

Chapter 15

ETUC for strengthening employee involvement

Wolfgang Kowalsky and Claudia Menne¹

1. Introduction

Since its foundation, the ETUC has supported and promoted workers' involvement in the sense of workers' information (one-way communication from management/employer), workers' consultation (two-way communication between management and workers' representatives) and workers' participation (board level representation).

Significant achievements at European level in terms of concrete workers' rights have been made, for instance, the 2001 Directive and Regulation on the European Company Statute [SE], the 2002 Directive establishing a general framework for employees' information and consultation, the 2009 Recast European Works Council Directive and, above all, acknowledgement in the Charter of Fundamental rights (Art. 27) all grant European workers with substantial rights of information and consultation in companies' decision making processes and participation in the board.

And yet, this linear progress need not be taken for granted, as some current trends and initiatives on the one hand, and lack of initiative on the other hand, have put national legislations under pressure by facilitating "regime shopping" from companies at the expense of workers' rights.

This leaflet summarises two ETUC Resolutions adopted by its Executive Committee in 2011 and 2012 and presents the ETUC positions on current EU priorities with regard to company law and worker involvement:

1. This text was printed as a separate ETUC brochure in May 2012. The authors would like to express their thanks to Aline Conchon, Séverine Picard and Sigurt Vitols for their support in preparing the text.

- Commissioner Barnier stated that *“Experience with recent negotiations on pending cases shows that Member States have difficulties to trust each other in matter of company law. Various simplification work and the SPE Statute offer striking examples”*.²

The ETUC argues that the simplification agenda must be replaced by a sustainable approach. Under the headline “minimizing the regulatory burden for small and medium-sized enterprises (SMEs) and adapting EU regulation to the needs of micro-enterprises” the European Commission has accelerated its efforts to deregulate a large part of the European economy. In the area of company law the Commission has proposed waiving requirements for SMEs (particularly for micro-enterprises). SMEs are estimated to account for approximately two thirds of private sector employment in the EU, thus the potential impact of deregulation on employment and working conditions is huge. The owners of many of these companies enjoy the privilege of limited liability, which limits the claims that employees and other stakeholders can make in the event of company failure. The ETUC is adamant that better regulation does not necessarily mean less regulation. Necessary safeguards and rights for workers and other stakeholders should not be abolished in the name of reducing costs.

- Commissioner Barnier called for *“progress towards a more long-term approach of our economy: we need to reduce harmful, short-termist tendencies. Sound corporate governance can help achieve this”*.³

The only way to such a *sound corporate governance is the strengthening of worker involvement* since workers have the greatest interest in the long-term sustainability and growth of their company. European Works Councils, Transnational Company Agreements and Board-Level Employee Representation already play a fundamental role in this regard. Realizing this concept of a “sustainable company” requires fundamental changes in our legal and regulatory framework. Company law needs to take the long-term interests of workers and other stakeholders into account, not just the interests of shareholders. The transparency of compa-

2. Opening speech at the conference on “European Company Law: the way forward”, Brussels, 16 May 2011 [our own translation].

3. Opening speech at the XI European Corporate Governance Conference, Warsaw, 15 November 2011.

nies, particularly with regard to their social and environmental impact, needs to be improved through binding standards for disclosure.

A key question of the twenty-first century: better workers' participation in sustainable companies

The question of industrial or social democracy is a key question of the twenty-first century and the future of Europe. If the European integration continues to be perceived as doing damage to Social Europe, as stirring Europe in permanent austerity governance, it will generate an unprecedented anti-European backlash in many Member States. The financial crisis led to a power shift from democracy towards financial industry. It is time to shift it back: The way must be paved for a new era of more democracy at the workplace, stronger industrial policy, and stronger workers' participation rights. This objective is an ambitious one and will not be reached within a few months but it should be possible to introduce a new momentum into these developments. And the ETUC believes that there is a strong momentum for strengthening workers participation in Europe.

Trade unions have a fundamental interest in promoting more democracy at the workplace and sustainable EU governance. The coming years will be difficult for workers. The current economic context leads to more frequent changes in company strategies, including greater recourse to restructuring. Workers and their representatives must be given a place and a voice in these strategic decisions.⁴

Reforming European company law in the interests of workers and other stakeholders will not be easy. The ideologies of shareholder value and regime competition have fundamentally shaped the EU company law *acquis*. But the financial crisis has clearly demonstrated the need for change.

