

# Chapter 6

## EU company law and employee involvement – some perspectives on future developments

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### 1. Introduction\*

A long-standing conflict in the European integration project is between advocates of greater market integration and those who believe that market integration will inevitably lead to the dismantling of social rights at national level. In the 1970s a social action programme was adopted in order to try to overcome this conflict. Policymakers took the view that action in the area of social policy was needed in order to avoid the perception that the European Union (EU) was only an instrument for capital. The EU was said to be in need of a more human face in order to gain the support of the working population.<sup>1</sup>

In his 2010 report on a new strategy for the single market, Professor Monti states that this conflict has been revived after some controversial judgments of European Court of Justice (ECJ). According to Professor Monti, a potential effect of this divide may be the alienation of previous key supporters of the single market within the workers' movement and the public at large (Monti 2010: 68). This reasoning bears a resemblance to that used on the adoption of the social action programme in the 1970s. Another common feature to contemporary developments and the situation in the 1970s is the prevailing economic crisis.

In light of the recent report of the Reflection Group, we will analyse in the present chapter the current discussion on the modernisation of

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1. 'The Community has to be seen as more than a device to enable capitalists to exploit the common market; otherwise it might not be possible to persuade the people of the Community to accept the discipline of the market,' Michael Shanks quoted in Bercusson (1996: 50).

company law and the implications for employee involvement. We propose two different routes which could be used to protect and enhance employee involvement in the EU. The first is to adopt legislation at EU level establishing a European minimum standard for employee involvement intended to complement existing national and European regulations on this subject. The second route is to pursue enhanced cooperation between EU States that wish to promote both social and economic integration.

## **2. Harmonisation of company law**

In the early 2000s, the European Commission introduced an action plan in order to modernise company law and enhance corporate governance in the EU (European Commission 2003). The action plan was seen as an impetus to harmonising EU company law in order to make the most of the internal market by facilitating the freedom of establishment, cross-border restructuring and to promote the integration of capital markets. The aim was also to minimise the damaging impact of a number of financial scandals that had recently occurred.

The Commission has recently taken an initiative to relaunch the process of harmonisation of company law. In 2010 the Commission established the Reflection Group on the Future of EU Company Law. The report of the Group (Reflection Group 2011) was discussed in May 2011 at a conference organised by the Commission.

The starting point for the Reflection Group report is the economic and financial crisis. The aim of the report is, in part, to assess whether imperfections in company law might have played a role in the economic crisis and to propose improvements in regulatory regimes in order to prevent future crises. The Group stresses excessive risk-taking and myopic management decisions as major causes of the crisis. At the same time, the Group emphasises that the financial crisis highlighted how important it is 'for businesses to operate in a flexible environment allowing for adaptation to new circumstances and for experimentation of innovative financial, organisational or industrial ideas'.

The Group thus wants to strike a balance between the need for rules discouraging harmful short-termism and excessive risk-taking, on the one hand, and the goal of preserving a flexible legal framework, on the other.

The Reflection Group puts forward a long list of recommendations concerning cross-border mobility, the contribution of corporate governance and investors to long-term viability of companies and concerning groups of companies. Against this background, the Reflection Group also addresses employee participation at board level.

Before considering the views expressed by the Reflection Group on the aim and function of employee participation, we will briefly sketch the EU law framework on employee involvement.

### 3. The EU employee involvement acquis in a nutshell

The law which provides for worker representatives to influence decision making in companies is an area where legal concepts and their translations tend to confuse discussions (Weiss 2004). The term employee involvement is used here in the widest sense, indicating any mechanisms through which employee representatives – these may be trade unions or works councils – may exercise influence on decisions to be taken within a company.<sup>2</sup> The mechanisms could be information (one-way communication from management/employer), consultation (two-way communication between management and worker representatives) or participation. The latter refers to the right of employee representatives to elect, appoint, recommend or oppose appointment of members in the supervisory or administrative organ (board-level representation).<sup>3</sup>

Workers' rights to information and consultation within the undertaking are considered fundamental rights for the purposes of the EU Charter of Fundamental Rights (Article 27), which is inspired by the revised European Social Charter (Article 21) and the Community Charter on the social rights of workers (points 17 and 18).<sup>4</sup> The latter states that information, consultation and participation rights must be developed along appropriate lines within the EU.

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2. See the definition in Article 2(h) of Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22.

3. See the definition in Article 2(k) of Directive 2001/86.

4. See the explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17, at p. 26.

The original Treaty of Rome did not include any explicit competence to adopt directives on employee involvement. However, different articles have been invoked as the basis for directives on employee involvement. The first directives were adopted on the basis of Article 100 of the Treaty of Rome (now Article 115 of the Treaty on the Functioning of the European Union (TFEU)). This article provided the EU with the competence to adopt directives for the approximation of national laws directly affecting the establishment or functioning of the common market.

