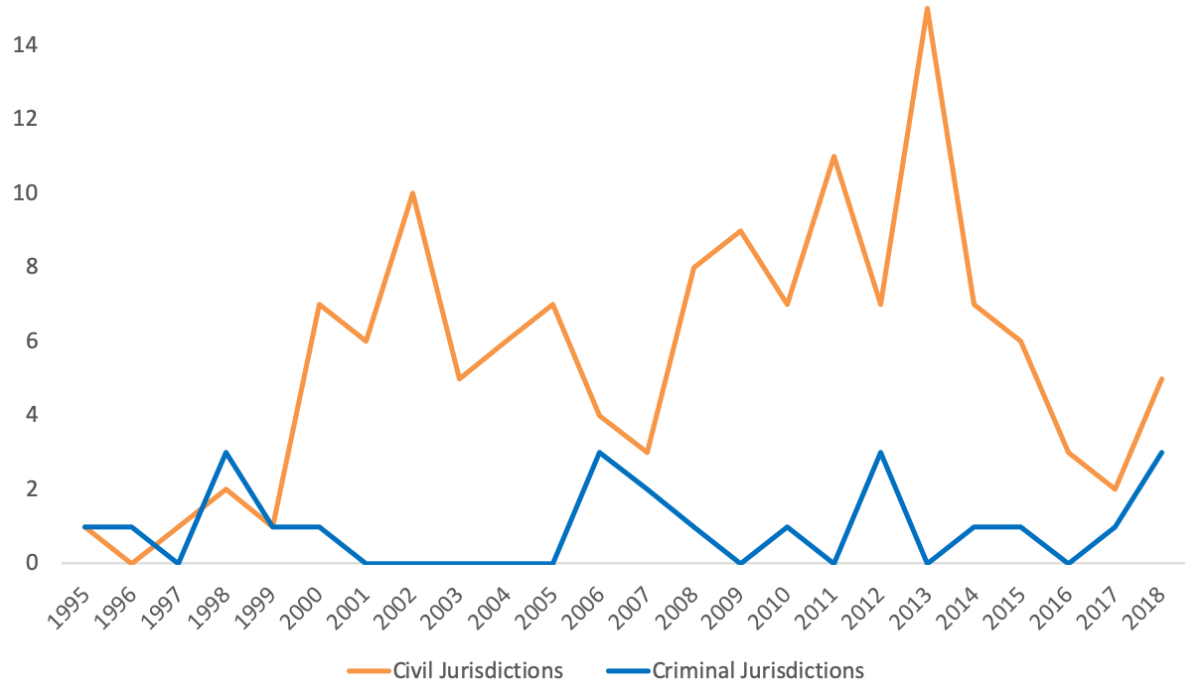

Figure 1- The evolution of the jurisprudence based on the Management Health and Safety at Work Regulation 1992/2018.

The breach of the obligation to conduct risk assessments is often considered by the judges; however, the breach of this regulation is not enough by itself to obtain damages for the workers. Reg. 15 (now Reg.22 of the MHSW Reg.1999) is often mentioned as a reminder of the exclusion of civil liability. The failure to conduct appropriate risk assessments has also been integrated into claims of gender discrimination against pregnant workers to challenge the fairness of their dismissals. Thus, the breach of Reg. 3 is part of the burden of proof that the worker has to submit to prove negligence or a breach of the duty of care.[336] However, the number of civil cases has dropped considerably since 2013, which might be seen as a sign of the success of the reform suggested by Lord Young Report to fight the "*compensation culture*".[337]

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[336] The **difference** between the civil and the criminal proceedings has to be underlined. By virtue of Section 33(1) of the HSW Act 1974, it is a criminal offence to contravene the terms of MHSW Regulation (1996/1999). Additionally, Section 40 of the HSW Act 1974 places the burden of proof on an accused in offences consisting of a failure to comply with a duty or requirement embodied in the Act.

[337] *See* Young, D.Y.B., 2010. *Common Sense Common Safety: A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture*. Cabinet Office.

On the other side, the decline (not to say the limited number) in the number of criminal cases might coincide with the decline of HSE resources over the past decades.[338] Additionally, since 2000, a new approach orientated towards fewer prosecutions and more "soft enforcement" has been developed by the Blair Government and followed by the governments since then.[339] However, criminal prosecutions are happening mostly when there has been a fatal accident, and the responsibility of the employer is foreseen. As underlined previously, in criminal trials if there is a breach of any provision of the code of practice the burden of proof is reversed. Indeed, as stated s.17(2) of the HSW Act 1974:

> "*Any provision of the code of practice which appears to the court to be relevant to the requirement or prohibition alleged to have been contravened shall be admissible in evidence in the proceedings; and if it is proved that there was at any material time a failure to observe any provision of the code which appears to the court to be relevant to any matter which it is necessary for the prosecution to prove in order to establish a contravention of that requirement or prohibition, that matter shall be taken as proved unless the court is satisfied that the requirement or prohibition was in respect of that matter complied with otherwise than by way of observance of that provision of the code.* »

This provision underlines the special legal status of the ACOPs.[340] It means that prosecutions are reactive and not preventive. Therefore, it would be interesting to look at the number of prosecutions made by LIs over the same period, in order to compare them.

To conclude, it seems that the MHSW Reg. 1992 transposition of the Framework Directive was well integrated into the legal strategies used in court by workers to support their claims, but the regulation — as the HSW Act 1974 — was used to obtain compensation when there is damage. Thus, its primary function of prevention may have been more efficient if the LIs' context was different. In that respect, the Blair Government initiatives did not help enforce the MHSW Reg. (or, indirectly, Directive 89/391/EEC).

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[338] For further analysis of the figures provided by the HSE for the period around 2000, *see* James, P. and Walters, D., 2004. *Health and safety revitalised or reversed?* Institute of Employment Rights.
[339] As explained further below
[340] https://www.hse.gov.uk/legislation/legal-status.htm

3.3.2. The 2000s: The UK's fight against the EU OHS dynamics by "cutting the red tape"

3.3.2.1. The political turning point of OHS under the New Labour

During its 1997 campaign, the New Labour made it clear that it was not the traditional Labour Party; it wanted to be different, particularly regarding its relationship with TUs. In the New Labour's manifesto, the direction was clear: new centre and centre-left politics focused on the "*promotion of dynamic and competitive business and industry"*[341] and *the decentralisation of the political power throughout the UK".*[342] The Employment Act (EA) 1999 could have had an impact on the appointment of health and safety representatives, but only if Schedule 1 did not limit the recognition of the TUs to the collective bargaining conducted on behalf of a bargaining unit. The appointment of health and safety representatives stayed linked to the prerequisite of having a recognised TU at the workplace, which stayed voluntary. The direct consultation with employees had still the same weaknesses as explained before.

Regarding OHS, the Blair Government went a step further by officially starting to present OHS legislation and associated inspections as a burden for competition that needed to be expunged. Until this point in time, OHS has not been officially and directly presented as bad for business. This was a significant shift in the public approach to OHS that impacted the enforcement of previous legislation and also motivated reform on the basis that less is more.

The new approach to OHS can be illustrated with two official documents: the 2000 HSE report *Revitalising Health and Safety (RHS)* and the 2005 Hampton Report. The publication of *RHS* had been described as a critical shift towards market-based regulation regarding health and safety policy.[343] One of the main ideas of this report was to develop a partnership rather than relying on enforcement, an idea that has been already developed by the *Robens Report* in 1974 and coincided with the dynamic of self-enforcement.

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[341] Labour Party, U.K., 1997. New Labour: because Britain deserves better. *Labour Party Manifesto*. commitment n°3

[342] *Ibid,* commitment n°9

[343] Tombs, S. and Whyte, D., 2009. A Deadly Consensus 1: Worker Safety and Regulatory Degradation Under New Labour. *The British Journal of Criminology*, *50*(1), p.51

The *RHS* report stated that enforcement should only be brought into play if encouragement and guidance had failed. Additionally, it was one of the first policy documents to advocate formally for a **"**risk-based" approach to health and safety; it encouraged businesses to compare the costs and benefits of good health and safety management. The traditional aim of improving the health and safety conditions, reasonably practicable, was replaced by an economic view: is it economically worth it to improve the health and safety conditions? Thus, the legal compliance of the OHS provisions became motivated by an economic rationale rather than a moral or a legal one, contrary to Robens philosophy. This opened the way for the idea that OHS prevention was too costly and had to be reduced because it was a burden to competition. Logically, *RHS* was a first step that was subsequently completed by the Hampton Report.

The Hampton Report, *Reducing administrative burdens: Effective inspection and enforcement,* was published in March 2005. This report advocated for more focused inspections, greater emphasis on advice and education, and removal of the "burden" of inspection from most premises. The link with the Better Regulation Task Force's report, *Less is More,* is officially recognised.[344] One of the aims of the report was to "*reduce the need for inspections by up to a third, which means around one million fewer inspections".*[345] Hampton based his argument on the observation that resources are limited, and because enforcement requires many people, it has to be reduced. To strengthen his point, Hampton said that fewer inspections and less enforcement do not lead to less effective regulation if self-regulation is developed. The weakness of this system — already supported by the *Robens Report* at the time — is that self-regulation is vulnerable to regulatory degradation.[346] Tombs and Whyte argue that

> *If government withdraws from regulatory enforcement […] and in the absence of countervailing power of trades unions within and beyond workplaces, then regulations becomes increasingly reliant upon market-based mechanisms.*[347]

[344] *See* Hampton, P., 2005. Reducing administrative burdens. *London [Hampton Report]*
[345] *Ibid* pp.8
[346] Tombs, S. and Whyte, D., 2009. A Deadly Consensus 1: Worker Safety and Regulatory Degradation under New Labour. *The British Journal of Criminology*, *50*(1), p.50
[347] *Ibid* p.50

In other words, under the New Labour, the government adopted policies of deregulation and did not reinforce the power of trades unions, leaving them globally weak.[348] Thus, the enforcement of regulations became reliant upon market-based mechanisms, like the cost-benefit approach.

3.3.2.2. OHS under the Coalition: when economic overcome the human aspect

From 2010 to 2015, the deregulatory approach was pursued by the Cameron-Clegg coalition government composed of members of both the Conservative and the Liberal Democrat. The main idea was that

> *The burden of excessive health and safety rules and regulations on business had become too great and a damaging compensation culture was stifling innovation and growth.*[349]

According to the government, there were too many inspections of relatively low-risk and well-performing workplaces. An overly complicated structure of regulation and a "compensation culture" led businesses to a fear of being sued for accidents, even when they were not fault. Thus, the government concentrated health and safety enforcement on higher-risk areas by applying a risk-based approach, targeting health and safety interventions. This resulted in a substantial drop in the number of health and safety inspections carried out in the UK.[350]

During this period, the HSE reduced the overall amount of health and safety legislation by 50% to have simpler and more modern legislation.[351] The coalition government introduced new rules so civil claims for compensation for people injured at work could only be brought in cases where the employer was negligent, and so could not be found liable if he or she had taken all sensible steps to prevent injury. The Coalition Government based its reform on a report presented by Lord Young in October 2010: *Common sense, common safety.* In this report, Prime Minister David Cameron acknowledged that health and safety have never been less valued by

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[348] Dodds, A., 2006. The Core Execut've's Approach to Regulation: From 'Better Regulation' to 'Risk-Tolerant Deregulation'. *Social Policy & Administration*, *40*(5), p.529

[349] Policy paper – 2010 to 2015 government policy: Health and safety reform. https://www.gov.uk/government/publications/2010-to-2015-government-policy-health-and-safety-reform/2010-to-2015-government-policy-health-and-safety-reform

[350] Ibid. According to the government, the Health and Safety Executive has reduced the number of proactive inspections it does each year by a third, from around 33,000 to 22,000.

[351] Ibid

the public. For Cameron, the reason for this is an inappropriate scope covering low-risk, leading to "*absurd examples of senseless bureaucracy"*.[352]

The central point of the *Common sense, common safety* report was to fight what was described as "*the compensation culture".* It aimed to make workers personally responsible for their own actions, motivated by "common sense". To some extent, this was not far from Robens and the apathy of the workers, or the wish to make everyone, including workers, responsible for OHS. The difference was that, in *Common sense, common safety,* workers claim compensation for damages when there is a workplace accident, and so out of an employer's fear of being sued rather than a desire to improve accident prevention and OHS itself. According to Lord Young, compensation culture is the consequence of a health and safety consultant "*employing a goal of eliminating all risk from the workplace instead of setting out the rationale, proportionate approach that the Health and Safety at Work Act demands".*[353] However, one can argue that the phenomenon of workers suing their employers for damages is a consequence of the reasonably practicable approach of the HSW Act 1974. Considering that the concept of reasonably practicable is relative to specific circumstances, it seems logical that workers ask a judge to decide whether or not the risk was reasonably practicable, and if the employer is responsible.

The fact that the report critiques the action of claiming damages for "even minor accidents" opens a potentially dangerous debate regarding the distinction between the damages "worth a compensation" and others. This might lead to a situation where some damages are no longer prevented because they are not worth the compensation. However, some research has raised the possibility that a preventive approach, based on worker participation and external inspection and enforcement, remains the preferable path to pursue.[354] Of course, not every damage should lead to compensation regardless of the circumstances. However, the HSW Act 1974, as well as Directive 89/391/EEC, emphasised that if the worker is proven to be responsible for his or her own damages, the employer cannot be held fully responsible. This is a principle that the courts are already applying. The *Common sense, common safety* report is

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[352] Young, D.Y.B., 2010. *Common Sense Common Safety: A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture*. Cabinet Office. p.5

[353] *Ibid* p.7

[354] Bell, M. Occupational Health and Safety in the UK: At a Crossroads ? in Ales, E. ed., 2013. *Health and safety at work: European and comparative perspective*. Kluwer Law International. p.380

not about reforming the core approach to the HSW Act 1974, but about the compensatory aspect. Interestingly, in his report, Lord Young argues that the UK OHS framework is:

> *"Part of the responsibility lies with the EU where the Framework Directive of 1989 has made risk assessments compulsory across all occupations, whether hazardous or not, and part to the enthusiasm with which often unqualified health and safety consultants have tried to eliminate all risk rather than apply the test in the Act of "reasonably practicable" approach".*[355]

According to Young, the EU OHS framework goes against the core of the Robens philosophy and, therefore, the initial legal framework. It is worth noting that Reg. 15 of the MHSW Reg. 1992 states clearly that the sole breach of the risk assessment, on its own, cannot open a right to claim damages. Therefore, the breach of risk assessment is always raised in cases where there is actual damage. Thus, some doubts can be expressed about how the EU Framework Directive 1989 could be responsible for compensation culture, especially with the CJEU case validating the "reasonably practicable" approach. Young even recommended that *"we go back to the European Commission and negotiate a reduction of burdens for law hazard environments".*[356] For once, the UK and the EU approach might have been the same considering that, in 2010, the EU Commission shared the same vision of OHS being an obstacle to competition that needed to be reduced.

Some commentators in the House of Commons Work and Pensions Committee observed that

> *there appear to be two extremes in practice: some organisations that have misinterpreted, in an overly-bureaucratic fashion, the process of risk assessment, alongside other organisations that fail to undertake even basic risk assessments.*[357]

Additionally, in a study on OHS Bell said that the deregulatory steps proposed by Young's review "*reflect an outdated view of occupational health risks as those likely to lead to serious physical injury.* He emphasised that *the most common sources of work-related ill-health and*

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[355] Young, D.Y.B., 2010. *Common Sense Common Safety: A report by Lord Young of Graffham to the Prime Minister following a Whitehall-wide review of the operation of health and safety laws and the growth of the compensation culture*. Cabinet Office. p.11

[356] *Ibid*. p.12

[357] Work and Pensions Committee, 2008. The role of the health and safety commission and the health and safety executive in regulating workplace health and safety: third report of session 2007–08. *House of Commons Paper*, (246). p.19

absences from work are stress and musculoskeletal disorders, and there are limited to high-risk sectors – all the contrary".[358]

In 2011, the UK government published a report: *Good health and safety, good for everyone*. This report continued to support the idea that it is necessary to focus *"on higher-risk industries and on tackling serious breaches of the rules".*[359] This meant reducing the number of pro-active inspections in fields where there are low or no risks. The consequence of this is that an inspection would only occur in low-risk fields when there is a breach or an accident. This could mean little to no prevention in these sectors — which is against the spirit and the application of Directive 89/391/EEC. In the *Good health and safety, good for everyone* report, the government explicitly targeted the EU OHS activity:

> *a plethora of legislation has grown up, compounded by the introduction of European Union legislation from 1992 onwards. There are now 17 Acts owned and enforced by HSE, and over 200 regulations owned and enforced by HSE/Local Authorities.*[360]

It seems that the motivation for reviewing health and safety regulation is always to ease further burden on business, not improve the OHS of people in the workplace substantially.

To complete this assessment, and with a hope to legitimise further reform, the government asked Professor Ragnar to

> *re-examine those regulations originating from European Union Directives to ensure that, where the Directive has not simply been copied out into UK law, there is a sound justification for this, and UK businesses are not being unnecessarily burdened compared to other member states.*[361]

This shows that EU OHS standards, which were supposed to be minimum standards, came to be understood as maximum ones. This approach encourages a race to the bottom by MS in order to increase the competitiveness of their companies.

In his report, *Reclaiming health and safety for all,* Professor Ragnar concluded that

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[358] Bell, M. Occupational Health and Safety in the UK: At a Crossroads? in Ales, E. ed., 2013. *Health and safety at work: European and comparative perspective*. Kluwer Law International. p.380
[359] DWP (Department for Work and Pensions), 2011. Good Health and Safety, Good for Everyone: The Next Steps in the Government's Plan for Reform of the Health and Safety System in Britain.p.3
[360] *Ibid*.p.9
[361] *Ibid.* p.12

> *in general, there is no case for radically altering current health and safety legislation. The regulations place responsibilities primarily on those who create the risks, recognising that they are best placed to decide how to control them and allowing them to do so in proportionate manner. There is a view across the board that the existing regulatory requirements are broadly right, and that regulation has a role to play in preventing injury and ill health in the workplace. Indeed, there is evidence to suggest that proportionate risk management can make good business sense.*[362]

For him, the problem was not the regulations themselves but the way in which they were interpreted and applied. Regarding EU law, Professor Ragnar said that *"many of the requirements that originate from the EU would probably exist anyway, and many are contributing to improved health and safety outcomes. There is evidence, however, that a minority impose unnecessary costs on business without obvious benefits"*.[363] Furthermore, he supported EU dynamism revolving around a risk-based approach with the Better Regulation Agenda.

To conclude, the post-2010 reports and reforms profoundly changed the OHS perception in the UK. As Hutter underlines, not long ago, intervention and enforcement were positive signs of regulators' capacity to manage relations with duty holders, not of their unreasonableness.[364] Maybe the most rooted change is that opposition to OHS is not as clear as it used to be; the novelty here is to present it as common sense, as if anything else would not be.[365]

3.4. Conclusion

During the 1970s, the UK developed a strong OHS legal framework deeply rooted in the existing voluntary system of IR. At the time of the implementation of Directive 89/391/EEC, the Conservative Party was in government under Margaret Thatcher. In this chapter, I have argued that these facts help to explain why the impact and influence of the Framework Directive on UK law were limited. Only that which was necessary to avoid condemnation of the CJEU has been reformed, such as risk evaluation and the right of workers

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[362] Löfstedt, R., 2011. *Reclaiming health and safety for all: An independent review of health and safety legislation* (Vol. 8219). The Stationery Office. p.5 and p.32
[363] *Ibid*. p.4
[364] Hutter, B., 1986. An Inspector Calls: The Importance of Proactive Enforcement in the Regulatory Context. *British Journal of Criminology, 26,* p.114
[365] Almond, P., 2015. Revolution Blues: The Reconstruction of Health and Safety Law as 'Common-sense' Regulation. *Journal of Law and Society*, *42*(2), p.203

to leave their workstations in case of serious and imminent danger. Therefore, the rationale and the logic of OHS in the UK has not been changed, even when elements, such as the concept of consultation of workers, have changed. European Union law had an impact and led to reforms on the appointment of health and safety representatives, but this change was motivated by the directive on collective redundancy and not the Framework Directive. Nevertheless, it had an impact on one of the initial key concepts in British OHS development. Interestingly, this phase of minimising the impact of EU law was followed by an approach of actively counteracting the effect of the EU OHS law in the UK. Indeed, since the beginning of the 2000s, a series of reports sponsored by the government have advocated for less enforcement by external actors, e.g., LIs, and developing more partnership at the workplace.

Some reports, like the Hampton report, kept emphasising the importance of developing self-regulation. Hampton also qualified the inspections of "burden" for the companies. This idea has been developed further since 2010, with inspections being reduced and targeted towards specific sectors. Lord Young went so far as to say that, by requiring a risk assessment, the Framework Directive went against the Robens philosophy of preventing risk as far as is reasonably practicable. However, using the Robens philosophy to fight EU OHS Directives is misplaced because it uses the voluntary approach and reasonable practicability out of context. The Robens philosophy is deeply embedded in the existing system of IR in the UK, based on the existence and presence of TUs. Advocating for self-regulation in a context of unbalanced industrial power while cutting the red tape and reducing inspections only lead to workers having no protection under the law or the TUs Additionally, as rightfully emphasised by Professor Ragnar, many of the requirements that originated from the EU would probably exist regardless. Therefore, an analysis of the implementation of the Framework Directive in the UK reveals two interesting aspects. First, it shows the limits of the transposition of the EU directives in countries that have already developed their own OHS framework. It also underlines the importance of the political context and the fact that the implementation of a directive should be understood and analysed within the broader context of national IR and the relation between the EU and the MS. Second, it also underlines that beyond the legal framework and the general principles, enforcement and application by judges are crucial to the effectiveness of these principles for the workers.

CHAPTER 4

The European Union as a Catalyst for National Improvement through Occupational Health and Safety: France

4.1. Introduction

Like the UK, the first OHS laws were adopted in France in the 19th century and focused on vulnerable populations, such as children[366] and women.[367] The concept of a general duty of prevention for the employer is also deeply rooted in French industrial history both from a jurisprudential[368] and legal perspective.[369] The Law of 12th of June 1893 and the Decree of 10th of March 1894 specified the scope of the employers' duty to adapt the workplace to guarantee the security of the workers.[370] As underlined by Verkindt, this legal framework was an ambiguous mix of "*philanthropy and cynical utilitarianism"*.[371] For him, the rationale was that protecting the workers meant protecting the tool of production: the workforce. However, this idea centred around prevention could not develop further and was stopped by the Law of 9th of April 1898, which installed a system of automatic but limited compensation in cases of workplace accidents as a counterpart of civil immunity for employers.[372] Collective prevention was forgotten in favour of an individual monetary compensation approach to OHS, at least until the 1970s.

Indeed, in the 1970s, the idea of developing collective prevention over individual compensation started to regain power. In the 1980s, laws surrounding workers' rights regarding working conditions and the creation of the *Comité d'Hygiène, de Sécurité et des Conditions de Travail* (*CHSCT* – CHSWC) legally acknowledged this preventive aspect of the OHS. Therefore, there was a favourable ground when the Framework Directive had to be

[366] Loi du 22 Mars 1841 relative au travail des enfants employés dans les manufactures, usines ou ateliers
[367] Loi du 2 Novembre 1892 sur le travail des enfants, des filles et de femmes dans les établissements industriels
[368] Cass. Civ. 27 avril 1877, S. 1878 I, p.413 ; Arseguel A. and Reynes B.,2004. La responsabilité en matière de santé et de sécurité au travail. In Igalens, J.(ed.), 2004. *Tous responsables*. Editions d'Organisation.p.137
[369] Léoni, L., 2017. Histoire de la prévention des risques professionnels. *Regards*, (1), p.29
[370] Chaumette P., 1983. Le Comité d'Hygiène de S écurité et des Conditions de Travail, et le droit de retrait du salarié, *Droit Social*. n°6 June, pp.425-433
[371] Verkindt, P.Y., 2008. Santé au travail: l'ère de la maturité. *Jurisprudence sociale Lamy*, *239*.
[372] Léoni, L., 2017. Histoire de la prévention des risques professionnels. *Regards*, (1), p.31.

implemented in the French legal framework. Moreover, contrary to the UK situation, a Socialist Government was in charge of the implementation of the OHS Directives.

This chapter attempts to consider whether EU action changed the initial rationale of French law-making and the development of the OHS field, and if so, to what extent? It is structured around three main periods. First, the study of workers' protests in the 1970s and the legislative answers in the 1970s and 1980s show how the promotion of collective prevention of OHS came from the workplace. The second period focuses on the implementation of the Framework Directive and underlines the importance of the political leadership at the time of implementation; as much as a Conservative Government tried to minimise the impact of the Framework Directive in the UK, the French Socialist Government embraced the concepts of Directive 89/391/EEC and saw an opportunity to reform, clarify, and improve its own legal system. However, the third period, which focused on the recent OHS reforms in France, shows some similarities with the UK in its "deconstruction" of tools, actors, and services that were necessary to the proper functioning of OHS in France. Therefore, this chapter confirms the argument that the national political agenda, and the relations between the MS and the overall European project, impacted the way the Framework Directive was implemented and applied at the national level.

4.2. Initial Construction of the Occupational Health and Safety Framework

In French history, the events of May and June 1968 remain a symbol of contestation by the whole society against past societal rules.[373] Particularly on the workers' side the mobilisation in May and June 1968 in various factories all across the French territory was the culmination of years of tensions and periodic conflicts, which created an environment in which workers' claims could be expressed.[374] Simultaneously, the 1960s corresponded with a period where workers started to question their working organisation.[375] Most of the conflicts in the 1960s — and later in the 1970s — were due to the workers' dissatisfaction with their working

[373] This research focuses on the question of health and safety. Thus, the political and the social aspects of the students' protest are not analysed in depth.
[374] Gobille, B., 2008. L'événement Mai 68. In *Annales. Histoire, sciences sociales*. Éditions d' l'EHESS, *63*(2), p.332
[375] Vigna, X., 2007. *L'insubordination ouvrière dans les années 68: Essai d'histoire politique des usines*. Rennes: Presses Universitaires de Rennes. *See part on :* Travail, classifications et qualification. Location 3831 of 8225

conditions.[376] Taylorism changed working organisation and conditions at that time profoundly.[377] From the employers' side, the division of work was a way to guarantee their control over their workers.[378] From the workers' side, this division of work removed, to a certain extent, their feeling of control over the product and the making process.[379]

The decomposition of the production process led to mental and physical deteriorations of workers' health; their work was not only physically hard, but they could no longer identify themselves as being part of the production process.[380] In response, qualitative claims started to be expressed on top of traditional quantitative claims, e.g. wage and working time.[381] The workers also started to question the legitimacy of the TUs, who were the traditional worker representatives, and the workers became willing to speak directly for themselves. There was a growing tendency for workers to attempt to take back control of their work from the employers as well as the TUs. Thus, the 1970s were a pivotal period between two social and industrial models.[382] During this decade, the three oil crises impacted the economic situation, and it switched from strong growth to an economic crisis.[383] Additionally, the technological revolution changed the nature of work and, therefore, the nature of risks. Meanwhile, it was also the moment for workers to protest for better work conditions, and OHS in general, not at the national level but the factory floor level.

Therefore, this section provides an overview of the workers' protests in the 1970s and see to what extent, if any, the protests influenced the OHS legal rationale. First, a short analysis of the protests during the 1970s shows that there was an increasing interest in the qualitative

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[376] Piotet, F., 1988. L'amélioration des conditions de travail entre échec et institutionnalisation. *Revue française de sociologie*, p.21

[377] One Taylorian methods was the division of labor and mechanization. Additionally, the Taylorism inscribed a technical indicator of efficiency, human productivity, measurable as "the ratio of the quantity produced to the time spent by the workers in producing it" - Peaucelle, J.L., 2000. From Taylorism to post-Taylorism. *Journal of Organizational Change Management*. p.454

[378] Tchobanian, R., 1988. *L'amélioration des conditions de travail et l'évolution des règles de gestion du travail* (Doctoral dissertation, Université de la Méditerranée-Aix-Marseille II). p.116

[379] *See* Marglin, S., 1973. Origines et fonctions de la parcellisation des tâches. *A. Gorz (éd.), Critique de la division du travail*, pp.41-90.

[380] Vigna, X., 2007. *L'insubordination ouvrière dans les années 68: Essai d'histoire politique des usines*. Rennes: Presses universitaires de Rennes. *See part on:* La critique du travail parcellisé. Location 3863 of 8225

[381] Gobille, B., 2008. L'événement Mai 68. In *Annales. Histoire, sciences sociales*. Éditions d' l'EHESS Vol. 63, No. 2, pp. 337 ; The principle of no delegation and demands for the autonomy of workers were example of qualitative claims.

[382] Tchobanian, R., 1988. *L'amélioration des conditions de travail e' l'évolution des règles de gestion du travail* (Doctoral dissertation, Université de la Méditerranée-Aix-Marseille II). p.14

[383] *See* Antonin, C., 2013. Après le choc pétrolier d'octobre 1973, l'économie mondiale à l'épreuve du pétrole cher. *Revue internationale et stratégique*, (3), pp.139-149.

aspect of the OHS rather than the quantitative one. The workers and some TUs argued in favour of a structural and organisational approach to OHS, in opposition to the *ad hoc* approach where damages were individually 'fixed'. Even employers recognised the importance of OHS and working conditions and attempted to repress workers' expression and channel their claims through committees they controlled.

Interestingly, this structural and organisational approach to OHS was also discussed in some reports and national collective agreements. Unfortunately, the Conservative Governments of the 1970s did not consider these ideas, especially from the mid-1970s onward due to the economic crisis. Only beginning in the 1980s, with the election of a Socialist Government, did workers' claims and the suggestions made in reports for a more humane vision of working organisations and conditions found transposition in legal terms.

4.2.1. Questioning the traditional quantitative OHS approach: The social background

During the 1970s, one particular conflict illustrated the workers' claim to better working conditions and a right to health: the Pennaroya conflict.[384] The archaic and obsolete working conditions in Pennaroya were harder than the usual working conditions in factories and led to many of the workers developing lead poisoning.[385] However, the link between the development of this disease and the working conditions was denied by the employer. Therefore, the workers structured their claims around two main topics.

First, in order to get monetary compensation, the workers asked for official recognition of the occupational aspect of their disease. However, the workers' claims went beyond traditional compensation: they also asked for decent working conditions and a change in organisation to prevent the disease at its origin. One of their slogans, "*Our health is not for sale",* emphasised the workers' refusal to resolve the conflict only through monetary

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[384] Pitti, L., 2009. Penarroya 1971-1979: "Notre santé n'est pas à vendre!" *Plein Droit*, (4), p.36 ; This case in particular will be examined, but it has to be acknowledged that similar conflict happens in other factories.
Vigna, X., 2007. *L'insubordination ouvrière dans les années 68: Essai d'histoire politique des usines*. Rennes: Presses Universitaires de Rennes. *See part on :* Les grèves et la condition d'ouvriers immigrés : une articulation singulière à l'usine. Location 2617 of 8225 ; Rochefort, T., 2013' L'amélioration des conditions de travail ' l'épreuve du système français de relations professionnelles: la négociation d' l'accord interprofessionnel de 1975. *Négociations*, (1), p.11

[385] *Ibid See part on :* Les grèves et la condition d'ouvriers immigrés : une articulation singulière à l'usine. Location 2617 of 8225, Pitti, L., 2009. Penarroya 1971-1979: "Notre santé n'est pas à vendre!" *Plein Droit*, (4), p.36

compensation. [386] After almost a decade of conflict and tension, they finally obtained recognition of the occupational origin of the lead poisoning and better prevention with a change of their working conditions.[387]

The will to overcome the traditional compensatory approach was also defended more broadly by some TUs, such as the CFDT, which also advocated for developing a preventive approach to OHS. Lapeyre, who served as a member of the CFDT, explained that in the company where he was working at the beginning of the 1970s, the working conditions were hard because tasks were tedious and overall quality of the working environment was poor, e.g. the quality of the air.[388] The CFDT representatives advocated for focusing on the origin of the problem rather than addressing the consequences solely with monetary compensation for the workers exposed to the risk. The collective preventive and organisational approach were preferred over the individual monetary solution.

Additionally, in 1977, the CFDT published *Les dégâts du progrès,* which covered the latest evolutions in terms of working organisation and equipment. [389] The aim was to underline the risks these evolutions represented for workers and how to prevent them. The examples provided in *Les dégâts du progrès* were collected from various sectors and provide valuable information about the workers' mobilisation based on these new risks, and subsequently, OHS claims.[390]

However, not all the French TUs shared the vision of the CFDT; others, such as the Confédération Générale du Travail (CGT), still defended the former quantitative approach. According to Lapeyre, the CGT refused to recognise the structural differences of the workers' claims and new approaches following the events of May to June 1968. This difference in approach has been a clear obstacle in the unity of action of the French TUs in that field, which

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[386] CFDT, *Pourquoi nous voulons être main dans la main avec les travailleurs français,* tract, 2p., 20 Février 1972
[387] See Pitti, L., 2009. Penarroya 1971-1979: "Notre santé n'est pas à vendre!" *Plein Droit*, (4), pp.36-40
[388] Lapeyre, Jean. Interview June 14, 2017. Archives, University of Glasgow pp.1-3
[389] Confédération française démocratique du travail, 1977. *Les dégâts du progrès: les travailleurs face au changement technique*. Seuil.
[390] E.g., The modification of the everyday technique and the working organisation is covered in Chapter 4 . The explanation of the risks is illustrated by the example of RENAULT where there were two conflicts on that topic in 1969 and 1972, the reasons for which are explained in detail based on testimony of workers.

poses a significant problem when the social partners had to agree on the working conditions at the inter-sectoral level.[391]

Furthermore, not all the strikes were as successful as the Pennaroya's action. In the late 1970s, it became especially difficult to start a protest. Due to the economic crisis of 1973/74, some companies faced intense difficulties and, in a period where jobs were in danger, striking was not the most suitable way to express workers' claims. One of the main consequences was a shift in the balance of power in IR. Consequently, expression and defence of workers' concerns were transferred from the workplace to the public sphere; there was a move from striking to voting. This transfer was encouraged by the main TUs, which wanted to focus on the coming general presidential elections in 1981. However, it also marked the end of the factories as political spaces and the end of the contestation period, which lasted an entire decade.[392]

Not only workers, but employers learnt from the events of May 1968. They subsequently tried to adapt their workplace strategies to maintain control while avoiding tension. There were two antagonist strategies: the first was to address conflict through repression, and the second was to focus on prevention to avoid situations that could lead to strikes. Indeed, most of the employers were still hostile towards TUs in the workplace despite the legal improvement of their rights after the events of May and June 1968.[393] Some repression was internal to the workshop, either in a subtle way with informers among the workers in charge of alerting the employer to everything happening in the workshop, or a more direct way with internal militia among the workers in charge of physically breaking a strike if there was one.[394]

Even if the right to strike was theoretically protected in France, some employers dismissed workers who joined the strikes or were pro-actively opposed to their employer. Additionally, some employers did not hesitate to go to court in cases of conflict in order to have the legal authorisation to dismiss the strikers.[395] All of these elements were intended to create an atmosphere of fear among workers to dissuade them from starting an industrial action.

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[391] See bellow, later in the section pp.109-110
[392] Vigna, X., 2007. *L'insubordination ouvrière dans les années 68: Essai d'histoire politique des usines*. Rennes: Presses Universitaires de Rennes. *See part on:* Conclusion: crise et crise de l'usine. Location 3311of 8225
[393] *See* Loi n°68-1179 du 27 décembre 1968 relative à l'exercice du droit syndical dans les entreprises
[394] Hatzfeld, N., 2002. *Les gens d'usine: 50 ans d'histoire à Peugeot-Sochaux*. Editions d' l'Atelier. pp. 371-372
[395]Vigna, X., 2007. *L'insubordination ouvrière dans les années 68: Essai d'histoire politique des usines*. Rennes: Presses Universitaires de Rennes. *See part on:* Répression solidaire. Location 7060 of 8225

However, some employers did not only take the initiative through repression; some of them also acted upstream in order to prevent trouble. One way was to employ more immigrant workers, assuming that they would react less and be more willing to work in poor conditions.[396] The language barrier of the foreign workforce during the first years was also a guarantee for employers that workers might not be able to communicate with one another and would, therefore, be less likely to coordinate an action. Of course, this strategy had limits and did not prevent the workers of Pennaroya from taking industrial action, but it seems that it was the exception.

The second way to prevent tension in the workplace, and thereby the risk of industrial actions, was to improve working conditions. Initially, the TUs were in charge of improving working conditions.[397] Therefore, to counter the influence and importance of TUs in that field, some employers decided to create groups with a similar aim of improving working conditions. For example, at the Peugeot factory in Sochaux, the employer created a separate council for the improvement of the working conditions. It was a led by the employer, contrary to the commission on working conditions led by the TU. Through the creation of a distinctive committee, the employer wanted to improve the workers' trust in management and to diminish the role of the TUs.[398] However, as soon as the first economic difficulties appeared in 1979, Peugeot gave up on this pro-active strategy of improving working conditions.[399]

This example illustrates the fact that the prevention of working conditions, and so of health and safety, was the first element to be neglected in times of crisis. This underlines the importance of developing institutions to protect OHS and proper working conditions without being subject to external economic circumstances and the willingness of political parties. The autonomy and continuity of the kind of worker representative institutions such as the

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[396] Hatzfeld, N., 2002. *Les gens d'usine: 50 an' d'histoire à Peugeot-Sochaux*. Editions d' l'Atelier. p.558; For example, in the company PEUGOT-SOCHAUX after 1968, there was a significant rise in the number of workers coming from Turkey, Morocco, and Portugal

[397] – according to a law adopted on 27 December 1973

[398] Vigna, X., 2007. *L'insubordination ouvrière dans les années 68: Essai d'histoire politique des usines*. Rennes: Presses Universitaires de Rennes. *See part on:* Aménagement et preservation de l'usine taylorienne. Location 7215 to 7223 of 8225

[399] Wisner, A., 1974. Contenu des tâches et charge de travail – in *Conditions de travail: Le Taylorism en question.* Sociologie du travail n°4, October-December. p.355

Committee of Hygiene, Safety, and Working Conditions (CHSWC) was, and still is, an essential characteristic of the sustainable development of OHS.

To conclude, the 1970s was a crucial turning point in the approach to OHS for all social partners: workers, TUs, and employers. The workers, by stating that their *"health was not for sale"*, challenged the working organisation and pushed toward an inclusive structural and organisational approach to OHS. The working conditions and the impact on the workers' health and safety was not something that could be addressed exclusively with monetary compensation; it was part of the work and needed to be treated as such. As shown, some TUs recognised this change and advocated for a collective and preventive approach to OHS, even if it was not legally recognised. Interestingly, the behaviours of some employers showed that the key challenges to OHS in the 1970s were the centrality of the workplace and the importance of the workers' expression of their working conditions: they either abstained or channelled it. Therefore, we must address to what extent the legal sphere developed and changed during the 1970s and if there were any similarities between the legal and workshop levels.

4.2.2. The legislative counterpart to workers' claim: Theoretical change under the Conservative Governments and the Socialist Party

4.2.2.1 Theoretical changes and questioning of the OHS status quo against governmental reticence leading to minimal legislative change

4.2.2.1.1. The Governmental Reports

Following the events of May 1968, the Government ordered several reports to understand the state of French IR, and the reasons behind the recent workers' protest. The first report was delivered by Yves Delamotte to the Labour Minister in 1972 and developed a more humane working organisation.[400] The *Delamotte Report* was unique in its analysis and comparison of foreign IR.[401] The main idea of the report was to develop social aspects of the workplace, and not only economic considerations such as productivity. Based on the situation

[400] Delamotte, Y. *Recherches en vue d'une organisation plus humaine du travail industriel*, Paris, la documentation Française, 1972
[401] Especially the Swedish or the Norwegian systems

in the countries examined in the report, the possibility for a more democratic functioning of the workplace was raised.

Then, the *Sudreau Report* in 1974 examined the dysfunctionality of French IR and proposed ideas to resolve it. [402] The main recommendation for OHS was the recognition of workers' right of expression regarding their working conditions. This report underlined the importance of humans in a working organisation, the function of TUs, and the necessity of workers being able to express their vision. [403] Even if these suggestions were not significantly innovative, it was still too much for the Conservative Government which ignored them.[404] In fact, after the economic crisis and from 1976 onward, Prime Minister Raymond Barre advocated for firmness on social conflicts and IR in general. The position of the Government illustrated the turn from the reforming impulse of the beginning of the 1970s, when the workers and TUs had power, to the economic crisis of the mid-1970s, when the employers regained power in industrial balance.

4.2.2.1.2. The Laws

The law adopted on the 27th of December 1973, improved working conditions with two mains provisions and was the first major step in the OHS field. The first provision was the creation of the Commissions to Improve the Working Conditions (CIWC) at the workplace. [405] These commissions were different from the Committee of Hygiene and Security (CHS), which was a part of the Works Council. [406] The CIWC was also affiliated with the Works Council and, therefore, had a strong link with TUs, but had a broader scope regarding working conditions. The second important provision was the creation of a national agency to improve working conditions, called the National Agency for the Improvement of Working Conditions (*L'Agence Nationale pour L'Amélioration des Conditions de Travail*; ANACT), which worked closely with the minister of labour. The ANACT also had a consultative function and was working with companies to improve the working conditions. Additionally, the law of the 6th of December

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[402] Sudreau P., La réforme de l'entreprise, La documentation française, 1975.
[403] *See* Verdier, J.M., 1976. Le rapport sudreau. *Revue internationale de droit comparé*, *28*(4), pp.771-783.
[404] Vigna, X., 2007. *L'insubordination ouvrière dans les années 68: Essai d'histoire politique des usines*. Rennes: Presses Universitaires de Rennes. Location 7128 of 8225
[405] Loi n° 73-1195 du 27 décembre 1973 relative à l'amélioration des conditions de travail.
[406] Created by Décret n°47-1430 du 1 août 1947 portant règlement d'administration publique en ce qui concerne l'institution de comités d'hygiène et de sécurité dans les établissements soumis aux dispositions du titre II du livre II du code du travail

1976 introduced, for the first time, an obligation to participate in training regarding security rules, as well as a general principle of prevention and the responsibilities of the employer in case of a workplace accident.[407] However, no additional law was adopted in the second half of the 1970s, which may have been due to an economic crisis and a change in government priorities.