Overall, the ETUC recommends *a more sustainable approach in relation to workers involvement in European company law*. As business is increasingly becoming global, the European Union must reflect if

4. See ETUC Resolution "Anticipating change and restructuring: ETUC calls for EU action" of 6-7 March 2012 and ETUC Resolution "Workers participation at risk: towards better employee involvement" of 8 December 2011 and ETUC Resolution "The Future of European Company Law: towards sustainable governance" of 7 March 2012.

and how a sustainable streamlining of employees' involvement can be achieved. Such reflection should not be geared towards downsizing existing national provisions but rather to see how the Union can promote competitive and socially responsible European company forms. This work should be done in view of going from a defensive to a more offensive strategy.

The rules of financial capitalism are global, yet, the applicable standards on workers' participation are still shaped at national level. As business goes global and ignores national boundaries, a rethinking of the role of workers' involvement in companies must be shaped at European level. An elaborated ETUC proposal for European standards for information and consultation rights as well as worker participation should help prevent that registration and localisation of the company seat can be organised with a view to avoid workers' participation. A good starting point for this work is the fact that employee influence is now a fundamental right under the Treaty (TFEU).

Addressing the failures of corporate governance

The shareholder value paradigm has dominated policy debates and company law for more than two decades in Europe and much of the rest of the world. For the ETUC this shareholder short-termism model is one of the major causes of the crisis. It creates powerful incentives to create shareholder value by externalising costs onto society; it favours excessive risk-taking and myopic management decisions by insisting that shareholder value ought to be the only goal pursued by corporate management.

For the ETUC, the answer to shareholder economy and short-termism is to safeguard and develop employee involvement rights and practice in all kind of companies. The lesson of the crisis is to develop workers' involvement on all levels. A stronger participation of workers in strategic business decisions which are often taken at European or global level is necessary and the current crisis must be considered as opportunity to strengthen worker involvement to strengthen the long-term viability and sustainability of companies. A corporate law that gives control rights by default exclusively to shareholder exposes executives to strong pressure to maximise returns to shareholders in the short term. Managerial autonomy is one of the mechanisms to govern an enterprise in the interest of all stakeholders.

Workers' involvement at risk

In the “Work Programme 2012” of the Commission published on 15 November 2011 the COM outlines three roadmaps. One of these proposals features the revision of the Directive 2001/86/EC on *employee involvement in the European Company* (*Societas Europaea*, henceforth: SE): “The initiative would aim to bring about simplification”. The “main problems” which this initiative intends to address are “in particular the rules on employee involvement”, “the scope of the ‘before and after’ principle”, “double requirements when a European Works Council already exists”.

The second roadmap is on the *Statute for a European Company* (SE): the Commission is reflecting on possible amendments to the SE-Statute in view of legislative proposals in 2013 with the scope to “entail simplification and reduction of administrative burdens”.

The third roadmap schedules a consultation on the Revision of Directive 2003/72/EC on *involvement of employees in the European Cooperative Society* (*Societas Cooperativa Europaea*, henceforth SCE) in 2013. The objective is to assess whether existing arrangements on employee involvement “may be considered responsible for a very small take up of this legal framework and identify any feasible possibilities for simplification”. Both issues are dealt again under the “simplification” agenda. *The ETUC will not accept that workers involvement is sacrificed on the altar of the “better regulation” – or a highly ideological internal market agenda.*

In the field of company law, the guiding principle anchored in the SE and SCE Directives, according to which companies are not allowed to make use of European legislation so as to reduce or circumvent existing national participation rights, is losing ground. Provisions related to the negotiation of board-level employee representation in the cross-border merger (CBM) Directive already presented a cutting back compared to the SE pattern. A similar assessment could be drawn about the proposal for a European Private Company (SPE) and doubts are legitimate as regards the forthcoming proposal related to the cross-border transfer of companies' registered office.

