
Board-level employee representation rights in Europe

Facts and trends

Aline Conchon

Report 121

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european trade union institute

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Introduction

Amongst the different facets of industrial democracy, such as employees' information, consultation and negotiation rights, employee representation in the boardroom with a right to vote is a particularly controversial one (Conchon 2011a). The well-known German Codetermination law in the steel, coal and iron industries enacted 10 April 1951, (the so-called *Montan-Mitbestimmungsgesetz*) did not stem from a firm consensus between social partners and policy-makers but, rather, was the result of a political compromise between competing projects and conceptions (Müller 1991). 60 years later, controversies still exist, and have reached the European level where board-level employee representation [henceforth BLER] represents a hotly debated topic when it comes to the production of legal rules in the field of company law, such as the pending proposal for a European Private Company Statute (*Societas Privata Europaea* – SPE): 'Reopening the employee participation debate in the context of the SPE would expose the SPE to an unreasonable political risk' (European Commission 2008a: 33). This 'risk' stems from the fact that, although BLER is a right anchored in the industrial relations systems not only of Germany but also of some 16 other Member States plus Norway, there are other countries which strongly oppose such an employee involvement mechanism, a position also voiced by their national trade unions.

It could, however, be argued that current circumstances justify a re-launching of the debate on the utility and relevance of BLER in fostering the long-term survival of companies, hence of economies. At company level, the limits and failures of the 'shareholder value' approach, according to which a company's interests and performance are best served when management orients its decision to the sole interests of shareholders, have been acknowledged to such an extent that it has led major actors to turn to more of a 'stakeholder approach'² even if much is still to be done to implement and promote the concept of the 'sustainable company' (Vitols and Kluge 2011). The German employer associations BDI and BDA are known for their reluctance towards BLER; however some German CEOs, such as Peter Löscher at Siemens³, have expressed their support for this specific form of employee involvement arguing that it constitutes a competitive advantage. Such controversial positioning has

2. For instance, the European Commission has adopted the following interpretation of corporate governance as 'the system by which companies are directed and controlled and as a set of relationships between a company's management, its board, its shareholders and its other stakeholders' (European Commission 2011a: 2).

3. 'For me, codetermination is a competitive advantage of Germany' [Für mich ist die Mitbestimmung ein Standortvorteil Deutschlands], in *Die Welt* of 25 October 2009.

recently led Paster (2011) to raise the question of the German paradox between individual support to BLER from top managers and the collective opposition expressed by their representative organisations. At national level, even foreign observers see the German model of BLER as one explanation for the German 'miracle'. On the occasion of the January 2011 World Economic Forum, John Studzinski, managing director of Blackstone (a US investment and advisory firm), stressed that BLER was one of the factors behind Germany's success in mitigating the crisis: 'This may be odd for managers, but it introduces a range of new perspectives'⁴. Again from the US, a renowned columnist and political expert, Stephen Hill, emphasises that: 'The magic of what is known as "codetermination", "supervisory boards", and "works councils" provides Europe's economy with a distinct advantage over America's that will become increasingly apparent over the next several years, as the impacts of global capitalism deepen. These distinctly European advances are perhaps the most important innovations in the world economy since the invention of the modern corporation itself' (Hill 2010: 54).

For any debate to take place on such a hotly debated topic one must first have in mind the ins and outs about BLER, i.e. the current situation, potential future developments and what is at stake. The present report aims at providing an as exhaustive as possible overview of the rights of employees to be represented on the board of directors or the supervisory board of companies in Europe, as well as the major trends that have emerged in recent years. Anyone interested in this subject would find invaluable information in existing ETUI reports published in the mid-2000s (HBS and ETUI 2004, SDA and ETUI 2005, Kluge and Stollt 2006). However, much has happened since then (changes in national laws, adoption of the cross-border merger Directive, proposal for an SPE...). The information available, therefore, needed not only to be updated (see for instance Kluge and Vitols 2010) but also to be compiled in a systematic way in order to reveal the potential challenges and opportunities which have arisen in the last five years.

To avoid the confusion which frequently occurs in publications dealing with 'worker participation' or 'employee involvement', we must first firmly state the object of this report. We shall be looking at the representation of employees (as labour providers as such) on the board of directors or supervisory board of companies, in a deliberative rather than merely consultative capacity, i.e. with the right to vote. We argue that this distinctive feature of industrial relations deserves a separate publication, although it is clearly closely connected with the other elements of industrial relations (information, consultation, collective bargaining) and of corporate governance (board composition, companies' policies on information disclosure, etc.). As a consequence, this report will not touch upon the related topic of employee financial participation, even though employees can be represented on the boards of companies, but as capital providers. Neither will it touch upon other existing rights for employees to voice their views at the highest level in a company by, for instance, participating

4. Financial Times Deutschland, 27 January 2011, translated from German.

in board meetings in an consultative capacity (as occurs in France, Romania, Sweden, Norway and Bulgaria) or by participation in the annual general meetings of shareholders (Norwegian, French, Bulgarian, Swedish, Hungarian and Dutch employees are entitled to speak in these meetings)⁵. Moreover, we will focus generally on commercial, i.e. profit-making companies (as defined by the national or European company law), in whatever legal form (state-owned company, public or private limited company). We have thus chosen to exclude from the scope of this report the following legal entities: cooperatives (since, in these cases, employee board members do not represent labour as such but both labour and capital), non-profit organisations, foundations, associations, mutual societies (because of their non-commercial purpose) and state agencies. Finally, we have chosen to use the broader terminology ‘BLER’ so as to encompass the variety of situations. However, readers will find two other expressions in the following lines which have, in the specific context of this report, to be considered as being synonyms of BLER: ‘participation’ and ‘codetermination’. Use of the term ‘participation’ refers to the definition of BLER as it has been institutionalised in the European law, especially and for the first time in the European Company Directive. The term ‘codetermination’ could be found in the excerpts of academics writings or publications issued by industrial relations actors themselves as it has been the first wording used to refer to BLER as a literal translation of the German *Mitbestimmung*. Most of the time thus, it specifically refers to the German model of BLER.

5. For more information about these other rights, see Conchon (2011b).

Part I

Board-level employee representation at national level across Europe

One reason why Germany is very often erroneously considered as the main, if not the only, country granting employees the right to be represented on boardrooms is that it was the first country to legislate on this issue. Indeed, the 1951 Act regulating BLER in the German coal, iron and steel industries marks an historic step as 20 more years had to be waited until the enactment of the next BLER legislation in Europe. The 1970s were a decade of lively legal action in this regard, as laws regulating BLER were enacted in 7 other countries (NL, AT, IE, DK, LU, SE and PT), while the German legislator has also introduced in 1976 an Act implementing parity BLER in all companies with more than 2,000 employees. In the 1980s, 4 countries passed a similar law (PL, FR, GR, HU) and 4 more did the same in the 1990s (FI, CZ, SK, SI). However, since then no new country has joined this group of the most advanced countries in terms of industrial democracy.

1. State of the art: national rights and the unresolved link with company performance

There are two main views as to how to determine the legitimacy of employee representation on the board of companies. On the one hand, proponents of BLER argue that enabling employees to have a say in the running of the company and to become citizens at their workplace corresponds to a broader project of justice and democracy. They thus conceive BLER as a fundamental right, even anchored, in some countries, in the national constitution (e.g. in FR and SI). On the other hand, supporters of a more instrumentalist vision advocate that BLER rights can be justified as long as they bring added value to a company's economic performance. In this sub-section, we address both these approaches by firstly looking at the institutionalisation of BLER as a right in European countries and, secondly, by reviewing existing empirical research related to the instrumentalist standpoint.

1.1 BLER rights in Europe: Institutional diversity as a key distinctive feature

In 17 out of the 27 European Member States plus Norway, employees are granted the right to be represented on the board of directors or the supervisory board of their company with decision-making power. This information refutes

a fairly common prejudice according to which BLER is a marginal phenomenon in Europe. This idea is so widespread that even some proponents of the ‘stakeholder’ approach believe that Germany is the only country providing employees with BLER rights: ‘In most other countries, there is no legal basis for the participation of non-shareholders in the control of a corporation’ (Brink 2010: 643). The picture is definitively not so clear-cut. Rather, we can distinguish between three groups of countries in the European Economic Area⁶:

- A group of 14 countries with widespread BLER rights, in force in both the public and the private sector, i.e. in state-owned, privatised, public and private companies (AT, CZ, DE, DK, FI, FR, HU, LU, NL, NO, PL, SE, SI, SK);
- A group of 4 countries with limited participation rights, mainly found in state-owned companies (ES, GR, IE, PT);
- A group composed of the 12 remaining countries with no rights at all.

These basic findings already allow us to correct some ideas voices in European fora, even at a high level. For instance, it is incorrect to state that ‘11 European countries have introduced workers’ participation at board level with employee representation of up to one-third of all board members’ (Henssler 2011: 1). Table 1, below, gives further details on the rights in force in each country, so as, again, to avoid any new inaccuracies such as those denying the existence of certain rights in some countries⁷.

6. We have chosen the EEA as a point of reference on the grounds that some European company law dealing, amongst other things, with the issue of BLER, does not only cover EU Member States as such but also EEA countries.

7. In France, according to the 1983 Act on Democratisation of the public sector and the 1994 Act on the enhancement of employee participation in companies, employees in state-owned and privatised companies are represented, with voting rights, in the boardroom, as shown in Table 1. Therefore, stating that ‘these representatives do not have the same rights as other board members – in particular they cannot vote’ (Henssler 2011: 1) is inaccurate.

Table 1 Board-level employee representation in the European Economic Area⁸

	Regulation in the		Scope	Proportion/ Number of employee reps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public sector	Private sector*			Trade union	WC			
AT	×	×	Ltd>300 Plc	1/3		×	By WC	Only WC members	D
BE									M
BG									M+D
CY									M
CZ	×	×	Plc>50 SOE**	1/3 up to 1/2	Agreement management /TU-WC		vote	Employees (external TU in Plc)	D
DE	×	×	C.>500	1/3 up to 1/2	×	×	vote	Employees and external TU	D
DK	×	×	Ltd and Plc>35	1/3 (min. 2-3 members)	No legal procedure		Vote	Only employees	M+D
EE									D
ES	×		Savings banks SOE>1000	1 to 3 members			By TU in SOE, by worker group of the general assembly in savings banks	No restrictions	M
FI	×	×	Ltd and Plc>150	1/4 (max. 4 members) or based on agreement	Agreement between personnel groups		Vote if no agreement	Only employees	M+D
FR	×	×	SOE Plc	Min. 2 members Max. 1/3	×		vote	Only employees	M+D
GR	×		SOE	1-2 members	De facto by TU fractions		vote	Only employees	M
HU	×	×	Plc and Ltd>200	D: 1/3 M: by agreement	Consulted	×	By WC	Only employees	M+D
IE	×		SOE	1/3 (1 to 5 members in practice)	×		Vote	Only employees	M
IS									M
IT									M+D
LI									M
LT									M+D
LU	×	×	SOE Plc>1000	Min. 3 members, max. 1/3	Vote by employee representatives			Only employees (except in iron and steel industry)	M+D
LV									D
MT									M
NL	×	×	'structuur' Plc and Ltd>100	Max. 1/3		×	By AGM	No employee, nor TU	(M)***+D

	Regulation in the		Scope	Proportion/ Number of employee reps	Nomination by		Appointment mechanism	Eligibility criteria	CG structure
	Public sector	Private sector*			Trade union	WC			
NO	×	×	SOE>30 Ltd and Plc>30	Min. 1 member Max. 1/3			Vote	Only employees	M
PL	×	×	SOE Privatised C.	Min. 2-4 members Max. 2/5			Vote	No restrictions	D
PT	×		SOE	Defined by C's articles of association	By 100 or 20% of employees		Vote	Only employee	M
RO									M+D
SE	×	×	Plc and Ltd>25	2 to 3 members	×		Several options	Only employee	M
SI	×	×	Plc>50	D: 1/3 to 1/2 M: 1 to 3 members		×	By the WC	Only WC members	M+D
SK	×	×	Plc>50 OSOE	Min. 1/3 Max. 1/2	×		Vote	Only employees	D
UK									M

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

** We specifically mention SOE in the case of countries that regulate them by a specific law

*** Dutch companies will be able to choose the monistic structure as of 2012.

C. = company

TU = trade unions

WC = works council

CG = Corporate Governance

Ltd = private limited company

Plc = public limited company

SOE = state-owned enterprises as long as the State holds more than 50% of capital

AGM = annual general meeting of shareholders

M = monistic structure (a single board of directors)

D = dualistic structure (a management board and a supervisory board)

Source: HBS and ETUI (2004), SDA and ETUI (2005), Kluge (2005: 170), Kluge and Stollt (2006: 83-85), Calvo *et al.* (2008), Büggel (2010), Fulton (2011), updated by Conchon in 2011.

Table 1 demonstrates that the distinctive element of BLER in Europe is its institutional diversity. National rights vary to a great extent on the basis of several variables (Kluge and Stollt 2009): the characteristics of the company subject to BLER; the characteristics of its board; the appointment modalities of board-level employee representatives; and the way in which the legal provision is implemented.

As regards the characteristics of the company, the right for employees to be represented on the board varies from one country to another according to:

- The nature of company ownership: in some countries, only state-owned companies where the State holds at least 50% of the capital are covered by the legal provisions, whereas companies from both the public and the

8. More detailed information about each national regulatory framework can be found in Annex.

private sector fall under the scope of the related law in the majority of countries with BLER rights;

- The company's legal status: BLER rights are generally attached to a specific legal status. While in some countries, the law applies, in the private sector, to both private and public limited companies, it can also be restricted to Plcs (in CZ, FR, LU, SI, SK). As for the public sector, the law can state that BLER rights apply only to companies governed by a distinct legal status (such as the French EPIC⁹);
- The size of the company: the scope of the law could also be determined by the size of the workforce. In a few countries, legal provisions do not state any workforce threshold for the law to be applicable (Austrian Plc, or state-owned companies in Luxembourg). In most countries, however, minimum thresholds apply. These may be low (from 25 to 50 employees, as in SE, DK, CZ, SI, SK and NO), medium (from 50 to 500 employees, as in AT, DE, FI, HU, NL) or high (more than 500 employees in ES, LU and DE).

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

- The corporate governance structure as such: depending on their national company law, the corporate governance structure of companies in European countries can follow the monistic model (a single board of directors exercising both supervisory and management functions, as in the UK), the dualistic model (a management board in charge of the running of the company and a supervisory board responsible for monitoring as in DE), or a free choice between these two (a growing trend, with recent laws allowing for this flexibility as introduced, for instance, in DK in 2010 and in NL as of 2012). Therefore, depending on the corporate structure in force in the company, board-level employee representatives could either sit on a board of directors or a supervisory board;
- The composition of the board: the number of board-level employee representatives varies significantly between countries from a single representative up to half the board. However, in none of the countries where BLER is widespread can the employee-side ultimately prevent a board decision from being taken if the shareholder-side speaks with a single voice. This is true even in Germany and Slovenia¹⁰ where companies may

9. Etablissement Public à Caractère Industriel et Commercial (Public establishment with industrial and commercial purpose).

10. The parity BLER system in Slovenia is interestingly similar to German parity BLER. A ruling of the Slovenian Constitutional Court in 2001 stated that parity BLER was unconstitutional if it enabled employees to hold a majority of votes when a board-level employee representative is nominated as chairman of the board. As a result of this ruling, the Act on Worker Participation in Management was changed in 2001, specifying that a board-level employee representative could not be chairman of the board, and that this position could only be occupied by a shareholder representative who, in the event of a tie, would hold the casting vote.

have equal distribution of supervisory board seats between shareholder and employee representatives, since the chairman (who always comes from the ‘shareholder bench’) has a casting vote in the event of a tie. The most frequent proportion of board-level employee representatives is one-third of the board as in AT, CZ, DK, FR or HU.

