

# The quiet transnationalisation of board-level employee representation in national law and practice

A case for pan-European legislation

Sara Lafuente

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european trade union institute

**Sara Lafuente** is a researcher at the European Trade Union Institute (ETUI) in Brussels.  
Contact: [slafuentehernandez@etui.org](mailto:slafuentehernandez@etui.org)

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## **Abstract**

Board-level employee representation rights are far from harmonised at the level of the European Union. Yet, beyond some limited cases of Europeanisation taking root in EU secondary law (i.e. the European Company Directive (Societas Europaea) and other corporate law instruments taking this framework as a reference), experiences of transnationalisation have found their way in multinational groups operating in the European Economic Area based on national law and practice and independently of any EU legislation. This Working Paper examines the diversity of institutional routes available and applied by actors in Germany, Sweden, Norway, Denmark and France. It argues that the legal, practical and political challenges raised by these bottom-up solutions call for pan-European coordinated solutions on representation rights, both in legislation and trade union strategy. Drawing on country case studies and interdisciplinary methods, the Paper identifies different practices of transnationalisation and the factors which promote or hinder them, as well as the implications for national systems of employee representation and the development of European industrial relations. Some recommendations emerge for trade unions, policymakers and research.

**Keywords:** board-level employee representation; Europeanisation; transnationalisation; MNCs; trade unions.

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# 1. Introduction

When it comes to studying the Europeanisation of board-level employee representation (BLER), research focuses almost exclusively on the European Company (Societas Europaea, or SE). The 2001 SE Directive was the first legislative instrument regulating worker participation rights on company boards at EU level. Based on negotiation and ‘before-after’ safeguarding principles, it was a key reference for other EU corporate law instruments touching upon BLER rights (i.e. the 2005 Cross-border Mergers Directive<sup>1</sup> and, more recently, the 2019 amendment Directive on cross-border conversions, mergers and divisions<sup>2</sup>).

Yet, beyond those limited cases of BLER Europeanisation taking root in EU secondary law,<sup>3</sup> experiences of transnationalisation have found their way independently of EU legislation, although these have been largely neglected in EU industrial relations research. Some countries with extended BLER rights in corporate groups have accounted for the impact of transnationalisation in their systems of codetermination, either excluding, allowing or promoting the involvement of worker representatives from foreign subsidiaries on parent company boards registered on their territory. Their adaptation to the increasing transnational corporate reality in the margins of explicit EU regulation bears a certain parallel with the early experimentation with European group councils before the European Works Council (EWC) Directive was adopted (Rehfeldt 1993).

The question is not a minor one: the situation may affect a significant number of corporate groups and employees in Europe, and parent company boards have important decision making powers in MNCs.<sup>4</sup> Corporate activity

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1. EU Directive 2005/56/EC on cross-border mergers of limited liability companies was repealed by EU Directive 2017/1132/EC of 14 June 2017 relating to certain aspects of company law.
  2. EU Directive 2019/2121 amending former Directive 2017/1132 on cross-border conversions, mergers and divisions should have been transposed into national law by January 2023, although the transposition has been delayed in most Member States.
  3. Only 88 out of 3368 SEs have negotiated BLER in their agreements (ETUI 2021a) and, of 6214 cross-border merger cases, only 47 mention BLER in their merger plans, 28 of which specifically refer to BLER renegotiations (Meyer and Biermeyer 2021).
  4. Here, I assume a parent company board has ultimate decision making powers over company policy and worker representatives can exert influence therein. In practice, workers’ influence depends on a number of internal and contextual factors, e.g. the resources, power relations, position and competences of the participatory board (Rosenbohm and Haipeter 2019; Waddington and Conchon 2016).

is transnationalising, and workers' interests and problems often depend on decisions taken at supranational level, but trade union action and the scope of BLER systems remain largely domestic. This gap raises questions about the extent to which national BLER systems can actually influence transnational corporate decision making and how (far) the composition of BLER in multinational companies could be considered politically legitimate. When worker representatives have the right to sit on a parent company board according to national law, to what extent are the interests of the transnational workforce taken into account in institutional arrangements and actual practice? How far can the inclusion of foreign worker representatives be indicative of a social and political process of Europeanisation? These arrangements and practices could constitute political opportunity structures for cross-national labour collaboration and collective action (Turner 1996), but what are the legal and political implications for the making of Europeanised worker representation on company boards and how far do they extend?

This Paper assesses national institutional frameworks and actual practice against the backdrop of Europeanisation theory. Europeanisation has been defined in multiple ways in political science and EU integration studies.<sup>5</sup> The present research aims at understanding how far Member States incorporate a European dimension into their BLER frameworks and in how (far) trade unions and employers have been promoters or users of these Europeanised options. Answering these questions might tell us a great deal about the potential or limits of a European integration 'by stealth rather than by frankly political means' (Majone 2005: vii) in the field of BLER rights. Approaches conceiving Europeanisation only as top-down ('down-loading'), bottom-up ('up-loading') or policy transfer ('cross-loading') processes seem unfit for purpose. Conversely, a notion that combines top-down and bottom-up dynamics (Featherstone and Radaelli 2003), emphasising their interaction and the use that actors make of the European space (Menz 2008: 83), appears more encompassing.

Europeanisation is the whole set of formal or informal processes, practices and dynamics deployed by different actors considering the EU space and its regulatory relevance. Such an inclusive perspective allows looking at how national institutions and actors incorporate and reproduce European frames, and at their role in influencing and shaping EU policy. National regulators and social actors are involved in multiple ways in a complex multi-directional process, not only as receivers and implementors, but crucially as effective makers of Europeanisation (Fetzer 2010; Menz 2008). Conversely, transnationalisation refers more generally to processes of internationalisation that may or may not overlap with the EU as a regulatory arena.

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5. For an overview and discussion of Europeanisation theories, see e.g. Howell 2004; Duez 2014; Bandov and Herceg Kolman 2018; and Saurugger 2020.



This approach is combined with a sociological perspective on Europeanisation, informed by the use (or lack of use) of Europe by social actors in their action, strategies and routines (Woll and Jacquot 2010; Kostera 2013). Erne's seminal distinction between Euro-technocratisation and Euro-democratisation strategies that actors, particularly trade unions, can pursue regarding European integration is useful in the context of examining BLER Europeanisation and understanding its process and the implications of actoral roles for this European institution in the making.

In Erne's framework, social actors can indeed promote two alternative kinds of European integration. On the one hand, they can promote a project of European democracy, by pursuing a Euro-democratisation strategy (Erne 2008: 23), namely the creation of a European public sphere, in which 'political leaders are obliged to legitimize their political actions', the promotion of 'European collective action' by recognising that 'they belong to a common polity', and the politicisation of 'EU-level decision making in a transnational public sphere', enabling social contestation and access to new actors (Erne 2008: 20; Zürn 2016: 168). On the other hand, social actors can conversely promote a project of Euro-technocracy, based on 'quiet politics' (Culpepper 2011), by adopting a Euro-technocratisation strategy. Such a strategy implies that they consider the decision-making sphere as 'apparently apolitical', purely technical and depoliticised, 'disconnected from partisan politics' and social conflict, and insiders capture the political process, preventing access to new actors (Erne 2008: 20).

Similarly, the EU, national legislators and courts, companies and trade unions at different levels can, with their action and strategies, contribute to make out of a Europeanised BLER a process that either resembles more a Euro-democratic project or, on the contrary, a Euro-technocratic one. It is within the choices of the actors to decide what kind of worker representation on boards should be promoted in an integrated EU.

This Working Paper analyses the institutional channels and intervening practice in the making of BLER as a transnational institution of industrial relations within MNCs in the five European Economic Area (EEA) countries in which such processes have been observed: Germany, Sweden, Norway, Denmark and France. Their implementation and implications are analysed by adopting an institutionalist and actor-focused perspective, combining interdisciplinary methods from corporate and labour law with a case study research design (Yin 1989: 23). The Working Paper draws on a diverse set of data, including a literature review, analysis of regulation and available case law, corporate documents and European works council (EWC) agreements, as well as fourteen expert interviews, two focus groups and notes of meetings with representatives.

The study reveals four main findings. First, varied combinations of regulatory settings and practice have developed in a rather uncoordinated and bespoke way to transnationalise BLER in these countries: from unilateral trade union co-option or *ad hoc* cross-border political arrangements to more elaborate

institutionalised solutions, depending on company-level negotiations, legal rules or managerial preferences. Second, while national institutional routes set out the ways of transnationalising BLER, they cannot always be traced back to Europeanisation: except for France and Denmark, the frameworks or practices in place were triggered by global competition, capitalist projects or corporate idiosyncrasies. Europe is not the main frame of reference. Third, the study reveals (very) limited implementation in practice. Except in France and, more timidly, in Norway, actors have rarely used the transnational solutions available. Fourth, when they have done so, trade unions and companies used their options unequally, more often to the strategic advantage of companies. Diverse domestic institutional frameworks partly explain these outcomes and entail different challenges for the actors involved.

Overall, none of the transnational routes found at national level have led to BLER Euro-democratisation. In the absence of EU rules, the processes of BLER transnationalisation which may be observed respond more either to an avoidance of Europe or to selective cross-border collaborations, at best involving Euro-technocratic strategies which, following Erne's framework, contribute to the making of a technocratic, as opposed to a democratic, kind of European institution of worker representation. Unless EU legislators and trade unions politicise the issue of BLER and proactively develop a coherent pan-European strategy, BLER Europeanisation is unlikely to develop in a democratic way.

Left to uncoordinated, indirect and flexible types of regulation, BLER Europeanisation develops as Euro-technocratisation and may erode existing codetermination systems to the disadvantage of workers, in the same vein as already identified in EWCs:

The first main problem is that they can be 'captured' by the actors they are intended to control; becoming an extension of the very interests they were meant to regulate. Second, (...) they may be open to bureaucratic inertia and fail to connect with their original purpose. (...) Finally, the very way such new forms of regulation have been developed may undermine their accountability and democratic status. Hence the new mechanisms may be transformed to function in ways unintended and unanticipated. (Martínez Lucio and Weston 2007: 187).

The possible contradictory usages of transnationalised BLER reflect the very political nature of worker representation emphasised by Martínez Lucio and Mustchin (2019). It seems long overdue to look at what a European framework could entail for the democratic dimension of BLER. Such a strategy should aim to secure regulatory certainties, transparent electoral procedures in MNCs, reinforced multi-level articulation with other instances of labour representation at EU and local levels and, finally, the protections and resources for worker representatives that will allow them to fulfil the functions of a European mandate adequately.

The Working Paper is structured as follows. Section 2 situates how far BLER has become an issue of European policy and presents some dead ends in the debate and in Europeanising solutions. After Section 3's focus on methodological considerations, Section 4 presents the country case studies, explaining the diversity of approaches found, their institutional workings and how the social actors have implemented them. Section 5 evaluates the findings in a comparative perspective, identifying some explanatory factors and implications for BLER systems and their potential Europeanisation, before some alternative avenues are explored in Section 6 towards a better articulated EU framework for BLER rights in MNCs. The conclusions synthesise the findings and elaborate recommendations for research, policymakers, EWCs and trade unions as a means of addressing some of the problems that could arise from a potential EU harmonised regulatory framework and existing trade union policies.

