



Workers' voice in corporate governance:

A European perspective

Acknowledgements

By Aline Conchon, Researcher, European Trade Union Institute

Aline Conchon is a researcher at the European Trade Union Institute (ETUI¹) which is the independent research and training centre of the European Trade Union Confederation. With a twofold academic background in human resource management and sociology of industrial relations, she has concentrated her research on the interlinkages between corporate governance and industrial relations systems at company level, especially through the study of employee involvement in strategic decision-making processes.

Acknowledgments

The author would like to express her gratitude to each of the national correspondents of the SEEurope network, an ETUI-run network of European experts in industrial relations and company law. This report owes much to their invaluable contributions in delivering and cross-checking information related to national legal provisions with regard to worker representation in corporate governance. Thanks are also due to Janet Williamson at the TUC for valuable comments and assistance on this paper.

More about the SEEurope network and European developments in the field of workers' rights to information, consultation and participation can be found at www.worker-participation.eu

Contents

5	Foreword
6	Executive summary
8	Introduction
11	Existing legal provisions in European countries
31	The European-level approach
37	Concluding remarks
40	Notes

Section one

Foreword

There is increased interest across the political spectrum and within the trade union movement in exploring options for workers' voice in corporate governance and worker representation on company boards. The TUC is publishing this report written for us by Aline Conchon of the ETUI as a contribution to that debate, updating a report originally published in September 2013.

In the UK, worker representation on company boards is often associated with Germany and its two-tier board system. What is less widely known is that workers have the right to be represented on company boards in 19 European countries, and that this applies in countries with a unitary board system like the UK as well as those with a two-tier board system such as Germany.

This report sets out the situation in relation to worker voice in corporate governance across Europe. It examines the differences and similarities in provisions on worker representation in corporate governance in different European countries, as well as EU Regulations and Directives on the subject.

We hope that this detailed report will be a valuable resource for all those who are interested in this area and will spur and inform continued discussion and debate.

Section two

Executive summary

- It is a distinctive feature of European economies for workers to have a voice in corporate governance. This can take place through four mechanisms: worker involvement in the composition of the top management team (in large Slovenian companies, in Polish privatised companies, in German companies in the iron and steel sector); worker representation at annual general meetings (in France, Bulgaria, Hungary, the Netherlands and Sweden); worker representation in boardrooms with a consultative voice (in France, Romania and Sweden) and worker representation in boardrooms with decision-making power (across Europe).
- The latter is, by far, the most common right being to be found in no less than 19 European countries (18 European Member States plus Norway). In 13 of these countries, rights are widespread insofar as they cover both state-owned companies and private or public limited companies (Austria, Croatia, Germany, Denmark, Finland, France, Hungary, Luxembourg, the Netherlands, Norway, Sweden, Slovenia, Slovakia).
- There are significant variations in the way in which worker representation at board-level with decision-making power operates in different European countries. These variations include which companies are covered by requirements on worker board representation; the nomination and election process and eligibility criteria for worker representatives; and the number or proportion of worker representatives per board.
- As opposed to common misconceptions, worker representation at board level with decision-making power is not exclusively linked to two-tier board structures but is also to be found in unitary board structures composed of a single board of directors. It is also not exclusively linked to statutory systems of industrial relations which rely extensively on mandatory rules, as exemplified by its existence in Nordic countries where an initiative from the worker or trade union side is needed to trigger the implementation of worker representation on boardrooms.
- The representation of workers on company boards with the right to vote is acknowledged in both European primary law and secondary law. Three European legal texts include requirements covering the representation of workers on company boards: the European Company Statute adopted in 2001; the European Cooperative Society Directive adopted in 2003; and the Cross-Border Merger Directive adopted in 2005.

- While there are differences in the provisions of the three regulations, they all largely follow two key principles: that worker involvement mechanisms including board representation are subject to negotiations between workers and the employer; and a 'before and after' principle, whereby pre-existing rights to worker representation at board level should be safeguarded (but if no such pre-existing rights exist the employer is not required to put such rights in place).
- In addition, all include provision for a prescribed process for negotiations to take place between workers and employers on worker representation and a fall-back set of provisions that apply if this process fails to reach agreement or if both parties so agree.
- National and supranational rights for worker representation at board level with decision-making power are not static but constantly evolving, either in the direction of greater rights (as illustrated by a new French law initially adopted in June 2013 and revised in summer 2015) or weaker rights (as illustrated by the new Czech Companies Act which repealed provisions requiring compulsory representation of workers on boards). Moreover, national rights are put under pressure by a new trend at European level which favours 'regulatory competition' between Member states and can enable companies to circumvent the obligation to have workers on their boards.
- All in all, if the different rights for workers to raise their voice in corporate governance bodies are combined, be it at the AGM, the top management team of the board, 21 European countries have adopted such an industrial democracy perspective.

Section three

Introduction

“The financial crisis has demonstrated the need for a clearer corporate governance framework which focuses more strongly on stakeholder participation”, states the European Parliament². On its side, the European Commission “believes that employees’ interest in the sustainability of their company is an element that ought to be considered in the design of any well-functioning corporate governance framework. Employees’ involvement in the affairs of a company may take the form of information, consultation and participation in the board”³. Finally, the European Economic and Social Committee “is convinced that ‘good’ and thus ‘sustainable’ business management must be built on the internal market’s tried and tested legal structures and practices of employee involvement based on information, consultation and, where applicable, co-determination too”⁴.

These three statements by key European institutions demonstrate the convergence towards a twofold diagnosis. First, the acknowledgment of the limits, if not the failure, of the shareholder-value approach to corporate governance which is seen by many researchers and policy makers as one of the major causes of the recent financial, economic and social crises. None of the soft-law mechanisms aimed at gently reforming corporate governance – be it the introduction of so-called ‘independent’ directors or of the ‘comply or explain’ principle – helped to prevent flawed decision-making, distorted by groupthink and short-termism, or the adoption of excessive executive remuneration. Secondly, the involvement of stakeholders, and in particular workers, in the determination of companies’ long-term strategies is presented as one key way out of the crises. This paradigm shift is not just about an abstract conceptual view, but has permeated the real world of policy debate. Illustrations can be found from the discussion which took place about workers’ representation on remuneration committees as a means to better regulate executive pay in the United Kingdom. A step has been taken in this direction with a 2013 European Directive obliging banks and investment firms to set up a remuneration committee and to ensure, in countries which provide for worker representation on boards, that at least one employee representative participates on it⁵. Another illustration is given by the June 2013 French law transposing a cross-sectoral national agreement which contains an article that extends worker representation at board level to large private sector companies. A subsequent Act adopted by the French Parliament in summer 2015 goes further in this direction by widening the scope of the June 2013 law. The workforce thresholds above which worker directors must join the board was lowered from 5,000 to 1,000 employees in France and from 10,000 to 5,000 employees worldwide, thus significantly extending the right for workers to be represented on French company boards.

The rise of interest in the representation of workers in corporate governance has also to do with Germany's success in mitigating the crises which is said to rest, amongst other things, on its codetermination system. However, legal provisions granting workers a voice in corporate governance bodies such as boardrooms is far from being a German idiosyncrasy and are in fact so widespread that they could be considered a central component of the European social model. Workers have the right to raise their voice at the Annual General Meeting [AGM] on a consultative basis in five European countries (Bulgaria, France, Hungary, the Netherlands and Sweden). In France, the works council has the right to submit a resolution to the AGM, and hence to oblige shareholders to pronounce themselves for or against proposals coming from worker representatives. In another three countries (Germany, Poland and Slovenia) workers are involved in the nomination of one senior executive of the top management team. When it comes to the board of directors or the supervisory board, workers hold the right to be represented in boardrooms in a consultative manner in four countries (France, Norway, Romania and Sweden).