4.2.2.1.3. The inter-sectorial agreement

This change of dynamism in the 1970s can also be illustrated by the bargain of an inter-sectorial agreement on working conditions that started in 1973 and ended in 1975.[408] The content of the final agreement was innovative in many respects. First, it did not limit its scope to health and safety;[409] instead it extended it to the working organisation,[410] working time,[411] and management role. The social partners aimed to reach real improvement rather than seeking monetary compensation[412]; expectations of the workers' productivity had to be compatible with workers' physical and mental capacities.[413] In this agreement, an entire title was devoted to OHS. The development of OHS was recognised as essential to improving working conditions. Therefore, the development of OHS has to be considered by management and employers whenever a concern regarding working organisation and production was discussed.[414]

The agreement also underlined the importance of the prevention of OHS accidents at the earliest stage possible, emphasising that OHS accident prevention is the responsibility of everyone in the managerial hierarchy, especially those at the top-level. The workers and their representatives have to be involved in the OHS process of prevention.[415] These dispositions acknowledged the second aspect of the workers' claims with a pro-active role in the prevention of risks instead of monetary compensation for accidents.

Unfortunately, even if the agreement contained interesting dispositions, its application and implementation were limited for various reasons. First, the initial context of bargaining was

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[407] Loi n° 76-1106 du 6 décembre 1976 relative au développement de la prévention des accidents du travail.
[408] Accord-Cadre du 17 Mars 1975
[409] *Ibid*, TITRE IV
[410] *Ibid*, TITRE I
[411] *Ibid*, TITRE II
[412] *Ibid*, préambule
[413] *Ibid*, Article 1
[414] *Ibid*, Article 20
[415] *Ibid*, Art. 23

characterised by the radicalisation of social partners; the employers wanted to diminish the power of the TUs as much as possible, and the TUs were in complete opposition to the employers' power.[416] Interestingly, it was the CNPF — the employers union — that asked to start a discussion. Based on a neo-liberal approach, the social partners wanted to regain control of the organisation of the workplace and to increase the autonomy of the social partners before the adoption of a new law by the Government. Unfortunately, this initial dynamic failed due to the extensive length of the discussion: two and a half years. The Government became impatient and adopted a new law in 1973. This law marked a break in the dialogue and was the reason for the small impact the agreement had afterwards.

Another limit to the application of the agreement was the paradox between workers' wanting to claim more power at the company level and the French tradition of bargaining at a centralised level to pressure the government. Thus, the difficulties of coordination between the different levels of bargaining and the complexity of the French IR limited the effect of the recommendations made in the agreement. Therefore, it was necessary to wait for the elections in 1981 and the victory of a Socialist Government to see these principles legally recognised.

4.2.2.2. The legal recognition and consecration of a decade of OHS development

The election of President Mitterrand in May 1981 brought the Socialist Party to power in France after 23 years of Conservative leadership. Therefore, the TUs had high expectations and the CNPF concerns regarding future reforms of the Labour Code.[417] As underlined by former Labour Minister Auroux, the TUs did not have common claims and everyone asked the new Government for something different.[418] On one side, the CFDT wanted to give more importance to and to develop collective bargaining; on the other side, the CGT and Forces Ouvrières (FO) were in favour of developing a legal framework.

According to Jean Auroux, the OHS legal framework needed to be reformed for several reasons in 1982. First, the reactive and individual approach of OHS did not correspond to the reality and the wish to develop a pro-active approach.[419] Second, the implementation of new

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[416] Rochefort, T., 2013 L'amélioration des conditions de travail ' l'épreuve du système Français de relations professionnelles: La négociation d' l'accord interprofessionnel de 1975. *Négociations*, (1), p.11
[417] Gobert P.,2012. L'homme des lois. *Editions du 1er Mai.* pp.60-61
[418] Auroux, Jean. Interview June 15, 2017. Archives, University of Glasgow. p.8
[419] *Ibid.* p.1

technologies complicated the concept of health and safety, and the development of unknown risk made the previous laws less relevant.[420] Reforms of the OHS legal framework occurred in two steps: first, a report presented an analysis of the situation, then two fundamental laws were adopted which have been the basis of the OHS legal framework in France for the past 30 years.

In June 1981, President Mitterrand, who was conscious of this need for change, required a report to prepare the reform of the Labour Code. Contrary to the reports previously studied, which were led by experts or a member of Parliament, Auroux himself was in charge of the research. The report, *The workers' rights,* was published in September 1981.[421] Coherency was at the heart of the future reform, so all the TUs intensively cooperated with the elaboration of this report.[422] Auroux wanted to change workplace organisation profoundly and officially recognise the importance of workers as humans. Therefore, the report was structured around two ideas: workers have to be both citizens and active actors in their workplace. The concept of citizenship was linked to the concept of rights; hence, the report focused on an existing fundamental right, the right to health and safety, and recognised new rights with the right of expression. Additionally, becoming actors of organisational change in the workplace required the development of collective bargaining, which was made mandatory on an annual basis. This report was the reference for the four mains laws adopted by Auroux (so-called "Auroux's Laws").[423] However, only the law of the 4th of August and the 23rd of December are studied in the current thesis because they are the two that directly relate to OHS.

The first Auroux's law, adopted on the 4th of August 1982, focused on workers' freedoms in the workplace. One of these freedoms was the freedom of expression of working conditions.[424] The law provided that "*the workers benefit from a right of direct and collective expression on the content and the organisation of their work as well as on the definition and the implementation of actions for improving working conditions at the factory/workplace"*.[425]

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[420] *Ibid.* p.2
[421] Auroux, J., 1981. *Les droits des travailleurs: rapport au Président de la République et au premier Ministre*. Documentation française.
[422] Le Goff, J., 2009. Une concertation État-partenaires sociaux atypique. *Esprit*, (1), pp.138-157.
[423] Loi n°82-689 du 4 août 1982 relative aux libertés des travailleurs dans l'entreprise; Loi n° 82-915 du 28 Octobre 1982 relative au développement des institutions représentatives du personnel; Loi n° 82-597 du 13 Novembre 1982 relative à la négociation collective et au règlement des conflits collectifs du travail; Loi n° 82-1097 du 23 Décembre 1982 relative aux comité' d'hygiène, de sécurité et des conditions de travail.
[424] Loi n°82-689 du 4 Août 1982 relative aux libertés des travailleurs dans l'entreprise, Titre VI
[425] Former Article L.461-1 of the French Labour Code

A collective agreement provided the details of the application of this right.[426] The function of the collective agreement underlined the idea that the law secured general principles at a centralised level, but the specificities of every sector of activities and factories were to be discussed in collective agreements. There were no more normative quantitative laws but rather qualitative ones that legally framed methods of acting, such as the right to expression. The informal corollary of this right was an employer's duty to listen, brought about through the empowerment of the Committee of Health and Safety when it became the CHSWC.[427]

The fourth Auroux law was adopted on the 23rd of December 1982 and focused on the workers' representative Committee initially in charge of health and safety. With this law, the Committee merged with the Committee for the Improvement of Working Conditions created in 1973 and became the CHSWC. This reform echoed the dynamic of coherence recognising the link between health and safety and working conditions, and the importance of treating them together in order to have an efficient and coordinated action. This law recognised the pro-active behaviour of workers and their representatives in OHS accident prevention at the workplace as well as new duties for the employers. On the workers' side, they obtained a right to alert and retreat in case of a serious and imminent threat to their life or health. In such a case, they would signal the risk to the management and be allowed to leave their workstation.[428] The employer or the management could not ask a worker to restart work if the working conditions showed serious and imminent danger.[429] This implied that the employer had a responsibility to take care of the situation.

Meanwhile, in the case of serious and imminent danger, the CHSWC could ask for an investigation to determine the origin of the danger and prevent it. Additionally, the CHSWC had a general duty to prevent the OHS risk and improve the working conditions. In that context, the employer had an obligation to consult the committee before any taking action related to OHS and the working conditions.[430]

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[426] Former Article L.461-3 of the French Labour Code
[427] Auroux, Jean. Interview June 15, 2017. Archives, University of Glasgow. pp.9-10
[428] Former Art. L 231-8 of the French Labour Code
[429] Former Art. L 231-8 of the French Labour Code
[430] Former Art. L 236-2 of the French Labour Code

Overall, the TUs recognised that Auroux's laws addressed their claims, especially concerning health, safety, and working conditions.[431] On the employers' side, some of them, including young entrepreneurs (the *Centre des Jeunes Dirigeants d'Entreprise*), thought that Auroux's laws could promote progress.[432] For them, the right to expression could bring an interesting dynamic to IR and was a fundamental need of workers. However, most employers were ideologically opposed to these laws because they did not agree with the notion of "citizenship at the workplace"; from a technical standpoint, they also thought that the new legal framework was too strict and lacked flexibility.[433]

Despite their recalcitrant position, these laws have since been well accepted and are the bases of IR as we know them today in France (at least until recently).[434] The reforms adopted after Auroux's laws confirmed this idea of social democracy, and up until 2018, the CHSWC was a powerful and central institution at the workplace.[435] However, Auroux's laws relied on strong TUs, which are now in a period of decline.[436] Therefore, it is possible that these laws were built on an unstable foundation, much like the HSW Act 1974 and the exclusive ability of TUs to appoint health representatives in the UK. Auroux himself recognised that even if the mains ideas of his laws are still being applied today, there has been a significant weakening of TUs and a lack of dynamism in collective bargaining, which was not what he expected in 1982.[437] For him, the fact that the individualism took over the collective aspect of IR is the reason for the decrease in TUs' power, collective bargaining, and IR as a whole.[438]

4.2.3. Conclusion

To conclude, the 1970s was a crucial turning point in the approach to OHS with claims and development of an organisational understanding of OHS rather than one that focused only on the individual and monetary compensation. All the social partners recognised a link between the OHS and general working conditions and the need for workers or their representatives to be involved in the decision-making process with their management or employer. There were two

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[431] Caire, G., 1984. Les lois Auroux. *Relations industrielles/Industrial Relations*, p.253
[432] *Ibid* p.251
[433] *Ibid* p.252
[434] The 2018 reforms are covered below.
[435] Loi n° 2014-288 du 5 mars 2014 relative à la formation professionnelle, l'emploi et à la démocratie sociale
[436] Amadieu, J.F., 1989. Une interprétation de la crise du syndicalisme. *Travail et emploi*, (4), pp.46-59.
[437] Gobert P., 2012. L'homme des lois. *Editions d[u] 1er mai.* p.119
[438] Auroux, Jean. Interview June 15, 2017. Archives, University of Glasgow. p.14

instances of legislative recognition of this change. First, the ideas that addressed workers' claims by developing workers' right to expression at the workplace and regarding their working conditions, through the publication of reports and the adoption of a national collective agreement. Second, the legal creation of the CIWC to complete the Committee of Hygiene and Security was a fundamental step towards legal recognition of the workers' right to be involved in OHS from an organisational perspective. Unfortunately, due to the economic crisis that started in the mid-1970s and the political preferences of the Conservative Government, there were no further legal improvements to OHS in the 1970s. However, the election of the Socialist President Mitterrand in 1981 introduced further legal reforms based on the ideas developed in the previous decade. The workers' right to express their working conditions and the importance of the organisational preventive approach of OHS were officially recognised with the law of the 4th of August and the 23rd of December 1982. This means that most of the key concepts of the Framework Directive 89/391/EEC already existed in the French legal framework when the directive was implemented.

4.3. Implementing the Framework Directive to Strengthen French OHS

This section focuses on the provisions of the implementation Law n°91-1414 that transposed the provisions of the Framework Directive.[439] The question of the impact of Directive 89/391/EEC on the French legal system, and whether it has substantially changed, is examined. By the end of the chapter, it will be possible to evaluate whether or not the implementation of the Framework Directive led to a convergence of the British and French legal systems regarding their OHS legal frameworks.

To understand the crucial issues of the implementation of Directive 89/391/EEC, it is important to contextualise the situation at the end of the 1980s and then to conduct a close examination of the report at the origin of the draft, as well as the parliamentary debates in both chambers (the Senate and the National Assembly). This analysis highlights what has been problematic and challenging from a theoretical point of view. The section then focuses on the jurisprudence of the French judiciary high court — *Cour de Cassation* — based on the articles of the Labour Code implemented by law 91-1414.[440] Thus, it is possible to observe what has

[439] TITLES I & III of law n°91-1414
[440] A total of 296 cases, between 1995 and 2019

been challenging from a practical perspective at workplaces, the position of judges, and how the French courts understand and apply the European concepts within the French legal tradition.

4.3.1. The increase in workplace accidents and the need to implement OHS EU directives as an opportunity to update the French OHS legal framework

The end of the 1980s corresponded with a dramatic change in the rate of workplace accidents in France. After ten years of continuous decline, the number of accidents began to grow for the first time in decades, affecting mainly the construction industry.[441] Even more concerning, the severity of accidents also increased.[442] In reaction to this alarming situation, the second Mitterrand Government requested a new report on what was causing this increase in accidents. [443] The aim of the report was also to improve accident prevention in high-risk sectors. The main recommendations of the report were to improve the knowledge about workplace accidents, generalise OHS training, revitalise accident prevention, bolster control and enforcement of the existing legislation, extend the number of CHSWC,[444] and work on the "pricing" of social security for employers in case of accidents. The explanations for the increase in workplace accidents were structural:[445] there was economic growth in France that led to more people being employed, but also more subcontracting agreements,[446] and inspections by LIs had stagnated — not to say reduced.[447] Therefore, the French Government needed to reform, or at least update, the OHS legal framework.

Meanwhile, at the European level, the end of the 1980s corresponded with a revitalisation of legal activity in the OHS field.[448] During this period, the French Government implemented seven European directives in its national legal system.[449] For the French Labour Minister, Martine Aubry, the transposition of these directives was the opportunity to address

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[441] Between 1977 and 1987; Daubas-Letourneux, V. and Thébaud-Mony, A., 2001. Les angles morts de la connaissance des accidents du travail. *Travail et Emploi*, *88*, p.26
[442] From 258 fatal accidents in 1987 to 362 fatal accidents in 1988.
[443] François Mitterrand was elected for the first time in 1981 and was re-elected for a second mandate in 1988 until 1995. The Report is also nown as the "QUERRIEN Report" and has been published in 1990
[444] *Comité d'Hygiène et de Sécuité;* The Health and Safety Committees
[445] Assemblée nationale – 3ème Séance du 19 November 1991. pp.6331
[446] Increase of 45% in the construction industry between 1987 and 1989.
[447] 380 000 inspections from the Labour Inspectorates in 1987, 330 000 in 1988 – Assemblée nationale – 3ème Séance du 19 November 1991. pp.6331
[448] *See* Chapter 2*,* p.30
[449] Directive 89/391/ EEC; Directive 89/392/ EEC; Directive 89/ 686; Directive 89/ 655; Directive 89/ 656; Directive 89/654/ EEC; Directive 89/379/EEC

the deficiencies of the French legal approach to OHS accident prevention, not only in the construction industry but in general.[450] She highlighted the need to implement the European concepts of prevention while respecting the rationale of the previous laws that had shaped the French OHS legal approach.[451] Aubry, and draftsman Alain Vidalies, also expressed their support of the social development of the EU and wanted to set an example by being the first MS to implement the directives, and particularly the Framework Directive 89/391/EEC. They justified their support by citing the fact that the directives had been adopted under the French presidency of the European Commission by Jacques Delors, and that French approach had inspired the directives. Aubry was also a member of Auroux's Cabinet in 1982 and had been in charge of drafting the OHS laws in 1982, which places the implementation of the European directive in the continuity of the previous OHS laws in France.

4.3.2. Legislative context of law 91-14141

4.3.2.1. Report by Jean Madelin and Alain Vidalies

In 1991, a report written by Jean Madelin (Senate) and Alain Vidalies[452] (Assembly Nationale, Socialist Party) completed and introduced the draft of Law n°91-1414 that was debated before the National Assembly.[453] To set the context and the importance of the future law, they emphasised three points.

First, Madelin and Vidalies acknowledged that there were difficulties in implementing EU OHS Directives in the French legal system. Although French law influenced and was at the root of plenty of EU OHS directive provisions, the directives synthesised different legal traditions. Some of them were far from the French approach, especially the Anglo-Saxon conception.[454] Additionally, the French Constitution makes a distinction between what should

[450] Assemblée nationale – 3ème Séance du 19 Novembre 1991. pp.6333
[451] See law of 6 December 1976 n°76-1106, and the law of 23 December 1982 n°82-1097
[452] The draftsmen of the law project
[453] Constituted by Parliament and the Senate
[454] Madelain J., 1991. Rapport fait au nom de la commission des affaires sociales (1) sur le projet de loi modifiant le code du travail et le code de la santé publique en vue de favoriser la prevention des risques professionnels et portant transcription de directives européennes relatives à la santé et à la sécurité du travail. n°327, p.12

be framed by the law[455] and what by regulations.[456] Therefore, not everything could be implemented by laws, and part of the directives had to be transposed with regulations.

The report also summarised the fundamental principles of the French OHS conception. Regarding liability, the Labour Code distinguished two categories of actors being potentially liable: on one side the employers, and on the other side the manufacturers, sellers, and distributors of dangerous products and equipment.[457] Their responsibilities were both civil and criminal. If there was a workplace accident, the employer was liable due to the existence of the subordination link with the worker, and the fact that the employer was in charge and therefore responsible for the working conditions. The law of the 9th April of 1898 created a special regime for worker compensation: in case of a workplace accident, the workers could claim damages without having to prove the fault of the employer. However, the reparation of the damage was a lump-sum. This concept might seem contradictory to Article 13 of Directive 89/391/EEC, which introduced the concept of workers' responsibility for their own safety and health and that of other persons affected by their acts or omissions at work. This difference of approach raised some opposition during the debates. Overall, in the report, the Framework Directive was presented as a text with general provisions that were obvious or already implemented in the French legal system.[458] Nevertheless, the Directive defined a general prevention strategy and introduced the idea of provisional management of health and safety in companies. This existed previously in the French Labour Code but not as clearly and therefore needed to be reframed as a whole.

Second, the authors of the report highlighted the need to implement the Directive in a clear and effective manner, based on the previous jurisprudence of the CJEU.[459] To identify what was the appropriate way to transpose the Framework Directive, the authors considered the legal foundation of the Directive: Article 118A. This article aimed at a harmonisation but not a unification of the national legal systems. According to the authors, the French legal system already satisfied the minimum standards provided by the Directive. However, this had to be

[455] Article 34 of the French Constitution
[456] Article 37-1 of the French Constitution
[457] *See* article L.4121-1 (former art. L.231-1) and former L.231-2
[458] Madelain J., 1991. Rapport fait au nom de la commission des affaires sociales (1) sur le projet de loi modifiant le code du travail et le code de la santé publique en vue de favoriser la prevention des risques professionnels et portant transcription de directives européennes relatives à la santé et à la sacurité du travail. n°327, p.22
[459] *Ibid*, p.36

expressed unambiguously. The authors underlined the importance of the CJEU's control, especially in the situation of preliminary ruling where it can directly affect the Directive if not implemented appropriately by the national law. This was a situation the French Government purposefully wanted to avoid. This might explain why not many subsequent preliminary ruling cases before the CJEU on that legal basis were coming from France.[460]

Third, the authors raised the difficulty of the National Assembly having a debate on the law-draft because it was already the result of preliminary negotiations between the Government and the social partners. Also, the Government had already lobbied in favour of the social partners' position during the debates of EU OHS Directives. These previous dynamics resulted in a fragile balance, that did not take into consideration the National Assembly's perspective or function. Therefore, the debate on the transposition of EU OHS Directives was not about the fundamental concepts as such, but about applying technical modifications to avoid conflict with the previous provisions embodied in the French Labour Code. The authors also emphasised the challenge of implementing EU OHS concepts while reinforcing the role of the national CHSWC.

4.3.2.2. Debates at the National Assembly: Senate and Parliament

The draft of the Law n°91-1414 did not lead to significant disagreement among the various political parties and their representatives within the National Assembly, except for the Communist Party. Apart from it, everybody agreed on the positive aspect of European social development and the adoption of the seven EU OHS directives. However, the Communist Party saw these EU OHS directives as a threat to the acquis won by the workers through protest. According to them, these directives aimed to ensure the functioning of the single market in order to increase the profits of a minor part of society, not to answer human needs.[461] The communist group voted against the implementation of the law and was the only group to do so.

The position of the right-wing party RPR was also interesting.[462] It acknowledged the legitimacy of the EU's social goal but expressed concerns about the potential economic impact. In the view of the RPR, not all of the MS develop OHS standards at the same pace, and it

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[460] *See* Chapter 5, pp.152-154
[461] Mrs. Muguette Jacquaint, Assemblée nationale – 3ème Séance du 19 Novembre, 1991. pp.6338
[462] *Rassemblement pour la République*, known today as *Les Républicains.*

worried that creating further rules and duties for employers would be a burden for the French economy.[463] Interestingly, this is an argument that has also been used in the UK and at the EU level.[464] Therefore, even though the RPR agreed on the general idea, it was not in favour of an additional law and was convinced that the French Labour Code already complied with most of the Framework Directive provisions.[465] Thus, the RPR voted in favour of the law of transpositions, but only under the conditions of amendments. Regarding the Senate members, they agreed with the general aim of the law but suggested some modifications towards a more liberal approach and understanding of the European directives.

Regarding the content of the draft, the first title focused on the implementation of the fundamental principles of the Framework Directive through the "General principles of prevention". One article guaranteed the scope of the application of provisions relating to the Framework Directive; Art. L.230-2 of the Labour Code translates Article 6 of the Framework Directive almost word for word.[466] The only difference was that the term "employer" was replaced by "*chef d'entreprise",* which is a French specificity and was necessary to guarantee coherence with the rest of the legal system.[467] The *chef d'établissement* was required to take all measures of protection, prevention, information, and training, and adapt them whenever there was a modification of circumstances and improve them whenever possible. Similar obligations already existed in the French labour law, but there were now explicit general duties.[468] The innovative part of the new provisions was that prevention had to consider the technical evolutions and change in the workplace. The third paragraph of L.230-2 restated the obligation to conduct a general assessment, which could lead to a modification of work organisation or the methods of production.

As mentioned earlier, although most of the provisions of the Framework Directive were not conflictual with the French legal framework, there was one provision transposing the Framework Directive that raised a considerable amount of concern and opposition, not only between the Senate and the National Assembly but also among the political parties of

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[463] Mr. Christian Cabal, Assemblée nationale – 3ème Séance du 19 Novembre, 1991. p.6339
[464] *See Chapters 2 and 3*
[465] Mr. Christian Cabal, Assemblée Nationale – 1ère Séance du 16 Décembre 1991. p.7969
[466] Former Art. L.230-1 of the French Labour Code
[467] Especially to coordinate the terms used in the articles concerning the employer's responsibility; former Articles L.260-1 and L.263-1.
[468] Former Art. L.232-1 (health), L.233-1 (security), L.231-1 (training) of the French Labour Code

Parliament. Article L.230-3 in the Labour Code, which transposes Article 13 of the directive, provides that "*it does behove each worker to take care, according to his/her training and possibilities, of his/her health and security as well as one of the other people affected by his/her action or omissions"*.[469] The French provision is shorter than Art. 13 of the Framework Directive. This article came from the Anglo-Saxon tradition establishing a parallel between the employer's duties and the workers' obligations regarding health and safety.[470] Before this article, the duties of health and safety were the exclusive responsibility of the employer. The rationale was that the consequence of the employment contract — with the subordination link — placed the employer as responsible for all risks created by a company's activity.

Although this article was completed by Article L.230-4 of the Labour Code that maintained the principle of employer liability, some members of Parliament were strongly opposed to the adoption of this article. The most virulent opposition within Parliament came from the Communist Party, who qualified Article L.230-3 as "*a structural modification that shows the complete reversal of the Labour Code's principles, and the withdrawal of a protective principle for the workers*".[471] Interestingly, the RPR was in favour of this article and would have been in favour of even more detailed provisions.[472]

The opposition between the National Assembly and the Senate was based on a different issue. The Senate advocated for a more detailed version of the workers' duty to take care of themselves and others and supported the idea of having it framed by a decree. It also defended the concept of co-responsibility and co-management in the context of L.230-3. The members of the National Assembly disregarded the suggestions made by the Senate. For them, the aim was to express clearly that workers had to participate in the implementation of the OHS prevention policy in companies. The internal rules of the company would frame the details, as it was not the function of the law to do it. Regarding the concept of co-responsibility, the members of the National Assembly expressly mentioned that this approach contradicted the fundamental labour law principle of the employer's power in the company. According to the French legislative decision-making mechanisms, when there is a disagreement between the

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[469] "*Il incombe à chaque travailleur de prendre soin, 120uropa120nion de sa formation et selon ses possibilités, de sa sécurité et de sa santé ainsi que celles des autres personnes concernées du fait de ses actes ou de ses omissions au travail".*
[470] *See further details in previous* Chapter 3
[471] Mrs. Muguette Jacquaint, Assemblée Nationale – 3ème Séance du 19 Novembre, 1991. p.6338
[472] Mr. Christian Cabal, Assemblée Nationale – 3ème Séance du 19 Novembre, 1991. p.6340

Senate and the National Assembly, the vision of the National Assembly predominates. Therefore, the shortened version with the express recognition, which did not change the previous fundamental principle of labour law, was adopted. Interestingly, even though this article raised concerns on theoretical ground, the articles that raised issues in practice were not the ones that the National Assembly debated the most.[473]

4.3.3. The application of law 91-1414 by judges, illustrated by the Cour de Cassation

In the French legal system, it is possible to bring a claim before the court on three grounds: criminal law, civil law,[474] and employment law. An examination of all the cases held by the high court — *Cour de Cassation* — basing its decisions on one of the dispositions implemented by Law 91-1414,[475] shows how the French jurisdictions understood and applied EU OHS concepts from the Framework Directive, 89/391/EEC.[476]

4.3.3.1. The Criminal Chamber of the Cour de Cassation

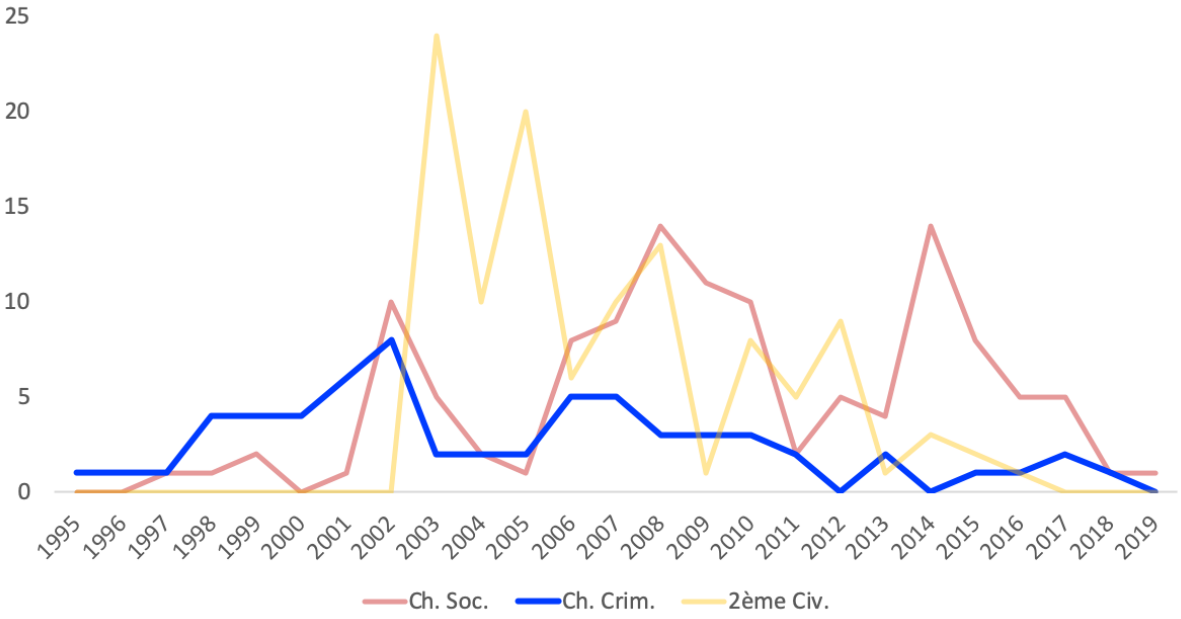

Figure 2 - The evolution of the jurisprudence of the Criminal Chamber (Cour de Cassation) from 1995 to 2019)

[473] See next section on the implementation of the transposition law by the French courts
[474] Which can be qualified as the equivalent of tort law in the UK
[475] The articles analysed were : Art. L.230-1, L.230-2, L.230-3, L.230-4, L.230-5, L.231-10, L.231-11 and L.231-12. The recodification of the Labour Code in 2008 has also been taken in consideration.
[476] 295 decisions have been examined – from 1995 to 2019

The cases heard by the Criminal Chamber of the *Court de Cassation* are based on several articles: L.230-1 on the scope of application, L.230-5 on the LI's power to stop construction in case of a dangerous situation.

The issues discussed are usually about responsibility in the case of unintentional injury or homicide, usually completed by the charge of infraction of the health and safety regulation. The Court must determine whether the employer is criminally responsible when there is a workplace accident. The established jurisprudence from the *Court de Cassation* is that the employer is liable as soon as there is a workplace accident, based on Art. L.230-2, which provides the employers' general obligation. The employer is responsible even if the worker made a mistake; if the worker has been "forced" to make a mistake due to the lack of prevention, he is not responsible.[477] More broadly, the lack of prevention has sometimes been used as a reason to hold the employer criminally responsible.[478] The Court takes the same position when there is a case of employee leasing;[479] the employer's obligation of prevention applies to all the workers under his control.[480] However, the Court refuses to hold an individual (such as a manager or team leader) responsible on a criminal ground when there is not sufficient proof of the delegation of powers from the employer to this individual.[481] For the Court, criminal liability is linked with the concept of authority, and the subordination link that initially exists between the employer and the workers. Less frequently, the employer is held responsible on criminal grounds for obstruction of the Health and Safety Committee CHSWC[482] or the LI.[483]

[477] Cour cass. Ch. Crim. 25 Jan. 2000 n°98-87097
[478] *See* Cour cass. Ch. Crim, 13 March 1996, n°95-82644; Cour cass. Ch. Crim. 8 June 1999 n°98-82732; Cour cass. Ch. Crim. 6 June 2001 n°00-86643; Cour cass. Ch. Crim, 24 April 2001, n°00-85911
[479] i.e., "*an arrangement in which a company's workers are employee of another company which pays them and manages other costs and responsibilities relating to them.*" - https://dictionary.cambridge.org/dictionary/english/employee-leasing
[480] *See* Cour cass. Ch. Crim 9 Nov. 1998, n°97-80714; and Cour cass. Ch. Crim. 11 Dec. 2001, n°01-81047
[481] Cour cass, Ch. Crim. 11 Oct. 2011, n°10-87.212 ; and Cour Cass, Ch. Crim. 17 Oct. 2017, n°16-80.821 9
[482] Cour cass. Ch. Crim. 12 May 1998, n°97-82188
[483] Cour cass. Ch. Crim. 24 April 2001, n°00-84712

4.3.3.2. The Civil Chamber of the Cour de Cassation

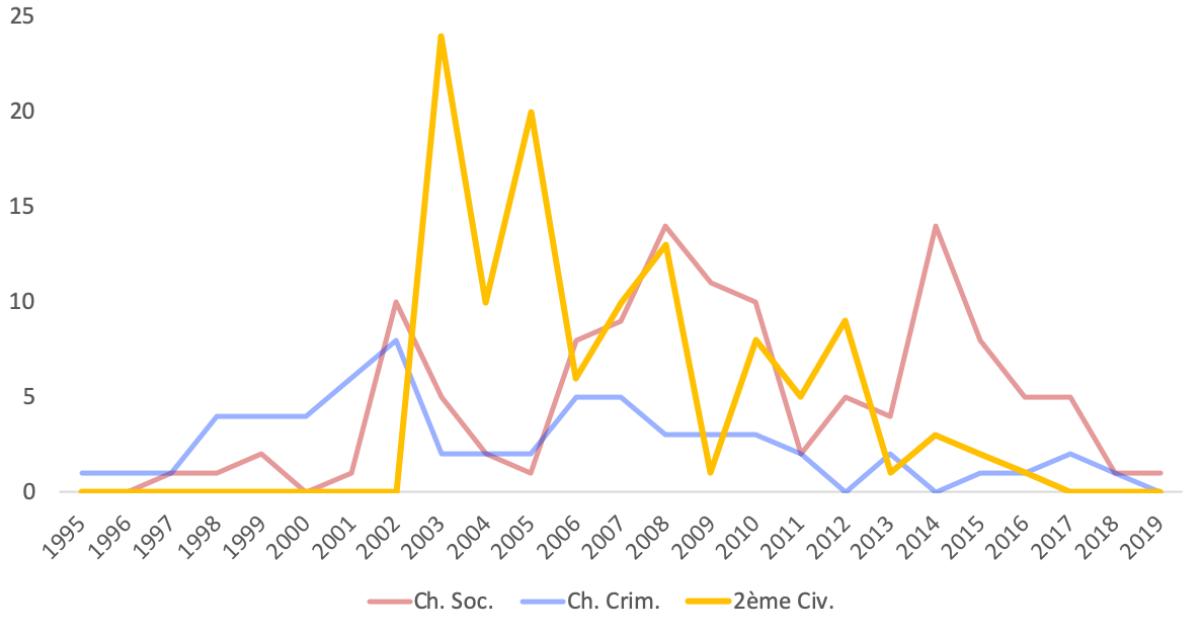

Figure 3 -The evolution of the jurisprudence of the 2nd Civil Chamber (Cour de Cassation) from 1995 to 2019

The year 2003 was characterised by an increase in the number of cases before the Civil Chamber based on Article L.230-2 and Art. 1147 of the Civil Code. First, the *Cour de Cassation* strengthened its position regarding inexcusable mistakes by employers, even when a worker's error caused the accident. As long as the employer should have known about this risk according to his training or status and did nothing to prevent the risk, it is an inexcusable mistake.[484] The Court confirmed that the inexcusable mistake exists even if there is no proof of a breach by the employer; the simple fact that he should have known is enough.[485] The same principle applies when it is a slight mistake by the employer[486] or when the mistake is not unusual.[487] The Court extended its jurisprudence on inexcusable mistake considerably in 2003, hearing 16 cases on the knowledge of a risk and the lack of prevention for occupational diseases (most of the cases were asbestos).[488] From 2008, the Civil Chamber started to refuse to recognise the inexcusable

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[484] Cour de Cass· 2ème Ch. Civ. 12 May 2003, n°01-210 71; confirmed by Cour de Cass. 2ème Ch. Civ. 16 Dec. 2003 n°02-30 48 ; although the Cour de Cassation has recently tried to narrow the scope of the inexcusable mistake – *see* Cass. 2 civ, 30 March 2017, n°16-1220

[485] Cour Cass. 2nd Ch. Civ, 18 Oct 2005, n°04-30.555, n°04-30.558, n°04-30.559, n°04-30.560 ; Cour de Cass· 2ème Ch. Civ. 16 Sep. 2003, n°01-21192

[486] Cour de Cass. 2ème Ch. Civ. 16 Dec. 2003, n°02-30777 ; Cour Cass. 2nd Ch. Civ. 22 Nov. 2005, n°04-30.213

[487] Cour de Cass· 2ème Ch. Civ. 18 Nov. 2003, n°02-30188

[488] Cour de Cass. 2ème Ch. Civ. 4 Nov. 2003, n°02-30063, n°02-30065, n°02-30066, n°02-30067, n°02-30068, n°02-30069, n°02-30070, n°02-30071, n°02-30072, n°02-30175, n°02-30176, n°02-30177, n°02-30178, n°02-30178, n°02-30180, n°02-30064

mistake when there is not enough evidence that the employer knew or should have known about the risk.[489]

4.3.3.3. The Social Chamber of the Cour de Cassation

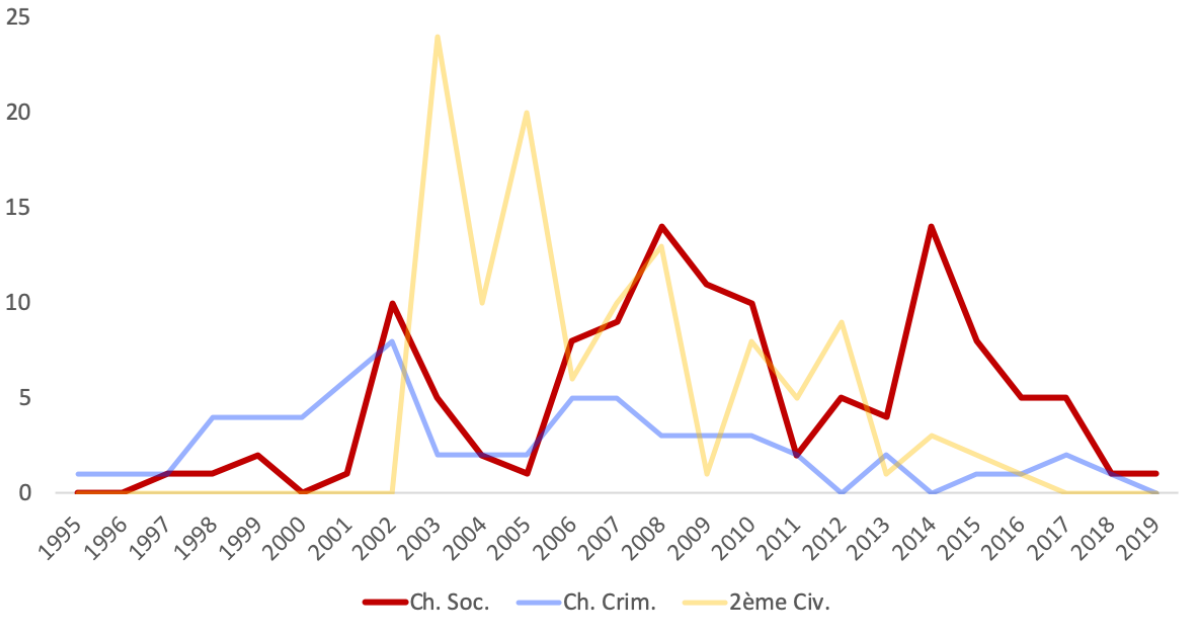

Figure 4 - The evolution of the jurisprudence of the Social Chamber (Cour de Cassation) from 1995 to 2019

The evolution of the jurisprudence of the Social Chamber shows three interesting peaks of activity in 2002, 2008 and 2014, each of them illustrating a main turning point in the understanding of the OHS legislation.

In 2002, the Social Chamber held six decisions based on article L.230-2, often combined with article 1147 of the Civil Code, to develop the concept of *faute inexcusable* in the context of the employer's *obligation de sécurité de résultat.*[490] These cases echoed a turning point from the Cour de Cass in early 2002. On the 28th of February 2002, the *Cour de Cassation* changed the definition of an inexcusable mistake by an employer.[491] Before, the concept of an inexcusable mistake required the employer to have made a severe and unusual mistake, but with

[489] Cour Cass, 2nd Civ. Ch. 2 Oct 2008, n°07-18.437, 13 Nov. 2008 n°07-20.437.
[490] Cour cass, Ch. Soc. 10 oct. 2002, n°01-20.405 and n°01-20.623 ; Cour cass, Ch. Soc. 11 Apr. 2002 n°00-16.535 ; Cour cass., Ch. Soc. 11 jul. 2002, n°00-17.377 and n°01-20.408
[491] From 2002 the definition has been: ""*When he/she* ***was, or should have been, aware of the danger*** *to which the employee was exposed, and that he/she did not take the necessary measures to protect the latter from such danger."* Before 2002 the conditions to recognise the *faute inexcusable* were stricter.

the 2002 cases, the employer became responsible for his mistake if he knew or should have known about the risk and still did nothing. The worker still has to provide evidence, but the "unusual" and the "fundamental/severe" criteria of the action are no longer required. This change in jurisprudence was considered a revolution in French labour law and its approach to OHS. [492] Since, the *Cour de Cassation* used this new concept and combined it with Article L.230 and Article 1147 of the Civil Code to allow workers to ask for indemnities when employers should have known about a danger but failed to prevent it. However, in 2008, the Social Chamber has slightly softened its application of the *faute inexcusable* over the past years. The main argument for refusing the existence of a *faute inexcusable* is when the Court estimated that there had not been enough pieces of evidence proving the causality link between the damage and the employers' behaviour.[493]

Nevertheless, in 2014 (the 10th December) the Social Chamber gave a new dimension to the understanding of the OHS employers' obligation and recognised for the first time the *prejudice d'anxiété* for the workers who knew that they were working in dangerous conditions without having the employer taking appropriate measures, e.g. asbestos at the workplace.[494] For the Social Chamber, the awareness of the fear and the high risk of developing an occupational disease without being able to prevent it on its own can lead to psychological trouble and prejudice. It illustrates the failure by the employer of the obligation to protect the health and the safety of the workers. In 2015, the Social Chamber restricted the conditions to recognise such a prejudice to only some workplaces, which have been listed in an official document.[495] The latest decision on that topic has been held by the Social Chamber the 11th September 2019 and reminds the direct link between art L.4121-2 of the Labour Code (new art. L.230-2) and Directive 89/391/EEC.[496] With this decision, the Social Chamber extends the scope of the *prejudice d'anxiété* to all the sectors where workers have been exposed to dangerous chemical products.

