

Chapter 5

The protection of workers under EU company law – the current position and future prospects

Johannes Heuschmid

1. Introduction*

In light of the European Commission's recent Action Plan on European company law and corporate governance,¹ this chapter examines how European company law could be improved as a matter of good corporate governance to increase the recognition given to worker interests. The basic presumption underlying the following analysis is that company law should be structured to reflect a plurality of interests (also known as the 'stakeholder approach'). According to this approach, a company's management should manage in the interests of the company and, in that regard, take account not only of shareholder concerns but also of the concerns of workers and other groups involved with the company. A starting point of this kind can be found in many European legal orders.² The counterpart to the stakeholder approach is the 'shareholder value approach',³ which requires management to be guided simply according to the interests of shareholders.⁴ Under that approach, its primary obligation is to maximise shareholder welfare whether in the form of dividends, share price improvements or liquidation proceeds. This model is to be found chiefly in countries with a common law tradition, in particular, the United States and the United Kingdom.⁵

* Chapter 5 was translated from German by Paul Skidmore.

1. Action Plan on European company law and corporate governance, published on 12 December 2012, see: http://ec.europa.eu/internal_market/company/modern/index_en.htm.

2. See below.

3. Within this approach, various supposed variations such as the 'enlightened shareholder value approach' are mentioned. See Grundmann, S. (2011), § 13, paragraph 461.

4. For a critique of this approach, see Vitols, S. (2011), p. 18.

5. Hopt, K. (2011), p. 476.

In the context of the corporate governance debate, the Commission's activities in the area of company law – prior to the financial crisis – adopted primarily the shareholder value approach. In other words, they focused on the interests of shareholders and the financial markets.⁶ Since the financial crisis, a cautious change in thinking can be observed. In contrast to the Commission, the European Parliament has long favoured the stakeholder approach. For example, in a resolution adopted in 2006, it stressed that 'corporate governance is not only about the relationship between shareholders and management, but that other stakeholders within the company are also important for a balanced decision-making process and should be able to contribute to decisions on the strategy of companies'.⁷ Notwithstanding the general approach taken by the Commission, support for the stakeholder principle is to be found also in some of its documents.⁸

There can no longer be any doubt that, in the context of the pluralist model, employees as a group occupy a special position amongst the stakeholders.⁹ This view appears to be shared by the European Parliament which notes in the recitals to the abovementioned resolution that employee participation at the level of undertakings should be seen as forming an integral part of European corporate governance.¹⁰ This is a reference to the rules on worker participation in company decision-making, that is, board-level employee representation.¹¹ Those rules allow workers to influence the composition of a company's most senior organs responsible for its management and/or the supervision thereof.¹² If the interests of workers are to be given effective and timely consideration, this should take place in the organ where the fundamental decisions are made.¹³

6. Heuschmid, J. (2009), p. 262.

7. European Parliament resolution on recent developments and prospects in relation to company law of 4 July 2006 (P6_TA(2006)0295), paragraph 14. See also W. Koberski, and J. Heuschmid (2010), p. 210.

8. Commission Communication on Preventing and Combating Corporate and Financial Malpractice COM(2004) 611 final, p. 4, and Commission staff working document SEC(2007) 1707, p. 28.

9. For a justification of this position, see Parkinson, J. (2003), pp. 481-509, at p. 491 et seq.; Johnston, A. in this book; Wißmann, H. (2009) § 282, paragraph 15; and Hopt (2011), p. 505.

10. European Parliament resolution, cited above, recital F. See Kleinsorge, G. (2011) in O. Wlotzke, H. Wißmann, W. Koberski, and G. Kleinsorge (eds) *Mitbestimmungsrecht, EU-Recht*, paragraph 1.

11. An EU law definition of this concept can be found in Article 2(k) of Directive 2001/86/EC (SE Directive).

12. Wißmann, H. (2011), *Vorbem.* paragraph 1.

13. Heuschmid (2009), p. 110.

Board-level worker participation has several positive effects. First, participation of this kind can encourage the taking of decisions which are focused on the long-term prospects of the company and, consequently, also on the retention of jobs. At the same time, this reduces the influence on company administration exercised by shareholders, whose perspective more often than not focuses on the short-term.¹⁴ A further positive aspect is the fact that board-level worker participation tends to inhibit takeovers.¹⁵ This is to be welcomed as takeovers generally involve adverse negative consequences for workers but do not necessarily facilitate a sustainable future for the company.¹⁶

This introductory section has established as a basic presumption that European company law should be structured to reflect a plurality of interests. Further, the proposition was advanced that, in the framework of that pluralist model, employees occupy a special position. The remainder of this chapter will examine how these objectives can be implemented in European company law. However, before making any specific proposals for reform, the existing EU legal framework for board-level worker participation will be outlined.

2. The current legal framework

Rules governing board-level worker participation are to be found in EU legislation establishing specific European corporate forms. In addition, rules of that kind are also included in certain company law directives on cross-border corporate reorganisation.