However, across Europe by far the most common workers' right in relation to corporate governance is for workers to be represented in boardrooms with the right to vote like any other board member. Depending on the national framework, companies in Europe may opt either for a unitary board corporate governance structure or a two-tier board corporate governance structure. In a unitary board structure, a single board of directors carries out both supervisory and management functions, as in the United Kingdom. In a two-tier board structure which prevails for example in Germany, a management board is in charge of running the company and a supervisory board monitors the actions of the latter. As a consequence, worker directors can be found either on a board of directors or a supervisory board. This right to worker representation at board level with full director status is to be found in no less than 19 European countries, which is the reason why it will form the core part of this report.

The report leaves aside the issue of the board representation of employee shareholders, putting emphasis on the representation of workers as providers of labour rather than capital. Irrespective of the fact that they sit on a board of directors (in a unitary board corporate governance structure) or on a supervisory board (in a two-tier board corporate governance structure), worker representatives with a right to vote will be referred to as 'worker directors'. Moreover, the expression 'worker representation at board level', in the context of this report, will specifically refer to worker representation on boards in a decision-making capacity.

The first section of the report presents the extent and variety of national rights across Europe for workers to make their voice heard in corporate governance bodies (be it the board, the AGM or the top management team). The second part looks specifically at the existence of such rights in European law and how the European *acquis* has so far dealt with the institutional diversity to be found in the different European countries. By unveiling the ins and outs of worker participation at the firm's strategic level, especially through worker representation at board level, this report seeks to challenge several common prejudices:

Introduction

- that the right to worker representation in corporate governance bodies is limited to the specific German case or to just a handful of countries;
- that worker representation at board level only exists in and fits the two-tier board structure comprising two distinct bodies, a management board in charge of the day-to-day management and a supervisory board which appoints, controls, advises and supervises the latter and on which worker representatives may sit;
- that worker representation at board level is a distinctive and typical feature of statutory systems of industrial relations which would make it inappropriate or inadvisable in the context of voluntarist ones.

Section four

Existing legal provisions in European countries

Including the German case, workers are granted the right to be represented on the board of directors or the supervisory board of their company with decision-making power in a total of 19 European countries (18 European Member States plus Norway) that. This information refutes a fairly common misconception according to which worker representation at board level is a marginal phenomenon in Europe. We can distinguish between three groups of countries in the European Economic Area (see figure 1)⁶:

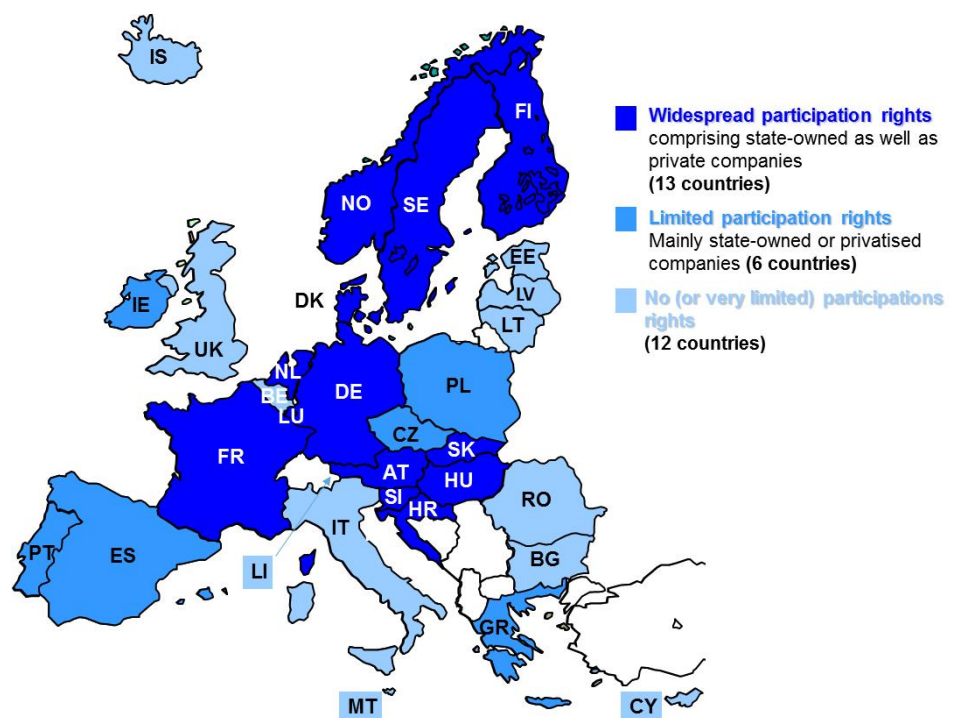
- A group of 13 countries with widespread rights to worker representation at board level in force in both the public and the private sectors, i.e. in state-owned, privatised, public limited and private limited companies (Austria, Croatia, Germany, Denmark, Finland, France, Hungary, Luxembourg, the Netherlands, Norway, Sweden, Slovenia, Slovakia);
- A group of six countries with limited participation rights, mainly found in state-owned or privatised companies (the Czech Republic, Spain, Greece, Ireland, Poland, Portugal);
- A group composed of the 12 remaining countries with no rights at all (Belgium, Bulgaria, Cyprus, Estonia, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Romania and the UK).

This grouping of countries reflects the current situation but remains open to changes according to evolving legislation. In particular, a new Act was adopted by the Czech Parliament in March 2012 which amends the Czech commercial code. The new legislation (Act 90/2012 Coll. on commercial companies and cooperatives) not only introduced a choice for companies to opt for a unitary board corporate governance structure composed of a single board of directors, but also repealed the previously existing legal provisions on compulsory worker representation on boards. Since its entry into force in January 2014, there is no longer an obligation for private sector companies to have worker directors. As a consequence, the Czech Republic has moved to the second group of countries with limited participation rights (as rights applying to Czech state-owned companies remain untouched). It remains to be seen whether the situation will further evolve in the light of repeated announcements by the newly-established government – which also took office in January 2014 – about its willingness to restore the mandatory presence of one third of worker representatives on private sector corporate boards.

Existing legal provisions in European countries

As part of an ongoing empirical study on worker representation at board level throughout Europe being conducted at the ETUI by Aline Conchon and Professor Jeremy Waddington⁷, individuals holding a mandate on boards as worker representatives were identified in order to send them a tailor-made questionnaire. The outcome of this census exercise (which aims to be as exhaustive as possible) suggests there are a total of 17,442 worker directors and in addition another 5,733 companies which are required to welcome worker representatives on their board in 17 countries⁸. However, these figures have to be considered as minimum values given the limitations in the identification process due to difficulties in data access (especially on companies' subsidiaries and because of a lack of information provided by some national business registers).

Figure 1. Rights to worker representation at board level in the European Economic Area



Source: section on cross-national industrial relations in Europe from the website www.worker-participation.eu/National-Industrial-Relations/Across-Europe, updated by Conchon in 2015 with the support of the members of the SEEurope network.

What best characterises the European landscape with regard to worker representation at board level is a twofold institutional diversity. There is first an 'inter'-diversity between a majority of the 19 European countries that have some degree of worker representation at board level and the minority of twelve countries without any similar rights. There is then an 'intra'-diversity within the group of 19 countries, given the fact that the rights to worker representation at board level are not strictly the same from one country to the other, as illustrated by the presentation of each national right displayed in Table 1 overleaf.