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[492] Lyon-Caen A. Une révolution dans le droit des accidents du travail. *Droit Social*, 2002. p.445
[493] See Cour cass. Ch. Soc. 20 May 2008, n°06-45.521, Cour Cass. Ch. Soc. 11 Apr. 2008 n°07-41.099, and Cour Cass., Ch. Soc. 26 March 2008 n°06-43.103 ; Cour cass. Ch. Soc. 21 May 2008, n°07-41.717.
[494] *See* Cour Cass. Ch. Soc. 10 Dec. 2015, n°13-21.217, n°13-20.137, n°13-20.136, n°13-20.135, n°12-20.134, n°13-20.139, n°13-20.140, n°13-21.224, n°13-19.359, n°13-23.691, n°13-22.430
[495] *See* Cour Cass. Ch. Soc., 19 Nov. 2015, n°14-13.833, n°14-14.084, n°14-15.518
[496] Cour Cass., Ch. Soc. 11 Septembre 2019, n°17-24.879 to 17-25.623

Regarding the application of the controversial Article L.230-3, the Court had to decide whether or not disregard for health and safety rules provided by an employer can be a reason to dismiss a worker. The Court makes a distinction between the degree and the impact of the disregard for the health and safety rules by a worker. For example, if a worker refuses to wear protective equipment provided by the employer for two days but then complies to the rules before the start of the dismissal procedure, then dismissing a senior worker is disproportionate and can be considered an unfair dismissal.[497] However, when the behaviour of the worker is in contradiction of the health and safety rules and makes it impossible for the employer to maintain him in the company, the employer has no other choice but dismissal to protect the rest of the company's workforce.[498]

Interestingly, in some cases, the Social Chamber mentioned the Directive 89/391/EEC directly, either to contextualise the articles of the Labour Code introduced by the Law n°91-1414, or as such.[499] The Chamber did it in two particular situations, (i) in case of *harcèlement moral*[500] and (ii) conditions to returning to work after a period of sick leave. Regarding the *harcèlement moral*, the Social Chamber extends the employers' duty to ensure the safety and health of workers in every aspect related to the work, to the psychological aspect of health and the employers will be held responsible even if they do not commit the bullying themselves.[501] In this decision, the Social Chamber refers to the Directive to contextualise article L.230-2 and to give it a large application.[502] However, the Social Chamber also use article L.230-2 contextualised with the Directive to emphasise that there is no prejudice if there is not enough evidence of the bullying or if the employer did everything in his power to stop it.[503]

The Social Chamber bases its decisions on article L.230-2 of the Labour Code with the Directive 89/391/EEC against workers' dismissal for health reasons. Indeed, according to a continuous jurisprudence of the Court, the medical verification that the worker can restart

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[497] Cour cass. Ch. Soc. 9 October 2002, n°00-44297; The worker has been employed by the company for the past 22 years.
[498] Cour cass. Ch. Soc. 22 May 2002, n°99-45878 ; Cour cass. Ch. Soc. 24 Feb. 2004, n°01-47000
[499] For the use of the Directive 89/391/EEC as such, see details Cour Cass. Ch.Soc. 28 Jan. 2009, n°07-44.556 – regarding a case of leaving the workplace in case of serious danger
[500] The equivalent in the UK would be 'workplace builling', which is broader than 'harassment' as defined in the Equality Act 2010
[501] Cour Cass, 21 June 2006, n°05-43.914
[502] Same idea to protect the worker in Cour Cass, Ch Soc 27 Jan. 2009, n°07-43.257 ; Cour Cass. Ch. Soc. 9 Jan.2008 n°06-46.043, Cour Cass. Ch.Soc., 25 March 2009, n°07-44.408 and Cour Cass, Ch. Soc. 2 Dec. 2009, n°08-44.969
[503] Cour Cass. Ch. Soc., 25 Feb. 2009 n°07.41.846, Cour Cass., Ch. Soc. 1 Jul. 2009 n°07-44.482

working after sick leave and the adaptation of the workstation are crucial illustrations of the Directive 89/391/EEC. Therefore, even if a worker is responsible for an accident at work, he cannot be dismissed if there have been no verification that he could do the job in the first place.[504] For the Court, the employer did not respect his obligation of prevention by assigning task to the worker that was not conform with his capacities. Similarly, an employer cannot dismiss a worker for "incapacity to work" if he has not tried to adapt the workstation in the first place.[505]

To conclude, the Social Chamber of the *Cour de Cassation* has been heavily using the articles of the Labour Code, which have been adopted to implement the Directive 89/391/EEC. The Social Chamber applies a broad understanding of EU OHS standards and uses it to extend the workers' protections. Additionally, even if these concepts might have existed before, even decades after the implementation, the judges of the Social Chamber reminded the direct link and connection with the Directive 89/391/EEC.

4.4. Challenges to the Foundations of the Legal Framework by Recent Reforms

The legal framework described above has been working well for the past 30 years. It originally focused on prevention with the CHSWC as the health and safety workers' representative institutions, the LIs to enforce the OHS standards, and the labour doctors to prevent OHS risks at the individual level. Each of these bodies was crucial for the proper functioning of the French OHS system. However, since the beginning of the 2010s, many reforms have challenged — not to say threatened — these core institutions, which provided stability to the French OHS system.

First, occupational medicine[506] is under enormous reformatory pressures. The role of occupational medicine is for prevention of the disease or injury only,[507] and health examinations are mandatory for all workers regardless of their work-sector. Occupational doctors can and should be involved in health and safety training and improving accident prevention and general

[504] Cour cass. 28 Feb.2006 n°05-41.555, and Cour Cass., Ch.Soc. 13 Dec.2006 N°05-44.580
[505] Cour Cass. Ch.Soc. 5 Jul.2018, n°16-26.916
[506] Médecines du travail
[507] When a disease or an injury is noticed, the worker has to see a general doctor.

working conditions.[508] Occupational medicine played a crucial role because occupational doctors determine if a worker is fit for work or not. After an important reform in 2011 with Law 2011-867 (20th of July 2011)[509] and two *décrets*[510] (followed by another in 2016)[511], another report was published on August 2018 by *La République En Marche* (LREM) MP Charlotte Lecoq. According to her, "*the employers feel the OHS prevention as a compilation of duties they have to fulfil, and not like a way to achieve a better performance"*.[512] This statement can be placed in the more general context of political mistrust of OHS, which is considered to be an administrative burden in France, the UK, and at the European level.

Secondly, Labour Inspectorate Authority was created in 1874 to control the application of the labour law standards in private companies, and its powers and functions expanded over time. Nowadays, LIs are in charge of controlling the legal, regulatory, and conventional labour standards.[513] They look for infraction of the OHS rules and take action to stop risks, to advise and to mediate, and to make some decisions as to the organisation of the company.[514] This means that the LIs have the general competency to control and enforce labour law, not only OHS. The French LIs have one of the broadest scopes of competency in Europe.[515] This leads to a critical workload and means that not everything can be covered.[516] The key to the success of this authority is to be autonomous, independent, and have some legitimate power of action. However, these fundamental concepts started to be challenged in 2006 and even most significantly in 2014 with the *Décret Sapin*[517] and then the *Ordonnance Macron.*[518]

The outcome of the reforms is that LIs cannot themselves decide to control the workplace as they want, and they can no longer take sanctions; they have to refer to the hierarchy first. Beyond the fact that these reforms raised some concerns regarding their

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[508] Libert, B. and Yamada, Y., 1998. Occupational medicine in France: A perspective at the Fiftieth Anniversary of Medecine du Travail. *Journal of Occupational Health*, *40*(1), p.91
[509] Relative à l'organisation de la médecine du travail
[510] Décret n°2014-798 du 11 Juillet, 2014, portant diverses dispositions relatives à la médecine du travail; Décret n°2014-799 du 11 Juillet 2014 portant diverses dispositions relatives à la médecine du travail.
[511] https://www.actuel-hse.fr/content/charlotte-lecocq-les-entreprises-vivent-la-prevention-comme-un-empilement-dobligations
[513] Art. L 8112-1 et s.
[514] For example, an employer has to ask the labour inspectorate for authorisation before dismissing a workers' representative (considered a "protected worker").
[515] Des Inspecteurs Du.Travail, 2016. Où va l'inspection du travail?. *Vie Sociale et traitements*, n°129. p.70
[516] *See* Chapter 6 of this thesis p.179
[517] Décret n°2014-359 du 20 mars 2014 relatif à l'organisation du système d'inspection du travail
[518] Ordonnance n°2016-413 du 7 Avril 2016 relative au contrôle de l'application du droit du travail

conformity with Article 17 of the ILO Convention n°81, it deeply affected the autonomy of the LIs.[519] Although the rights and duties of the workers and the employers have not formally changed, these reforms raised some concerns regarding the enforcement of the legal framework at the workplace. However, the most concerning reform, which was adopted in 2018, effected the CHSWC.

Thirdly, the CHSWC was created in 1982 by Auroux and was mandatory for all workplaces with more than 50 workers. The CHSWC's missions were to help protect employees' health and safety and improve working conditions.[520] A series of reforms began with the Rebsamen reform, which made the merging of the CHSWC, the Work Council, and *the Délégué du Personnel* into a single workers' institution possible under specific conditions.[521] The merging of these independent and autonomous bodies into a single institution was not optional since the adoption of the *Ordonnances Macron,* adopted 22 September 2017.[522] Now, in all companies that employ between 50 and 300 workers, it is mandatory to have a single workers' representative council called the *Comité Sociale et Economique (CSE)*. It is no longer possible to have a separate CHSWC even with a collective agreement. The only option available is to have a *Commission santé, sécurité et condition de travail* (CSSCT), but this is only possible for companies that employ more than 300 workers, and it must be framed with a collective agreement at the company level (i.e., *accord d'entreprise*). Moreover, even in that situation, the commission would still be under the authority of the *CSE* (the new version of the Work Council), sending the situation back to what it was before 1982.

This reform was surprising considering that studies have proved the importance and effectiveness of the CHSWC, even stressing its significance for the entire French OHS framework. It was a strong, autonomous, and effective way for workers to represent their OHS interests.[523] Some authors, like LeRouge, have raised concerns regarding the impact of this reform on the effectiveness of OHS in France.[524] LeRouge expressed concern that the merging

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[519] Des Inspecteurs Du.Travail, 2016. Où va l'inspection du travail?. *Vie Scoiale et traitements*, n°129. P.72
[519]https://travail-emploi.gouv.fr/sante-au-travail/les-acteurs-et-interlocuteurs-de-la-sante-au-travail/comite-d-hygiene-de-securite-et-des-conditions-de-travail/qu-est-ce-qu-un-chsct/article/le-comite-d-hygiene-de-securite-et-des-conditions-de-travail-chsct
[521] Art. 13 and 14 of the Loi n° 2015-994 du 17 Août 2015, relative au dialogue social et l'emploi
[522] An *Ordonnance* is a legal act signed by the president without being discussed by the Parliament.
[523] Verkindt P.Y., *Le C.H.S.C.T. au milieu du gué*. Rapport à Monsieur le Minsitre du travail de l'emploi, de la formation professionnelle et du dialogue social.
[524] *See* Lerouge, L., 2017. Quel avenir pour le rôle et les attributions du CHSCT dans la fusion des IRP: Dilution ou maintien? *Noticias CIELO*, (9), pp.1-5

of the institutional representative of workers would unbalance the collective relationship in health and safety. Indeed, considering that the responsibilities and functions of the previous three separate institutions are now one, the members might be overwhelmed by the new quantity of work.[525] Therefore, some topics might be overlooked, and consultations on health and safety may no longer be a priority. Auroux himself shared this concern.[526]

Additionally, there have been some concerns concerning the members of the new institution will have general knowledge and no specific knowledge on OSH. Indeed, the health and safety field is technical and requires specific knowledge and expertise. Thus, the workers might need extra help from external experts; this help will be possible but harder to obtain than previously. Indeed, even if the employer still covers some expertise expenses, the new CSE will now have to cover 20% of other costs. There is also now only one budget where before the separate institutions had three distinct funding frameworks.

The independence of OHS matters will be thoroughly diluted considering that before, the CHSWC had its own legal persona and could sue an employer or start an action if necessary; now, even in the case of a CSSCT, the committee will need to obtain the approval of the CSE to initiate a judicial action. The problem is that the Work Council's bargaining dynamic is to consider the economic aspect, which might overshadow the OHS interests in the agenda. LeRouge also highlights that the CHSWC used to be a pillar for working conditions and a "*courroie de transmission*" ("transmission belt") between the shop floor and the management level. Having a single centralised workers' institution might disconnect them from the OHS reality.

4.5. Conclusion

The study of the initial constructions of the OHS in France and the UK and the implementation of the Framework Directive in these two countries shows some similarities and differences in the influence that EU OHS might have on national OHS legal frameworks. First, there is a difference regarding the origin of the impulse to reform. In the UK, the impulse to reform was a political answer to the number of workplace accidents, whereas in France, it came

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[525] *see* Guillas Cavan K., 2017. Fusionner les instances representatives du personnel: une fausse bonne idée?, *Institut de recherches économiques et sociales,* Eclairages #006 pp.1-16

[526] Vérot P.O., 2017. Macron "fait fausse route". *La Montagne* – newspaper published 15th September 2017

from workers' protests supported by some TUs. In both cases, the 1970s was a period of change and reflection that was expressed in various reports. In the UK, only the *Robens Report* advocated for the development of a voluntary approach to OHS, arguing that the responsibility of taking action lies "*with those who create the risks and those who work with them"* (i.e., workers and the management or employer). [527] The report developed the idea of a general duty of prevention for the employer, as far as is reasonably practicable, and the fact that the workers are also responsible for their actions. The report also embodied the idea of communication between the workers and the employer on OHS with health and safety representatives.

In France, there has been a series of reports underlining the importance of the human at the workplace and an approach to OHS with the development of humane working conditions. The idea is ostensibly the same: place the workers in the middle of the process and in charge of OHS at the workplace. In both cases, collective prevention was at the centre of the process, and both emphasised the importance of health and safety representatives. However, in the UK, it seems that the dynamic was more to make the workers responsible through the creation of duties, where in France, it was the recognition of a right of expression regarding working conditions. Indeed, in the UK and France, the period before 1989 was when both countries developed the basis of a national OHS framework: with the HSW Act 1974 in the UK (completed by the SRSC Reg 1977) and Auroux's laws in France. Although the laws of both MS recognised the employer's obligation to provide general prevention, the aspects regarding the obligation to provide information and consult with the workers' or their representatives were slightly different.

These well-developed legal frameworks set the background for the implementation of the Framework Directive in both France and the UK; however, the two MS did not welcome the implementation of the Directive in the same way. On one side, the UK estimated that it already had most of the principles of Directive 89/391/EEC in the HSW Act 1974 and reformed only what was strictly necessary. On the other side, although France already had a well-developed OHS framework, the government took the opportunity of implementing Directive 89/391/EEC to clarify and improve its legal framework. This difference in approach to implementation might be due to a difference of legal tradition as well as a political difference:

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[527] Robens, A., 1972. *Safety and health at work: report of the Committee, 1970-72* (Vol. 1). HM Stationery Office. p.6

a Conservative Government implemented the directive in the UK, whereas a Socialist Government implemented the Directive in France. The positions of France and the UK were also different on a broader level regarding their relations with the EU.

Nevertheless, we can conclude that after the implementation of the Framework Directive in France and the UK, there was a phenomenon of theoretical convergence; both countries had similar OHS standards, and both needed to reform their national legal frameworks to comply with the Directive. Interestingly, the UK had to develop the "workers' rights" aspect, whereas France had to integrate the "workers duty" part — the point on which they initially diverged. A study of the jurisprudence in France and the UK shows that EU OHS standards have been used differently by the national courts. Additionally, although similar concepts exist in both countries, the methods of implementation and application are different (e.g., the obligation of consultation). This difference underlines a divergence in the practice of EU OHS standards. This observation shows the limits of the European influence on OHS; equivalent standards does not mean equal standards. The implementation of the Framework Directive in France and the UK well illustrates this point.[528]

Finally, an examination of the recent reforms shows that there has been a tendency in both France and the UK not to reform the general principles— influenced by the EU directives, but to reform services, agencies, and bodies in charge of the functioning of the OHS framework (e.g., the Lis). The problem is that the laws adopted in the 1970s and 1980s relied on strong TUs with a fair balance of power in IR. In France and in the UK, there has been a decline in TUs, meaning that the legal framework may now be the only protection for workers, and it has to be applied by LIs (which is a national responsibility). Therefore, by reforming the LIs — and the CHSWC in France — there is a weakening of EU OHS standards due to their non-application, even if they still legally exist. Considering that the likelihood of a new OHS directive at the EU level is low, it might be worth considering whether EU OHS standards can be improved by focusing on their application before the CJEU (Chapter 5) and enforcement by

[528] Both have a general obligation of prevention: one is conditional and concerns what is *reasonably practicable*; the other is more "absolute" and concerns the *obligation of result.* Both have an obligation of consultation on the working condition. In the UK, the obligation of consultation focuses on coordination with the health and safety representatives, whereas in France, the employer has to consult the CHSWC every time there is a change in working conditions.

LIs at the EU level (Chapter 6) to counteract the national tendencies, and to revitalise EU OHS concepts.

CHAPTER 5

Is Litigation Before the Court of Justice an Appropriate Path to Improve Occupational Health and Safety in the European Union?

5.1. Introduction

The OHS field is currently experiencing a period of double paralysis at the EU level. First, a legislative paralysis, illustrated by the lack of adoption of significant OHS directives between 2004 and 2014, when the directives were mainly adopted to revise or provide details on previous directives. Second, the paralysis of social dialogue with the latest EU OHS framework agreement adopted in 2009. This was a revision of the framework agreement on parental leave initially adopted in 1994. The result of this double paralysis is a stand-off position that can partly be explained by the political context.

As described in a previous chapter, José Manuel Barroso, the head of the European Commission, led a "liberal turn" to the European orientation from 2004 to 2014, especially to the European social model.[529] A key illustration of this change in orientation was the REFIT programme making "*EU law simpler and less costly*".[530] Until 2015, the goal was to reform and simplify the entire OHS EU legal framework. Therefore, up until now, it has been unlikely that the Commission will promote an agenda towards the expansion of the current OHS EU framework, either via the adoption of directives or by requiring social partners to start consultations.[531] This raises the question of whether the lack of commitment by public actors (i.e., the Commission) can and should be compensated by the actions of private actors (i.e., workers, TUs, and workers' representatives). In a bid to ensure that individual cases are resolved in a manner that has a much wider impact than simply on the parties involved, could private actors usefully litigate their existing rights in the field of OHS standards before the CJEU?

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[529] Ter Haar, B.P. and Copeland, P., 2010. What are the future prospects for the European social model? An analysis of EU equal opportunities and employment policy. *European Law Journal*, *16*(3), pp.287-290; *See Chapter 2* p.55

[530] https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

[531] The dynamic might change in the future depending on the agenda and the actions of the new Van Der Leyen-Commission.

Debates about the CJEU and the extent of its powers began in the 1980s and continue today. The first phase of the debate in the doctrine was to determine the level of autonomy of the Court and its relationship with the national court.[532] The main focus was on the explanation and the scope of the *doctrine of direct effect* and the *doctrine of supremacy*. The role of the Court and its influence on European integration has also been raised.[533] Two schools dominated the debate during the 9190s: neo-functionalism[534] and intergovernmentalism.[535] At the end of the 1990s and beginning of the 2000s, the ideas of the two schools started to converge, and the debate shifted a bit.[536] The independence and the impact of the Court were generally accepted,[537] but it was regarded as subordinate to various factors; among them, national jurisdictions.

From the start of the 2000s, new questions emerged in the debates. First, a clear distinction was made between the two procedures available before the Court: the preliminary ruling and the infringement procedure. While the infringement procedure is highly political and depends on the Commission's "willingness" to sue MS, the preliminary ruling has significantly greater potential to affect the way European law is enforced and applied in MS. Thus, the importance of the national courts ceased to be questioned: they were recognised as being crucial to implementing the Court's decisions and ruling in the national legal order. Indeed, due to its lack of administrative infrastructure, the effectiveness of the Court's role in the enforcement of European law is contingent on the support of national judiciaries, and it may vary across national judicial cultures.[538] However, the remaining question was why the national court should play according to the rules of the CJEU. It should be noted that not all courts have the same interest and incentive for applying the jurisprudence of the Court; for example, the lower national courts have a greater interest in bringing questions to the CJEU as a way of gaining a

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[532] *See* Weiler, J.H., 1994. A quiet revolution: The European Court of Justice and its interlocutors. *Comparative political studies*, *26*(4), pp.510-534; Golub, J., 1996. The politics of judicial discretion: Rethinking the interaction between national courts and the European court of justice. *West European Politics*, *19*(2), pp.360-385.
[533] *See* Wincott, D., 1995. The role of law or the rule of the Court of Justice? An 'institutional' account of judicial politics in the European Community. *Journal of European Public Policy*, *2*(4), pp.583-602.
[534] *See* Burley, A.M. and Mattli, W., 1993. Europe before the Court: A political theory of legal integration. *International Organization*, *47*(1), pp.41-76.
[535] *See* Garrett, G., 1992. International cooperation and institutional choice: The European Commun'ty's internal market. *International Organization*, *46*(2), pp.533-560.
[536] Wasserfallen, F., 2010. The judiciary as legislator? How the European Court of Justice shapes policy-making in the European Union. *Journal of European Public Policy*, *17*(8), pp.1131-1132
[537] Kelemen, R.D., 2012. The political foundations of judicial independence in the European Union. *Journal of European Public Policy*, *19*(1), pp.43-58.
[538] Scharpf, F.W., 2012. Perpetual momentum: Directed and unconstrained? *Journal of European Public Policy*, *19*(1), p.128

little independence from the higher national courts.[539] For a long time, the higher national courts resisted the CJEU's influence, but they are now theoretically forced to bring questions before the Court if requested. [540]

Moreover, the previous literature focused mainly on the *two heads* of the CJEU — infringement proceedings and preliminary rulings — the links between them, and their positions in the European legal system.[541] Concerning the infringement procedures, some studies have analysed the evolution of commission activity over time.[542] Some authors have attempted to explain this evolution as the inability of states to comply and state reluctance to conform. They have demonstrated that cross-national factors rather than national and individual aspects are responsible for non-compliance.[543] Meanwhile, other studies have proposed hypotheses to understand the behaviour of the Commission and show that some connection can be drawn between the number and the nature of infringement proceedings and the political agenda of the Commission.[544]

Regarding the preliminary rulings, debates concerned the ability of the Court to defend some general categories of rights, such as fundamental human rights[545] and social rights. The debate then shifted to more precise fields. A small number of studies have been conducted to examine if the CJEU influenced the fields of non-discrimination law, disability rights, equal

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[539] Alter, K.J., 1996. The European Court's political power. *West European Politics*, *19*(3), p.466

[540] Article. 267 TFEU – "*where any such question is raised in a case pending before a court or tribunal or a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."*

[541] Jacobs, F.G., 2003. Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice. *Texas International Law Journal*, *38*(3), p.548

[542] The scope of this study was not limited to OHS.

[543] *See* Mbaye, H.A., 2001. Why national states comply with supranational law: Explaining implementation infringements in the European Union, 1972-1993. *European Union Politics*, *2*(3), pp.259-281.

[544] Steunenberg, B., 2010. Is Big Brother watch ing? Commission oversight of the national implementation of EU directives. *European Union Politics*, *11*(3), p.361; Audretsch, H.A., 1986. *Supervision in European community law: observance by the member states of their treaty obligations, a treatise on international and supra-national supervision*. 2nd ed. North-Holland. p. 35; Conant, L.J., 2002. *Justice contained: Law and politics in the European Union*. Cornell University Press. pp.74-79; Falkner, G., Treib, O., Hartlapp, M. and Leiber, S., 2005. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press. pp.219-221

[545] *See* Weiler, J.H., 1986. Eurocracy and distrust: Some questions concerning the role of the European Court of Justice in the protection of fundamental human rights within the legal order of the European Communities. *Wash. L. Rev.*, *61*, pp.1103-1142; Coppel, J. an' O'neill, A., 1992. The European Court of Justice: Taking rights seriously? *Legal Studies*, *12*(2), pp.227-239.

treatment (gender equality)[546] or free movement.[547] Additionally, research shows some connection between the two procedures and underlines that the Commission's withdrawal from centralised enforcement led to an increase in private enforcement.[548] However, few studies have investigated the CJEU's influence in the specific field of the OHS, even if it is an important aspect of EU employment law. Moreover, the research that has been conducted only covers one part of the EU OHS scope: working time.

This chapter seeks to address the question of whether or not, in a context of legal paralysis at the European level in the OHS field, litigation before the CJEU has the potential to improve workers' occupational health and safety. The analysis proceeds as follows: the first section provides an overview of what has been done in terms of strategic litigation before the CJEU in the field of OHS in the form of infringement proceedings and preliminary rulings. Based on the CJEU's database,[549] an analysis of all of the Court's decisions in which the main argument relied on one OHS directive confirms the politicised behaviour of the Commission to initiate infringement proceedings and the shift towards a decentralised channel to enforce EU OHS standards — with an argument based on individual rights for workers.[550]

The second section of this chapter explores, from a more theoretical perspective, the hypothetical arguments that might be developed before the CJEU to expand the scope of the current OHS directives to new situations to compensate for the unlikelihood of the adoption of new directives. The section aims to show how it might be possible, under certain conditions, to develop the current OHS legal framework via a strategic litigation before the CJEU. To

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[546] *See* Alter, K.J. and Vargas, J., 2000. Explaining variation in the use of European litigation strategies: European community law and British gender equality policy. *Comparative Political Studies*, *33*(4), pp.452-482; Fuchs, G., 2013. Strategic litigation for gender equality in the workplace and legal opportunity structures in four European countries. *Canadian Journal of Law & Society/La Revue Canadienne Droit et Société*, *28*(2), pp.189- 208 ; Hilson, C., 2002. New social movements: the role of legal opportunity. *Journal of European Public Policy*, *9*(2), pp.238-255; Jacquot, S. and Vitale, T., 2014. Law as weapon of the weak? A comparative analysis of legal mobilization by Roma and women's groups at the European level. *Journal of European Public Policy*, *21*(4), pp.587-604; Barnard, C., 1995. A European litigation strategy: the case of the Equal Opportunities Commission.

[547] *See* Mabbett, D., 2005. The development of rights-based social policy in the European Union: The example of disability rights. *JCMS: Journal of Common Market Studies*, *43*(1), pp.97-120; Vanhala, L., 2006. Fighting discrimination through litigation in the UK: The social model of disability and the EU anti-discrimination directive. *Disability & Society*, *21*(5), pp.551-565; Davies, G., 2012. Activism relocated. The self-restraint of the European Court of Justice in its national context. *Journal of European Public Policy*, *19*(1), p.79

[548] Hofmann, A., 2018. Is the Commission levelling the playing field? Rights enforcement in the European Union. *Journal of European Integration*, *40*(6), p.738

[549] curia.europa.eu

[550] A total of 161 cases have been collected, and then classified according to the year of the decision, the type of action before the CJEU (i.e., infringement proceeding or preliminary ruling), the member states involved, and the OHS directive topic.

illustrate this idea, this section raises the possibility of expanding the right to an adaptable workstation beyond the current scope of disability, based on Article 6.d of the Framework Directive, to cover the situation of injured or unwell workers returning to work after sick leave for occupational reasons. Currently, injured or unwell workers are excluded from the disability protection framework if the impairment cannot be qualified as "long-term"; therefore, their situations vary depending on the national legislation and approaches. Based on disability protection, the argument would be that the general obligation of employers to prevent OHS risks for their workers also applies when the workers are impaired, as prevention can prevent the impairment from becoming a long-term disability. One way would be to adapt the workstation when the workers return to work. However, this strategy has limits due to the admissibility test and the costs that represent such an action. Therefore, it is subsequently argued that such an idea can be developed before the CJEU only if Trade Unions take the initiative to raise such questions.

An examination of the cases where TUs have been involved shows significant improvements in the application of the EU OHS framework; these examples underline that the TUs can and should be the actor in charge of initiating this kind of action. Of course, the ultimate limitation would be the philosophy of the CJEU, which can lead to a narrower understanding of the EU OHS framework rather than a broader one. Even if a favourable decision is held by the CJEU, there is no guarantee that the national courts will follow the recommendations of the CJEU.

5.2. The CJEU as a witness to the Commission's withdrawal of its responsibility for enforcing OHS and the shift towards increased responsibility of the individual

It is true that the Commission justified its failure to adopt new directives by reasoning that priority and emphasis should be placed on the enforcement of the existing legal framework. The Barroso Commission emphasised its role as the "guardian of the Treaties" and the importance of appropriate and effective implementation of OHS directives by the MS.[551] That

[551] *See details,* Chapter 2, p.51

said, however, some studies show the arbitrary behaviour of the Commission in deciding when to start infringement proceedings.[552]

One consequence of the Commission selecting cases is the (intentional or not) shift of the central enforcement (i.e., infringement proceedings) towards decentralised enforcement (i.e., preliminary rulings). Therefore, the primary aim of the analysis contained in this section is to consider the situation in terms of a balance between the centralised and decentralised way of applying and enforcing EU OHS standards before the CJEU. The second aim of this section is to highlight the impact of this shift on the CJEU's jurisprudence dealing with the development of OHS in the EU. Therefore, the following analysis will be structured in two parts: first, the study of infringement proceedings and then preliminary rulings.

5.2.1. The partial commitment of the Commission to enforcing OHS standards before the CJEU: A case study of the infringement proceedings

The infringement procedure is a way for the Commission to control the way MS implement the EU directives. According to Art. 226 of the Treaty, infringement proceedings consists of three formal stages: the Commission's initiation of a proceeding through a letter of formal notice, the Commission's legal elaboration through a reasoned opinion, and the Commission's referral of a case to the CJEU for a final decision. Considering the scope of this chapter, which focuses on the CJEU, only the last stage, involving the CJEU final decision, will be studied in what follows.

The examination of the cases of infringement proceedings connected to OHS directives shows three aspects of the Commission's behaviour as "guardian of the Treaties". First, the evolution of the number of infringement decisions held by the CJEU might be an indication confirming the Commission's arbitrary behaviour and the hypothesis of a link between the Commission's policy agenda and the willingness to initiate an infringement proceeding against MS before the CJEU. Second, the analysis of the nature of the infringement proceeding —

[552] Falkner, G., Treib, O., Hartlapp, M. and Leiber, S., 2005. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press. p.209 ; Kassim, H., Connolly, S., Dehousse, R., Rozenberg, O. and Bendjaballah, S., 2017. Managing the house: The presidency, agenda control and policy activism in the European Commission. *Journal of European Public Policy*, *24*(5), p.666

either a substantive or a formal control — highlights either the lack of resources of the Commission, or the intention to sue the MS in a minimal way.

5.2.1.1. The evolution of the number of Infringement Proceedings before the CJEU from 1984 to 2017

Regarding the evolution of the number of infringement proceedings judged before the CJEU, some studies have shown that overall, the Commission initiates less and less formal infringement procedures over time.[553] Hofmann observed that the number of court referrals reached its peak in 2006,[554] but this number dropped considerably in 2017.[555] For Hofmann, this decrease shows the first shift in the Commission's approach to centralised enforcement.[556]

For some authors, the willingness to bring some cases before the CJEU can be connected with the Commission's agenda and should be understood in a broader strategic context.[557] One study explicitly draws a connection between the decline in infringement proceedings and the restrained policy activism of the second Barroso Commission.[558] Therefore, as underlined by Mbaye, an activist Commission may bring more cases before the Court, whereas a passive Commission may bring fewer cases,[559] to the point where the infringement procedure is a *"political tool at the Commission's disposal"*.[560]

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[553] Hofmann, A., 2018. Is the Commission levelling the playing field? Rights enforcement in the European Union. *Journal of European Integration*, *40*(6), pp.737-751 – However, the scope of this study was not limited to OHS.

[554] Ibid, p.739 - The Commission referred 254 infringement cases to the CJEU; dataset based on: Sweet, A. S., and T. L. Brunell. 2007. "The European Court and Enforcement Actions: Data Set with
Codebook on Infringement Proceedings (Art. 226), 1958–2005.

[555] Ibid, p.739 - Only 41 cases

[556] Hofmann, A., 2018. Is the Commission levelling the playing field? Rights enforcement in the European Union. *Journal of European Integration*, *40*(6), pp.739-740

[557] Steunenberg, B., 2010. Is Big Brother watching? Commission oversight of the national implementation of EU directives. *European Union Politics*, *11*(3), p.361; Audretsch, H.A., 1986. *Supervision in European community law: Observance by the member states of their treaty obligations, a treatise on international and supra-national supervision*. 2nd ed. North-Holland. p.35; Conant, L.J., 2002. *Justice contained: law and politics in the European Union*. Cornell University Press. pp.74-79; Falkner, G., Treib, O., Hartlapp, M. and Leiber, S., 2005. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press. pp.219-221

[558] Kassim, H., Connolly, S., Dehousse, R., Rozenberg, O. and Bendjaballah, S., 2017. Managing the house: The presidency, agenda control and policy activism in the European Commission. *Journal of European Public Policy*, *24*(5), p.666

[559] Mbaye, H.A., 2001. Why national states comply with supranational law: Explaining implementation infringements in the European Union, 1972-1993. *European Union Politics*, *2*(3), pp.263-264

[560] Lenaerts, K. and Gutiérrez-Fons, J.A., 2011. The general system of EU environmental law enforcement. *Yearbook of European Law*, *30*(1), p.4

In the OHS field, analysis of the infringement proceeding cases based on at least one of the OHS directives (Fig.2) shows an overall increase in the activity from 1995, peaking in 2004 and then exhibiting a general decrease.[561] There may be a plausible reason for the increase in activity from 1995. First, the adoption of Directive 89/391/EEC was a turning point in the EU OHS development; as explained previously, there were not many earlier OHS directives, and the nature of these directives made it challenging to enforce any rights before the CJEU. Additionally, the Framework Directive and the individual directives were followed by a period of implementation at the national level, meaning a difference of a few years between the adoption of EU OHS Directives and the moment when their implementations were suitable for an investigation by the Commission. These two elements might explain the low number of infringement proceedings before 1995. However, the increase beginning in 1995 and the decrease beginning in 2004 might have a different explanation, which goes beyond technical and legislative timing.

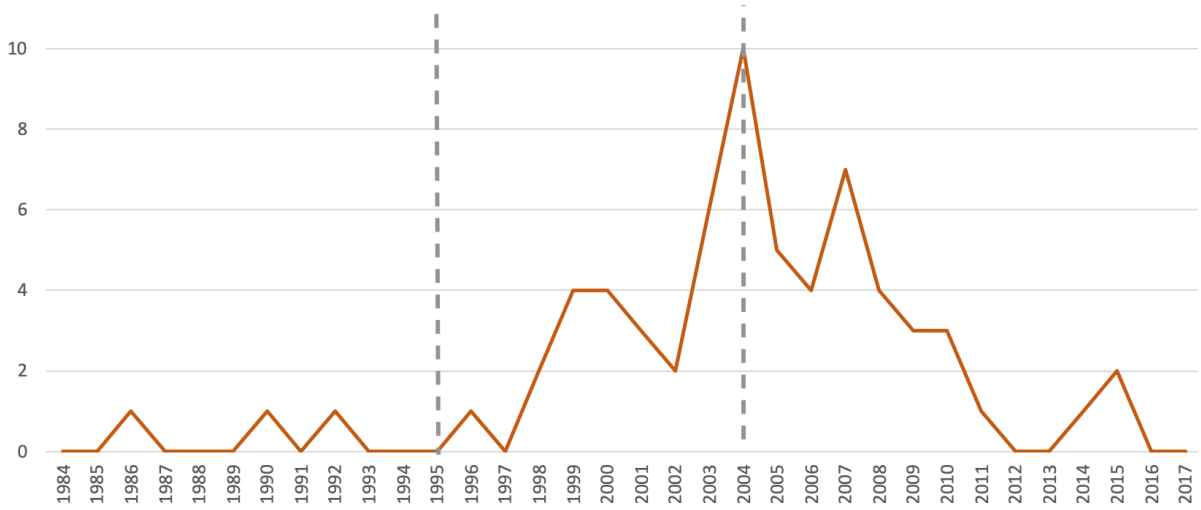

Figure 5- The number of infringement proceedings before the CJEU in OHS (1984-2017)

The hypothesis is that the variation in the number of infringement proceedings cases can be linked to the OHS agendas of different European commissions. Three distinct stages are observable in Figure 2: (1) before 1995,[562] (2) between 1995 and 2004,[563] and (3) from 2004 onward.[564] When these periods are compared with the mandates of the different commissions, it is possible to draw some connections with the Commissions' OHS agendas. Similar to what

[561] Observe the similar pattern between OHS and the overall picture with *Fig. 2* of Hofmann, A., 2018. Is the Commission levelling the playing field? Rights enforcement in the European Union. *Journal of European Integration*, *40*(6), pp.737-751.
[562] The time period corresponds to the Delors Commission
[563] The time period corresponds to the Santers, Marin, and Prodi Commissions
[564] The time period corresponds to the Barosso and Junker Commissions

has been noticed by Kassim et al., the decrease in infringement proceedings noticeable from 2004 corresponds to the nomination of Barroso as the president of the Commission.[565] As mentioned in a previous chapter, the Barroso Commissions prioritised flexibility and industry self-regulation to restart the competitiveness of companies, which led to characterising social rights, such as OHS, as a "burden".[566] The Barroso Commission published the "better regulation" strategy in the mid-2000s, which partially focused on simplifying the OHS directives and advocated for the simplification of the older provisions.[567]

Meanwhile, the Barosso Commissions published two health and safety strategies[568] that were criticised for their lack of clarity and pragmatism.[569] Paradoxically, the Barosso Commission emphasised its role as "*guardian of the Treaties"* and said that it would not hesitate to sue MS that did not implement the OHS directives effectively. Based on the decline of the number of infringement proceedings, one might doubt the commitment of the Commission to control the implementation of the directives by MS. As for the periods before, it has been shown that most of the existing EU OHS directives were adopted under the Delors Commissions. As explained above, the time before 1995 corresponded with the implementation phase of these directives. Therefore, there have been no, or only a few, infringement proceedings because there was nothing to control while the MS were implementing the directives.

Under the Prodi and the Santers Commissions, the emphasis was on non-legislative measures and resistance towards legislative procedures.[570] This might be the reason for a relatively small increase from 1995. It is necessary to wait for the appointment of the Prodi Commission[571] to notice a real increase in infringement proceedings. As mentioned in a previous chapter, the Prodi Commission re-centred its OHS action around the Framework Directive, which can also explain the motivation to control the implementation of the existing

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[565] Kassim, H., Connolly, S., Dehousse, R., Rozenberg, O. and Bendjaballah, S., 2017. Managing the house: The presidency, agenda control and policy activism in the European Commission. *Journal of European Public Policy*, *24*(5), p.666

[566] Vogel, L. 2010. Barroso I: A 5-year standstill on health and safety at work. *HesaMag 2.* pp.6-9

[567] *See* Vogel, L. and Van den Abeele, E., 2010. *Better Regulation: a critical assessment*. ETUI; Van den Abeele, E., 2010. *The European Union's Better Regulation Agenda*. Brussels: European Trade Union Institute.

[568] *Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work,* COM(2007) 62 final of 21.02.2007; EU Strategic Framework on Health and Safety at Work 2014-2020, COM(2014) 332 final of 06.06.2014

[569]Del Castillo, A.P., 2016. Occupational safety and health in the EU: back to basics. *Social policy in the European Union: state of play 2016*, pp.141-146

[570] See Chapter 2, pp.46-49

[571] Between 1999 and 2004

legal framework.[572] Therefore, this analysis possibly confirms that the political willingness of the Commission to enforce and ensure effective transposition of the directive before the CJEU shall be understood within a broader context of the Commission's political agenda. The official agenda should also be considered in the context of the OHS field and influence the behaviour of the Commission in its action of infringement proceedings before the CJEU.

5.2.1.2. The evolution of the nature of the control of the Commission before the CJEU from 1986 to 2017

A close examination of the focus of the infringement proceeding gives complementary indications regarding the nature of the control of the Commission over the years. Previous studies have shown that a majority of infringement proceedings are due to non-notification (i.e., notification of the report of transposition if the directive in the national legal system by the MS to the Commission) of the MS rather than incorrect notification, resulting in the incorrect implementation of the directives into the national legal system.[573] The authors explained this difference by arguing that the Commission's resources determine its enforcement policy. Indeed, control of the notification by the MS can easily be achieved with a binary approach: has the MS notified the Commission or not? However, determining if an MS has correctly implemented the directive requires more resources, time, and expertise, and is more demanding of the Commission.[574]

Other studies have also noticed that the Commission's limited resources have an important impact on the limited number of infringements cases and prevent the Commission from adopting a systemic approach.[575] Under these circumstances, the actual interventions are determined by the political preferences and agendas of the Commission.[576] There are three consequences of this non-systemic approach: (1) it encourages bargaining between the

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[572] *See* Chapter 2, pp.45-46
[573] Two-thirds of the infringement procedures studied dealt with non-notification according to Falkner, G., Treib, O., Hartlapp, M. and Leiber, S., 2005. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press. p.220
[574] *Ibid*. p.202
[575] Steunenberg, B., 2010. Is Big Brother watching? Commission oversight of the national implementation of EU directives. *European Union Politics*, *11*(3), p.371 ; Tallberg, J., 2002. Paths to compliance: Enforcement, management, and the European Union. *International organization*, *56*(3), p.626
[576] Falkner, G., Treib, O., Hartlapp, M. and Leiber, S., 2005. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press. p.219

Commission and the MS to avoid going before the CJEU[577] and is a less formal method of enforcement;[578] (2) because the Commission may act strategically when selecting cases that are to go before the ECJ,[579] the Commission may be less regarding about the way in which the MS implement the directives;[580] (3) it creates a shift towards "domestic enforcement" and the development of preliminary rulings.