The SE-Directive has set a political precedent. For the SE a historic compromise around the involvement of workers was found after 30 years of

discussions and negotiations. The ETUC considers this compromise as the *benchmark* for any EU legislation touching upon board level representation and a step towards a European minimum standard on participation rights which now has to be taken as basis for a deepening and an extension of those rights, for promoting board level representation in the 16 EU Member States where such systems exist (AT, CZ, DE, DK, ES, FI, FR, GR, HU, IE, LU, NL, (NO,) PT, SE, SI, SK) and in European legal entities. Employee involvement in the decision making process at company level is a central component of the European social model.

So far the EU has adopted a rather disjointed *acquis* concerning employee involvement. It presupposes existing national systems of employee involvement. What is needed is common requirements for employee involvement.

Activities on European level and next steps for the ETUC

The ETUC calls for a radical change of approach in EU policy. EU company law should focus on promoting a coherent, sustainable and forward-looking corporate model, including an EU framework instrument on workers' involvement. Major questions can also be raised about the real purpose and effect of the current better regulation / simplification agenda. The European Commission after the consultation on corporate governance in 2011 now launched another one on company law in 2012. It is not clear in which direction the Commission will go, but there is enough evidence that simplification and flexibility are still high on the agenda. It must be clear for the Commission that workers' right to information and consultation within the undertaking is considered a fundamental right according to Article 27 of the EU Charter of Fundamental Rights (CFREU). The Commission has not only to respect but also to promote these rights (Article 51(1) CFREU). Article 152 TFEU which has been introduced by the Lisbon Treaty as the main improvement in the Social policy Title requires the Union (and its institutions) to promote the role of Social Partners at EU level and to "facilitate dialogue between the social partners, respecting their autonomy".

Against this legal background, the Commission in particular is obliged to do all it can to improve the information, consultation and participation at the appropriate levels. Further, the EU should, according to the Treaty, support and complement the activities of the Member States in this

field and may to that end adopt minimum directives (Article 153 TFEU). The ETUC must stress these facts and convince the Commission that strengthening of employees' involvement is a step in the direction of less short-termism and less shareholder value, more stakeholder value and sustainability, in short: it would be a step towards a sustainable company. The Commission shouldn't look at companies as money-machines seeking the highest returns from global markets.

- The ETUC reiterates its demand for a meaningful consultation on policy orientation. A more active involvement on the part of European Social Partners in the shaping of EU company law policy would greatly contribute to unblock numerous deadlocks. Online consultations and Green Papers are not an adequate substitute for the specific consultation of the social partners, which is foreseen in the European Treaties.

The Commission must understand that the compromise found for the SE is a *yardstick* and that it was wrong not to respect this minimum standard in the cross-border mergers directive and the proposed Private Company Statute (henceforth SPE), both representing backward steps compared to the SE provisions. The Commission must come back on these and further issues: Problems with shelf SEs must be tackled and the question of employment growth as “structural change” which makes it necessary to renegotiate the participation rights. Forms of escape from co-determination (e.g. by choosing a legal statute provided by another Member State, such as the British public limited company statute), should no longer be possible; existing loopholes and bypass strategies must be addressed and tackled. The Treaty is clear on this issue and explicitly asks to “support and complement” and thus prevent circumvention of co-determination and other forms of workers participation: “*With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination (Article 153)*”.

The discussions on the proposed SPE Statute have further highlighted the need to ensure that businesses do not abuse the opportunities offered by the internal market to evade their legal obligations that would otherwise be applicable under national law. The ETUC is strongly opposed to the Commission's proposal for a *European Private Company*

Statute. Whilst the ETUC encourages initiatives that improve market conditions for businesses and welcomes any proposals designed to improve the market performance of SMEs, it is adamant that the flexibility of SMEs must not be enhanced to the detriment of workers' rights to sit on the Boards of their companies. It is crucial that the SPE Statute be accompanied by rules governing minimum standards on workers' involvement.