## **2. Partial policy efforts towards BLER Europeanisation**

Conversely to EWCs, BLER rights have been little exposed to regulation, practice and debate at EU level since the 1970s. The European Commission's initial plans to harmonise them in the context of the European Company Statute were openly rejected by (some) countries (Davies 2003; Gold 2010). Differing historical, economic and socio-political contexts account for BLER not being institutionally anchored in all Member States, something which continues to be the case, while national trade union positions and practice around it are far from homogeneous (Conchon 2011: 22; Hyman 2016). EU legislation on codetermination requires Council unanimity so the political controversy lasted for decades, causing the so-called Fifth Corporate Law Directive to fail (Seifert 2017; Keller and Rosenbohm 2020), until a compromise on employee involvement was found with the 2001 SE Directive, based on the 'before-after' principle and negotiated agreements at individual company level. This flexible regulatory framework was taken as the point of reference for employee involvement rules in other EU corporate law instruments. The rules had limited scope and aimed mostly at safeguarding pre-existing national BLER standards where they existed, even though these were being opened up to more countries.

European employee representation on SE boards was based on seat allocations according to country interests (Lafuente Hernández 2019: 9), similar to EWC Directive 94/45/EC, where the bodies representing employees and negotiating EWC agreements were composed in line with national rules and practices, and on the basis of seat allocations by country. The subsidiary requirements echoed such federal solutions, largely aligned with an intergovernmentalist logic in EU integration theory (Moravcsik 1998; Bickerton et al. 2015). However, workers' seats on boards are much fewer than in EWCs, so a mere seat allocation could not ensure a power distribution across countries that sufficiently reflected territorial diversity. Already in EWCs, diverse national experiences had been considered an insufficient indicator of the proper European representation of employees (Béthoux 2009): with all the more reason, such a 'quantitative notion of Europeanization' (Rehfeldt 2013: 167) left a great deal to be desired in the context of BLER.

The European Trade Union Confederation (ETUC) and the European trade union federations (ETUFs) tried to develop broader political and qualitative understandings of the 'European mandate' on SE boards (Kluge 2008: 129;

Conchon 2011: 38-39) so that SE worker directors<sup>6</sup> represented the whole European workforce beyond the narrow interests of their specific country or establishment (Rehfeldt 2013: 182). European mandates pose important political questions concerning representation (Pitkin 1967), yet representatives embodying these mandates do neither naturally cooperate with each other (Müller et al. 2011: 222) nor naturally have the skills to do so, despite their union credentials (Conchon 2014: 277).

On the one hand, a European Workers' Participation Fund was set up, fed with transfers from SE worker directors receiving remuneration for their board activity. The Fund was allocated to the ETUI to finance specialised training and expertise on worker participation at EU level (ETUC 2008; Stollt and Wolters 2011: 98-99). This mirrored the German system,<sup>7</sup> probably in an attempt to dampen the potential sieve-like effect of the SE framework on German (and, consequently, European) trade union resources. But the Fund also aimed to secure equal treatment, legitimation, political accountability and transparency for BLER within SEs, providing a direct financial resource to the European trade union movement. However, it was only linked to SEs, excluding other cross-border situations, where practice remained heterogeneous.

On the other hand, ETUC affiliates finally agreed to lobby for an EU directive on an integrated architecture for information, consultation and minimum standards on BLER rights according to a harmonised escalator approach<sup>8</sup> (ETUC 2016), going beyond the established 'before-after' principle. However, the proposal was limited to European company forms: MNCs covered by the EWC Directive or governed by national law (except when they explicitly resulted from an EU-regulated transaction) were excluded.

In brief, limited steps to Europeanise BLER have been adopted, but the logics of seat allocation and decentralisation to company level have prevailed both in EU and trade union policy, which has remained largely focused on SEs without attempting to achieve substantial changes in employee representation practices in MNCs governed by national law. I turn now to examine how, despite this nuanced preliminary account, BLER transnationalisation has emerged in national law and practice.

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6. In this Paper, I refer to board-level employee representatives as worker directors indistinctively.
  7. In Germany, the DGB's non-profit organisation Hans-Böckler-Stiftung (HBS) has received remuneration transfers from trade unionists sitting on German supervisory boards since it was established in 1977.
  8. The ETUC Resolution proposes that at least two or three board-level employee representatives should seat in EU companies of between 50 and 250 employees, one-third participation should exist in those of between 250 and 1000 employees and parity boards in those of over 1000 employees.

## 3. Methodological considerations

### 3.1 Case study selection: internationalised economies and BLER at group level

Aside of EU regulations, previous literature and research<sup>9</sup> points at five countries where the possibility for transnational BLER has permeated in MNCs: Germany, Sweden, Norway, Denmark and France. These countries thus constitute the case study selection for this research. All stand out as the most internationalised economies in the EEA, hosting numbers of corporate groups operating on a cross-border basis and with large numbers of employees abroad. Table 1 shows the degree of transnationalisation and Europeanisation of companies headquartered in these countries, which have national regulations on BLER rights at corporate group level. The level of transnationalisation can be measured both in terms of the number of companies with a presence abroad as well as in terms of the number of employees abroad.

These countries have also normalised BLER at group level (Hagen and Mulder 2013: 152) in their corporate and labour laws. This means that the scope of worker representation rights and institutions applies beyond the confines of the company as an individual corporate 'legal entity' *strictu sensu*: the notion of a group of undertakings is incorporated in their systems of industrial relations and collective labour rights so that employee representation rights can be established at group level, in works councils covering the whole group or in the parent board of a corporate group consisting of distinct legal entities, franchises, branches or establishments.<sup>10</sup>

When national participation systems set specific norms to acknowledge worker representation rights in a group of undertakings, then, the question on how to adapt this worker representation to the transnational character, structure and scope of operations of the group is more naturally addressed. Group-level institutions of worker representation and social dialogue are far from extended in Europe: legal definitions establishing employer liabilities and employee representation rights do not generally capture the increasingly

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9. See, among others, Mulder (2017a) and Opinion of Advocate General Saugmandsgaard Øe in Case C-566/15, *Konrad Erzberger v TUI AG* before the Court of Justice of the EU (CJEU).

10. Branches or establishments are considered part of the same legal entity as their parent company.

normal reality of complex corporate multiple employer structures (Serrano Olivares 2016; Weil 2017; Lafuente et al. 2016; Ferreras 2017; Prassl 2015: 145). The EWC Directive was, in that regard, a ground-breaking exception in establishing an employee representation structure and collective rights within a European group of undertakings according to specific criteria. But there is no harmonised EU-wide definition of a group of undertakings, despite long-standing criticisms and proposed solutions (Embid Irujo 2005; Antunes 2005; Böckli et al. 2017). Share ownership, partnership interests or formal control agreements (as are found, for instance, in *Konzerne*) are often used to measure the influence and control of parent companies over subsidiaries, but legal definitions, case law criteria and their implications remain extremely diverse across countries and are under-explored in comparative labour law and industrial relations. The extension of employee representation rights to groups has generally depended on whether or not national corporate law traditions considered the interest of the whole group in their definition of the company interest (Böckli et al. 2017: 15).

National provisions for BLER at group level seem necessary for transnational BLER to exist in MNCs, but this condition is not sufficient: in Austria and The Netherlands, central or group works councils can appoint or nominate members to the supervisory board of the parent company of the group. Yet, no case of transnational BLER was found in those countries in our preliminary research and, consequently, they were excluded from the case study selection.

In Austria, BLER rights are rooted in labour law: the (central) works council is entitled to appoint members to the supervisory board of the group and, thus, the exercise of BLER rights arises from the right to vote or to be elected to the (central) works council of the Austrian parent company. According to the interpretation of private international law and the principle of territoriality set out within national jurisprudence in Austria (see Kalss 2004: 103-106), such a right is reserved to employees of Austrian subsidiaries when the group is transnational.

As for the Netherlands, a legal reform in 2004 (the so-called *Two-tier Structure Reform Act*) introduced an exemption from the Dutch system of participation for international holding companies, the majority of whose employees are located abroad (Windbichler 2005: 524; Cremers 2018: 104; Groenewald 2005: 296). Faced with the challenges of transnationality, the Dutch legislator thus opted for exclusion instead of, for instance, an expanded EWC role in the nomination of supervisory board members of transnational groups. Admittedly, BLER rights are weaker in the Netherlands than in the other countries analysed: the Dutch works council recommends one-third of the members of the supervisory board but they cannot be employees or trade unionists (Cremers 2018: 107). This peculiarity has already led other comparative studies of BLER to exclude The Netherlands from analysis (see Waddington and Conchon 2016: 221-222).



Table 1 Outward activity of MNCs from countries with BLER regulations in corporate groups, by country of location

Country	World (other than declaring country)		EU28		BLER rights at group level	Transnational BLER cases identified
	Employees	Companies	Employees	Companies		
Germany	5 739 631	29 026	2 637 426	14 244	Yes	Yes
Sweden	1 417 383	17 634	660 528	9691	Yes	Yes
Norway	277 498	4328	161 313	2848	Yes	Yes
Denmark	1 160 150	10 632	483 105	6264	Yes	Yes
France	6 119 947	46 529	2 375 113	22 054	Yes	Yes
Netherlands	nd	nd	nd	nd	Yes, except holdings with > 50 per cent of employees abroad	No
Austria	562 778	3831	382 697	2578	Yes, but national	No

Note: The table should be read as follows: 'According to OECD Statistics for 2016, 29 026 companies headquartered in Germany operated outside Germany, employing 5 739 631 workers worldwide other than in Germany. Of those, 14 244 companies operated in the EU28, with 2 637 426 employees'.

Source: Author's elaboration based on own research and OECD Statistics (Outward activity of multinationals by country of location – ISIC rev. 4 (data from 2016, for all business enterprise sectors. Last checked 26/7/2022).

### 3.2 Methods, data collection, analysis

To pursue this research on BLER transnationalisation in MNCs, the study combines social sciences methods with the fields of labour and corporate law in an interdisciplinary qualitative design. It brings together previous scattered knowledge, completing and directing it where necessary with empirical research to build a comparative assessment of the national regulations and practice involved in this phenomenon. The study explores each case in context to reach comparable meaningful results across different country realities (Locke and Thelen 1995), using different sources of evidence, data collection and analysis strategies to adapt to the logics of local actors and their societal coherence as a path of discovery (Streeck 2001; Maurice et al. 1979). The primary and secondary data include a review of previous literature, jurisprudence and specialist studies and an analysis of legal regulations and case law when available,<sup>11</sup> as well as corporate documents, EWC agreements and expert interviews, building a multiple case design (Yin 1989).