Table 1. The institutional diversity of worker representation at board level in Europe

	REGULATION IN		SCOPE	PROPORTION/NUMBER OF WORKERS' REPRESENTATIVES	NOMINATION OF CANDIDATES	APPOINTMENT MECHANISM	ELIGIBILITY CRITERIA	CORPORATE GOVERNANCE STRUCTURE	
	Public sector	Private sector*							
AUSTRIA	X	X	Ltd > 300 empl. Plc	1/3 of SVB	appointment by WC		only WC members (having active voting rights, i.e. only employees)	Two-Tier	
BELGIUM	no regulation								
BULGARIA	no regulation								
CROATIA	X	X	Ltd>200 empl. Plc	1 member of the board	1. appointment by WC, if none then 2.		no restriction	Unitary / Two-Tier (only Plc can choose Unitary)	
					2. by TU or a group of empl. (supported by at least 20% of empl.)	2. election by empl.	only employees		
CYPRUS	no regulation								
CZECH REPUBLIC	X		state-owned companies**	1/3 of SVB	electoral regulations established by employer in agreement with TU if any	election by empl.	only employees	Unitary / Two-Tier (only private sector companies can choose Unitary)	
DENMARK	X	X	Plc & Ltd>35 empl. +demand by TU or employees followed by a yes/no ballot	1/3 of board with a min. of 2 members (min. 3 members on the board of the parent company of a group which falls within the scope of the regulation)	no legal procedure specified	election by empl.	only employees	Unitary / Two-Tier (choice)	
ESTONIA	no regulation								Two-Tier

	REGULATION IN		SCOPE	PROPORTION/NUMBER OF WORKERS' REPRESENTATIVES	NOMINATION OF CANDIDATES	APPOINTMENT MECHANISM	ELIGIBILITY CRITERIA	CORPORATE GOVERNANCE STRUCTURE
	Public sector	Private sector*						
FINLAND	X	X	Plc & Ltd>150 empl. + request by 2 personnel groups together representing a majority of employees	agreement between employer and at least 2 personnel groups representing a majority with regard to: number of representatives (unlimited) and the body on which they will sit <u>if no agreement</u> , minimum standards: 1/5 of the board (max. 4), employer decide on which board (SVB, MB or BoD) they will sit	by personnel groups	election by empl. if no agreement between personnel groups	only employees	Unitary / Two-Tier (choice)
			state-owned companies	<200 empl. 2 members, up to 1/3 >200 empl.: 1/3 of the board In subsidiaries: 200-1,000 empl.: 3 members >1,000 empl.: 1/3 of the board	candidates supported by TU or by 10% of employee rep. within the company	election by empl.		
FRANCE	X	X	private sector Plc (voluntary)	up to 1/4 of the board (max. 4 members or max. 5 in listed companies with a BoD)	candidates supported by TU or by 5% of empl. (or 100 empl. in companies>2,000)	election by empl.		
			private sector Plc (compulsory) >1,000 empl. in France or >5,000 worldwide	boards≤12 members: min. 1 board>12 members: min. 2	After WC's opinion, the general meeting of shareholders chooses either 1, 2, 3 or 4: 1. nomination by TU 2. appointment by WC 3. appointment by TU 4. one empl. rep. is appointed as 1., 2. or 3., the other by the European WC or the WC of the European Company		only employees (and no other mandate of workers' rep.)	Unitary/ Two-Tier (choice)

	REGULATION IN		SCOPE	PROPORTION/NUMBER OF WORKERS' REPRESENTATIVES	NOMINATION OF CANDIDATES	APPOINTMENT MECHANISM	ELIGIBILITY CRITERIA	CORPORATE GOVERNANCE STRUCTURE
	Public sector	Private sector*						
GERMANY			Plc & Ltd with 500 to 2,000 empl.	1/3 of SVB	WC, employees (10% or 100)	election by empl.	if 1 or 2: only empl. if >2: at least 2 empl. (so possible external TU rep.)	Two-Tier
	X	X	Plc & Ltd >2,000 empl.	1/2 of SVB, at least one being an executive manager NB: SVB chairman (appointed by the shareholder side) has a casting vote in the event of a tie	employees (20% or 100), TU can nominate 2-3 candidates	election by empl. (or by delegates in companies >8,000 empl.)	employees / (external) TU rep.	
			companies in the iron, coal and steel industry >1,000 empl.	1/2 of SVB (on which also sits an additional 'neutral external person' agreed by both sides) +blocking minority in appointing the 'Labour director' to the MB	some by WC, some by TU	by the general meeting of shareholders	employees / (external) TU officials / 'extra member' on the employee side: neither employee nor TU official	
GREECE	X		state-owned companies	1 member of the board	legally: by employees de facto: by TU	election by empl. (final appointment by the responsible minister)	only employees	Unitary
HUNGARY	X	X	Plc & Ltd >200 empl.	D: 1/3 of SVB (unless otherwise agreed by WC and management) M: according to agreement between WC and BoD	WC (duty to ask for TU opinion)	by the general meeting of shareholders	only employees	Unitary / Two-Tier (only Plc can choose Unitary)
ICELAND	no regulation							Unitary
IRELAND	X		state-owned commercial companies and state agencies	1/3 of the board	TU or bodies recognised for collective bargaining	election by empl. (final appointment by the responsible minister)	only employees	Unitary
ITALY	no regulation							Unitary/ Two-Tier (choice)

	REGULATION IN		SCOPE	PROPORTION/NUMBER OF WORKERS' REPRESENTATIVES	NOMINATION OF CANDIDATES	APPOINTMENT MECHANISM	ELIGIBILITY CRITERIA	CORPORATE GOVERNANCE STRUCTURE
	Public sector	Private sector*						
LATVIA	no regulation							Two-Tier
LIECHTENSTEIN	no regulation							Unitary
LITHUANIA	no regulation							Unitary/ Two-Tier (choice)
LUXEMBOURG	X	X	Plc>1,000 empl.	1/3 of the board	election by employee delegates exception in the iron and steel industry: the most representative national TUs can directly appoint 3 of the employee side board members	only employees (except in iron and steel industry)	Unitary/ Two-Tier (choice)	
			state-owned companies (min. 25% of shares held by the State or state concession)	1 board member per 100 employees (min. 3 members, max. 1/3 of the board)	election by staff representatives	only employees		
MALTA	no regulation							Unitary
THE NETHERLANDS	X	X	'structuur' Plc & Ltd, i.e. companies with: <ul style="list-style-type: none">■ equity capital>16 M€■ a WC■ >100 empl. (some exceptions)	D: 1/3 of SVB M: 1/3 of the non-executive directors' seats	WC	by general meeting of shareholders	neither employees nor trade unionists engaged in collective bargaining with the company	Unitary/ Two-Tier (choice)

	REGULATION IN		SCOPE	PROPORTION/NUMBER OF WORKERS' REPRESENTATIVES	NOMINATION OF CANDIDATES	APPOINTMENT MECHANISM	ELIGIBILITY CRITERIA	CORPORATE GOVERNANCE STRUCTURE
	Public sector	Private sector*						
NORWAY	X	X	Ltd & Plc> 30 empl. state-owned companies>30 empl. + request by a majority of empl. in companies<200 empl.	min. 1 member up to 1/3 of the board+1 member (depending on the size of the company and the existence of a corporate assembly)	TU	election by empl.	only employees	Unitary
POLAND	X	X	'commercialised' and privatised companies NB: state-owned companies continue to be governed by 1981 Act on workers' self-management which grants 'workers' council' substantial managerial powers	in 'commercialised' companies (state-owned companies turned into Plc or Ltd with the State as sole shareholder): 2/5 of SVB in privatised companies (in which the State is no longer the sole shareholder): min. 2-4 members of the SVB (depending on SVB size) additionally, in companies>500 employees: 1 member of MB	no restrictions	election by empl.	no restrictions	Two-Tier
PORTUGAL	X		state-owned companies but the law has very rarely been implemented	defined by company's articles of association	WC, 100 or 20% of employees	election by empl.	only employees	Unitary / Two-Tier (choice)
ROMANIA	no regulation		Unitary / Two-Tier (choice)					

