

Chapter 8

The ETUC on the way towards sustainable European employee involvement

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1. Introduction: the challenge

The concept of a Sustainable Company is based on several cornerstones (Vitols 2011) which need to be put together like the pieces of a jigsaw puzzle. One of these cornerstones is worker involvement, since it enables and is necessary for the exercise of ‘worker voice’ in corporate governance and company affairs. The focus of this chapter is the need to Europeanise and modernise workers involvement and to have a close look at the evolution of the ETUC in embracing the Sustainable Company concept. Recent progress towards a unanimous position on board-level representation¹ (ETUC 2014a) constituted a historical breakthrough and clarified the position on an important cornerstone of the Sustainable Company concept. This chapter spells out the elements of this picture more clearly and details this significant step in the direction of supporting the Sustainable Company.

The EU’s corporate governance framework combined with short-termism was one of the root causes of the financial crisis which commenced in 2007. It demonstrated the failure of the old corporate governance model, thus strengthening the assumption that the European Commission would draw some lessons from it.² A shift away from the current shareholder-centric approach is needed to move towards a stakeholder approach based on stronger stakeholder rights, in particular strengthened workers’ involvement prioritising the long-term interests of the company.

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1. Participation means the influence of employees’ representatives by way of the right to elect or appoint members of the company’s supervisory or administrative organ and the right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ (analogous to the SE, article 2).
 2. The Commission proposal on the Shareholder Rights Directive (COM/2014/0213) is based on the approach to empower shareholders, but there is no evidence that shareholder empowerment creates pressure for a longer-term perspective. As underlined by Frank Bold, the proposed Directive might be used to push managers towards even more short-term decision making.

However, the financial, economic and social crisis has not yet been adequately addressed to promote sustainable growth through sustainable companies.

In a company, a balanced and fair decision-making process should reflect a plurality of interests including all major stakeholders. Amongst the stakeholders, employees occupy a special position. In many Member States, company law traditionally recognises the plurality of stakeholder concerns and the notion of the ‘interests of the company’ as a guiding principle. A separate chapter on the role of stakeholders in corporate governance was inserted into the OECD Principles of corporate governance in 2004.

By creating a building block for workers’ information, consultation and board-level participation the EU should contribute to a concept of corporate governance that is in line with the European social model and that clearly distances itself from the primacy of shareholders’ interest in the debate about good corporate governance.

Shareholder value orientation has not improved corporate governance in many companies, quite to the contrary. A massive increase in inequality (Eurofound 2015) was a consequence of the old corporate governance model, and one of the main contributors to this trend was the huge increase in the remuneration received by the top management of the largest companies. One relevant factor which would restrain the upward spiral of remuneration would be the inclusion of workers’ representatives on company boards.

Jean-Claude Juncker and Martin Schulz, as candidates for the Commission presidency in 2014, took a stance in favour of setting a European minimum standard on employees’ board-level representation, but unfortunately never did come back to this campaign pledge (Mitbestimmung 5/2014). The ETUC declared that it was ready to contribute actively to this work while making clear that this is not about introducing any form of co-management or collaboration but of strengthening workers’ influence, in particular possibilities for the control and supervision of important company decisions affecting the workforce. From an ETUC perspective, employee board-level representation is not about extending German co-determination or any other national model; it is different as it would be genuinely European, covering European company forms in a first step and transnational companies in a second step. The

logic is to strengthen and broaden the right to workers' representation in order to broaden workers' strategic influence in company decision making.

The ETUC recommends that the Commission draws lessons from the corporate governance crisis and proposes a new framework for more democracy at work – or at least: to review the operation of existing Directives on employee involvement with a view to proposing suitable amendments where necessary. The triple objective should be to promote sustainable companies, good corporate governance and stakeholder participation and 'catch-up Europeanisation' of workers' involvement.