The analysis and presentation of findings follow a two-step sequence in each country case. First, they focus on understanding the national labour and corporate law frameworks underpinning BLER rights, identifying the actors involved, their roles and the way in which BLER is structured in corporate

11. Legal traditions and the diverse embeddedness of BLER in the economy explain that case law on the matter is scarce or non-existent in some countries. While BLER is recent in France's private sector, Scandinavian countries reveal low levels of conflict on BLER matters (Hagen 2016) and rely on social partnership, negotiations at company level or conflict resolution structures before turning to the courts. This is converse to the situation in Germany.



groups, in order to understand how the transnational option is articulated in or excluded by the legal framework. The political context from which the transnational option emerged is also considered. This phase draws primarily on an analysis of legal frameworks, the prevailing jurisprudence, specialist studies and interviews to experts as internal informants of the systems.

Second, the analysis and presentation of findings address how (far) transnational solutions have been applied by employee representatives and companies in practice. This phase draws on the findings of previous studies (Hagen 2016; Lafuente 2022) and original analysis of corporate annual reports, statutes and governance information available on the corporate websites of the pioneer companies that have transnationalised BLER, as well as on fourteen interviews with specialists, two focus groups and expert meetings conducted between 2016 and 2022 with insider informants of the cases (i.e. the trade union advisors involved in negotiations, board-level employee representatives and, where relevant, European Works Council representatives). Preliminary conclusions are drawn from each case to feed a transversal comparison and discussion.

## **4. Bottom-up routes to transnationalise BLER: from ad hoc political arrangements to multi-level institutionalisation**

This section presents each case study, focusing first on some key institutional elements to understand the BLER transnational solution, especially how MNCs and foreign<sup>12</sup> workforces are considered in institutional frameworks but also the specific context and public debate that shaped the emergence of the phenomenon. It then presents how the actors have applied solutions in practice, with reference to specific company cases where these could be identified.

The cases are presented following a progression in terms of the institutionalisation of the European dimension in BLER systems. The sequence starts from those cases where BLER transnationalisation is only possible by means of *ad hoc* cross-border political arrangements between trade unions depending on their will (starting with Germany where a heated debate closed the door on an institutional solution) and extends to those where the law sets more complex institutional arrangements turning BLER into a transnational institution, the case of France being exemplary as it has established an institutional solution articulating different levels of EU industrial relations. The sequence also brings closer those cases that share similar characteristics, namely those where trade unions have a more prominent role on the one hand (i.e. Germany, Sweden and Norway) and those where management and, crucially, shareholders have a special role on the other hand (i.e. Denmark and France), resulting in a sort of 'rainbow' display.

### **4.1 Germany: trade unions as gatekeepers of rare symbolic political arrangements**

Germany counts the oldest codetermination system in force.<sup>13</sup> Employees are entitled to elect one-third of the members of the supervisory board in companies and groups of between 500 and 2000 employees and one-half of them in companies of over 2000 employees (1000 employees for companies in the iron, coal and steel sector). European and global economies were not as

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12. 'Domestic' and 'foreign' refer to workers whose employment relationship is respectively governed by the laws of the headquarters' or another country's jurisdiction. The nationality of the representative is irrelevant for this study.

13. The Montan-Mitbestimmungsgesetz and Mitbestimmungsgesetz (Codetermination Act) were adopted in 1951 and 1976 respectively. The Drittelbeteiligungsgesetz (Third Participation Act) was last revised in 2004 although the original law dates back to 1952.

integrated as today when these systems were first introduced in the immediate post-WWII period, so the law neither explicitly foresaw nor excluded foreign subsidiaries from corporate groups' participation systems. However, the procedural character of German industrial relations has made it difficult afterwards to adapt the system to internationalisation without affecting some of its core elements. The prevailing German legal doctrine and case law have defended that BLER in German MNCs only covers workforces and subsidiaries in Germany. Such a restrictive interpretation of the territoriality principle and EU free movement rules has de facto excluded workers in foreign subsidiaries from election to German supervisory boards and from employee thresholds giving access to BLER.<sup>14</sup>

As EU integration and globalisation have developed, the unbalanced involvement of domestic and foreign employee representatives on the supervisory boards of German MNCs was increasingly seen as an unsettled problem of democracy, addressed in a polarised debate over the 'modernisation' of German codetermination (Biedenkopf et al. 2006; Hellwig and Behme 2009; Habersack et al. 2016; Krause 2016). A number of academics and shareholder activists have argued that the law should adapt to EU non-discrimination and free movement rules. Employer circles drafted a proposal to enable to extend the scope of group BLER to subsidiaries outside Germany by company agreements (Baums and Cahn 2009), but this never saw the light of day (Keijzer et al. 2017) as it encountered great opposition from trade unions, who argued for legal regulation (Hexel and Seyboth 2009:6). Concerned with the problem, German trade unions have supported pragmatic changes (e.g. extending by law the right of candidacy to employees outside Germany) rather than fundamental ones (such as a legal equal entitlement for all workforces to vote and run for office) (Dihn 1999: 996; Windbichler 2005; Hexel and Seyboth 2009:6). Fearing that fragmented supervisory boards and worldwide ballots could weaken (German) union power and BLER guarantees and protections overall (Windbichler 2000: 279; 2005: 521-524; Mulder 2017a: 98), German unions have, in practice, been more concerned with defending the status quo than with experimenting with inclusion. Admittedly, the *Erzberger vs TUI AG* case before the Court of Justice of the European Union (CJEU)<sup>15</sup> could have led to an imminent disapplication of German codetermination provisions, had a breach of EU law been confirmed, which explains why German trade unions have prioritised a defensive attitude.

Despite these apparent legal dead-ends, some *ad hoc* political compromises have allowed a few German supervisory boards to transnationalise, thanks to a German institutional peculiarity: in groups of over 2000 employees, German trade unions (i.e. their national federations) have the prerogative of nominating two or three members to the supervisory board. The candidates must be ratified by workforce elections in Germany – or by delegates in

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14. For an account of the relevant German case law and jurisprudence on this matter, see Lafuente Hernández and Rasnača (2019).

15. Case C-566/15, *Konrad Erzberger v TUI AG* [2017] ECLI:EU:C:2017:562. For a critical analysis, see Lafuente Hernández and Rasnača (2019).

companies of over 8000 employees (Fulton 2021), but they are usually trade union officials proposed by the union. Through this channel, IG Metall has been able to introduce one foreign trade union representative to the workers' seats on the supervisory boards of two champion car manufacturers: DaimlerChrysler AG and Volkswagen AG.<sup>16</sup>

Daimler had circa 180 000 employees in Germany and Chrysler 170 000 in the US when the two merged in 1998.<sup>17</sup> By virtue of a political arrangement, IG Metall ceded one of its three seats (out of the ten seats assigned to workers) to a representative of the United Automobile Workers (UAW) (LA Times 1998; Daimler 2020: 109). Different share sales and spin-offs affected the position of the US DaimlerChrysler business within the group, leading the UAW member to step down from the supervisory board on different occasions, so the arrangement had only intermittent effects (Shields 2007; Adler 2021; Daimler 2021).

As for Volkswagen, a representative of the Swedish Metal Workers Union IF Metall in Scania AB was appointed to the supervisory board between November 2015 and 2020 on the IG Metall ticket (Volkswagen 2015a, 2015b and 2020: 17). In 2021, a representative of the Spanish Unión General de Trabajadores (UGT; General Union of Workers) from the main Seat plant followed (Volkswagen 2021). IG Metall lost one seat but kept control on who was nominated, co-opting foreign candidates based on brand and country relevance and on a political assessment of their individual trade union credentials, experience and social dialogue profile.<sup>18</sup> Nevertheless, co-option did not imply political accountability to IG Metall: tellingly, the newly appointed representative stated he would defend Seat workers in Spanish and Portuguese plants (Tejero 2021), confirming the plant competition reported in the automotive manufacturing sector (Hancké 2000; Fetzer 2008).

Opening large paritarian supervisory boards to one foreign trade unionist seems more of a symbolic gesture than a significant step towards making BLER a transnational institution in which collective identity or solidarity could develop across borders. Non-German employee interests remain too isolated in what are markedly German corporate and cultural contexts in terms of ownership, corporate governance and industrial relations. The bias in favour of German workers' interests has proved decisive in past transnational restructurings in Volkswagen (De Munck and Ferreras 2013: 404-405) and

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16. IG BCE also introduced a foreign trade unionist in BayerCropScience (Windbichler 2005), but there is no confirmation that the arrangement is still in force. In coherence with the focus of this research on regulation and practice in MNCs governed by national law, expressly excluded here are cases of transnational BLER in German SEs, which amounted to at least 48 in 2017, as analysed elsewhere (Lafuente Hernández 2019).

17. For a detailed history of the DaimlerChrysler case, see Dinh (1999).

18. IG Metall's criterion was not only the geographical distribution of the workforce: in 2019, Seat counted fewer employees (15 000) than Skoda (35 000) but still got a member in the supervisory board; on the other hand Scania did not operate only in Sweden when it got a BLER seat in the supervisory board of Volkswagen AG, which complicates the picture of what 'fair' employee representation could mean in such a case.

involving one foreign representative seems unlikely to revert such established path-dependent dynamics. In Volkswagen, the pressure on the company's institutional configurations (Whittall et al. 2017: 400) and on German codetermination following the 2015 scandal of manipulated emissions tests (Elson et al. 2015) might well have played a role in the imminent replacement on the supervisory board of a resigning IG Metall member by a Swedish representative.

In conclusion, voluntary political arrangements between German and foreign trade unions were rare, limited, not automatic and rather unstable, mostly explained by idiosyncratic circumstances linked with restructurings, the specific distribution or concentration of the foreign workforce and cross-border trade union partnerships. The initiative came from German trade unions, at a political cost to them. Theoretically, at best three seats could be offered to foreign representatives but always depending on electoral ratification by the German workforce.<sup>19</sup> Workers from foreign subsidiaries still cannot participate in elections. The status and protection of foreign employee representatives and candidates remain uncertain as German rules are not binding abroad.