Today, employee involvement is covered by the EU competence on social policy. Article 153 TFEU requires the Union to support and complement the activities of the Member States in this field and authorises it to adopt minimum directives to that end. This competence covers both information and consultation (Article 153(1)(e) TFEU) and participation (Article 153(1)(f) TFEU). However, the latter power requires unanimity in the Council and has to our knowledge never been used. The use of Article 153 TFEU as a legal basis also presupposes the involvement of the social partners at European level (see Article 154 TFEU). Within the scope of the social dialogue, the social partners may conclude an agreement that can be turned into a directive (see Article 155 TFEU).

The European Union has over the years adopted a wide but rather disjointed *acquis* concerning employee involvement. This secondary EU law presupposes existing national systems of employee involvement.

The first kind of directive addressed issues of employee involvement in relation to certain matters or incidents, which often are an effect of the internal market. The first two directives – adopted in the 1970s – concerned information and consultation in relation to the restructuring of companies.<sup>5</sup> The need for restructuring of companies was considered a necessary and desirable effect of the increased competition on markets for goods and services following the establishment of an internal market.<sup>6</sup>

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5. Both directives have been revised and consolidated. The latest versions are: Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16, and Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16.

6. In the same vein, the directive on takeover bids also contains provisions on information and consultation. See Directive 2004/25/EC of the European Parliament and the Council of 21 April 2004 on takeover bids, OJ L 142, 30.4.2004, p. 12.

The second kind of directive in the employee involvement *acquis* addresses different issues related to companies operating across national borders. The Directive on European Works Councils regulates employee involvement in Community-scale undertakings.<sup>7</sup> The Directive provides for the establishment of permanent employee representation bodies at transnational level for the purpose of informing and consulting on transnational matters. The Directive does not regulate participation. Further, there are three directives concerning other aspects of the cross-border organisation of companies. These directives aim at establishing participation – board-level representation – in undertakings which have adopted the legal form of the European company (SE) or the European cooperative society (SCE), and following cross-border mergers.<sup>8</sup> Further, there is a proposal that a future European private company (SPE) should also include a system for worker participation. However, the SPE proposals (European Commission 2008) are currently on hold.<sup>9</sup>

The third kind of directive is the 2002 Information and Consultation Directive, which provides a general framework for information and consultation in national companies.<sup>10</sup> The Framework Health and Safety Directive also includes obligations for information and consultation.<sup>11</sup>

A general observation is that directives on information and consultation lay down substantive standards, which are to be applied in different situations. These standards are considered minimum requirements, reflecting the idea of upward harmonisation expressed in Article 151 TFEU ('harmonisation, while the improvement is being maintained'). The directives concerning participation mainly regulate the applicable law and procedures aimed at reaching agreements on how participation is to be

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7. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (recast), OJ L 122, 16.5.2009, p. 28.

8. Directive 2001/86, cited above, Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.8.2003, p. 25, and Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310, 25.11.2005, p. 1.

9. For the amendments proposed by the Parliament see OJ C 87E, 1.4.2010, p. 300.

10. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ L 80, 22.3.2002, p. 29.

11. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1.

organised. In addition, they also contain default requirements if such agreements cannot be concluded. The main aim of these directives is to avoid dilution of existing national systems for participation as a result of cross-border business activities.

## **4. Employee participation according to the Reflection Group**

### 4.1 Aim and function of employee participation

The Reflection Group evaluates employee participation at board level from the perspective of how it affects the performance of companies, presumably defined as the return provided by the company to its shareholders or the increase in value of the company's shares. The point of reference for evaluating employee board representation thus appears to be that of shareholder value. According to the Group, the empirical econometric studies available do not indicate any clear evidence of a correlation between employee participation at board level and the performance of the companies. Companies with employee participation at board level or countries with such systems do not perform either better or worse than they would have been expected to have done without any such board representation.

The Reflection Group thus takes the view that employee participation at board level is neither good nor bad for the performance of the companies. And since the existence of systems of employee board-level representation is based on consciously taken political choices, these systems must be respected (even though the Group suspects that there might be vested interests in keeping such systems once they are established).

### 4.2 Implications

The policy implications of this view are, according to the Group, that there is no need to enhance EU rules on board-level representation. Likewise, there is no need for the EU to interfere with existing national systems for employee participation, unless they are discriminatory. The 'appropriate attitude' for the EU legislative bodies is thus to abstain from both deregulation and introduction of legislation on worker participation (Reflection Group 2011: 53).