2. A fragmented and incomplete European architecture of corporate governance – the role of workers' involvement

European company law looks like an arbitrary patchwork, like an incomplete mosaic. Information and consultation are individual fundamental rights permitting no thresholds, and at the same time there are collective rights for European works councils, works councils and worker representation in general. Pursuant to Article 151 of the Treaty, a particular objective of the Community and the Member States is to promote social dialogue between management and labour. Point 17 of the Community Charter of Fundamental Social Rights of Workers provides that 'information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States'. Point 18 stipulates:

Such information, consultation and participation must be implemented in due time, particularly in the following cases:

- when technological changes which, from the point of view of working conditions and work organisation, have major implications for the work force are introduced into undertakings;
- in connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers;
- in cases of collective redundancy procedures;
- when trans-frontier workers in particular are affected by employment policies pursued by the undertaking where they are employed.

The Community framework on employee involvement intends to support and complement the action taken by Member States in the field of information, consultation and participation of employees.

The information and consultation directives³ – which have been the subject of a social partner consultation since April 10, 2015 – establish a minimum standard for workers in Europe, in particular in view of collective redundancies and transfer of undertakings. These directives urgently need updating as company restructuring has become a permanent feature of company life. Restructuring and anticipation of change are not yet dealt with in these directives. First and foremost, provisions on anticipatory management of change need to be taken up, but also stronger consultation rights with a view to reaching an agreement via meaningful social dialogue before any decision can be finalised. Stronger sanctions are necessary to end the situation of workers being put *devant le fait accompli*. The information and consultation must include the value chain, upstream suppliers, subcontractors and dependent companies downstream. The European Commission has launched a social partner consultation in view of a possible consolidation, recast or revision of the three directives, particularly related to shortcomings and incoherencies of the definitions, but also to anticipation of change and restructurings as well as coverage of all workers (seafarers and public administration) (ETUC 2013).

European Works Councils (EWCs) are quite well known to the general public as a genuinely European body for information and consultation in the workplace. The legislation on EWCs was adopted in 1994 and its provisions were improved through a recast in 2009. Close to 1,000 EWCs are active (ETUI n.d.; ETUI 2014a). An EWC has been established in approximately half of the companies covered by the directive. The Commission has to report on the functioning of the legislation before June 2016.

The European Company Statute or *Societas Europaea* (hereafter SE) had one of the longest gestation periods of all EU company law initiatives: 30 years between the original proposal in 1970 and the SE legislation in 2001. Since then, a decade of experience with the SE has shown that it is

3. Directive on a general framework for Information and Consultation (2002/14/EC of 11 March 2002), Directive on the Transfer of Undertakings (2001/23/EC of 12 March 2001), Directive on Collective Redundancies (98/59/EC of 20 July 1998).

practically unknown among the general public and exists in significant numbers in only a few countries (ETUI 2014b).⁴

After ten years of experience with SEs, we can see that European company law has (however inadvertently) resulted in robust incentives for business to circumvent national institutions of workers' involvement. Statistics (ETUI 2014c; Hans Böckler Stiftung 2014)⁵ show that more and more companies register as SEs in order to bypass the national rules. This loophole urgently needs to be tackled, otherwise this trend may even accelerate and cause more damage to national industrial relations systems. The German example best illustrates the situation: a company approaching the thresholds of 500 or 2,000 employees which, respectively, make one-third or one-half (i.e. parity) for workers' representatives in company boards obligatory will be tempted to circumvent these thresholds: it is sufficient to convert to a European Company just before reaching a threshold and, as a reward, the company gets a European label. Through the use of the 'before-and-after' principle the company can so circumvent the German co-determination laws and then continue to grow in size and number of employees without having to respect national regulations. This situation is untenable, unsustainable and unacceptable. The internal market and in particular European company law has offered many advantages for businesses and has given a push for the Europeanisation of companies. However, at the same time, European company law can lead to an erosion of national institutions of workers' involvement. For the European legislator it would be easy to catch up and close the loopholes. It is necessary to close this exit option and to strengthen democracy at work.