Under such conditions, transnational BLER seems only conceivable where consolidated social dialogue exists in a foreign subsidiary and the foreign representative is already a trade union official or employee representative with protections granted by her local labour laws. German trade unions thus conduct careful preselection, acting as the gatekeepers of BLER transnationalisation. Symptomatically, the currently recorded EWC agreements in neither Volkswagen nor Daimler include a reference to BLER (ETUI 2021b), indicating the procedures were not negotiated with the European sphere as a reference.<sup>20</sup>

## 4.2 Sweden: BLER 'Scandinavianisation' as a condiment of Nordic capitalist projects

In Sweden, the right of workers to demand employee representation on corporate boards was legally established in 1976,<sup>21</sup> long before Sweden entered the EU (in 1995). This legislative intervention was exceptional in a system that

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19. A lack of electoral support prevented the transnational composition of BLER at Deutsche Telekom where the German union ver.di had nominated a representative of the Communications Workers of America (CWA) (Windbichler 2005: 521).
  20. Volkswagen's EWC agreement predated the establishment of transnational BLER although DaimlerChrysler renegotiated its agreement later, in 2010. In both cases, negotiations could have taken place when the decision to transnationalise BLER was adopted, giving rise to addendums or discussion about a potential EWC role in appointing or nominating non-German representatives to the supervisory board. Yet, this was not the case according to this research study.
  21. Law 1976:351 on employee representation on boards of companies and economic associations, and Law 1976:355 covering banks and insurance companies, derogated by Law 1987:1245 on board representation of private-sector employees as in force.

has usually relied on consensual dialogue, employee participation practice and union influence at workplace and company level (Movitz and Palm 2018). The law set an escalator rule. In companies with at least 25 employees, employees are entitled to two representatives on the board with voting rights and two substitutes to participate in board meetings; in companies active in more than one industry and/or with at least 1000 employees, three board level representatives and three substitutes are to be appointed, without ever reaching a majority of seats (Rose 2008: 224). When the company is a parent of a group, group employees are counted in the thresholds and represented by employee representatives sitting on the parent board (Fulton 2021). The law has remained silent regarding workers from foreign subsidiaries but, conversely to Germany, no restrictive national case law has prevented their inclusion in the participation system or in the employee thresholds.

Historically, BLER was not a priority in Sweden compared to local negotiations on wages, working conditions and job protection (Mulder 2017b: 279) and unions did not push for it in the public debate, despite options for legal improvement (Movitz and Palm 2018). The reasons are at least twofold. First, BLER is not automatic in Sweden. Local unions have to demand it, which implies in practice a cost-benefit evaluation on their side. Second, employee representatives are legally excluded from board meetings or committees when the issues being discussed concern regular management affairs or when they conflict with the union's interest in collective bargaining or strikes. Thus, unions often prefer not to establish BLER, exchanging it instead for other benefits (Skog and Sjöman 2014: 266), as the steady decline in BLER numbers in Sweden suggests (Hagen 2020: 64).

Board-level employee representatives and their substitutes receive their normal pay as employees : additional board remuneration is a rare exception. Representatives are, however, given the necessary paid time-off to prepare for board meetings in their normal condition as employee representatives (Fulton 2021).

Transnationalising BLER runs against the tide given the pivotal role played by local trade unions, much more so in Sweden than in other Nordic countries. The so-called Swedish 'trade union connection' (Levinson 2001) is based on a strong and broadly accepted single-channel model in which unions are recognised as holding a monopoly on employee representation at the workplace and on company boards (Movitz and Palm 2018). It is the local union, bound by a collective agreement with the company, which decides whether or not to install BLER in a company or group, who to appoint and how to do so – for example, directly by the local union or by election at union meetings, councils, committees or among affiliates (Levinson 2001: 270). In brief, establishing a transnational BLER in a Swedish group requires a proactive role and the acquiescence of local unions who are, however, less likely to have a cross-border vision of the MNC and worker representation, as well as of union networks, in comparison to national union confederations.

Yet, two cases have been identified in the Swedish aviation and banking sectors in which BLER has been internationalised: Scandinavian Airlines System (SAS); and Nordea.<sup>22</sup>

SAS, one of the ‘multi-flag’ airlines that proliferated in the second half of the twentieth century, remained for a long time state-controlled in an otherwise generally liberalised and privatised global civil aviation industry.<sup>23</sup> Headquartered in Sweden, SAS resulted from a consortium between Sweden, Denmark and Norway in the early 1950s. This three-country ownership was reflected in workforces, management positions, investment distribution and a multinational board composition (Amankwah-Amoah et al. 2017; SAS 1957-1960). Today, the board counts 11 members, three (plus two deputies each) of which are employees elected by the corresponding employee organisations in Sweden, Denmark and Norway, in correspondence with each country’s legislation and in line with a historical agreement (SAS 2016-2019 and SAS 2020: §6). The transnational BLER experiment here is thus constrained to the Nordic countries involved in the consortium and results from the distribution of national political interests and an active corporate strategy since the late 1990s to stamp Scandinavian culture and identity as an asset when competing in the global market (Amankwah-Amoah et al. 2017; Marklund 2017).

As for Nordea, it was one of the first to announce its conversion into an SE in 2004 although ultimately this never happened due to difficulties with transferring national deposits and banking liabilities (ILO 2004; Keller and Werner 2008: 172; Patra 2009: 184). Nordea is a unique pan-Nordic corporate structure known for its strong cross-national union cooperation via a Group Council including representatives from the different countries, a union umbrella body (the Nordea Union Board) and a sort of EWC called the ‘Nordea Forum’. In 1998, when the Finnish and Swedish banks Merita plc and Nordbanken Holding AB (publ) merged into MeritaNordbanken plc (later Nordea), the local unions – supported by their national unions – negotiated a cooperation agreement with central management so that employee representatives from countries where the bank operated could have a seat on the board. Thus, transnational BLER was established in Nordea before the SE Directive was even adopted.

At first, BLER counted one representative from Sweden and one from Finland (MeritaNordbanken 1998) but, following successive restructurings, Danish and Norwegian representatives were added so that, in 2002, three full members and one rotating deputy represented all four Nordic countries (Nordea 2000-2002 and Nordea 2016). Nordea moved its seat to Finland in 2018, but the BLER system was retained by agreement between a Special

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**22.** According to Dinh, Ford’s purchase of Volvo’s automotive facilities did not lead to any union arrangement on BLER internationalisation because the operation was a transfer of assets and not a merger (Dinh 1999: 995).

**23.** Today, SAS is only partly state-owned, with only 43% of shares and voting rights belonging to the four Nordic states. See <https://www.sasgroup.net/investor-relations/the-share/shareholders/>



Negotiating Body and management in the application of the transposed EU cross-border merger rules on employee participation (Nordea 2017; Nordea 2020: 49). However, the Finnish law is less protective of BLER than the Swedish so a loss of rights could follow in the future.<sup>24</sup>

In conclusion, local trade unions do have the possibility to reach arrangements with management and foreign unions, but BLER transnationalisation is only an exception in Sweden. When it has occurred, it responded more precisely to a BLER ‘Scandinavianisation’ than to a Europeanisation: it was established as an identity condiment to very specific Nordic corporate strategies aimed at competing better in the global market, in line with the Nordic approach identified in studies on transnational union cooperation and action (Larsson et al. 2012).

### **4.3 Norway: The world as a space to negotiate BLER in transnational groups**

In Norway, BLER rights were legally established in 1972.<sup>25</sup> In companies from 30 to 199 employees, a majority of employees must support a demand to install BLER (by vote, signatures or the representative local union) before being entitled to appoint either: 1) one representative and one observer, in companies between 30 and 50 employees; or 2) one-third of board members, but never less than two members (even on a five-member board), in companies with more than 50 employees. In companies of over 200 employees, employees are directly entitled to elect one-third of board members without a prior vote,<sup>26</sup> which can explain the higher BLER coverage in large companies than in small ones despite an observed low interest and decrease in implementation rates (Hagen 2015: 85; Hagen 2017; Hagen 2020: 64; Lekvall 2014: 78). BLER in this category of companies is compulsory and automatic, an exception in Scandinavian countries (Hagen and Mulder 2013: 141). BLER usually emerges in companies with a pre-existing functioning social dialogue (Hagen 2016: 18) and involves local unions, although they do not have exclusive representation rights. Worker directors have the same rights and obligations as any other board member.

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**24.** This case deserves deeper longitudinal analysis evaluating the impact of cross-border corporate mobility on BLER.

**25.** Law No. 44 of 13 June 1997 on private limited companies (Articles 6.4, 6.5 and 6.35) and Law No. 45 of 13 June 1997 on public limited companies (Articles 6.4, 6.5 and 6.37) contain the main provisions in force with their respective implementing regulations. Similar norms exist for the public sector.

**26.** In theory, the election corresponds to a corporate assembly composed of shareholders and one-third employee representatives, but management and trade unions usually agree not to establish such a corporate assembly. Election rights pass to the whole workforce which gains one additional board member and two observers in compensation (Fulton 2021; Knudsen and Norvik 2014: 210, 233-234). In practice, the candidates of local trade unions representing more than half of the workforce and acting in concert are more likely to be elected (Evju 2002: 7).



In terms of BLER transnationalisation, the Norwegian institutional channel is permissive. Management and employees<sup>27</sup> can negotiate with great autonomy<sup>28</sup> in setting a BLER system at group level. If such a group arrangement exists, the group BLER system automatically covers the parent company and the subsidiaries it controls all over the world without distinction. The employees of Norwegian subsidiaries do not then elect representatives to the board of their subsidiary, but instead participate in the election of the parent company board representatives (Hagen and Svarstad 2021: 14). Employees of foreign subsidiaries or branches have full rights of involvement in the group participation system, even beyond EEA countries: they can vote and be eligible for the Norwegian parent company board (Mulder 2017a). However, since 2018, management and employees are entitled to agree on the exclusion of some (foreign) subsidiaries from the arrangement without the obligatory intervention of the Industrial Democracy Tribunal (Hagen 2016: 5). The current Dispute Resolution Board will only intervene and decide if they disagree on the scope.<sup>29</sup>

In unique research, Hagen has examined how and to what extent transnational group arrangements had been implemented (Hagen 2016), especially since they were expected to increase after the legal change in 2014 (Hagen and Mulder 2013). However, not all Norwegian groups have negotiated group arrangements and certainly not all have transnational operations, so Hagen singled out 24 Norwegian groups fulfilling both criteria (i.e. BLER group arrangement and transnationality) from an estimate of 5000 groups of over 30 employees which had foreign subsidiaries.<sup>30</sup>

Hagen found that group arrangements were usually triggered in the context of restructurings where the foreign workforce or ownership were significant, and sometimes at managerial initiative. Transnational group arrangements could still discriminate against foreign subsidiaries but, quite simply, the requirement for Tribunal approval since 2014 made this harder. This may, however, have shifted after the latest legal changes. Quite tellingly, Hagen observed that those groups choosing to cover only some foreign subsidiaries in their group arrangement tended to be unionised and also to include Nordic

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27. Generally the local union or, if none is present, a majority of employees (Hagen 2016).

28. Regulation No. 850 of 20 June 2014, later amended by Regulation No. 1277 of 24 August 2017.

29. The Industrial Democracy Tribunal (*Bedriftsdemokratienemnda*) had a historical role in the system: based on social partnership and governed by the Ministry of Labour, this institution had originally to ratify group arrangements. Then, its role was reduced to doing no more than approving exemptions and finally, since 2018, in view of the declining number of disputes before the Tribunal and the political will to increase the autonomy of local parties (Ministry of Labour and Social Affairs 2017), its remaining dispute resolution competences were transferred to the Dispute Resolution Board (*Tvisteløsningsnemnda*), governed by the Working Environment Act.