2.1 European corporate forms and board-level worker participation

As the law currently stands, provisions on board-level worker participation are to be found in the legislation governing the European company (*Societas Europaea* (SE)) and the European cooperative society (SCE). In the future, legislation on the European private company (SPE), on the

14. Hopt (2011), p. 504.

15. *Ibid.*, p. 506.

16. On the negative consequences of the Takeover Directive, see Sjäffell, B. (2009), p. 343 et seq.

European foundation (FE) and on the European mutual society (ME) may be added to this list.

The European company (SE)

Adoption of the Statute for a European company in 2001 heralded the introduction to EU secondary law of the first provisions on board-level worker participation.¹⁷ That outcome was the result of some 30 years or more of negotiations, necessary in part to resolve the issue of board-level worker participation.¹⁸ Therefore, in this context, it is legitimate to regard the SE as a breakthrough. The SE is based on two legal instruments, first, the SE Regulation¹⁹ establishing the company law framework and, second, the SE Directive²⁰ with regard to the involvement of employees. As a consequence, the SE Regulation governs the following matters: foundation, company organs, structure, and transfer of the registered office. The SE Statute allows for a choice between a one-tier and two-tier system of governance. In addition to the general meeting of shareholders, the organs of the SE are, in the two-tier system, a supervisory organ and a management organ and, in the one-tier system, an administrative organ. Establishment of an SE is permitted only where there is a cross-border element.²¹

The SE Directive governs the involvement of employees both at plant level and in company organs. Unlike the legislation on board-level worker participation in several Member States,²² the SE Directive does not establish any standards of its own concerning the number or proportion of employee representatives to be included within the structures for employee involvement or the thresholds necessary to trigger that involvement. Instead, the SE Directive restricts itself to the establishment of a negotiating procedure²³ which is intended to facilitate the negotiation of arrangements for the involvement of employees in the SE. The aim of the negotiating procedure is for company management and employee representatives to reach an agreement on the arrangements for the

17. Kleinsorge (2011), EU-Recht, paragraph 4.

18. Ibid.

19. Regulation (EC) No 2157/2001, OJ L 294, 10.11.2001, p. 1.

20. Directive 2001/86/EC, OJ L 294, 10.11.2001, p. 22.

21. Kleinsorge (2011), EU-Recht, paragraph 8.

22. For an overview, see Conchon, A. (2011), pp. 12-13.

23. For a detailed account, see Kleinsorge (2011), EU-Recht, paragraph 13 et seq.

involvement of employees at various levels within the SE. Although, in principle, the parties are free to determine the agreement's substance, if this entails a reduction in participation rights, a special (qualified) majority is required. The underlying aim is known as the 'before and after principle'. This is intended to ensure that the formation of an SE does not result in a loss of existing employee participation rights. The management of the relevant company or companies must institute the negotiating procedure in accordance with the SE Directive as soon as the establishment of an SE is planned.

If negotiations fail, the SE Directive establishes standard rules to apply in default governing not only plant-level worker participation but also board-level worker participation. In accordance with the before and after principle, the standard rules are intended to ensure that existing rights to worker participation in the companies establishing the SE are maintained in the new SE. In relation to board-level worker participation, taking account of the number of workers in the SE covered by worker participation rights prior to its establishment, the most favourable set of rights is to apply.²⁴

Although, initially, commentators were sceptical as to the prospects for the SE,²⁵ this legal form has become increasingly popular. In December 2011, the number of registered SEs recorded in the European Trade Union Institute's database exceeded the 1000 companies mark for the first time.²⁶ However, these include numerous 'shelf' SEs whose legal validity is not uncontested.²⁷

The motives for establishing an SE are extremely diverse. These may include the internationalisation of the supervisory or administrative board or the establishment of a European corporate identity.²⁸ At the same time, establishment of an SE is often used in order to avoid board-level worker representation.²⁹ For example, it has been observed in Germany that companies established under national law approaching the relevant

24. *Ibid.*, paragraph 17.

25. *Ibid.*, paragraph 59, with further references.