- The board’s duties: the duties of the board as set out in each national law, determine its importance and capacities. In Hungary, a supervisory board (unless stipulated differently by the company statutes) can only give recommendations whereas in Austria a legal list of business decisions exists for which management needs the approval of the supervisory board. The 2002 Act on Transparency and public disclosure introduced a similar right in Germany, making it compulsory to draw up a list of essential corporate decisions that cannot be taken by the management board without the formal approval of the supervisory board.

The modalities governing the appointment of board-level employee representatives also appear to vary across the 18 countries, especially as regards:

- The appointment process itself: in general, there are two ways of appointing employee representatives in boardrooms. They can be nominated directly by trade unions or must be elected by the entire workforce. Moreover, in some countries, the final appointment has to be validated by the annual general meeting of shareholders, as in NL, HU, and the German companies from the iron, coal and steel sectors;
- The profile of employee representatives who can be appointed: countries can be grouped into three categories. The first one has seats ‘reserved’ for external trade union representatives. In Germany some of the workforce seats are reserved for external trade unionists, i.e. representatives from the industry union(s) who are not employed in the company. This is the case for companies employing more than 2,000 employees and for companies in the coal, iron and steel industry. In Luxembourg, in the iron and steel industry, the three most representative national unions have the right to directly nominate three board-level employee representatives, even if they are not represented within the company. In the second group of countries only employees from the company can sit on the board. This is the case in the majority of the 18 countries. However, this does not mean that these board-level employee representatives are not members of a trade union, especially where trade unions play an important role in the choice of candidates to board-level employee representatives seats (as in FR, IE, SE or SK). The third case is that of the Netherlands, where board-level ‘employee representatives’ cannot be employees of the company or external trade union officers. As a consequence, the representatives proposed by the works council often come from academia or from the political sphere.

Finally, national BLER rights also vary according to the manner in which they are established. In the great majority of countries, legal provisions are automatically implemented as soon as the company fulfils the required criteria.

In some countries, however, and especially the Nordic ones, an initiative from the employee-side is needed to trigger the application of the BLER rules. In Denmark, an initial yes/no vote amongst the workforce is organised to decide whether or not to enforce BLER rights. The same goes for Norway where employees may demand the implementation of BLER through a vote or a formal request signed by half of the concerned employees.

1.2 Still no clear evidence of the correlation between BLER and company economic performance

The question as to whether BLER is detrimental or beneficial to company economic performance is as old as the first debates on the legitimacy for employees to be represented in the boardroom. For a long time, the dispute mainly involved competing ideological viewpoints, until economists developed new methodological tools making it possible to carry out econometric studies. Many have hoped that these studies would solve the initial question by providing clear-cut, irrefutable findings. However, a review of such econometric studies conducted, in the great majority, in Germany, shows them unable to reach a consensus, cf. Table 2.

Table 2 Findings of econometric studies concerning the link between BLER and company performance

Reference	Correlation surveyed	Findings
German Studies		
Svejnar (1982)	BLER and productivity in industrial sectors	No significant effect
Benelli <i>et al.</i> (1987)	BLER and company profitability	No significant effect
Gurdon and Ray (1990)	BLER and company profitability	Negative effect on productivity Positive effect on return on assets
FitzRoy and Kraft (1993)	Parity BLER and company productivity, costs and profitability	Negative effect on productivity and profitability (return on equity) No significant effect on labour costs
Schmid and Seger (1998)	Parity BLER and shareholder value	Negative effect when compared to one-third BLER
Baums and Frick (1998)	Parity BLER and share price at industry-level	No significant effect
Gorton and Schmid (2000, 2004)	Parity BLER and company performance	Negative effect when compared to one-third BLER (on return on equity, return on asset and market-to-book ratio)
Kraft (2001)	Parity BLER and price cost margin	No significant effect
Kraft and Stank (2004)	Parity BLER and company innovation	Slight positive effect
FitzRoy and Kraft (2005)	Parity BLER and company productivity	Slight positive effect compared to one-third BLER
Werner and Zimmermann (2005)	BLER and employment development	Negative effect of the presence of trade union representatives

Reference	Correlation surveyed	Findings
German Studies		
Fauver and Fuerst (2006)	BLER and company efficiency (payment of dividends and concentration of ownership) and market value	Positive effect Higher positive effect of one-third BLER compared to parity BLER on shareholder value
Gerum and Debus (2006)	BLER and size of the board	Positive effect
Kraft and Ugarkovic (2006)	Parity BLER and return on equity	Positive effect
Vitols (2006)	Parity BLER and company performance	No significant effect on return on equity and market capitalisation when compared to one-third BLER
Renaud (2007)	Parity BLER and productivity and profitability	Positive effect of the change from one-third to parity BLER
Vulcheva (2008)	BLER and reliable accounting	Positive effect
Vitols (2008)	Parity BLER and company performance	No significant effect on company performance (return on equity, return on assets, market capitalisation or employment dynamics)
Petry (2009)	Parity BLER and stock price	Negative effect
Wagner (2009)	One-third BLER and company performance (productivity and profitability)	No significant effect compared to companies without BLER
Frick and Bermig (2009)	BLER and company market value and accounting	No significant effect on the market value of the company and on the return on equity. Positive effect on amount of cash holdings.
Boneberg (2010)	One-third BLER and company productivity and profitability	Positive effect on productivity Negative effect on profitability (due to positive effect on wage level)
Kraft, Stank and Dewenter (2010)	Parity BLER and company innovation	No significant effect
Debus (2010)	BLER and company performance	Positive effect of both one-third and parity BLER on company survival and return on assets
Balsmeier <i>et al.</i> (2011)	BLER and company performance	Positive effect (on Tobin's Q and market-to-book value) until the voting power of employees reaches a threshold value between 41% and 46%. Declining effect thereafter.
Other national studies		
France: Hollandts <i>et al.</i> (2009)	BLER and company performance	Positive effect
France : Ginglinger <i>et al.</i> (2011)	BLER and company performance	No significant effect on firm value or profitability Negative effect on payout ratios
Norway: Bøhren and Strøm (2005, 2010), OStrøm (2007)	BLER ¹¹ and company performance	Negative effect on market value Positive effect on average wage (Strøm 2007)

Source: Gerum and Wagner (1998: 349), Vitols (2005:20), Biedenkopf *et al.* (2006: 15), Jirjahn (2010), Frick (2011), and author's own literature review.

11. Amongst other elements subject to econometric analysis such as gender diversity, board size, directors' age and independence.

The findings of the German econometric studies are difficult to compare, given the great variety of methodologies and panel data used. Some researchers chose a longitudinal approach, comparing company economic performance before and after the introduction of BLER; others based their analyses on the comparison between companies with and without BLER; still others opted for a comparison between companies subject to the one-third BLER and those under the parity BLER regime¹². The representativeness of the surveyed companies could also be open to criticism: the mix of companies with different characteristics (size, for instance), the questionable interpretation of studies using cross-sectional data, which therefore underestimates firm-specific effects, and, finally, the reliability of some data themselves (Jirjahn 2010: 48).

Even if we ignore these potential methodological pitfalls, a reading of Table 2 leads to mixed conclusions. 10 studies discern some positive effects of BLER on company performance, while no significant effects are identified in 11 others and negative effects are underlined in 7 studies. Findings of the still very scarce econometric studies conducted in other countries are also confusing. French data show sometimes a positive effect, sometimes no significant correlation while the Norwegian studies reveal a negative effect on company market value.

Not only there is no clear correlation between the presence of board-level employee representatives and company performance but there is not even any case evidence of a causal link. The report drawn up by the academic members of the Biedenkopf-Kommission, which assessed the German model of BLER in 2006, came to a similar conclusion, underscoring that, despite the recent improvement in quality of econometric studies, a causal relationship could still not be established, due to the complexity of the issue and the great variety of factors involved in such analyses (Biedenkopf *et al.* 2006: 15). This conclusion is also shared by the authors of the above-mentioned econometric studies themselves (Boneberg 2010: 13).

2. Trends: several challenges to BLER rights and some opportunities

A review of the various changes implemented since the mid-2000s, and the on-going initiatives related to BLER rights suggests that employee participation in the decision-making process at the highest level of a company is under pressure if not completely at risk in several European countries. Firstly, BLER does not appear to be a core topic of corporate governance debates, even in countries with extended rights (DE, NL and SE). Secondly, as

12. In German companies having between 500 and 1,999 employees, the one-third BLER system applies according to the 1952 Works Constitution Act amended in 2004 (and now called the One Third Participation Act – Drittelbeteiligungsgesetz). In companies with more than 2,000 employees, parity BLER applies, meaning that half the board is made up of employee representatives, according to the 1976 Codetermination Act (Page 2011).

a direct effect of privatisation programs, BLER is slowly, if not completely, disappearing from countries where BLER only applies in state-owned companies (IE, MT, GR, ES and PL). Besides this mathematical effect, political plans exist in some countries to withdraw or at least reduce BLER rights (PL and CZ). In others, similar political wills have already been implemented on the occasion of the introduction of the one-tier system (SI and HU).

Elsewhere, however, there are voices calling for an extension of existing BLER rights. In Germany, the SPD and Die Linke parliamentary groups have recently submitted proposals in this regard, relaying demands from the DGB. Other national trade unions (in NO, LU, NL and FR) are following this trend by upholding new or renewed claims. Since implementation and extension of BLER rights are highly dependent on political circumstances, the likelihood of success of such demands seems debatable. The outlook could seem gloomy were it not for some positive examples of an increase of BLER rights, through the extension, in Nordic countries, of their coverage to employees in companies' foreign locations. Such a proposal is also under discussion in Germany.

In the 5 remaining countries surveyed in this report, the status quo seems to prevail (AT, FI, PT, SK, SE).

2.1 BLER disregarded in the general debate on corporate governance

Following major corporate scandals in the early 2000s (e.g. the Enron and Parmalat cases), and again in the aftermath of the recent financial, economic and social crisis, debates on so-called 'corporate governance'¹³ have become so prominent that they have even reached the institutional sphere of policy-making at national and European levels¹⁴. The most patent illustration of the importance granted nowadays to this topic is the adoption of Directive 2006/46/EC requiring that national companies comply, or explain why they do not comply, with a national corporate governance code to be determined by each national legislator. These codes give recommendations as to the best practice for the composition and running of a board, among other things, and are influenced to a great extent by the OECD Principles of Corporate Governance (OECD 2004) which devote specific attention to the role of

13. Corporate governance refers to 'all mechanisms which have the effect of delimiting powers and of influencing managers, in other words, which "govern" their behaviour and define their discretionary leeway' [own translation] (Charreaux et Wirtz 2006: 7). These mechanisms could be external regulatory mechanisms such as financial markets, markets for goods and services or managers' labour markets, but they could also be internal regulatory mechanisms, including the shareholders annual general meeting and the board (of directors or supervisory board).

14. See for instance, the European Commission's initiatives on this topic such as the 2003 action plan 'Modernising Company Law and Enhancing Corporate Governance in the European Union' (European Commission 2003) or the more recent Green Paper on an 'EU corporate governance framework' (European Commission 2011a).

stakeholders (Principle IV.). One could therefore expect BLER to be distinctly referred to in each national code of countries providing employees with this right. The picture is more mixed than expected as shown in Table 3 below.

Table 3 References to BLER in corporate governance codes of countries with BLER right

Country	Code	No mention of BLER	BLER mentioned as a distinct part of the text	Peripheral mention of BLER*
AT	Österreichischer Corporate Governance Kodex (2010)		× (p. 36-37)	
CZ	Kodex správy a řízení společností (2004)		× (p. 20)	
DE	Deutscher Corporate Governance Kodex (2010)			× (p.1)
DK	Anbefalinger for god Selskabsledelse (2011)		× (p.13)	
ES	Código unificado de buen gobierno (2006)	×		
FI	Suomen listayhtiöiden hallinnointikoodi (2010)			× (p.13)
FR	Code de gouvernement d'entreprise des sociétés cotées (2010)		× (p. 12)	
GR	Κώδικας Εταιρικής Διακυβέρνησης για τις Εισηγμένες Εταιρείες (2011)	×		
HU	Felelős Társaságirányítási Ajánlások (2008)	×		
IE	UK Corporate Governance Code (2010) and The Irish Corporate Governance Annex (2010)	×		
LU	Les dix Principes de gouvernance d'entreprise de la Bourse de Luxembourg (2009)		× (p. 18)	
NL	De Nederlandse corporate governance code (2008)	×		
NO	Norsk Anbefaling – Eierstyring og Selskapsledelse (2010)		× (p. 27-28)	
PL	Dobre Praktyki Spółek Notowanych na GPW (2011)	×		
PT	Código de governo das sociedades da CMVM (2010)	×		
SE	Svensk kod för bolagsstyrning (2010)	×		
SI	Kodeks upravljanja javnih delniških družb (2009)			× (p. 7)
SK	Kódex správy a riadenia spoločností na slovensku (2008)		× (p. 24)	
Total		8	7	3

* A 'peripheral mention' is one which takes the form of a footnote, a short reference in a sentence or less within a broader paragraph, or a mention appearing in an annex or the preamble.

Source: European Corporate Governance Institute's index of codes, available at http://www.ecgi.org/codes/all_codes.php, and author's own search.

8 of the 18 countries with BLER rights do not mention them in their national code of corporate governance. The fact that corporate governance codes usually apply only to private and public limited companies can explain why there is no mention of BLER in the countries providing this right only to state-owned

companies. This explanation could apply in the cases of GR, ES, IE, PL and PT. But the same cannot be true for HU, NL and SE, where the lack of reference may rather results from a political choice. The latter may also help understanding why BLER only merits a footnote in the compiled recommendations on corporate governance in the Nordic countries (Danish Corporate Governance Committee *et al.* 2009: 8). It also explains the appeal made by the CNV (Dutch Christian Trade Union Federation) for the inclusion of a passage in the Dutch code mentioning the status and roles of employees in corporate governance (CNV 2008: 1).

In 3 other countries, BLER is referred to only superficially in the code, not in the text itself but only in the margin, as a footnote or as a short reference within a broader paragraph. It is very striking that the German model of BLER, however renowned, is only mentioned in the preamble of the code rather than in the code itself.

The fact that BLER is disregarded in the general debate on corporate governance in these 11 countries is even more surprising when the situation is compared to that in countries without BLER, such as Lithuania, where employee involvement, in the broader sense, is mentioned in the corporate governance code. Indeed, Principle VII of the Lithuanian code states that: 'Examples of mechanisms of stakeholder participation in corporate governance include: employee participation in adoption of certain key decisions for the company' (Heuschmid 2008).

2.2 The mathematical impact of privatisation

As mentioned above, BLER rights are restricted to the public sector in some countries. It is therefore a mere matter of mathematics to see a reduction of the number if not a complete loss of companies covered by the regulation as a consequences of privatisation processes, hence a reduction in the number of board-level employee representatives in these countries. This trend is particularly noticeable in Ireland, where a significant number of state-owned companies have been privatised such as Telecom and Aer Lingus (Kluge and Vitols 2010: 11-12) and, more recently in Greece which is undergoing a large programme of privatisations as a means to return to economic growth.