30. See Hagen (2016) for the detailed methodology. Boards with fewer than five members were discarded from her sample (i.e. with fewer than two employee representatives) to isolate cases where BLER could involve two different nationalities. However, a BLER with one single member could also entail a transnational dimension provided that all workers across the group participate in the election to grant her a transnational mandate.

subsidiaries while those including foreign subsidiaries without distinction had no union presence. Actually, nearly half of the 24 cases had no trade union presence, suggesting that unions are not necessarily facilitating transnational negotiations. In previous research, Hagen and Mulder had already identified 15 of these Norwegian groups with transnational BLER,<sup>31</sup> noting that ‘most of these companies have weak trade unions or none at all’ (Hagen and Mulder 2013: 154).

This leads to a discussion of the role and capacity of trade unions. Seemingly, they have not always been proactive in establishing transnational group representation either because of the lack of a global perspective or a lack of interest in or a resistance to involving foreign subsidiaries indiscriminately, fearing a loss of control over BLER politics. The herculean task of negotiating and implementing BLER transnationally requires ‘strong trade unions or enthusiasts in Norway’ (Hagen 2016: 9-10), with sufficient resources and contacts across borders to organise transnational elections. Also, local trade unions may consider that giving up a seat outside Norway weakens labour’s position. From that rationale, they may prefer leaving it to headquarter representatives with privileged access to information and influence (Hagen 2015: 93; Hagen 2016: 15, 16), who can act as ‘advocates for the diaspora’ (Kotthoff 2006). They may also prefer to include only those foreign subsidiaries with a well-established social dialogue, strong trade unions and local protections for employee representatives, and with which they have a cultural connection or a history of collaboration.

Overall, trust and the expectation of continuity in BLER dynamics seem the key factors over which insiders prefer the strategic preselection of their possible partners in the workers’ seats. This echoes union rationales observed in the Swedish and German cases.

On the other hand, foreign employees and unions are not in a position to promote the process, given their limited knowledge of Norwegian rules and access to central management. To illustrate, Hagen found only one case where the initiative came from foreign employees, while EWCs were not even discussing the issue of BLER group arrangements in the cases concerned (Hagen 2016: 16). This reveals a gap in articulation between arenas of employee representation in transnational groups. While at national level BLER seemed connected to an already functioning social dialogue in the company, BLER at transnational level has no equivalent industrial relations framework from which to emerge (Hagen 2016: 18). Yet, central managements seem increasingly interested in promoting group arrangements, even when this implies installing transnational BLER (or perhaps precisely because of that). Hagen could not ascertain a managerial strategy to weaken pre-established local trade unions but, as she points out, it is not ruled out that transnational

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**31.** Namely Orkla, EDB Ergogroup, Rocksource, Roxar, Datarespons, Pronova BioPharma, Imarex, Nordic Paper, Kraft Foods, Norwegian Energy Company, Veritas, Component Software Group, Fast Search and Transfer, Andvord Tybring-Gjedde and Moelven.

group arrangements have indirect effects in terms of preventing local unions from controlling BLER systems in the future.

Finally, how are BLER electoral procedures implemented in these transnational cases? In Norway, once a group BLER system is set up, a local election board composed of management and employee representatives decides how to run the elections and how to divide constituencies across the transnational group, as well as the practicalities of the voting (e.g. whether or not to establish electronic voting, which is possible under the Norwegian system) according to specific provisions.<sup>32</sup> Foreign electoral rules can apply where foreign constituencies are established, but Hagen's study reported frequent technical difficulties in implementing electoral processes abroad, as well as disputes over seats between trade unions from different countries (Hagen 2016: 13).

To conclude, the institutional path to making BLER transnational seems more developed in Norway than in other countries. Even so, the permissive institutional framework is not exempt in practice either from challenges or from uncertainties regarding local unions and foreign workforces, and the findings from Hagen's studies call for caution when evaluating empirical implementation. The transnational BLER cases have developed independently of Europeanisation dynamics: they have rather followed the cross-border geographical configuration of corporate groups, as defined by negotiations between management and local unions, often with a Nordic preference.

#### **4.4 Denmark: BLER Europeanisation in shareholders' hands**

In Denmark, BLER rights were introduced in 1973<sup>33</sup> after an intense public debate on workplace democracy. With EU integration on its way, conservatives feared that Denmark would be forced to adopt a parity codetermination system similar to the German one so they accepted a formula in which unions were formally kept out of appointment procedures (Rose 2008). The Danish industrial relations system is strongly based on social partnership; consequently, rooting BLER in hard law kept it separate from other levels of workplace interest representation, especially cooperation committees and unions (HBS 2017).

As with small and medium companies in Norway, the right to install BLER is not automatic but must first be demanded by 10 per cent of employees or equivalent trade union representatives, then obtain the support of most

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<sup>32</sup>. Regulation No. 1277 of 24 August 2017.

<sup>33</sup>. Law 371 of 13 June 1973 on public limited companies, revised by Law 470 of 12 June 2009 on public and private limited companies (Companies Act) (Articles 140, 141 and 142) and by Edict No. 344 of 30 March 2012 on employee representation in public and private limited liability companies to regulate voting procedures.

employees in a preliminary ballot. Only then can elections be organised by and among employees to elect board representatives. The gap between BLER and workplace representation and the complex three-step procedure explains why, except in large industrial companies, employee representation on Danish boards is less frequent than could be expected (Hansen and Lønfeldt 2014: 150; Gregoric and Poulsen 2017). Again, unions need to be well organised at group level and to evaluate whether the potential gains provide sufficient compensation for the effort to start the process (Fauerholdt 2014). In Danish public and private limited companies with at least 35 employees, employees can elect representatives and alternates for up to one-third of the board on the basis of at least two members (or three, if BLER is at parent company level). The representatives have in principle the same rights and obligations as other members but, as in Sweden, they cannot take part in decisions directly concerning workers' interests (Fulton 2021).

Since its transposition of the Cross-border Mergers Directive, Danish law has made it possible to include in the BLER system any subsidiaries and branches located within the EEA (Mulder 2017a). Indeed, the definition of 'employees' for the purposes of BLER (Articles 140 and 141 of the Companies Act) includes those from foreign branches and subsidiaries. However, according to the Danish Business Authority (2011), they are not counted in employee thresholds or as part of the 10 per cent of the workforce entitled to demand BLER in a Danish group: only the workforce within Denmark can decide to install BLER in an initial ballot. Then, it is for shareholders in their general meeting to decide whether, and which, foreign subsidiaries in EEA countries can be included in the system, regardless of the opinions of labour (Köstler 2017: 4). This is a condition for employees from foreign subsidiaries to be entitled to participate in elections.

The applicable electoral procedure (Edict 2012, Paragraph 48) establishes that the workforce in Denmark retains at least one BLER seat, or two if the Danish workforce exceeds 10 per cent of the group total. Similar to Norway, an election committee composed of management and employee representatives is in charge of organising the elections but this can be appointed either by a cooperation committee with a union presence or by management (Fulton 2021). The independence of the elections has been called into question (HBS 2017) given the decisive roles played by the general shareholder meeting and by management.

Only two cases of BLER Europeanisation have been recorded in Denmark, both at Grundfos group.<sup>34</sup> The Danish company Grundfos A/S already had BLER installed at local level before two new group BLER systems involving

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**34.** According to testimony from CO-industri, the Danish Business Authority does not have a register but has not received questions from any company on how to implement these rules, which indicates their very infrequent use. Hagen and Mulder (2013: 155) allude to Carlsberg as an example of where foreign (i.e. Scandinavian) employees were included in a group arrangement for board participation. However, we could not find more information in the literature or on Carlsberg's website and in its annual reports.

foreign subsidiaries were set up in 2012, namely at Grundfos Holding and at the Poul Due Jensen Foundation. Each of these two boards has 12 members, four of which are elected by employees. Foreign representatives occupy one seat in the holding company and two in the Foundation<sup>35</sup>. All three were elected among and by EU/EEA-based employees of the Grundfos group, while their Danish colleagues sitting in the same boards were elected among and by the Danish workforce (Grundfos 2012-2020).

In the context of a major group restructuring exercise, management informally suggested establishing two BLER systems at the top of the structure, also involving foreign subsidiaries, and Danish local unions supported the idea. Danish employees agreed in the preliminary ballots, a general shareholder meeting agreed that the EEA subsidiaries should be covered (at the board's recommendation) and then two election committees were appointed, one for each board election. Online voting was organised on the group's intranet in Europe, in which all employees could vote, campaign and run for election following the same Danish rules.

The procedure has raised legal questions. According to international law, national electoral rules should apply in each country and electronic voting – although admittedly efficient for transnational group elections – is not constitutional everywhere,<sup>36</sup> especially not when implemented by management. Surprisingly, the EWC established at Grundfos did not play any role in the process and local unions have identified other problems: foreign BLER representatives did not always have equal access to the resources to fulfil their new role adequately (e.g. time-off, union connections or translation). Not all members speak English and so language issues may cut off shopfloor representatives from access to the board. All in all, unions did not consider the experience as a success, according to respondents interviewed for this research.

Finally, Danish law does not entitle board members to remuneration but, if the general shareholder meeting fixes remuneration for board members, this also applies to employee representatives as they have the same rights and obligations. According to Danish case law, remuneration can be different if justified by differences in the amount or type of work (Krüger Andersen 2004: 19). From our research, however, it could not be determined whether policies existed on the transfer of such resources to unions or how these

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**35.** The representatives are from Germany in the holding company, and Germany and Hungary in the Foundation.

**36.** The judgement of 3 March 2009 of the German Constitutional Court (Bundesverfassungsgericht, Docket Nos. 2 BvC 3/07 & 2 BvC 4/07) considered the Federal Voting Machine Regulation (Bundeswahlgeräteverordnung 1975) unconstitutional for not requiring transparent control mechanisms to grant the accuracy of vote counts in electronic voting in the 2005 federal elections. In this direction, while the rules were amended during the Covid-19 crisis to allow works councils meetings by phone or video (e.g. new §129 on the Betriebsverfassungsgesetz), the DGB preferred to postpone supervisory board elections rather than conduct them by post or electronically (Sick and Gieseke 2020).

might have affected foreign employee representatives in transnational BLER situations.

In brief, despite the regulatory opportunity to open up BLER in Denmark to foreign subsidiaries, the option is underused and limited, partly due to the flaws in the Danish BLER system itself. Although the framework has, in a number of ways, been influenced by Europe and refers to subsidiaries in the EEA, it does not secure a Euro-democratic type of process in BLER transnationalisation in line with Erne's analytical framework, as explained in Section 1. Full protections and guarantees are not provided in the process.<sup>37</sup> The activation of rights depends on the Danish workforce – who always retain at least one seat, irrespective of electoral preferences or workforce distribution – and the general shareholder meeting ultimately decides on the cross-border scope for BLER. Extreme efforts are required from labour to coordinate transnationally and with no evident successes.

#### **4.5 France: a new role for European Works Councils decided by shareholders**

BLER rights were recognised for several decades in French state-owned and privatised companies<sup>38</sup> before being extended to French private companies with at least 1000 employees in France or 5000 worldwide.<sup>39</sup> However, BLER is still regarded with caution by some trade unions and has historically taken a secondary position in the French employee participation system compared to collective bargaining or the provision of information and consultation (Géa 2020: 106).