26. For further information, see <http://ecdb.worker-participation.eu/news.php> [accessed 26 February 2012].

27. Stollt, M. and N. Kluge (2011), p. 185; Eidenmüller, H. and J. Lasák (2011).

28. Eidenmüller and Lasák (2011), and Kleinsorge (2011), EU-Recht, paragraph 60.

29. Conchon (2011), p. 35 et seq.

thresholds for board-level worker representation (500 or 2000 employees) convert to SEs in order to avoid the introduction of board-level worker representation or its widening from one third of the members of the supervisory board to parity. In addition, establishment of an SE permits a company to reduce the size of its management organ which can also result in a loss of seats for worker representatives. Reports from practitioners indicate that this strategy is used particularly to remove trade union representatives from company organs.³⁰ Measures of that kind are possible because of gaps left by the existing legal framework for the SE. For example, the before and after principle embedded in the current SE acquis applies only in relation to the initial establishment of the SE. For structural measures carried out at a later stage, and which may considerably increase the workforce size, no rules have been established. The same problem arises on the activation of a shelf SE.³¹ One can legitimately question whether this practice is compatible with the aims of the SE Directive. According to recital 18 in the preamble, the before and after principle 'should apply not only to the initial establishment of an SE but also to structural changes in an existing SE and to the companies affected by structural change processes'. Consequently, it comes as no surprise that there have been calls to revise the SE rules to ensure that structural changes following the establishment of an SE result in a renegotiation of the arrangements for employee involvement.³² The existing deficits have led to considerable reservations amongst German trade unions in relation to the SE. For example, in the context of the recent takeover by the Spanish investor ACS of the German construction company Hochtief AG, the trade union IG BAU concluded an investor agreement with ACS which expressly excludes the conversion of Hochtief AG to an SE.³³

The European cooperative society (SCE)

On the coattails of the agreement on the SE, the European legislative bodies reached an agreement in 2003 on the legal framework for the European cooperative society. The legal framework is structured in a similar manner to the SE. The Statute for the European cooperative society

30. Keller, B. and F. Werner (2009), pp. 416-424.

31. COM (2008) 591 final, p. 8; Eidenmüller and Lasak (2011).

32. COM (2008) 591 final, pp. 7-8.; Kleinsorge (2011), EU-Recht, paragraph 65.

33. For more on this, see the chapter in this book by W. Däubler.

is laid down in a Regulation,³⁴ supplemented by a Directive³⁵ with regard to the involvement of employees. However, the practical significance of this legal form remains rather limited.³⁶

The European private company (SPE)

Discussions are currently taking place at European level with regard to the introduction of the SPE. Whereas the SE *acquis* is aimed at large public companies, the SPE is intended to offer small and medium-sized companies an alternative to national legal forms such as the GmbH in Germany or the limited company (Ltd) under English law. The aim is to facilitate the cross-border activities of these firms.³⁷ The Commission presented its proposal for a regulation on 25 August 2008.³⁸ From the outset, numerous aspects of the company's structure have been the subject of controversy.³⁹ These include, in addition to the rules on board-level worker participation, the proposed minimum capital requirements and the provisions on the registered office of the company.⁴⁰ On the issue of board-level worker participation, the Commission proposal was entirely unacceptable, envisaging that such representation should be determined simply according to the law of the State of establishment.⁴¹ This would have created a variety of incentives to circumvent or avoid board-level worker participation.⁴² The original Commission proposal has been amended under various Council presidencies.⁴³ However, the existing areas of dispute have not been successfully resolved. Unless substantive rules on board-level worker participation are introduced, this legislative project is unlikely to succeed. A possible framework for substantive rules of that kind is set out towards the end of this chapter.

34. Regulation (EC) No 1435/2003, OJ L 207, 18.8.2003, p. 1.

35. Directive 2003/72/EC, OJ L 207, 18.8.2003, p. 25.

36. Report from the Commission, 16.9.2010, COM 2010/481.

37. Sick, S. and R. Thannisch (2011), pp. 155-159.

38. COM (2008) 396 final. For an overview of the historical development of the SPE, see <http://www.worker-participation.eu/Company-Law-and-CG/Company-Law/European-Private-Company-SPE/History>.

39. For detail, see Koberski and Heuschmid (2010), pp. 209-210.

40. *Ibid.*, p. 207.

41. *Ibid.*, p. 210 et seq.

42. Sick and Thannisch (2011), p. 158.

43. *Ibid.*, p. 156. See also Koberski and Heuschmid (2010), p. 210 et seq. For an overview of the historical development of the SPE, see <http://www.worker-participation.eu/Company-Law-and-CG/Company-Law/European-Private-Company-SPE/History>.

2.2 Other secondary law instruments linked to board-level worker representation

In addition to rules establishing the European corporate forms outlined above, the EU *acquis* also includes Directives governing certain cross-border structural actions taken by companies established under national law and which, as a result, also include provisions to protect board-level worker participation.

The most important instrument in this category is the Merger Directive.⁴⁴ This was adopted by the Council on 19 September 2005 and required implementation into national law by December 2007. The Merger Directive establishes a common legal framework for the cross-border merger of companies established under national law. This is an option which under previous domestic law regimes had either simply been ignored or was burdened with numerous legal and administrative difficulties.⁴⁵ In addition to provisions concerning various company law issues, the Directive also includes in Article 16 measures to protect existing board-level worker participation in the merging companies.⁴⁶ In contrast to the EU corporate forms analysed above, the principal difference under the Merger Directive is that the company resulting from the merger is not a body established under EU law but remains governed by national law. Article 16 of the Merger Directive provides that, in principle, the scheme for employee involvement will be determined in accordance with the law of the Member State where the company resulting from the merger has its registered office. In the cases in which that would result in a loss of worker participation rights, the Directive provides for a negotiating procedure including standard rules to apply by way of default similar to the scheme established in the SE Directive. Given that involvement in the merger of a company subject to board-level worker participation generally triggers the negotiating requirement; such cases will always involve negotiations on worker participation structures.⁴⁷ In contrast to the SE scheme, the standard rules established under the Merger Directive are less favourable in certain respects.⁴⁸