- It is not acceptable that the European Commission does not respect the minimum standard of worker participation as anchored in the SE and tries to dilute it further. The ETUC asks for the minimum standard of the SE being generalised to all other legal forms, the European Private Company, the cross-border mergers and the forthcoming 14th Directive on the transfer of seat. There is a real and unique chance to do some steps to extend this minimum standard on participation rights. Once the SE-provisions on workers participation established as minimum standard, there will be less ambiguity about the Commission position on workers involvement.
- The ETUC has to make sure that the compromise on workers' involvement in the SCE will not be questioned and that some general conclusions on the promotion of workers' involvement will be supported by the EP.
- The ETUC is renewing its call for an open debate on a *14th Company Law Directive on cross-border transfers of registered offices*, with a view to preventing the establishment of 'letterbox' companies. The ETUC will monitor closely the developments and try to make sure that the reference point will be the minimum standard anchored in the SE.

Change the fundamental objectives of EU company law

However, Social Europe and a sustainable economy cannot be realized simply by hoping that the crisis will pass soon and the economic recovery will put us on the right path. The demands discussed above, together with the list in the annex of existing EU company law directives and where they need to be reformed, provide a roadmap for fundamental change in how our companies operate and are regulated. In order to achieve a democratic and social Europe, it is crucial that workers and their representatives are not excluded from the political process. The

relationship between companies and society has become unbalanced in favour of the former. But companies need to serve society, rather than society serving the shareholders. A proper balance can be achieved only by fully including trade unions in the process of change.

Instead of promoting a harmonising approach, the Commission is pursuing a regulatory competition agenda (based on basic minimum requirements at EU level and a mutual recognition principle). By introducing a 1 euro minimum capital requirement and very light registration requirements, the Commission's proposal for a European Private Company illustrates well this minimalist approach.

The consequences of this regulatory competition agenda run against the spirit of European integration. National company laws, where they provide for fairness and social justice, are under the fire of EU law and the pressure is increasing towards more regime competition amongst company laws to provide the highest corporate benefits.

The ETUC considers it unacceptable for EU law to promote a race to the bottom agenda. A major change of approach is urgently needed so as to restore the fundamental objectives of sustainable EU company law: to prevent regime competition and to promote a forward looking model at EU level taking into account the necessity of high level of quality employment and social progress.

Preventing regime competition

The ETUC believes that increasing company mobility can be beneficial to the European economy to the extent that it responds to justified business needs, linked to genuine organisational reasons. But cross border mobility cannot be treated as an end in itself, which means that EU law must put in place the necessary safeguards to prevent the setting up of artificial structures, such as “letter box companies”, designed to evade the applicable national rules.

The choice of the *place of registration* is an important step in the life of businesses as it determines the main national regime applicable to the company. However, the dominant philosophy is to allow companies to establish their registration seat in a different Member State than the place of real business. For the ETUC, this artificial division has no justi-

fication under EU law. It leads to regime competition for all the wrong reasons, including in particular tax optimisation and circumventing existing workers' rights.

Against this background, the ETUC considers that the 'real seat' principle should be a core principle of EU company law. The ETUC therefore urges the EU legislator to devise the appropriate rules so as to ensure that the registration place is linked to the place of main business.

Furthermore, the ETUC is increasingly concerned by *transfers of registered offices* in the Union. European Court of Justice rulings have made such transfers very problematic, in particular from a regime competition point of view. In the absence of an express will from the EU legislator, the Court has strengthened the possibility for companies to choose the corporate regime of any Member State.

There have been initiatives to approve a specific company law Directive dealing with such transfers (the '14th company law Directive'). The ETUC is very conscious of the fact that such a Directive would lead to an increase of cross-border transfers within the Union, with the accompanying risks of delocalisation and watering down of workers' rights. A number of safeguards are therefore indispensable so as to limit transfers of registered offices to cases of justified business needs, linked to genuine organisational reasons. In particular, the following pre-conditions are essential for ETUC support for a 14th Directive:

- As highlighted above, the 'real seat' principle is indispensable;
- There must be a meaningful information and consultation procedure about the proposed transfer. Effective sanctions must be put in place so as to guarantee the respect of this obligation;
- The provisions governing workers' involvement (information, consultation and participation) must be in line with the mechanism of the SE Directive.⁵

A substantial capital base for companies is considered to provide a basic level of protection for workers and other stakeholders when companies run into financial difficulties. Currently however, with the exception of financial companies and public limited companies, there is no EU level