The Directive for a European company (SE) with regard to the involvement of employees is insufficient, as it does not ensure the establishment of a European minimum standard of employee board-level representation. Consequently, it does not create a level playing field. If and when participation rights exist beforehand these rights are preserved in principle, however, many workers are discriminated against due to the absence of participation rights. The discrimination is one of the reasons

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4. 319 'normal SEs' existed in October 2014 out of a total of 2234 SEs. Only 57 have workers' board-level representation.
 5. A leaflet of the HBS shows a gap such that in Germany alone 53 out of the 135 SEs have more than 500 and 25 more than 2000 employees in 2014, but only 54 SEs in Europe are SEs with participation rights.

why the approach based on the 'before and after' principle must be replaced and a strong plea in favour of a common European minimum standard is needed. Against all expectations, the SE statute has not yet established a European minimum standard, as it is based on the 'before-and-after' principle, which itself is based on national provisions. This purely national basis makes the European label look incomplete. The ETUC recently drew conclusions from it and rejected the 'before-and-after' principle, asking instead for a European minimum standard for all European company law forms (ETUC 2014a).

The information and consultation framework needs to be strengthened, in particular in view of anticipation of change and restructuring. Information and consultation are the necessary starting point for any other form of participation. Information and consultation are likely to work better in companies where workers' board level representation is in place, as it normally allows privileged access to early information, or in companies with a cooperative form of social dialogue. Attention should be paid in particular to an early information procedure and stronger consultation rights in order to reach agreement via a meaningful dialogue before a decision can be finalised. No worker should be excluded from the scope of application of the Directive and effective and dissuasive sanctions must imperatively be put in place.

Major changes are necessary: the Community has drawn up an employment strategy based on the concepts of 'anticipation', 'prevention' and 'employability' which are to be incorporated as key elements into all policies likely to benefit employment, including the policies of individual undertakings. The existing legal framework for employee involvement tends to adopt an excessively a posteriori approach to the process of change and does not contribute to genuine anticipation. Dialogue and negotiation at the level where decisions are prepared and effective participation of employees' representatives are preconditions to anticipate and manage change. In this context it is important that workers' representatives are empowered and enabled to anticipate and manage change.

The first step back in European company law followed with the introduction of the cross-border mergers (CBM) directive which does not refer to information and consultation rights and undermines the provisions on board-level representation of the SE. It contains provisions to split the registered seat from the administrative (i.e. 'real') seat so that companies can abuse this directive in order to transfer their registered

office for fiscal, social and other legal reasons (e.g. letter box companies), whereas the SE in article 7⁶ makes the single seat principle obligatory. The lack of coherence with the SE Directive has to be addressed, in particular the increased threshold (25 per cent vs 33 per cent), the possibility to restrict workers' board-level representation to 1/3 of the company board and the direct application of standard rules instead of negotiations.

A further important step backward was undertaken with the proposal of the Commission for a draft Directive on a 'single member limited liability company' (SUP) to harmonise national company law (on 9 April 2014). The ETUC warned (in a press release the day before) that the European Commission's draft Directive is a charter for avoiding tax and national labour rules. The ETUC rejects this proposal, opposing in particular the separation of the administrative seat from the registered office, allowing the circumvention of employee board-level representation (ETUC 2014b). While the European Commission presents the Directive as a means of helping small business to trade across the single market, it has to be pointed out that there is nothing to stop large companies from setting up single member subsidiaries to avoid tax and labour regulations. The Directive has major faults in that it a) fails to define the size of company that the Directive applies to, b) allows a company to register its business in a country different from the one in which it actually operates (a provision that facilitates fraud), c) harmonises national regulation in breach of the subsidiarity principle through the establishment of a 29th regime undermining stronger national provisions and d) lacks a European/cross-border dimension. Taken together, the Directive removes almost all references to workers' rights and would enable larger companies to misuse the legislation and choose a country of registration with lower taxes and less protection for workers. It would also enable businesses in EU member states where worker representation on the board is a legal requirement⁷ to avoid national worker representation rules by registering their business in another country where such rules

6. 'The registered office of an SE shall be located within the Community, in the same Member State as its head office. A Member State may in addition impose on SEs registered in its territory the obligation of locating their head office and their registered office in the same place' (Ervine 2014: 727).

7. Worker representation on company boards is a legal requirement in many member states, e.g. in Sweden for companies with over 25 employees; Denmark for over 35 employees; the Czech Republic, Slovenia and Slovakia over 50 employees; Netherlands 100; Finland 150; Hungary 200; Austria 300; Germany 500.

do not exist. The proposal generates serious concerns with regard to fiscal evasion, bogus self-employment, letter box companies, workers' rights and sustainable corporate governance in general. Once adopted, the SUP would constitute a giant step away from the Sustainable Company concept.