44. Directive 2005/56/EC, OJ L 310, 25.11.2005, p. 1.

45. Kleinsorge (2011), EU-Recht, paragraph 85.

46. For details, see Heuschmid, J. (2006) pp. 184-192.

47. See Sick, S. (2010), paragraph 44, and Kleinsorge (2011), EU-Recht, paragraph 94 et seq. An exception to the negotiating procedure is provided for in Article 16(4)(a).

48. Kleinsorge (2011), EU-Recht, paragraph 94 et seq., and Sick (2010), SE und grenzüberschreitende Verschmelzung, paragraph 48.

Further, reference must also be made to the project for a 14th company law directive.⁴⁹ The purpose of this directive is to allow the cross-border transfer of the registered office of limited companies and, hence, conversion to a different legal form.⁵⁰ Policy-level discussions on the project have been ongoing for several years but have not resulted in any serious legislative proposal by the Commission.⁵¹ As conversion to a different legal form may have considerable consequences for worker rights, possibly even the complete loss of board-level worker participation, protective mechanisms are essential. In this connection, the European Parliament recently adopted a second resolution calling on the Commission to present a legislative proposal for a 14th company law directive.⁵² In addition to the issue of board-level worker representation, the question whether the directive should require the registered office and administrative seat of a company to be located in the same Member State proved particularly controversial in the Parliamentary debates.

2.3 Interim conclusion

The previous sections have identified that only limited individual measures have been adopted at EU level in the area of board-level worker representation. A coherent company law solution for ensuring workers' interests remains to be developed. At present, where companies decide to take advantage of their rights under the European *acquis*, workers can only be sure of board-level worker participation if, as a matter of national law, they are already accorded such rights.⁵³ This follows from the decision of the European legislature not to introduce an independent EU standard for worker participation but simply to establish a negotiating procedure. In addition, this limited scheme contains various weaknesses which can have an adverse impact on board-level worker participation.⁵⁴ For that reason, the EU *acquis* is often used in order to reduce or weaken board-level worker representation. In this connection, the absence of an independent EU standard for worker participation has proven to be a particular disadvantage.

49. Koberski and Heuschmid (2010), pp. 213-214, and Kleinsorge (2011), EU-Recht, paragraphs 124-125.

50. Krause, R. (2004), p. 396.

51. Koberski and Heuschmid (2010), pp. 213-214.

52. On the first resolution (P6_TA(2009)0086), adopted in 2009, see Koberski and Heuschmid (2010), p. 214. The second resolution was adopted on 2 February 2012 (P7_TA(2012)0019).

53. Kluge, N. (2011), p. 167.

54. Conchon (2011), p. 35 et seq.

3. A future legal framework

This brings us back to our original question. How could European company law be reformed to secure worker interests in a more effective and coherent manner? There appear to be two important aspects here. First, legislation should define the notion of the ‘interests of the company’ – which management is required to respect – in pluralist terms. Second, in addition to this proposal to establish the stakeholder model as the statutory norm, this should be supplemented by a legal framework which ensures that stakeholder interests are indeed respected.⁵⁵ For the purpose of protecting worker interests in this context, as identified earlier, the concept of board-level worker participation is particularly well-suited.

3.1 Pluralist approach to company law

Legal rules requiring management to adopt a pluralist approach when pursuing the company’s interest are to be found in many legal orders. Although the group of stakeholders to be considered varies somewhat, on the whole, workers are accorded a special status in this context.⁵⁶ The nature of this approach will be illustrated here by an examination of German law (taken to be representative of numerous legal orders in continental Europe).

The legal framework in Germany and other continental European countries

German company law has traditionally taken as a guiding principle the notion of the ‘interests of the company’.⁵⁷ Over many decades, that notion has been understood to mean that management should accord appropriate recognition to the plurality of stakeholder concerns.⁵⁸ A previous version of the Companies Act (*Aktiengesetz*) whose origins went back to the time of the Weimar Republic provided explicitly that the board should take account of the interests of various stakeholders.⁵⁹ Al-

55. For a similar view, see L. Gower and P. Davies (2008), p. 519.

56. For a justification of this position, see Parkinson, J. (2003), pp. 481-509, at p. 491 et seq.; Johnston, A. in this book; Wißmann, H. (2009), § 282, paragraph 15; and Hopt (2011), p. 505.

57. For detail, see Spindler, G. (2008); Deipenbrock, G. (2010), pp. 17-18; Kuhner, C. (2004), pp. 244-279; and Hüffer, U. (2010) *Aktiengesetz*, § 76, paragraph 12 et seq.