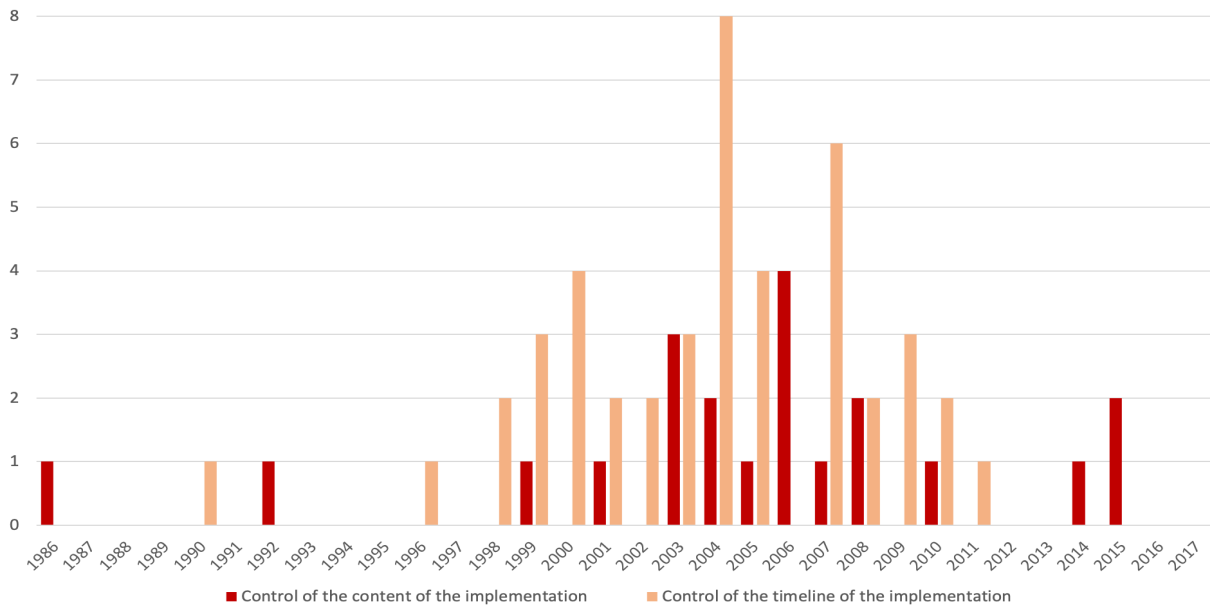

Figure 6 - The topic of infringement proceedings (1986-2017)

In the OHS field, the evolution of control of the notification by the MS (i.e., control of the implementation timeline; Fig. 3) follows the general evolution of the number of infringement proceedings (Fig. 2). This shows that most of the Commission's activity has revolved around the control of the delay in notifications by the MS.[581] So far, the Commission has won all cases focusing on the notification period before the CJEU. The Court based its decisions on two main principles. First, the consideration for the appreciation of

[577] Tallberg, J., 2002. Paths to compliance: Enforcement, management, and the European Union. *International Organization*, *56*(3), p.617

[578] *See* Hartlapp, M., 2008. Extended governance: Implementation of EU social policy in the member states. *Innovative Governance in the European Union: The Politics of Multilevel Policymaking*, pp.221-236. ; Van Voorst, S. and Mastenbroek, E., 2017. Enforcement tool or strategic instrument? The initiation of ex-post legislative evaluations by the European Commission. *European Union Politics*, *18*(4), pp.640-657.

[579] Mbaye, H.A., 2001. Why national states comply with supranational law: Explaining implementation infringements in the European Union, 1972-1993. *European Union Politics*, *2*(3), p.268

[580] Steunenberg, B., 2010. Is Big Brother watching? Commission oversight of the national implementation of EU directives. *European Union Politics*, *11*(3), p.372

[581] It represents 68% of the infringement proceeding related to OHS directives; it confirms finding Tallberg, J., 2002. Paths to compliance: Enforcement, management, and the European Union. *International Organization*, *56*(3), p.625

implementation or lack of implementation of the EU OHS in the national legal system means the situation at the end of the delay mentioned in the reasoned opinion, and subsequent modifications will not be taken into consideration.[582] Thus, it does not matter if a national parliament is debating implementation at the moment of the Court's decision; it is too late. The second principle on which the Court bases its decision is that an MS cannot justify the non-implementation of EU directives by the structure of its internal organisation, such as federalism.[583]

Meanwhile, a minor but meaningful part of the infringement proceeding controls the content of national implementation.[584] The Commission has won 66% of the cases. On the occasions when the Commission has lost, the CJEU based its decisions on two arguments to reject the Commission's claims. The first argument of the Court was to favour a flexible, "national friendly" understanding of EU OHS Directives, in opposition to a more restricted vision by the Commission. This was the case with the measures to select the health and safety representatives, where the Commission advocated for a detailed national law to frame the election process of these representatives.[585] According to the Court, Directive 89/391/EEC does not contain any obligation for MS to organise the election of workers' representatives in a particular way orientated towards the protection of OHS. There are various mechanisms to appoint these representatives, and the choice belongs to the MS.

A similar idea is illustrated by one judgement of the Court that had an impact on the entire EU OHS field by providing details on the nature of the employer's responsibility in the context of Directive 89/391/EEC and subsequent related directives. Indeed, in the case C-127/05,[586] the Commission defended a narrow interpretation of the employer's responsibility that could be considered a "*result obligation",*[587] where the employer would have the strict obligation to keep his or her employees safe. This means that if there is an accident, or if an

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[582] *"It is settled law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in the Member State as it stood at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes (see, inter alia, C-361/95 Commission of the European Communities v Spain [1997] ECR I-7351, paragraph 13)".*

[583] *" Par ailleurs, la Cour a itérativement jugé qu'un État membre ne saurait exciper de dispositions, de pratiques ou de situations de son ordre juridique interne, y compris celles découlant de son organisation fédérale, pour justifier l'inobservation des obligations et des délais prescrits par une directive".*

[584] It represents 32% of the infringement proceeding related to OHS directives.

[585] C-425/01, Commission of the European Communities v Portuguese Republic. ECR *2003 I-06025*

[586] Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. (2007) ECR I-04619

[587] *Obligation de résultat*

employee contracts an occupational disease, the employer is held responsible unless there is proof of the worker's fault and responsibility. This vision is opposed to the obligation for the employer to prevent the risks when it is "*reasonably practicable",*[588] where the employer has to organise the prevention of the risks insofar as it is reasonably possible to do so. This means that if there is an accident, or if an employee contracts an occupational disease, employers will not be held responsible if they did their best. The Court determined that the directive provides only a general duty of employers to ensure the safety and health of workers, without detailing anything about the nature or the form of the responsibility. Consequently, as long as the MS implement the general obligation, they are free to choose the measures that suit them best.

The Court commonly used a second argument when it surmised that the Commission did not demonstrate that the national laws implementing the directive were contrary to the EU legal order and sometimes did not establish the existence of a practice contrary to the directive.[589] Cases where the Commission won involved the intervention of the Commission when the laws implementing the directives were not clear or detailed enough to ensure the full applicability of EU OHS standards.[590] The action of the Commission before the Court led to improvements in terms of the scope of application of the OHS directives and ensured a general application regardless of the sector,[591] the number of workers,[592] and gender.[593] It also led to a change of practices in the employment relationship concerning the application of working time and the guarantee that workers could benefit from their time and day off.[594] This shows that some substantial improvements have been made through the Commission's actions.

However, the Commission's commitment to controlling the implementation of the EU directives is limited. Considering the number of directives and the number of MS, it is surprising that national measures wrongly implemented EU OHS Directives in only twenty-

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[588] HSW Act 1974, s.2
[589]C-188/84 ; C-428/04 ; C-459/04 ; C-252/13 ; C-87/14
[590] For the implementation of Directive 89/391/EEC, concerning the risk assessment see cases C-49/00 and C-5/00, and for the hierarchy of the employer's duties, see cases C-49/00 and C-428/04; for the implementation of Directive 85/501/EEC, see cases C-190/90 and C-336/97; for the implementation of Directive 96/82, see case C-392/08; for the implementation of Directive 90/270, see case C-455/00.
[591] For the application of Directive 89/391/EEC, see cases C-226/06, C-132/04 and C-428/04; for the application of Directive 2003/88, see case C-180/14; for the application of Directive 86/686/EEC, see case C-103/01.
[592] For the application of Directive 89/391/EEC, see cases C-5/00 and C-428/04; For the application of Directive 92/57, see case C-504/06.
[593] For the application of Directive 76/207/EEC, see case C-203/03.
[594] For the application of Directive 93/104/EEC, see case C-484/04

two cases.[595] Although the decisions before the CJEU represent only the last stage of the infringement proceedings and most of the cases never reach the CJEU,[596] the existing cases for incorrect implementation of EU OHS standards represent only 2,6% of all possible cases.[597] Without advocating for action by all MS on all the OHS directives, we may question whether the Commission is appropriately investigating the content of the national implementation laws according to its role as "*guardian of the Treaty"*.

5.2.1.3. Conclusion

To conclude, analysis of the evolution of the number of infringement proceedings cases relating to OHS confirms conclusions drawn in the literature which suggest that the political willingness of the Commission to enforce and ensure proper transposition of the OHS directive before the CJEU should be understood within a broader context and that the official Commission's agenda should be considered. Additionally, the examination of the focus and the nature of the control of the Commissions also confirms that most of the Commission's activity revolved around the control of the delay of transpositions. Only a minority of cases concerned the nature of the implementation. Further investigations would be required to link these results to the question of the Commission's resources to conduct such actions, but it might be a plausible explanation. These results also support the hypothesis that the Commission acted to encourage the decentralisation of enforcement of OHS directive, i.e. via preliminary rulings. Overall, the analysis of the infringement proceeding in the OHS field shows a weakness of the Commission when it comes to the enforcement of EU OHS standards. It is unlikely that the Commission will change its approach in the coming years. Therefore, preliminary rulings should be considered further as a suitable alternative method to enforce and apply EU OHS standards.

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[595] If we take in consideration that there are 30 European OSH directives, and 28 member states; it means that there are 840 possible controls of the implementation of the EU OHS directives. Therefore 22 cases of infringement proceeding represent 2.6% of these opportunities, and 65 cases of infringement proceeding represent 7.7% of the opportunities.

[596] Mbaye, H.A., 2001. Why national states comply with supranational law: Explaining implementation infringements in the European Union, 1972-1993. *European Union Politics*, *2*(3), p.267

[597] This study only looks at the judgement by the ECJ, not the referral to the ECJ, the reasoned opinion or the Letter of Formal Notice — as shown in Falkner, G., Treib, O., Hartlapp, M. and Leiber, S., 2005. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press. p.209, the judgement by the ECJ represent only a small percentage of the infringement procedures initiated by the Commission

5.2.2. Preliminary rulings as a last resort to effectively enforce EU OHS standards

According to Art. 267(2) TFEU, the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and the validity and interpretation of acts by institutions, bodies, offices, or agencies of the Union — including directives. As early as 1963, the Court in *Van Gen and Loos*[598] ruled that the rights conferred directly on the individuals should be protected and enforced even against the interests of their own state.[599]

The preliminary ruling is considered to be a pillar of the Community legal order,[600] central to the legal integration of Europe because it allows national courts to enforce EU law over national law.[601] Indeed, the most important legal decisions of the Court have been made in preliminary ruling proceedings.[602] In contrast to infringement proceedings, in cases of preliminary rulings, the costs of supervision rely on individuals and national courts. According to Tallberg, it is a way for individuals to secure their rights under EU law more directly and with a higher chance of judgements being respected compared to infringement proceedings.[603]

An examination of all preliminary rulings concerning OHS directives reveals three points of interest. First, the evolution in the number of preliminary rulings heard by the CJEU might provide some indication confirming a shift from a centralised to a decentralised method of enforcing EU OHS standards. Second, the analysis of the nature of the preliminary rulings confirms that OHS claims are based on individual rights provided by the directives, which are few in number given the reflexive nature of OHS directives. Finally, an examination of the origins of the referrals for a preliminary ruling shows interesting differences among the MS, with some countries being more active than others.

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[598] Case 26/62
[599] Woodworth, R.L., 1966. The Court of Justice of the European Communities: The Request for a Preliminary Ruling and the Protection of Individual Rights Under Article 177 of the Treaty of Rome. *Syracuse L. Rev.*, *18*, p.604
[600] Dauses, M.A., 1986. Practical considerations regarding the preliminary ruling procedure under Article 177 of the EEC Treaty. *Fordham Int'l LJ*, *10*, p.539
[601] Carrubba, C.J. and Murrah, L., 2005. Legal integration and use of the preliminary ruling process in the European Union. *International Organization*, *59*(2), p.399
[602] Dauses, M.A., 1986. Practical considerations regarding the preliminary ruling procedure under Article 177 of the EEC Treaty. *Fordham Int'l LJ*, *10*, p.539
[603] Tallberg, J., 2002. Paths to compliance: Enforcement, management, and the European Union. *International Organization*, *56*(3), p.622

5.2.2.1. The evolution of the number of Preliminary Rulings before the CJEU from 1984 to 2017

Figure 7 - The number of preliminary rulings compared to infringement proceedings before the CJEU on OHS (1984-2017-

The intensity of litigation related to OHS before the CJEU related to OHS changed considerably over time.[604] According to Hofmann, the number of private rights claims with preliminary references before the CJEU reached a new record in 2017, with 533 newly registered cases.[605] Hofmann observes that references for preliminary rulings now make up almost three-quarters of the CJEU's caseload. For him, there is a clear connection between the increasing number of preliminary rulings and the decreasing number of infringement proceedings by the Commission. Therefore, private enforcement can be seen as a potential substitute for infringement proceedings: in effect, a form of de-centralised infringement procedure.

In OHS, although there is confirmation of an increase, it is certainly not of the same degree as the global trend observed by Hofmann. There is indeed an increase from 1995 onward; however, the most plausible explanation is the increase in the quantity and significance of EU legislation dealing with OHS. As emphasised previously, before Directive 89/391/EEC,

[604] *See Figure 7.*
[605] Hofmann, A., 2018. Is the Commission levelling the playing field? Rights enforcement in the European Union. *Journal of European Integration*, *40*(6), p.741

there were only a few OHS directives, which had a limited impact.[606] Although the directives were mandatory, they only provided recommended thresholds of limit values on occupational exposure to chemical substances. Therefore, their enforcement before the courts was rare. The European legislative activity related to OHS increased after the adoption of Directive 89/391/EEC. Most of the current EU OHS Directives were adopted between 1992 and 1996.

Additionally, we must also consider the time required for the directives to be transposed into the national legal orders, to confer rights to workers, and to be challenged before the national courts. Only thereafter was it possible to require the opinion of the CJEU. Thus, as for the infringement proceedings, the delay and the start of the litigation activity only from 1995 onwards. However, contrary to the infringement proceedings, there was an overall increase in the use of preliminary rulings — despite the variations from one year to another. According to Fig. 4, from 2009, the number of preliminary rulings becomes more important than the number of infringement proceedings. Of course, the two procedures are different, but it might illustrate, to a certain extent, the shift from a centralised to a decentralised method of controlling the application of the EU legal framework in the OHS field.

5.2.2.2. The nature of Preliminary Rulings before the CJEU

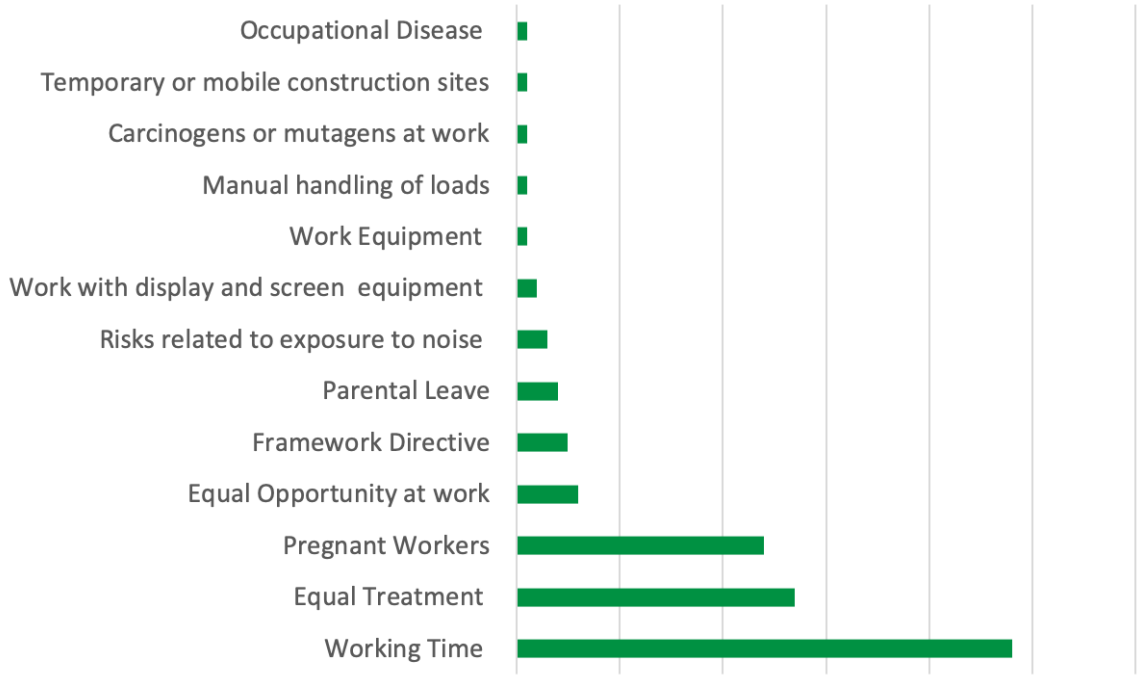

Figure 8 - The topic of preliminary rulings cases

[606] *See* Chapter 2, pp.27-32

Following the nature of preliminary ruling claims before the CJEU, analysis of the subjects brought before the Court is an essential key element to understanding the current trends in litigation. According to Fig. 5, three areas stand out in the OHS field: working time, equal treatment, and pregnant workers.[607] The equal treatment directive[608] has been used to protect pregnant workers either before the enforcement of the pregnancy directive[609,610] or as a complement to it.[611] A similar combination between directives can be seen with the directive for equal opportunities at work[612] and the directive on pregnant workers.[613] Therefore, the main subjects about which an action has been brought before the CJEU are working time directives and pregnant workers directives. These two fields differ from the rest of the EU OHS Directives in that they provide individual rights to workers and offering a resolution of cases with monetary compensation. Other OHS directives embody some individual rights, such as the directives on parental leave,[614] working with display and screen equipment,[615] and the risks related to noise.[616] The cases based on these directives do not represent a majority of the cases; however, when they are challenged before the CJEU, the large majority is through a preliminary ruling action. This suggests that they present a potential for further actions in the future.

The other fields where the preliminary rulings are less prevalent and where infringement proceedings are more common, cover directives in which there are no individual rights and mostly consist of obligations of the employer, the project supervisor, the operator, or the MS directly. Additionally, the OHS directives that have not led to preliminary rulings are mostly

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[607] Interestingly, these two topics have also been highlighted in a study focusing on infringement proceedings. The authors suggested that these directives raised conflict between the supranational and the national level. *See* Falkner, G., Treib, O., Hartlapp, M. and Leiber, S., 2005. *Complying with Europe: EU harmonisation and soft law in the member states*. Cambridge University Press. p.210

[608] And particularly, Directive 76/207/EEC

[609] Directive 92/85/EEC

[610] C-179/88, Birthe Vibeke Hertz vs. Aldi Marked K/S; C-421/92, Gabriele Habermann – Beltermann vs. Arbeiterwohlfahrt, Bezirksverband Ndb./ Opf.e.V

[611] C-32/93, Carole Louise Webb vs. EMO Air Cargo (UK) Ltd; C-400/95, Helle Elisabeth Larsson vs. Føtex Supermarked A/S; C-394/96, Mary Brow vs. Rentokil Ltd; C-66/96, Berit Høj Pedersen & Kvickly Skive vs. Bettina Andersen, Jørgen Bagner vs. Tina Pedersen, Jørgen Rasmissen vs. Pia Sørensen & Hvitfledt Guld of Sølv ApS; C-109/00, Tele Danmark A/S vs. Handel-og Kontorfunktionærernes Forbund I Danmark (HK); C-460/06, Nadine Paquay vs. Société d'architects Hoet + Minne SPRL; C-506/06, Sabine Mayr vs. Bäckerei und Konitorei Gerhard Flöckner OHG; C-232/09, Dita Danosa vs. LKB Lïzings SIA.

[612] Directive 2006/54/EC

[613] C-167/12, C.D. vs. S.T.; C-363/12, Z. c/ A Government department, The board of management of a community school; C-65/14, Charlotte Rosselle vs. Institut National D'assurance Maladie-invalidité (INAMI), Union Nationale des Mutualités Libres (UNM).

[614] Directive 96/34/EC, and Directive 2010/18/EC

[615] Directive 90/270/EC

[616] Directive 86/188/EC, and Directive 2003/10/EC

directives that can be considered reflexive law. It has been argued that the theory of reflexive law has consequences on regulatory design and implies a shift from substantive to procedural law.[617] Thus, it encourages the self-regulation mechanism, which is the aim of most of the OHS directives. Therefore, much freedom in the method of application is given to the MS and the industrial partners. Hence, it is not suitable for preliminary ruling actions, or it is harder to prove the non-compliance of national rules with the EU legal requirements.

These observations might confirm the hypothesis that some rights and OHS provisions are more suitable than others to be the object of an action before the courts, either national or European. This does not mean that the European obligations regarding OHS are not enforceable, but that the CJEU might not be the appropriate channel for it. Therefore, the improvement of workers' OHS would have to be developed through these individual rights, rather than the enforcement of organisational obligations.

5.2.2.3. The variations of the Member States' willingness to ask the CJEU via Preliminary Rulings

Regarding the variation of preliminary rulings depending on the country, Carrubba and Murrah noticed an overall increase in the number of preliminary references over three decades.[618] They underlined that this overall increase is not uniform among the MS. They raise a series of hypotheses to explain the differences between the MS, including the variation in transnational economic activity, variation in legal culture, variation in legal doctrine (i.e., monism vs dualism), variation in public support for integration, and variation in political information.[619] Additionally, another study also noticed the activity in terms of preliminary rulings varies among the MS; they argue that the difference might be due to the resources of the institution and that courts in bigger and highly judicialized countries send more references to the CJEU.[620]

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[617] Deakin, S. and Rogowski, R., 2011. 11. Reflexive labour law, capabilities and the future of social Europe. *Transforming European employment policy: Labour market transitions and the promotion of capability*, p.232

[618] Carrubba, C.J. and Murrah, L., 2005. Legal integration and use of the preliminary ruling process in the European Union. *International organization*, *59*(2), pp.399-418.

[619] *Ibid* pp.402-407

[620] Vink, M., Claes, M. and Arnold, C., 2009. Explaining the use of preliminary references by domestic courts in EU member states: A mixed-method comparative analysis. Paper presented in Panel 6B "Judicial Politics in the EU and Beyond", 11th Biennial Conference of the European Union Studies Association.

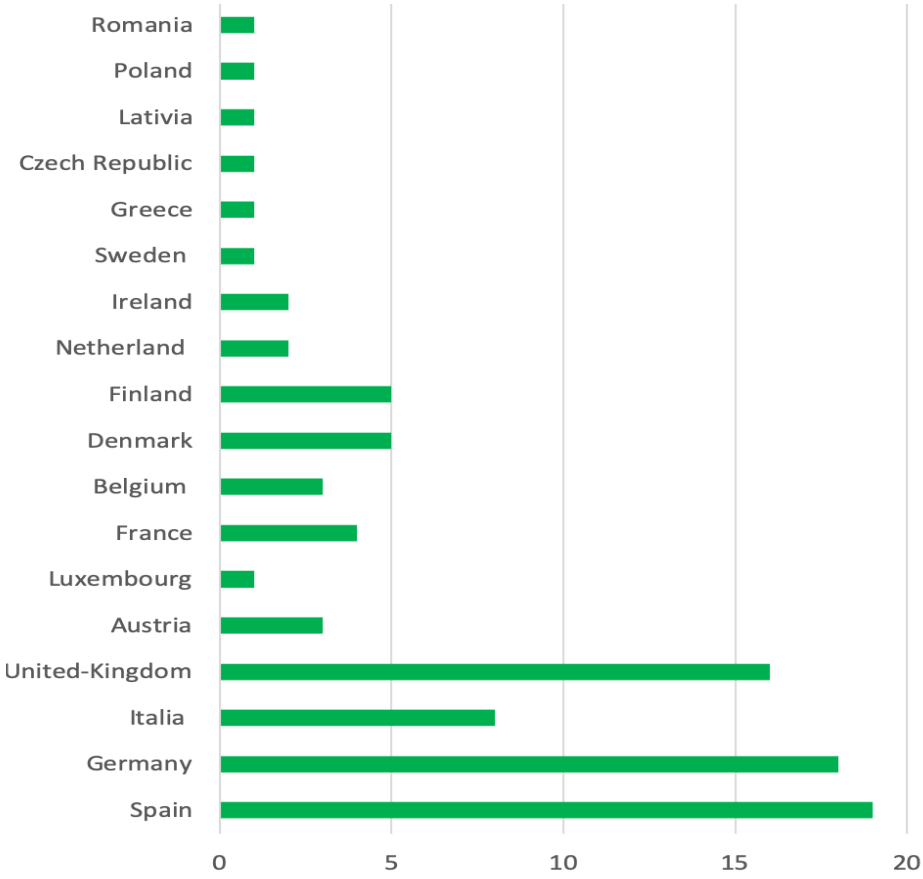

Figure 9 - Member States with courts referring to the CJEU with preliminary questions

Regarding the difference among countries' use of preliminary rulings before the Court in OHS cases, three countries stand out: Spain, Germany, and the UK. The current study does not provide any explanation for their behaviour but raises hypotheses that could be verified by additional studies. There are two main hypotheses: first, that the socio-cultural background of MS influences their willingness to ask questions of the CJEU. Indeed, some comparative research has proven that there are differences in the frequency of preliminary references originating from courts in MS.[621] For example, the authors of the study have shown that judges in *majoritarian democracy* (e.g., Denmark, Sweden, Finland and the UK) countries seem to be less willing to challenge the national laws adopted according to a democratic process and to submit to the control of European judges that have not been elected.[622] On the other side, judges from *constitutional democracy* are more willing to refer questions to the CJEU.[623] This theory applies partially here; Spain, Germany, and Italy are indeed more active than Sweden, Finland, and Denmark (see Fig. 6). However, this does not explain why this path is not the same for

[621] Wind, M., Martinsen, D.S. and Rotger, G.P., 2009. The uneven legal push for Europe: questioning variation when national courts go to Europe. *European Union Politics*, *10*(1), p.67
[622] Ibid, p.72
[623] Ibid, pp.73-74

other countries, such as Portugal or Austria. This point requires further investigation on the number of times a national court is asked to communicate a question to the CJEU (related to OHS), and the reactions of the courts depending on the MS. Further study would allow the habits of preliminary ruling processes across the EU to be mapped.

Second, the differences between the countries might be due to national interest — or lack of interest — in bringing OHS issues before the courts in general. This depends on the willingness of the parties to bring the case at a European level. Indeed, these procedures require more preparation, financial resources, and time. All the differences cannot be explained in this chapter; however, it is essential to know that they exist, as they should be taken into consideration when developing potential proposals for a litigation strategy based on the EU OHS legal framework. These proposals will not find the same application all over Europe and will need to be adapted depending on the national context. Moreover, further studies need to be done on the importance given to OHS at the national level and if it is a matter that is contested before the courts.

5.2.2.4. Conclusion

To conclude, the analysis of the evolution in the number of preliminary rulings concerning OHS directives confirms the previous literature on a shift from a centralised to a decentralised method of controlling the implementation and ensuring the correct application of EU OHS standards. Additionally, a close examination of the topics of the argument affirms that to be possible and successful, these claims have to be based on rights granted individually to workers, which is rare in OHS given the reflexive nature of the provisions embodied in the directives. Finally, the information on the MS in which the claims originate shows that at the national level, either the courts are not equally willing to request the opinion of the CJEU regarding the national laws or the workers are not willing to challenge their OHS rights before the courts. However, this demonstrates that the use of preliminary rulings and requests might be a suitable way to ensure the correct application of EU OHS standards in cases concerning individual workers' rights.

5.2.3. The potential limits of future litigation before the CJEU as a strategy to develop OHS

The results discussed above provide an overall picture of the situation, and some hypotheses were proposed to explain it; however, it is important to acknowledge the limitations of the method used and the need for further investigations. In this respect, it is important to clarify precisely what this section did and did not do. It looked at CJEU jurisprudence, where an OHS directive is mentioned as the source of the legal argument. It did not look at national jurisprudence where an OHS directive has been mentioned as the basis of the legal argument without raising a question before the CJEU. A study of this kind would be necessary to make the distinction between two situations: (1) when national courts do not refer at all to EU OHS Directives (which can express a rejection of the European legal activity in that field), and (2) when national courts do refer to EU OHS Directives but do not raise question (which can express a recognition of the EU OHS legal action but a refusal to challenge the national law adopted through a democratic process with the opinion of non-elected European judges). At the same time, this study examined the preliminary ruling requests that got through the admissibility test. It did not examine those requests that were found to be inadmissible. It would be interesting to study these numbers and the reasons for rejection. This would provide data that could illustrate the difference between *legal apathy* at the national level regarding EU OHS Directives and a *silent dynamic* that is stifled by the procedural rules.

It is also important to relativize and be aware of the limits of the CJEU's powers for the cases mentioned connected to OHS and in general. Indeed, some authors have underlined the importance of the national context in connection with the CJEU rulings and the influence of the MS.[624] Additionally, it is fundamental to remember that the CJEU has the power that the national courts give it.[625] Indeed, only the Court's interpretation of the Treaty of the EU law is binding, but this is not the case for the opinions on particular cases, which represent most of the OSH preliminary rulings.[626] Thus, the effectiveness of a decision of the Court depends on

[624] Carrubba, C.J., Gabel, M. and Hankla, C., 2008. Judicial behavior under political constraints: Evidence from the European Court of Justice. *American Political Science Review*, *102*(4), pp.435-452.
[625] Fastovets, A., 2015. Judicial activism and interpretation of law: should the European Court of Justice restrain itself?. *European Political and Law Discourse*, Vol.2(3), p.70; Dauses, M.A., 1986. Practical considerations regarding the preliminary ruling procedure under Article 177 of the EEC Treaty. *Fordham Int'l LJ*, *10*, p.575
[626] Davies, G., 2012. Activism relocated. The self-restraint of the European Court of Justice in its national context. *Journal of European Public Policy*, *19*(1), p.79

the support of the national judges and authorities, and it might vary considerably from MS to MS.[627] In the current context of mistrust towards European institutions, at a time where nationalist parties are gaining power in the European Union, it is important for the Court to *"be aware that the ultimate success of EU law depends on national judicial support, and that excessive bossiness and doctrinal overreach could be counterproductive".*[628] Thus, the challenge involved in developing further litigation before the CJEU is to find legal provisions that the CJEU can expand and apply and that the national jurisdictions and MS will accept.

5.3. Developing the Protection of Workers' OHS Before the CJEU Through Preliminary Proceedings

Based on the previous section, a pattern for successful cases may be discerned. Despite important successes before the Court, it is possible to highlight situations that have not yet been challenged via preliminary rulings, such as the protection of workers in case of occupational disease or workplace accident. Given that the situation of the workers affected by disease or a workplace accident has only been examined through the lens of non-discrimination and the concept of disability, at the EU level, individuals who suffer from limited impairment are excluded from the protective scope of Directive 2000/78/EC, such as art.5.

Throughout its jurisprudence, the CJEU has defined disability as a long-term limitation that results from physical, mental, or psychological impairment and hinders participation in professional life. However, this definition does not cover workers suffering from impairment at the early stage of the limitation. To address this legal gap, the current study investigates if there are legal provisions in the existing framework that can apply to injured or unwell workers returning to work after a workplace accident or an occupational disease, and how these provisions can be structured in the context of a strategic litigation before the CJEU. As underlined by Alter and Vargas, litigation at EU level offers advantages that a domestic legal strategy does not offer. The preliminary ruling process creates a way to avoid opposition at the national level while allowing strategic litigation to succeed with the support of only a few lower

[627] Scharpf, F.W., 2012. Perpetual momentum: directed and unconstrained? *Journal of European Public Policy*, *19*(1), p.128
[628] *Ibid* p.88

level courts.[629] Developing an argument for a European legal strategy before the CJEU would also have the advantage of having a very broad impact with one successful ruling.

The aim of this section — using the example of injured or unwell workers — it to explore the possibilities to expand the boundaries of the existing EU OHS law before the CJEU to cover new aspects of workers' OHS protection. It begins by reviewing the current European legislative framework and jurisprudence regarding the adaptation of the workplace of disabled workers. This overview highlights the restrictive approach of the concept of disability and why injured or unwell workers are not covered – at least at the early stage. The reason is that currently, the origin of the disability is not taken into consideration; only the effect is analysed. This approach is challenged on the basis that the origin of the impairment is important because it is the employer's responsibility under the Directive 89/391/EEC to prevent the risk to the health and safety of the workers. Therefore, if the worker is injured or unwell due to their work, the employer should prevent any further deterioration due to the worker's conditions.

This section investigates the possibility of an extensive application of the obligation of prevention under Article 6.2.d. of Directive 89/391/EEC. The first conclusion is that while the jurisprudence on disability at work does not provide workers with appropriate protection at the early stage of impairment, by focusing on the occupational origin of the impairment, it is possible to develop a complementary litigation strategy advocating for an injured or unwell individual's right of workplace adaptation before the CJEU based on Directive 89/391/EEC. This hypothetical argument provides an example of a situation or legal question on which the CJEU could give an opinion that would contribute to the improvement of the EU OHS legal framework. Indeed, if the CJEU recognises that not having a right of adaptation of the workstation for injured or unwell workers is contrary to the Framework Directive and the obligation of prevention, this decision would have an impact on all the national jurisdictions of the MS. However, this argument has limits and some elements need to be taken into consideration. One of them is the cost that action before the CJEU represents. Therefore, in a second part, this section reviews the previous action of TUs in the development of the application of OHS standards before the CJEU to assess whether they are suitable actors to coordinate or support such litigation in the future. In a third and last section, more theoretical

[629] Alter, K.J. and Vargas, J., 2000. Explaining variation in the use of European litigation strategies: European community law and British gender equality policy. *Comparative Political Studies*, *33*(4), p.453

considerations regarding the feasibility of raising such a question before the CJEU are addressed, i.e., the role of the national judges in the preliminary ruling process, and the power of the CJEU as a "law-maker".

5.3.1. The right to reasonable accommodation in the workplace: A case study of disability jurisprudence

5.3.1.1. The current state of the CJEU jurisprudence: Disability and illness

So far, the problematic situation of workers affected by a disease or a workplace accident has only been examined through the perspective of non-discrimination and its connection with the concept of disability. Disability started to be a matter of interest and concern at the European level in 1996, and more specifically, when the CJEU's interpreted Directive 2000/78/EC.[630] At that moment, the Court took up the role of developing the principle of equal treatment and non-discrimination as a general principle of Community law. The CJEU cases in that field suggest the equality directive because they are a specific formulation of the general principle of equality and have a direct horizontal effect.[631] However, the understanding of this concept is restricted and narrow.[632] This understanding has been challenged several times, for example, in the case of the purported relationship between disability and obesity,[633] a link that has been rejected. Some studies of the CJEU jurisprudence and its potential extension have already been investigated and underline the various "missed opportunities", and the extension to sickness and workplace accidents have been rejected too.[634] A study that underlines

[630] *See* Colominas, D.G., 1999. Disability under the Light of the Court of Justice of European Union: Towards an expansion of the protection of Directive 2000/78?. *Science & Medicine*, (48), pp.1173-1187.
[631] Howard, E., 2011. ECJ advances equality in Europe by giving horizontal direct effect to directives. *Eur. Pub. L.*, *17*, p.729.
[632] Waddington, L., 2015. Fine-tuning non-discrimination law: Exceptions and justifications allowing for differential treatment on the ground of disability. *International Journal of Discrimination and the Law*, *15*(1-2), p.18
[633] *See* Damamme, J., 2015. How Can Obesity Fit within the Legal Concept of Disability-A Comparative Analysis of Judicial Interpretations under EU and US Non-Discrimination Law after Kaltoft. *Eur. J. Legal Stud.*, *8*, pp.147-179
[634] *See* Colominas, D.G., 1999. Disability under the Light of the Court of Justice of European Union: Towards an expansion of the protection of Directive 2000/78?. *Science & Medicine*, (48), pp.1173-1187.

the consequence is the exclusion of individuals who perhaps have only a limited impairment from protection under the law.[635]

At the national level, the concept of non-discrimination and the relationship between sickness and disability is not clear either. Some academics have investigated how the standards of non-discrimination and reasonable accommodation set by EU law have been embraced by different national legal systems. Only a few countries have a social model of disability, in which the perception by and the interaction with the surrounding environment plays a role in the classification of disability. Others have a more medically orientated definition.[636] Regarding the social model of disability, a distinction has to be made. It is possible to dismiss someone during a sick leave if there is a fair reason. However, it is not possible to base the dismissal on the health status of the worker. Health status is a protected characteristic. There is a clear distinction with the concept of disability, but health status is protected (either for professional reasons or non-professional ones). Belgian law[637] and French law[638] are two examples.

Concerning the medically orientated definition of disability, the UK offers a good example. Under the UK legislation, health status is excluded from the criteria of non-discrimination. As evidence, the Equality Act 2010 mentions exactly the same protected characteristics as the EU directive. However, there have been some debates around the concept of disability and its relationship to illness, especially psychosocial risks and mental health.[639] Although illness is not a protected characteristic, the government underlines that the employer should "*look for ways to support* [the worker] – *e.g. Considering whether the job itself is making you sick and needs changing, and also give you reasonable time to recover from your illness"*

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[635] *See* Waddington, L., 2015. Fine-tuning non-discrimination law: Exceptions and justifications allowing for differential treatment on the ground of disability. *International Journal of Discrimination and the Law*, *15*(1-2), pp.11-37

[636] *See* Hießl, C. and Boot, G., 2013. The application of the EU framework for disability discrimination in 18 European countries. *European Labour Law Journal*, *4*(2), pp.119-134.

[637] *See* Art. 4.4 of the Law of the 10 May 2007 (modified 30 December 2009 and 17 August 2013)

[638] *See* Article L.1132-1 of the Labour Code

[639] *See* Fevre, R., Robinson, A., Lewis, D. and Jones, T., 2013. The ill-treatment of employees with disabilities in British workplaces. *Work, Employment and Society*, *27*(2), pp.288-307; Hepple B., 2011. *Equality. The New Legal Framework*. Hart Publishing; and, James, P., Cunningham, I. and Dibben, P., 2006. Job retention and return to work of ill and injured workers: towards an understanding of the organisational dynamics. *Employee Relations*, *28*(3), pp.290-303.

before taking any actions when a worker has a persistent or a long-term illness that makes it impossible for the worker to do his or her job.[640]

The current stage of jurisprudence stresses that the approach tends to extend the concept of disability to the "early stages" of workers affected by an occupational disease or victim of a workplace accident. This is not efficient for the simple reason that it is not the aim of the directive. Therefore, the solution to cover these situations might be to combine the disability provisions within the broader context and scope of obligations provided by the Framework Directive 89/391/EEC.

5.3.1.2. A potential way to develop workers' OHS protection before the CJEU through a new combination of OHS directives

The main argument would be to develop an approach before the CJEU that combine the individuals' right directives and the obligations of Directive 89/391/EEC to create "new rights" for the workers. So far, the CJEU stated that the protection of the status of pregnant workers does not apply to absences due to an illness attributable to pregnancy or confinement.[641] However, Directive 76/207/EEC does protect and apply to absences due to incapacity for work caused by illness resulting from that pregnancy only during the pregnancy.[642] These cases underline that it was not the origin of the illness that was taken into consideration, but only the timing of the absences.

Then, the CJEU had to comment on the relationship between the concepts of disability and sickness in a working context. It started with the Chacón Navas case; this was a step forward for the protection against discriminatory dismissal, and a step back for the protection of the sick workers. [643] Indeed, the Court recognised that dismissal on the grounds of disability is protected by Directive 2000/78. However, the definition of disability is expressively separated from illness. The illness can be considered a disability only if it is a "*limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life".*[644] Here, the CJEU emphasised the

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[640] https://www.gov.uk/dismissal/reasons-you-can-be-dismissed
[641] C-179/88 Birthe Vibeke Hertz vs. Aldi Marked K/S (1990)
[642] C-394/96 BROWN (1998)
[643] C-13/05 (2006), Sonia Chacón Navas c/ Eurest Colectividades SA
[644] *Ibid,* point 43

consequence of the worker health status and not the origin. Meaning, the CJEU did not have to decide on an occupational disease that led to a dismissal. Maybe if the illness fulfils this definition, it can be considered a disability.

It should be said that, in the Chacón Navas case, the Spanish employer recognised that a dismissal for no reason (and most likely due to the sick leave of the employee) was unlawful. Also, the origin of the sickness was not focused on, which probably would not have made a difference. However, it can be suggested that the fact that the employer did not do everything he should have to keep the worker in employment — in terms of adapting the workplace —led to a different outcome.

Later, the CJEU had to refine its definition in HK Danmark.[645] On this occasion, the CJEU extended its concept of disability by recognising and referring to the UN Convention on the Rights of Persons with Disabilities. Moreover, the Court detailed the provisions of Directive 2000/78/EC, regarding reasonable accommodation and indirect discrimination based on disability. According to the advocate general, the origin — illness or not — does not matter; the only decisive factor is whether the limitation lasts for a long time. As soon as there is a limitation in functional capacities where the person is not capable of working full-time, it should be regarded as a disability within the meaning of Directive 2000/78. The Court of Justice followed most of the legal reasoning of the Advocate General and confirmed that the origins of the disability do not seem to be important, nor is the fact that the person concerned can work only to a limited extent. Since disability is an evolving concept, the Court opened the coverage of Directive 2000/78/EC to the illnesses that give rise to long-term limitations, not only accidents. Additionally, the concept of disability is connected with a hindrance to the exercise of a professional activity and is not limited to situations where the exercising of such activity is impossible. This underlines the fact that indirect discrimination is an effect-related concept.

Overall, this case was a step forward for the sick workers, but only in the extent of a long-term illness. From this basis, it might be argued that if there is an overall obligation to adapt workstations for disabled people — no matter the origin and even if the employer is not responsible — might it be possible to require the same obligation when there is a workplace

[645] Joint case C-335/11 and C-337/11, HK Danmark (Jette Ring) c/ Dansl almennyttight Boligselskab (C-335/11) and HK Danmark (Lone Skouboe Werge) c/ Dansk Arbejdsgiverforening (Pro Display A/S)

accident or an occupational disease? Moreover, even if the "long-term" criterion is not fulfilled, the fact that the employer was the cause of the accident or illness ought to be taken into consideration. The legal basis can be found in Art. 6 of Directive 89/391/EEC explained further below.