3. Rapid Europeanisation of business and delayed Europeanisation of the right to workplace democracy

The new conditions created by globalisation of the economy involving a process of concentrations of undertakings and cross-border mergers constitute a major challenge for employee involvement. The great diversity of rules and practices existing in Member States underscores the need to Europeanise and modernise the existing set of national and European rules in this field, in particular Community legislation on transnational employee involvement. Procedures for participation of employees are often not yet geared to the transnational⁸ structure of the entity which takes the decisions affecting those employees. This may lead to different treatment of employees affected by the same decisions within one and the same undertaking or group of undertakings. Decisions which have a potential effect on the entire undertaking or group or at least two Member States are considered to be transnational - including matters which are of importance for the European workforce in terms of the scope of their potential effect or which involve transfers of activities between Member States or cross-border restructuring.

Appropriate provisions must ensure that the employees of Community-scale undertakings – or Community-scale groups of undertaking –

8. A definition of 'transnational' can be found in the 16th recital of the EWC Recast Directive: 'The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.' The fact that the Member State of the managerial decision is different from the one where the employees are affected would qualify such a decision as transnational (European Parliament 2009: 2).

participate properly in decisions which affect them, in particular when and if they are transnational, either taken in a Member State other than that in which they are employed or with potential effects on other Member States. In this particular context the right of employee representatives to be members of, and to vote in, supervisory or administrative company organs is too often still missing. Representatives of recognised trade unions should become members of supervisory or administrative boards regardless of whether they are employees of a company participating in the establishment of employee board-level representation.

The sudden shutdown of the Greek public radio television broadcaster ERT in June 2013 sounded like a wakeup call: Over 2,500 workers were effectively laid off overnight without any information, consultation or participation; even the workers' representatives on the board were not involved in the decision. The information and consultation rights of the staff had been totally ignored - as a decade ago in the Renault-Vilvoorde case, which led to the adoption of the 2002 Directive establishing a general framework on information and consultation rights.

4. A new ETUC proposal to strengthen good corporate governance in sustainable companies

4.1 Paving the way

The ETUC Secretariat received the mandate of the Athens ETUC Congress 2011 with regard to strengthening their in-depth work on information, consultation and workers' participation. Half a year later, in December 2011, an ETUC Resolution took up this mandate, suggesting that the EU institutions should be provided with an elaborated ETUC proposal for European standards on workers' involvement, which should help prevent registration and location of company seats being organised with a view to avoid employees' board-level representation. One year after the Congress, in June 2012, a project 'Setting European Standards in Workers' Involvement' was launched to analyse the current state of play and to come up with concrete proposals to improve the situation. Following a series of meetings, a progress report was submitted and discussed at the Executive Committee Meeting of 3-4 December 2013 with the aim of guiding the secretariat and agreeing on the next steps to be taken. After further in-depth work, in October 2014 the ETUC

unanimously adopted a resolution calling for a new overarching European framework for information, consultation and board-level participation.

4.2 Cornerstones for more democracy at the workplace

Since the objective of the ETUC resolution ‘Towards a new framework for more democracy at work’ (adopted at the Executive Committee meeting of 21-22 October 2014), namely the Europeanisation and the improvement of employee involvement in European company forms in the context of a modern social market economy and fair competition, cannot be sufficiently achieved by the Member States and can be better achieved at Community level, the Community is challenged to adopt measures to achieve that objective. The new framework would include an adaptation clause and a minimum standard into the SE statute so that workers’ involvement is updated automatically in case the number of employees changes.

Employee board-level participation structures should be a cornerstone of:

- the new Directive establishing a general framework for information, consultation and board-level participation, asking Member States to apply the stakeholder approach and principles of good corporate governance in order to strengthen democracy at workplace;

or

- the revised SE legislation to avoid situations in which the ‘before and after’ principle does not establish a European minimum standard of employee board-level participation in European company forms (such as the SE or European company law instruments such as the Cross-border Mergers Directive, etc.).