58. Kuhner (2004), p. 252.

59. Koberski and Heuschmid (2010), p. 210 and footnote 52.

though that the provision was repealed as part of the 1965 reform to company law, the overwhelming majority of commentators presumed that this pluralist approach continued (implicitly) to apply. For example, the explanatory notes to the 1965 government bill introducing that reform considered it self-evident that, in pursuing company activities, the board must take account of the concerns of shareholders, workers and society at large. Doctrinal support for this principle can be found in various legislative provisions. These include, most importantly, the notion established in Article 14(2) of the Basic Law (Grundgesetz) that the use of property shall also serve the public good and also the legislation on board-level worker participation.⁶⁰ In philosophical terms, this approach draws on a variety of inspirations including Hegelian thought and Catholic social teaching.⁶¹

With the increasing popularity of the notion of shareholder value that emerged in the 1990s and continued into the first decade of the 21st century, certain legal writers began to express doubts as to the correctness of the pluralist approach taken in German company law.⁶² However, the majority of commentators continued to support the pluralist approach. In any event, the 2009 amendments to the German Corporate Governance Code ought to have dispelled any lingering doubts. Following those amendments, the board has been required to adopt a pluralist approach to the notion of the ‘interests of the company’. Section 4.1.1 of the code is worded as follows: ‘The board is responsible for independently managing the company in the interests of the company, that is, taking account of the interests of the shareholders, its employees and other stakeholders, with the objective of sustainable creation of value.’ In other words, the interests of the company may be regarded as the sum of the various forces coincident within the company as a pluralistically structured association.⁶³ Naturally, these forces include the demand for profitability and the continued existence of the company.⁶⁴ At the same time, this principle also means that the board is neither required nor permitted to pursue its task of management guided simply by shareholder interests.⁶⁵

60. Kuhner (2004), p. 248.

61. Ibid.

62. Groh, M. (2000), pp. 2153-2158; Fleischer, H. (2009), p. 190. However, the shareholder value idea never took hold completely. See von Hein, J. (2008), p. 229 et seq. On this development, see Vitols (2011), and Deipenbrock (2010), pp. 17-18.

63. Hüffer (2012), § 76, paragraph 12 et seq.; Wißmann (2009), § 282, paragraph 15; and Koberski, W. (2011), § 25 MitbestG, paragraph 93 et seq.

64. Wißmann (2009), § 282, paragraph 15, and Hüffer (2012), § 76, paragraph 13.

65. Hüffer (2012), § 76, paragraph 12.

Thus, in the German legal order, the shareholder value approach has been completely undermined.⁶⁶

Company law systems underpinned by a pluralistic notion of the interests of the company comparable to that inherent in German law are to be found in many other countries in continental Europe. These countries include France,⁶⁷ Italy,⁶⁸ the Netherlands,⁶⁹ Austria,⁷⁰ Switzerland⁷¹ and the Scandinavian countries.⁷²

The different approach of common law countries

In the United Kingdom, the shareholder value approach traditionally prevails.⁷³ For that reason, it comes as no surprise that the courts have equated ‘the interests of a company’ to the interests of shareholders.⁷⁴ Consequently, of particular interest in this connection is section 309 of the Companies Act 1985 (subsequently repealed) which, at least in theory, mitigated that general focus on shareholder interests.⁷⁵ It was worded as follows: ‘The matters to which the directors of a company are to have regard in the performance of their functions include the interests of the company’s employees in general as well as the interests of its members’. However, its lack of enforceability was seen as a problem.⁷⁶ As part of recent company law reforms, that provision was repealed by the Companies Act 2006 and replaced by a watered-down provision in the new section 172.⁷⁷ Those reforms followed an independent review of

66. Ringleb, H., T. Kremer, M. Lutter and A. von Werder (2010), section 4.1.1 of the code, paragraph 602, and Deipenbrock (2010), pp. 20-21.

67. Lord Wedderburn of Charlton (1993), vol. 109, p. 233.

68. Grundmann (2011), § 13, paragraph 462.

69. The Supreme Court of the Netherlands (Hoge Raad) has clarified that the interests of shareholders do not take precedence over the interests of other stakeholders. See its judgment of 13 July 2007 in ABN AMRO and Others, reported: JOR 2007, p. 178.

70. Section 70(1) of the Austrian Companies Act provides: ‘The board shall be responsible for independently managing the company with a view to ensuring the company’s interests taking account of the interests of shareholders, employees and the public at large’.

71. According to a judgment of the Swiss Federal Supreme Court, the objective of a company is not simply the pursuit of profits but also to secure other interests, for example, an existence for employees. Reported in BGE 100 II 393.