An interesting example of a complete loss of board-level employee representatives in a country, as a side effect of privatisation, is Malta. Malta used to be considered in previous publications (e.g. Kluge and Stollt 2006) as a country providing employees with the right to be represented on boardrooms, until this phenomenon completely faded away. The Maltese case, however, is a very specific one, as there was never any law or collective agreement at national level (inter-sectoral or sectoral) backing up this right. Instead, the relevant legal provisions were anchored in case-by-case laws governing state-owned companies, or in company-based collective agreements dating from the 1970s, and did not, therefore, survive the wave of privatisations. As a consequence, seats for board-level employee representatives vanished from

Malta Shipyard Limited (resulting from the merger of Malta Drydocks and Malta Shipbuilding), Malta Freeport, Malta Information Technology Training Service and even Maltacom, although, in the latter case, one seat was retained directly after privatisation. Nowadays, there remains no single board-level employee representative in a Maltese company¹⁵.

Despite the significant weakening of BLER rights in Ireland and Malta, national trade unions remained strikingly silent. One possible explanation could be that, in an unfavourable economic context, trade unions tended to be more on the defensive, re-focusing on ‘bread-and-butter issues’, hence ‘perceiv[ing] such procedural issues as employee board-level representation as peripheral’ (Kluge and Vitols 2010: 18-19). Indeed, BLER does not seem to figure amongst the priorities of the Irish trade unions, which did not mention it at all at the last Social Partnership Agreement¹⁶. Debono and Tabone (2005) observed that the Maltese trade unions remained silent at the time of the withdrawal of board-level employee representatives in the 2000s and later. Not only have trade unions been silent, but they even failed to safeguard this right when negotiating company agreements, as in the case of GO (resulting from the privatisation of Maltacom) or Malta Shipyard Limited. In some cases, such as the Bank of Valetta, tacit approval by trade unions is even suspected (Kluge and Vitols 2010: 19). Another possible explanation for this silence could be that, once privatised, companies set up a works council, thus making the issue of safeguarding employee representatives’ seats on the board slightly less relevant and strategic for trade unions.

The Spanish case offers a somewhat different picture. Here, the decreasing number of board-level employee representatives has less to do with a traditional privatisation process, but is rather the result of current restructuring plans in the savings banks. These plans, initiated as one way to mitigate the financial crisis, have led to mergers and concentrations of some Cajas de Ahorros, with a view to reduce their number by half by the end of the process (from the 45 Cajas de Ahorros existing at the beginning of 2008). Again, as a mere mathematical consequence, as the number of savings banks decreases, so does the number of employee representatives on their boards.

In two other countries, France and Poland, the law governing BLER also applies to privatised companies, although this does not systematically mean that the right is safeguarded. Indeed, the 1994 French Act makes it compulsory for privatised companies to stipulate in their articles of association that up to 3 board members will still be employee representatives elected by the workforce. But, nothing prevents the same companies from later deciding at the general meeting of shareholders to get rid of these board seats. However, in practice, the great majority of privatised companies have kept seats reserved

15. This complete disappearance even led to the creation of a specific blog on the Internet as the last chance to demonstrate disagreement: <http://workerdirector.blogspot.com/>.

16. The last Irish Social Partnership Agreement (‘towards 2016’) was signed in 2006 but abandoned by the government in the aftermath of the crisis.

for board-level employee representatives (Conchon 2006: 20-21). In Poland, however, because of the speed of the privatisation process, there are fewer and fewer board-level employee representatives.

2.3 Political will to withdraw BLER rights

Besides the mathematical consequences of privatisation, there is an emerging political trend in some countries to withdraw or decrease the right to BLER. This approach may be sporadic and not systematic, as in the case of Malta where some board-level employee representatives have been dismissed and not replaced as a result of a ministerial decision targeting specific state-owned companies (e.g. at Air Malta and Enemalta). However, it can take the form of a systematic and organised plan, such as the proposal of draft laws significantly amending existing rights.

In Poland, the number of board-level employee representatives is tending to diminish as a consequence of privatisation, but, moreover, they could soon be completely abolished if the current bill is adopted as a binding law. In January 2010 the Ministry of State Treasury initiated discussions of a draft law on the ‘principles of the exercise of certain competencies by the Treasury’¹⁷ aiming, amongst other things, at reviewing the running and corporate governance duties of privatised companies. This bill suggests major changes in BLER rights, which could lead to the complete elimination of BLER in Poland. This significant threat to workers’ rights has been opposed by NSZZ Solidarność (TUAC 2010: 3) and OPZZ, the two main Polish trade unions. Up to now, the draft law is still pending, but it has been held up in the legislative process since March 2011.

Something similar is taking place in the Czech Republic. In January 2011, a draft law amending the Company Act was sent out by the Ministry of Justice to other ministries as well as to several courts, with a view to building a broad consensus on the final version of the bill and enabling the initiating Ministry to claim that ‘the proposal has been submitted to the government without conflict’¹⁸. In fact, there is a conflict, at least on the trade unions’ side, since some of the amendments relate to BLER rights, and suggest turning them into an optional provision requiring a decision of the company management. At the time of writing (October 2011), the bill¹⁹ has been approved by the government as amended by the Legislative Council, and is now under discussion in Parliament. Ultimately, it is very likely to be adopted, predict some national experts.

17. Projekt ustawy o zasadach wykonywania niektórych uprawnień Skarbu Państwa, http://bip.msp.gov.pl/portal/bip/115/3516/Projekt_ustawy_o_zasadach_wykonywania_niektorych_uprawnien_Skarbu_Panstwa.html

18. See the website of the Ministry of Justice at <http://obcanskyzakonik.justice.cz/cz/zakon-o-obchodnich-korporacich/vysledky-pripominkoveho-rizeni.html>

19. See the last version of the draft law on business corporations available at http://obcanskyzakonik.justice.cz/tinymce-storage/files/2011/Vladni%20navrh%20zakona%20o%20obchodnich%20korporacich_2011.pdf. And its related explanatory note, http://obcanskyzakonik.justice.cz/tinymce-storage/files/2011/Vladni%20navrh%20zakona%20o%20obchodnich%20korporacich_2011_DZ.pdf

2.4 Introduction of the one-tier system brought a weakening of BLER rights

In some cases, amendment of national company law to introduce the monistic structure of corporate governance, in countries where this did not previously exist, has enabled the realisation of political will to weaken BLER rights. HU and SI offer interesting examples in this regard.

In Hungary, the revised Act on Business Associations (2006) introduced the possibility for public limited companies to opt for a one-tier corporate governance structure, i.e. a single board of directors. While BLER rights are guaranteed by law in the dualistic structure, they now became subject to an agreement between the board of directors and the works council. National experts such as Neumann considered this new option as resulting in the reduction of the role of board-level employee representatives, since ‘under the one-tier corporate governance system, no minimum legal standard for employee representation applies’ (Neumann 2006).

In Slovenia, the possibility for companies to opt for a monistic structure was introduced in 2006 through changes in the Companies Act, which were themselves influenced by new European legislations, especially the legislation on the European Company Statute. The year after, the Act on Worker Participation in Management was amended accordingly, but by providing employees with fewer rights on the board of directors than was the case in supervisory boards (Hojnik 2008). While employees have the right to nominate between one-third (33%) and a half (50%) of a supervisory board, they are entitled, in one-tier system, to a lower proportion of board seats: between 27% of seats on large boards (of 11 members) and 20% on smaller boards (5 members). Moreover, on the smallest boards of directors, where only one employee representative can be appointed as a board member, he will be as an executive director (equivalent to the German Labour director, who is a member of the management team) and not as a ‘traditional’ board-level employee representative. Finally, the revision of the Worker Participation in Management Act in 2007 which was initially meant to take into account the new possibility for companies to opt for a monistic structure, had also represented an opportunity to restrict the scope of the law by introducing a threshold for compulsory BLER. Before the 2007 revised Act, BLER was mandatory in every company with a supervisory board, irrespective of the size of the workforce. Art. 84a of the 2007 Act states that BLER no longer applies to ‘small’ companies, which broadly means, according to the definition of a ‘small’ company provided by Art. 55 of the Company Act, that BLER is no longer compulsory for companies with fewer than 50 employees, whether there have opted for a dualistic or for a monistic structure.

The weakening of BLER rights as a consequence of the introduction of the one-tier system in national company law is not systematic, but is the result of a political choice as contrary examples exist. The newly adopted Dutch Law, which will allow companies to opt for a monistic structure as of 2012²⁰, so far does not undermine BLER rights. Its practical consequences remain to be seen

but, nevertheless, the right of the works council to propose board members is guaranteed and will apply to the nomination of the non-executive directors on the board.

2.5 Scarce demands from political actors to increase rights

The description of previous trends shows how dependent BLER is on political circumstances. Maybe not surprisingly, right-wing political parties are more willing to oppose the introduction or the extension of national rights to BLER. On the contrary, left-wing political parties are keener to promote employee involvement mechanisms in the decision-making process at the highest level of the company. For instance, proposals related to the extension of BLER in France are commonly to be found in the political programme of the Parti Socialiste.

It is probably not, therefore, surprising that the only demands, to our knowledge, initiated by a political party for increasing BLER rights have come from left-wing parties. Indeed, in 2010 two German parliamentary groups, the SPD (in June 2010) and Die Linke (in April 2010) submitted proposals for an extension of BLER, requesting the Federal Government to establish a bill on the basis of these²¹. The SPD²² proposal, mostly based on demands from the DGB, contains the following points:

- Companies operating in Germany under a foreign legal form shall be subject to the same BLER rules as national companies,
- The German law shall introduce a list of the key decisions that require the approval of the supervisory board, such as decisions on plant closures or relocations and sales. Moreover, a qualified majority of one-third of the board members shall be entitled to add to this catalogue of transactions,
- Some of the provisions on BLER applying to the iron, steel and coal sectors shall also apply to all companies with BLER. The chairman, then, will no longer have a casting vote in the event of a tie, and, instead, an additional board seat will be reserved for a neutral person,
- The thresholds shall be lowered for both parity BLER (from the current 2,000 to 1,000 employees) and one-third BLER (from 500 to 250 employees).

20. Wet van 6 juni 2011 tot wijziging van boek 2 van het Burgerlijk Wetboek in verband met de aanpassing van regels over bestuur en toezicht in naamloze en besloten vennootschappen, http://www.eerstekamer.nl/behandeling/20110614/publicatie_wet_3/f=/viqscqohzwhf.pdf.

21. See 'Opposition will Arbeitnehmerbank stärken', in *Mitbestimmung*, (6), page 7.

22. SPD proposal 'Demokratische Teilhabe von Belegschaften und ihren Vertretern an unternehmerischen Entscheidungen stärken' (Strengthen Democratic participation of employees and their representatives in corporate decisions), Deutscher Bundestag Drucksache 17/2122, <http://dipbt.bundestag.de/dip21/btd/17/021/1702122.pdf>.

Die Linke²³, is asking for the legal provisions related to one-third and parity BLER to apply to companies registered with a foreign legal form but whose headquarters are located in Germany. On their website, Die Linke goes even further by requiring the application of parity BLER to all public and private limited companies with more than 100 employees²⁴.

On 9 May 2011, a public hearing was organised at the Bundestag Committee on Labour and Social Affairs to examine the demands of the SPD and Die Linke. On this occasion, key industrial relations actors, such as the DGB and the employers' associations BDA and BDI, expressed their viewpoint²⁵. The DGB supported the proposals of both parliamentary groups. Perhaps not surprisingly, since they have regularly expressed their opposition to BLER, BDA and BDI rejected the proposals, arguing that they would 'deepen the isolation of the German codetermination system in Europe' (BDA 2011: 7) and be contrary to European laws, to the German Constitution as well as to German Constitutional Court rulings. As regards the question of a statutory catalogue of topics subject to supervisory board approval, BDA and BDI claimed that such a measure would not fit every company-specific situation and that the issue had already been resolved in the 2002 Act on Transparency and Disclosure. Instead of a lowering of the thresholds, BDA and BDI have made a counter-proposal suggesting that the existing statutory arrangements for BLER be replaced by arrangements negotiated on a case by case basis, referring to their 2004 proposal for a reform of the 'codetermination' system (BDA and BDI 2004). At the time of writing (October 2011) there has yet been no follow-up to this public hearing.

2.6 Some trade unions demand for enhanced BLER rights

Whereas trade unions remained silent in some countries where BLER rights were at risk, such as in Ireland and Malta, they seem to have been more proactive in other countries such as Norway, Luxembourg, France, Germany and the Netherlands. Indeed, recent and/or renewed claims for an extension of BLER rights have been formulated in these countries by various national trade unions.

In March 2007, the Norwegian LO confederation sent a letter to its Ministry of Labour demanding an extension of BLER rights, lowering the existing threshold of 30 employees to 10 employees. This new impetus was followed by the setting up, under the auspices of the Ministry of Labour, of a committee

23. Die Linke proposal 'Unternehmensmitbestimmung lückenlos garantieren' (Guaranteeing a board-level codetermination without any loophole), Deutscher Bundestag Drucksache 17/1413, <http://dipbt.bundestag.de/dip21/btd/17/014/1701413.pdf>.

24. See Die Linke web page: <http://www.die-linke.de/index.php?id=5853>.

25. For a comprehensive view of the discussions held at the Committee's meeting, incl. intervention from experts, see Deutscher Bundestag Ausschussdrucksache 17(11)501, available at http://www.bundestag.de/bundestag/ausschuesse17/a11/anhoerungen/Archiv/17_11_501.pdf.

composed of representatives of trade unions and employers' associations, as well as independent researchers, discussing, on the basis of a Green Paper (Arbeidsdepartementet 2010), the LO proposal as well as some five other issues:

1. Lowering the threshold of 50 per cent acceptance of the preliminary demand which requires a poll amongst employees,
2. Making BLER rights more likely to be implemented by requiring employers to survey the willingness of employees to enjoy such rights,
3. Standardising the number of board-level employee representatives at 1/3 of the board, regardless of company size,
4. Simplifying the procedures establishing BLER at group level (it has currently to be approved by a public committee) by allowing voluntary arrangements,
5. Exploring the possibilities of establishing BLER in 'non-traditional' group structures (franchise, sub-contractors, etc.)

In August 2011, the Ministry of Labour issued a White Paper (Det Kongelige Arbeidsdepartement 2011) as a follow-up to the work of the committee. Out of the 6 points discussed, the White Paper only addressed points 2 and 4, and rejected the question referring to the lowering of the threshold.

If LO claim was eventually omitted from the final White Paper, the German trade union claims were supported by some political parties, as described above. Indeed, the DGB²⁶ is also demanding an extension of the right to BLER, through lowering of the threshold for parity BLER. Their demands are also more directly geared towards combatting existing ways to circumvent BLER rights, e.g. requesting the application of BLER provisions to companies operating in Germany but registered under a foreign legal status (see *infra*).

The following Luxembourg, French and Dutch trade union claims, however, have not yet been taken up as political demands to be brought to the legislative institutions.

In Luxembourg, the LCGB called in 2010 (LCGB 2010: 7) for an extension of existing BLER rights. They demanded a reduction of the existing threshold (from 1,000 to 200 employees), a broadening of the scope of the law to all companies, regardless of their legal status, the inclusion of all companies where the State acts as a shareholder (the current law only applies to state-owned companies in which the State holds a minimum of 25% of the capital), and a generalisation of the right of each representative trade union to directly appoint one board-level employee representative, as it is already the case in the metal sector.

26. For the official positioning of DGB on BLER, see the report from the DGB 19th Congress of May 2010, point J 'Mitbestimmung', available at <http://www.dgb.de/uber-uns/dgb-heute/bundeskongress/19-obk/++co++3d349ab2-5847-11df-7067-00188b4dc422>.