In practice, this formally neutral position risks undermining the employee involvement systems in Germany, Austria and the Nordic countries (especially Sweden), which are the countries with the most developed systems for employee participation at board level. The Reflection Group appears to propose that those Member States that have weak or no employee participation systems in place should deepen their cooperation in order to introduce a regulation for a European private company (SPE). The Reflection Group has suggested using the possibility of enhanced cooperation, which gives Member States willing to commit to such cooperation the ability to do so (see the provisions of Article 20 of the Treaty on European Union (TEU) and Articles 326 to 334 TFEU).<sup>12</sup> In doing so, the Group indirectly defines employee participation as something odd, which should not form a part of the common EU solution.

The Reflection Group further states that employees in the EU might suffer unequal treatment with respect to co-determination due to the fact that subsidiaries may be in a different jurisdiction to the parent company, for instance, a German Aktiengesellschaft. The Group highlights here an important structural problem in the internal market. The Group's proposal is that the Commission should challenge such situations before the ECJ. However, that course of action would hardly provide any solution to the discrimination of employees regarding their participatory rights. Instead, it would risk undermining the existing system for employee participation. The proper solution would, in our opinion, require legislation at national or European level.

The attitude within the Reflection Group towards worker participation is also reflected in the fact that the Group does not see any need for further comparative studies on employee representation. Nor does it call for any other studies in this field. In this respect, the position of the Group is not fully consistent with its own observation that there are different views on the impact of employee participation on the performance of companies. The position is also in sharp contrast with the general approach of the Group, which favours further studies on different aspects of EU company law.

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12. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (recast), OJ L 122, 16.5.2009, p. 28.

### 4.3 Employee involvement according to the Treaty

The understanding of the aims and function of employee participation as limited to its ability to enhance the performance of the companies is not fully compatible with the aims and functions attributed to employee involvement (of which participation is one part) in the political and legal debate. This point is clearly illustrated if we consider the functions and aims of employee involvement as expressed in the Treaty, which is intended to guide the actions of the European Commission.

According to the Treaty, employee involvement forms part of the social policy of the Union. The aim of social policy, as set out in the Treaty, includes improvement of the dialogue between management and labour (Article 151 TFEU). One of the directives in the EU employee involvement acquis states in its recitals that the strengthening of social dialogue is needed to promote mutual trust within undertakings in order to, for instance, improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking etc.<sup>13</sup> It is obvious that the Treaty, as well as secondary EU legislation concerning employee involvement, is, on the one hand, based on the assumption that employee involvement might increase shareholder value. It is, on the other hand, equally evident that the EU employee involvement acquis ascribes to social dialogue a value of its own, which does not have to be justified in terms of improving shareholder values.

When adopting measures to implement social policy objectives, the Union and the Member States should, according to the Treaty, take account of ‘the need to maintain the competitiveness of the Unions economy’ (second paragraph of Article 151 TFEU). This indicates a different order of structuring the arguments compared to the reasoning of the Reflection Group. The argument of the Reflection Group, somewhat oversimplified, is that there is no need to eliminate national regulations on participation since it is not proven that these regulations are bad for shareholder value. The argument of Treaty is different. It identifies as an aim the strengthening of the social dialogue. While doing this, the EU and the Member States should ensure that the function of the market is not distorted, or at least not more than is necessary.

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13. See recital 7 in the preamble to Directive 2002/14.

Further, it is expressly stated in the Treaty that the objectives of social policy will not follow only from the functioning of the internal market, but require action from the EU, including harmonisation of national laws (third paragraph of Article 151 TFEU). This view clearly rejects the argument sometimes put forward in the debate that employee participation is detrimental because, if it were not, it would have been developed by the market and hence co-determination need not and should not be introduced as a matter of law (contrast Reflection Group 2011: 53).

Further, the point of view expressed in the Treaty is that the Union should support and complement the activities of the Member States in the field of employee involvement, including the provision of information to and consultation with workers, and the representation of workers, including co-determination<sup>14</sup> (Article 153(1)(e) and (f) TFEU).<sup>15</sup>

The policy implications of the Treaty are thus different from those put forward by the Reflection Group. In light of the Treaty, the question must be whether there is any need for the Union to support and complement the activities of the Member States in order to promote dialogue between management and labour. If this is done, the Treaty requires that it should be in a way that does not interfere with the functioning of the market more than is necessary.

## **5. Is there a need for a European minimum standard on employee involvement?**

Is there a need today for the Union to complement the actions of the Member States in the field of employee involvement?

We believe that the answer is yes. The main argument for such actions is the increase in cross-border activities of companies. This increase is partly related to the evolution of EU company law, for instance the case-law concerning cross-border mobility of companies, the establishment of the European company (SE), and now the proposed European private

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14. In German the term is *Mitbestimmung*, which refers, inter alia, to systems for board-level representation. See, inter alia, Preis (2003: 377 et seq.).