	REGULATION IN		SCOPE	PROPORTION/NUMBER OF WORKERS' REPRESENTATIVES	NOMINATION OF CANDIDATES	APPOINTMENT MECHANISM	ELIGIBILITY CRITERIA	CORPORATE GOVERNANCE STRUCTURE
	Public sector	Private sector*						
SLOVAK REPUBLIC	X		Plc>50 empl. (or <50 empl. if provided for by articles of association)	1/3 of SVB (up to 1/2 if provided for by articles of association)	TU, employees (10%)	election by empl.	no restrictions	Two-Tier
		X	state-owned companies	1/2 of SVB (but not the chair)	unspecified	election by empl., plus direct appointment of one of the employee side board members by TU (if any)	only employees (TU members only for the TU seat)	
SLOVENIA	X	X	Plc and Ltd fulfilling at least two of the following conditions: ■ >50 empl. ■ sales turnover>8.8 M€ ■ asset value>4.4 M€	D: min. 1/3 up to 1/2 of SVB but not the chair (defined by articles of association) M: 1/4, min. 1 (defined by articles of association) NB: in companies>500 employees, possibility to appoint 1 member of the MB or 1 executive member of the BoD (could apply to companies<500 employees if so agreed by WC and management)	appointment by WC		only employees	Unitary / Two-Tier (only Plc can choose Unitary)
SPAIN	X		state-owned companies>1,000 empl. state-owned companies in the metal sector>500 empl.	2-3 members (1 per TU entitled to participate)	TU entitled to participate (i.e. representing at least 25% of staff representatives and works council seats)		no restriction	Unitary

	REGULATION IN		SCOPE	PROPORTION/NUMBER OF WORKERS' REPRESENTATIVES	NOMINATION OF CANDIDATES	APPOINTMENT MECHANISM	ELIGIBILITY CRITERIA	CORPORATE GOVERNANCE STRUCTURE
	Public sector	Private sector*						
SWEDEN	X	X	Plc & Ltd>25 empl. +decision by local TU bound by collective agreement with the company	<1,000 employees: 2 members >1,000 employees + operating in several industries: 3 members max. 1/2 of the board NB: equal number of deputies who can attend board meeting with a consultative voice	appointment by TUs bound by collective agreement with the company If no agreement between TUs, standard rules apply (with regard to the distribution of seats between TUs)		'should' be employees (i.e. no formal obligation)	Unitary
UNITED KINGDOM	no regulation							Unitary

* Including privatised companies as long as the legal provisions cover companies in which the State holds less than 50% of the capital.

** The case of state-owned companies is mentioned only with regard to countries that regulate them by a specific law and/or statute.

Source: section on cross-national industrial relations in Europe from the website www.worker-participation.eu/National-Industrial-Relations/Across-Europe, updated by Conchon in 2015 with the support of the members of the SEEurope network.

Legend:

empl. = employees

Unitary =unitary board structure (single board of directors)

SVB = supervisory board

TU = trade union

Plc = public limited company

MB = management board

WC = works council / elected worker representatives

Ltd = private limited company

Two-Tier = two-tier board structure (management board and

BoD = board of directors

rep. = representative

In four countries, as a complement or a substitute to worker representation at board level in a decision-making capacity, workers representatives can also attend board meetings in a consultative capacity, i.e. they do not have the right to vote and are thus not considered as genuine board members. They however can give their viewpoint on the strategic issues raised at the board meetings and usually receive the same information as the other board members (see Box 1).

Box 1. Worker representation in boardrooms with a consultative voice

In France, the works council has the right to send two to four of its members (depending on the composition of the workforce in terms of occupational status) to attend board meetings. Works council delegates are entitled to the same documents as those sent or given to board members. They are allowed to submit works council opinions to the board, which then has to provide a reasoned response.

In Romania, the employer may invite the representative trade union at the unit level to participate in the board of directors meetings in order to discuss issues of 'professional, economic and social interest'. However, this worker representation right is limited in several respects. Firstly, whereas the employer was formerly obliged to invite trade union representatives to board meetings, the 2011 reform of the labour code repealed this right which is now of a voluntary nature. Secondly, the law only addresses the situation of unitary boards and remains silent on the possibility of worker representatives attending supervisory board meetings in two-tier board structures. As a complement to this consultation right, trade unions can receive information concerning the activity of the board of directors (again, there are no provisions relating to supervisory boards). The board of directors is obliged to communicate the decisions it makes on dossiers linked to 'professional, economic and social interests' to the trade union within two working days of the date of the meeting.

In Sweden, the law on worker representation at board level provides for an equal number of full board members and deputies. The deputies have the right to attend and speak at the board meeting even if the full member representing the workers is also present. The Norwegian case is somewhat similar as workers may not only elect representatives who have the right to vote, but also 'observers' with a consultative voice.

With regard to worker representation at board level with full director status, the diversity of national settings is best captured by considering variations over four main elements: the characteristics of the companies covered by the corresponding law; the characteristics of the boards on which worker directors sit; the way worker directors are nominated and appointed; and the way legal provisions are implemented.

Existing legal provisions in European countries

In reference to companies' characteristics, the right for workers to be represented on the board with a right to vote on strategic issues varies according to:

The nature of company ownership

- In five countries, only state-owned companies (i.e. companies whose capital is at least 50 per cent owned by the State) are covered by the legal provisions (the Czech Republic, Greece, Ireland, Portugal and Spain). The right is extended to privatised companies in Poland. Companies from both the public and the private sectors fall under the scope of the related law on worker representation at board level in a majority of 13 countries.

The company's legal status

- Rights to worker representation at board level are generally attached to a specific company legal status. The two legal statuses most commonly adopted in Europe are those of private limited liability company and public limited liability company, although there are variations in how national laws treat them. While in 11 countries, the law applies, in the private sector, to both private and public limited companies, in other cases its application is restricted to public limited companies only (in France, Luxembourg, and Slovakia). As for state-owned companies, the law can state that compulsory worker representation at board level applies only to companies governed by a distinct legal status (such as the French legal status of 'Public establishment with industrial and commercial purpose').

The size of the company

- In 10 cases, legal provisions do not state any workforce threshold for the law to apply. This is particularly true when the law concerns state-owned companies, for which there is no minimum threshold in eight countries (the Czech Republic, France, Greece, Ireland, Luxembourg, Poland, Portugal and Slovakia). For private sector companies, there are only two cases where the national law does not specify any minimum size, that of Austrian and Croatian public limited companies. In most countries, however, worker representation at board level is applicable only once the company reaches a certain size. This workforce threshold may be low (starting from 25 to 50 employees, as in Denmark, Norway, Slovakia, Slovenia and Sweden), medium (starting from 50 to 500 employees, as is the case for Austrian and Croatian private limited companies, for Spanish metal sector state-owned companies and in Finland, Germany⁹, Hungary and the Netherlands) or high (a minimum of 1,000 employees is required for compulsory worker representation at board level to apply in Luxembourg, in French private sector companies and in the German companies of the iron, coal and steel sector).

Among countries providing workers with the right to be represented on the board, there are also structural differences in relation to the characteristics of the board itself:

The corporate governance structure

- Depending on their national company laws, the corporate governance structure of companies in European countries can follow a unitary board model (a single board of directors), a two-tier board model (a management board and a supervisory board), or a free choice between these two. The latter is a growing trend, with recent laws having been adopted so as to allow for this flexibility in 2006 in Slovenia and Hungary, in 2010 in Denmark, in 2013 in the Netherlands and in 2014 in the Czech Republic. A total of nine out of the 19 countries with rights to worker representation at board level allow companies to choose between a unitary or a two-tier board structure. As a consequence, worker representatives may sit either on a single board of directors or on a supervisory board. In addition, rights to worker involvement in the composition of the management board exist in three countries (see Box 2).

In countries in which one or the other corporate governance structure can be adopted by companies, rights to worker representation at board level apply in the same way, irrespective of the nature of the board. There are however two exceptions to this general rule, Hungary and Slovenia, where differentiated rights to worker representation at board level apply depending on the corporate governance structure. In Hungary, workers represented in the two-tier structure on the supervisory board benefit from specified mandatory rules which are automatic as soon as the company fulfils the legal conditions, while their representation in the unitary board structure is subject to an agreement between the board of directors and the works council, without any minimum standards to be respected. In Slovenia, the right to worker representation at board level is weaker in the unitary board structure than in the two-tier one: while workers have the right to nominate between one-third and a half of the supervisory board, the minimum proportion of worker representatives on a unitary board is one-quarter.

Box 2. Worker involvement in the composition of the top management team

In Slovenian companies with more than 500 employees, the works council is entitled to propose a 'Labour director' who is appointed among the members of the management board (in a two-tier board structure) or among the executive directors sitting on the board of directors (in a unitary board structure). Such a 'Labour director' may also be appointed in companies with fewer than 500 employees if there is agreement between the employer and the works council.