The purpose of the new general framework for employee involvement is to establish a European minimum requirement applicable throughout the Community, whilst at the same time not preventing Member States from laying down provisions more favourable to employees at national level. Further development of the internal market and company law must be properly balanced, maintaining the essential values on which our societies and the European Social Model are based and ensuring that

all citizens benefit from economic and social development within the Community.

4.3 Work in progress

In 2012/13 an ETUC expert group on workers involvement dealt with the issue of workplace democracy. One point of discussion was to add an additional layer to the EWC Directive to allow workers' representatives to introduce employee board-level participation structures in companies covered by the directive (analogous to the provision of the EWC Directive): a request of employees from at least two countries representing the majority of the workforce would trigger the process of establishing significant employee board-level participation in a European supervisory board. In this case the same principles as in the SE would apply: first negotiations have to take place and then subsidiary requirements would apply. The national trade unions should play a central role and the competent European trade union federations (affiliated to the ETUC) a complementary role.

The need for a Europeanisation of company boards was another point of discussion. The employee representatives in the supervisory or administrative company organs must represent employees from the various Member States in a balanced fashion. Where the structure of the undertaking or group of undertakings changes significantly, for example due to a merger, acquisition or division, the existing employee board-level structure must be adapted.

At its first meeting on 29 April 2014 the new ETUC reflection group on workers involvement discussed a proposal for cornerstones for a European minimum standard in the European company (so-called 'option A'). The proposal on the table was an 'escalator' starting with a low proportion of workers' board-level representation (WBLR) for small enterprises and increasing to higher proportions depending on the size of the company (as well in the monistic as in the dualistic system):

- a low proportion of WBLR (at least a critical mass of two or three representatives to have real influence) could be applied to small companies with 50 to 250 employees (within the company and its direct or indirect subsidiaries);

- a higher proportion (one third) of participation for companies with 250 to 1,000 employees⁹ (within the company and its direct or indirect subsidiaries); and
- a robust parity (half of the seats) for big companies with more than 1,000 employees (within the company and its direct or indirect subsidiaries).

At a second meeting on 15th January 2015 some clarifications were introduced: the WBLR-‘escalator’ would deal with the proportion and replace the ‘before-and-after-principle’ in the subsidiary requirements (in the Annex, Standard rules, Part 3 Standard rules for participation, referred to in Article 7 of the SE-Directive). It was underlined that the escalator, as part of the fallback positions in the subsidiary requirements, would leave space for negotiations. The escalator should not be understood as an attempt to introduce thresholds, but to have clear rules on the proportion. At the third meeting of the ETUC reflection group on 25 June 2015 the rationale behind the ‘escalator’ and its three steps was discussed. The main objective is to take fully into account from a trade union perspective the broad diversity and the specific variations of the existing systems which have to be integrated in a truly European standard of workers’ board-level representation in European company forms.

5. Conclusion

The financial crisis has clearly shown that a change of paradigm in European company law is necessary. An alternative to shareholder value must be promoted, specifically the vision of a Sustainable Company which is sustainable along each of three dimensions: environmental, social and economic governance. From a trade union point of view, sustainable worker rights and sustainable employment are key components of sustainability which cannot be neglected. Companies cannot be truly sustainable without a sustainable workforce and working conditions.

9. In Germany companies with more than 500 employees have third parity, but the DGB demands a reduction to 250 employees; companies with more than 2000 have half parity, however, DGB wants this to go down to 1000.

Strong worker involvement is needed in order to achieve these goals through the effective exercise of worker voice. An efficient articulation in the triangle of information, consultation and the right to board-level representation is a condition for strong and effective workers' involvement. In this regard it is important to establish and maintain strong links to the TUs, EWCs, WCs, workers representatives and the workforce itself.

The ETUC has shifted its position towards a true European vision of sustainable company law and added an important piece to the mosaic of fundamental rights, the right to board-level representation and participation. The ETUC resolution on a framework for more democracy at work (2014a), completed work by an ETUC expert group on workers involvement and ongoing work by an ETUC workers' involvement reflection group are components of this historic shift. The nearer the trade union movement comes to achieving the objective of strong and ambitious European standards for worker involvement, the more progress will be made towards Sustainable Companies with sustainable rights and sustainable employment.

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