15. Different legislative procedures apply if the proposed legislation concerns the representation of workers including co-determination, see Article 153(2) TFEU.

company (SPE). The development of genuine cross-border companies has put, and will continue to put, severe constraints on national systems of employee involvement. Thus, there is a need to complement the activities of the Member States. An EU intervention would have added value in the promotion of dialogue between management and labour.

This has also traditionally been one of the main arguments for adopting the EU employee involvement *acquis*, starting from the Collective Redundancies Directive in the 1970s, via the European Works Councils Directive in the 1990s, to the Directive on Cross-border Mergers in 2005.<sup>16</sup> Further, the existing *acquis* is rather disjointed and highly complicated. This is particularly true for regulation on employee participation at board level.

There are, in our opinion, reasons to consider a new framework directive covering all types of European companies and other European legal entities (i.e. undertakings which have adopted the legal form of SE, SCE or SPE). The objective of such a directive would be both to enhance employee involvement and thereby promote the dialogue between management and labour and to promote the functioning of the internal market, in particular to implement the freedom of establishment. The directive could give each Member State an option to choose between different methods of safeguarding employee involvement, that is, either participation or information and consultation.

By introducing a common European minimum standard of employee involvement, such a directive would stress that companies and other actors taking advantage of the European internal market must respect and promote workers' participation in decision making. This standard should help to prevent the registration and localisation of the seat of such companies being done solely or mainly with a view to avoid worker participation. Furthermore, it is necessary to guarantee the existing or established best practices when companies from different jurisdictions merge or when the restructuring processes of existing entities result in the establishment of a European legal entity. Such a directive would further provide an opportunity to simplify the rules on employee par-

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16. Part of the EU employee involvement *acquis*, namely, Directives 98/59, 2001/23 and 2002/14, is currently subject to evaluation by the European Commission to determine whether the legislation is fit for purpose.

ticipation for undertakings adopting the SE or SCE form and would also solve some of the legislative problems related to the adoption of an SPE regulation.

## 6. Enhanced cooperation – a possible way ahead?

The proposal for a European private company (SPE) has, as was already mentioned, been put on hold. This is mainly due to disagreements on how to regulate employee participation. Against that background, the Reflection Group has suggested using the possibility of enhanced cooperation. The idea, as indicated above, is to adopt a regulation on an SPE which would not cover all Member States. According to the Group, a Member State wishing to impose its national system of workers' participation should not be able to block others wishing to progress on the SPE.

If we assume that market integration and social policy are on an equal footing – which arguably is the position of the Treaty – the idea of enhanced cooperation in the field of company law without addressing the issue of employee involvement is not the only or, indeed, the obvious choice. Considering social policy and market integration as equally important to establish a highly competitive social market economy (Article 3(3) TEU), a possible route for enhanced cooperation between progressive Member States is to develop a cooperation addressing both social and economic integration i.e. adopting both an SPE regulation and a framework directive on employee involvement of the kind just proposed. This would better serve the aims of the Treaty, by both promoting dialogue between management and labour and facilitating the internal market. Therefore – in its role as guardian of the treaties – the Commission should try to promote enhanced cooperation between those Member States that want to take on board employee involvement as a part of the SPE package and not between those wishing to exclude it.

The possibility of enhanced cooperation might in this way provide an opportunity to reinvigorate the idea of Jacques Delors for *un espace social européen*, which promotes both social and economic integration. In 1986 Delors stated:

‘Our ultimate aim must be the creation of a European social area. This idea, may I remind you, was rejected as Utopian, dangerous, and irrelevant to the Community venture a few years ago. Today its purpose is

clear: to ensure that economic and social progress go hand in hand.’ (European Commission 1986)

The idea of coupling social and economic integration is, as has been illustrated, clearly in line with the ambitions of the Treaties and need not be Utopian.

## 7. Conclusion

Recent decisions by the ECJ have rekindled the long-standing conflict between supporters of market integration and those that fear that such integration threatens social rights embedded in national systems. In 2011, the Reflection Group on the Future of EU Company Law, appointed by the European Commission, published a report outlining recommendations and options for future actions in this area. However, this report suffers from a number of deficiencies, particularly with regard to employee involvement rights in the EU.

This chapter has discussed the deficiencies of that report and suggested alternative ways forward. One route could be to adopt legislation at the EU level on a minimum standard of employee involvement. This standard would supplement and protect existing national systems of employee involvement, which are particularly threatened in cases of cross-border activities by companies. A second route would be to use the mechanism to pursue enhanced cooperation between certain Member States. In this way, countries wishing to give equal footing to both economic and social integration in the EU could pursue an agenda more supportive of employee rights. Both of these mechanisms are compatible with EU law, and could help to retain much-needed support for the European project among trade unions and the public at large.

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