In France, the great majority of board-level employee representatives (78% according to Conchon 2009: 111) are members of one of the three following trade unions: CFDT, CGT and CFE-CGC. The two latter are very active not only in coordinating their own network of board-level employee representatives (e.g. The 'Cercle des administrateurs salariés CFE-CGC' and the 'Groupe de travail des administrateurs salariés CGT') but also in demanding for a generalisation of BLER, which is so far limited to state-owned and privatised companies (CFE-CGC 2010: 3, CGT 2009:13).

In 2007, CNV, the Dutch Christian trade unions, called for an extension of BLER rights asking for the right for employees to appoint half the members of the supervisory board. The CNV addressed its call to the Social and Economic Council and unsuccessfully asked it to relay this recommendation to the Dutch government (European Employment Review 2007).

It is doubtful, however, whether these demands will be implemented in the near future, given, as already stressed, the high dependence of BLER rights on political circumstances.

2.7 Extension of BLER rights to employees in foreign subsidiaries

The most hotly debated topic recently in several countries, primarily in Germany, is the question of whether employees located in foreign establishments and/or subsidiaries should be granted the possibility of enjoying national BLER rights.

Denmark has been a pioneer in this regard. In the autumn of 2006, the Danish Minister of Economic and Business Affairs launched an initiative to review national company law, in line with the European strategy of 'better regulation', which aims at simplifying the regulatory framework and reducing the administrative 'burden' on companies (Knudsen 2008). This process resulted in the entry into force of the new Danish Company Act in the summer of 2010. The most noticeable change it introduced as regards BLER is the possibility for employees in foreign subsidiaries to vote and be eligible as board-level employee representatives on the board at group-level (Art. 141, §3). This right is not, however, automatic and depends on the decision of the general meeting of shareholders. Therefore, if shareholders so decide, employees of one or several foreign subsidiaries may elect at least one representative. If these employees constitute more than 10% of the entire eligible workforce, moreover, they may elect two representatives.

This feature of BLER has been newly introduced in Denmark but is already in force in Norway and Sweden. However, in these two countries, the right for employees working in foreign subsidiaries to be represented on the board of a Norwegian or Swedish parent company is not enshrined as such in dedicated legal provisions, but results from the interpretation of the legal definition of a

‘group’ of companies. Indeed, subsidiary companies might be included within the scope of BLER at group level, irrespective of their location, unless they are linked to the parent company through ownership or common management (Art. 6-5 and Art. 6-35 of the respective Norwegian Acts on private and public companies)²⁷. In Norway and Sweden, as noted earlier, the application of BLER rights in a company is not automatic and has to be triggered by a demand from trade unions (in SE) or employees themselves (in NO). The same applies when it comes to the representation of ‘foreign’ employees on the board. More especially, in Norway, where a specific procedure has in any case to be followed for the implementation of BLER at group level, the demand for employees of foreign subsidiaries to be represented must be included in the application submitted for approval²⁸ to a national ‘Industrial Democracy Board’ (Bedriftsdemokratinemda²⁹).

Against this background, there are growing discussions in Germany, already stirred up by the academic members of the 2006 Biedenkopf-Kommission. ‘It is therefore recommended that there should be a legal option allowing for agreements, on the basis of which the employees outside Germany of companies and subsidiaries of groups with board-level involvement could be included in representation on the supervisory board’ (Biedenkopf *et al.* 2007:25). Although German trade unions (as well as the employers’ associations) refused to co-sign the final report of the Biedenkopf-Kommission, they backed this recommendation, as noted above, on the grounds that employees in foreign locations cannot vote or stand for election to the supervisory board, although this board can make decisions affecting them.

In fact, all German industrial relations actors agree on the need to adapt the current framework to allow employees from foreign locations to be part of the BLER system. The debate does not therefore concern the required adaptation as such but rather how to implement the change. This point is a very sensitive one, as it has indirectly reopened the dispute on deregulation of BLER, from hard law to a ‘flexible’ approach lauding self-regulation. Proponents of the latter are making use of the ‘discrimination’ argument, according to which ‘to not give rights to employees in foreign subsidiaries [...] could be deemed unjustified discrimination under the EU Treaty’ (Antunes *et al.* 2011: 53; BDA 2011: 7). They use this argument to justify their demand to go from a statutory framework anchored in binding laws to company-based negotiated arrangements, following the example provided by the EU Directive on employee involvement in the European Company (BDA and BDI 2004, Antunes *et al. ibid.*). On the other hand, supporters of the German model of BLER argue that the territoriality of national law is not in contradiction with

27. See for instance the interpretations provided by court cases in Norway under point 18.4 of the following web page (in Norwegian): http://www.regjeringen.no/nb/dep/ad/kampanjer/bedriftsdemokratinemnda/nemdas-praksis.html?id=447138#_Toc239472125.

28. Such an application is submitted either by a majority of employees or by trade unions representing at least 2/3 of the workforce.

29. Bedriftsdemokratinemda is a joint social partner committee under the auspices of the Ministry of Labour.

European legislation. They suggest that existing German laws could be further developed so as to take into account the specificity of the foreign workforce, as long as this does not lead to a complete review of the BLER system (see the interview with a DGB board member in Latzel 2011).

Part II

Board-level employee representation at European level

A review of the main trends taking place at national level is undoubtedly an absolute prerequisite for assessing potential developments as regards BLER. However, this will not be enough for a comprehensive picture to be drawn, as the understanding of national evolutions in European countries can no longer be disconnected with related occurrences at European level. The impact of European company law cannot be ignored, especially in view of its growing importance in the last decade (12 Directives and a Regulation have been enacted since 2000, compared to the 8 Directives and one Regulation passed in the 40 previous years³⁰). BLER is no stranger to this phenomenon since the European legal rules touching upon it, still few in number, are anchored in the field of EU company law (Conchon 2011a).

For instance, BLER was recognised for the first time as a distinctive feature of industrial democracy in Directive 2001/86/EC supplementing the European Company Statute (a significant feature of EU company law) as regards the involvement of employees. This recognition, of what the European legislator calls ‘participation’, went along the institutionalisation of a definition as follows:

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

- The right to elect or appoint some of the members of the company’s supervisory or administrative organ, or
- The right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ’ (Art. 2, §k).

This recognition, and the related provisions on BLER contained in the Directive, were one of the main reasons for the especially lengthy process which eventually led, after 30 years of difficult debates, to the final adoption of the statute of the *Societas Europaea*³¹ [henceforth SE] ten years ago. Since then,

30. For an exhaustive presentation of the development in European company law see DG Internal Market web page: http://ec.europa.eu/internal_market/company/official/index_en.htm.

31. For a comprehensive overview of the legislative process related to the adoption of the SE statute refer to Stollt (2006), Rehfeldt (2009), Dionisopoulou (2009) or Schwimbersky and Gold (2009).

other European legal rules have been enacted that touch upon the question of BLER and still others are currently pending, all of which could have potential impact on national existing BLER rights. In this second part, therefore, we review the current situation and BLER trends at European level, having in mind a central question: does the impact of European laws on BLER represent a challenge or an opportunity (Van het Kaar 2009, 2011) compared to existing national rights?

1. State of the art: concrete developments thanks to EU company law but mixed assessment

Before going into the details of the role of and attention given to BLER in European company law, it is worth recalling that BLER is recognised as a European fundamental right. Indeed, the 1989 Community Charter of Fundamental Social Rights for Workers acknowledges that participation, in the sense of BLER, is, along with information and consultation mechanisms, a fundamental right: ‘Information, consultation and participation of workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. This shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community’ (Art. 17). Although the reference to employee participation disappeared in the 2000 Charter of Fundamental Rights of the European Union³², for an unclear reason (Schömann 2011: 244), BLER remains a fundamental right, given that the 5th recital of the new Treaty on European Union stipulates that EU Member States ‘confirm[...] their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers’. Moreover, the Treaty of the Functioning of the European Union clearly states that ‘The Union shall support and complement the activities of the Member States in the following fields: [...] representation and collective defence of the interests of workers and employers, including codetermination’ (Art. 153, §f TFEU).

1.1 BLER right anchored in several pieces of European law

In 1972, the European Commission issued its proposal for a Fifth company law Directive concerning the structure of public limited companies and the powers and obligations of their organs (European Commission 1972). This Directive aimed to impose the German model of BLER, i.e. a two-tier governance structure for companies with compulsory one-third employee representation. However, no political agreement could be reached, and the European Commission had to give up its attempts almost 30 years after the initial

³² Following the adoption of the Lisbon Treaty in 2009, the Charter of Fundamental Rights of the European Union has been granted a legally binding character (Art. 6 TEU).

proposal was made³³ (European Commission 2001). Although it also took 30 years of lively debate for its adoption to take place, the SE statute came to legal life in 2001³⁴, paving the way for two others pieces of European company law tackling the issue of BLER: the European Cooperative Society Statute (better known as the SCE statute) in 2003³⁵ and Directive 2005/56/EC Directive on Cross-Border Mergers of limited liability companies. We will not discuss the former here, for the reasons set out in the introduction, and since it is currently of marginal importance in the European economic landscape, as very few cooperatives societies have chosen to adopt this statute³⁶.

The key principle behind the SE Directive is that negotiations of the various modalities of employee involvement (information, consultation and participation when applicable) are an absolute prerequisite for the new SE to be registered. As for European Works Councils, a special negotiation body [SNB] has to be set up to convene related negotiations, which can last from six months up to a year. If the SNB is able to reach an agreement with management, both parties can freely decide on its content. However, for such an open agreement to be allowed to reduce or eliminate pre-existing national BLER rights, the qualified majority of two-third of the SNB members is required in situations in which these pre-existing BLER rights covered at least 25% of employees (in case of the constitution by a merger³⁷) or 50% (in case of the formation of a holding company or of joint subsidiaries). Where an SE is formed by means of a conversion, the SNB cannot decide to reduce pre-existing rights. If the SNB and the management so agree, or if they fail to reach an agreement within the time frame, the standard rules provided as an annex to the Directive apply³⁸.

As regards BLER, the standard rules state that, in the case of an SE established by conversion, pre-existing BLER rights, if any, continue to apply. In all other cases, the higher³⁹ pre-existing BLER rights are safeguarded (as long as they covered at least 25% of the SE employees were the company was formed

33. For a snapshot of the stages of the unfinished legislative process related to the Fifth Directive see Conchon (2011a: 28).

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

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

36. As of May 2010, only 17 existing SCEs have been identified (Cooperatives Europe *et al.* 2010).

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

38. A third possible outcome of the negotiation process on employee involvement could be that the SNB decides not to open or to terminate negotiations. In this case, the national rules on employee information and consultation apply as well as the European Works Council Directive. However, this potential outcome is not possible in the case of a SE formation by means of conversion.

39. In the SE Directive, the 'higher' BLER rights are those equal to the highest proportion of board-level employee representatives in force before the registration of the SE.

through a merger, or at least 50% of the SE employees in case of the formation of a holding company or joint subsidiaries). In essence, whereas the modalities for employee information and consultation shall always be included in the agreement or by application of the fall-back options, BLER is subject to the so-called ‘before and after principle’, i.e. if there were pre-existing rights these should be safeguarded. On the contrary, if none of the participating companies was subject to BLER before registration of the SE, no participation rights will apply after the formal creation of the SE.

The Cross-Border Merger Directive [CBM Directive] presents a somewhat different picture. As far as BLER rights are concerned, the guiding principle is that the applicable BLER rights are those of the Member State where the company resulting from the cross-border merger has its registered office (Art. 16, §1). However, and to avoid the ‘regime shopping’ temptation whereby companies might choose to register in a Member State with fewer or no participation rights compared to their previous situation, the Directive foresees some safeguarding mechanisms which, at first sight, seem very similar to the SE equivalent. However, slight differences between the BLER provisions in the two Directives have even led some experts and observers to talk about a ‘cutting back’ in the CBM Directive compared to the SE Directive (Cremers and Wolters 2011: 8; Van het Kaar 2011: 196):

- The standard rules on BLER (which are a copy-paste of the SE ones) shall apply, as long as at least 33% (as opposed to the 25% of the SE Directive) of the employees of one or more of the companies participating in the merger were covered by pre-existing BLER rights (Art. 16, §3, (e)),
- A threshold of 500 employees has been introduced as a point of departure for opening negotiations on BLER⁴⁰ (compared to the lack of threshold in the SE Directive) (Art. 16, §2),
- Companies which have adopted a monistic corporate governance structure can restrict the proportion of board-level employee representatives to 1/3 of the board (there is no such restriction in the SE Directive) (Art. 16, §4, (c)),
- The general meeting of shareholders has the right to decide to skip negotiations on BLER by directly applying the fall-back provisions described in the annex to the SE Directive (Art. 16, §4, (a)).

As far as we know, no empirical study has yet assessed the application of the CBM Directive. On the contrary, and thanks to the European Company Database [ECDB] set up by the ETUI (<http://ecdb.worker-participation.eu/>), a thorough assessment of the SE Directive is possible. As of September 2011, the ECDB identified 909 SEs, of which 189 are described as ‘normal’ SEs⁴¹, i.e.

⁴⁰ Negotiation on BLER is thus triggered when at least 500 employees of one of the merging companies were enjoying higher BLER rights than those provided in the country where the company resulting from the cross-border merger is registered.

⁴¹ The ECDB draws a distinction between four categories of SE: ‘normal’, ‘empty’, ‘shelf’ and ‘UFO’. An ‘empty’ SE has business activities but no employees. A ‘shelf’ SE has neither business activities nor employees, and is therefore considered as a ‘dormant’ SE that can later be

having both business activities and more than 5 employees (Kelemen 2011). The country with by far the greatest number of registered SEs is the Czech Republic (509 SEs), although only 33 of these are said to be ‘normal’ companies. The second largest country in this regard is Germany with 175 SEs, of which 89 are ‘normal’. Then comes a group of countries with between 20 and 40 SEs (FR, NL, SK, UK), another with 6 to 20 SEs (AT, BE, CY, IE, LV, LU, SE) and a last group of countries with 1 to 5 registered SEs (DK, LT, NO, PL; PT, ES, EE, HU, LI). There are no registered SEs in 7 countries (BG, FI, GR, IT, MT, RO, SI).

Out of the 189 ‘normal’ SEs, 76 grant their employees information and consultation rights, and 38 do the same as regards BLER rights⁴² (source: ECDB as of October 2011). This goes for a total of 118 board-level employee representatives sitting on the board of an SE⁴³ and coming from eleven different countries. The great majority of them are German (87 individuals), while the next most frequent nationalities are Austrian (6), British (6), French (6), Dutch (5) and Polish (4)⁴⁴.

1.2 In theory, the SE legal framework offers an indirect way to circumvent BLER rights

On the basis of in-depth legal analyses combined with the knowledge of certain case studies, some researchers have concluded that, as it stands, the SE legal framework does not help to safeguard pre-existing BLER rights and even offers the possibility for companies to circumvent national rights attached to BLER (Kluge and Stollt 2011, Keller and Werner 2010). It seems that the SE statute could be used to further three potential bypass strategies⁴⁵: the avoidance of BLER; a ‘freeze’ of BLER; or a reduction in the number of seats allocated to board-level employee representatives, especially when these are occupied by external trade unionists.

As regards the first strategy aiming at avoiding the implementation of BLER rights, the rationale stand as follows: according to the ‘before and after’ principle, a company which has not implemented BLER rights, as it does not fall within the legal scope, will not be obliged to provide its employees with the

activated. Finally, the ‘UFO’ category refers to SEs for which no information is available as regards the business activities and number of employees. Micro-SEs (with 5 or fewer employees) are included in the latter category.