In the German coal, iron and steel sector, a 'Labour director', who is a member of the management board, is appointed by the supervisory board in a decision which cannot go against the votes of the majority of worker directors (who compose half of the supervisory board in these companies).

In Polish privatised companies with more than 500 employees, workers are entitled to elect one member of the management board (within a two-tier board structure).

Board composition

- The number or proportion of seats allocated to worker representatives varies significantly from a single representative (in Croatia, France, Greece and Spain) up to half the board (in the well-known German cases of companies with more than 2,000 employees and companies in the iron and steel sectors but also, if provided for by a company's articles of association, in Slovakia and Slovenia). However, in none of the countries where worker representation at board level is widespread can the worker-side ultimately prevent a board decision from being taken if the rest of the board speaks with a single voice. In Germany and Slovenia where companies may have an equal distribution of supervisory board seats between shareholder and worker representatives the chairperson (who always comes from the 'shareholder group') has a casting vote in the event of a tie. The most frequent proportion of worker directors to be found in 12 cases is one-third of the board (in Austria, Denmark, Hungary, Ireland, Luxembourg, the Netherlands, Norway, the French and Czech state-owned companies, the German companies with between 500 and 2,000 employees, as well as Slovenian and Slovak companies which decided to stick to the legal minimum).

Board duties

- The duties of the board as set out in each national law determine its importance and capacities. In Hungary, a supervisory board (unless stipulated differently in a company's articles of association) can only give recommendations, whereas in Austria a legal list of business decisions exists for which management needs the approval of the supervisory board. The 2002 Act on Transparency and public disclosure introduced a similar right in Germany, making it compulsory to draw up a list of essential corporate decisions that cannot be taken by the management board without the formal approval of the supervisory board. Therefore, the degree of worker involvement in strategic decision-making is also dependent on the genuine strategic role played by the board itself.

In situations where the board has limited duties, worker representation at the Annual General Meeting [AGM] of shareholders could boost the role of workers in corporate governance. The right for workers to make their voice heard at the AGM currently exists in five European countries (see Box 3).

Box 3. Worker representation at the Annual General Meeting (AGM)

In France, the works council can submit resolutions on any topic to the AGM. Moreover, two works councillors can attend the AGM and can speak, on their request, on any resolution for which unanimity is required. Finally, the works council may ask the court to appoint an agent who will be in charge of convening an AGM in case of emergency.

When worker representatives sit on a board of directors in a unitary board structure, they are usually allowed to attend the AGM as can any other board member. The Swedish law makes this point clear in specifying that worker directors' deputies can both attend and speak at AGMs.

In Bulgarian private and public limited companies with at least 50 employees, workers are represented at the AGM in a consultative capacity. In public limited companies, access to the same documentation and information as is afforded to shareholders is secured by law. Moreover, the Bulgarian Companies Act states that AGMs of private limited companies can adopt resolutions on labour and social issues only after hearing the position of a worker representative.

Worker directors in Hungary and Slovakia hold an additional right in relation to AGMs. In the event that their opinion (unanimously in Hungary) differs from the majority standpoint of the supervisory board on a single issue, worker directors have the right to have their minority standpoint stated at the AGM.

Since 2010, the works council of Dutch public limited companies has had the right to submit its views to AGMs on resolutions relating to: a significant change in company structure (e.g. a major acquisition or divestment); the appointment, suspension or dismissal of a member of the board (either of the board of directors or the management board or the supervisory board); and executive remuneration policy. The chairperson or any other member of the works council has the right to explain the works council's positions at the AGM.

For a proper understanding of the diversity of the selection processes for workers directors, a clear distinction needs to be drawn between the processes that determine their initial nomination (i.e. choice of those who will be candidates for board appointment) and those which determine their final appointment (i.e. choice, amongst the candidates, of those/the one who will sit on the board). With regard to both the nomination and appointment of worker directors, marked institutional variations prevail between the 19 countries on the following points:

The nomination of candidates

- The way in which candidates for board appointment are selected varies according to three situations. In the first situation, a unique actor is in charge of the nomination of candidates, which could be the trade union (in Finland, Greece, Ireland, Norway, Spain and Sweden), the works council (in Austria, Croatia, Hungary, the Netherlands and Slovenia) or staff representatives (in Luxembourg).

Existing legal provisions in European countries

A second situation is where a plurality of actors can nominate candidates and applications can be presented either by trade unions, the works council or by a certain proportion of employees (in France, Germany, Portugal and in Slovak private sector companies). A final situation, the rarest, is where the law is silent on the nomination process and on who can nominate candidates. This is the case in Denmark, Poland and in Slovak state-owned companies.

The appointment process itself

- In general, there are two ways of appointing worker representatives to boardrooms. They can either be appointed directly by trade unions (in Finland, Sweden, in Spanish and Slovak state-owned companies, and metal sector companies in Luxembourg) or by the works council (in Austria and Slovenia); or be elected by the entire workforce which is the most common appointment mechanism (in Croatia, the Czech Republic, Denmark, Greece, Ireland, Norway, Poland, Portugal, Slovakia, one-third and parity codetermination in Germany).

Moreover, in some countries, the appointment is the responsibility of the annual general meeting of shareholders, as in Hungary, the Netherlands and German companies from the iron, coal and steel sector. National legislation specifies which one of these appointment mechanisms (direct appointment by the trade unions, by the works council or election by the employees or the shareholders) applies. New French legislation from June 2013 innovated in this regard. In the case of large private sector companies, four different appointment mechanisms are possible: workforce election, direct appointment by trade unions, direct appointment by the works council or, when two workers directors are to be appointed, appointment of one of them following one of the first three mechanisms and direct appointment of the other by the European works council or the works council of the European Company. It is up to the general meeting of shareholders, after having heard the works council's opinion, to decide which appointment process will apply.

The profile of worker representatives who can be appointed

- The 'eligibility' criteria which determine who can be appointed as worker representatives on the board differ to such an extent that six situations can be distinguished.

A first situation, by far the most common, is one in which only employees of the company can be appointed to the board. This does not mean that these worker directors are not members of a trade union, especially where trade unions play an important role in the nomination of candidates. In contrast, legislation in two countries prevents worker directors from carrying out trade union activities (in Polish 'commercialised' companies) or holding other representative positions (in France where worker directors cannot be at the same time a member of the works council, a member of the health and safety committee, a trade union representative and, since the 2013 legislation, a member of the European works council).

A second situation corresponds to legal rules which reserve some of the worker directors' seats for external trade union representatives, e.g. from the industry union, who are not employed by the company (in Slovak state-owned companies, in iron and steel sector companies in Germany and Luxembourg as well as in large German companies with more than 2,000 employees).

Worker representation at board level in Austria constitutes a third case insofar as only members of the works council with full voting rights (who are thus also employees of the company) are allowed to be appointed to the board.

A fourth specific situation is that of the Netherlands, where 'worker representatives' at board level cannot be employees of the company nor trade unionists engaged in collective bargaining with the company. As a consequence, board members proposed by the works council often come from the academic or political sphere.

Another configuration is that of the absence of eligibility criteria and restrictions which therefore opens the possibility for external trade union officials or experts to sit on the board as worker directors (in Poland, Spain and Sweden as well as in Slovak public limited companies).

A final situation which comprises two cases is when one worker director's seat is reserved for managerial and professional staff (in French state-owned companies) or even executive managers (in German companies with more than 2,000 employees), and hence the seat has to be filled by a worker representative belonging to this category of workers.