After this promising advancement, the CJEU went back on its understanding or at least the legal value of the UN Convention on the Rights of Persons with Disabilities with the controversial Z. case.[646] In this case, a woman was not able to carry a child, and she saw her demand of paid leave equivalent to maternity or adoption leave denied on the grounds that she qualified for neither and the law did not provide for paid leave following the birth of a child through surrogacy. The Court emphasised that the concept of disability not only refers to the impossibility of exercising a professional activity but also to "*a hindrance to the exercise of such an activity"*.[647] Here, the "simple" impairment is not enough and has to impact her ability to work. With this approach, the Court confirmed its medical and individual model of disability. This position has been criticised because if Mrs Z. was disabled, the impact of her impairment would have a consequence on her access to employment-related benefits.[648] Additionally, the Court stated that "*the validity of that directive cannot be assessed in the light of the United Nations Convention on the Rights of Persons with Disabilities, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention".[649]* The Court took a step back from the broad understanding of the Convention and stuck to its narrow understanding.

Finally, in the *Daouidi* case, Mr Daouidi was the victim of a workplace accident that led him to an undetermined working incapacity and that impact his ability to work. [650] One could suppose that Directive 2000/78/EC should cover this. The Court stated that

> *The fact that the person concerned finds himself or herself in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time, as*

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[646] C-363/12, Z. v A Government Department and the Board of Management of a Community School
[647] C-363/12 *Z. v. A Government department, The Board of Management of a Community School,* para. 77.
[648] *See* Waddington, L., 2015. Saying All the Right Things and Still Getting it Wrong: The Court of Justice's Definition of Disability and Non-Discrimination Law. *Maastricht Journal of European and Comparative Law*, *22*(4), pp.576-591.
[649] C-363/12, Z. v A Government Department and the Board of Management of a Community School. Final conclusion pt.2.
[650] Case C-395/15, *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal.* 26 May 2016

> *the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as being "long-term".*[651]

This was also the occasion for the advocate general to pronounce that

> *Disability is an objective concept and it is therefore irrelevant to take account of the subjective views of the employer as to whether the inability to work of the applicant in the main proceedings was sufficiently long-term or not.*[652]

This statement points out the crucial fact that there is a purpose for disability protection, and it is not to protect the right to physical integrity and health of workers. The current legislative configuration leads to situations that are covered by nothing: where a working incapacity is long enough to justify or to motivate a dismissal, but not-long-enough to be protected by Directive 2000/78. This illustrates the necessity to develop EU OHS protection alongside the non-discrimination based on disability. The *Daouidi* case is the perfect example of where claims should not have been based only on disability but also on the Framework Directive, raising the fact that it was the obligation of the employer to take care of his workers — and so, in case of a workplace accident, he should have demonstrated that he tried everything to keep the worker before dismissing him.

To summarise, the CJEU developed the concept of disability and non-discrimination in the workplace as a long-term physical, mental, or psychological impairment that is an obstacle to professional life. This definition does not consider the origin of the disability and the response of the employer. However, when it comes to the protection of workers' OHS, especially in the context of occupational disease or workplace accident, these two elements are fundamental. On that basis, one can argue that another right disconnected from disability (but inspired by it) should be defended before the Court: the general right to a reasonable accommodation in the workplace when the employer is responsible for a serious alteration of the worker's health. The argument is not that the notion of "disability" in the context of Directive 89/391/EEC should be expanded to cover workers who suffer from limited impairment and are, therefore, excluded from the scope of Directive 2000/78/EC. The only aim of the previous examination of the jurisprudence based on Directive 2000/78/EC was to show

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[651] *Ibid* Final conclusion
[652] Opinion of the Advocate General, Case C-395/15, *Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal.* 26 May 2016, paragraph 48

the "limits" of the jurisprudence to address the situation of workers who are not "impaired enough" to be covered by the Directive 2000/78/EC, but who are "impaired enough" to not perform their work as usual.[653] Therefore, the argument is to have a dynamic and modern reading of the Directive 89/391/EEC to address situations that are excluded by the Directive 2000/78/EEC. In no case is the argument developed in the coming paragraph intended to cover disabled people. It is only for impaired workers returning to work after a work accident or an occupational disease."

Currently, there are some concepts in the existing corpus of OHS directives that support the idea of an individual right to the adaptation of the workplace after the recognition of an occupational disease or being the victim of a workplace accident. The OHS prevention can be found within Article 3 of the European Social Charter. It states that "*all workers have the right to safe and healthy working conditions"*, while specifying that it has to be done by "*improving OSH and to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, particularly by minimising the causes of hazards inherent in the working environment"*.[654] The same idea of prevention is expressed in Art. 6.1 of the Framework Directive, 89/391/EEC.[655] However, it is argued that Art. 6(d) should also apply once the damage is caused.

Presently, the major gap of Directive 89/391/EEC is that it settles obligations for the prevention, but from an organisational point of view, the EU OHS legal framework does not provide for what happens after. The right to safe and healthy working conditions should not only concern the prevention but also the protection of health through the adaptation of working conditions when a disease is contracted, or an injury to health has occurred in the course of work. It seems to be the natural consequence of the obligation of employers to protect the health and the safety of workers. If a worker needs sick leave for occupational reasons (either an occupational disease or a workplace accident), it might mean that the employer did not comply with the aim of the Framework Directive. One can oppose the CJEU's jurisprudence regarding

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[653] Waddington, L.B., 2015. 'Not Disabled Enough': How European Courts Filter Non-Discrimination Claims Through a Narrow View of Disability, *European journal of human rights*, *15*(1), p.14

[654] European Social Charter, art.3.

[655] *« The employer shall implement the measures referred to in the first subparagraph of paragraph 1 on the basis of the following general principles of prevention: (a)Avoiding risks; (b) Evaluating the risks which cannot be avoided; (c) Combatting the risks at source, (d) adapting the work to the individual, especially as regards the design of work places, the choice of work equipment and the choice of working production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health. »*

the nature of the employer's liability. However, the argument is based on the aim of the directive and the logical consequence of these provisions in terms of rights for the employer to avoid a situation in which a worker is dismissed because of the alteration of his or her health for occupational reasons. This would be limited to cases where the employer can be considered responsible for the sickness or accident. The only problem in practice would be that suing an employer to prove his or her responsibility might decrease the chance of having the worker still work at the company, and therefore eliminate the need for adaptation. Thus, it is necessary for this approach to be supported by TUs or workers' representatives who can integrate it into a more general "litigation strategy". Only then, having an employer condemned to adapt to the workplace in such circumstances, can the future situation be impacted, even if the worker initially concerned is not impacted directly.

In order to increase the likelihood of admissibility of the argument by the CJEU, the right to have the workplace adapt to the health conditions in the case of occupational alterations should follow the same wording as Art. 5 of Directive 2000/78/EC. Hence,

> *employers shall take appropriate measures, where needed in a particular case, to enable a person with an occupational disease or victim of a workplace accident, to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate*.[656]

Another example of the obligation to adapt the workstation (but with a different legal base) can be found in Art. 5.1 of Directive 92/85/EEC.[657] In both cases, the employers shall adapt the workplace to the extent of what is necessary and practicable so workers can continue to perform their jobs.

An alternative or complementary approach for developing an obligation for the employer to adapt the workstation/working conditions to the needs of the impaired worker returning to work after a work accident or an occupational disease could be to contextualise it in the existing obligation for the employer to assess the risk.[658] However, to have a chance to

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[656] Illustrated by joint case C-335/11 and C-337/11, HK Danmark (Jette Ring) c/ Dansl almennyttight Boligselskab (C-335/11) and HK Danmark (Lone Skouboe Werge) c/ Dansk Arbejdsgiverforening (Pro Display A/S)
[657] Ilustrated by C-471/08, *Sanna Maria Parviainen v. Finnair Oyj*, 17 December 2009
[658] Art. 6.3 of the Directive 89/391/EEC.

be accepted by the CJEU, the argument cannot rely only on the breach of an employer's obligation but a worker's right (i.e., in this situation, the individual right to compensation). As underlined by the previous examination of the CJEU's jurisprudence, the cases that led to an improvement in the OHS field concerned individual rights. The only potential way to aim at an improvement of the situation of impaired workers returning to work after a work accident or an occupational disease would be to prove that the breach to assess the risk accurately – and/or to prevent it - caused damage (e.g., aggravation of the impairment) and that the national law does not implement art.6.3 of the Directive 89/391/EEC.

5.3.2. Development of the proceeding to empower collective actors and defend collective interests during litigation

The role of TUs and the justifiability of collective interest have been debated beyond the limits of the OHS field. Some studies have investigated the entitlement to take legal action for individual members (and their interests), and the justifiability of collective interests. The notion that only the individual directly affected by action that might also damage the collective interest can take action before a court can be challenged.[659] In that case, the individual can act only to obtain monetary compensation for damages, which, according to Cappelletti, is not enough to protect the collective interest.[660] Cappelletti previously advocated for an extension of the entitlement to take legal action to private bodies (individuals or associations) that were not directly affected. He called it the "*revolutionary of the concept of entitlement to act*".[661]

In the British debate, and according to Ewing, Trade Unions have five functions.[662] One of them is a representative function. He observed a dilution of that function and the regulatory function to the benefit of the service, governmental, and public administration functions. The functions of TUs can be connected to the changing nature of trade unionism. According to Ewing, the workplace representation function means that the TU will represent the interests of

[659] *See* Cappelletti, M., 1975. La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile). *Revue internationale de droit comparé*, *27*(3), pp.571-597.
[660] He mentions the example of consumers against big distribution chains; one consumer won't sue a big chain because the gain will be small in comparison to the fight and paying the monetary compensation of one person will not have a greater effect. However, if someone represents the interest of a group of consumers, then it will be different and can have an impact.
[661] Cappelletti, M., 1975. La protection d'intérêts collectifs et de groupe dans le procès civil (Métamorphoses de la procédure civile). *Revue internationale de droit comparé*, *27*(3), p.580
[662] *See* Ewing, K.D., 2005. The function of trade unions. Industrial Law Journal, 34(1), pp.1-22.

the employee in the workplace. This representation function has both an individual and a collective dimension. Additionally, the potential for unions to play a role in enforcing statutory employment rights has been investigated within the UK legal system.[663] Colling found a sustained commitment to strategic legal challenges, but also some substantial obstacles to the broader use of the law to mobilise workers and potential members. Colling then further developed the union initiatives, which aimed to use legal provisions and entitlements to mobilise members around key issues in the workplace. Meanwhile, in France, the weaknesses of the litigation by individuals have been underlined, emphasising the need for alternative forms of litigation action; the commitment of TUs in litigation is one of them.[664] Hence, Willemez underlined the evolution and growing function of the TU in the litigation field, either to defend the individual rights of members or its own collective interests.[665] Willemez stresses that TUs have the power to engage in legal proceedings, but they need to have the legitimacy to do it (entitlement to take legal action).

Based on the existing literature, the potential role of TUs seems to be a key element in the development of strategic litigation. Thus, the goal of this section is to analyse the extent to which these developments apply EU OHS rights. If they do, then the question is, how can they be implemented, and how would the potential litigation function of TUs apply in the case of EU OHS rights?

The litigation actions of TUs have two main aspects: (1) the substitution proceedings where the TUs act in place or in support of one of their members, and (2) when the TUs are defending their own collective interest. Firstly, within the current jurisprudence, there are seven cases where TUs acted on behalf of their members to defend their individual rights related to OHS. [666] A close examination of the cases shows that there is not a large emphasis on the TU representation in the text, but in practice. This might mean that the unions are writing the

[663] *See* Colling, T., 2006. What space for unions on the floor of rights? Trade unions and the enforcement of statutory individual employment rights. *Industrial Law Journal*, *35*(2), pp.140-160.
[664] *See* Guiomard, F., 2003. Syndicats: Evolutions et limites des stratégies collectives d'action juridique. *Mouvements*, (4), pp.47-54.
[665] *See* Willemez, L., 2003. Quand les syndicats se saisissent du droit. *Sociétés Contemporaines*, (4), pp.17-38.
[666] C-179/88 HERTZ, (1990); C-400/95 LARSSON, (1997); C-66/96 HØJ PEDERSEN E.A., (1998);, C-109/00 TELE DENMARK (2001); C-14/04 DELLAS E.A., (2005); C-335/11 HK DENMARK (2013); C-512/11 & C-513/11 TSN, (2014)

conclusions and probably paying for the lawyer. Yet, the preparatory work and the financial aspects are fundamental prerequisites for a successful case.

There is also a noticeable difference regarding the origin of the TUs who are active: the Handels-og Kontorfunktionærernes Forbund i Danmark (HK) is present in five cases out of seven. Whereas, the French and Finnish TUs are present only once each. Beyond the fact that some national TUs are less active, all the countries not mentioned here are fully absent. This difference might be due to legal and cultural differences, and some studies should investigate this aspect further. There is also the confirmation that the rights defended are mainly individual rights: five cases related to the pregnant worker directive, one case on non-discrimination and disability directive, and one case on working time. In terms of impact, most of the actions where TUs acted on behalf of their members were successful.[667] These cases influenced the jurisprudence considerably: HK Danmark changed the overall definition of disability, Høj Pederson secured the wage of all pregnant workers and their position during the time before giving birth, Tele Danmark enlarged the protection of pregnant workers in short term contract, and Dellas modified the understanding of what should qualify as working time in France. Overall, these cases led to major improvements that had implications beyond the individual cases.

Second, the situation where a TUs or workers' representative is defending its own collective interest related to an OHS directive has been illustrated eight times in the CJEU jurisprudence.[668] Another detailed study of these cases underlines that there is a difference between the national origin of the actions; however, the active MS are different from those mentioned previously. Here, three cases were conducted by Spanish TUs, two by German work councils, one by the French TUs, and one by the British TUs. Additionally, the nature or level of the TUs differs; local unions seem to defend their own interests while national TUs take action on behalf of individuals. It is proven once again that strategic litigation is based on individual rights: all the cases concerned the working time directives. Moreover, four cases contested collective agreements, and the other cases challenged national law directly (in the

[667] Five cases were successful out of seven.
[668] C-303/98 SIMAP, (2000) ; C-241/99 CIG, (2001) ; C-173/99 BECTU, (2001) ; C-52/04 ; Personalarat der Feuerwehr Hamburg (2005) ; C-486/08 Zentralbetriebsrat der Landerskrankenhauser Tirols, (2010), , C-428/09 Union Syndicale Solidaire Isère (2010) ;, C-78/11 ANGED (2012) ; C-266/14 Federacion de Servicios (CC.OO), (2015)

BECTU case, it is a transposition law). For one case — *Zentralbetriebsrat* — the Work Council used a European framework agreement to challenge a national law.

In terms of impact, it is indisputable that these cases influenced and broaden the scope and application of the working time directives considerably and found an application beyond the initial situation. To conclude, the actions led by TUs or workers' representatives have led to significant steps towards better protection of workers' OHS but are considerably underused. Therefore, it is suggested that TUs focus on strategic litigation when defending an approach based on a new combination of directives.

5.3.3. Factors influencing the impact of future litigation before the CJEU as a strategy to develop OHS

The argument that it may be possible to develop a complementary litigation strategy advocating for an injured or unwell individual's right of workplace adaptation before the CJEU based on Directive 89/391/EEC relies on two conditions: (1) the existence of an appropriate factual matrix, allowing for a question to be raised concerning the interpretation of the Directive 89/391/EEC and the national judges referring the question to the CJEU, (2) the CJEU ruling in favour of an expansive interpretation of the Directive to cover such a situation, which might be qualified as "activist" behaviour. However, some elements need to be taken into consideration regarding both of these conditions.

First, a national court may request a preliminary ruling from the CJEU where a decision is necessary for a national court to give judgement, or where there is no judicial remedy under national law. The decision to make a request for a preliminary ruling is exercised exclusively on the initiative of the national courts and tribunals, regardless of whether or not the parties to the main proceedings have expressed the wish that a question be referred to the Court.[669] In other words, it falls to the discretion of the national judges to communicate or not a question to the CJEU. In principle, however, *where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.*[670] Where there is no judicial remedy under national law, these courts have to communicate a question regarding

[669] Recommendations to national courts and tribunals, in relation to initiation of preliminary ruling proceedings, 25 November 2016, Official Journal of the European Union, C-439/1, n°3
[670] Art. 267 TFEU

the interpretation or the validity of EU law – this obligation is also clearly stated in the jurisprudence of the CJEU.[671]

There are two exceptions to the obligation of last-instance courts to refer a preliminary ruling: first, where the CJEU has already ruled on the point of law in question in a previous case (so-called *Acte éclairé*);[672] secondly, where the CJEU has not answered the question but the answer is "*without doubt and obvious"* (so-called *Acte clair*).[673] The CJEU can also refuse to hear a case if it is not admissible – e.g., not enough description of the facts. Additionally, before raising a question before the CJEU, the national court or tribunal has to determine, in the light of each case, both the need for a request for a preliminary ruling to deliver its judgment and the relevance (i.e., the interpretation can affect the outcome of the national case) of the questions which it submits to the Court.[674] The need and the relevance are assessed only by the national tribunal or court, not by the CJEU. Moreover, it has to be noted that the tribunal or the court can do it at any stage of the litigation, even at first instance.[675] In theory, the CJEU is bound by the assessment of the national court, and the questions submitted benefit from a presumption of relevance.[676]

Therefore, it is necessary to emphasise that the development of potential strategic litigation will depend on the willingness and the discretion of national courts to refer questions to the CJEU – even if a case can be made before the highest courts. As underlined previously in this Chapter, the behaviour of the national judges might vary from one Member State to another.[677] This explains why further studies need to be conducted to determine which country, and sometimes which court or tribunal, has been more willing to request the interpretation of the CJEU on OSH matters. If strategic litigation is to be conducted by a TU in the future, it would be necessary to focus on these jurisdictions – considering that other national courts might disregard such reasoning.

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[671] C-322/16, *Global Starnet* (2017), para. 26
[672] C-28/62, *Da Costa en Schaake NV and Others v Administratie der Belastingen Health* (1963); C-283/81 *Srl CILFIT v Ministry of Health* (1982), para.14
[673] C-283/81 *Srl CILFIT v Ministry of Health* (1982), para.16-20
[674] Recommendations to national courts and tribunals, in relation to initiation of preliminary ruling proceedings, 25 November 2016, Official Journal of the European Union, C-439/1, n°3
[675] Recommendations to national courts and tribunals, in relation to initiation of preliminary ruling proceedings, 25 November 2016, Official Journal of the European Union, C-439/1, n°12
[676] C-355/97 *Beck and Bergdorf* (1999) ECR I-4977, para 22-24, C-300 /01 *Doris Salzmann,* (2003) I-04899, para 31
[677] Schmidt, S.K., 2015. The shadow of case law: The Court of Justice of the European Union and the policy process. In Richardson, J., 2015. *European Union: Power and policy-making*. Routledge. p.164

Secondly, from a more principled perspective, extension of the OHS protective framework by the CJEU might be understood to constitute a form of "judicial activism". Previous research has underlined that the CJEU has defended *une certaine idée de l'Europe,* by giving a specific interpretation of Community law.[678] One way of doing so is:

> "*to introduce a new doctrine gradually: in the first case that comes before it, the Court will establish the doctrine as a general principle but suggest that it is subject to various qualifications; the Court may even find some reason why it should not be applied to the particular facts of the case. The principle, however, is now established. If there are not too many protests, it will be re-affirmed in later cases; the qualification can then be whittled away and the full extent of the doctrine revealed."*[679]

By strengthening the application of the European rule of law, the Court plays an important role in policymaking and law-making in the EU.[680] As underlined by Leczykiewic, "*every judgement involves some interpretation of the rule it applies, and therefore it adds to the legal material that can be used to establish the meaning of the rule in future cases."*[681] The independence, autonomy, and the freedom of the Court in some of its rulings led some to question the "activism" of the Court.[682] According to Eeckhout, the CJEU is not "*usurping the role of the legislature"* provided it does not depart from the wording of the Directive and does not act contrary to the intentions of Community law.[683] For example, the CJEU adopted a strong position with its decision in the case of *Defrenne,* which influenced equal pay and was the first in a series of judgments that fundamentally strengthened the position of women in the Member States.[684] It has been recognised that in some areas (e.g., social rights), the CJEU created rules that can be considered as new substantive law.[685]

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[678] Wincott, D., 1995. The role of law or the rule of the Court of Justice? An 'institutional'account of judicial politics in the European Community. *Journal of European Public Policy*, *2*(4), p.585

[679] Hartley, T.C., 2014. *The foundations of European Union law: an introduction to the constitutional and administrative law of the European Union*. Oxford University Press, USA. p.75

[680] Schmidt, S.K., 2015. The shadow of case law: The Court of Justice of the European Union and the policy process. In Richardson, J., 2015. *European Union: Power and policy-making*. Routledge. p.170; De Búrca, G., 1998. The principle of subsidiarity and the Court of Justice as an institutional actor. *JCMS: Journal of Common Market Studies*, *36*(2), pp.231-32

[681] Leczykiewicz, D., 2008. Why do the European Court of Justice judges need legal concepts?. *European Law Journal*, *14*(6), p.776

[682] It is important to note that the defintion of « activism » is broad and take many forms. *See* De Witte, B., Muir, E. and Dawson, M. eds., 2013. *Judicial activism at the European Court of Justice*. Edward Elgar Publishing

[683] Eeckhout, P., 1998. The European Court of Justice and the legislature. *Yearbook of European Law*, *18*(1), p.17

[684] Case 43/75, Defrenne v Sabena [1976] ECR 455

[685] De Freitas, L.V., 2015. The Judicial Activism of the European Court of Justice. In Coutinho, L.P., La Torre, M. and Smith, S.D. eds., 2015. *Judicial activism: an interdisciplinary approach to the American and European experiences*. Springer. pp.176-177

Whether the CJEU should have the function of policy and law maker, and under which circumstances, is outside of the scope of this thesis. However, the argument that the CJEU might in the future interpret article 6 of the Directive 89/391/EEC broadly is based on an EU Directive, and the overall aim of improving workers' health and safety is stated in art. 3 of the European Social Charter and art.153 of the TFEU.[686] Therefore, such an interpretation is not excluded and might be possible. Of course, there is no guarantee, and such a result cannot be predicted in advance and will depend on the discretion of the CJEU.

5.4. Conclusion

In the context of legal paralysis at the European level in the OHS field, litigation before the CJEU might be an appropriate path to improve some specific aspects of the workers' OHS. Indeed, an overview of the current jurisprudence suggests that litigation by the Commission in the form of infringement proceeding might be an unlikely route to such improvement considering the highly political nature of the decision to start such a procedure, as well as the potential limits of resources to conduct an examination into the way the OHS directives are applied at the national level. The findings of this chapter also confirm the shift from a centralised to a decentralised method of controlling the application of EU OHS standards, with an increasing number of preliminary rulings. Therefore, proposals for strategic litigation should focus on the individual parties and the mechanism of the preliminary ruling. This approach has been effective and has led to significant improvements in workers' rights, especially in fields such as working time and the protection of pregnant workers.

The idea that preliminary rulings might be an effective way to improve the application of the existing EU OHS framework, is illustrated with the example of the return to work of injured or unwell workers who have been victims of a workplace accident or occupational disease. Currently, workers who are at an early stage of impairment — up to the recognition of the disability — are not covered at the EU level. Although health status is a protected element in certain national legislation, there is a dramatic gap at the EU level. By exploring the possibility of combining the general obligations of the Framework Directive, 89/391/EEC, with the individual protection provided by the protective framework applicable to disabled workers, it might be possible to argue for a recognition of a right for the workers to have a reasonable

[686] Art. 153(1)(a), and 153(2) of TFEU

accommodation in their workplaces when they are victims of a workplace accident or an occupational disease, and when the employer is responsible.

This chapter has shown that the existing boundaries of the EU OHS legal framework could and should be challenged before the CJEU. Obviously, no one can predict with certainty the decision that the CJEU would reach in any given case. This argument does not aim to change the situation of the workers that are the party of any case before the CJEU but to push the CJEU to give a decision that would apply to similar future situations all over the EU. According to the hypothetical construction of this argument, it is fundamental that TUs and workers' representatives be in charge of developing and applying this idea when they witness cases that might be suitable for such an action before the Court. Additionally, it is important to point out that this litigation strategy will not be applied in the same way and will not be welcome in all MS. The cultural and legal differences have to be taken into consideration. Hence, further studies should map TU litigation actions in MS. Also, research on the behaviour of national judges regarding the CJEU would help to determine where the chances of getting through the judiciary process are the highest.

CHAPTER 6
The Fragile Equilibrium Between the National and European Level Enforcement of the OHS Standards

6.1. Introduction

The building of Europe created a new employment dynamic with the increase in cross-border employment opportunities. According to the Commission, there are 12 million EU citizens who are either working, seeking a job, or being posted in another MS. The free movement of workers and the freedom to provide services depends upon well-functioning cross-border labour mobility in respect of EU employment rules. Compliance at the national level is difficult because there is an inequality of scopes: the free movement of services has a European scope, and the scope of competences of the enforcement authorities are limited to the territory of the MS.

According to the Treaties, the LIs are bound to ensure that common EU social standards are met.[687] Despite the adoption of an extensive body of legislation, the EU OHS policy has suffered from important implementation problems.[688] In addition to the potential problem of implementation by MS, the problem of enforcement is also due to practical and institutional barriers arising from national differences in inspection services. Indeed, even if the Framework Directive provides the legal basis for the scope of the labour inspection, and if the EU MS have a similar set of powers on OHS that are broadly in line with those laid down in Articles 12 and 13 of the ILO Convention 81,[689] the organisation and the management of labour inspection authorities remains the MS' individual responsibility.[690]

Historically, labour regulation has been a matter of domestic law and control, and labour movements have largely operated and been defined within a national scope. It is assumed that the EU will not interfere and enforcement will stay a national matter.[691] As underlined by

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[687] Art. 4.3 TFEU
[688] Sabel, C.F. and Zeitlin, J., 2008. Learning from difference: The new architecture of experimentalist governance in the EU. *European Law Journal*, *14*(3), p.287
[689] Walter D. 2016., Labour inspection and health and safety in the EU. *HESA Mag*
[690] Yarmolyuk-Kröck, K., 2018. The Implementation of International and European Occupational Safety and Health Standards into the National Legislation of Ukraine. p.188
[691] Olsen, J., 2003. Towards a European administrative space?. *Journal of European public policy*, *10*(4), p.514

Richthofen, the labour inspection services, as part of a public administration system, require an institutional framework based on law and regulations enacted by the MS.[692] However, the question of the enforcement of OHS standards in the EU by the LIs can only be understood in the larger context of the functioning of the EU, especially the relationship between the economic and the social fields.

Moreover, the enforcement of EU OHS standards falls into the general scope of the social policy,[693] in respect of which competence is shared.[694] Therefore, the competence of the EU on OHS is governed by the principles of subsidiarity[695] and proportionality.[696] The coordination of action between the national and European levels is fundamental. This means that the EU complements the MS actions to enforce OHS standards. Alongside these institutional principles, considering the context of cross-border employment relationships, there is also the problem of the so-called "coordination rules" at the EU level. These rules are based on the principle that one jurisdiction applies at any one time in cases of employment outside a worker's country of origin. This means that a person moving within the EU is subject to the social security provisions of only one MS. As a general rule, the legislation of the MS in which the person pursues his or her activity as an employed or self-employed person applies.[697] This element adds some complexity to the mission of the national LIs when they have to deal with a workplace accident or occupational disease of workers under a cross-border employment relationship.

The increasing number of cross-border employment relationships is only one of the challenges LIs have to face. It follows that there is a need to rethink the share of competence between the European and national levels within the existing institutional scope regarding the enforcement of EU OHS standards, especially considering the cross-border dimension. We should consider whether the EU could act in place of the national LIs while empowering them to improve the enforcement of EU OHS standards. The aim of the Chapter is to assess and to

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[692] Von Richthofen, W., 2002. *Labour inspection: A guide to the profession*. International Labour Organization. p.23
[693] Article 153 of the TFEU
[694] Article 4 of the TFEU
[695] Some researchers argue that this principle led to a regulatory gap between political mobilisation at the national level and neo-liberal regulation at the European level. *See* Taylor, G. and Mathers, A., 2002. The politics of European integration: A European labour movement in the making? *Capital & Class*, *26*(3), pp.39-60.
[696] Article 5 of the TEU
[697]Regulation 883/2004, art.12.2; Cremers, J., 2010. Rules on working conditions in Europe: Subordinated to freedom of services? *European Journal of Industrial Relations*, *16*(3), p.294

examine the current situation, and to clarify what is the role of the actors involved in the monitoring and enforcement of OSH standards (i.e., Labour Inspectorates, EU Committees, and Agencies), and the interconnections between the different levels (i.e., National and EU). The situation of competence at the EU level limited to areas in which there is a clear need for European-wide coordination, such as the position of cross-border workers, is examined only as part of the function of the future European Labour Authority (ELA). The aim of studying the competences of the ELA is not to make a recommendation, but to assess how this new agency will interact with the existing actors. Neither this Chapter, nor the thesis, intends to give recommendations in favour or against the possibility of an EU agency that would seek to develop stricter oversight of the competence of national enforcement authorities in situations wich do not have any cross-border element. Such recommendations are outside the scope of this thesis and would need to be developed in future research.

To address the question of whether the EU should have competence to act in place of the national LIs while empowering them to improve the enforcement of EU OHS standards, it is it necessary to have a general understanding of the current setting. Thus, this chapter aims at providing an overview and is structured into three parts. First, referring to the most recent EPSU Reports and COWI evaluation of EU OHS standards, it is possible to provide an overview of the similarities and differences in the national methods of enforcement by LIs. Next, the chapter examines how the existing institutions at the EU level (i.e., SLIC, ACSH, Eurofound, and the European Agency for Health and Safety at Work [EU-OSHA]) function and to what extent they contribute to the improvement of the enforcement of EU OHS standards. At the end of these two first analyses, a significant gap appears between the differences and common challenges faced by the LI at the national level and the limited powers and competencies of the EU actors. Therefore, the last part of the chapter focuses on the recently created ELA and assesses the extent to which this authority might fill the gap.

The conclusion of this chapter is that the ELA provides an illustration of the current limitations to improving EU OHS standards. Some options that could lead to real improvement at the EU level are discussed but because of the choice of some stakeholders to hold on to the "sovereignty" of their authority — so maintaining the imbalance of scope between the enforcement of EU OHS and market freedoms — the ELA is an upgraded version of the existing mechanisms, such as networking and mediations, but without real novelty or innovation. This

example shows that ways of improving the enforcement of OHS in the EU do not only depend on what is legally possible but also on the political will of the main actors, starting with the MS.

6.2. The Heterogeneous Situation at the National Level

As underlined by the literature, the enforcement systems differ from one MS to another.[698] The factors explaining the difference of structure and operation of labour inspection systems at the national level include a generalist inspectorate or specialised health and safety inspectorate, a single system or multiple participants, and coverage of all employed workers or only select workers. [699]

The specialist inspectorate model has been developed according to an Anglo-Scandinavian system where the inspectors are mainly responsible for securing compliance with requirements concerning health, safety, and welfare at work. In the generalist inspectorate model, the inspectors are responsible for the enforcement of all labour standards.[700] Nevertheless, it has also been said that the national administration enforcing the standards might change towards more cooperation[701] to counterbalance or remove the substantial weaknesses of LIs at the national level.[702]

To address whether the EU should act in place of the national LIs while empowering them to improve the enforcement of EU OHS standards, it is necessary to examine how the national LIs enforce OHS standards to identify points of convergence and divergence. Thus, it is possible to highlight where further cooperation might be possible and where a European action might be necessary to ensure some coherence in the way EU OHS standards are enforced. Therefore, this section, mainly based on country reports, summarises the main differences and the similar obstacles to enforcing OHS standards that the national LIs are facing and how the

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[698] Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), p.809; *See* Walters, D., Johnstone, R., Frick, K., Quinlan, M., Baril-Gingras, G. and Thébaud-Mony, A., 2011. *Regulating workplace risks: a comparative study of inspection regimes in times of change*. Edward Elgar Publishing.

[699] *See* Vogel, L. 2007. Inspection still a weak link in most national preventive strategies *HESA Newsletter*; Walter D. 2016., Labour inspection and health and safety in the EU. *HESA Mag*; *see Appendix N°6*

[700] *See* Piore, M.J., and Schrank, A., 2008. Toward managed flexibility: The revival of labour inspection in the Latin world. *International Labour Review*, *147*(1), pp.1-23

[701] *See* Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), pp.805-824

[702] *See* Olsen, J., 2003. Towards a European administrative space? *Journal of European Public Policy*, *10*(4), pp.506-531.

cross-countries situations add to these.[703] The analysis of the country reports was complemented with a review of more theoretical literature and studies on LIs. The main observation is that differences regarding enforcement revolve around the central concept of sanctions and may be divided into three sub-categories: the nature of the sanctions, the proportionality of the sanctions, and the balance between legally and non-legally binding sanctions and methods of enforcement. This analysis confirms the previous literature on LIs regarding the enforcement of labour law standards applied to OHS but also confirms some theoretical ideas applied to OHS.[704] The analysis of the common obstacles revolves around the idea of 'lacking': the lack of human and material resources as well as the lack of support and cooperation that led to non-enforcement at the national level (challenged even more due to the common market).

This section emphasises that one way of improving the enforcement of EU OHS standards is to ensure some coherence regarding the way sanctions are applied. Indeed, the differences among MS regarding the legal nature of the sanction, the amount of the fine, and the combination with soft enforcement can lead not only to inconsistency but also to a non-effectiveness of EU OHS standards on the national ground. This lack of a consistent way of applying the rules can affect the competitiveness of the MS. This section also underlines common dysfunction at the national level and highlights the potential need for European action to provide support for the lack of support and resources, especially with respect to cross-border employment.

6.2.1. The deep national divergences in enforcing EU OHS Standards

The national reports underline significant differences when it comes to the sanctions available to enforce OHS standards.[705] There are three subdivisions where important divergences are noticeable: the nature of the sanction, the degree of the sanction, and the balance between hard and soft enforcement.

[703] EPSU (2012). A Mapping Report on Labour Inspection Services in 15 European Countries. A Syndex Report. Geneva: European Federation of Public Service Unions (EPSU).
[704] E.g., The theory of optimal law enforcement that has been developed in criminal law.
[705] EPSU 2012. A Mapping Report on Labour Inspection Services in 15 European Countries. A Syndex Report. Geneva: European Federation of Public Service Unions (EPSU); and COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Reports.

6.2.1.1. The nature of the sanction

The first main difference concerns the nature of the sanction in case of infringements of the OHS legal requirements. In legal theory, according to Austin, sanctions are essential to the idea of a legal obligation; it is the existence of the sanction and its threat that gives the law its normative force, and so its authority.[706] Although Hart considerably challenges Austin's vision,[707] some scholars, such as Schauer, argue that Austin's account is more relevant today by underlining the coercive dimension of the OHS legal framework.[708] This vision has been confirmed outside of the legal theory field; some labour law scholars have stressed that the probability and the severity of a punishment are crucial to explaining the compliance with the law.[709] Hartlapp even stated that enforcement could be considered "*as a necessity for guaranteeing a proper implementation at the workplace"*. Additionally, the importance of sanctions in times of economic crisis has been proven by Martinsen and Vollard; according to them, when economic strain and costs pressure the voluntary aspect of the application of social standards, the need for external control increases. [710] Therefore, it appears that sanctions are crucial to enforcing OHS standards. However, from a purely legal perspective, there are different bases for imposing sanctions in the case of the breach of the OHS standards: criminal, administrative, and civil. However, these different bases do not exist in an equal manner in the MS. It is fundamental because, depending on the basis chosen, the sanctions are more or less likely to be applied effectively.

As an example, in Belgium, criminal proceedings are possible only if the victim has no insurance.[711] Similarly, in the Netherlands, criminal sanctions are only possible if the employer knew that there was a life-threatening risk for the workers, or if he ignored or refused orders

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[706] Schauer, F., 2010. Was Austin right after all? On the role of sanctions in a theory of law. *Ratio Juris*, *23*(1), p.4, with reference to Austin, J. 1885. *Lectures on Jurisprudence or the Philosophy of Positive Law.* 5th ed. Ed. Campbell, R. London: John Murray (1st ed. 1861)

[707] See. Hart, H.L.A., 1994, *The Concept of the Law.* 2nd ed. Ed. Bulloch, P.A. and Raz J. Oxford Clarendon

[708] Schauer, F., 2010. Was Austin right after all? On the role of sanctions in a theory of law. *Ratio Juris*, *23*(1), p.4 - For whom the non-coercive aspect of the law is as important, even more important that the sanction to define the legal obligation.

[709] Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), p.809

[710] Martinsen, D.S. and Vollaard, H., 2014. Implementing social Europe in times of crises: Re-established boundaries of welfare?. *West European Politics*, *37*(4), p.670

[711] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Belgium. p.183

from the inspectorates to shut down operations.[712] In Cyprus, there are no administrative sanctions applicable to non-compliance with the OHS legislation.[713] In Bulgaria, some stakeholders report that there is no case regarding OHS prevention because there are no complaints about working conditions.[714] Only the cases involving an accident are brought before the Court, and it is a matter of compensation, not of prevention. According to the law, a worker cannot make any claims concerning OHS irregularities.

These few examples provided by the EPSU reports confirm the differences underlined by the literature, regarding not only the different sanctions but also the different nature of the sanctions in the case of non-respect of OHS standards. As a result, there is a heterogeneous way of enforcing OHS standards that goes beyond the national specificities and might become an obstacle to enforcement of the EU OHS legal framework.

Although it might not be possible in the current institutional context, it seems that giving some guidance regarding European expectations is necessary. There is a possibility of making the punishment of infringements of EU OHS standards mandatory on an administrative ground with the possibility of adding criminal or tort responsibilities in case of severe injuries, fatal accidents, or occupational diseases causing death. The degree of the sanctions could then depend on the national legislation, but it would bring some coherence to the way OHS standards are enforced.

6.2.1.2. Severity of the sanctions

The second difference concerns the severity of the sanctions. Smith argued that if the penalty is too severe, it will be counterproductive, but if it is too weak, then the expected penalty for violating the regulation may fall below the cost of complying.[715] Garoupa later expanded this theory of optimal law enforcement.[716] According to him, the sanction leading to the optimal

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[712] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for the Netherlands.p.195
[713] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Cyprus. p.167.
[714] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Bulgaria. p.161.
[715] *See* Smith, R.S., 1976. The Occupational Safety and Health Act: Its Goals and Its Achievements. Evaluative Studies Series.
[716] Applies for criminal law.

impact in terms of enforcement might not be the maximal amount.[717] Along the same lines, Rasmusen provided evidence that it is easier to deter less harmful crimes than more harmful crimes.[718] Thus, the severity of the sanction should depend on the consequence of the crime.

According to Scholz, the severity should vary depending on the firm's behaviour so "*enforcement agencies need to be reasonable toward cooperative firms, vengeful toward cheaters, unrelenting in pursuit of chronic evaders, but conciliatory towards repentant firms*".[719] Similarly, some arguments based on economic rationality support the idea that fines should depend on individuals' wealth.[720] If we transpose this idea to companies, it will imply that fines should depend on the size of the company. To summarise, some flexibility and a range of sanctions depending on circumstances might lead to better enforcement of the OHS standards.

This idea has been partly illustrated at the national level. For example, in the Danish system, there is a concept of proportional penalty.[721] There is a basic penalty fine for the violation itself, and this sum doubles if it has caused an accident with serious injury or death. This is an innovative way to combine prevention and repression. There are also rules for calculating the fines according to the size of the enterprise, which is also a way to increase the responsibility of large companies. [722] This means that a small company that has not completed a risk assessment will pay less than a big company that might have a legal department in charge of it. There is also an additional raise in case of aggravating circumstances.[723] The distinction between the size of the company is essential; it was a point of criticism regarding the LIs' practice in Romania, where LIs have criticised the lack of flexibility.[724] In France, the size of

[717] Garoupa, N., 1997. The theory of optimal law enforcement. *Journal of Economic Surveys*, *11*(3), p.272
[718] Rasmusen, E., 1995. How optimal penalties change with the amount of harm. *International Review of Law and Economics*, *15*(1), pp.101-102
[719]Scholz, J.T., 1984. Voluntary compliance and regulatory enforcement. *Law & Policy*, *6*(4), p.385
[720]*See* Lott Jr, J.R., 1987. Should the wealthy be able to" buy justice"?. *Journal of Political Economy*, *95*(6), pp.1307-1316.
[721] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Denmark. p.198
[722] From 0 to 9 employees, it is a normal fine; from 10 to 34 employees, the fine increases by 50%; from 35 to 99 employees, it increases by 75%; and from 100, it increases by 100%.
[723] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Denmark. p.189.
[724] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Romania. p.220

the company is not formally taken into consideration but the recidivism of the non-respect of the OHS norms, especially if it led to a workplace accident, can aggravate the sanction.[725]

The Greek system offers a mix and broad illustration of the trends seen in other countries. Indeed, the level of fines escalates according to four criteria: (1) the number of workers affected, (2) the severity of the consequence of the infringement, (3) the risk level of the sector the enterprise belongs to, and (4) the recidivism of the specific employer.[726]

To conclude, it seems that flexibility would lead to better enforcement of OHS standards. However, because flexibility depends on the situation, it seems unlikely there will be a hard, legal intervention by the EU in that respect. However, developing the idea of mediation and collaboration or guidelines to encourage countries to adopt a more flexible approach might be an improvement, especially in MS that have a rigid approach, like Romania.

6.2.1.3. The balance of enforcement

The third main difference relates to the balance of enforcement through hard sanctions and guidance. Based on a distinction between the 'deterrence based' and 'Latin model' workplace regulation, Piore and Schrank found than the deterrence model aimed at changing employer behaviour by raising the expected penalties for non-compliance.[727] In contrast is the Latin model, which aimed at changing it by allowing employers to adapt their work systems to meet the compliance problems. The latter approach of inspection is based on a balance between a hard and soft approach, rather than a strict application of legal sanctions. Including an aspect of collaboration might introduce a degree of fairness in the way OHS standards are enforced. Part of the literature shows that if individuals perceive the rules being enforced in a just and moral way, it positively influences the degree of compliance.[728] This would mean that some flexibility in applying the rule of law would increase voluntary compliance by the actors who perceive it as fair. Furthermore, Tyler's study shows that the perception of legitimacy is closely

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[725] Auvergnon, P., 2011. *Etude sur les sanctions et mesures correctives de l'inspection du travail: Le cas de la France*. ILO. p.16

[726] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Greece. p.176.