- 42. In line with the ‘before and after principle’, these 38 SEs are registered in countries providing BLER rights at national level, be it Germany (28 SEs), France (6), Austria (2) or Hungary (1). The remaining SE, which is currently registered in Cyprus, was originally set up in Norway.
- 43. However, and given the difficulties involved in trying to identify these board-level employee representatives, 118 has to be considered as a minimum.
- 44. Source: data from the European Worker Participation Competence Centre [EWPPCC], <http://www.worker-participation.eu/About-WP/European-WP-Competence-Centre>.
- 45. Examples of companies which applied these strategies and which will be indicated within brackets come from Köstler and Werner (2007), Rehfeldt *et al.* (2011) and Kluge and Stollt (2011).

right to be represented at board level. As implementation of BLER rights depends in several countries on the size of the company workforce, national companies could choose to adopt the SE statute before reaching the national threshold which would have otherwise led to the introduction of board-level employee representatives. In the Czech Republic, the threshold for implementing BLERs right is rather low (50 employees). This avoidance strategy, therefore, could well be (in the absence of real data) one of the explanations for the high number of SEs registered in this country. Another example would be that of German companies which, being close to the 500 employee threshold triggering the implementation of the one-third BLER, would rather opt for the SE statute if possible. However, avoidance of BLER has only been observed in a few cases (Köstler 2010).

The second bypass strategy, the ‘freeze’ of BLER rights, could be followed by companies which have already implemented the rights but which would like to avoid any increase in them. German companies could be particularly tempted by such a strategy, given two specific legal requirements they must respect: the obligation for a company already subject to the one-third BLER to adopt parity BLER as soon as it reaches the threshold of 2,000 employees; and the obligation for German companies to adapt the size of their board according to the size of their workforce (more employees means more board members). As a consequence, German companies close to the threshold of 2,000 employees might choose to adopt the SE statute so as to retain the one-third BLER model (examples in this regard are GfK SE, Conrad Electronic SE and Surteco SE). They could also do the same before having to increase the size of their board as their workforce grew (e.g. Fresenius SE).

German companies might not only avoid an increase in the size of their supervisory board, but can even decide, when adopting the SE statute, to reduce it. Therefore, even if the proportion of board-level employee representatives remains the same, their number automatically decreases (e.g. BASF SE, MAN SE or Allianz SE). In itself, such a move is not evidence of a threat to BLER rights, since the proportion, e.g. parity BLER, is safeguarded (Keller, Werner 2011: 16). It could, however, be a potential weakening to the specific requirement in Germany to appoint external trade union officers to the board, as the seats which could disappear as a consequence of the reduction in board size may well be theirs. For instance, previous to its adoption of the SE Statute, three out of the 10 board-level employee representatives on the board of BASF AG were external trade union officials. With the adoption of the SE Statute and the reduction of the board size from 20 to 12 members, only 2 external trade unions officers remained (Rehfeldt *et al.* 2011: 59). However, this reduction does not seem to lead to a complete disappearance of these posts.

Finally, an even more complex strategy is possible. A national company could first adopt the SE statute before converting back into a company regulated by national company law (as permitted by Art. 66 of the SE Regulation). This is seen in Germany as a strategy which could ‘result in the loss or reduction of participation rights if the form of company adopted is not subject to employee

participation or if the level of employee participation is reduced’ (European Commission 2008b: 7).

At a first reading, description of these bypass strategies coupled with examples of companies which have followed them, could imply that this is a major trend. Such is, for instance, the conclusion drawn by the 2009 Ernst & Young study commissioned by DG Internal Market to assess application of the SE Regulation. ‘Though highly prescriptive, the SE regime can appear in some Member States to be a favourable alternative to the national co-determination regime and it may be used as a vehicle to optimize, reduce, freeze or in specific cases, avoid the national participation regime’ (Ernst & Young 2009: 238). Another 2009 study came to a similar conclusion (Eidenmüller *et al.* 2009: 27). However, the findings of both pieces of research are questionable as they rely on the experience of ‘several German SEs’ (Ernst & Young 2009: 247) or report comments from ‘many SE incorporators’ without assessing the representativeness of those company cases. The picture they draw thus suffers the same shortcomings as the exercise which consists in using a few examples to illustrate a statement: the examples might not be representative and can thus lead to misleading interpretations.

More extensive empirical studies (Köstler 2010, 2011; Rehfeldt *et al.* 2011), however show the relatively marginal nature of such practices, which have been used only in some specific cases. ‘Company-based analyses indicate that this motive [avoiding or “freezing” BLER rights] has been a driving force in only a very limited number of cases so far’ (Rehfeldt *et al.* 2011: 16). On the basis of the ten extensive case studies conducted by Rehfeldt *et al.*, the authors conclude that ‘codetermination rights in the supervisory board were secured or even improved’ (*ibid.*: 1). More recently, Köstler (2011) argued that initial German BLER rights have so far been respected, since 16 out of the 33 SEs registered in Germany and having between 500 and 2,000 employees have a supervisory board complying with the one-third BLER and that 11 out of the 13 SEs with more than 2,000 employees have a supervisory board of which half is made up of board-level employee representatives. In light of such results, it might be more cautious to follow Keller and Werner’s suggestion and speak of “preventive avoidance of stricter forms of co-determination” (“Mitbestimmung”), “freezing of previously existing standards” or “preservation of the status quo ante” (Keller and Werner 2011: 10).

Besides the one-sided perspective we have so far presented, there are some counter-examples of companies in which BLER rights increased after the adoption the SE statute. In the Plansee SE case, the proportion of board-level employee representatives increased from one-third of the supervisory board, in accordance with the Austrian law governing BLER provisions before adoption of the SE statute, to a situation where 2 out of 5 SE board members are employee representatives⁴⁶. Even in the above mentioned case of a ‘freeze’

46. The adoption of the SE statute in the Plansee SE case, was accompanied by a change in the corporate governance structure, from a two-tier to a one-tier system.

of BLER at GfK SE, the potential loss of BLER rights was offset by an additional board seat being granted to an employee representative (Rehfeldt *et al.* 2011: 37). As for GfK SE, in some cases the reduction in BLER rights was agreed on with the SNB as a trade-off for other information and consultation rights (Köstler and Werner, 2007; Keller and Werner 2011: 17). In other words, some SNBs may have agreed to a reduction of BLER rights in return for extended rights and resources for the SE works council. This was the case for Equens SE, Hager SE and Elcoteq SE (Rehfeldt *et al.* 2011: 37, 57-58).

Although there have been only a few examples in practice of companies misusing the SE statute to circumvent BLER rights, it is still true that, in theory, the current SE legal framework allows companies to choose to do so. This in turn explains the concerns raised by European trade unions such as the European Metalworkers' Federation which 'argued, for example, for the need to correct the "before and after" provisions in Directive 2001/86/EC in order to prevent companies using this clause to become SEs as a way of avoiding codetermination rights' (Rehfeldt *et al.* 2011: 19).

To conclude on this point, it is misleading to state that bypass strategies are widespread, or to argue that the reason for the largest number of SEs being found in countries with high BLER rights is that national companies perceive the SE statute as a mean to escape national regulatory provisions on BLER. Eidenmüller *et al.* (2009) and the 2009 Ernst & Young studies put forward this questionable argument. If their argument were valid, one could expect to find a significant number of SEs in the Nordic countries in which BLER rights are particularly widespread. In actual fact, only 4 SEs are registered in Denmark, 5 in Norway and 7 in Sweden, i.e. significantly fewer than the 175 SEs established in Germany.

1.3 A somewhat Europeanisation of BLER rights

Assessments of whether or not there has been an Europeanisation of BLER rights as a consequence of the implementation of the SE statute have drawn mixed conclusions. Some observers identify a growing trend in this regard, while others conclude that it has not yet had a significant effect.

Amongst the arguments advocating for a positive effect of the SE regulation on the spreading of BLER rights in Europe, Kluge (2008: 128) considers that one could speak of some forms of Europeanisation in situations where employees of an SE (registered in a country providing BLER rights) are located in a Member State without national BLER rights but are covered by the specific SE arrangements on participation. Another argument supporting the Europeanisation perspective is that the mandate held by employee representatives on SE boardrooms is a European one, since those specific board-level employee representatives are expected to defend the common interest of all employees, irrespective of their location. The European Metalworkers' Federation explicitly promote this conception by stating that

‘the mandate in a cross-border company on the basis of ECS⁴⁷ is a European mandate with strong national roots. It is a European trade union mandate that has to cover the complete area of the company and not only those Member States from which the board members come’ (EMF 2003: 2). In other words, board-level employee representatives in an SE ‘should take account of the interests of all SE employees’ (Kluge 2008: 129) and not only those of their fellow countrymen. A final argument pleading in favour of the Europeanisation of BLER rights related to the diversity of nationalities of SE board-level employee representatives. In this regard, Strabag SE (an Austrian-based company) appears to be one of the European companies which have achieved the greatest diversity through its 2009 revised agreement on employee involvement. This has granted only one seat to an Austrian employee representative out of the 5 board-level employee representatives in total, thus departing from its national roots and opting for a more transnational profile.

However, the argument of the diversification of employee nationality in boardrooms also goes the other way round by revealing, despite some exceptional company cases such as Strabag SE, that it is not yet a significant phenomenon. When looking at the nationalities of the 118 SE board-level employee representatives identified by the EWPC, it is noticeable that some of them come from Italy, Belgium or even the United Kingdom, i.e. from countries granting no BLER rights at national level and even strongly reluctant to do so. However, a closer look at the extent of their representation compared to the overall population of SE board-level employee representatives presents a more mixed picture. Although the British board-level employee representatives are the second most represented nationality (with 6 individuals), along with the French and Austrian employee board members, they are still a long way, in absolute terms, behind the most common nationality which is German citizenship (87 individuals). We should, however, emphasise that these data are not exhaustive⁴⁸ and are evolving rapidly over time. Still, and ‘at least for the time being, the influence of this rather limited number of “foreign” representatives should not be overestimated. Some optimistic statements quite obviously exaggerate the potential impact of the SE for employee involvement’ (Keller, Werner 2011: 17).

One reason for this still limited Europeanisation of BLER rights rests, according to some experts, on the strict application of the ‘before and after principle’ which, though helping to safeguard pre-existing national BLER rights, also prevents the dissemination of this type of employee involvement to countries non-familiar to BLER. For instance Davies (2003: 84) considers that ‘the policy is the negative one of preventing the possibility of forming a SE from being used as a way of escaping from the national-level provisions on board-level participation, rather than the positive one of promoting board-level participation in all SEs’.

47. ECS stands for ‘European Company Statute’.

48. This is due to difficulties relating to the identification of the SEs with BLER rights on the one hand, and of the board-level employee representatives sitting on the board of such an SE on the other hand.

2. Trends: some grounds for concern

An examination of the state of the art concerning BLER at European level offers quite a mixed picture. Technically, the SE legal framework, as it stands, allows companies to circumvent if not completely avoid national BLER rights. However, this rarely occurs in practice, and bypass strategies seem to remain the exception. The assessment as to whether or not BLER has been ‘Europeanised’ thanks to the spreading of the SE statute depends on whether you see the glass as being half empty or half full. There are indications that employees from countries without BLER are enjoying this new right because they are covered by the SE BLER rights and can even sit as board-level employee representatives. The extent of this phenomenon, however, is still rather limited and it is hard to predict how it will evolve in the future.

Turning now to trends at European level, the picture is again rather mixed, although tending to give rise to concerns about the protection of existing national and European BLER rights. The European conception of BLER rights established in the SE Directive may well be improved thanks to the on-going discussion on a potential review of SE legislation. The topics for discussion proposed so far to European social partners within the framework of a Treaty-based consultation on the SE Directive seem to tackle the issues arising from existing and potential company bypass strategies. In this regard, there could be a window of opportunity allowing for a better safeguarding of national BLER rights.

On the contrary, the pending proposal for a new European Private Company Statute could put national BLER rights under pressure, as it allows companies to escape the statutory BLER regime by choosing to register in a country without an equivalent (in the case of an SPE created *ex-nihilo*). Moreover, the measures envisaged so far aiming at safeguarding pre-existing BLER rights fail to completely reach their goal. Rather, they represent a backward step compared to the SE Directive provisions, since they are instead modelled on the provisions of the CBM Directive.

The last and greatest cause for concern, in terms of BLER, relates to the freedom of establishment for companies, as a core element of the European economic model. This makes it legally possible for a new company to evade the obligation of respecting the BLER rights of a country in which it is operating by registering in a country without any form of BLER. The number of companies with extensive business activities and sites in Germany, but governed by a foreign legal status (e.g. that of a British Plc.) is constantly increasing, as is the case in the Netherlands, Austria and Norway. Moreover, as companies may split the location of their registered and real seats into two Member States, they become free to decide which national law they will be subject to. Despite years of discussion at European level about a potential 14th Directive on the cross-border transfer of registered office, and despite pressure from the European Parliament on the European Commission to take action in this regards, no regulation has yet been put in place and BLER rights remain under pressure.

2.1 Discussion on a potential review of the SE legislation: relevant identification of the main issues could open the door to improvements

Enacted in October 2001, the SE statute came into force in October 2004, and, by mid-2007, all the European Member States had transposed the SE Directive into their national laws. As stipulated in Art. 15 of the SE Directive, the European Commission was supposed to coordinate the review of the Directive in consultation with Member States, European trade unions and European associations of employers by October 2007. It actually did so in 2008 under the auspices of DG Employment, which conducted an assessment of the SE Directive. Its conclusions state that, at that time, there were not enough SEs in existence (146 SEs registered by mid-June 2008) to be able to carry out a sound and reliable evaluation, implying that it was ‘too early to revise it now’ (European Commission 2008b: 8). Moreover, it considered that, given the complementarity between the SE Regulation and Directive, the European Commission should wait for the assessment of the SE Regulation before ‘consider[ing] the appropriateness of revising both instruments and the scope of any such revision’ (*ibid.*: 9).

As to the SE Regulation, its Art. 69 required the European Commission to issue a report on its application by October 2009. It was on the basis of an external study conducted in 2009 (Ernst & Young 2009), and of comments received as a response to a public consultation in 2010⁴⁹ followed by a conference in May 2010 (both organised by DG Internal Market) that the European Commission issued its official report in November 2010 (European Commission 2010). The latter concluded that ‘the Commission is currently reflecting on potential amendments to the SE Statute, with a view to making proposals in 2012, if appropriate’ (*ibid.*: 10), the ‘appropriateness’ depending, amongst other things, on the outcome of the Treaty-based consultation of the social partners⁵⁰.

Thus, the time has come for considering the need for this review, as the assessments of both the SE Regulation and the SE Directive have been conducted. In fact, the first-phase consultation of the European social partners has been launched in July 2011. A letter was sent, inviting them to reflect on whether any amendments should be made to the SE Directive and, if any were necessary, on the possibility of initiating negotiations under Article 155 TFEU (European Commission 2011b).

As far as BLER is concerned, the document forming the basis of this first-phase consultation sets out four key issues related to ‘the concern that the use of the SE form would have an effect on the rights to employee involvement granted under national or EU law’ (*ibid.*: 5).

⁴⁹ For a critical assessment of the procedure of this public consultation, see Cremers *et al.* (2010) and Cremers (2011).

⁵⁰ As regulated by Article 154 TFEU.