Linked to the question of worker directors' 'eligibility' criteria is the issue of gender, topical not least in the light of the European Commission proposal for a Directive aimed at improving gender balance among non-executive directors in listed companies, worker directors included. Ten of the 19 countries with rights for worker representation at board level have enacted gender quotas which apply either to both private and public sector companies (France, Germany, the Netherlands, Norway and Spain) or to state-owned companies only (Austria, Denmark, Greece, Ireland and Slovenia). In Denmark, a new law entered into force in April 2013 which introduced the principle of 'flexible quotas', according to which large companies are obliged to establish a gender quota and report progress on its achievement. However, the most recent development took place in March 2015 when the German Parliament implemented an agreement reached by the coalition government to introduce a mandatory gender quota in listed companies under the parity codetermination system, alongside a flexible quota for companies which are either listed or have worker directors on their board.

Under the new German law, the gender quota applies to the population of worker representatives in the supervisory board. Whether the gender quota is meant to include worker directors too in Spain, the Netherlands and Danish state-owned companies is not clear. In contrast, board seats occupied by worker directors are outside the gender quota in seven countries in which the quota only covers board members elected by the annual general meeting or appointed by the State (in Austria,

Existing legal provisions in European countries

Greece, Ireland, Slovenia, Norway, France and Denmark). In France and Norway, however, the gender balance of worker directors is subject to a specific regulation. In France, when employee representatives are appointed by means of an election, the lists of candidates must comprise candidates of both sexes listed alternately and the difference between the number of candidates of each sex cannot be greater than one. In large private sector companies in France, when employee representatives are appointed by means of direct appointment by the works council, and when two worker directors have to be appointed, gender equality prevails as workers must be represented by a man and a woman. In Norway, when two or more worker representatives are to be appointed, both genders must be represented except in companies in which one gender represents less than 20 per cent of the workforce.

Finally, national rights to worker representation at board level also vary according to the manner in which they are implemented, depending on whether the right is mandatory or open to the choice of the actors who can freely decide to implement it or not.

- In the great majority of countries, legal provisions are mandatory rules whose implementation is automatic, i.e. a company which fulfils the eligibility requirements is obliged to have worker representation at board level.
- In the four Nordic countries, with the exception of Norwegian companies with more than 200 employees, an initiative from the worker or trade union side is needed to trigger the application of rules on worker representation at board level.
- In Denmark, the legal provisions are not compulsory and have to be triggered by a demand coming either from the workers themselves (with a minimum of 1/10th of them) or from the trade union at the workplace (representing at least 1/10th of the employees) or by a majority of works council members. Once this demand has been triggered, a yes/no ballot is organised amongst the workforce to decide whether or not to enforce the right to worker representation at board level. If yes votes comprise an absolute majority, then worker directors have to be elected.
- In Norwegian companies with fewer than 200 employees, worker representation at board level is not a mandatory right and it is up to workers to demand it, either through a vote or a formal request in writing gathering the support of two thirds (in companies with 30 to 49 employees) or half (in companies with 50 to 199 employees) of the concerned employees.
- In Sweden, worker representation at board level is set up only if so decided by the local trade unions with whom the employer has a collective agreement.
- In Finland, worker representation at board level is subject to both an agreement and a request from the trade unions (called 'personnel groups'). Indeed, in companies with more than 150 employees, worker representation at board level (number of representatives and choice of the board on which they will sit) can be arranged through an agreement between the employer and at least two personnel groups representing the majority of the workforce. If no agreement is reached and if at least two personnel groups representing the majority of the workforce so

demand, worker representation at board level is set up according to the fall-back provisions stated in the law.

All in all, if we combine the different rights for workers to raise their voice in corporate governance bodies, be it at the AGM, the top management team or the board, no less than 21 European countries which have adopted such an industrial democracy perspective.

Section five

The European-level approach

Out of the various forms of worker representation or involvement in corporate governance bodies, only one is recognised in European law: the representation of workers on the board of companies with the right to vote. It has indeed been recognised as a fundamental right by the 1989 Community Charter of Fundamental Social Rights for Workers under the label ‘participation’ and is enshrined in the Treaty on the Functioning of European Union in article 153, which sets ‘codetermination’ as one field of the EU social policies (see Box 4).

Box 4. Worker representation at board level recognised in European primary law

‘Information, consultation and participation of workers must be developed along appropriate lines, taking account of the practices in force in the various Member States.

This shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community’

Art. 17 of the 1989 Community Charter of Fundamental Social Rights for Workers

The European Union Member States:

‘Confirming their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of Fundamental Social Rights of Workers’

5th recital of the Treaty on the European Union (consolidated version 2012)

‘The Union shall support and complement the activities of the Member States in the following fields:

...

(f) representation and collective defence of the interests of workers and employers, including codetermination’

Art. 153 (1) of the Treaty on the Functioning of the European Union (consolidated version 2012)

Worker representation at board level appeared for the first time in European secondary law (composed of Regulations and Directives) in 2001 with the adoption of the first Europe-wide company legal status, namely the European Company (*Societas Europaea* – SE). The European legislator chose to name it ‘participation’ and gave it a specific and unequivocal definition (see Box 5).

Box 5. Worker representation at board level recognised in European secondary law

“Participation” means the influence of the body representative of the employees and/or the employees’ representatives in the affairs of the company by way of:

- The right to elect or appoint some of the members of the company’s supervisory or administrative organ, or
- The right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ’

Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, Art. 2 (k).

However, consideration for worker representation at board level by European policy-makers started much earlier in the 1970s during the ‘industrial democracy’ decade triggered, amongst other things, by the social movements of 1968. This saw a wave of enactment of national laws on worker representation at board level, aimed either at creating new rights (in the Netherlands in 1971, in Norway in 1972, in Denmark in 1973, in Luxembourg in 1974, in Sweden in 1976, in Ireland in 1977 and in Portugal in 1979) or at extending existing rights (in Austria in 1973 and Germany in 1976). In 1972, the European Commission issued a proposal for a Fifth Company Law Directive concerning the ‘structure of public limited companies and the powers and obligations of their organs’. This Directive intended to impose the German model of worker representation at board level on all national public limited companies across Europe, i.e. a two-tier board corporate governance structure for companies with compulsory one-third worker representation. However, no political agreement could be reached, and the European Commission had to give up its attempts in 2001, almost 30 years after the initial proposal was made.

It also took 30 years of lively debate between the first 1970 proposal for a European Company [SE] Statute and its adoption in 2001. The most contentious point was the regulation of worker representation at board level in these European Companies, given the twofold diversity we described above, i.e. an ‘inter’-diversity between countries with and without rights to worker representation at board level and an ‘intra’-diversity amongst countries with such a right. The solution to the political deadlock was reached in the 1990s with the adoption of a flexible approach largely inspired by the Directive on European works councils. This flexible approach rests on two principles: that worker involvement mechanisms (i.e. both worker information,

The European-level approach

consultation and representation at board level) in the SE are subject to negotiation between workers and the employer to enable them to come up with tailor-made arrangements; and a 'before and after' principle, according to which pre-existing rights to worker representation at board level should be safeguarded, while there is no obligation to agree on provisions related to worker directors if none existed prior to the establishment of the SE.

What is more, a SE may only be established if an agreement on worker involvement mechanisms has been reached. As with European works councils, a special negotiation body [SNB], composed of worker representatives from the companies participating in the formation of the SE, has to be set up to convene related negotiations, which can last from six months up to a year if both parties so wish. If the SNB is able to reach an agreement with management, both parties can freely decide on its content. However, for such an open agreement to be allowed to reduce or eliminate the application of pre-existing national rights to worker representation at board level, the support of a majority of two-thirds of the SNB members is required in situations in which pre-existing rights covered at least 25 per cent of employees (in case of the formation by a merger¹¹) or 50 per cent (in case of the formation of a holding company or of joint subsidiaries). Where an SE is formed by means of a conversion, the SNB cannot decide to reduce pre-existing rights. If the SNB and management so agree, or if they fail to reach an agreement within the stipulated time frame, the standard rules provided as an annex to the Directive apply¹².