5. Directive 2001/86/EC supplementing the statute for a European company with regard to the involvement of employees

minimum capital requirement. This has allowed a “race to the bottom” between Member States, many of which have been lowering capital requirements in an attempt to attract foreign business. *The EU should impose a minimum capital requirement for all kinds of companies which will provide a reasonable level of protection to workers and other stakeholders if the company they are working for or doing business has financial problems.*

Promoting a coherent and sustainable model

Overall, the ETUC considers it necessary to start discussions on a *framework instrument on workers’ involvement*. The exercise should not be about rethinking national models on information, consultation and participation but to build a sustainable European company law model. Any company which decides to benefit from the provisions of European company law (e.g.: a European Company, a European Cooperative Society, a European Private Company, a company moving across the EU in line with the cross border merger Directive etc.) should at the same time adhere to certain shared values.⁶

Furthermore, the large EU company law *acquis* is disjointed. In their quest for the ‘lightest regime’, companies are not only able to pick and choose national legal forms; they can also put EU instruments in competition with each other.

Considering the current approach to EU company law, the ETUC is of the view that a codification of EU company instruments is a perilous exercise, which may have damaging consequences. There is, however, a clear need to create in the short term *more convergence between the various EU company law Directives*. For instance:

- The Takeover Directive 2004/25/ contains very weak provisions on workers’ involvement. This Directive must therefore be reviewed with a view to align its provisions on workers’ rights with other pieces of the Community *acquis*.
- The relevance of the distinction between listed companies and private companies which is currently made by EU law must be

6. Directive 2001/86/EC supplementing the statute for a European company with regard to the involvement of employees.

reassessed. For instance, the protection afforded by the transfer of undertakings Directive 2001/23/EC must also be available to workers in listed companies.

- The worker involvement provisions in the cross border merger Directive 2005/56/EC must be aligned to those of the SE Directive 2001/86/EC.
- Whenever a company envisages relying upon an EU company law instrument, there should be a mandatory assessment of the impact on workers (merger, division, transfer of registered office, takeover, etc.).
- Similarly, where new EU company law initiatives are being envisaged, the ETUC urges the Commission to reflect carefully on a coherent approach. The SPE proposal in its current form should be withdrawn as it creates intolerable competition with both the SE legislation and national company laws. Also, the provisions in the existing *acquis* must serve as a point of departure for an initiative on cross border transfer of registered seats.

Auditing and reporting

The financial crisis demonstrated once again that *auditing* firms fail to adequately play the role of “gatekeepers” that they are supposed to. The extent to which companies and financial institutions receiving a “seal of approval” from an auditing firm ran into difficulties in the crisis and thereafter shows that this failure was systematic rather than exceptional. Core causes of this failure include: significant conflicts of interest through the simultaneous provision of auditing firms of both auditing and certain types of consulting services, an oligopoly among large auditing firms, flaws in current accounting standards, and a focus on historical (rather than forward-looking) performance and on data of interest mainly to shareholders.

The Commission’s recent proposals on auditing⁷ need revision in order to achieve a number of goals: encouraging a forward-looking focus which includes a judgment of key risks and the sustainability of the business strategy, inclusion of more information relevant for workers and other

7. Proposed Regulation on statutory audit of public interest entities (COM (2011) 779 final) and Proposed Directive amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts (COM (2011) 778 final)

stakeholders, respect for two-tier board systems and access to audit reports in different national systems of worker involvement in the EU, and removing conflicts of interest that would endanger independence in the auditing process, in order to discourage a rubber-stamp approach to auditing.

The current regime of *company reporting* is characterized by a focus on listed companies and the needs of their shareholders. Workers and other stakeholders need and should receive the relevant information, such as financial information, and the social and environmental impact of companies. In the rare cases where information is disclosed, it is frequently done so without reference to external standards. Furthermore, when disclosure is done on a “comply or explain” basis, explanations are frequently lacking or inadequate. The lack of adequate information to workers and other stakeholders, especially in smaller sized companies, can prevent the detection of financial difficulties in the company. The spirit of the general framework Directive on information and consultation (Directive 2002/14/EC) must be respected.