The first issue deals with the absence in the current SE Directive of any provision regulating the re-opening of negotiations on employee involvement when changes occur in the SE after its registration. In fact, recital 18 of the SE Directive foresaw such situations by recommending that the ‘before and after principle’ which guides the safeguarding of pre-existing employee involvement rights including BLER ‘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’. However, this recital does not resolve two tricky questions: which renegotiation process should apply in such situations; and, most of all, what is the definition of a ‘structural change’? There is no consensus on the latter question, especially as to whether or not the growth of the workforce constitutes a structural change. Interpretations in this regard differ. Certain German experts and the ETUC consider that a change in the number of employees does constitute a structural change, as even already confirmed by German courts (Ernst & Young 2009: 14), while some company lawyers assert that the legal notion of ‘structural change’ does not encompass changes in the size of the workforce (*ibid.*: 246-247). In fact, some countries have partially solved the debate by introducing provisions into their national transpositions governing the possibility of reopening negotiations in case of major changes in the SE which could impact BLER rights. These can include a significant growth of the workforce⁵¹ (Fulton 2006: 41). As mentioned by Köstler and Werner (2007) this issue is of particular relevance when it comes to the so-called ‘activation’ of shelf or empty SEs becoming ‘normal’ SEs⁵². This is a growing trend (351 shelf SEs have been activated since 2004 according to Kelemen 2011), which is especially easy to observe in the Czech Republic.

The second issue raised in the consultation document is that the institutionalised definitions of employee information, consultation and participation mechanisms to be found in Art. 2 of the SE Directive do not acknowledge employee involvement at group level, as it exists in some Member States, such as in France with its ‘comité de groupe’.

The third issue relates to one of the ways already mentioned to circumvent if not completely avoid BLER rights, when an SE converts back into a national public limited company (Art. 66).

The fourth and final issue tackles the question of another potential bypass strategy which consists in reducing the size of the board. Some Member States with BLER rights, as well as the ETUC, are arguing that, as it could impact employee rights to be represented in the boardroom, the decision to reduce the size of the board should be subject to the preliminary negotiations (European Commission 2011b: 5).

51. These countries being: Austria, France, Germany, Malta and the Netherlands.

52. i.e. of SEs initially registered without employees nor business activities and which later become active in terms of business operation and hired workforce.

The main controversial issues are therefore properly tackled by the consultation document. It remains to be seen what the outcome of the first-phase consultation will be, and whether European social partners will be willing to open negotiations on potential amendments to the SE Directive which, for the time being, does not seem to be BUSINESSEUROPE position⁵³.

2.2 The SPE: still no political agreement, partly because of the lack of guarantees as to national BLER rights

The SE regulation contains a minimum capital requirement of €120,000 and also makes it impossible to create an SE from scratch. Largely for these reasons, which may prevent small and medium-sized companies [SMEs] from adopting such a transnational legal statute, the European institutions started thinking in the early 2000s about enacting a new statute specifically targeted at and designed for SMEs (European Economic and Social Committee 2002). After having conducted a feasibility study, a public consultation and an impact assessment, the European Commission submitted its proposal for a Statute for a European Private Company (*Societas Privata Europaea* – SPE) in 2008. No political consensus has yet been reached due to deep controversies on four key issues: the required cross-border component; the level of the minimum capital requirement; the possibility of having the registered office and the headquarters located in different Member States; and the rules governing employee involvement, especially at board-level.

These four points have been seen as particularly problematic. It is felt that the lack of a cross-border requirement, a low minimum threshold for capital, the possibility of dividing the registered seat and the head office (real seat) combined with a lack of safeguarding measures to protect pre-existing BLER rights, would lead to a high risk of ‘regime shopping’. Thus such a system would open the possibility for a company to freely choose the regulatory regime under which it would fall by deciding to register in the country offering what is seen as the best advantages and least stringent rules (including in the area of BLER).

Although the European Commission felt it had paid enough attention to the issue of BLER in its 2008 proposal, the ETUC and its member trade unions strongly disagreed arguing that ‘there is therefore a great risk that companies will use the SPE Statute to evade the most protective legislations and that existing participation rights will be undermined’ (ETUC 2008: 96). Recital 15 of the 2008 proposal stated that ‘employees’ rights of participation should be governed by the legislation of the Member State in which the SPE has its registered office (the “home Member State”). The SPE should not be used for the purpose of circumventing such rights. Where the national legislation of the

53. ‘BUSINESSEUROPE does not recommend reopening the SE Directive, ‘even with the only aim of simplifying this procedure’ as it sees no need for European action aimed at avoiding the negative effect of SE on employees’ rights to BLER (BUSINESSEUROPE 2011: 2).

Member State to which the SPE transfers its registered office does not provide for at least the same level of employee participation as the home Member State, the participation of employees in the company following the transfer should in certain circumstances be negotiated. Should such negotiations fail, the provisions applying in the company before the transfer should continue to apply after the transfer' (European Commission 2008c: 13-14). Moreover, in the case of cross-border mergers, the CBM Directive would apply.

This reference to the CBM Directive which, on its own, represents a step backward from the safeguards of BLER rights compared to the SE Directive has already been viewed with suspicion by proponents of BLER. These misgivings were heightened by the fact that 'in certain circumstances' meant that negotiations would be opened under the condition that at least one third of the employees enjoyed a higher level of BLER rights in the home Member State (while there is no such threshold triggering the negotiation process in the SE Statute). BLER supporters therefore strongly opposed the 2008 SPE proposal, as it planned to allow companies setting up from scratch a free choice as to the country in which they could register, thus allowing companies to escape national BLER regimes by registering in BLER-free countries. The European Commission acknowledged this possibility, but justified it on the grounds of the existing freedom of establishment granted by the EU Treaty: 'While company founders creating a SPE ex novo could choose to register the SPE in a Member State with less stringent participation rules than the Member State in which the SPE employees are located, this possibility already exists in relation to all national company forms under the Community case law' (European Commission 2008a: 37).

Dissatisfaction with the European Commission proposal explains in turn why, in March 2009, the European Parliament presented a revised proposal, containing significant amendments to the 2008 initial text (European Parliament 2009a). This proposed, amongst other things, a requirement for a cross-border component, and stated that the SE Directive shall be the reference text in the case of negotiations on BLER. Thereafter, a new revised text was submitted to the Council for discussion by the Czech Presidency in April 2009, but did not gain sufficient support from Member States to be adopted. In fact, none of the 7 subsequent political compromises submitted by the Swedish, Belgian and Hungarian Presidencies to the Council reached a consensus as to a definitive SPE statute. In March 2011, at the time of the next-to-last Council debates to date, the ETUC clearly stated that, in its view, the new political compromise then up for Council discussion was 'a cause of concern' (ETUC 2011a). This was particularly true, it said, because the SPE Statute should rather be modelled on the SE Directive requiring preliminary negotiations as a condition of registering the SPE. The ETUC also demanded a significant reduction of the proposed thresholds for triggering negotiations on BLER, and rejected the possibility of limiting the number of seats allocated to board-level employee representatives.

The last attempt to reach a political compromise in Council dates back to May 2011. It was short-lived as two Member States with extended national BLER

rights, Sweden and Germany, rejected the political compromise put to them. The Swedish representative argued that the proposed SPE statute was still lacking sufficient guarantees as to the safeguarding of national BLER rights. The legislative process surrounding the SPE statute increasingly resembles the history of the SE statute, which is leading some to fear that it could take another couple of years before the SPE Statute is adopted⁵⁴. This fear is so strong that the members of the ‘reflection group on the future of EU company law’ set up by DG Internal Market issued a very questionable recommendation: finding solutions so as to avoid the blockage of legislative processes by a handful of Member States. ‘Member States should not be allowed to impede the progress in enhanced cooperation among willing Member States (Article 20 EU Treaty and Articles 326 et seq. TFEU) by blocking such cooperation’ (Antunes *et al.* 2011: 54).

2.3 Freedom of establishment might undermine national BLER rights

In 2006 the academic members of the German Biedenkopf-Kommission acknowledged that a new trend was emerging in Germany under the shape of companies operating in Germany however under a foreign legal status, hence not subject to the rules on BLER (Biedenkopf *et al.* 2006: 35). Arguing that such a phenomenon only applied to a few cases, they considered that there was, at that time, no need to adapt the legal framework of BLER accordingly, but they recommended monitoring of the evolution of this trend. Indeed, several case law decisions by the European Court of Justice [ECJ] on the cross-border mobility of companies have confirmed that the Treaty-based freedom of establishment requires the recognition of foreign companies established in accordance with the law of another Member State⁵⁵. In terms of BLER rights, this means that these companies could legally avoid the application of BLER⁵⁶ since the company law governing such a company is the one of the country of its registered office and not the one of the country in which it conducts its real business activities.

Following the Biedenkopf-Kommission’s recommendation to keep a close eye on this trend, several analyses have been conducted in this regard (Sick 2006,

54. Which is leading BUSINESSEUROPE to ‘call for the quick adoption of the Statute for the European Private Company’ by solving the controversy on BLER through the ‘inclu[sion of] simple rules on employee involvement in accordance with applicable laws in the country of the registered office’ (BUSINESSEUROPE 2011: 3) rather than more advanced rules aiming at safeguarding pre-existing rights.

55. Especially the following ECJ rulings: Daily Mail (C-81/87, 27 September 1988); Centros (C-212/97, 9 March 1999); Überseering (C-208/00, 5 November 2002); Inspire Arts (C-167/01, 30 September 2003), Sevic Systems Ag (C-411/03, 13 December 2005), Cadbury-Schweppes (C-196/04, 12 September 2006); Cartesio (C-210/06, 16 December 2008).

56. Employee involvement at establishment level (the works council) continues to apply as this right is not linked to the country of registered office but to the country where the company has its operations.

2008, 2010). Niemeier (2007), for instance, counted some 35,000 British limited companies operating in Germany. However, as the vast majority of them were small craft or hairdressing businesses with few employees, and thus not subject to provision on BLER anyway, the question of threat to BLER was not consistent. Since then, however, studies have tended to show the trend growing to such an extent that the question of adapting the current legal framework for BLER has been raised. By October 2010, Sick and Pütz (2011) found that the trend extended to prominent companies such as the airline company Air Berlin or the fashion chain H&M. At that time, 43 companies with more than 500 employees (thus at least subject to the one-third BLER) were governed by a foreign legal status. Of these, 19 had more than 2,000 employees, which would have made them subject to parity BLER if German law had applied.

As a consequence, and following some scholars' arguments (e.g. Weiss and Seifert 2009), the DGB calls for the extension of BLER rights to these companies (see *supra*). BDA and BDI, on the contrary, suggest that the phenomenon is still too marginal to be considered as a real threat and claim that it would make no sense to force such foreign-based companies to adopt the German model of BLER, especially when they are governed through a monistic corporate governance structure (BDA 2011).

Germany is not the only country whose BLER rights could be impaired by the growing number of new companies choosing to be registered abroad (the British private limited company form seems to be particularly attractive), thus avoiding the implementation of BLER rights. In fact, this trend is becoming so widespread in Europe that it has caused several Member States to reform their national company law, reducing capital requirements and simplifying the registration procedures so as to be more attractive. A similar competition between national and foreign legal forms can be observed in Austria, the Netherlands and Norway (Cremers and Wolters 2011: 37). It could also occur in theory in any of the other countries in which BLER rights are attached to a specific legal status, i.e. in which BLER rights are more a matter of company law than of labour law (e.g. in DK, PL, HU, CZ, SK, SI) (Conchon 2011a: 22).

Since this trend towards competition between national regulatory frameworks is a direct consequence of the Treaty-based freedom of establishment and related ECJ rulings, one could expect an appropriate answer to be proposed by the European rather than national level. There have indeed been debates at the European Commission since 1997 on how to regulate the possibility for companies to transfer their registered office to Member States other than that in which their business operations take place. More specifically, the European Commission, following the recommendations of a high-level group of experts in Company Law (Winter *et al.* 2002: 101-106), expressed in 2003 its intention to present a proposal for the so-called 14th company law Directive related to the cross-border transfer of registered offices (European Commission 2003: 20).

In line with this intention, the European Commission coordinated a public consultation in 2004 in order to collect comments and opinions. At that time,

BLER was considered by the European Commission as a relatively easy issue to regulate in the case of a company transferring its registered seat to another Member State⁵⁷: by simply following the principle of maintaining or negotiating on BLER where the home Member State grants higher BLER right than the host Member State (a principle also governing the pending SPE regulation): ‘Employee participation rights should be governed by the legislation of the host Member State. Where they are more firmly enshrined in the home Member State, they should be maintained or negotiated. The home Member State could adopt its own rules governing these negotiations where it deems this to be necessary’ (source: DG Internal Market webpage devoted to the 2004 public consultation on a potential 14th Directive⁵⁸). Such a guiding principle, which can also be found in the SE and the CBM Directives, seeks to safeguard existing national BLER rights and to prevent companies from choosing to transfer their registered seat in order to circumvent statutory BLER. The core question is thus how this safeguarding principle will be implemented and whether it will be based on the provisions set out in the SE Directive or, rather, on the measures, providing less protection, contained in the CBM Directive. The European Commission has not yet published any document giving sufficient detail to allow an assessment to be made of these specific potential provisions.

Indeed, the 14th Directive has not yet entered the European legislative process as such as no formal proposal from the European Commission has so far been tabled. This explains why, in 2005, the European Parliament reminded the European Commission of the need to take further steps, by formulating a proposal for a Directive so that a debate could take place in this regard (European Parliament 2005). As the 2007 impact assessment conducted by the European Commission ended up recommending the ‘no action’ option, the idea of a 14th Directive vanished, and disappeared from the European Commission annual work programme since 2007. The impact assessment concluded that any legislative action would first need to await an assessment of existing legislation on cross-border mobility (especially the CBM Directive) and possible further clarifying by the ECJ of the transfer of registered office (European Commission 2007: 6).

Although the European Commission has so far advocated maintenance of the status quo, the European Parliament, on the contrary, considers cross-border transfer of registered seat such a crucial issue, particularly as regards its potentially detrimental impact on BLER rights, that it regularly repeats its appeal to the European Commission to be more active. The 2009 European Parliament resolution called for the re-launching of discussions and action in

57. ‘The Commission will address the question of employee participation in the decision-making bodies of the company whose registered office is transferred. This matter should be easier to resolve than in the case of cross-border mergers [...]since the transfer of registered office concerns only one company’ (European Commission 2004).

58. Web page of DG Internal Market about the 2004 public consultation:
http://ec.europa.eu/internal_market/company/seat-transfer/2004-consult_en.htm.

this area. It emphasised the need for safeguarding measures preventing the dilution of BLER rights, following, however, the pattern of the CBM instead of the SE Directive (European Parliament 2009b). Another forthcoming European Parliament resolution is in the pipeline and will be discussed at the legal committee meeting of 22 November⁵⁹.

59. See <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=2&procnum=INI/2011/2046>.

Conclusion: is board-level employee representation in Europe under pressure?

The overall picture at both national and European levels shows that the life of BLER is not a bed of roses, and that it is still, years after having been recognised in legal texts, a controversial topic whose legitimacy is regularly called into question. This is in contrast to other mechanisms of employee involvement such as information and consultation which, on the contrary, are recognised as indisputable workers' rights⁶⁰, even if their specific content and procedures are subject to discussion.

At national level, two main factors have influenced the developments of BLER rights we have reported: the political environment and, to some extent, the economic context. Whether or not BLER is under pressure is therefore highly dependent on these two factors.

We have emphasised that the evolution of BLER rights depends very much on political circumstances. It is not, therefore, surprising to note that in the countries where the corporate governance code disregards BLER (e.g. NL, SE), political power is in the hands of right-wing parties (conservatives, liberals or a coalition of both). It is also the right-wing parties in power which are leading legislative plans to withdraw or greatly diminish existing BLER rights in the Czech Republic and Poland. On the contrary, supporters of BLER calling for an extension of BLER rights tend to be left-wing parties, as is currently to be seen in Germany, with the demands formulated by the SPD and Die Linke. We can therefore assume that trade unions claims in favour of extending BLER rights (e.g. in FR and NL) would clearly have far greater chances of success if they could be submitted to a left-wing government.