72. Bruun, N. (2006), p. 40, and Hopt (2011), p. 476.

73. Hopt (2011), p. 476, and Fleischer (2009), p. 209.

74. Fleischer (2009), p. 209.

75. For details, see Villiers, (2000), pp. 593-614.

76. Villiers (2000), pp. 596-597.

77. Heuschmid (2009), p. 155; Wynn-Evans, C. (2007), pp. 188-193; Villiers (2010), p. 9; and Gower and Davies (2008), p. 518.

company law commissioned by the Department of Trade and Industry which in its final report had recommended the notion of shareholder primacy and rejected the pluralist approach.⁷⁸ In this connection, the principle introduced by section 172 of the Companies Act is commonly referred to as the notion of ‘enlightened shareholder value’.⁷⁹ This approach is said to combine the shareholder value approach with consideration of stakeholder interests.⁸⁰ This means that the board is allowed, at the very least, to have regard to stakeholder concerns.⁸¹ Ultimately, however, under the British notion of corporate governance, the primary focus remains on shareholders.⁸² If, prior to the 2006 reforms, the protection afforded to employees as stakeholders was regarded already as weak, the situation under the new regime is even worse.⁸³ In introducing the Companies Act 2006, the United Kingdom clearly missed an opportunity to create a progressive and sustainable system of company law.⁸⁴

Although company law in the United States generally also follows the shareholder value approach,⁸⁵ since the early 1980s various states have introduced provisions (known as ‘other constituency statutes’) allowing management to have regard, in addition to the interests of shareholders, also to the concerns of other stakeholder groups.⁸⁶ Section 717 of the New York Business Corporations Law is a model in this respect.⁸⁷ Certain states have gone further, for example, imposing an obligation to have regard to stakeholder interests.⁸⁸ Sometimes, in order to temper the shareholder value approach, the business judgment rule is invoked,

78. DTI (2001) *Modern Company Law for a Competitive Economy, Final Report 2001*, London: DTI, paragraph 1.23.

79. Heuschmid (2009), p. 155; Villiers (2010); and Fleischer (2009), p. 209.

80. Villiers (2010), p. 1.

81. Grundmann (2011), § 13, paragraph 462.

82. Villiers (2010), p. 2; and Grundmann (2011), § 13, paragraph 462.

83. Gower and Davies (2008), p. 518; and Villiers (2010), p. 1.

84. Villiers (2010), p. 1.

85. Kuhner (2004), pp. 274-275. The leading case is *Dodge v Ford Motor Co.*, 204 Mich. 459 (1919).

86. Cox, J. and T. Hazen (2003), pp. 210-211.

87. This is worded as follows: ‘... (b) In taking action ... a director shall be entitled to consider without limitation ... (1) both the long-term and the short-term interests of the corporation and its shareholders and (2) the effects that the corporation’s actions may have in the short-term or in the long-term upon any of the following: (i) the prospects for potential growth, development, productivity and profitability of the corporation; (ii) the corporation’s current employees; (iii) the corporation’s retired employees ..; (iv) the corporation’s customers and creditors; and (v) the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which it does business.’

88. For an overview, see Fleischer, cited above, p. 211.

which accords management considerable discretion in the exercise of its tasks.⁸⁹ Nonetheless, company law in the United States continues to reject any presumption that the notions of shareholder value and stakeholder value are converging.⁹⁰ The other constituency statutes are said not to be indicative of the legislative philosophy inherent in company law.⁹¹ In addition, as is the case in the United Kingdom, the statutes adopted by the various states lack an enforcement mechanism to ensure that regard is actually had to stakeholder interests.⁹² In contrast, shareholders are in a different position. They are afforded legal tools to enforce their interests, more often than not at the expense of other stakeholders.

OECD level

The stakeholder approach has also had an impact at the level of the OECD (Organisation for Economic Co-operation and Development). A separate chapter on stakeholders (Chapter IV – The Role of Stakeholders in Corporate Governance) was inserted on the 2004 revision of the OECD Principles of Corporate Governance. By means of those rules, the OECD seeks to ensure a balancing of interests between the various groups involved.⁹³ This is made clear by its call for the corporate governance framework to encourage active cooperation between companies and stakeholders in the interests of the company's own welfare and its long-term performance.⁹⁴ In this connection, its recommendation that 'performance-enhancing mechanisms for employee participation should be permitted to develop' can be understood as a reference to instruments such as board-level worker participation.

89. Von Hein (2008), pp. 861-862.

90. *Ibid.*, p. 862.

91. *Ibid.*

92. Villiers (2000), p. 598.

93. Fleischer (2009), p. 203.

94. This principle is fleshed out in the OECD Principles as follows: 'A. The rights of stakeholders that are established by law or through mutual agreements are to be respected. B. Where stakeholder interests are protected by law, stakeholders should have the opportunity to obtain effective redress for violation of their rights. C. Performance-enhancing mechanisms for employee participation should be permitted to develop. D. Where stakeholders participate in the corporate governance process, they should have access to relevant, sufficient and reliable information on a timely and regular basis. E. Stakeholders, including individual employees and their representative bodies, should be able to freely communicate their concerns about illegal or unethical practices to the board and their rights should not be compromised for doing this. F. The corporate governance framework should be complemented by an effective, efficient insolvency framework and by effective enforcement of creditor rights.'