[727] Piore, M.J. and Schrank, A., 2008. Toward managed flexibility: The revival of labour inspection in the Latin world. *International Labour Review*, *147*(1), p.5

[728] Sutinen, J.G. and Kuperan, K., 1999. A socio-economic theory of regulatory compliance. *International Journal of Social Economics*, *26*(1/2/3), p.183

linked to people's views of the fairness of the procedures used by the authorities.[729] Thus, indirectly, if the LIs collaboratively apply the standards, it appears fairer, and their actions more legitimate. The efficiency of soft law compared to pure hard law has also been shown.[730] However, Teague specifies that soft law needs to be complemented by hard law and will not be efficient on its own. The importance of the collaboration to build a climate of compliance is illustrated in the following examples.

In the Greek system, the level of fines can decrease depending on the degree of collaboration that the employer demonstrates.[731] This practice introduces a good incentive for the employer to resolve the situation rather than just "*pay the bill*" — unlike the Bulgarian system.[732] Indeed, some flexibility is essential; it has been shown that where the controls are very rigid, there is a lack of prevention incentive, like in Romania where the LIs give fines without offering the possibility for remedies.[733] Thus, employers are generally reluctant to fulfil their OHS obligations and, therefore, refuse to invest their time and resources to develop proper OHS management and, consequently, refuse to cooperate with the LI to have proper guidance.

In Germany, the LIs emphasised the importance of actual enforcement even if they do not use it: "*enforcement without the abstract threat of sanctions would be like a toothless tiger*".[734] The ability to sanction is the difference between impactful advice or de facto advice that will not be applied. Indeed, deterrence is related to the perception that the expected costs are high enough to lead companies to comply voluntarily.[735] Therefore, the existence of significant sanctions will be an incentive to comply or to cooperate to avoid it.

However, in some cases, the advice is not the complementary side of hard enforcement but is the only enforcement possible. For example, in Austria**,** the LI is in charge of the controls, but since he hardly has the ability to impose sanctions, he instead advises and ask for measures

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[729] Tyler, T.R., 2006. *Why people obey the law*. Princeton University Press. p.187
[730] Teague, P., 2009. Reforming the Anglo-Saxon model of labour inspection: The case of the Republic of Ireland. *European Journal of Industrial Relations*, *15*(2), p.211
[731] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Greece. p.176
[732] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Bulgaria. p.161
[733] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Romania. p.220
[734] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Germnay. p.199
[735] Weil, D., 2008. A strategic approach to labour inspection. *International Labour Review*, *147*(4), p.355

to be implemented, but then the impact of the controls is limited.[736] This also leads to the issue of credible sanctions.[737] De Baets illustrates this idea with the example of the UK where the existence of severe penalties with high conviction rates does not lead to proper enforcement if the lower courts oppose them. According to De Baets, prison sentences are rarely imposed, and the same applies to remedial orders and disqualifications of managers. A similar situation happens in France, where 25% of the cases are abandoned, and 15% lead to simple warnings.[738]

6.2.1.4. Conclusion

To conclude, these few examples underline that if sanctions are applied too strictly, there is no incentive for the employers to comply with the OHS standards. On the other hand, they would be more inclined to try if they knew that the LI would help them if they show some good faith. However, a more flexible way to control the application of OHS would lead to better self-compliance and cooperation only if it complemented by strict, legally binding rules that will act as a threat. Here, the EU might play a role by framing the strict rules better and providing guidance and training on how to support and mediate. Of course, the behaviour of the national courts and the interactions with national LIs are outside of the EU competence. All the examples mentioned above illustrate that the concept of sanctions and its various aspects are fundamental to ensuring the enforcement of OHS standards in the MS. However, the differences among MS regarding the legal nature of sanctions, the amount of the fine, and the combination with soft enforcement, can lead not only to inconsistency but also to non-effectiveness of EU OHS standards on the national ground. This lack of a consistent way of applying the rules can affect the competitiveness of the MS.

As shown previously, action by the EU institutions might help achieve a more consistent application of EU OHS standards. First of all, the EU could specify the legal nature of the sanctions in case of infringement of EU OHS standards, e.g., administrative, criminal, and civil. The MS would still have the freedom to adapt these requirements to their national functioning,

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[736] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Austria. p.171.
[737] De Baets, P., 2003. The labour inspection of Belgium, the United Kingdom and Sweden in a comparative perspective. *International Journal of the Sociology of Law*, *31*(1), p.48
[738] EPSU (2012). A Mapping Report on Labour Inspection Services in 15 European countries. A Syndex Report. Geneva: European Federation of Public Service Unions (EPSU). p.41

but it would avoid risking an administrative fine in one MS and a criminal proceeding for the same offence in another MS.

Regarding the size of the fine, the EU could proceed with its role of coordinator by communicating the example of the other MS not only to the LI but also the governments so they can be inspired. The EU could have a role in ensuring real enforcement of the OHS standards by looking at the ways in which these standards are enforced; if there is only soft enforcement there is no deterrence. The legal enforcement and role of the EU must be completed to ensure that the administrations at the national level are functioning or, if it does not want to intervene, then the EU needs to act by itself in at least the part of enforcement that would lead to distortion in the single market. Another aspect that can justify an EU action in the way EU OHS Standards are enforced is the similarities in the obstacles that the LIs are facing.

6.2.2. The common European wide obstacles faced by national LIs

The country reports reveal not only differences but also common dysfunctions and obstacles that the LIs face when it comes to enforcing OHS standards. There are two main problems that the labour authorities face at the national level: the dysfunction of the national organisations and more challenging contexts and working settings.

6.2.2.1. Lack of resources and dysfunction of the labour inspectorates

In its 2006 report on labour inspection, the ILO reminds us that

> *In order to carry out its functions effectively, a labour inspectorate does not only need an adequate number of staff, with appropriate conditions for hiring, training and service; these staff must also be given the necessary resources to perform their tasks and to ensure that their role and the importance of their work is appropriately recognized. In this regard, the labour inspection Conventions provide that it is the responsibility of the competent authority to make the necessary arrangements*.[739]

However, as underlined by Weil, the ILO expressed some concerns that labour inspection services in many countries are not able to carry out their roles and functions because

[739] Labour Inspection, Report III (Part 1B), International Labour Conference, 95th Session, Geneva, 2006, ISBN 92-116606-6. p.77

they are often understaffed, underequipped, under-trained, and underpaid.[740] Unfortunately, this statement was still valid in 2012, as illustrated by the EPSU reports.

In 2012, more than half of the European MS did not meet the ILO threshold of a maximum of 10.000 workers per inspector.[741] The lack of staff has been mentioned as one of the most significant problems in Belgium, Germany, Greece, and Spain.[742] In Belgium, besides the lack of staff, the problem of ageing staff and insufficient anticipation of new recruits has also been raised. The qualification and level of expertise of the LIs have been identified as reasons for the lack of staff in Germany. In Greece, Italy, Spain, and Hungary, the low wages, and the lack of career prospects has been mentioned to explain the situation. The understaffing issue could also be due to austerity policies conducted across the EU since 2008. There have been two noticeable reactions by MS to the austerity measures: either the MS reduces the number of LIs, or it increases them to deal with the other effects of the crises, such as economic redundancy (e.g., France).

The problem of the lack of resources and support can be divided into two categories. First, there is a lack of financial support that most of the national stakeholders complain about and share.[743] Secondly, there is also a lack of material resources that can have broad consequences. As an illustration, the weaknesses of the LIs concerning staff training, equipment and administrative support have often been mentioned by Greek LIs. As a result, enforcement and guidance are not homogenous across the country. In Italy, the lack of material resources is illustrated by the fact that LIs have to pay personally for professional expenses. They also mention a lack of training in general. The lack of technical support as a barrier in Sweden and the Nordic countries has also been acknowledged.[744]

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[740] Weil, D., 2008. A strategic approach to labour inspection. *International Labour Review*, *147*(4), p.351.; Labour Inspection, Report III (Part 1B), International Labour Conference, 95th Session, Geneva, 2006, ISBN 92-116606-6. p.116

[741] *See* Appendix n°5 based on the Country reports; 12 Member States respect the threshold; 14 Member States do not respect the threshold, and 1 is unknown.

[742] *See* Appendix n°6 based on the EPSU report.

[743] EPSU (2012). A Mapping Report on Labour Inspection Services in 15 European countries. A Syndex Report. Geneva: European Federation of Public Service Unions (EPSU). p.19; COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Germany. p.199; COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Greece. p.167

[744] Walters, D., Wadsworth, E.J.K. and Quinlan, M., 2013. *Analysis of the determinants of workplace occupational safety and health practice in a selection of EU Member States*. European Agency for Safety and Health at Work. p.46

Moreover, the lack of support is a considerable obstacle to the accomplishment of the LI's functions. On that point, Sutinen argues that "*those who accept an authority's legitimacy are expected to comply with its dictates even when the dictates are contrary to an individual's self-interes*t".[745] In other words, the employers would comply with the OHS standards if they consider the action of the LI to be legitimate, even if it is contrary to their personal interests.

However, in that respect, some LIs experience a lack of cooperation and coordination that can take various forms. As an illustration, the Romanian and the Italian inspectorates do not benefit from any cooperation with employers, and they are often victims of physical and psychological intimidation. In France, the physical threats towards LIs led to a major incident in 2004 where two LIs were killed during an inspection. Since then, concerns about their security have been raised. The legitimacy of LIs is a vital prerequisite for the acceptation of their decisions. Their legitimacy is mostly built on recognition by the other key authorities, such as police forces or political stakeholders, governments, and public authorities. Problems arise when there is no support from these authorities, leading to a weakening of the LIs' legitimacy. In Romania, the LIs suffer from a lack of support from the political sphere and the media, which present them as corrupt and dishonest. In Poland, the LIs also lack support from principal actors, such as the police, public prosecutors, and the courts.

Another kind of lack of support, which involves not referring matters to the courts, has been noticed in France[746] and Spain. It creates the habit of reporting for nothing and does not prompt the LI to open an official case. The literature has recognised this lack of support in research showing that a court case rarely follows compliance reports by LIs in many MS and most violations detected and reported by inspectors nevertheless go unpunished.[747] These elements undermine the authority of the LI and make enforcement of OHS standards more difficult.

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[745] Sutinen J.G., A socio-economic theory of regulatory compliance. *International Journal of Social Economics*, Vol. 26, p.182

[746] 25% of the cases abandoned, 15% led to a simple warning. EPSU (2012). A Mapping Report on Labour Inspection Services in 15 European countries. A Syndex Report. Geneva: European Federation of Public Service Unions (EPSU). p.41

[747] Arrigo, G., Casale, G. and Fasani, M., 2011. *A Guide to Selected Labour Inspection Systems*. Geneva, ILO. pp.24-27

6.2.2.2. The complexity of the new forms of work

According to Weil and Yarmolyuk-Kröck, various factors could explain the increasing complexity of the tasks of the LI. [748] The ILO recognises that

> *The […] fragmentation of the labour market; the rapid growth in foreign and migrant workers; the rise in deregulation and privatization; the new forms of subcontracting or outsourcing; the increase in atypical working arrangements and relationships; […] the rapid and complex developments in technology […] have had a considerable impact on the traditional concept of labour protection.*[749]

Therefore, calls for structural changes — like centralising supervision and control of inspectorates and increasing collaboration between LIs and other institutions with overlapping mandates — have been made.[750] The need for further collaboration is strengthened by national examples, showing the lack of cooperation between the different actors and institutions dealing with OHS and employment situations. In Belgium, the insufficient cooperation between the institutions is considered a daily obstacle by some stakeholders. Similar obstacles have been identified in Greece, where there is a lack of coordination between the different public administrations with no connection or cooperation between the institutions.

6.2.2.2.1. Increasing workload and complexity

One other obstacle is the increasing workload and the high complexity of administrative papers. In Belgium, the bureaucracy and the administrative tasks are described as extremely time-consuming for the LIs. The more time they spend on it, the less time they have for visits and controls. The same issues have been reported in the UK and Italy. In Poland, LIs require a simplification of the documentation that they have to complete after an inspection. In France, which is one of the rare countries that has increased the number of the LIs in a context of austerity, the LIs reported that they are overloaded and that there are not enough of them to cover all the required tasks.

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[748] Weil, D., 2008. A strategic approach to labour inspection. *International Labour Review*, *147*(4), p.350; Yarmolyuk-Kröck, K., 2018. The Implementation of International and European Occupational Safety and Health Standards into the National Legislation of Ukraine. p.191

[749] Labour Inspection, Report III (Part 1B), International Labour Conference, 95th Session, Geneva, 2006, ISBN 92-116606-6. P.115

[750] Weil, D., 2008. A strategic approach to labour inspection. *International Labour Review*, *147*(4), p.353

The French LI is a general body in charge of enforcing all the labour law regulations; in time of economic crisis, there are more collective redundancies or economic dismissals that they have to take care of. [751] This legal complexity is also noticed in Germany, where the dual structure of the authority in charge of evaluating risks and the different approach to implementation makes coordination between different *Länder*[752] difficult. The fragmentation of inspection tasks between the different levels reduces the impact of state control. The competence for OHS is divided among an excessive number of regional subdivisions within each *Land*. Additionally, the diversity of computing systems used by different structures is a source of difficulty in communication and information. On the positive side, most of the country uses the European orientations and strategies in the establishment of their own strategies.[753]

6.2.2.2.2. New forms of work

In Greece**,** there is also a problem related to labour relations. There is a spread of flexible forms of employment and overtime flexibilities in the legislative framework. Thus, the ability and the capacity of the LIs to control both the working time and employment is diminished. In Italy, there is a high number of SMEs, which means that each LI controls a significant number of enterprises. In Poland, there has been an increase in the accident rate, and the LIs have stressed the need to intensify the preventive and promotional activities relating to labour security in rural areas. However, from a legal perspective, the framework is not supportive of the LIs' tasks. Some Polish LIs state that many labour laws are vague, incoherent, and cause much uncertainty. One of their primary concerns is OHS. Similarly, in Spain, the current legislation makes it difficult to control the working time, and this legislation needs to be reformed.

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[751] This increasing complexity of the administrative process but also the law has been underlined by Von Richthofen: *"In many other counties, one still notes an extraordinary development and increasing complexity of labour legislation. For example, the French Labour Code has over 2 000 articles, and besides that there are many supranational regulations and other labour protection dispositions that have been transposed into national law but are not part of the Code. Although it does not always keep up with the evolution of technology, labour legislation appears continuously to accumulate new provisions concerning the protection of workers. Thus, OHS prevention is not prevention and not covered as it should be"* (p.58).

[752] i.e. German subnational provinces/regions

[753] COWI 2015. Evaluation of the EU Occupational Safety and Health Directives. Country Summary Report for Bulgaria. p.156; case of Hungary *see* EPSU (2012). A Mapping Report on Labour Inspection Services in 15 European countries. A Syndex Report. Geneva: European Federation of Public Service Unions (EPSU). p.51

6.2.2.2.4. International and cross-border complexity

As pointed out by the ILO, the increasing number of international and cross-border situations adds complexity to the functions of the national LIs. As emphasised by Singh and Zammit, globalisation is one of the most serious challenges for LIs because it creates a "*race to the bottom*" in labour standards, affecting the effective functioning of labour inspection.[754] For instance, concerning OHS, globalisation contributes to increasing work-related causalities.[755] This fact is supported by evidence where, in Belgium, for example**,** the increasing number of foreign workers and enterprises makes the work of the LIs more complicated. They need to know more about the national legislation of other EU MS. This concern has been shared by other MS, such as Spain, where there is insufficient regulation of transnational enterprises.

Some stakeholders emphasise that the lack of means to coordinate activity between MS increases the complexity of international situations. Teague also raised the question of whether traditional strategies to ensure compliance with labour standards can adequately address the rise of economic vulnerability that has emerged through globalisation, structural change, and the rapid diffusion of new technologies.[756] The concerns regarding globalised and cross-border employment relationships underline the need for action at the EU level.

6.2.2.2.5. Conclusion

Not all the national LIs have the same problem, and the obstacles are not uniform, but a similar pattern emerges among some MS. As Yarmolyuk-Kröck summarises, "*what is more important, the legal scope of a labour inspector's rights […] is not the same everywhere, creates obstacles for the effective functioning of this institution".*[757] Additionally, some research has also proved that some factors which complicate the situation[758] are due to

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[754] *See* Singh, A. and Zammit, A., 2004. Labour standards and the 'Race to the Bottom': Rethinking globalization and workers' rights from developmental and solidaristic perspectives. *Oxford review of economic policy*, *20*(1), pp.85-104

[755] Arrigo, G., Casale, G. and Fasani, M., 2011. *A Guide to Selected Labour Inspection Systems*. Geneva, ILO pp.3-5

[756] Teague, P., 2009. Reforming the Anglo-Saxon model of labour inspection: the case of the Republic of Ireland. *European Journal of Industrial Relations*, *15*(2), p.208

[757] Yarmolyuk-Kröck, K., 2018. The Implementation of International and European Occupational Safety and Health Standards into the National Legislation of Ukraine. p.193

[758] Labour Inspection, Report III (Part 1B), International Labour Conference, 95th Session, Geneva, 2006, ISBN 92-116606-6. p.115

important changes in legal and institutional arrangements regulating labour markets within the EU MS.[759] Therefore, both the SLIC and the Commission have called for solutions to the cross-border enforcement of administrative fines and penalties (SLIC 2012).

The problem is that the activities of the national LIs, which are relevant for cross-border labour mobility, end at the border because the mandate of the control and enforcement institutions is limited to the national territory. Ergo, joint activities beyond national borders need more legal backing.[760] Thus, if arrangements regulating labour markets have been the cause of the complication of the functioning of the LI, they can also be the solution by regulating differently. This means that there is a need for European action to support the national LIs, maybe by regulating the legal scope of LIs' rights.

6.3. Multiplicity of Actors in the European Union: Duplicates and Complements

The difficulties of implementing the European OHS legal framework led to a series of overlapping responses from the EU institutions, which have pushed the Community's regulatory framework towards the development of network governance.[761] One of them was the creation of European networks of national health and safety inspectorates and European agencies. The aim is to compensate for the weak implementation of OHS directives by collecting and disseminating information, supporting cooperation and exchanges of experience among MS and European institutions. At the EU level, there are two agencies and two committees related to OHS: the SLIC, the Advisory Committee for Safety and Health at Work (ACSH), the European Foundation for the Improvement of Living and Working Conditions, and the European Agency for Safety and Health at Work. The existing literature has studied these European actors involved in OHS either by providing a broad overview[762] or by examining the contribution of one actor — such as the SLIC — to a specific problem, e.g.,

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[759] Walters, D., Wadsworth, E.J.K. and Quinlan, M., 2013. *Analysis of the determinants of workplace occupational safety and health practice in a selection of EU Member States*. European Agency for Safety and Health at Work p.60

[760] Senior Labour Inspoector's Committee (2012) Consensus Paper on Cross-border Enforcement (CIBELES Project) European Commission: Brussels.

[761] Sabel, C.F. and Zeitlin, J., 2008. Learning from difference: The new architecture of experimentalist governance in the EU. *European Law Journal*, *14*(3), pp.287-289

[762] Kapp, E.A., *Occupational Safety and Health Capacity in the European Union*. A UL Safety Index^{tm} Topical report. pp.9-13; Yarmolyuk-Kröck, K., 2018. The Implementation of International and European Occupational Safety and Health Standards into the National Legislation of Ukraine. p.190

transnational cooperation,[763] the safety of machines,[764] or posted workers.[765] However, so far, no study has examined these actors while drawing connections with the national level and considering the recent and future ELA. Therefore, this part is structured in two sections: (1) a concise overview of the two committees and two agencies, and (2) a detailed examination of the SLIC's work. The aim is to develop a better understanding of the existing European stakeholders and how they are currently supporting — or not — the national LIs in their role of enforcing the OHS labour standards.

6.3.1. Existing structures to improve OHS in the European Union

6.3.1.1. Committees

At first, the creation of the SLIC was "natural" in the sense that a "group of senior labour inspectors" began to meet informally in 1982. These meetings and the role of the group were formalised with the Commission Decision of 12 July 1995, which established the Senior Labour Inspectors Committee (SLIC). At the creation of the Committee, there was an explicit reference to the principle of subsidiarity. It was also clearly stated that the *"identification, analysis and resolution of practical problems related to implementing, and monitoring the enforcement of secondary Community legislation on health and safety at work fall mainly within the competence of national* labour inspection services".[766]

The SLIC is a committee of the European Commission (DG EMPL) with a mandate to give its opinion to the Commission on all problems relating to the enforcement of Community law on OHS by the MS.[767] The opinion can be extended to matters covering other areas of Community social legislation that have an impact on OHS.[768] The role of the SLIC is mainly a role of coordination. For instance, the objectives of the SLIC are defining the common

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[763] Suzuki, T., 2016. International trends in systems for inspection of labor law violations. *Japan Labor Review*, *13*(4) pp.92-93; Fasani, M., 2011. *Labour inspection in Italy*. ILO. pp.11-12

[764] Tozzi G.A., The Machinery Directive, Gains and Challenges for the New Approach, *Newsletter of the European Trade Union Technical Bureau for Health and Safety n°21, June 2003,* p.3

[765] Veloso, L., Sales Oliveira, C. and Marques, J.S., 2018. *EU Post Lab: Developing experiences of administrative cooperation and enhanced access to information in the framework of the posting of workers-assessment report*. EU Post Lab: developing experiences of administrative cooperation and enhanced access to information in the framework of the posting of workers-assessment report. p.19

[766] COMMISSION DECISION of 12 July 1995 setting up a Committee of Senior Labour Inspectors (95/319/EC) preliminary statement

[767] Article 2.1. Commission decision 95/319/EC

[768] Article 2.2. Commission decision 95/319/EC

principles of labour inspection in the field of OHS; promoting improved knowledge, mutual understanding, a labour exchange programme, and cooperation; exchanging information; and studying the possible impact of other Community policies on inspection activities connected to OHS. These objectives — and the powers that go with them — can be qualified as "soft" or "non-legally binding". Thus, there is no doubt that the role of the SLIC is to assist the Commission.[769]

Also, the Committee shall propose any initiative to the Commission that it considers appropriate to encourage the effective enforcement of Community law on OHS. This means that the Commission is the only institution deciding to pursue initiatives on OHS. The SLIC is composed of the Commission and one representative of the labour inspection services of each EU MS. It assembles for a meeting every six months in the EU MS holding the EU presidency.[770] It is the principal committee and actor dealing with the enforcement of EU OHS standards.

The Advisory Committee for Safety and Health at Work (ACSH) is a tripartite body set-up in 2003 by a Council Decision (2003/C 218/01) to streamline the consultation process in the field of OHS and rationalize the bodies created in this area by previous Council decisions.[771] The committee is composed of three full members per MS, representing national governments, TUs, and employers' organisations. The Committee meets twice a year in a plenary. Its activities are coordinated by a bureau composed of two representatives from the Commission and the spokespersons and coordinators designated by the interest groups. The Commission chairs the committee. The bureau prepares the committee's annual work programme for adoption by the committee. Some working parties are established within the committee to deal with specific technical issues and to prepare draft opinions for adoption by the committee. Here we can see the strong influence of the Commission on the ACSH activity.

[769] Article 1.1. Commission decision 95/319/EC
[770] http://ec.europa.eu/social/main.jsp?catId=148&langId=en&intPageId=685
[771] Namely the former Advisory Committee on Safety, Hygiene and Health Protection at Work (established in 1974) and the Mines Safety and Health Commission for safety and health in the coal mining and the other extractive industries (established in 1956).

6.3.1.2. Agencies

To complete the activities of the committees, there are also two agencies covering the OHS field. The first agency is Eurofound, also called the European Foundation for the Improvement of Living and Working Conditions.[772] It aims to "*contribute to the planning and establishment of better living and working conditions through actions designed to increase and disseminate knowledge*".[773] It is the tripartite EU agency providing knowledge to assist in the development of better social, employment, and work-related policies. It provides research-based findings and knowledge to help develop social and work-related policies. The ultimate aim is to help plan and design better living and working conditions in Europe.[774] Its work is used to provide an evidence base for policy, such as in the recent European initiatives on youth unemployment and the youth guarantee, mainly monitoring the working conditions across the EU.

The second agency is the EU-OSHA, also named European Agency for Safety and Health at Work. It was created in 1994, and only 67 people work there. It is based in Bilbao, Spain. The role of the EU-OSHA is to provide the Commission, the MS, the social partners, and those involved in the OHS field with useful technical, scientific, and economic information. To carry out its mission, the agency collects, analyses, and disseminates information for those involved in safety and health at work. It aims to increase awareness, identify new and emerging risks, and establish and maintain networks with stakeholders and other interested parties.[775] The EU-OSHA works to make European workplaces safer, healthier, and more productive for the benefit of businesses, employees, and governments. The agency promotes a culture of risk prevention to improve working conditions in Europe.

6.3.1.3. The Commission as common reference point to the OHS European bodies

Overall, the European actors mentioned above do not have the executive power to take direct action to enforce EU OHS standards; they provide support to the Commission, which is the institution that can take action. Additionally, these actors have relatively limited resources

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[772] Established in 1975 under Council Regulation No. 1365/75 on 26 May 1975.
[773] Council Regulation No. 1365/75 on 26 May 1975. Art.2.
[774] https://europa.eu/european-union/about-eu/agencies/eurofound_en
[775] Council Regulation (EC) No 206/94 of 18 July 1994, established the European Agency for Safety and Health at Work, and has been amended three times: Council Regulation (EC) No 1643/95 of 29 June 1995, Council Regulation (EC) No 1654/2003 of 18 June 2003, and Council Regulation (EC) No. 1112/2005 of 24 June 2005.

to achieve their goals. Committees (the SLIC and ACSH) meet only twice a year under the supervision of the Commission. Their role is to support and provide information to the Commission — one through a consultation process at the EU level, and the other by enforcing existing EU OHS standards. Meanwhile, the agencies focus on the research and publication of data. It seems that their roles and themes covered are complementary and might overlap. The main problem is the light coordination between these actors.[776] Indeed, in 2012 the SLIC stated in its position on the EU strategy for 2013–2020 that they "*also feel that there is a scope for better coordination of the activities of European (and other) agencies including for example EU-OSHA, SLIC, ACSHW and EUROFOUND*".[777]

Their work appears to be useful in monitoring and mapping the situation and supporting decision-making. However, some scholars, such as Smismans, have illustrated the weak influence of the EU-OSHA on the European Commission's decision-making.[778] According to him, the information collected by the EU-OSHA does not match the Commission's policy priorities, and the coordination between them is insufficient. In his research, Smismans also argues that the information collected by the EU-OSHA might not be reliable. The information is provided by the national authorities, which might have an interest in presenting only the best aspects of their work, which might not reflect reality. This concern can be extended to all the agencies and committee working on OHS in coordination with the Commission.

To fulfil their functions with limited resources, the agencies and the committees have to rely on the national authorities to provide the necessary data to map the situation in the EU. However, if they provide information that shows weak or non-compliance, there is a risk that the Commission will use this information against the MS. Therefore, there is no incentive for the MS to provide a true picture. The existing actors might suffer from the lack of independence from the commissions, and, therefore, cannot build a solid relationship with the MS. This limit has also been underlined by Cremers, who argues that

[776] Cremers, J., 2017. The enhanced inspection of collctively agreed working conditions: An assessment of the compliance files, based on the Social Pact 2013. p.5
[777] EU strategy Priorities, 2013–2020. A submission from the SLIC. Point 31
[778] *See* Smismans, S., 2004. *Law, legitimacy and European governance: functional participation in social regulation*. Oxford University Press. pp.260-290

these bodies are facing constraints in their ability to provide support to national authorities due to lack of executive and operational powers. There is little direct involvement in the operational work that is needed.[779]

6.3.2. The SLIC: Torn between national and European concerns and realities

The SLIC is the principal committee and actor that deals with the enforcement of EU OHS standards. Thus, an analysis of the previous work done by the SLIC between 2010 and 2017 provides useful insights into the current EU position on the enforcement of EU OHS standards. [780] Two (sometimes contradictory) themes emerge from the SLIC publications regarding the suitability of actions at the European level to ensure the enforcement of OHS standards. On one side, the SLIC expressed its intention to give priority to the national level to enforce OHS standards. On the other side, in some of its work during its campaigns, the SLIC defended a more "*European orientated*" action plan. [781]

6.3.2.1. The importance of the national over the European level

As indicated above, the SLIC is a committee that aims to coordinate the national LIs and assist the Commission; it is a mediator between the national and the European levels regarding the enforcement of OHS standards. To fulfil its role of coordinator through the exchange of information, the SLIC has developed networking activities that have been central to horizontal cooperation between the national LIs since the 1980s.[782] However, as underlined by Hartlapp, these activities seek to implement binding EU social policies through the improvement of national enforcement capacity.[783]

The approach of the SLIC can be qualified as bottom-up, in opposition to top-down, which would be a European action applied to the MS. This focus on the national level is confirmed by the SLIC's evaluation team, which emphasises that sharing experiences among LIs is of the utmost importance for the correct and effective performance of inspection and

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[779] Cremers, J., 2017. The enhanced inspection of collectively agreed working conditions: An assessment of the compliance files, based on the Social Pact 2013. p.5
[780] *See Appendix n°5*
[781] Campaigns on: Manual Handling of Loads (2007); risks from chemicals in the workplace (2008), psychosocial risk assessment (2012); for the prevention of workplace accident due to slips and trips on the same level.
[782] Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), p.819
[783] *Ibid*. p.819

enforcement activities.[784] This position has also been held in the integrated and strategic response to the Commission work programme provided by the SLIC in 2012, enhancing OHS governance, improving implementation, and promoting health and safety at the workplace: the *EU Strategic priorities 2013-2020; a submission from the SLIC.*[785] At that time, the Commission wanted to reduce the number of pieces of legislation. The SLIC emphasised that this reduction should not be at the cost of reducing standards in the workplace. It suggested that the EU legislation should focus more on defining its goals than prescribing "one size fits all" solutions.

In the SLIC submission, the SLIC stated that three tests should be applied when new directives are under consideration: the possibility to use means other than regulation, a cost–benefit analysis, and a practical assessment of the means for compliance by duty holders and enforcement. This emphasised the wish to use primarily soft law to support the national level before adopting a new directive at the European level. The SLIC also mentioned that the EU strategy should acknowledge "*that measures and targets may be better to be set within the supporting action plans prepared by each Member State, rather than being uniformly imposed*". Therefore, the approach of EU OHS enforcement by the SLIC can be described as a bottom-up dynamic. The following statement confirms this approach:

> *A strategy should focus on a modest number of priorities of wide concern and significant potential harm, rather than try to be comprehensive. We suggest […] a broad goal is set so as to describe the outcome required, that Member States can then plan to achieve in ways that reflect their individual priorities or circumstances. We would make the general point here that problems are not uniform across countries, nor are the means we each use to monitor and evaluate progress; nor is such uniformity essential to collective progress. However, we are not advocating that the priorities be optional; MS should appropriately address each but with flexibility as their approach, reflecting national circumstances.*[786]

In terms of impact, it seems that the SLIC reports have influenced the national level. For example, in Sweden, there have been moves to rate employers using qualitative checks and

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[784] Veloso, L., Sales Oliveira, C. and Marques, J.S., 2018. EU Post Lab: Developing experiences of administrative cooperation and enhanced access to information in the framework of the posting of workers-assessment report. *EU Post Lab: developing experiences of administrative cooperation and enhanced access to information in the framework of the posting of workers-assessment report*. p.17

[785] Communication from the Commission "An agenda for new skills and jobs" COM (2010) 682; Accessible on circabc.europa.eu, ref. Ares(2012) 162 420 – 13/02/2012

[786] EU strategy Priorities, 2013–2020. A submission from the SLIC. Point 11

publish the results in response to one of the SLIC reports.[787] In Portugal, the national authorities have taken initiatives to address the issues of safety of machinery in the workplace based on the Machex network set-up by SLIC.[788] Moreover, the Council of the EU officially recognised that it considers the opinion given by the SLIC.[789] It seems that the current approach is actively contributing to improving the enforcement of EU OHS standards.

However, the position that "*problems are not uniform across countries*" should be discussed. This Commission recognises that new mechanisms have become necessary to allow national enforcement systems to remain functioning in a changing environment.[790] It has also been shown that national administrations put topics on the SLIC agenda whenever they feel a loss or a challenge of national authority and need the cooperation of other national administrations.[791] Therefore, while recognising the economic and cultural differences between the MS, there are some common structural problems,[792] and the EU should be active in ensuring better coordination regarding the enforcement of OHS standards. Interestingly, the need for European action seems partially recognised by the SLIC itself.

6.3.2.2. The recognition of a European action to complement national level

In 2014, the working group (WG) "Impact of the Crisis on LI" was set up to carry out a study of the evolution of EU LI in recent years, including a study on the resources available to each national LI. They found that the most common measures adopted were budget cuts, downsizing of LI, salary reduction, no promotions, no recruitment, reduction in the number of cars and offices, reorganisation at the national and regional level, and redirecting activities. The study ran between 2008 and 2014 and confirmed the common obstacles mentioned previously. It also emphasised the change in the statement of the SLIC regarding the national situation of the LI. Here we can see that the SLIC has been divided between the necessity to align, even

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[787] Walters, D., Wadsworth, E.J.K. and Quinlan, M., 2013. *Analysis of the determinants of workplace occupational safety and health practice in a selection of EU Member States*. European Agency for Safety and Health at Work. p.15
[788] Tozzi G.A., The Machinery Directive, gains and challenges for the new approach. *TUTB Newsletter*, No 17, June 2001, p.6
[789] Council of the European union (2015) EU Strategic Framework on Health and Safety at Work 2014-2020: Adapting to new challenges, Brussels, 27 February 2015
[790] COM15, 22 February 2006
[791] Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), p.819
[792] *see above*

partially, with the Commission's vision that emphasised national enforcement, and the results of its campaigns that require actions at the European level.

During its campaigns, the SLIC held a more European-orientated vision and recognised the weaknesses of national enforcement. [793] In a 2008 campaign report, the SLIC concluded that there was a high level of non-compliance with Directive 90/269/EEC: more than 80% of companies inspected in transport and healthcare had some intervention.[794] The WG also noticed that fatal and severe workplace accidents were continuing to occur throughout Europe. Additionally, some general problems were stressed by the report, such as cross-border problems, that the national companies in international transport have to deal with because of the logistic health unawareness of other countries. Cross-border challenges also come from the risk assessment on manual handling that is not common in several countries.

The report also mentioned that there is still a Europe-wide gap in the interpretation of the directive.[795] This illustrates that, on some topics, the MS are facing the same problems due to divergences in national approaches. It proves the need to develop a common framework and guidance for the implementation of the directive while respecting the national specificities. Also, in the campaign report on risks of chemicals in the workplace, the SLIC added that one objective was to push for some degree of harmonisation of enforcement of the related legislation.[796] Cross-border enforcement has been an issue of cooperation in the SLIC since its founding.[797] One answer to the cross-border issue has been to develop the exchange of knowledge. Information is exchanged via annual reports that describe not only the structure and organisation of labour inspection but also the activities, types of inspection, and strategies implemented.[798]

In 1997, common principles were adopted to help the systematisation of the exchange of information. For example, the WG Machex proposed starting a group that would develop a

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[793] Campaigns on: Manual Handling of Loads (2007); risks from chemicals in the workplace (2008), psychosocial risk assessment (2012); for the prevention of workplace accident due to slips and trips on the same level.
[794] Evaluation Report – SLIC European inspection and communication campaign, Manual Handling of Loads 2007. p.14
[795] *Ibid* p.14
[796] *Ibid*
[797] Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), p.817
[798] *Ibid* p.817

European database for the exchange of national requirements and results of the inspection of work equipment. Additionally, the SLIC published a handbook on labour inspection and more specific recommendations. There is an E-handbook, *Cross-border Enforcement on Occupational Safety and Health by SLIC Inspectorates,* completed by National Answers, of all the MS (2015–2016). In 2012, one of the SLIC working groups, Machex, submitted a proposal for a common European guide establishing the minimum requirements to ensure the competency of persons who conduct the periodic examinations of the tower and mobile crane assembly.

Meanwhile, in order to increase awareness of the differences between national enforcement, the SLIC developed an inspector exchange scheme. These exchanges aim to promote at least one of the following activities: (1) facilitation of cooperation between LIs, (2) promotion of joint action with regards to specific sectors or risk, (3) encouragement of training programmes on innovative approaches and good practices to achieving compliance. In 2009, there were twenty-two, one-week exchange visits presented as offering a unique opportunity for individual inspectors to gain knowledge and direct practical experience of the inspection practices and techniques of another MS. However, it seems evident that the number of inspectors benefiting from these exchanges cannot have a systemic impact in all the MS against the challenge of cross-border enforcement.[799] Therefore, the idea of developing joint inspections has moved more prominently onto the agenda as increasing numbers of workers are crossing borders since the adoption of the directives on the posting of workers and service liberalisation.[800] Thus, substantial attention has been devoted to the cross-border enforcement of EU OHS in sectors that are strongly exposed to the movement of workers and services.

6.3.3. Conclusion

To summarise, the existing European actors which have a mandate related to OHS do not have executive power and are all mainly supporting, in one way or another, the Commission, which is the sole institution to have executive power. However, as shown in the second chapter of the thesis, the action of the Commission is highly politicised. Additionally, the examination of publications by the SLIC in recent years underlines the duality of the visions and calls for

[799] The Inspectorate Exchange Programme encouraged 21 exchange visits in 2010, 16 in 2011, and 21 in 2012. There were 20 applicants, 17 of which were approved, in 2013
[800] COM15, 22 February 2006

improvement of the enforcement of EU OHS standards. On the one hand, we have the confirmation that the SLIC and the Commission will maintain their roles as coordinators and try to respect the sovereignty of the MS. However, on the other hand, it seems that there is an increasing awareness of the current challenge — especially the cross-border work relationships. To address these specific challenges, it is necessary to have an independent authority at the EU level, ideally with executive power, that could act in place of the MS. In 2017, after years of debates, the Commission finally announced the creation of such an authority: the ELA.

6.4. The European Labour Authority: New Hope or Missed Opportunity?

In September 2017, President Juncker of the European Commission announced the creation of the ELA, a new European inspection and enforcement body for ensuring fairness in the single market. The Commission also created a European Advisory Group for the ELA with the mission to facilitate cooperation among national authorities and stakeholders and advise the Commission on the swift establishment and future operational functioning of the ELA.[801] Current literature focusing on the ELA either mentions it within the broader context of the EPSR or mentions that the authority represented a potential improvement in the field of social policy,[802] especially regarding the debates around the Posted Workers Directive (PWD).[803] One author, Jan Cremers, has published in-depth analyses and work of the ELA, addressing how the ELA would answer current challenges.[804] However, heretofore, no work has looked at what the ELA will be and what it could have been, drawing connections to the challenges facing the

[801]Commission decision (EU) 2018/402;
http://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=3596&news=1

[802] *See* Kilpatrick, C. and De Witte, B., 2019. A tangible human face for social Europe. *RSCAS Policy Papers 2019/02.* p.3; Bonciu, F., 2018. The European Pillar of Social Rights: Too Little, Too Late. *Romanian J. Eur. Aff.*, *18*, p.64; Dhéret, C., 2018. European Pillar of Social Rights: Member states must shoulder the responsibility of delivery. *EPC Commentary, 16 March 2018*; Duarte, F., 2019. *The Politics of Austerity and Social Citizenship Rights: A Case Study of the Impact of the 2008 Financial Crisis on the Welfare State in Portugal* (Doctoral dissertation, Carleton University) p.226; Vanhercke, B., Ghailani D. and Sabato S., 2018. Social policy in the European Union: state of play 2018. *ETUI.* pp.84-86; Hay, C. and Bailey, D., 2019. *Diverging Capitalisms*. Springer International Publishing, p.190; *see* Karlson, N. and Wennerberg, F., 2018. *The European Social Pillar: A Threat to Welfare and Prosperity?* (No. 314). The Ratio Institute; Pelkmans, J., 2019. A fair single market for EU prosperity, *RSCAS Policy Papers 2019/03* p.7

[803] *See* Barslund, M., Busse, M. and De Wispelaere, F., 2017. Posted workers–for some it matters. *CEPS Policy Insights*, (2017/37). p.8; Bublitz, E., 2018. The European Single Market at 25. *Intereconomics* 53, p.342; Milanese, N., 2019. Democratizing Europe's Economy. *Carnegie Europe* p.2; Lindstrom, N., 2019. What's Left for 'Social Europe'? Brexit and Transnational Labour Market Regulation in the UK-1 and the EU-27. *New Political Economy*, *24*(2), p.287

[804] *See* Cremers, J., 2017. The enhanced inspection of collectively agreed working conditions: An assessment of the compliance files, based on the Social Pact 2013.

national LIs in enforcing EU OHS standards and addressing how the ELA can address these obstacles.

This section is based on an in-depth analysis of the official publication from the Commission on the ELA: *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a European Labour Authority* COM(2018) 131.[805] There are three main parts. First, there is an analysis of the current political context, which provides a better understanding of the rationale behind the creation of the ELA. Then, there is an analysis of the legal basis for EU intervention, which is crucial to identify the possible scope of action of the ELA. Finally, there is an overview of the various possibilities regarding the functions, the role, and the delivery options. This section ends with the conclusion that the ELA could have had the potential to address the obstacles faced by the national LIs effectively and to lead to a real improvement in the enforcement of OHS standards. Unfortunately, the option chosen was to create an upgraded version of the existing actors. It is, therefore, likely that ELA's future impact will be limited.