The current economic, financial and social crisis appears, albeit indirectly, to be an explanatory factor for some of the changes we have observed, such as the loss or disappearance of board-level employee representatives' seats in state-owned companies as a consequence of recent and extensive privatisation programmes (Greece being the most noticeable illustration in this regard). However, the impact of a harsh economic context could work both ways. The need to reform corporate governance institutions, as one way of mitigating the crisis, has, for example, triggered debates on the role of employees in the supervision of management remuneration. One unexpected outcome, given

⁶⁰. As noted earlier, whereas BLER is not mentioned in the Charter of Fundamental Rights of the European Union, the 'workers' right to information and consultation within the undertaking' (Art. 27) are instead consecrated.

the traditional reluctance to accept institutionalised forms of employee involvement in this country, is the current debate taking place in the UK, where, on some occasions, the possibility of having employee representatives on the remuneration committee of boards of directors has arisen. A 2009 report by the Treasury Committee of the House of Commons stated, for example, the following: ‘It is our view that remuneration committees would also benefit from having a wider range of inputs from interested stakeholders—such as employees or their representatives and shareholders’ (House of Commons 2009: 31). In 2010, the report from a public consultation launched by the Secretary of State for Business ‘invite[s] views on whether independent members or employee representatives on remuneration committees would provide a helpful, fresh perspective and encourage greater challenge; as well as the potential risks and practical implications of such measures’ (BIS 2011:7). This is in line with the TUC recommendation that ‘employees should be represented on remuneration committees through their trade unions’ (TUC 2011: 16). Such debates have even influenced law. In Germany, for instance, the 2009 Act on the ‘appropriateness of management board remuneration’⁶¹ came into effect on 5 August 2009, and introduced a shift of responsibilities in the decision-making on remuneration from the remuneration sub-committee to the entire board, thus including board-level employee representatives.

In countries without BLER rights, with the exception of the UK, the status quo seems to prevail, also among trade unions. At least two hypotheses could be put forward to explain trade union silence on this issue. Firstly, some national trade unions have tended to focus the debate on employee involvement on the topic of financial participation. This is the case in Italy, where in 2009 the government and most of the social partners signed a joint opinion on the promotion of employee financial participation and the board-level representation of ‘employee shareholders’ (European Employment Review 2010). Secondly, in some countries, trade unions are concentrating their work on the proper implementation of information and consultation rights at the workplace, where these did not exist before the 2002/14/EC Directive⁶², as in Bulgaria (Kluge and Vitols 2010).

At European level, the trends we have described could be summarised by the three following points: (1) the safeguarding of pre-existing national rights in a company is not sufficiently guaranteed in EU company law (loopholes in the SE Directive, possibility of evasion in the SPE proposal); (2) the benchmark for current and future European legal texts touching upon the BLER issue is no longer the SE Directive, but the CBM Directive, which offers less protection; (3) competition between the real seat (head office) and registered seat doctrines, backed by the EU regulatory framework, might impair national BLER rights.

61. Gesetz zur Angemessenheit der Vorstandsvergütung (VorstAG).

62. Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community.

(1) The ‘no export, no escape’ European motto for BLER (Davies 2003: 87), though regularly reasserted⁶³, is open to question. There are some indications of export, through the somewhat Europeanisation of BLER, and some possible forms of escape, i.e. the bypass strategies made technically possible in the SE Directive and pending SPE Statute. Whereas the European Commission has acknowledged the loopholes in the SE legislation, thus leaving open the possibility of correcting them in the on-going discussion on a potential review, the current SPE proposal still contains elements of pressure on existing BLER rights. The major issue is the threshold so far determined for triggering negotiations on BLER when some employees of the SPE could have enjoyed a higher level of participation than that granted in the country where the SPE is registered. In the most recent political compromise tabled at Council (Council of the European Union 2011: 53), the threshold is set at 500 employees (i.e. when a minimum of 500 employees work in a country providing for higher BLER rights, negotiations should start) and, in case of the transfer of the registered seat, at least 1/3 of employees and not less than 500 (Council of the European Union 2011: 53). Such a high threshold represents a step backward compared to the legal provisions applying in no less than 9 Member States, where the threshold for implementing BLER rights in the private sector is lower than 500 employees⁶⁴, with Sweden having the lowest threshold: 25 employees.

(2) After 30 years of lively debates, the final compromise resulting in adoption of the SE legislation has been judged as satisfactory by many actors such as the ETUC. The ETUC has even called for the SE legislation to be established as the benchmark for future EU legislation: ‘ETUC fully endorses the final compromise, which was reached in respect of the European Company Directive concerning participation rights. That is why ETUC urges all EU institutions to be fully in accordance with this historic compromise regarding all legal provision in respect of cross-border company structures.’ (ETUC 2004: 35). However, since its enactment in 2005, it is the CBM Directive, although assessed as providing ‘cutting back’ measures compared to the SE Directive, which has become the benchmark for European initiatives. The European Commission proposal for a SPE Statute does not once mention the SE Directive and, instead, explicitly states that it draws its inspiration from the CBM Directive (European Commission 2008c: 9). Another illustration is provided by the current recommendations regarding a possible 14th Directive on the cross-border transfer of registered office: ‘The regime in place to protect stakeholders, notably shareholders, employees and creditors, of the Directive on cross-border mergers should be applicable *mutatis mutandis* and the additional protection offered by the SE Regulation could be considered’

63. For instance the 2011 report ‘on the future of EU company law’ confirms that ‘the appropriate attitude for the EU legislator is therefore (a) not to ask Member States which have not considered such a system or have deliberately decided against it to introduce it; (b) not to ask Member States to restrict or cut down on the extent or form of the codetermination chosen by them. The latter includes that it should not be tried to provide for loopholes through which market actors can easily escape a given system’ (Antunes *et al.* 2011: 53).

64. i.e. AT, CZ, DK, FI, HU, NL, SE, SI, SK.

(Antunes *et al.* 2011: 22). The SE Directive is no longer seen as the pattern to follow but rather as a Directive to ‘consider’. Against this background, some observers state that ‘SE legislation can be considered as the temporary pinnacle of employee involvement on a European level’ (Van het Kaar 2011: 200).

(3) Not only the ‘safety net’ contained in the SE Directive and foreseen in the SPE Statute does not guarantee the total safeguarding of pre-existing national BLER rights in the participating companies, but the freedom of establishment offered to companies combined with the possibility given to them of dividing their registered and real seats between different Member States might lead to a weakening of national BLER rights. The main, if not the only, reason is that European company law, and most existing national legislations, favour the so-called ‘registered office doctrine’ (also called the ‘incorporation doctrine’) rather than the ‘real seat doctrine’. According to the registered seat doctrine, the legal framework, i.e. national legislation, which applies to a company and thus bound its activities, is that of the country in which it is registered. On the contrary, the real seat doctrine obliges the company to respect the regulatory provisions of the country in which it conducts its business activities. The prevailing doctrine for the European legislator turns out to be the registered seat doctrine, as the real seat doctrine is seen as an impediment to the freedom of establishment⁶⁵. Since, in EU company law, BLER rights are subject to the registered office doctrine, a company could opt to register in a country without any form of BLER rights. So far, only the SE Regulation has helped to avoid this issue, since according to this text, the registered office and the head office must be located in the same Member State, thus avoiding competition between these two doctrines (Art. 69, §a of the SE Regulation). The general trend, however, is in the opposite direction. For example, the only obligation for a SPE (as stipulated in the most recent version of the proposal) is to have its registered and real seats located ‘in the European Union’, which does not mean in the same Member State. This analysis reveals the paradoxical nature of BLER: it is a workers’ right, but not attached to the workers themselves (otherwise the applicable law would be that of the country in which workers habitually carry out their work)⁶⁶. It is, rather, attached to companies (the law which applies depends on the country where the company is registered). This paradox is even stronger for countries in which BLER rights are regulated by company law (NL, NO, DK, PL, HU, CZ, SK, SI) rather than labour law (Conchon 2011a: 22).

Is board-level employee representation in Europe under pressure? The answer is yes, even if it is not so much about a risk of a complete disappearance and even if the pressure might less come from a national level but a European one. This conclusion is, for instance, shared by the ÖGB (the Austrian confederation

65. As argued in 2002 by the high-level group of experts invited by the European Commission to reflect on ‘a modern regulatory framework for company law in Europe’: ‘Broad application of “real seat” doctrine to incapacitate companies is a disproportionate measure’ (Winter *et al.* 2002: 102).

66. In reference to Art. 8 (2) of the 593/2008 Regulation on the law applicable to contractual obligations (Rome 1).

of trade unions), which, on the occasion of its 16th federal congress, stressed the following: ‘And yet co-determination rights – mostly regulated on the national level – are in constant danger of being undermined by the on-going integration process and a unilateral understanding of European fundamental freedoms. The increasing Europeanisation of company law continues to be a particular challenge for this pillar of our social model’, which led the ÖGB to demand to make ‘the principle of co-determination – a characteristic feature of participatory democracy – into a guiding principle of European policies’ (ÖGB 2007).

In 2009, the European Parliament, aware of these pressures and with the aim of mitigating the impact of European legislation on national BLER rights, issued a resolution stating that it was time for the European Commission to take action. In this resolution, it ‘1. Calls on the Commission, on the basis of Article 138 of the EC Treaty, to initiate a consultation with the social partners, with a view to evaluating and where necessary streamlining, creating or reinforcing the provisions for employees' participation in the internal market; 2. Calls on the Commission to assess the impact of the existing European company statutes and relevant rulings of the European Court of Justice (for example, the “Daily Mail and General Trust”, “Sevic Systems”, “Inspire Art”, “Überseering”, and “Cartesio” cases) as regards employees' participation in boards of companies and possible avoidance or circumvention of the relevant national provisions’ (European Parliament 2009c).

As for the ETUC, it has supported BLER since its creation (Conchon 2011a: 31), and has firmly reiterated this support as a reaction to the above-mentioned risks of weakening. In April 2011, it called for ‘strong European minimum standards for worker involvement to strengthen workers' rights to information and consultation in the EU and to ensure that the EU respects and promotes different forms of board level representation’ (ETUC 2011b: 3). It reasserts that the benchmark for future legislation should be the SE Directive rather than the CBM Directive, and calls for an improvement to the EU company law framework, by requiring every company using one of existing pieces of EU legislation (by adopting the SE, the SCE or the forthcoming SPE statute, or by applying the cross-border merger Directive) not only to respect existing BLER rights but also to adopt the highest level of participation. ‘All the legal forms of company entity at the EU level (SE, SCE, and pending SPE) must be subject to binding regulations on worker participation in company boards and on information and consultation with worker representatives regarding cross-border issues. Companies that have operations in several countries should be covered by the regulations that entail the best available model for worker participation’ (ETUC 2011c: 31). This demand now forms part of the ETUC Strategy and Action Plan up to 2015.

The outcome of on-going discussions on the potential SE review, the proposal for an SPE Statute and on the 14th Directive remains to be seen. Only then can we assess the extent to which the European Commission and, broadly, the European institutions, have taken to heart the repeated appeals made by the European Parliament and the ETUC.

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Annex

1. Legislation on board-level employee representation in Europe

Country ¹	Year ²	Legal provisions ³
Germany	1951	<p>Montan-Mitbestimmungsgesetz - Gesetz über die Mitbestimmung der Arbeitnehmer in den Aufsichtsräten und Vorständen der Unternehmen des Bergbaus und der Eisen und Stahl erzeugenden Industrie vom 21. Mai 1951 [Mining Co-determination Act - Act on the participation of employees in the supervisory boards and boards of companies in the mining and iron and steel industry of May 21, 1951]</p> <p>Companies employing more than 1000 employees and operating in the iron, coal and steel industry are obliged to devote ½ of the supervisory board's seats to employee representatives. Those representatives are nominated by the works council, and by the works council along with trade unions when it comes to seats reserved for trade union officials. However, confirmation of those nominations by the general meeting of shareholders is required. An additional member called a 'neutral external person' is appointed to the board and therefore has a casting vote.</p>
	1952	<p>Betriebsverfassungsgesetz vom 11. Oktober 1952 [Works Constitution Act of October 11, 1952]</p> <p>1/3 of the supervisory board of companies employing 500 to 2000 workers is directly elected by the workforce, candidates being nominated by works council or employees (10 per cent or 100 employees)</p>
	1976	<p>Mitbestimmungsgesetz vom 4. Mai 1976 [Co-determination Act of May 4, 1976]</p> <p>In companies having more than 2000 employees, ½ of the supervisory board are employee representatives, some being directly elected by employees amongst their ranks (above 8000 employees, electoral colleges are organised), others being trade union officials nominated by their TU (trade unions can nominate 2 or 3 of the candidates) and subject to election. However, the chairman of the supervisory board is always elected by shareholders representatives on the board and has a casting vote in the event of a tied vote.</p>
Netherlands	1971	<p>De Wet van 6 mei 1971 (S 289) houdende voorzieningen met betrekking tot de structuur der naamloze en besloten vennootschap (Structuurwet) [Act of May 6, 1971 (S 289) establishing provisions for the structure of public and private limited companies (Law of structure)]</p> <p>In large companies meeting following criteria: equity capital higher than €16 million; existence of a works council; more than 100 employees including subsidiaries; the dualistic structure of corporate governance is compulsory. Moreover, the works council has the right to propose 1/3 of the board, the final appointment being ultimately made by the general meeting of shareholders. Candidates nominated by the works council cannot be employees of the company nor trade unionists engaged in collective bargaining with the company.</p>
Norway	1972	<p>Lov om aksjeselskaper av 12. mai 1972 [Act on joint stock companies of May 12, 1972]</p> <p>The Company Act provides employees with the right to election by and from among the workforce representatives to serve on boards of directors. However, this right is not automatic and has to be triggered by a request from a majority of employees. In companies with 30 to 50 employees, 1 board-level employee representative may be elected. In companies with more than 50 employees, employees may elect up to 1/3 of the board, with a minimum of 2 members. In companies with more than 200 employees and having a corporate assembly, employees may elect from 2 board members up to a third of the board. Special provision exists for companies with more than 200 employees and not having a corporate assembly: then employees have the right to elect an additional board-level employee representative.</p>
	1991	<p>Lov om statsforetak av 30. august 1991, No. 71 [Act on state-owned enterprises of 30 August 1991 No. 71]</p> <p>Rules governing board-level employee representation in state-owned companies are the same than the ones provided by the Act on joint stock companies.</p>