Since 2013, large French public limited companies have been legally obliged to have one employee representative with voting rights on the board, or two, depending on board size.<sup>40</sup> A sustained academic and political debate on corporate reform had led to such an *acquis*, building a strong case for employee involvement in corporate governance (Beffa and Clerc 2013; Conchon 2014; Favereau and Roger 2015; Notat and Senard 2018; Segrestin and Vernac 2018; Crifo and Rebérioux 2019; Rehfeldt 2019; Bourgeois et al. 2021).

BLER in the private sector came together with the possibility of BLER transnationalisation. The worldwide workforce had to be taken into account to

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37. Ironically, the Danish Business Authority provided global capital investors with an English translation of the Danish Companies Act but did not translate Edict 2012 or the 2011 Guidelines which are key to running BLER elections in multinational Danish groups operating in the EEA.

38. Law 1983-675 of 16 July on the democratisation of the public sector.

39. Law 2013-504 of 14 June on safeguarding employment, modified by Law 2015-994 of 17 August on social dialogue and employment.

40. See Auzero (2013) and Koehl (2020: 239) for detailed analysis and the scope of application of BLER rules in the French private sector.



reach the thresholds for BLER rights and a general shareholder meeting had the right to decide on the appointment of BLER members from among four legal modalities:<sup>41</sup> 1) staff elections in France; 2) appointment by the French (group) works council; 3) appointment by the most representative trade union organisations in the social elections in France; or 4) appointment of a second representative (among employees in France or abroad) by the EWC or SE-WC while the first member remained subject to election or appointment via any of the previous channels. In other words, the general shareholder meeting could rely on a European institution of employee representation, if present, to grant a European mandate to the second BLER member in large French MNCs. While such a role is typical in SEs with BLER, the EWC Directive did not foresee EWCs appointing BLER members in ‘regular’ MNCs.

A recent legal change<sup>42</sup> has broadened the sample of companies for which this fourth modality of appointment has been possible. Groups with BLER obligations must now appoint two board-level employee representatives when their board is over eight members (instead of 12, as before), excluding worker representatives. The ETUI conducted systematic research on 132 French companies with EWCs/SE-WCs (ETUI 2021b), collecting and analysing data from corporate websites, official statutes (Infogreffe 2021) and EWC/SE-WC agreements on a series of variables<sup>43</sup> to examine how far EWCs/SE-WCs were involved in appointing BLER members and what implications this novelty entailed.<sup>44</sup>

The findings indicate that French MNCs were interested in this fourth modality: when a second BLER member had to be appointed and an EWC was present, companies generally preferred to rely on the EWC than on other options. EWCs tended to appoint foreign (sometimes non-European) representatives instead of French ones, although technically they could opt to grant a ‘symbolic’ transnational mandate to a French representative.<sup>45</sup>

The ETUI’s study reveals a process of BLER Europeanisation in France which also introduced uncertainties and tensions into the system. EWCs

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**41.** Article L225-27-1 of the French Commercial Code. The company’s statutes must reflect the chosen modality. Such ways of appointment do not apply to companies with BLER rights established by previous laws applicable to the public sector, privatised companies or according to voluntary BLER in the private sector. In those cases, staff elections in France remain the rule. See Lafuente (2022).

**42.** Law 2019-486 of 22 May 2019 on the growth and transformation of firms; the so-called ‘PACTE law’.

**43.** For a detailed account of this empirical research and its methodology, see Lafuente (2022).

**44.** For the comparative purposes of this Paper, French SEs are excluded from the statistics to keep the focus exclusively on MNCs governed by national law, as in the other country cases. Thus, only French cases involving EWCs are considered.

**45.** In the sample of 132 French companies, 41 cases involved either an EWC or an SE-WC in the appointment of the second BLER member, but only nine were SEs. So, 32 companies did grant this role to an EWC aside of any influence of the SE Directive transposition rules. Of these 32, the nationality of the second BLER member could be identified in 21 cases and 16 were not French: nine were from countries with codetermination traditions and seven from countries without, including Canada.

rarely anticipated their new role or negotiated on it. In only a few exceptional cases did agreements address the issue, most often in SEs as they are bound to include provisions on employee involvement.<sup>46</sup> Sometimes, minutes of meetings or the internal rules of procedure of the EWC or the board of the company treated the issue in less formal ways. According to interviews with representatives, management was often proactive in setting *ad hoc* procedures to appoint the second BLER member, suggesting candidates or taking part in their preliminary selection to ensure their ‘fit’ to the requirements of the board. This can be explained by an urgency to comply with the PACTE law’s tight deadline of six months to appoint a second BLER following the general shareholder meeting which had modified the company statutes. It has often been hard for trade unions to find candidates, too: French law obliges BLER members to resign from other representative mandates in the company, reducing options for nominating experienced representatives and creating problems of replacement elsewhere. Managerial proposals were often accepted as a pragmatic way out of these problems and of political cross-border competition for the seat.

Moreover, EWCs had generally been caught off guard. They lacked information (especially foreign representatives) about the possibility of appointing a BLER member. In some cases, French representatives were sceptical of BLER and had not previously pushed for it, so it was EWC involvement that triggered the instalment of BLER, allowing domestic and foreign representatives to experiment with it at the same time. In other cases, French representatives were reluctant to give up an existing BLER seat to a foreign colleague: management could deprive ‘uncomfortable’ French trade unions from their role in appointment by giving it to the EWC. Finally, companies generally forced the new foreign BLER members to quit other representative mandates including those outside France, a broad interpretation which is not supported by literal and systematic interpretations of the law (Vernac 2022) but which reveals a pervasive managerial mistrust of the role of employee representatives on the board. Case law has not clarified the cross-border application of the prohibition on combining mandates under French law, but foreign representatives have not usually contested managerial interpretations either: they have generally accepted their new role with prudent curiosity under the conditions imposed, awaiting opportunities to learn and act in the future.

To conclude, French national law has devised a unique institutional route to transnationalise BLER: not only do the thresholds on mandatory BLER take account of employees worldwide but the general shareholder meeting can make the EWC/SE-WC responsible for appointing a second (French or foreign) BLER member, a legal option that has been actively used by companies and EWCs mostly to appoint foreign representatives. However, EWCs have been underprepared for their new role.

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46. Out of the 60 EWC/SE-WC agreements analysed, only 10 had established BLER with five of them being SEs even though the larger sample only included nine SEs in total.



The expanding BLER Europeanisation observed in France is largely dependent on shareholder decision and the influence of management which, all too often, has retained the upper hand in the process of the selection of candidates and in the dynamics of the board. This has been favoured by an institutional framework in which BLER members are cut off from other representative mandates in the company, have very minor levels of representation and face both a determining role of shareholders and a prevalent culture of mistrust.

## 5. Transversal comparative findings

The countries examined in this Paper articulate transnational BLER in varied and complex institutional ways, revealing significant path dependencies. The historical point when codetermination laws were adopted, the differences in legal systems, industrial relations and codetermination, and the position of actors and of national economies within the global and EU integrated market explain such diversity and how the discussion on transnationalisation has been framed. Section 5.1 presents the findings from a comparison of national institutional frameworks followed in Section 5.2 by a comparative analysis on their implementation and the implications for actors.

### 5.1 Diverse institutional frameworks

Following Hagen's analytical framework (Hagen 2016: 4), the routes for BLER transnationalisation vary according to the institutional foundation of the BLER system at company level (i.e. how BLER has been established and its scope decided) and of the BLER mandates (i.e. who are the representatives and how they are appointed). Both aspects can be rooted in collective agreements, laws, voluntary choice or a combination of regulatory sources, depending on diverse and hard-to-dissect intertwined institutional conundrums at country level. The thresholds and conditions for access to BLER rights vary, as do the number or proportion of the worker directors and actors involved, as well as the level and form in which they may intervene (i.e. they may decide on the installation of the cross-border BLER system, the method of appointment and/or the specific members appointed).

In Germany and Sweden, the transnational scope of BLER bears the unilateral political decision of (national or local) trade unions, meaning that the whole framework clearly gravitates around the national or local level respectively, whereas in Norway it depends on negotiation between employees or local trade unions and central management to set a by default cross-border group arrangement in MNCs. There, the transnational scope of the group more easily becomes the level of reference – although it is up to the local actors to select a more constrained, yet still cross-border, territorial scope if they so desire. Europe seems rather absent from these three frameworks as an explicit level of regulatory reference. In the other cases, the employer ultimately decides whether, and which, EEA foreign subsidiaries are included in the group BLER system (in Denmark) or whether the EWC shall appoint one BLER member (in France). The EEA scope is an explicit institutional option left in the hands of

the employer, particularly in Denmark whose EU adhesion and transposition of EU corporate law significantly shaped the domestic regulation. Table 2 summarises these comparative findings.

Table 2 Routes towards transnational BLER in MNCs according to institutional frameworks, by country

Country:		Germany	Sweden	Norway	Denmark	France
Decisive level intervening:		HC (national)	HC (local)	Global	EEA	EEA
System	Pre-condition	Reserved TU seats (i.e. parity-based supervisory board)	Company collective agreement binding local TU	Trigger by HC employees	Trigger by HC employees + ballot	2 board seats for employees (i.e. board-size > 8) + an EWC exists
	Actor deciding on transnational scope	HC national TU	HC local TU	Management and employees (or TUs)	GSM	GSM
Mandates	Way of appointment	Co-optation (i.e. TU nomination ratified in HC elections)	Co-optation	Elections, organised by local election boards between management and employees, according to national regulations	Process ran by management and employees as negotiated (no legal procedure) + foreign regulations	EWC appoints 1 member
	Actor appointing	HC national TU + HC workforce	HC local TU	Group employees	Group employees (management decisive)	EWC
	Number or proportion of 'foreign' seats	1 up to 3	1 up to 3	1 up to 1/3 (max. 4)	1 up to 2 or 3 (HC is granted 1 or 2)	1 (HC is granted 1).
Implementation	Companies identified	VW DaimlerChrysler	SAS Nordea	24 (e.g. Orkla, Roxar, Veritas, Nordic Paper, Kraft Foods, etc.)	Grundfos Poul DueJensen Foundation	42 (e.g. Alstom, Veolia, etc.)

Note: HC – home country; TU – trade union; GSM – general shareholder meeting.

Source: Author's elaboration based on Hagen (2016) and own legal analysis.

No national legislation in the countries considered here explicitly excludes foreign subsidiaries or branches from participation systems, even though they do not explicitly include them either (Mulder 2017a: 98). In that sense, none could be accused of being directly discriminatory or protectionist. Rather, it is the interplay between international private law rules, the lack of an EU regulation and the risks of regulatory uncertainty that explains the narrow interpretations of the national courts and actors which have often constrained BLER to the jurisdiction of the headquarter country.

Furthermore, none of the systems offers fully transnational solutions or is in a position to secure equal representation to foreign and domestic workforces.