With regard to worker representation at board level, the standard rules state that, in the case of an SE established by conversion, pre-existing rights to worker representation at board level, if any, continue to apply. In all other cases, the 'higher' pre-existing right (which is, according to the SE Directive, equal to the highest proportion of worker directors to be found on the boards of the participating companies) is safeguarded, as long as it covers at least 25 per cent of the employees of an SE formed by merger, or at least 50 per cent of the employees of an SE formed as a holding company or joint subsidiary. In essence, while provisions for worker information and consultation must always be included in the agreement or through application of the standard rules, worker representation at board level is subject to the aforementioned 'before and after principle', i.e. if there were pre-existing rights these should be safeguarded. In contrast, if none of the participating companies were subject to worker representation at board level before registration of the SE, no participation rights will apply after the formal creation of the SE.

According to the latest available data from the ETUI 'European Company (SE) database'¹³, 2,402 SEs were established as of July 2015, 355 of which are said to be 'normal' SEs since they employed a minimum of 5 employees and conduct genuine business activities (as opposed to empty or 'shell' SEs). Out of these 355 'normal' SEs, 113 do provide their workers with information and consultation rights and 57 do so with regard to rights to representation at board level. These findings show that in a significant number of established SEs, no negotiation on worker involvement took place, which is mainly due to the high number of SEs initially created as empty

companies, i.e. with no employees. There are several loopholes that enable companies to circumvent worker involvement rights, and especially rights to worker representation at board level, by adopting the SE status. The main one relates to the legal uncertainty as to the possibility of reopening negotiations on worker involvement when the SE is 'activated' through the recruitment of employees, or reaches such a workforce size that it would have had to apply national laws on worker representation at board level. Although these loopholes were rightly diagnosed and acknowledged by the European Commission, it eventually decided not to revise the SE Statute and to leave it as it stands because of the fear of a potential political risk in reopening this sensitive debate and because of the disagreement amongst the European social partners as to the necessity of modifying the existing legal texts.

The final adoption of the SE Statute in 2001 paved the way for the adoption of two others pieces of European company law that have worker representation at board level as a component (see Box 6): the European Cooperative Society Statute (better known as the SCE statute) in 2003 and the Directive 2005/56/EC on Cross-Border Mergers of limited liability companies.

Box 6. Pieces of European company law containing provisions on worker representation at board level

The European Company Statute (Societas Europaea – SE)

- Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
- Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees

The European Cooperative Society (Societas Cooperativa Europaea – SCE)

- Regulation (EC) 1435/2003 on the Statute for a European Cooperative Society
- Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees

The Cross-Border Merger Directive

- Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies

As the 'success' of the SCE Statute is still highly questioned (as of November 2011, there were only 24 established SCEs), we shall focus on the legal provisions relating to worker representation at board level which are contained in the Cross-Border Mergers Directive.

Although the provisions of the Cross-Border Mergers Directive which relate to worker representation at board level were greatly influenced by the SE provisions, they present a somewhat different picture. The guiding principle in the Cross-Border Merger Directive is that the applicable rights are those of the Member State where the company resulting from the cross-border merger has its registered office (Art. 16,

The European-level approach

§1). However, and to avoid the ‘regime shopping’ temptation whereby companies could choose to register in a Member State with fewer or no participation rights compared with their previous situation, the Directive includes some safeguarding mechanisms which, at first sight, seem very similar to provisions in the SE. However, slight differences between provisions on worker representation at board level in the two Directives have led some experts and observers to talk about a ‘cutting back’ compared to the SE Directive:

- The standard rules on worker representation at board level shall apply, as long as at least 33 per cent (as opposed to 25 per cent in the SE Directive) of the employees of one or more of the companies participating in the merger were covered by pre-existing rights (Art. 16, §3, (e));
- A threshold of 500 employees has been introduced as one of the points of departure for opening negotiations on worker representation at board level (compared to the lack of threshold in the SE Directive) (Art. 16, §2);
- Merged companies which adopt a unitary board structure can restrict the proportion of worker directors to 1/3 of the board (there is no such restriction in the SE Directive) (Art. 16, §4, (c));
- The general meeting of shareholders and company management have the right to decide to skip negotiations on worker representation at board level by directly applying the fall-back provisions described in the annex to the SE Directive (Art. 16, §4, (a)).

Although the adoption of the SE Statute was welcomed by the different industrial relations actors at European level as a satisfactory compromise, the European policy-makers did not follow the pattern it set in a strict manner. The Cross-Border Mergers Directive departs from the SE Directive in many respects and appears to be less respectful of national rights.

In 2008, the European Commission launched its proposal for another EU-wide company legal status specifically tailored to private limited-liability companies, namely the Statute for a European Private Company (*Societas Privata Europaea* – SPE). As the SE Statute contains a minimum capital requirement of 120,000 euros and makes it impossible to create an SE from scratch, European policy-makers thought that these constraints could prevent SMEs from adopting it and thus from fully benefiting from the internal market. Unlike SEs, the SPE Statute was meant to allow *ex nihilo* creation of such companies which would, furthermore, have been able to locate their registered office and actual headquarters in two different Member States. In short, the 2008 proposal for an SPE Statute would have introduced, if adopted, a European ‘Delaware effect’: any company opting for the SPE Statute would have been able to choose as its country of registration a country with no provision for worker representation at board level (as it would have been its applicable company law, this would have meant that the company would not have been obliged to have worker directors in its board), while conducting all of its real operations in countries providing for worker representation at board level without to

have to comply with these domestic provisions. It was mainly, albeit not solely, for this reason that the 2008 proposal was opposed by several Member States, as were each of the eight subsequent political compromises submitted to the Council.

Just six months after the official withdrawal of the SPE proposal in October 2013, the European Commission proposed in April 2014 an alternative measure geared towards the same goal: a new proposal for a Directive on single-member (i.e. single shareholder) private limited liability companies (*Societas Unius Personae* – SUP). The SUP proposal shares common features with that of the SPE. Indeed, the same controversial points are present in the European Commission's text: the split of seats between two countries (the country of registration and the country of real operations) is permitted; a one euro minimum capital requirement is established; regulation of the rights for worker involvement and worker representation on boards in particular is not addressed. What is more, the SUP proposal contains new elements, such as an online registration procedure, which could potentially foster the multiplication of letterbox companies in Europe. Against this background, concerns have already been voiced by various actors such as the European Economic and Social Committee and the European social partners, who are asking for either the revision or the complete rejection of the SUP proposal, and whose discussions promise to be stormy¹⁵. Despite controversy as to whether the principle of subsidiarity is fully respected¹⁶, the European Commission nevertheless argues that its new proposal is aimed at harmonising national rules rather than creating a new supranational legal form as with the SPE. This argument enables the European Commission to anchor its SUP proposal in a legal basis which requires a qualified majority voting in Council instead of the unanimity which proved impossible to reach for the SPE. This new approach may therefore prevent the Member States that combined to block the SPE proposal doing the same with the SUP.

The SPE proposal is not the sole European initiative which recently failed in the field of company law. Presented in February 2012, the proposal for a European Foundation Statute was eventually withdrawn three years later as a consequence of the lack of progress in reaching the required unanimity at the Council, due, amongst other things, to disagreement as to how employee involvement mechanisms should be regulated. Taking into consideration these failed attempts, worker representation at board level is for now a component of three pieces of European company law: the SE Statute, the SCE Statute and the Cross-Border Mergers Directive. It remains to be seen whether the on-going discussions on the European Commission proposal for a SUP and the European Parliament's call for a Statute for a European Mutual Society will eventually incorporate provisions relating to worker representation at board level.

Section six

Concluding remarks

Going through the existing national rights to worker representation in corporate governance across Europe challenges some of the still commonly found misconceptions on this very specific form of worker involvement. In particular:

- Workers can make their voice heard in corporate governance bodies, and more particularly at the board, not only in Germany but in a group of no less than 21 European countries, 19 of them allowing the representation of workers on the board of their company with the right to vote.
- Worker representation at board level is not exclusively attached to the two-tier board structure, i.e. representation of workers is not limited to supervisory boards but is also to be found in boards of directors in 14 countries either with the unitary board structure in place or where the national legislation allows companies to choose between the two alternative structures.
- Worker representation at board level is also not exclusively attached to statutory systems of industrial relations which rely extensively on mandatory rules. In the four Nordic countries, a decision to implement the right for workers to be represented on the board is up to workers themselves or to company level trade unions.