Interim conclusion

As has been demonstrated, a large number of countries, particularly in continental Europe and the OECD, conceive of company law in pluralist terms. It should therefore not be a surprise that the pluralist approach is also the leading perspective from a comparative law point of view.⁹⁵ Even common law jurisdictions, which in this connection have traditionally taken a different approach, cannot avoid in their company law systems the recognition of interests going beyond the interests of shareholders alone. However, it remains impossible to speak of a convergence between shareholder value and the stakeholder approach.

If the Commission decides to develop the EU company law *acquis* further, adoption of a pluralist perspective is essential.⁹⁶ In this connection, the wording of section 4.1.1 of the German Corporate Governance Code may serve as a useful starting point. The first step would be to insert a clarification of that kind in Article 38 of the SE Regulation and any future SPE Regulation. The next step would be to consider whether the pluralist approach should be inserted in the legal order of all the Member States by means of a coordinating directive adopted on the basis of Article 50(2)(g) TFEU. For most Member States that would simply mean EU-level reinforcement of the national status quo. However, even for the United Kingdom, given the features of its company law regime identified above, a development of that kind would not involve a concept which is entirely foreign.

3.2 Development of board-level worker participation at EU level

As was outlined earlier, the legislative establishment of a pluralist (stakeholder) concept of company law will require supplementing with legal enforcement mechanisms. From the perspective of employees, rules on board-level worker participation would appear particularly well-suited in that regard.⁹⁷

The introduction of board-level worker participation by means of EU secondary law has been under discussion since the early 1970s. This ap-

95. Hansmann H., R. Kraakman (2004), p. 18.

96. For a similar view in relation to environmental concerns, see Sjøfjell, B. (2010).

97. See also demand of the ETUC: Executive Committee Resolution from 28 April 2011.

plies in particular to the Commission's 1972 proposal for a fifth company law directive.⁹⁸ On the basis of Article 54(3) EEC (now Article 50(2)(g) TFEU), the proposed directive sought to establish a uniform structure for companies established under national law and to introduce board-level worker representation in companies of that kind.⁹⁹ More specifically, the proposal envisaged the introduction of a two-tier board structure (Article 2) and board-level worker participation entailing no fewer than a third of the seats on the supervisory board in all companies having 500 or more employees (Article 4).¹⁰⁰ Quite clearly, this would have fixed company law on the stakeholder track. However, notwithstanding over two decades of efforts, as a result of differences on core issues concerning company structure and board-level worker participation, the directive was never adopted.¹⁰¹

The failure of the universal solution proposed in the fifth company law directive should not be seen as a hindrance to the development of EU schemes for worker participation. It is possible that the project to introduce board-level worker participation to the legal order of each Member State was – and still is – somewhat over-ambitious. However, an approach of that kind is unnecessary. Instead, other means are possible. First, the existing corporate forms established under EU law could be enhanced with an independent EU standard for worker participation. Second, those Member States which are well-disposed to the concept of board-level worker participation could make use of the framework for enhanced cooperation established in Article 20 TEU in conjunction with Articles 326 to 334 TFEU to harmonise their systems of company law including the rules on board-level worker participation.

Introduction of an independent scheme for board-level worker representation in the corporate forms established under EU law

A first step towards the enhancement of board-level worker participation could be taken through the introduction of an independent EU standard

98. COM (72) 887 final (not published in English). See also Habersack, M. (2003), paragraphs 55-56.

99. COM (72) 887 final.

100. In a later proposal, the threshold for participation was raised to 1000 employees: Grundmann (2011), § 11, paragraph 366.

101. Habersack (2003), paragraphs 55-56; and Bröhmer, J. (2011), Article 50 AEUV, paragraph 12. Similar problems arose in relation to the SE. See Kleinsorge (2011), EU-Recht, paragraph 4 et seq.

for board-level worker participation in the corporate forms governed by EU law. This would be an opportunity to reduce or even remove the deficits in the existing SE *acquis* identified above and, as a result, make these corporate forms governed by EU law more attractive from an employee perspective.

The legislative process currently underway in relation to the SPE could be used for this purpose. Consequently, the legislative actors involved should consider the introduction of an independent EU standard for board-level worker participation which goes beyond the existing negotiating procedure. The proposal for the fifth company law directive mentioned earlier could be treated as a starting point for the substance of any such scheme. However, in this connection, it does not appear necessary to require the introduction of a two-tier board structure. It will suffice if each SPE is simply required to adopt a structure compatible with board-level worker participation. This was the approach adopted in the consolidated draft SPE regulation submitted by the Swedish Council Presidency in 2009.¹⁰² As regards the intensity of worker participation, here, too, the draft fifth directive provides a useful starting point. Under that proposal, no less than a third of the seats in the supervisory or management organ must be reserved for worker representatives. At the same time, a special rule will be needed for a Member State whose national law provides for higher levels of worker representation. That State should have the power to apply the higher level of worker representation to SPEs that are registered there. This will ensure that the requirements of Article 151 TFEU are satisfied. On the question of the size of company needed to trigger the introduction of this independent EU notion of board-level worker representation it would appear appropriate, in line with Article 8 of the SCE Directive, to set the threshold at 50 employees.