Country ¹	Year ²	Legal provisions ³
Denmark	1973	<p>Lov nr. 370 frá 13. juni 1973 om aktieselskaber [Act No 370 of June 13, 1973 on public limited companies] Lov nr. 371 af 13. juni 1973 om anpartsselskaber [Act No 371 of June 13, 1973 on private limited companies]</p> <p>In private and public limited companies with more than 35 employees, employees may elect, from among their ranks, a minimum of 2 employee representatives (3 in the parent company of a group), up to 1/3 of the board. This provision is not compulsory and has to be triggered by a demand from at least 1/10 of employees or one or several trade unions at company level which represent at least 1/10 of employees. Once this demand is triggered, a yes/no ballot is organised among employees. If yes votes comprise an absolute majority, then board-level employee representatives are elected.</p>
Austria	1974	<p>Arbeitsverfassungsgesetz, ArbVG [Labour Constitution Act]</p> <p>1/3 of supervisory board of Plc (AG) and Ltd (GmbH, but with a minimum of 300 employees) companies are employee representatives, appointed by the central works council (or works council in companies with only one establishment). Those board-level employee representatives must not only be employed by the company, but they also must be works councillors with full voting rights at the works council.</p>
Luxembourg	1974	<p>Loi du 6 mai 1974 instituant des comités mixtes dans les entreprises du secteur privé et organisant la représentation des salariés dans les sociétés anonymes [Act of May 6, 1974 establishing joint committees in the private sector and organising the representation of employees in public limited companies]</p> <p>In the private sector, 1/3 of the board of Plcs having more than 1000 employees must be board-level employee representatives elected by staff representatives. Board-level employee representative must be employees of the company. However, there are exceptions for the iron and steel industry, where the most representative national trade unions have the right to directly appoint three board-level employee representatives. Board-level employee representatives can be nominated from outside the company's workforce. In the public sector, the election process is the same as in the private sector, but the number of board-level employee representatives differs: there is one board-level employee representative per 100 employees, with a minimum of three board-level employee representatives and a maximum of 1/3 of the board.</p>
Sweden	1976	<p>Lag (1976:351) om styrelserepresentation för de anställda i aktiebolag och ekonomiska föreningar [Act 1976/351 on employee representation on boards of companies and economic associations] NB: First enacted in 1973 (Lag om medbestämmande I Arbetslivet, Act on Codetermination at the Workplace), the law on board-level employee representation in Sweden became permanent with the enactment of Act 1976:351.</p> <p>In companies having more than 25 employees and if local trade unions (bound by collective agreement with the company) so decide, board-level employee representation is set up. Trade unions may appoint two board-level employee representatives in companies with fewer than 1000 employees and three board-level employee representatives in companies with more than 1000 employees and operating in several industries. However, board-level employee representatives can never form a majority on the board. Moreover, the Act provides for an equal number of deputies who also have the right to attend board meeting but on a consultative basis.</p>
Ireland	1977	<p>Worker Participation (State Enterprises) Act, No 6/1977</p> <p>In state-owned commercial companies, employees have the right to elect, from amongst their ranks, 1/3 of the board of directors. Election candidates are nominated by trade unions or bodies recognised for collective bargaining.</p>
Portugal	1979	<p>Lei nº 46/79 de 12 de Setembro - Comissões de trabalhadores [Act No 46/79 of September 12, 1979 on works councils]</p> <p>According to Art. 428 of the Labour Code (2009 version), the works council can promote the election of board-level employee representation on the boards of state-owned companies. The number and the determination of the body on which board-level employee representatives sit are defined by each state-owned company's articles of association.</p>

Country ¹	Year ²	Legal provisions ³
Poland	1981	Ustawa z dnia 25 września 1981 r. o przedsiębiorstwach państwowych [Act of September 25, 1981 on state enterprises] In state-owned companies where the privatisation process has not (yet) started, the main governing body – along with top managers – is the 'workers council', elected by employees. This 'workers council' has the right to adopt business plans, audit accounts and appoint/remove managers.
	1996	Ustawa z dnia 30 sierpnia 1996 r. o komercjalizacji i prywatyzacji przedsiębiorstw państwowych [Act of August 30, 1996 on the commercialisation and privatisation of state enterprises] In privatised companies where the State remains the sole shareholder, 2/5 of the supervisory board is composed of board-level employee representatives, elected by and from among employees. Once the State is no longer the sole shareholder, elected board-level employee representatives hold 2 to 4 seats on the supervisory board depending on its size.
Greece	1983	Νόμος 1365/1983, Κοινωνικοποίηση των Επιχειρήσεων δημοσίου χαρακτήρα ή κοινής ωφελείας [Act 1365/1983, Socialisation of state-run undertakings and utilities] In state-owned companies only (as long as the State holds more than 50% of capital), employees elect 2 members of the board of directors from amongst their ranks. The law stipulates that candidates for election are nominated by employees themselves but, in practice, they are put forward by trade union branches. Once elected, the appointment of board-level employee representatives requires formal validation by the Minister responsible for the company.
France	1983	Loi 83-675 de Démocratisation du secteur public [Act 83-675 on the democratisation of the public sector] In state-owned companies, the workforce elects board-level employee representatives. Candidates for election to the board must be employees of the company and nominated by a trade union. In state-owned companies with fewer than 200 employees, between 2 board members and 1/3 of the board are elected employee representatives. In state-owned companies with more than 200 employees, the employee side of the board is always 1/3. Specific provisions exist for subsidiaries of these state-owned companies: when these subsidiaries have between 200 and 1,000 employees, three members of the board are employee representatives, while they compose 1/3 of the board in subsidiaries of state-owned companies with more than 1,000 employees.
	1986	Ordonnance 86-1135 modifiant la loi 66-537 sur les sociétés commerciales [Edict 86-1135 modifying Act 66-537 on commercial companies] Companies in the private sector may introduce provisions in their articles of association whereby up to 1/3 of the board is composed of employee representatives elected by the workforce
	1994	Loi 94-640 relative à l'amélioration de la participation des salariés dans l'entreprise [Act 94-640 on enhancing employees' participation in the company] In privatised companies, the new articles of association must state that up to 3 members of the board remain employee representatives elected by the workforce from among their ranks. Candidates are supported by representative trade unions.
Spain	1985	Ley 31/1985, de 2 de agosto, de regulación de las normas básicas sobre Órganos Rectores de las Cajas de Ahorros [Act 31/1985, of 2 August, regulating the basic rules of the governing bodies of Savings Banks] Employee representatives on Savings Banks' boards of directors are appointed by the general assembly. Candidates should be proposed by the worker group at the General Assembly and come from their ranks.
Hungary	1988	1988. évi VI. Törvény , A gazdasági társaságokról [Act VI of 1988 on Business Associations] Within public and private limited companies with more than 200 employees, the works council nominates board-level employee representatives, who are employees of the company. Board-level employee representatives are ultimately appointed by the general meeting of shareholders. In companies operating with a single board structure of corporate governance, the number of board-level employee representatives is arranged according to an agreement reached between the works council and the board of directors. In companies with a dual board structure, board-level employee representatives represent 1/3 of the supervisory board.

Country ¹	Year ²	Legal provisions ³
Finland	1990	<p>Laki 725/1990 henkilöstön edustuksesta yritysten hallinnossa [Act 725/1990 on personnel representation in the administration of undertakings]</p> <p>In companies with more than 150 employees, board-level employee representation (number of representatives and choice of the board) can be arranged through an agreement between the employer and at least 2 personnel groups representing the majority of the workforce.</p> <p>If no agreement is reached and if at least 2 personnel groups representing the majority of the workforce so demand, board-level employee representation is set up as follows: the management decides on which board (board of directors, supervisory board, management groups or similar bodies) board-level employee representatives will sit; the number of board-level employee representatives varies between one and four, representing ¼ of the total number of board members.</p> <p>In any event, board-level employee representatives are employees of the company elected by the personnel groups, or – if they cannot agree amongst themselves – elected by the workforce.</p>
Slovak Republic	1990	<p>Zákon č. 111/1990 z 19. apríla 1990 o štátnom podniku [Act No 111/1990 of April, 19 1990 on state enterprise]</p> <p>In state-owned companies, ½ of the supervisory board are employee representatives elected by and from among employees. If there is a trade union in the company, it then has the right to directly nominate one additional member to the board.</p>
Czech and Slovak Republic	1991	<p>Zákon č. 513/1991 Sb., obchodní zákoník [Act No 513/1991 Coll., Commercial Code]</p> <p>In Czech Republic: 1/3 of supervisory board of PlCs (AS) with more than 50 employees are employee representatives elected by the entire workforce. Board-level employee representatives must be employee of the PlC or of external trade unions. The company's articles of association, however may allow board-level employee representation even if the company has fewer than 50 employees, and can entitle for them to compose up to half of the supervisory board.</p> <p>In Slovak Republic: In joint stock companies with a minimum of 50 employees, 1/3 of the supervisory board are employee representatives elected by and from among employees. The company's articles of association can determine that employee representatives may comprise up to ½ of the board, and that board-level employee representation will be set up even if the company has fewer than 50 employees. Trade unions and/or a minimum of 10% of employees can nominate candidates to the election.</p>
Czech Republic	1997	<p>Zákon č. 77/1997 Sb., o státním podniku [Act No 77/1997 Coll., on state enterprises]</p> <p>1/3 of the supervisory board are employees of the company, elected by the workforce. The electoral regulations are established by the management in agreement with trade unions, if any.</p>
Slovenia	1993	<p>Zakon o sodelovanju delavcev pri upravljanju – ZSDU (Uradni list RS, št. 42/93 z dne 22. 7. 1993) [Act on Worker Participation in Management – SDU (Official Gazette RS, No 42/93 of 22 July 1993)]</p> <p>BLER only applies to companies that are not regarded as being 'small', given that a 'small' company is one meeting two of the following criteria: fewer than 50 employees, less than €8,8 million of turnover and/or an asset value below €4,4 million.</p> <p>In companies with a dual corporate governance structure, articles of association determine the proportion of board-level employee representatives to the supervisory board, which cannot be less than 1/3 or more than ½ of the total number of board members. In companies with a single board structure, between one and three seats (depending on the size of the board of directors) are allotted to employee representatives.</p> <p>In both cases, board-level employee representatives are appointed by the works council. Furthermore, irrespective of the structure of the board, companies with more than 500 employees must appoint a labour director who is nominated by the works council and is a member of the management board/executive committee, representing the employees.</p>

Sources: HBS and ETUI (2004), SDA and ETUI (2005), Kluge and Stollt (2006), Calvo *et al.* (2008), Büggel (2010), Fulton (2011).

Notes:

1. Regulations applying to the Spanish state-owned companies are not mentioned here since these provisions are not laid down by law but by two collective agreements: the 'Acuerdo sobre participación sindical en la empresa pública' of 16 January 1986 and the 'Acuerdo colectivo para las empresas del Sector del Metal del Grupo INI-TENEO' of 22 June 1993.
2. The year and title of the legal text refer to the initial text: that is, the first legislative measure that regulates board-level employee representation in the country after 1945.
3. The explanation of the law refers to current provisions, thus taking into account amendments to the original legislation or legislation enacted subsequent to the initial measure.

2. Additional information on legislation related to state-owned companies

The above table mentions laws which have been enacted for the specific case of state-owned companies in Ireland, Portugal, Poland, Greece, France, the Slovak and the Czech Republics. However, that does not mean that BLER legislations do not apply to state-owned companies in other countries. In fact, state-owned companies in the remaining countries are subject to the same regulations as the private sector, given that BLER is linked not so much to the nature of the company's ownership as to the company's legal status. As a consequence, a state-owned company whose capital is owned for more than 50% by the State but which is ruled under the statute of a public or private limited company will thus have to implement the rules on BLER enshrined in laws mentioned in the above table. For instance, as the vast majority of Dutch state-owned companies have the statute of a 'naamloze vennootschap' (Plc) or 'besloten vennootschap' (Ltd), the rules on BLER that apply are the same as the rules laid down in the 'structuurwet'⁶⁷. State-owned companies in Finland, Hungary, Luxembourg, Sweden, and Slovenia abide by same pattern, i.e. the applicable provisions on BLER are the ones laid down in the law regulating the private sector as they fall under one of the legal status provided by the national private company law.

The same goes for German state-owned companies. There, the three German legislations regulating BLER apply to the public sector as long as the state-owned company has the statute of an AG (Plc) or a GmbH (Ltd). However, there is no BLER (except in a few cases) in state-owned companies under a different legal status ruled by public law (e.g. Anstalten öffentlichen Rechts, institutions of public law).

In some countries, there may be specific regulations governing the ruling of some state-owned companies. In Norway, inter-municipal companies are ruled by the specific Act No. 06 of 29 January 1991. However, provisions regulating BLER in those companies are very similar to the ones applying to limited companies in the private sector. In Denmark, only three state-owned companies do not fall under the Company Act and are regulated by a specific legal text: DBS (Danske Statsbaner), Naviair (Navigation Via Air) and Energinet.dk. In the first two, rules on BLER are strictly equivalent to those laid down in the Company Act. The only exception therefore is Energinet.dk whose statute stipulates that 3 board members are employee representatives out of the total of 11 board members (i.e. less than the common rule of 1/3 of the board).

⁶⁷. However, state-owned companies whose capital is 100% hold by the State are governed by a 'light structure regime' ('verzwakt structuurregime') which has no impact on the rules for BLER but which states that the supervisory board does not have the right to appoint or dismiss members of the management board.

On the other hand, the specific regulations governing some (but few) Austrian state-owned companies generally touch upon the legal provisions for BLER. The three most noticeable regulations in this regard are: the ÖIAG Gesetz⁶⁸ which follows the one-third BLER with the difference that employee representatives are nominated by the Austrian Chamber of Labour; the Arbeitsmarktservicegesetz⁶⁹ where 4 out of the total 10 board members are employee representatives (3 being nominated by trade unions and the Austrian Chamber of Labour and an additional one by the works council); The ORF⁷⁰ - Gesetz whose board (called 'Stiftungsrat' – board of trustees) is composed of 35 members out of which 5 are nominated by the central works council.

68. Österreichische Industrieholding AG (Austrian Industry Holding Plc).

69. Which is the law governing the organisation of the company in charge of the Employment Service.

70. Österreichischen Rundfunk (Austrian Broadcasting Company).

Glossary

BDA	Bundesvereinigung der Deutschen Arbeitgeberverbände (Confederation of German Employers' Associations)
BDI	Bundesverband der Deutschen Industrie (Confederation of German Industries)
BLER	Board-Level Employee Representation
CBM	Cross-Border Merger (Directive)
CEO	Chief Executive Officer
CFDT	Confédération Française Démocratique du Travail (French Democratic Confederation of Labour)
CFE-CGC	Confédération Française de l'Encadrement – Confédération Générale des Cadres (French Confederation of Management – General Confederation of Managerial and Professional Staff)
CGT	Confédération Générale du Travail (General Confederation of Labour)
CNV	Christelijk Nationaal Vakverbond (National Confederation of Christian Trade Unions)
DG	Directorate General
DGB	Deutscher Gewerkschaftsbund (Confederation of German Trade Unions)
ECDB	European Company DataBase
ECJ	European Court of Justice
EEA	European Economic Area
ETUC	European Trade Union Confederation
EU	European Union
EWPPC	European Worker Participation Competence Center
HBS	Hans-Böckler Stiftung (Hans Böckler Foundation)
LCGB	Lëtzebuurger Chrëschtliche Gewerkschaftsbund (Confederation of Christian Trade Unions of Luxembourg)
LO (NO)	LandsOrganisasjonen i Norge (Norwegian Confederation of Trade Unions)
Ltd	Private limited company
NSZZ Solidarność	Niezależny Samorządny Związek Zawodowy Solidarność (Independent and Self-Governing Trade Union Solidarność)
OECD	Organisation for Economic Co-operation and Development
ÖGB	Österreichischer Gewerkschaftsbund (Austrian Trade Union Confederation)
OPZZ	Ogólnopolskie Porozumienie Związków Zawodowych (All Poland Alliance of Trade Unions)
Plc	Public limited company
SCE	Societas Cooperativa Europaea (European Cooperative Society)
SDA	Social Development Agency
SE	Societas Europaea (European Company)
SMEs	Small and Medium sized Enterprises
SNB	Special Negotiation Body

SPD	Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)
SPE	Societas Privata Europaea (European Private Company)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TUAC	Trade Union Advisory Committee (to the OECD)
TUC	Trade Union Congress
UFO	Unidentified Flying Object
US	United States (of America)

List of country codes

AT	Austria
BE	Belgium
BG	Bulgaria
CY	Cyprus
CZ	Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
ES	Spain
FI	Finland
FR	France
GR	Greece
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
LI	Liechtenstein
LT	Lithuania
LU	Luxembourg
LV	Latvia
MT	Malta
NL	Netherlands
NO	Norway
PL	Poland
PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovak Republic
UK	United Kingdom

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