National frameworks cannot be enforced abroad so fail to grant equivalent protections, resources and rights to foreign members exercising BLER functions on the parent company board although that would be key to an effective cross-border participation system. Additionally, some frameworks privilege the position of actors from the headquarter country (e.g. one BLER seat being reserved to the national workforce in France or Denmark), recognising the political relevance of labour retaining direct links with the centre of corporate power and the national jurisdiction in which BLER rights are rooted. This can be considered as an institutional leverage for workers' collective strength. Even the more inclusive Norwegian legislation relies on Norwegian actors and procedures to trigger BLER in MNCs.

## **5.2 Implementation and implications for power relations**

As is demonstrated here, despite the national institutional routes at hand – admittedly as diverse and incomplete as they are – BLER transnationalisation remains generally both underused and unequally used by actors. Even when frameworks explicitly refer to Europe, practice has remained at an experimental stage or has had dubious success.

In Germany and Sweden, the sole goodwill and proactivity of the national or local trade unions benefiting from BLER rights has seemed insufficient to generalise transnational BLER in MNCs. Where exceptional *ad hoc* political arrangements exist, these have been triggered by factors external to trade union policy or have otherwise proved unstable over time. Having domestic trade unions own and control the process favours more consensual involvement stories, but it has not secured long-term institutionalisation or access to all foreign workforces equally. In Norway or Denmark, the requirement to demand BLER, organise elections across borders and negotiate with management a (group) arrangement has often seemed too big a hurdle for local trade unions. In brief, regulatory uncertainties, political risks, cognitive barriers and a lack of organisational resources has discouraged trade unions from pursuing transnational BLER systems in these contexts.

When transnational systems have been established, the formal integration of foreign members has not necessarily meant equal recognition of their interests on the board. First, the power that foreign workforces can gain from participating in the parent company BLER may differ depending on board composition and the degree of employee representation therein. On German paritarian supervisory boards, where six, eight or ten board members represent employees according to the German Codetermination Act (§7(2)), labour's influence can be stronger but German interests will prevail if only one foreign member is represented. Such an imbalance as regards workers' seats is reduced where employees occupy only one-third of board seats – up to four (Thomsen et al. 2016) as in Scandinavian countries; or one or two as in France. Second, transnational solidarity is harder to pursue when domestic

and foreign representatives have uneven positions and opportunities to build coalitions on the board due to different channels of influence in their industrial relations systems and the distance from the headquarter location.<sup>47</sup>

Finally, the diversity of remuneration policies deserves specific attention given their sensitivity and implications for BLER transnationalisation. In Nordic countries, even if the rights and obligations of board-level employee representatives are generally similar to those of other board members, board remuneration is known to be relatively modest (and even absent in Sweden) compared with other countries (Lekvall 2014: 86; Thomsen et al. 2016). This, together with the central role of local unions in the participation system, could explain the apparent lack of a centralised trade union policy on resource transfers or a discussion on the potential impact of remuneration on workers' independence. In contrast, trade union confederations in Germany and France show an explicit concern regarding board remuneration with a view to keeping worker directors' independence of management as well as union discipline. While remuneration on German boards is high and systematic, French companies generally, although not mandatorily, offer substantial yet lower remuneration to BLER members (i.e. so-called '*jetons de présence*' before the PACTE law renamed these as '*rémunération*': Coignard (2019)).

However, policies on resource transfers do respond to different models of trade unionism. As mentioned already, the German system traditionally centralises and organically coordinates transfers via the HBS and, in the cases examined, foreign representatives on German boards are assimilated to domestic representatives and have to commit to the same transfer guidelines. Conversely, in France, as a result of trade union pluralism, each trade union has developed independent guidelines for their unionised worker directors (e.g. CFDT 2017; CGT 2016: 6), leaving it up to foreign members and their unions back home to decide on potential resource transfers. One transfer policy is not intrinsically more transnational or egalitarian than another in its justification, but the French one can *de facto* result in some redistribution of financial trade union resources across borders.

In sum, transnational BLER in MNCs is found more often in Norway and France where national hard law promotes that option. The French route has proved the most effective in quantitative terms. It is also the one which provides EWCs with a potential role in appointing the second BLER member,<sup>48</sup> a role that employers seem to be encouraging. The EWC solution has the advantage of securing a European legitimacy to the BLER mandate while simplifying procedures as it articulates BLER within an already operative

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47. As observed by Dinh, the interests of domestic and foreign representatives are harder to align in what he calls 'trans-systemic' mergers where industrial relations systems based on collective bargaining and on codetermination collide and representatives cannot equally maximise their influence on company policy through their board involvement (Dinh 1999: 997).

48. No other case revealed a role for EWCs in appointing BLER members.

body of European employee representation. However, it is not a given how EWCs or trade unions should prepare discussions or set specific internal rules for selecting and appointing candidates and managing their mandate and remuneration in order that BLER Europeanisation is not instrumentalised by managements to interfere in an independent and legitimate collective voice of workers.

## 6. Discussion: imagining alternatives for BLER Europeanisation in MNCs

So far, no national framework depicts an exemplary model of BLER Europeanisation in MNCs – that is, one which encompasses two fundamental principles with which to consider BLER as an industrial relations institution with a European dimension: collective autonomy; and the political legitimacy of worker representation at EU level. Acknowledging the European dimension of social conflict, we suggest some possible avenues to stimulate and open up the *champs des possibles* for trade union action towards Euro-democratising employee representation on company boards.

A first avenue is EU legislation on codetermination (Article 153(1)(f) TFEU). Harmonisation has generally been discarded given the requirement for Council unanimity and decades of controversy and failed attempts to harmonise employee involvement in EU corporate law. The initial European Company Statute<sup>49</sup> and the so-called Fifth Company Law Directive<sup>50</sup> were the bones of contention in a project to impose two-tiered corporate governance structures with employee participation on supervisory boards on all public limited companies within the EEA. This was modelled on the German corporate governance system but was systematically rejected by the United Kingdom and Denmark and, later, by Spain (Seifert 2017: 342; Davies 2003; Gold 2010). The political context has of course changed since then: Brexit has eliminated a historical opponent of BLER while France, Spain and Italy today show growing interest in legislating BLER, as do some of their main trade unions despite a traditional opposition to codetermination. On another level, the European Parliament, whose legislative powers have increased, has recently passed a report on democracy at work calling, among other things, for minimum standards on BLER rights in European-scale companies (European Parliament 2021), in line with the ETUC's escalator proposal (ETUC 2016). The proposal does not intend yet to expand new rights across MNCs regardless of country or form of establishment and it is to be seen whether it will translate into concrete EU legislative action, but the event seemed unthinkable only a few years ago considering previous failed attempts (EMPL 2016).

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49. Proposal on the Statute for a European Company (OJ C, C/124, 10 October 1970).

50. Proposal for a Fifth Directive on the Coordination of Safeguards which, for the protection of the interests of members and outsiders, are required by Member States of companies within the meaning of Article 59.2 with respect to company structure and to the power and responsibilities of company boards (OJ C, C/131, 13 December 1972).

Harmonisation could indeed address different dimensions of the problem. Imposing homogeneous BLER rules on all MNCs in the EEA (even those within the scope of the EWC Directive and with an escalator approach) may seem politically improbable and could risk rejection by countries without codetermination traditions, certainly by influence of their employers. But a more feasible transnational avenue could well be to extend BLER rights across borders in companies which are already subject to group schemes according to their governing national laws, as is the case in the countries examined in this Working Paper. Also, reckoning the transnational (at least pan-European) scope of multinational groups as regards the determination of employee thresholds giving access to BLER rights under national laws would be a considerable step towards a more democratic Europeanisation of worker representation rights.

Additionally, national systems could adapt to cross-border corporate realities, ensuring the interests of foreign workforces and those in the headquarter jurisdiction are recognised and protected on a more equal basis. Such rules should apply across the EU, both to parent companies and the domestic and foreign subsidiaries concerned. In terms of content, they should address BLER members' appointment procedures, eligibility criteria, protections and resources such as training, time-off, interpretation during board meetings and the means to visit workplaces and meet with other worker representation bodies. In line with subsidiarity, EU rules could remit to national electoral procedures for worker representation and the protections existing in Member States to allow BLER members to fulfil their transnational mandates adequately. National legislators would also need to commit to supporting strong trade unions and the capabilities of worker representatives. EWCs (or their Special Negotiating Body as set out in the EWC Directive) could gain a new role in the appointment of BLER members, following the French example, contributing to the articulation of two key transnational arenas for worker representation and involvement in corporate policy while securing a democratic Europeanisation of board mandates in MNCs. The upcoming revision of the EWC Directive could be an opportunity to address this and secure pan-European certainty over procedures (EMPL 2022). An articulated EU institutional framework of upwards convergence would reassure trade unions familiar with BLER systems, minimising the potentially negative consequences of Europeanisation for the systems that currently exist, while also providing incentives to trade unions unfamiliar with BLER systems to make better use of their voice in transnational BLER.

Another essential aspect deserving exploration beyond this Paper are pan-European electoral rules. After a two-decade debate, the idea of a pan-European electoral district has gained momentum (van Hecke 2018; Verger 2018) and the European Parliament recently approved a proposal for a Council Regulation on transnational electoral lists in EU Parliamentary elections (European Parliament 2022). The proposal is not free of technical and political open questions and it does not resolve all the problems entailed by the making of a supranational democracy, but it is an attempt to move away from prevailing intergovernmental and federalist approaches to



representation and to emphasise ‘the supranational dimension of the single institution directly elected by citizens’ (De Castro 2022: 445-446) within the EU political system. This issue will be kept on the agenda after the Conference on the Future of Europe.<sup>51</sup> Considering the parallels between firms and political institutions depicted at length in democratic and political theory (e.g. Landemore and Ferreras 2016), could a similar proposal be eventually envisaged for the election of board-level worker representatives in MNCs? That could stimulate the creation of a European *demos* of workers while promoting the Europeanisation of trade union organisations within MNCs.

Which brings us to trade union action, strategies and policies as a second avenue of development in parallel with EU legislation. Trade unions could coordinate lobbying strategies towards transnational legislation on BLER, as mentioned. Crucially, however, they could do more to improve their political legitimacy, capabilities and ways of acting in transnational BLER systems. At normative level, deliberative processes could be organised to establish shared notions and guidelines on European mandates of worker representation, addressing the meaning of such a representative role and how to use it strategically in practice to get the most out of it in the defence of the collective interests of workers across borders.

At organisational level, trade unions could elaborate joint pan-European policies on board remuneration in MNCs in a similar vein as developed for SEs. Such a financial system could support the construction of a truly supranational trade union movement, favouring strategic action, training and planning on a cross-border basis and explicitly involving BLER in efforts to articulate worker representation in MNCs.