The ETUC judges the current disclosure regime as “poor” and *demand*s reporting by a larger spectrum of companies (nonlisted as well as listed, and not only large companies) on the basis of common standards which allow comparisons over time and between companies. Mechanisms for improving the credibility of this information include external auditing and trade union verification (e.g. of labour standards in supply chains).

Annex 1 The weaknesses of the current EU company law *acquis*

References	Topics	ETUC comments*
Directive 2009/109/EC	As part of the simplification initiative, under certain conditions reduces reporting and documentation requirements in case of divisions and mergers	Reporting and documentation requirements in general need to be strengthened, particularly regarding information and consultation rights for workers
Directive 2007/63/EC	Extends option for shareholders for an exemption from requirement for an independent expert's report contained in the cross border merger directive to purely domestic mergers	<ul style="list-style-type: none"> - Rights to an independent expert's report should be extended to employees - Other information and consultation rights should be strengthened
Directive 2007/36/EC	Shareholders' rights	<ul style="list-style-type: none"> - Shareholder responsibilities should be defined, not just shareholder rights - The voting records of investors should be made publicly available - Accountability should be ensured along the investment chain, so that investment managers and proxy agencies act in the interests of ultimate owners . - Enough transparency should be created so that companies can identify their shareholders, including those with short interest and borrowed voting rights.
Directive 2006/68/EC	Formation and capital of public limited liability companies	Provisions on minimum capital requirement need to be strengthened.

* NB: all Directives which relate to company strategy and restructuring should contain a provision requiring a thorough impact assessment of the proposed measure on the workforce.

References	Topics	ETUC comments*
Directive 2005/56/EC	Rules on cross-border mergers	<ul style="list-style-type: none"> – Workers' rights need to be aligned to the provisions of the SE Directive. In particular, provisions on information and consultation must be included and the provisions on participation must be identical to those of the SE Directive – Requires impact assessment of envisaged financing for the merger
Directive 2004/25/EC	Rules for takeover bids	<ul style="list-style-type: none"> – Requires stronger rights for workers, including in particular application of the transfer of undertakings Directive, and meaningful information and consultation about the proposed take over – Requires more transparency on the take over procedure – Require prior impact assessment of the take over
Directive 2003/58/EC	Modernization of the Accounting Directives	More transparency should be required in the form of binding standards for social and economics reporting, not just reporting on financial performance.
Directive 2001/86/EC	SE directive	<ul style="list-style-type: none"> – Phenomenon of shelf SEs should be investigated, – Adaptation clause needs to be included so that negotiations on workers' involvement are triggered in case of significant change in the size and/ or repartition of the workforce – Requires setting of a register at EU level, which would allow more transparency regarding business activities and the size of the workforce

* NB: all Directives which relate to company strategy and restructuring should contain a provision requiring a thorough impact assessment of the proposed measure on the workforce.

References	Topics	ETUC comments*
Eighth Council Directive 84/253/EEC	Auditing	<ul style="list-style-type: none"> – Requires removing of conflict of interest of auditing firms with both auditing and consulting business – Access of employee representatives to auditing reports – Requires forward-looking statements
Seventh Council Directive 83/349/EEC Fourth Council Directive 78/660/EEC	Accounting	<ul style="list-style-type: none"> – Must be more stakeholder oriented – Access of employee representatives to the information
Sixth Council Directive 82/891/EEC	Division of companies	<ul style="list-style-type: none"> – Requires reference to transfer of undertakings directive – Requires prior impact assessment
Directive 2011/35/EU	Mergers of public limited liability (amends 3rd directive)	<ul style="list-style-type: none"> – Requires reference to transfer of undertakings directive – Requires prior impact assessment
Second Council Directive 77/91/EEC	Formation and capital of public limited liability companies	Requires strengthening minimum capital requirement
Directive 2009/101/EC	Registration/power of organs/nullity	<ul style="list-style-type: none"> – More transparency in registration and basic company information – Improve access to (European) business register
Directive 2001/23/EC	Information and consultation on proposed transfer of undertakings + prohibition of changes in work conditions, including dismissals, for reasons directly connected to the transfer	Requires extending the scope to cases of shares sales, division of companies, mergers of public limited liability companies

* NB: all Directives which relate to company strategy and restructuring should contain a provision requiring a thorough impact assessment of the proposed measure on the workforce.