6.4.1. The context of social crisis and the urge for a commitment by the EU

Regarding the more general issue of enforcement in social Europe, an academic study found two points that would need to be improved.[806] First, the researcher emphasised that to achieve an equivalent implementation, it would be necessary to improve the coordination with and within MS with weak national enforcement systems. Second, cooperation at the EU level would have to be improved to enforce the application of binding EU social policies that exist in cross-border situations. A variety of stakeholders and institutions have previously expressed a similar sentiment. In 2013, the Commissioner in charge of the internal market, Michel Barnier, asked for the creation of a European "*control agency to coordinate and strengthen the mandate of labour inspectors".*[807] Then in 2016, in the report against social dumping, the Eurodeputy, Guillaume Balas, openly advocated for the creation of a European body of cross-

[805] The Commission Staff working documents: "Stakeholder Consultation – Synompsis Report", "Impact Assessment" SWD(2018)69 final, and the "Executive Summary of the Impact Assessment" SWD(2018)68 final
[806] *See* Hartlapp, M., 2014. Enforcing social Europe through labour inspectorates: Changes in capacity and cooperation across Europe. *West European Politics*, *37*(4), pp.805-824.
[807] "Barnier propose une agence européenne d'inspection du travail" Reuters, 3 December 2013. In recent years, the Jacques Delos Institute supported this idea: see Rinalid D.(2016) A new Start for Social Europe, *Jacques Delors Institute*, February 2016.

border LIs.[808] The same year, the EP followed up on his idea in a resolution by underlining the need to ensure proper implementation of EU legislation on cross-border labour mobility, asking for the reinforcement of controls and coordination between and by MS. The aim would be to promote standardisation and cooperation,[809] including through the strengthening of information exchanges between LIs.[810] The EP recommendations are formulated to address the more general problems faced by LIs in the EU.[811] The EP previously provided policy recommendations to promote cross-border cooperation between national authorities, combined with legal initiatives to strengthen the role of labour inspections. Aware of the limited competency of inspectorates in cross-border situations, the EP called on the Commission and the MS to ensure that labour inspections can be appropriately conducted in cross-border situations, regardless of a company's place of establishment.[812]

The need for coordination has previously been expressed at a different level, and before the ELA, nothing had been done because there were problems at the national and the European level.[813] At the national level, there was inadequate cooperation between national authorities on rule enforcement because of internal struggles, but also because they had difficulty working together. These difficulties could be due to the profound cross-country differences in staff and roles on competent authorities or the lack of information due to differences in linguistic and digital resources. Here, there is a failure at the European level to compensate or support the MS. Currently, the set-up at the EU level is fragmented, with several EU committees and networks operating on the basis of different legal acts and scopes of action. Additionally, as mentioned previously, none of them has decision-making or operational power or has very little. The EU should provide a framework and tools for administrative cooperation between MS. Currently, there are weak, not to say absent, mechanisms for joint cross-border enforcement activities.

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[808] Ballas, G. DRAFT REPORT on social dumping in the European Union (2015/2255(INI)) Committee on Employment and Social Affairs p.4

[809] European Parliament resolution of 14 September 2016, on social dumping in the European Union (2015/2255(INI))

[810] European Parliament resolution of 14 January 2014, on effective labour inspections as a strategy to improve working conditions in Europe (2013/2112(INI))

[811] *See details of the problem faced by LIs in the first section of this chapter*

[812] Fernandes S. (2018) What is our ambition for the European Labour Authority? *Notre Europe*. p.9

[813] "*There is scarcely any complaint or redress mechanism in the social field concerning the internal market rules that regulate the economic freedoms".*

To address these issues, European Commission President Juncker announced the creation of the ELA during the "Social Summit" on the 17 November 2017. The discussions between heads of state or government at the summit showed much common ground on the need for Europe to be equipped with a strong and tangible social dimension.[814] This summit featured the launch of the European Pillar of Social Right (EPSR), which was one of the ten priorities presented by Juncker before the EP.[815] The EPSR drives the EU's social agenda at all levels and aims to help the EU move towards upward social convergence in the single market. It is about delivering new and more effective rights to citizens to ensure equal opportunities and access to the labour market, fair working conditions, and social protection and inclusion. It was designed as a compass for a renewed process of convergence towards better working and living conditions across the Union.[816]

The EPSR has been described as a recent and rare initiative that aims to support, rather than deregulate labour market and welfare systems.[817] Some researchers underlined that the EPSR on its own does not necessarily change much but can have a meaningful impact if the stakeholders allow.[818] It is a tool, and its impact depends on how it is used. The support from all the key stakeholders will be crucial, starting with the MS and continuing with the EU institutions and European social partners. The same logic applies to the ELA. This future authority is linked to the EPSR as part of the "Social Fairness Package". Some commentators have indicated that although the package demonstrates a strong social commitment at the EU level, it will fail to provide effective delivery of the EPSR's goals without a shared commitment at the national level.[819]

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[814] European Commission – Press release. Europe's social dimension: President Juncker and Prime Minister Löfven present way forward after the Social Summit, 28 November 2017. http://europa.eu/rapid/press-release_IP-17-4973_en.htm

[815] Junker, J.C. 2014. *A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change.* Political Guidelines for the next European Commission, Opening Statement in the European Parliament Plenary Session pp.6-7

[816] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final

[817] Rasnača, Z., 2017. *Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking*. Working Paper 2017.05, ETUI, Brussels. p.5

[818] *Ibid*. p.8

[819] Dhéret, C., 2018. European Pillar of Social Rights: Member states must shoulder the responsibility of delivery. *EPC Commentary, 16 March 2018.*

After the announcement of the creation of the ELA in September 2017, former Eurodeputy Balas, who mentioned the idea of such an authority in early 2016, reacted by saying that the ELA should be able to adopt "decisions" when companies or national authorities do not apply rules and take sanctions against national authorities.[820] Some commentators questioned the feasibility of such an authority considering that, until now, there had been a fragile institutional framework for coordinating LIs across the Union.[821] For them, going from a nearly non-existent European institutional role to a common authority that would "*carry out cross-border inspections to fight abuse of workers and potentially settle disputes between national labour watchdogs*" was difficult to justify on either policy or political grounds.[822] Other commentators underlined that the discussions conducted in 2019 were crucial to guarantee that the future authority would bring a real added value within the EU functioning.[823]

Indeed, the creation of the ELA might have to face strong resistance by national governments over the principle of subsidiarity, mainly because the enforcement of labour mobility touches a national competence.[824] Fernandes underlined the risk of having a "minimal" agreement between the MS that would miss the point. To avoid this scenario, Fernandes emphasised that it will be imperative to insist on the dual argument in favour of the creation of the ELA, recall the cost of the non-creation of the ELA, and follow an incremental approach in setting up the ELA. However, he also underlined the potential of such an authority to help fulfil the EU's objective of being a social market economy. Cremers published an extensive report on the ELA in which he highlighted that some crucial questions regarding the details of the functioning of the ELA also need to be addressed in the discussion in 2019.[825]

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[820] Stupp, C., 2017.Commission wants new EU labour authority to crack down on worker abuse. *Euractiv* – accessible : https://www.euractiv.com/section/economy-jobs/news/commission-wants-new-eu-labour-authority-to-crack-down-on-worker-abuse/

[821] Beblavý, M., 2017. Is Juncker's enthusiasm for a common labour authority premature? CEPS Commentary, 18 September 2017.

[822] Stupp, C., 2017.Commission wants new EU labour authority to crack down on worker abuse. *Euractiv* – accessible : https://www.euractiv.com/section/economy-jobs/news/commission-wants-new-eu-labour-authority-to-crack-down-on-worker-abuse/

[823] Fernandes S. 2018. What is our ambition for the European Labour Authority? Notre Europe. Policy Paper n°219 p.2

[824]Barslund, M., Busse, M. and De Wispelaere, F., 2017. Posted workers–for some it matters. *CEPS Policy Insights*, (2017/37) p.8

[825] Such as: *which relevant stakeholder can ask for activation of the authority? What happens in the event of non-compliance with binding decisions? Should the ELA have executive power with direct punitive authority?- See* Cremers, J., 2018. Reflections on a European labour authority: Mandate, main tasks and open questions. Brussels: Friedrich Ebert Stiftung. p.14; *see also* Cremers, J., 2017. The enhanced inspection of collectively agreed working conditions: An assessment of the compliance files, based on the Social Pact 2013. pp.6-7

Between the 6th of November 2017 and the 7th of January 2018, the European Commission launched a double consultation to explore the views of citizens (the open public consultation; OPC) and stakeholders (the targeted consultation) on the establishment of an ELA. The majority of OPC respondents agreed that the existing cooperation between national authorities was insufficient to ensure the effective implementation of EU employment and social security rules in cross-border situations. [826] They also raised concerns about the lack of common EU standards for cross-border cooperation on employment and social security matters and the associated administrative costs. Thus, it appears that public opinion is aware of the problems mentioned above and, therefore, the need to take action.

Regarding the future function of the ELA, the OPC respondents were overall in favour of all the options suggested by the Commission.[827] Among the respondents who provided further explanations, they expressed their belief that the ELA could improve data collection and communication with added value in terms of law enforcement, dispute resolution, social dumping prevention, and support of national authorities posting workers.[828] Overall, it seemed that European citizens were in favour of the proposal of the Commission, which is different from the position of the targeted stakeholders. [829]

The targeted stakeholders were practitioners, including MS, public authorities, and social partners. Many of them recognised that differences in administrative capacity between the MS act as a barrier to effective cooperation.[830] Indeed, specific and complex national administrative landscapes and the lack of streamlined procedures, often with implications for institutional capacity, impede effective cooperation. In its common position, the PES Network added that challenges to cross-border mobility and social security coordination remain as systems in the EU are still not harmonised. They also acknowledge the fragmentation of efforts to address cross-border mobility issues and the problem of having a weak or absent mechanism for joint cross-border investigations and dispute settlements. Although the majority of

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[826] Commission Staff Working Document. Stakeholder Consulation – Synopsis Report. *Accompanying the document* Proposal for a Regulation of the European Parliament and of the Council establishing a European Labour Authority COM(2018) 131 final. p.2 - 67% in total: 33% Agree, 34% Strongly agree
[827] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.7
[828] *Ibid.* pp.7-8
[829] To the extent of the people who replied to the consultation.
[830] *Ibid* p.4

stakeholders agree on the nature of the problems and the need to address them, there are deep divergences on the ways to do so.

One possible solution to the problem of having a weak or absent mechanism for dispute settlement would be to acknowledge it, prompting the initiative to create a better system. Here, there are significant divergences regarding the nature of these potential mechanisms. Some stakeholders (like Business Europe) are sceptical of the idea of giving the ELA a dispute resolution function due to the potential interference with the CJEU. Surprisingly, the ETUC is also against legally binding mechanisms to resolve the disputes and is in favour of "*out-of-court*" solutions. However, the legally binding nature of the decision of the future ELA is crucial for its effectiveness.

A study suggested that ELA could intervene when dialogue between the national stakeholders failed. Then, it would be appropriate to provide the ELA with the possibility of appealing directly to the CJEU for a decision, if the ELA is unable to reconcile the viewpoints or find a solution.[831] It would also mean that if the ELA can adopt some binding decisions, the MS should have the right to appeal to the CJEU.[832] In the current political context and given the fragility of the CJEU's authority, it is not guaranteed that a compromise will be found among the MS in favour of an extension of the CJEU's authority over a national matter, even if giving up on that part might weaken the entire aim of the ELA.

Interestingly (and contrary to the opinion expressed via the OPC) a smaller share of the respondents to the targeted consultation was in favour of an ELA with advanced functions that would imply greater responsibility for inspection and enforcement activities. This position towards the ELA illustrates a broader dynamic from the MS regarding the development of the so-called "social Europe". Indeed, there has been a previous attempt by the EU to act in the social field, but some MS saw this as an intrusion in the national welfare systems.[833] Often, the MS argue that there is a need to preserve the national labour law and social models from European influence.[834] There is a strong paradox: on one side, there is an admitted need for

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[831] Fernandes S. What is our ambition for the European Labour Authority ? *Notre Europe*. p.12
[832] *Ibid*. p.13
[833] Rasnača, Z., 2017. *Bridging the gaps or falling short? The European Pillar of Social Rights and what it can bring to EU-level policymaking*. Working Paper 2017.05, ETUI, Brussels. p.7
[834] *See* Lamping W., 2010. Mission Impossible? Limits and Perils of Institutionalizing Post- National Social Policy, in Ross M. and Borgmann-Prebil Y. (eds.) *Promoting Solidarity in the European Union*, Oxford, Oxford University Press, pp.46–72

some EU-level social policy, but on the other side, there are protective tendencies concerning national systems. The result is a fragmented, incomplete, and ineffective legal framework that is partly subordinate to the market. Therefore, the positions of some stakeholders (i.e., MS) might have been an obstacle to an interesting European initiative from the Commission that has the support of European citizens.

6.4.2. The legal basis for the establishment of the European Labour Authority

Even though the ELA is part of the "Social Fairness Package", its legal basis is not provided by the social part of the European Treaties. Considering that it covers the issue of labour mobility, it can be broadly connected to working conditions in general, and the social security it might have instinctively fallen under the scope of the social provisions of the TFEU, meaning Art. 151, Art. 153, and Art.156. However, this would strongly limit the ambition and potential of an EU initiative. Indeed, according to the provisions mentioned above, the Union shall support and complement the activities of the MS by encouraging the cooperation between MS through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches, and evaluating experiences.[835] The Union shall also encourage cooperation and the coordination of national action by making studies, delivering opinions, and preparing the necessary elements for periodic monitoring and evaluation.

The Union is already doing this with the actors mentioned in the previous section: the SLIC, EU-OSHA, Eurofound, and ACSH. Their actions are useful and appropriate in the institutional context, but they have little or no executive power. Moreover, their actions are not suitable to address the challenges raised by cross-border situations, and to a certain extent, the problem faced at the national level by LIs. Additionally, if the Union had based the ELA on this basis, it should have acted by means of directives, which are minimum requirements. Furthermore, because of the scope of action that would cover the "social security and social protection of workers", the Council shall act unanimously in accordance with a special legislative procedure after consulting the EP and the European Social Committee.[836]

[835] Art. 153(1) of the TFEU
[836] Art. 153 of the TFEU

Considering the divergence on the political picture mentioned above, it would have been unlikely to reach a unanimous vote on such a proposal.

Therefore, the Commission has chosen a different approach with the legal basis for the ELA as it pertains to the free movement of persons and services and the right to establishment.[837] Indeed, the ELA's main task could be restricted to infringements related to labour mobility or cross-border recruitment, which find their origins in the functioning and application of the EU's economic freedoms.[838] Thus, the articles applicable are Articles 46, 48, 53(1), 62, and 91(1) TFEU. These articles have the advantage of being more "fitting" to the specific and narrow context of cross-border situations. Additionally, based on these articles, the EP and the Council can act in accordance with the ordinary legislative procedure. This means that if the Commission issues a positive opinion on the reviewed proposal, the Council decides based on qualified majority voting, which would be necessary in the current political context.

Additionally, in this setting, it is possible for the EU to issue directives or make regulations setting out the necessary measures. The fact that the Commission wants to act with a regulation has the advantage of being legally binding in every MS and would enter into force without the need for national implementation. It will most likely increase its effectiveness. Therefore, basing the creation of the ELA on economic freedoms increases its potential for effectiveness. However, it also subordinates the social step of the construction of the European model to the economic umbrella and might limit its ambitions in the long-term. Also, the ELA proposal does not fall under the exclusive competence of the EU. Thus, the principles of subsidiarity and proportionality apply.[839] The Commission justified its proposal, emphasising that the objectives of the ELA cannot be sufficiently achieved by the MS at a national, regional, or local level and can be better achieved at Union level. The reason is that the cross-border situation needs to be coordinated at the Union level, and so no MS can act alone.

Moreover, to ensure legal certainty for administrations and individuals, it is necessary to develop a coordinated and joint approach at the Union level rather than relying on a complex

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[837] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.23
[838] Fernandes S. What is our ambition for the European Labour Authority? *Notre Europe*. p.12
[839] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final pp.23-24

network of bilateral or multilateral agreements. Regarding the proportionality principle, the Commission stresses that the proposal is a proportional response to the need for operational support and does not go beyond what is necessary to achieve this goal. According to the Commission, the ELA would not impose new obligations on MS, individuals, or employers. It is likely the ELA will not impose direct new obligations (it will simply enforce existing rules) but might need to create some indirectly in order to ensure its functioning and effective cooperation and coordination between the MS.

In the risk assessment, the Commission underlined that the proposal does not trespass on national competences or enforcement activities. This part and the details on the functioning of the ELA will be crucial. To ensure its effectivity, the Commission might have to search for the extreme limit of the proportionality principle.

6.4.3. Possible futures of the European Labour Authority

6.4.3.1. The possible functions of the European Labour Authority

In the risk assessment, the Commission explicitly stated the options that have been discarded at an early stage.[840] It is clear that the ELA will not justify a transfer of new competencies from the national to the European level. Therefore, the rule of enforcement and inspection responsibilities are the competencies of national authorities. Respecting the principles of subsidiarity and proportionality, these competencies will not be transferred in any way to the Union level. This implies a rejection of the creation of a European LI or more competencies and powers granted to the European Commission. All the institutional stakeholders and social partners oppose this solution. However, to achieve the initial aim of the ELA — especially in terms of coordination and cooperation — standardisation of inspections and the LI will be necessary. This will still be the responsibility of the MS, but further actions by the Union might be required. The ELA may not be the opportunity to create a European LI, but it might be the occasion to re-frame the national inspectorates to allow them to work together.

[840] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.25

Meanwhile, the various policy options for the ELA and its tasks are explained in detail.[841] In order to address the identified challenges and achieve effective cross-border labour mobility, seven general tasks are envisaged at the EU level. These include labour mobility services and information for individuals and businesses, cooperation and exchange of information between national authorities, support for joint inspection, cross-border labour mobility analyses and risk assessment, capacity building, mediation between national authorities, and facilitation of cooperation in cases of labour market disruption. Three policy options have been considered (see Table 1).

Table 1 - *Synoptic Overview of Policy Options in Relation to Tasks*[842]

Tasks	Policy Option 1 (Support Option)	Policy Option 2 (Operational Option)	Policy Option 3 (Supervisory Option)
1. Labour mobility information and services for individuals and businesses	Definition of user needs and business requirements of the EURES Portal. Cooperation with relevant initiatives, tools and bodies at EU and the national level (e.g., Your Europe, Border Focal Point, national services).	Coordination and enhancement of the EURES network. Technical support to MS for the provision of services at the national level, including compliance with relevant obligations (e.g., SDG and enforcement directive on posting).	Establishment of standards for the provision of services at the national level based on EU rules. Establishment of a single physical national contact point on labour mobility.
2. Cooperation and exchange of information between national authorities	Coordination of role and liaison point between existing bodies.	Active support and expertise to competent authorities, ensuring cooperation and promoting the exchange of information through the use of relevant IT tools (ESSI, IMI).	Establishment of mandatory requirements on information exchange, where not provided for by current EU legislation. Development and inventory of user-friendly templates to enhance the

[841] *Ibid* pp.25-30
[842] *Ibid* p.27

			comparability of national procedures.
3. Support for joint inspections	Support for member states in coordinating joint inspections, i.e., organisation of coordination meetings and development of model agreements.	Pro-active proposals for joint inspections, logistical support, monitoring and follow-up.	Possibility to launch (joint) inspections on its own initiative. Management of European Inspection Corps (drawing on member states' inspectorates).
4. Cross-border labour mobility analyses and risk assessment	Sharing of studies and analyses by relevant EU bodies.	Analyses, risk assessment, data collection, peer reviews and follow-up recommendations.	In-depth assessments of member states.
5. Capacity building	Coordination of mutual learning activities across all mobility areas.	Set-up of comprehensive mutual learning, training and technical assistance programmes, exchange of best practices.	Development of pilot code for labour inspections.
6. Mediation between national authorities	Provision of expert opinion upon request on all mobility areas.	Facilitation of dispute settlement across all areas by mediation, including the possibility to adopt recommendations.	Development of pilot on out-of-court dispute settlement.
7. Facilitation of cooperation in cross-border labour disruptions	Awareness-raising among stakeholders about the *EU Quality Framework for Anticipation of Change and Restructuring (QFR)* and of relevant EU legislation and financial instruments.	Upon request, set-up of *ad hoc* support to national authorities and stakeholders to facilitate administrative cooperation, information sharing, and coordination in the event of cross-border events of company restructuring.	Issuing of recommendations as regards to the management of cross-border restructuring, and to the implementation of relevant EU legislation, including business insolvency and information and consultation of workers.

The first option would be a "support" function for the ELA, where the EU level would expand or coordinate existing activities or programmes or extend these from one specific area to all other mobility areas.[843] This option would not change much of the current setting and would not strongly impact the enforcement of OHS standards. Therefore, it will not be investigated further in this chapter.

This study focuses in detail on the "operational" and "supervisory" options, especially on the joint inspection and the conciliation mechanisms. The operational option would extend the scope of EU activities by adding some operational activities to the tasks mentioned in option 1 (Table 1). The significant change would be (depending on the agreement with the involved MS) to assume the role of launching and providing coordination and logistical support to joint cross-border inspections, including action to ensure their follow-up.

On that point, the supervisory option goes further and aims to achieve a more thorough EU-level integration of certain functions, which are not foreseen in the current framework yet are within the limits of EU competence. Regarding the joint inspections, the EU level would retain the right of initiative and would set-up a specialised European Inspection Corps composed of detached national experts. The EU level would also have the capacity to launch in-depth assessments of MS capacities for a thorough analysis of potential weaknesses and shortcomings.

The first reaction of the institutional stakeholders was to underline the importance of respecting national competencies, particularly in the area of labour inspections, which should remain a national matter. They made it clear that the joint investigations should not be entrusted to national authorities. Also, the ELA should not interfere in the functioning of national labour inspections. However, some of them recognised the value of the ELA supporting national authorities in conducting joint cross-border investigations. Yet the role of the ELA should be limited to a complementary role in cross-border cases, providing technical and logistical support.

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[843] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.28

Regarding mediation in cross-border disputes, the operational option would build on the existing conciliation mechanism by formalising it with a mediation mechanism that would provide recommendations to the involved MS on how to solve issues identified. The supervisory option would go a step further by having a pilot out-of-court arbitration system for certain cases. In that case, the EU would not only provide guidance on available EU resources but also recommendations to national authorities and stakeholders on the effective application of relevant EU legislation. There is a divided position of the targeted stakeholders concerning the ELA being able to carry out dispute resolution mechanisms in cross-border and social security matters. They are split on whether the decisions should be binding or whether the process should be voluntary and decisions non-binding.

In the risk assessment, the Commission ran a comparison of the different policy options.[844] The comparison of the three policies was based on four criteria: effectiveness, i.e., meeting three specific objectives of the initiative; efficiency, i.e., the extent to which objectives can be achieved for a given cost (cost-effectiveness); and coherence, i.e., the coherence and contribution in meeting Union's objectives and implementing relevant policy initiatives notably in the areas of the single market, justice, and fundamental rights.

Table 2 - *Comparison of Policy Options*[845]

	Policy Option 1 (Support)	Policy Option 2 (Operational)	Policy Option 3 (Supervisory)
Effectiveness (meeting objectives)	0/+	++	+++
Improved transparency and access to information	0/+	++	+++
Improved operational cooperation	0/+	++	++/+++

[844] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final pp.42-43
[845] *Ibid* p.43

Mediation in cross-border disputes	0/+	++	+++
Efficiency	0/+	++	- -
Coherence (including fundamental rights)	+	++	++

Note: For the purpose of comparing the impacts of options with the baseline scenario, all criteria have equal weight and a seven-stage qualitative grading scale is used: significant positive impact/gains (+++) medium (++), small (+), no impact (0), small negative impact/cost (-), medium (- -), significant (- - -).

It appears that the operational policy is preferred. According to the Commission, it achieves the best balance in meeting objectives; ensuring benefits (positive impacts) for national authorities, workers, and businesses without significantly increasing costs; and has the strong support of stakeholders.[846] It has been judged that the supervisory option goes beyond what is needed in the current context, especially in activities related to joint inspections and labour mobility services for individuals and businesses. Indeed, the possibility of launching inspections on the ELA's own initiative would limit the scope for national decision. Also, the idea of a European Inspection Corps could be a useful enhancement of national inspection capacity, but the establishment of such a system seems disproportionate compared to the size problem identified in the framework of this report.

Thus, the question is whether the operational option might answer the problem that the national LIs are facing in the enforcement of OHS standards, considering that the ELA seems to be the only tangible Union answer. The first common problem noticed in the previous section was the lack of staff, as the LI workforces are overloaded in Europe. In that respect, the operational option does not help, and the supervisory option with the creation of a European Inspection Corps could be a relief for the national level, at least for cross-border inspections. The fact that the ELA would not have the initiative to launch the joint inspection places the responsibility to start the process at the national level. Considering that the national LIs are already facing difficulty in that area, it is unlikely that they will voluntarily start an additional process that might seem complex. However, in that respect the operational option supposedly

[846] *Ibid* p.43

offers “logistical support, monitoring and follow-up”; depending on the details of these points, these might be of help for the national LIs.

The real problem of the lack of staff is not resolved here — almost the contrary. Regarding the lack of resources and support, it seems clear that there is a rejection by the institutional stakeholders to evoke this topic at the Union level, considering that it is a national matter. This is why the supervisory option, with the establishment of physical national contact points on labour mobility (the European Inspection Corps) at the charge of the Union, could indirectly help the functioning of the national LIs. [847] It is disappointing that, at the moment, the Union does not even consider this a problem, hiding behind the subsidiarity and proportionality principles.

Concerning the issues raised in terms of lack of cooperation and coordination, and the increasing number of international and cross-border situations, the operational option seems to centralise, focus, and extend the approach already applied by the current European OHS actors (SLIC, EU-OSHA, Eurofound and ACSH) to cross-border situations with the publication of analyses, data collection, and peer reviews, promoting the exchange of information. This approach is showing limits and might not be strong enough to address the problem faced by the national LIs. Meanwhile, the supervisory option offers to establish standards for the provision of services at the national level based on EU rules and mandatory requirements on information exchange and to develop an inventory of user-friendly templates to compare the national procedures. This latter option would standardise — not harmonise — the documents used and could bring clarity and transparency to the national LIs. It might also address the problem of the high complexity of administrative papers at the national level.

Also, it has been mentioned that in some MS, the organisation and legal framework might be a problem for the national LIs. If this is already a problem at the national level, it might also be the case for cross-border disputes where vastly different legal systems have to find a common situation. In that respect, the mediation offered with the operational option is a good start but might not be enough. However, one can raise the question of what would happen if mediation fails. Thus, the development of a pilot for out-of-court dispute settlements

[847] Even if it would financially impact the MS.

suggested in the supervisory option could be a good opportunity to resolve this problem, especially in the context of cross-border disputes.

6.4.3.2. Possible delivery options

Although the scope of action of the future ELA is something that has not been covered (at least not substantially) by existing EU actors (the Committee and agencies), it will cover their mandates to some extent. During the stakeholder consultation, some of them raised concerns about the risk of duplication or overlapping resulting from the co-existence of the ELA and other EU-level bodies. Thus, it has been clear that the creation of such an agency should not increase administrative complexity.

Most of the responses from the OPC emphasised its coordinating role to improve existing EU tools and EU networks rather than create a new body with broader scope substituting already existing organisations. A small number of respondents asked for the establishment of a centralised EU body incorporating existing EU tools and network. This opposition regarding the creation of a new agency seems contradictory according to the OPC results on the existing problem and the agreement that further action should be taken. This incongruity might be due to a misunderstanding of the function and power of the current actors.

Similarly, participants of the targeted consultation insisted that the role of the future authority should be limited to coordinating the work of MS bodies and existing EU-level bodies or mechanisms dealing with cross-border mobility. [848] The fact that the creation of the ELA should not imply a transfer of competencies away from the MS is a crucial point. The MS would rather improve the existing EU level structures than creating a new EU body as subsidiarity needs to be respected. Thus, the preferred option for several stakeholders is stronger cooperation between relevant existing EU bodies to address cross-border challenges without increasing their capacity or changing the way they are governed. Again, this seems inconsistent with the acknowledgement of the current issues and a need to act at the Union level.

[848] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.48

The current EU bodies are already showing some limits due to institutional limitation. Their investigations and recommendations are detailed and helpful, but not enough to address the current challenges. The requests of some institutional stakeholders to maintain the status quo, opposing the Commission's initiative to create a new authority, appear to be slightly irresponsible. This illustrates a bigger problem in terms of the functioning of the EU; there is an urgent need to have a European answer to social concerns, and the institutional stakeholders are holding back to maintain control at the national level. Moreover, among the stakeholders that would be in favour of the creation of a new body, it is only to the extent that it will be a supportive network and will not have an authoritative role. The rationale is still to safeguard the competencies of national authorities. The positions expressed during the consultation indicate that the forthcoming discussions regarding the adoption of regulation for the creation of an ELA will be complicated in the current political context, even though there is a factual need for it.

In its risk assessment, the Commission presented three delivery options: (1) a European Network will be established to coordinate existing EU labour mobility bodies, and the Commission will take on new operational tasks; (2) a new ELA will be established to perform operational tasks, building on existing labour mobility bodies; and (3) a new ELA will be established, building on an existing EU agency in the area of employment. [849] The network suggested that the first option would be composed of representatives from the existing EU bodies in the area of labour mobility and social security coordination. With this option, no new dedicated body would be created, and the existing EU bodies would remain unchanged; therefore, this option will not be investigated in further detail.[850] However, both the second and third options lead to the creation of a new ELA.

Under the second delivery option, the ELA is established as a new agency, following the Common Approach on EU decentralised agencies.[851] This ELA would benefit from an independent legal status, would not be tripartite, and would focus on supporting the application

[849] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final pp.45-48
[850] *See* Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.45 for further details
[851] *Ibid* p.46

of Union law based on an internal market legal basis. Its operational tasks would focus on supporting cooperation between competent authorities in cross-border matters. Also, the ELA would not be able to adopt binding decisions, would have to rely on the Commission and the MS, and would be addressed in the context of existing committees and networks, as currently applicable. In that case, the ELA would take over the role of seven existing bodies.[852] It has been explicitly said that this option would not directly address certain aspects, such as improvement of the working environment or working conditions.

Under the third delivery option, the ELA would be established through a merger with one of the existing EU agencies in the field of employment, namely Eurofound, Cedefop, or EU-OSHA. Here, the impact would be radically different, considering that two out of the three agencies considered are dealing with working conditions and one directly with OSH. The host agency would change its mandate to incorporate the new operational tasks of the ELA detailed above while continuing to deliver on its existing tasks. This option would be a two-steps-at-once approach by having a specialised and dedicated staff while seeking synergies with the expertise and management of an existing agency. However, considering that none of these agencies has a cross-border mandate, and they are more research-orientated rather than operative, there would be an obligation to amend one of the existing agencies' founding regulations.[853]

Moreover, the labour mobility issues fall outside the current scopes of expertise of the agencies (except Eurofound, partially). This might mean that, in the short term, the effectiveness of the ELA will not match the current expectation. However, building on existing agencies — especially EU-OSHA and Eurofound — could have a beneficial impact in the long-term. Indeed, that would give strength to the current agencies that already have strong expertise in employment (and so cross-border issues) and are already working with the other actors and

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[852] (i) The EURES European Coordination Office, in order to deliver the task of coordinating information, guidance, and assistance services to individuals and businesses facilitating the exercise of the right to work in another EU country; (ii) the Conciliation Board from the AC, with a view on extending its scope beyond social security coordination matters to all labour mobility areas, as well as the (iii) Audit Board and the (iv) Technical Commission of the AC, due to their operational nature; (v) the European Platform to tackle Undeclared Work with a view to streamlining operational activities, notably on capacity-building, analysis, and joint inspections; (vi) the Expert committee on the Posting of Workers; and (vii) the Technical Committee on the Free Movement of Workers, on the grounds of their technical nature (exchange of information between public authorities). The is no mention of the SLIC.

[853] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.54

EU bodies. That would facilitate the integration of the ELA. Moreover, building on existing staff and expertise could lead to interesting transdisciplinary progress, especially in OHS. It might be an indirect way to have an authority with a power of action in the OHS field.

Table 3 - *Comparison of Delivery Options* [854]

	Delivery Option 1 (European Network)	Delivery Option 2 (New Agency Building on Existing Bodies)	Delivery Option 3 (ELA Builds on Agency)
Effectiveness (meeting objective)	+	+++	+++
Transparency and access to information	+	+++	+++
Improved operational cooperation	+	+++	+++
Mediation between member states	0	+++	+++
Efficiency	0	++	+
Coherence	+	+++	+

Notes: For the purpose of comparison a seven-stage grading scale is used: significant positive impact/gains (+++), medium (++), small (+), no impact (0), small negative impact/cost (-), medium (- -), significant (- - -).

The Commission compared the various delivery options according to their effectiveness, efficiency (cost-effectiveness), and coherence (with the Union's objectives in the areas of employment and social policy and concerning the general policy of the Union's budgetary and organisational objectives). According to the Commission, the preferred option would be option 2, which also seems to be the most suitable in terms of proportionality. Once again, the Commission felt that the third option goes beyond what is necessary. The third option would involve an entirely different reform agenda in the mobility agenda. In the bigger picture, the third option might be an appropriate answer to bigger structural problems. However, even

[854] Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final p.57

if it is what is necessary in theory, the position of the institutional stakeholders does not make this option suitable to the current political setting.

To conclude, the Commission felt that the preferred option was to establish an ELA with an operational role, building on EU bodies in the area of labour mobility.[855] This new authority will also develop further cooperation with existing agencies in the employment area, ensuring complementarities and adapting to their future evolution. Thus, the impact on the enforcement of OHS standards in cross-border employment situations will be small, and there will be no impact on the problem that the national LIs are facing.

The supervisory policy option and the third delivery option could have at least left some opportunity for future evolution. In terms of improvement of the OHS standards, the current plan for the ELA started with potential but ended up being a missed opportunity. This illustrates the broader political crisis when it comes to building a social Europe today.

6.4. Conclusion

This chapter attempted to address the need to rethink the division of competences between the European and national level within the existing institutional scope regarding the enforcement of EU OHS standards — especially in the light of the cross-border dimension of OHS. The main question was whether the European Union can act in place of the national LIs, while empowering them to improve the enforcement of EU OHS standards.

To address this question, an overview of the similarities and differences in the national way of enforcement by the LIs was provided. All the examples mentioned illustrate that the concept of sanctions and its various aspects are fundamental to ensure the enforcement of OHS standards in the MS. However, the differences between MS regarding the legal nature of sanctions, the amount of the fine, and the combination with soft enforcement can lead not only to inconsistency but also to a non-effectiveness of EU OHS standards within MS. This lack of a consistent method of applying the rules can affect the competitiveness of the MS. As shown

[855] *See full details* Commission impact assessment – Accompanying the document, Proposal for a Regulatory of the European Parliament and of the Council establishing a European Labour Authority – COM (2018) 131 final – SWD(2018) 69 final pp.58-63

previously, action by the EU institutions might be possible to achieve a more consistent application of EU OHS standards.

Additionally, not all the national LIs have the same problem, and the obstacles are not uniform, but it is possible to see a similar pattern among some MS. The problem is that the activities of the national LIs which are relevant for cross-border labour mobility end at the border because the mandate of the control and enforcement institutions is limited to the national territory. Ergo, joint activities beyond national borders need more legal backing.[856] Thus, one can raise the idea that if arrangements regulating labour markets have been the cause of the complication of the functioning of the LIs, they can also be the solution by regulating differently, especially considering the functions and powers of the existing actors having a mandate on OHS at the European level (i.e., SLIC, ACSH, Eurofound, and EU-OSHA).

Indeed, they do not have the executive power to take direct action to enforce EU OHS standards; they provide support to the Commission, which is the institution that can take action. Additionally, these actors have relatively limited resources to achieve their goals. Their roles are to support and provide information to the Commission — one through the consultation process at the EU level and the other by enforcing the existing EU OHS standards. Meanwhile, the agencies focus both on the research and publication of data.

Examination of the publications by the SLIC in recent years underlines the duality of the visions and calls for action on how to improve the enforcement of EU OHS standards. On one side, there is confirmation that the SLIC and the Commission are holding on to their roles as coordinators and trying to respect the sovereignty of the MS. However, on the other side, it seems that there is an increasing awareness of the current challenge, especially the cross-border work relationships. To address these specific challenges, it is necessary to have an independent authority, ideally with executive power at the EU level, that could act in the name or place of the MS.

After years of debates, the Commission finally announced the creation of such an authority with the ELA. However, after an analysis of the different possible options, the

[856] Senior Labour Inspector's Committee (2012). Consensus Paper on Cross-border Enforcement (CIBELES Project), European Commission: Brussels.

Commission felt that the preferred option would be to establish an ELA with an operational role, building on EU bodies in the area of labour mobility. This new authority will also develop further cooperation with existing agencies in the employment area, ensuring complementarities and adapting to their future evolution. Thus, the impact on enforcing the OHS standards in cross-border employment situations will be small, and there will be no impact on the problem that the national LI are facing. The supervisory policy option and the third delivery option could have at least allowed for some future evolution.

In terms of improvement of the OHS standards, the current plan for the ELA started with potential but ended up being a missed opportunity that illustrates the broader political crisis when it comes to building a social Europe today. Overall, the ELA is an illustration of current limitations in terms of improvement of EU OHS standards. Some options that could have led to a real improvement at the EU level has been discussed but because of the choice of some stakeholders to hold on to the sovereignty of their authority (and so maintain the imbalance of scope between the enforcement of EU OHS and the market freedoms), the ELA will be an upgraded version of the existing mechanisms, such as networking and mediations, but without real novelty or innovation. This example shows that ways to improve the enforcement of OHS in the EU do not depend exclusively on what is legally possible, but on the political will of the main actors, starting with the MS.

CHAPTER 7
Conclusion

"What would have been desirable and what was reasonable are two different things. It is necessary to be reasonable and realistic."[857]

Although the above statement was intended to describe the development of the EU OHS legal framework in the 1970s, it seems that it is still applicable today. In contrast, rationales and approaches which led to the development of the existing EU OHS legal framework are no longer suitable for adopting new directives in 2019. The main body of the existing EU OHS legal framework was adopted between 1989 and 2000,[858] and since then, the situation can be described as a stand-off. While legally, there has not been any major step forward, the nature of work has changed considerably over the past twenty years. Various studies have shown the deep impact of work on workers' mental health with more attention given to psychosocial risks and how the latest use of technology impacts workers' lives via the increase of so-called technostress. The structural evolution of the labour market and the nature of the contract for work must also be taken into consideration: the increasing number of precarious self-employed workers who cannot benefit from the existing legal protections.

Reports published by the agencies and bodies in charge of OHS at the EU level demonstrates a degree of awareness of these issues. So, why have the psychosocial risks been addressed with a framework agreement and not a directive? Why, despite the institutional possibility to adopt a directive with a qualified majority, does the EU not push harder to adopt new directives? Especially when there is an increased need for cross-border action: the enforcement of EU OHS standards is still national while the labour market has a European scope with workers free to move rapidly from one MS to another. So, is it so complicated to move the boundaries of the national and the European competencies if there is a need to do so? Considering the long period of stagnation, one might even ask whether the EU is the appropriate level and has the appropriate institutions and powers to address these new challenges.

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[857]Berlin, Alexandre. Interview, March 01, 2018. Archives, University of Glasgow p.9
[858] Vogel, L., 2015. The machinery of occupational safety and health policy in the European Union. *History, institutions, actors, Brussels, ETUI*. p.44

It was with the intention to contribute to the debate on the future of EU OHS that this thesis provided an overview of ways to overcome this period of stagnation and continue the improvement of workers' health and safety. Its main conclusion was that the improvement of workers' health and safety might not be possible by adopting new EU OHS directives but rather by applying differently and ensuring the enforcement of the existing EU OHS legal framework. Indeed, I argued that the adoption of new EU OHS directives is currently unlikely because the initial adoption of the existing EU OHS legal framework was possible due to a set of circumstances which no longer pertains. Additionally, the informal rationales which have shaped the development of the EU OHS framework in the "golden age" of the Delors Commissions (i.e. reaching a consensus and a compromise) are not applicable at the current time. Therefore, the possible ways to improve workers' health and safety at the EU level are (i) by initiating a European coordination of the way the LIs enforce existing standards at the national level, and (ii) by challenging the application of EU OHS rights before the CJEU to cover existing gaps and develop "new" rights, e.g. the right to reasonable accommodation in the workplace for injured or unwell workers.

7.1. The legislative route to improving EU OHS standards is politically blocked

7.1.1. The limits of the rationales which built the existing EU OHS legal framework

In the evolution of the EU OHS legal framework, the Commission always had a role of coordinator of the national positions with the aim to find a compromise and a consensus. The coordinating role of the Commission might have been a factor which helped the adoption of EU OHS Directives in the 1990s, but it might also be the reason why the adoption of a new significant EU OHS Directive is unlikely in 2019. Even the institutional changes such as the introduction of qualified majority voting in 1986, or changes in the approach of the OHS such as the change towards qualitative duties and rights with Framework Directive 89/391/EEC, did not change these rationales of compromising and finding a consensus.

The importance and the informal aspect of OHS, and the importance of finding a compromise and a consensus between the MS was confirmed both by interviews conducted for this PhD project and by the existing literature on the institutional decision-making dynamics. It appears that even when the directives where adopted by a qualified majority, informal

compromises were reached, and a consensus was found to facilitate the application at the national level. In the first part of the thesis, I concluded that finding a common approach through compromise and consensus might not any more be appropriate or possible, for two reasons. First, it was easier in earlier decades to find a compromise because the MS had, for the most part, similar expectations regarding the role and functions of the EU. The dynamic changed considerably with the integration of new countries at the end of the 1990s and during the 2000s because these new MS had to meet the standards of EU OHS Directives – and EU *acquis communautaires* in general. In that context, adopting *additional* norms became politically difficult and technically complicated.

Secondly, during the time-period corresponding with the 'golden age' of OHS at the European level (i.e. during the 1990s), there was still something of a balance of power between the social partners. This balance does not exist any more and, due to deregulation at the national level, all across Europe and financialization (and its crisis) the TUs have been significantly weakened. However, history shows that it is not the first time that EU OHS decision-making has reached some institutional limits. The Single European Act was developed as a way to overcome the difficulties raised by the need for unanimity, which blocked the first wave of directives in the 1970s. This means that in the current context, where we are reaching the limits again, it would be necessary to have an ambitious Commission to take the initiative and oversee the continuing development of the EU OHS framework.