If agreement cannot be reached on including worker participation of this kind, it would be better to abandon the entire SPE project. Expansion of worker participation as outlined above is needed to remove the deficit which currently exists at EU level. Whereas businesses operating in Europe can take advantage of developments in EU law and adopt a corporate form governed by EU law, employees are, for the most part,

102. See Koberski and Heuschmid (2010), p. 209.

limited to those rights accorded by national law.¹⁰³ If, on the other hand, EU law is developed in the manner suggested above, this could be a model for the other corporate forms governed by EU law.

Development through enhanced cooperation

An alternative approach to extending board-level worker participation at EU level might be to use the procedure for enhanced cooperation provided for in Article 20 TEU in conjunction with Articles 326 to 334 TFEU.¹⁰⁴ In this case, the initiative for such a development would have to come from the Member States.

The conditions for enhanced cooperation are set out in Article 20 TEU in conjunction with Articles 326 to 334 TFEU. Pursuant to Article 20 TEU, Member States may establish enhanced cooperation between themselves within the framework of the Union's non-exclusive competences. It follows from Article 3 TFEU that questions of company law (Article 50(2)(g) TFEU) and worker representation (Article 153(1)(f) TFEU) do not fall within the Union's exclusive competences. Moreover, Article 20(1) TEU provides that enhanced cooperation shall aim to further the objectives of the Union and reinforce its integration process. That would not be difficult in this case as, pursuant to Article 3(3) TEU, the Union shall work for a social market economy and social progress. The same conclusion follows from Article 151 TFEU which establishes that the Union and the Member States shall have as their objectives: 'the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvements is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'. It is clearly evident that the harmonisation of company law with a view to ensuring the effective participation of workers constitutes a measure promoting the integration process. Pursuant to Article 20(2) TEU, enhanced cooperation may only be undertaken as a last resort, that is, when the objectives of enhanced integration cannot be attained by the Union as a whole. This is the case, as discussed earlier, in relation to the fifth company law directive. The final requirement, pursuant to Article 20(2) TEU, is that

103. Kluge (2011), p. 167.

104. A similar view is taken in the chapter by Malmberg, Sjödin and Bruun.

at least nine Member States participate in the enhanced cooperation. Given that legislation on board-level worker representation exists in 14 Member States,¹⁰⁵ it wouldn't seem impossible to achieve that quorum. In particular Germany, with both a healthy economy and widespread participation rights, could use its influence to convince other member states to follow the participation path. The procedure to establish enhanced cooperation is set out in Articles 329 to 334 TFEU. According to those provisions, the Member States which wish to establish this must address a request to the Commission. Authorisation to proceed will be granted by the Council on a proposal from the Commission and after obtaining the consent of the European Parliament. In the framework of enhanced cooperation, the participating Member States may make use of the Union's institutions and exercise those competences by applying the relevant provisions of the Treaties. Moreover, pursuant to Article 328(1) TFEU, the Commission is required to promote the participation in enhanced cooperation by as many Member States as possible.

4. Conclusion

Given the seriousness of current problems such as increasing social inequalities and the precarious state of the environment, the demands placed on EU company law are considerable. What is needed for the future is a system which with ingenuity and the careful harnessing of resources achieves greater qualitative rewards and improved output of benefit to society and does not simply conquer markets as rapidly as possible with a view to making shareholders richer.¹⁰⁶ The fact that good corporate governance requires consideration of employee interests has now been recognised even by supporters of the shareholder value approach. For example, Hopt writes in a recent article: 'good corporate governance includes the interests of other groups involved with the company, in particular, its employees'. This is something which must be put in practice at EU level. A first step in that direction would be to establish the pluralist notion of the company as a principle of EU company law. To do so would reflect a model in which a company is seen as a social association of cooperating stakeholders who contribute to that organisation's success through the provision of their capital or labour. In order

105. For an overview, see Conchon, cited above, p. 10.

106. Kluge, cited above, pp. 156-157.

to ensure – from an employee perspective – that this pluralist approach is actually put into effect, flanking measures are required which establish board-level worker participation. The shape that measures of that kind could take has been identified in this chapter. Consequently, the ball is now in the court of the EU legislature and the Member States. As long as the relevant actors do not take action in this field, employees have to access to more conventional measures to safeguard their interest in company decision making. How this could work on the basis of collective bargaining or investor agreements is described by the contribution to this book by Däubler.

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107. Hopt, cited above, p. 524.

108. Heuschmid (2009), p. 263.

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