Next, trade unions could trigger discussions within EWCs to promote this body’s role in appointing BLER representatives via transparent and inclusive procedures. ETUFs and their global equivalents could also play a key role in nominating BLER members where transnational board mandates are at stake in MNCs but where there remains an exclusive institutional reliance on national or local trade unions. An exemplary precedent can be found in the collective mandating procedures originally developed by international trade union federations to deal with the different situation of transnational negotiations in MNCs.<sup>52</sup> This could secure trade union rights on those boards alongside the political legitimacy of the mandates of those exercising them. It would of course require a transfer of political power from local or national trade unions to their corresponding European or global federations, as

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51. Citizens’ Proposal No. 38 on democracy and elections included transnational lists; see Report on the final outcome of the Conference on the Future of Europe of May 2022, <https://www.europarl.europa.eu/resources/library/media/20220509RES29121/20220509RES29121.pdf>

52. See especially the pioneer EMF mandating procedure (IndustriAll-Europe 2021) and the accounts of its implementation contained in Müller et al. (2011), Prosecci (2015) and Rehfeldt (2015).

‘multi-level employee interest representation (...) operates through a converse arrangement in which authority is delegated upwards from the local level’ (Haipeter et al. 2019: 20). Although challenging, this is not unthinkable.

Finally, this potential role for European and global trade union federations is an appealing solution particularly in the context of the recent CJEU judgement of 18 October 2022, in the case *C-677/20 IG Metall and ver.di v SAP SE*.<sup>53</sup> In this case, the CJEU has recognised that trade union rights to nominate a proportion of candidates to an SE supervisory board via specific ballots is a non-negotiable element of the German codetermination system, deserving the full protections of the SE Directive in cases of SE transformation under German law.<sup>54</sup> Interestingly, however, the CJEU goes further in stating that such nomination rights belong to all trade unions represented on the SE, not exclusively German ones. Following the Opinion of the Advocate General,<sup>55</sup> the judgement of the CJEU is explicit:

48. (...) in so far as the securing of acquired rights sought by the EU legislature implies not only the preservation of employees’ acquired rights in the company to be transformed into an SE, but also the extension of those rights to all employees of the SE, all employees of the SE established by means of transformation must enjoy the same rights as those which the employees of the company to be transformed into an SE enjoyed.

49. It follows that, in the present case, all employees of SAP must be able to avail of the electoral procedure laid down by German law, even in the absence of any indication to that effect in that law. (...) The right to nominate a certain proportion of candidates for election as employees’ representatives within a supervisory board of an SE established by way of transformation, such as SAP, cannot be reserved to the German trade unions alone but must be extended to all trade unions represented within the SE, its subsidiaries and establishments, in such a way as to ensure that those trade unions are treated equally in respect of that right.

Admittedly, CJEU has left it to the German courts, the national legislator and, most crucially, the trade unions to propose specific solutions, but the judgement makes an unambiguous call for the equal representation of workers and trade unions across an SE, and, although confined to the case of SEs established by transformation, it amounts to a strong statement in support of the Europeanisation of trade union mandates, one that resonates with previous calls for trade union internal democracy in transnational contexts (Hyman and Gumbrell-McCormick 2020). Since political legitimacy is the

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53. The judgement of 18 October 2022 in Case *C-677/20 IG Metall and ver.di v SAP SE* [ECLI:EU:C:2022:800].

54. In the case at stake, SAP SE had adopted a clause in its SE agreement that facilitated a disregard of the right of (German) trade unions to nominate members of the supervisory board via a separate ballot.

55. Opinion of Advocate General Richard de la Tour, 28 April 2022 [ECLI:EU:C:2022:325].

main source of power and authority that employee representatives can put forward on the boards on which they sit (Hagen and Mulder 2013: 161), trade unions should be eager to establish internal arrangements to preserve and improve their political legitimacy in transnational contexts.

The possibilities discussed above are a way forward in any kind of MNC situation but with all the more reason in SEs and other EU-regulated corporate structures after this categorical CJEU judgement.

## 7. Conclusion

Different national regulatory channels and practices have made room for transnational BLER in MNCs governed by national law. This Paper has examined their workings and implementation in five EEA countries: Germany, Sweden, Norway, Denmark and France. The Paper has addressed one gap in the literature on BLER Europeanisation by conducting comparative case study research. However, the topic awaits further qualitative and quantitative work to understand properly the institutional processes and negotiations, and their impact, in terms of board dynamics as well as actors' rationales and room for manoeuvre at micro level.

The findings question the assumed democratic attributes of national participation systems (Windbichler 2005; Marklund 2017) and the supposed automatic virtues of Europeanisation if uncoordinated or considered uncritically. The study reveals that, so far, BLER Europeanisation has generally not been guided by concerns on how to democratise worker representation in MNCs but rather by more technical and pragmatic concerns responding to the *ad hoc* and idiosyncratic circumstances triggered (directly or indirectly) by restructuring events, corporate legal reforms or capitalist projects. As pointed out by Erne, 'social actors hardly ever conceive of democratization as a goal in its own right': they only 'favor democratization if they expect that a more democratic polity will provide a framework in which their interests can be better satisfied' (Erne 2008: 22).

The study contradicts the functionalist assumption according to which Europeanisation happens 'by stealth'. Bottom-up Europeanisation of worker representation on boards has not naturally led to Euro-democratic outcomes. If BLER is taken seriously as an institution, able to redistribute power and democratise corporate government, then such a potential will not be achieved without proactive action from trade unions and EU legislators towards resizing BLER rights to the same level at which corporate decisions and operations take place. That would reinforce a Euro-democratic strategy. Without such a politicisation at EU level and an EU regulatory framework, actors already used to 'nationally institutionalised practices of corporatist and consensual negotiations' (Kostera 2013: 75) are more likely to avoid Europeanised solutions. At best, the strongest unions and companies may strategically use the rhetoric of board diversity to keep their current power status quo. While trade unions turn against each other across borders, companies keep the upper hand over labour's voice in corporate decision-making. Europeanisation in the form of Euro-technocratisation risks disrupting pre-established national

BLER systems and their political legitimacy, questioning the transparency and effectiveness of an institution that had asserted its democratic credentials right from the beginning.

BLER in MNCs opens up a new arena of transnational social dialogue and collective action for organised labour, but its use will ultimately depend on actors' strategic choices and orientation. Here, the CJEU judgement in Case C-677/20 *IG Metall and ver.di v SAP SE* may be a trigger for actors, particularly trade unions, to take more seriously the inequality of interest representation in MNC structures. Furthermore, it can be an incentive to search proactively for sustainable solutions which better encompass the representation via BLER of the plurality of workers' interests within MNCs.

Regulation can facilitate or, conversely, hinder the possibilities that BLER might become a useful tool to redistribute power and enhance European workers' interests in MNCs. No national law could fully or adequately address the legal and political challenges raised by BLER transnationalisation, but the EU legislator could step in to remedy many of the uncertainties in support of a more democratic BLER Europeanisation. An integrated EU framework of information, consultation and BLER rights extended to MNCs operating in the EEA could pave the way towards a pan-European policy on democracy at work.

## Abbreviations

<b>BLER</b>	Board-level employee representation
<b>CJEU</b>	Court of Justice of the European Union
<b>CO-industri</b>	Central Organisation of Industrial Employees in Denmark
<b>DGB</b>	Deutscher Gewerkschaftsbund / German Trade Union Confederation
<b>EEA</b>	European Economic Area
<b>EMF</b>	European Metalworkers Federation
<b>ETUF</b>	European Trade Union Federation
<b>ETUC</b>	European Trade Union Confederation
<b>EU</b>	European Union
<b>EWC</b>	European Works Council
<b>EWCdb</b>	European Works Council database
<b>HBS</b>	Hans-Böckler-Stiftung / Hans Böckler Foundation
<b>IG BCE</b>	Industriegewerkschaft Bergbau, Chemie, Energie / German Union for Mining, Chemicals and Energy
<b>IG Metall</b>	Industriegewerkschaft Metall / German Metalworkers Union
<b>MNC</b>	Multinational company
<b>PACTE</b>	Plan d'Action pour la Croissance et la Transformation des Entreprises / Action Plan for the Growth and Transformation of Firms
<b>SAS</b>	Scandinavian Airlines System
<b>SE</b>	Societas Europaea / European Company
<b>SE-WC</b>	Works Council of a European Company
<b>TFEU</b>	Treaty on the Functioning of the European Union

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Loi 2013-504 du 14 juin 2013 relative à la sécurisation de l'emploi, modifiée par loi 2015-994 du 17 août 2015 relative au dialogue social et à l'emploi [Law 2013-504 of 14 June 2013 on safeguarding employment, modified by Law 2015-994 of 17 August 2015 on social dialogue and employment], in force. <https://bit.ly/3lOiWmk>



Loi 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises (dite « loi PACTE ») [Law 2019-486 of 22 May 2019 on the growth and transformation of firms (known as 'PACTE Law')]. <https://bit.ly/3aGqPnE>

Ordonnance 86-1135 du 21 octobre 1986 modifiant a loi 66-537 du 24 juillet 1966 sur les sociétés commerciales afin d'offrir aux sociétés anonymes la faculté d'introduire dans leurs statuts des dispositions prévoyant que des représentants du personnel salarié siègeront avec voix délibérative au sein du conseil d'administration ou du conseil de surveillance [Ordonnance 1986-1135 of 21 October 1986, modifying Law 1966-537 of 24 July 1966 on commercial companies to offer public limited companies the possibility to introduce provisions in their Statutes to foresee worker representation with deliberative voice in their board of directors or supervisory boards]. <https://bit.ly/3BPN32q>

All links were checked on 06.06.2023.

## List of interviews and focus groups

Ahtianen M., Director of Finnish Confederation of Professionals STTK, 15 September 2021.

Amiguet Rovira E., CCOO board-level employee representative at Suez, 22 November 2016.

Asmussen C., Head of Secretariat at Nordea, 14 December 2017 and 16 August 2021.

Bidaud P., CFDT EWC coordinator, 29 September 2020.

Carnero M., UGT board-level employee representative at Volkswagen, 14 July 2021.

Christy N., Consultant at CO-industri, 17 February 2017.

Durivaux G., Policy Officer at EPSU, 20 August 2020.

García D., CCOO board-level employee representative at Alstom, 22 July 2021.

Gjern Sorens F., Consultant at CO-industri, 3 September 2021.

Hagen I. M., Senior Researcher at FAFO, 22 June 2018 and 20 February 2017.

Penado E., International Secretariat of CCOO Industry Federation, 22 July 2021.

Pütz L., Lawyer at Hans-Böckler-Stiftung, 3 March 2017.

Sofer-Ayadi M., EWC Secretary of Veolia, 3 March 2022.

Thaarup Herholdt K., Shop steward at Grundfos, 8 September 2021.

Focus group with board-level employee representatives from French multinationals at ETUI EDU Training 'The challenges of the Europeanisation of board-level employee representation in French companies', 23-24 March 2021.

Focus group with board-level employee representatives and EWC representatives at EWPC Workshop 'How do EWCs and Board-level employee representatives cooperate?', 24 February 2022.

Expert meetings with board-level and works council employee representatives from SCOR SE and Dassault Systèmes SE, 23 February 2022 and 3 March 2022.