Unfortunately, this has not been the case. The Barroso-Commissions went in the opposite direction with the *Better Regulation* Agenda attempting to significantly reduce the extensive and well-developed corpus of more than 30 OHS directives to a single directive to make "*EU law simpler and less costly*".[859] A review of EU OHS Directives proved their strength by concluding that reviewing and reducing this corpus of directives would not be an improvement. It did, however, set the tone of the Barroso Commissions regarding the OHS field. I underlined in Chapter 2 and in Chapter 5 the paradox of the Barroso-Commissions: in theory, this Commission focused on the implementation and the enforcement of the existing framework; in practice, it signalled a disengagement of the Commission in respect of the effectiveness of the law, and a reliance instead on national enforcement even if it means the

[859] https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en

existence of significant differences between the MS. Therefore, considering the small likelihood of having new directives adopted in the current context, one of the main arguments of the thesis was that it is necessary to focus on the existing legal framework to identify points of leverage to extend and to challenge the boundaries of EU OHS standards.

7.1.2. One common European understanding of OHS standards; two different national realities.

The adoption and the implementation of EU OHS Framework Directive 89/391/EEC during the 1990s created a theoretical convergence of standards while maintaining a difference in the way they are enforced at the MS level. A comparative study of OHS in the UK and France emphasised the importance of the national political contexts during the phase of implementation of EU Directives, but also underlined the fact that different legal traditions impact the way the EU Directives are applied at the national level. Indeed, the potential points of pressure on existing standards today can be identified only by examining how the EU OHS legal framework has been implemented at the national level. Considering that Directive 89/391/EEC is the cornerstone of the EU's modern legal framework, it can be assumed that an in-depth analysis of its implementation might show the overall trends for the rest of EU OHS Directives. Similarly, the French and the UK systems represented suitable examples due to their different legal 'families" (i.e. common law and civil law) but also due to their overall different relations with the EU. The comparative study confirmed that the implementation of EU OHS standards – even if they are legally binding – does not necessarily mean a standardised application and enforcement of these norms across national borders.

The examination of the impact of the implementation of the Framework Directive in France and the UK showed that this implementation brought the British and the French OHS national legal frameworks closer together – at least on paper. For example, the UK had to implement the right to leave the workstation in case of serious or imminent danger (which has been inspired by the French framework) and had to adjust the way of appointing the health and safety representatives by adding a second channel of representation. Meanwhile, the French legislature had to implement the duty of workers to be responsible for their own health and safety and that of people around them, which was against the French tradition and inspired by the British legal framework. However, from a practical perspective, the application of EU OHS standards continues to diverge, both before the courts and in the hands of the LI. Divergences

before the national courts might be due to the fact that the liability system and concept of employers' liability/responsibility are different in these two MS. In the UK, there is consideration of what is *reasonably practicable,* and in France, there is the principle of *obligation de resultat (faute inexcusable).* It confirmed and emphasised the importance of the courts in the application of the (EU OHS) legal standards. Moreover, in both countries, there have been national reforms on the way to apply and to enforce the OHS standards. The UK has changed the access to courts to get compensation, and reduced the number of LIs. France has reformed the CHSWC, and the occupational doctors, and the LIs too. The consequences of these reforms were that EU OHS standards still exist on paper but are barely applied or enforced in practice at the national level.

By the end of Chapter 4, it appeared that there might be a lack or a gap in the way EU OHS concepts are applied before the Courts and enforced by LIs at the national level. I therefore argued that an action before the courts and the way in which LIs enforce OHS standards are two points of pressure with which it would be possible to revitalise the existing EU OHS legal framework. The question was, how? Would this be possible at the European level given the existing institutions and competences? What could be achieved?

7.2. The improvement of the application and enforcement of EU OHS standards as a way to counter the disengagement of the Commission

The second main argument of the thesis was that the development of strategic litigation before the Court of Justice of the European Union (CJEU) and a European coordination of the ways the LIs enforce EU OHS duties and rights can lead to an improvement of the EU OHS legal framework: not by the adoption of new standards but by ensuring the application and enforcement of existing EU OHS rules.

7.2.1. Strategic litigation before the CJEU: many birds with one stone

My main argument here was that it is possible to challenge the current application of existing EU OHS provisions before the CJEU with the aim of extending the scope of OHS workers' right to previously 'uncovered' situations. To illustrate this idea, I began by examining CJEU jurisprudence on OHS in order to identify the factors that might explain the evolution of the jurisprudence in that field. Then I addressed the current lack of European protection for the

injured or unwell workers when they return to work after a work accident or occupational disease, focusing here on the discrimination jurisprudence. Currently the CJEU has a restrictive understanding of "disability" and does not take into consideration the origin of the disability. I argued that while the jurisprudence on disability at work does not provide workers with appropriate protection at the early stage of impairment, by focusing on the occupational origin of the impairment, it is possible to develop a complementary litigation strategy based on the provisions of Directive 89/391/EEC.

The detailed analysis of the jurisprudence of the CJEU led to vastly different findings in respect of infringement proceedings and the preliminary rulings. First, there was confirmation of the political behaviour of the Commission regarding the use of the infringement proceedings, as previously highlighted by the existing literature. The implication was that - except in the case of 'easy' infringements proceedings (such as the non-respect of the time to implement a directive) - the Commission might not be willing and/or have the resources to examine the conformity of the implementation in a substantive manner. That being the case, the thesis also confirmed the shift towards a decentralised enforcement of workers' rights before the CJEU, through the development of preliminary rulings. That said, the analysis also showed significant differences between the MS regarding the countries where the request for a preliminary ruling came from. These differences might be explained by the different legal traditions; however, they might also be due to differing political agendas at the national level, which impact the possibility to discuss OHS issues before the national courts.

Nevertheless, I underlined that some significant improvements in the application of the EU OHS standards have been made by the preliminary rulings hold of the CJEU. I identified the fact that the argumentation was based on individual rights as the common element of those decisions which served to improve the application of the EU OHS standards. For this reason, I argued that it might be possible to keep challenging the application of the existing legal framework before the CJEU with the development of a new litigation strategy. This idea has been illustrated by the existing gap in the EU OHS framework in respect of the right to a reasonable accommodation in the workplace for injured or unwell workers after a workplace accident or occupation disease. This thesis raised the possibility of arguing for such a right by relying on the phrasing of the discrimination framework and basing the main argument on the existing legal framework, in particular, Article 6.d of the Framework Directive. The idea would be to challenge the understanding of the employers' responsibility through the Court and to

argue that the lack of an obligation in the national legislation to adapt the working conditions of an injured or unwell worker who has been victim of a workplace accident or occupational disease would be contrary to the obligation of prevention embodied by the directive. Conscious of the time and the resources necessary to bring an action before the CJEU, I suggested that the litigation might be supported and led by TUs or worker representatives. Of course, no one can predict what the decision of the Court would be. However, in the case where the Court would support such an idea, it would have a direct impact on all the national jurisdictions and so the workers' situations, in the EU. It could also be a way to improve the application of EU OHS standards.

7.2.2. The necessity for a coordinated action of the Labour Inspectorates to compensate the imbalanced between social rights and economic freedoms.

I then examined the LIs in the EU confirming the imbalance between social rights and economic freedoms, and the gap created between the national methods of enforcement and cross-border problems. The main argument here was that there is a need to complete the legal enforcement at the national level, and it is the role of the EU to ensure that the administrations at the national level are functioning. If coordination of the national systems is not possible, the EU needs to act by itself, at least in respect of enforcement (or rather lack thereof) that would lead to a distortion of the single market. The creation of the European Labour Authority (ELA) can be seen as such an initiative. Unfortunately, I argued that the impact on the enforcement of OHS standards in cross-border employment situations will be small, and there will be no impact on the problem faced by national LIs. This meant that the problem of the sharing of competences still exists, and the institutional limits cannot be overcome by the ELA. It seemed that, beyond the case of the ELA, the analysis of different scenarios and the examination of the stakeholders' positions – especially the positions of MS – showed the limits of the current settings, not only legally but also politically. Indeed, this new Authority will develop further cooperation with existing agencies in the employment area, ensuring complementarities and adapting to their future evolution.

To justify the need for consistency in the application of OHS rules I began by examining the situation of the LIs at the national level. Here there are deep divergences regarding the sanctions and the way EU OHS standards are enforced by LIs, especially regarding the nature of the sanctions, the degree of the sanctions, and the balance between hard and soft enforcement.

These differences at the national level can lead not only to inconsistency but also to a lack of effectiveness of EU OHS standards on the ground, and so across the EU. Further studies are needed to strengthen and to explore this idea, but from this angle, it might be possible to legitimise action at the EU-level, arguing that such action would fall in the exclusive competencies of the EU due to its link with the functioning of the single market.

The examination of the national LIs showed that despite their differences, there are some similar patterns in the challenges that they face. The two main problems are (i) the shortcomings of the national organisations and (ii) the more challenging context and work settings illustrated by the increasing number of cross-border working relations. The LIs might be able to overcome and to address the cross-border situations with the current coordination of the SLIC, but the prerequisite conditions for them are to have the appropriate training, time, and resources – things that they do not have at the national level. This lack at the national level diminished the impact and the effectiveness of the European strategy of coordination. Indeed, all the existing actors with a mandate to work on OHS at the EU level do not have executive powers: their contributions support and are considered by the Commission, which is the institution with executive powers.[860] However, as shown previously, it is currently unlikely that the Commission will intervene in the direction of developing the powers of these bodies further.

The only exception has been the initiative to create the ELA in 2017 – becoming active in 2019/2020 and commencing full activity in 2024.[861] The purpose of the ELA is to address the challenges of the cross-border tensions between national authorities and market disruptions. Could the ELA be an illustration of what it is possible at the EU level to improve the enforcement of EU OHS standards? Different options as to the potential powers and role of the ELA were compared and debated. The supervisory policy option included the possibility to launch inspections on the authority's own initiative and establish the European Inspection Corps and standards for the provision of services at the national level based on EU rules. It would also contain mandatory requirements for information exchange and develop an inventory of user-friendly templates to compare the national procedures. It would have standardised – not

[860] At the European Union level, there are two agencies and two committees relating to OHS: The Senior Labour Inspectors Committee (SLIC), the advisory committee for safety and health at work (ACSH), the European Foundation for the improvement of living and working conditions and the European Agency for Safety and Health at work.
[861] https://ec.europa.eu/social/main.jsp?catId=1414&langId=en

harmonised – the documents used and might have brought clarity and transparency to the national LIs. I am convinced that this option would have led to real improvements at the national and European level by helping to shift the share of competencies of enforcing EU OHS standards between the two levels, when and where it is necessary. Unfortunately, the Commission felt that the preferred option was the establishment of an ELA with an operational role building on EU bodies in the area of labour mobility.

7.3. The contributions and limits of the thesis

The research and analysis undertaken in this thesis have limits. The focus was limited to OHS field. As underlined in the introduction, the development and the rationale that apply to OHS are specific and might differ from the rest of the 'social Europe'. This study proposed hypotheses that would need to be tested and potentially confirmed regarding other of the social dimensions. The comparative study in this thesis focused on MS that already had a strong legal OHS framework prior to the implementation of the Framework Directive. Therefore, it might be necessary to complement this first analysis with countries that did not have a well-developed OHS national legal framework before the implementation of the Directive 89/391/EEC. The final limitation of the thesis arose in respect of its examination of the CJEU jurisprudence: only decisions of the Court were analysed. However, it might be interesting to investigate the earlier stages of the infringement proceedings and action taken by the Commission to ensure the implementation of EU OHS standards (e.g., letter of intention). It would also be interesting to investigate the requests for preliminary rulings that did not pass the admissibility tests and to try to understand why was so. Such studies would complete the first findings of this these.

Notwithstanding these limitations, the thesis makes a significant original contribution to the existing literature. By conducting semi-qualitative interviews with those who directly helped drafting or negotiating the Framework-Directive 89/391/EEC, it has been possible to suggest a hypothesis to explain why the development of EU in the field of OHS might be at standstill. The testimonies from Alexandre Berlin, Jean Lapeyre and Marc Sapir helped to build the argument that the rationale of consensus and compromise is no longer applicable. It might contribute to the overall idea that there is a need to change the European decision-making system due to the high number of MS. One way would be to initiate a new institutional change, as was the case with the SEA, or to re-examine the idea of a 'two-speed' Europe.

Additionally, the detailed, schematic analysis of the jurisprudence of the CJEU over a period of more than 30 years gave a general overview of the jurisprudential trends and pattern in OHS field. Such an overview not only echoed previous research on the jurisprudence of the CJEU, but it also constitutes preliminary work for future research. Potential future research could, for example, investigate why some MS have referred more questions to the CJEU than others. Additionally, the argument of developing a litigation strategy based on individual rights before the CJEU to challenge an existing EU legal framework can be extended to fields other than the OHS directives.

Finally, by carefully comparing the LIs across the MS, it has been possible to synthesise main differences in the way to enforce OHS standards, but also similarities regarding the obstacle the LIs are facing. This overview led to questioning the existing functioning and institutional framework by highlighting the limits of the enforcement of EU OHS standards. It could contribute to the overall debate on the need to rethink the balance between Social and Economic within the Union – either towards a federal Europe (in that respect, further study would need to be conducted in comparable countries to see how they are dealing with OHS, e.g., Canada), or a New Union.

This thesis has also made a more practical contribution to legal and policy debates. By confirming the theoretical convergence while respecting the national differences, this study can provide an argument to adopt new directives in the future to address the OHS challenges. It could also counter the argument that directives are too binding for the MS. Finally, the idea of challenging the Framework Directive to address the gap of the protection for injured or unwell workers could be used by the ETUC as a starting point to mount strategic litigation before the CJEU.

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Single European Act 1986

Community Charter of the Fundamental Social Rights of Workers

Occupational Safety and Health Convention, 1981 (No.155)

Constitution Française de la Vème République

1.2. National Legislation

1.2.1. French Legislation

Loi du 22 Mars 1841 relative au travail des enfants employés dans les manufactures, usines ou ateliers

Loi du 2 Novembre 1892 sur le travail des enfants, des filles et de femmes dans les établissements industriels

Décret n°47-1430 du 1 août 1947 portant règlement d'administration publique en ce qui concerne l'institution de comités d'hygiène et de sécurité dans les établissements soumis aux dispositions du titre II du livre II du code du travail

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Manual Handling Operations Regulations 1992

Personal Protective Equipment Regulations 1992

Provision and Use of Work Equipment Regulations 1992

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Council Directive **80/1107/EEC** of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work

Council Directive **82/504/EEC** of 12 July 1982 amending Directive 78/663/EEC laying down specific criteria of purity for emulsifiers, stabilizers, thickeners and gelling agents for use in food

Council Directive **82/605/EEC** of 28 July 1982 on the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work (first individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)

Council Directive **83/477/EEC** of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)

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Council Directive **90/270/EEC** of 29 May 1990 on the minimum safety and health requirements for work with display screen equipment (fifth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Council Directive **92/57/EEC** of 24 June 1992 on the implementation of minimum safety and health requirements at temporary or mobile construction sites (eighth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Council Directive **92/85/EEC** of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

Council Directive **93/104/EEC** of 23 November 1993 concerning certain aspects of the organization of working time

Council Directive **96/34/EC** of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC

Council Directive **96/82/EC** of 9 December 1996 on the control of major-accident hazards involving dangerous substances

Council Directive **98/24/EC** on the protection of the health and safety of workers from the risks related to chemical agents at work

Council Directive **1999/63/EC** of 21 June 1999 concerning the Agreement on the organisation of working time of seafarers concluded by the European Community Shipowners' Association (ECSA) and the Federation of Transport Workers' Unions in the European Union (FST)

Directive **1999/92/EC** of the European Parliament and of the Council of 16 December 1999 on minimum requirements for improving the safety and health protection of workers potentially at risk from explosive atmospheres (15th individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)

Council Directive **2003/10/EC** of 6 February 2003 on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents

(noise) (Seventeenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC)

Council Directive **2003/88/EC** of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time

Council Directive **2006/54/EC** of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

Council Directive **2000/78/EC** of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

Directive **2010/18/EU** of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC

2.2. Regulations

Regulation (EEC) No 1365/75 of the Council of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions

Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work

Council Regulation (EC) No 1643/95 of 29 June 1995 amending Regulation (EC) No 2062/94 establishing a European Agency for Safety and Health at Work

Council Regulation (EC) No 1654/2003 of 18 June 2003 amending Regulation (EC) No 2062/94 establishing a European Agency for Safety and Health at Work

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

Council Regulation (EC) No 1112/2005 of 24 June 2005 amending Regulation (EC) No 2062/94 establishing a European Agency for Safety and Health at Work

2.3. Decisions

[487/57] Council Decision adopted the 9 July 1957 concerning the terms of reference and rules of procedure of the Mines Safety Commission

[74/325/EEC] Council Decision of 27 June 1974 on the setting up of an Advisory Committee on Safety, Hygiene and Health Protection at Work

[74/326/EEC] Council Decision of 27 June 1974 on the extension of the responsibilities of the Mines Safety and Health Commission to all mineral-extracting industries

COMMISSION DECISION of 12 July 1995 setting up a Committee of Senior Labour Inspectors (95/319/EC)

COMMISSION DECISION (EU) 2018/402 of 13 March 2018 setting up the European Advisory Group for the European Labour Authority

2.4. Commission Recommendations

[2188/62] Commission Recommendation to the Member States on the adoption of a European list of occupational diseases, 23 July 1962

[66/462/EEC] Commission Recommendation to Member States on the conditions of compensation for the victims of occupational diseases, 20th July 1966

[66/464/EEC] Commission Recommendation to the Member States on the medical control of workers exposed to particular risks, 27th July 1966

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2.5. Working Documents

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European Parliament resolution of 14 January 2014, on effective labour inspections as a strategy to improve working conditions in Europe (2013/2112(INI))

European Parliament resolution of 14 September 2016, on social dumping in the European Union (2015/2255(INI))

COMMISSION STAFF WORKING DOCUMENT SWD (2017) 10 final. Ex-post evaluation of the European Union occupatinal safety and health Directives (REFIT evaluation)

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3. Jurisprudence

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C-28/62	*Da Costa en Schaake NV and Others v Netherlands Inland Revenue Administration*	ECLI:EU:C:1963:6
C-43/75	Gabrielle Defrenne contre Société anonyme belge de navigation aérienne Sabena	ECLI :EU :C :1976 :56
C-283/81	Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health	ECLI:EU:C:1982:335
C-188/84	Commission of the European Communities v French Republic	ECR : 1986 I-00419
C-179/88	Handels- og Kontorfunktionaerernes Forbund i Danmark (on behalf of Birthe Viebeke Hertz) v Dansk Arbejdsgiverforening (on behalf of Aldi Market K/S).	ECR : 1990 I-03979
C-190/90	Commission of the European Communities v Kingdom of the Netherlands.	ECR : 1992 I-03265
C-382/92	Commission of the European Communities v United Kingdom	ECR: 1994 I-2435
C-421/92	Gabriele Habermann – Beltermann vs. Arbeiterwohlfahrt, Bezirksverband Ndb./ Opf.e.V.	ECR: 1994 I-01657
C-32/93	Carole Louise Webb vs. EMO Air Cargo (UK) Ltd	ECR : 1994 I-03567
C-84/94	United Kingdom of Great Britain and Northern Ireland v Council of the European Union	ECR: 1996 I-05755

C-361/95	Commission of the European Communities v Kingdom of Spain	ECR: 1997 I-735
C-400/95	Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Helle Elisabeth Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S.	ECR : 1997 I-02757
C-66/96	Berit Høj Pedersen v Fællesforeningen for Danmarks Brugsforeninger and Dansk Tandlægeforening and Kristelig Funktionær-Organisation v Dansk Handel & Service.	ECR : 1998 I-07327
C-394/96	Mary Brow vs. Rentokil Ltd	ECR : 1998 I-04185
C-336/97	Commission of the European Communities v Italian Republic	ECR : 1999 I-03771
C-355/97	Landesgrundverkehrsreferent der Tiroler Landesregierung v Beck Liegenschaftsverwaltungsgesellschaft mbH and Bergdorf Wohnbau GmbH	ECR : 1999 I-04977
C-303/98	Sindicato de Médicos de Asistencia Pública (Simap) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana	ECR : 2000 I-07963
C-173/99	The Queen v Secretary of State for Trade and Industry, ex parte Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)	ECR : 2001 I-04881
C-241/99	Confederación Intersindical Galega (CIG) v Servicio Galego de Saúde (Sergas)	ECR : 2001 I-05139
C-5/00	Commission of the European Communities v Federal Republic of Germany	ECR : 2002-I-01305
C-49/00	Commission of the European Communities v Italian Republic	ECR :2001 I-08575
C-109/00	Tele Danmark A/S vs. Handel-og Kontorfunktionærernes Forbund I Danmark (HK)	ECR : 2001 I-06993
C-103/01	Commission of the European Communities v Federal Republic of Germany	ECR : 2003 I-05369
C-300/01	Doris Salzmann	ECR : 2003 I-04899
C-425/01	Commission of the European Communities v Portuguese Republic	ECR : 2003 I-06025

C-203/03	Commission of the European Communities v Republic of Austria	ECR : 2005 I-00935
C-14/04	DELLAS E.A. v Prime Minister and another	ECR : 2005 I-10253
C-52/04	Personalrat der Feuerwehr Hamburg v Leiter der Feuerwehr Hamburg	ECR : 2005 I-07111
C-132/04	Commission of the European Communities v Kingdom of Spain	ECR : 2006 I-00003
C-428/04	Commission of the European Communities v Republic of Austria	ECR : 2006 I-03325
C-484/04	Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.	ECR : 2006 I-07471
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C-127/05	Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.	ECR : 2007 I-04619
C-226/06	Commission of the European Communities v French Republic	ECR : 2008 I-00086
C-460/06	Nadine Paquay v Société d'architectes Hoet + Minne SPRL.	ECR : 2007 I-08511
C-504/06	Sabine Mayr vs. Bäckerei und Konitorei Gerhard Flöckner OHG	ECR : 2008 I-01017
C-392/08	European Commission v Kingdom of Spain	ECR : 2010 I-02537
C-486/08	Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol.	ECR : 2010 I-03527
C-232/09	Dita Danosa v LKB Līzings SIA	ECR : 2010 I-11405
C-428/09	Commission of the European Communities v Kingdom of Sweden.	ECR : 2006 I-00079
C-78/11	Asociación Nacional de Grandes Empresas de Distribución (ANGED) v Federación de Asociaciones Sindicales (FASGA) and Others.	ECLI:EU:C:2012:372
C-335/11 and C-337/11	HK Danmark (Jette Ring) c/ Dansl almennyttight Boligselskab (C-335/11) and HK Danmark (Lone Skouboe Werge) c/ Dansk Arbejdsgiverforening (Pro Display A/S).	ECLI:EU:C:2013:222

C-512/11 & C-513/11	Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Terveyspalvelualan Liitto ry and Ylemmät	ECLI:EU:C:2014:73
C-167/12	C.D. vs. S.T.	ECLI:EU:C:2013:600
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C-252/13	European Commission v Kingdom of the Netherlands.	ECLI:EU:C:2014:2312
C-65/14	Charlotte Rosselle vs. Institut National D'assurance Maladie-invalidité (INAMI), Union Nationale des Mutualités Libres (UNM	ECLI : EU:C:2015:339
C-87/14	European Commission v Ireland	ECLI:EU:C:2015:449
C-180/14	European Commission v Hellenic Republic	ECLI:EU:C:2015:840
C-266/14	Federación de Servicios Privados del sindicato Comisiones obreras (CC.OO.) v Tyco Integrated Security SL and Tyco Integrated Fire & Security Corporation Servicios SA	ECLI:EU:C:2015:578
C-395/15	Mohamed Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal	ECLI:EU:C:2016:917
C-322/16	Global Starnet Ltd v Minister dell'Economia e delle Finanze and Amministrazione Autonoma Monopoli di Stato	ECLI:EU:C:2017:985

3.2. French Jurisprudence

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Cour cass. Ch. Crim.	24 April 2001	n°00-85911
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Cour de Cass. 2ème Ch. Civ	12 May 2003	n°01-210 71
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3.3. UK Jurisprudence

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4. PARLIAMENTARY DEBATES

4.1. UK Parliament debate

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4.2. French Parliament debate

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Appendices

Appendix 1 – Consent form (English version)

University of Glasgow

College of Social Sciences

Consent Form

Title of Project: Towards a reform of European Union Occupational Health and Safety law in a context of crisis

Name of Researcher: Aude Cefaliello supervised by Prof. Ruth Dukes

I - _____ - confirm that I have read and understood the Plain Language Statement/Participant Information Sheet for the above study and have had the opportunity to ask questions.

I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.

The interview: *Choose one option*
❑ I consent to be interviewed and, the interview to be audio-recorded
❑ I consent to be interviewed, but I do not consent that the interview is audio-recorded

Language: *Choose one option*
❑ I would like the interview to be in English
❑ I would like the interview to be in French

After the interview: *Choose one option*
❑ I would like to have the transcript of the interview, and I will proofread it
❑ I would like to have the transcript of the interview, and I will send a modified version only if I think it is necessary.
❑ I don't want to have the transcript of the interview

I acknowledge that if I decide to proofread /modify it, I engage myself to sign the second version of the transcript besides this consent form.

Consent to be interviewed and to be named: *Choose one option*
❑ I consent to be interviewed and to be named
❑ I consent to be interviewed but I do not consent to be named. However, I consent to be quoted only if my statements are anonymised by a pseudonym.
The pseudonym would be: _____
❑ I consent to be interviewed but I do not consent to be named or be quoted.

Storage & Sharing of the data: *Choose one option per section*

Use for future research:

❑ I consent that my statement will be used for this PhD project and future journal articles and conferences papers

❑ I consent that my statement will be used only for this PhD project

Storage

❑ I consent that the interview will be treated as confidential and kept in secure storage **for the period of the PhD** (2017-2020), and will be then **archive**d at the University of Glasgow for an **unlimited period**. The access of the data will be access **only by individual request**.

❑ I consent that the interview will be treated as confidential and kept in secure storage **only** for the time of the PhD (2017-2020), and will be **destroyed after that**.

Personal data

❑ I acknowledge that my personal details will be kept **confidential** all time and would be communicated only to the researcher's supervisors of the University of Glasgow for security reasons if I chose a face to face interview. The personal data will be destroyed after the PhD.

Copyright

❑ I consent to **waive my copyright** to any data collected as part of this project

Name of Participant …… Signature ……..

Date ……

Name of Researcher ……..… Signature ……..

Date ……

Appendix 2 – Consent form (French version)

University of Glasgow
College of Social Sciences

Formulaire de Consentement

Titre du projet: Vers une réforme européenne du droit de la santé et la sécurité au travail dans un contexte de crise.

Nom du chercheur : Aude Cefaliello supervisée par le Prof. Ruth Dukes

Je - _____- confirme avoir lu et compris la note d'information qui m'a été communiqué pour l'étude mentionnée précédemment, et avoir eu l'opportunité de poser des questions.
Je comprends que ma participation est volontaire et que je suis libre d'y mettre un terme à n'importe quel moment, sans avoir à me justifier.

L'interview : *Choisir une option*
❑ Je consens à être interviewer et, à ce que l'interview soit enregistrée sur support audio
❑ Je consens à être interviewer mais, je ne consent pas à ce que l'interview soit enregistrée sur support audio.

Langage : *Choisir une option*
❑ Je souhaite que l'interview soit en anglais
❑ Je souhaite que l'interview soit en français

Après l'interview : *Choisir une option*
❑ Je souhaiterais avoir la transcription écrite de l'interview et je la relierai
❑ Je souhaiterais avoir la transcription écrite de l'interview et je ne la modifierais que si je le juge nécessaire
❑ Je ne souhaite pas avoir la transcription écrite de l'interview

J'ai conscience que si je décide de relire/modifier la transcription écrite de l'interview, je m'engage à signer la seconde version en plus de ce formulaire de consentement.

Consentement d'être interviewé et d'être nommé :
❑ Je consens à être interviewé et à être nommé
❑ Je consens à être interviewé mais pas à être nommé. Je consens à être cité que à la condition que mes déclarations soient anonymisées par l'usage d'un pseudonyme.
Le pseudonyme sous lequel je souhaite être cité est : _____

❑ Je consens à être interviewé mais je ne consens pas à être nommé, ou à être cité.

Stockage & Partage des données *: Choisir* une option par section

Utilisation pour des futures recherches

❑ Je consens à ce que mes déclarations soient utilisées pour ce projet de thèse mais également pour la publication d'articles de journal et d'articles de conférences.

❑ Je consens à ce mes déclarations soient utilisées pour ce projet de thèse uniquement.

Stockage

❑ Je consens à ce que l'interview soit considérée et traitée comme confidentielle et gardée dans un endroit sécurisé pour la période de la thèse (2017-2020), et qu'elle soit par la suite archivée pour une durée illimitée à l'Université de Glasgow. L'accès aux données sera soumis à une requête individuelle.

❑ Je consens à ce que l'interview soit considérée et traité comme confidentielle et gardée dans un endroit sécurisé uniquement pour la période de la thèse (2017-2020) et qu'elle soit détruite par la suite.

Données personnelles

❑ Je reconnais que mes données personnelles seront gardées confidentielles et ne seront communiquées que aux superviseurs du chercheur pour des raisons de sécurité si l'interview en face à face est choisie. Les données personnelles seront détruites après la thèse.

Droit d'auteur

❑ Je consens à renoncer à mon droit d'auteur sur les informations collectées lors de ce projet.

Nom du Participant …… Signature ……..

Date ……

Nom du Chercheur …… Signature ……..

Date ……

Appendix 3 – Participant Information Sheet (English version)

University of Glasgow

School of Law

Participant Information Sheet

Towards a reform of European Union Occupational Health and Safety law in a context of crisis

By Aude Cefaliello – PhD at the University of Glasgow
Email: a.cefaliello.1@research.gla.ac.uk
Phone Number: [redacted]

You are being invited to take part in a research study. Before you decide it is important for you to understand why the research is being done and what it will involve. Please take the time to read the following information carefully. Ask us if there is anything that is not clear or if you would like more information. Take the time before you decide whether you wish to participate or not.

Thank you for reading this.

The research:

This study aims to examine and suggest reform of the function of the EU in the context of a new approach towards European Occupational Health and Safety (OHS). In the end, the PhD student would like to suggest a change of direction in the management of better OHS EU regulation. The goal is to preserve the balance between efficiency, competitiveness and productivity on the one hand, and overall security, sustainable development and social cohesion, on the other.

One part of the study is a comparative and historical study of the socio-legal construction of the rules framing the OHS at work, covering the period from the late 60s to the end of the 90s. The context of the decision-making process is necessary to a better understanding. Thus, it is fundamental to be able to explore the socio-political context and background of the legislation which was adopted. Therefore, this part of the research involves interviews with the key players and important witnesses of the creation and development of OHS legal framework.

Why am I being invited to take part?

You are being invited to be part of this study in order to discuss your position of/as _____, from _____ to _____.

What will happen if I agree to participate?

If you decide to be part of this research, I will contact you to plan a semi-structured interview. Ideally, the interview will be face to face, at a location which is convenient for you (either at your office or a public place). However, if it is not possible, the interview could be by video call via Skype. The duration of the meeting will be at least 1hour and up to 2hours depending on your availability and the nature of the discussion. Subject to your agreement, the interview will be audio-recorded. Remember that you are free to withdraw at any time, without giving any reason.

What will happen after the interview?

I will send you a **transcript** of the interview, and you will be able, if you wish, to **proofread** it. The proofreading is optional. However, if you decide to do it a second signature of the transcript will be asked/requested. If you choose not to proofread, the information used for the PhD would be the one from the audio-record or the notes took during the meeting.

Confidentiality of personal data

If you accept to take part of this research you will be asked to communicate your personal details: email address, address (working place) and phone number. For security reasons, if you choose the face-to-face interview this information would be communicated to the supervisors of the researcher. Your personal details will be kept **confidential** (not published to the public), only your name and your current and previous position will be mentioned if you agree on it.

Consent to be interviewed and to be named

You have to be aware that the data collected might be re-used for future studies and will be share with other researchers. Therefore, there are two situations possible:

(1) You consent to be interviewed and to be named: what you have said during the interview and transcript **can be quoted in the PhD thesis and for further research**. It will be possible to name you directly.

(*2) You consent to be interviewed but not to be named:*

a) The researcher **anonymises** your statement by using a pseudonym. In that situation, it will be possible to quote what you said in the transcript but I won't mentioned your name. You can indicate the pseudonym you wish to use in the consent form attached.

b) The researcher can draw one the substance of the interview but without quoting what has been said during the interview and without naming them. In that case, the interview will be transcribed for the purpose of the research and **then destroyed at the end of the PhD**.

You will make this choice in the **consent form attached** to this information note. Confidentiality will be respected unless there are compelling and legitimate reasons for this to be breached. If this is the case, we would inform you of any decisions that might limit your confidentiality.

Storage & Sharing of the data

The data collected will be used for the **publication a PhD thesis** but also potentially for journal **articles** and **conference papers**. If you want the data to be used only for the PhD thesis and not further work, **you can indicate** this in the consent form attached.

It will be **stored and secured** on password protected personal electronic devices, and the paper versions in a locked office at the University of Glasgow to which only the researcher, Aude Cefaliello, will have access for the period of the thesis (from 2017 to 2020).

Considering the **historical value** of the interview, the data **won't be destroyed** at the end of the research project. Both the University and the researcher will keep a sample of it. Indeed, at the end of the period of study (after 2020), **the entirety of the interview's transcript will be stored in the archives of the University of Glasgow** and so accessible to the public if someone requests it. However, **this won't apply if** you express that you want the data to be use **only for the PhD**. In that case, you can indicate it in the **consent form attached.**

The University of Glasgow College of Social Sciences has funded this research. This project has been considered and approved by the College Research Ethic Committee. If you need further information

or if you have any complaint about how this research is conducted, please contact the College of Social Sciences Ethics Officer, Dr Muir Houston, email: Muir.Houston@glasgow.ac.uk

Appendix 4– Participant Information Sheet (French version)

University of Glasgow
School of Law

Note d'information au participant

Vers une réforme du droit européen de la santé et la sécurité au travail en temps de crise.

Par Aude Cefaliello – étudiante en thèse à l'Université de Glasgow
Email: a.cefaliello.1@research.gla.ac.uk
Numéro de téléphone: [redacted]

Vous êtes invité(e) à prendre part à une étude. Avant de prendre votre décision, il est important que vous compreniez pourquoi cette recherche est menée et ce qu'elle implique. Prenez le temps de lire les informations qui vont suivre avec attention. N'hésitez pas à nous contacter s'il y a un point d'incompréhension ou si vous désirez de plus amples informations. Prenez le temps pour décider si vous souhaitez ou non prendre part à cette étude.

En vous remerciant pour votre attention

L'étude :

Cette recherche a pour but d'examiner et de suggérer une réforme du rôle de l'Union Européenne pour une nouvelle approche en matière de santé et de sécurité au travail (SST). A terme, la candidate de thèse souhaiterait suggérer un changement dans la direction de la gestion pour une meilleure régulation européenne de la SST afin de préserver l'équilibre entre d'un côté efficacité, compétitivité et productivité, et de l'autre sécurité, cohésion sociale et développement sur long terme.
La première partie de la thèse est une étude comparative et historique de la construction socio-juridique des normes encadrant la SST. La période étudiée couvre la fin des années 60s jusqu'à la fin des années 90s. Dans le but d'avoir une meilleure compréhension du contexte de la prise de décision, il est fondamental d'être capable d'explorer le contexte socio-politique et l'origine de la législation qui a été adoptée. Pour cela, cette partie de la recherche implique des interviews avec les acteurs clefs et les témoins importants de la création et du développement du cadre législatif en matière de SST.

Pourquoi suis-je invité(e) à prendre part à cette étude ?

Vous êtes invité(e) à prendre part à cette étude pour discuter de votre expérience en tant que _____, de _____ à _____.

Que va t-il se passer si j'accepte de participer ?

Si vous acceptez de participer à prendre part à cette étude je vous contacterais pour organiser l'interview qui sera semi directe (avec des questions ouvertes). Idéalement l'interview sera en face à face, dans le lieu qui vous conviendra le mieux (soit à votre bureau, ou dans un espace public de votre choix). Si cela n'est pas possible, l'interview aura lieu par téléphone ou vidéo conférence (ex : Skype). La durée de l'interview peut varier mais sera généralement entre une et deux heures ; cela dépendra de vos disponibilités et de la nature de la conversation. L'enregistrement audio de l'interview sera

soumis à votre accord. Souvenez-vous que vous êtes libre d'annuler votre participation à n'importe quel moment sans avoir à vous en justifier.

Que va-t-il se passer après l'interview ?

Une **transcription** de l'interview vous sera envoyée, et vous aurez la possibilité – si vous le désirez – de la **relire** et de la **modifier**. La relecture est optionnelle. Cependant, si vous décidez de le faire une seconde signature de l'interview vous sera demandé. Si vous décidez de ne pas relire, les informations utilisées pour la thèse seront celle recueillies pendant l'interview.

Confidentialité des données personnelles

Si vous acceptez de prendre part à cette étude, il vous sera demander de communiquer vos détails personnels : email, adresse postale de votre lieu de travail et numéro de téléphone. Pour des raisons de sécurité, si vous choisissez l'interview en face à face, ces informations seront communiquées aux superviseurs de la chercheuse. Vos données personnelles seront gardées **confidentielles** (non accessible au public), seulement votre nom et votre fonction seront mentionnées si vous êtes d'accord.

Consentement d'être interviewé(e) et d'être nommé(e)

Vous devez être conscient que les données collectées pourront être réutilisées à l'avenir et être partagé avec d'autres chercheurs. Pour cela plusieurs situations sont possibles :

(1) *Vous consentez à être interviewé(e) et à être nommé(e)* : ce que vous avez dit pendant l'interview et dans la transcription **pourront être cité dans le projet de thèse et dans les projets à venir**. Il sera possible de vous nommer directement.

(2) *Vous consentez à être interviewé(e) mais pas à être nommé(e)* :

a) La chercheuse **anonymise** vos déclarations en utilisant un pseudonyme. Dans cette situation il sera possible de citer ce qui a été dit pendant l'interview, ou dans la transcription, mais votre nom ne sera pas mentionné. Vous pourrez indiquer le pseudonyme choisi dans le formulaire de consentement ci joint.

b) La chercheuse peut s'appuyer sur vos déclarations pour avancer des idées mais sans vous ne citer ni vous mentionner. Dans ce cas l'interview sera transcrite uniquement pour les besoins de la thèse et **sera détruite à la fin de la période de recherche**.

Vous ferez ce choix dans le **formulaire de consentement** attaché à cette note d'information. La confidentialité sera respectée à moins qu'il y ait une raison légitime et/ou légale de la briser. Si c'est le cas nous vous informerons de la décision qui peut limiter votre confidentialité.

Stockage & Partage des données

Les données collectées seront utilisées **pour la publication de la thèse**, mais potentiellement pour des **articles de journaux** ou **présentation de conférences**. Si vous souhaitez que les données soient utilisées uniquement pour la thèse vous pourrez **l'indiquez dans le formulaire de consentement.**

Les données seront **stockées et sécurisées** pour la période de la thèse (2017-2020) par un mot de passe électronique, et la version papier sera dans un office fermé à clef auquel seule la chercheuse à accès.

Considérant la **valeur historique** que représentent ces interviews, elles **ne seront pas détruites** à la fin de la période de thèse ; l'Université de Glasgow et la chercheuse en garderont une copie. Après la thèse **l'intégralité des transcriptions seront archivées à l'Université de Glasgow** et seront donc accessible au public si quelqu'un présente une requête à l'Université. Cependant, ce paragraphe ne **s'applique pas** si vous exprimer le souhait que les données ne soient utilisées que pour la thèse. Dans ce cas-là vous pourrez l'indiquer dans **le formulaire de consentement** attaché ci joint.

Le collège de sciences sociales de l'Université de Glasgow finance cette étude. Ce projet a été examiné et approuvé par le Comité d'Ethique du Collège de Sciences Sociales. Si vous avez besoin d'information supplémentaires ou si vous souhaitez une réclamation à propos de la façon dont cette recherche est menée veuillez contacter le responsable éthique du Collège : Dr. Muir Houston. Son email est : Muir.Houston@glasgow.ac.uk.

Appendix 5- Number of workers/labour inspectorates in the Member States in 2012[862]

MEMBER STATES	Number of workers /labour inspectorates
AUSTRIA	9 370
BELGIUM	26 779
BULGARIA	4 717
CYPRUS	15 433
CZECH REPUBLIC	13 853
DENMARK	5 677
ESTONIA	16 431
FINLAND	6 131
FRANCE	8 229
GERMANY	7 164
GREECE	16 585
HUNGARY	38 019
IRELAND	22 541
ITALY	5 454
LATVIA	6 929
LITHUANIA	5 666
LUXEMBOURG	___
MALTA	12 335
NETHERLAND	27 500
POLAND	8 000
PORTUGAL	12 910
ROMANIA	8 366
SLOVAK REPUBLIC	7 815
SLOVENIA	28 000
SPAIN	18 021
SWEDEN	16 911
UNITED KINGDOM	12 000

[862] Based on: Evaluation of the EU Occupational Safety and Health Directives. Country Summary Reports (2015)

Appendix 6 – Problems faced by Labour Inspectorates in Member States[863]

	Lack of staff	Lack of resources and support	Lack of Cooperation Coordination	Workload Complexity of the administrative paper	International Situations	Legal Problems Organisations
BELGIUM	X		X	X	X	
FRANCE		X		X		
GERMANY	X		X			X
GREECE	X		X			X
HUNGARY						
ITALY		X	X	X		X
POLAND		X	X			X
ROMANIA		X				
SPAIN	X	X	X		X	X

[863] Based on « A mapping report on Labour Inspection Services in 15 European countries », a SYNDEX report for the European Federation of Public Service Unions (EPSU) 2012