This report delivers a snapshot of both the national and European level rights relating to worker representation in various corporate bodies. However, it should be stressed that these rights are not static and are evolving, especially in recent years under the double effect of the recent financial crisis and political circumstances. In the European countries most affected by the crisis, large privatisation plans were put in place as a consequence of the austerity measures required by the International Monetary Fund, the European Commission and the European Central Bank. This is leading to a decrease (and could soon lead to the disappearance) of worker representation at board level in Ireland, Greece, Poland and Spain where worker representation at board level is mostly found in state-owned companies.

In contrast, the crisis has fostered political debates on a renewed industrial democracy programme as one way to mitigate the crisis. In France, this, along with the coming to power of a left-wing government, took the shape of national negotiations which eventually led to the adoption of the 2013 law extending compulsory worker representation at board level to large private sector companies. In the United Kingdom, this has taken the shape of the aforementioned debate on the regulation of excessive executive remuneration which raised the issue of worker representation on remuneration committees. If the political climate is favourable to more rights to worker representation in corporate governance bodies in France, the

opposite was observed in the Czech Republic whose new Companies Act withdrew the obligation for companies to have worker directors on their board¹⁷.

At the European level, a clear trend is emerging which favours 'regulatory competition', i.e. the possibility for companies to shop around amongst the various national regulatory and legal frameworks so as to choose the most favourable ones. The defunct proposal for a SPE Statute as well as the current SUP proposal well illustrate this new approach to European company law, which has been confirmed by several rulings of the European Court of Justice according to which companies are free to split the location of their registered seat and real headquarters between two Member States, thus allowing for the setting up of letterbox companies. According to the European Court of Justice, it is thus legal for a firm to register in one country and thus be subject to its national company law (which regulates, amongst other things, the composition of corporate governance bodies, hence worker representation at board level), while conducting all of its business activities in another Member State. In doing so, companies can escape from the legal obligations of having worker representation at board level. This is already the case for some 94 German companies where there is no worker representation at board level as they chose to locate their registered seat in a 'worker directors'-free country (e.g. as a British public limited company).

Concerns about the pressure being put on these workers' rights is so high that it has prompted the European Parliament to call, in five different resolutions, for a regulatory mechanism on the cross-border transfer of seats through a 14th company law Directive. The fifth call in June 2012 seems to have eventually been heard by the European Commission which conducted a public consultation on this issue in the first quarter of 2013. It is worth mentioning however that only a summary of responses has been published so far, and that the official statement regarding the political conclusions drawn from the consultation is still awaited. The European Parliament is not the sole actor which has reacted to this trend. The European Trade Union Confederation has also made its position heard by calling for a Directive which should set high standard on workers' information and consultation as well as ambitious minimum standards on worker representation at board level: 'A Directive on rights to information, consultation and workers' board level representation applicable to all European company forms would address the gaps and loopholes in the EU acquis. Above all, by demanding such a Directive the ETUC is proposing a truly European vision for EU company law. The Union needs to send strong signals that it defends a business model based on social justice and sustainability'.¹⁸

Political and trade union claims for more extensive rights to worker involvement have traditionally been supported by the democratic argument that the principles of civil democracy should be transposed within firms in order for workers to become citizens in the workplace by participating in decisions that will affect them. The legitimacy and importance of such claims are in fact also supported by economic arguments, as a growing body of evidence demonstrates that advanced schemes of worker information, consultation and representation in corporate governance bodies contribute positively to economic and social performance. The 'European

Concluding remarks

Participation Index' developed by Vitols demonstrates that European countries with high standards of worker involvement (i.e. widespread rights and practices of board representation, workplace representation and collective bargaining) perform significantly better than countries with comparatively low standards on seven major indicators of the EU 'smart, sustainable and inclusive growth' strategy, including their employment rate (broken down by age and gender), expenditure on R&D, and the risk among the population of poverty or exclusion. In the current turbulent times, the fostering of greater information, consultation and representation of workers in corporate governance could therefore be an important means to enable companies to survive and thrive.

Section seven

Notes

¹ The ETUI is financially supported by the European Union.

² European Parliament (2012) [*Resolution of 14 June 2012 on the future of European company law*](#), P7_TA(2012)0259, Brussels.

³ European Commission (2012) [*Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies*](#), COM(2012) 740 final, Brussels, p.11.

⁴ European Economic and Social Committee (2013) [*Opinion on employee involvement and participation as a pillar of sound business management and balanced approached to overcoming the crisis*](#), CESE 2096/2012 – SOC/470, Brussels, p.1

⁵ See article 95 of Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, commonly referred to as CRD IV.

⁶ We have chosen the European Economic Area [EEA] as a point of reference on the grounds that some pieces of European company law that deal, amongst other things, with the issue of worker representation at board level, do not only cover EU Member States but also the 31 EEA countries.

⁷ This research project, entitled 'Corporate Governance and the Voice of Labour' is financially supported by the Hans-Böckler Foundation. Further information and related publications can be found at <http://www.etui.org/Topics/Worker-Participation/Company-Law-Corporate-Governance-and-Board-Level-Employee-Representation/Corporate-Governance-and-the-Voice-of-Labour-a-Transnational-Survey>.

⁸ Croatia and Portugal were not covered by the census which was completed in 2011 because the former was not yet a European Member State, nor a member of the European Economic Area (which form the scope of the questionnaire-based survey) and access to data relating to the latter proved impossible.

⁹ While the threshold is 500 employees for one third of the supervisory board to be comprised of worker representatives, companies with 2,000 or more employees are required to have half their board comprised of worker representatives.

¹⁰ Polish 'commercialised' companies are state-owned companies which have been converted into a public or private limited company but in which the State remains the sole shareholder.

¹¹ An SE can be formed by means of: a merger of companies located in at least two distinct EEA countries; the formation of a transnational holding company; the formation of a subsidiary by two or more companies located in at least two countries; the conversion of an existing public limited-liability company which has had at least one subsidiary in another country for at least two years.

¹² A third possible outcome of the negotiation process on worker involvement could be that the SNB decides not to open or to terminate negotiations. In this case, the national rules on worker information and consultation apply as well as the European

works council Directive. However, this potential outcome is not possible in the case of a SE formation by means of conversion.

¹³ The ETUI European Company (SE) database can be accessed online at <http://ecdb.worker-participation.eu/>.

¹⁴ In this case, negotiation on worker representation at board level is triggered when at least 500 employees of one of the merging companies were enjoying higher rights to worker representation at board level than those provided in the country where the company resulting from the cross-border merger is registered.

¹⁵ See in particular: the position of the European Trade Union Confederation adopted in 11-12 June 2014; the Opinion of the European Economic and Social Committee adopted in 10 September 2014; as well as the Joint position of the European social partners (i.e. both trade unions and employers' associations) of the construction industry from 27 February 2015.

¹⁶ See for instance the reasoned opinion presented by the Austrian parliament before the European institutions, arguing for a change in the legal basis of the proposed SUP. The full text can be accessed online at <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2014/0120>.

¹⁷ More details on the evolution of national rights to worker representation at board level can be found in the ETUI Policy Brief (2012) 'Are employee participation rights under pressure? Trends at national and EU level', downloadable at <http://www.etui.org/Publications2/Policy-Briefs/>.

¹⁸ Source: 'Towards a new framework for more democracy at work', resolution adopted by the ETUC executive committee of 21-22 October 2014, available online at http://www.etuc.org/sites/www.etuc.org/files/document/files/resolution_democracy_in_the_workplace_en.pdf.

¹⁹ Available at <http://www.worker-participation.eu/About-WP/European-Participation-Index-EPI>.



*Published by
Trades Union Congress
Congress House
Great Russell Street
London WC1B 3LS*

*Tel: 020 7636 4030
Fax: 020 7636 0632
www.tuc.org.uk*

Revised September 2015