Chapter 7
Worker participation as an element of the democratic principle in Europe – A critique of the co-determination relevant aspects in the Reflection Group report

Marie Seyboth

1. Introduction*

In December 2010, the European Commission established a Reflection Group on the future of EU company law. This group of 13 international experts was asked to report on EU company law and corporate governance issues.[1] In light of the financial and economic crisis the experts considered whether imperfections in company law may have played a role in the crisis and prevented the adoption of a more long-term perspective. The Reflection Group published its report in April 2011 and presented the findings at a conference on the future of EU company law held in Brussels the following month. The Report is divided into three main chapters and contains numerous recommendations for the European legislative bodies.

The Commission published a Green Paper on company law early in 2012. It then embarked on an extensive consultation with all stakeholders concerning the future development of EU company law. Following the consultation, the Commission has said that it will present specific legislative proposals.

Chapter 3 of the report entitled 'The contribution of governance and investors to long term viability of companies' contains a subsection on worker participation at the board level. It includes an assessment of worker participation in board-level decisions in the Member States. On the basis of numerous existing studies, the Reflection Group concludes

---

* Chapter 7 was translated from German by Paul Skidmore.

1. This report is available on the Commission's website http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf

that board-level worker participation has proven neither detrimental nor advantageous to the interests of shareholders.

However, this perspective is very superficial. The broad range of existing empirical econometric studies on worker participation both at board level and at plant level reveals an increasingly differentiated picture. The sheer diversity of recent studies using different methods, different panel data and leading to different results makes it increasingly impossible to deliver a generalised broad-brush assessment of the economic effects of worker participation.[2]

Looking at these studies in total, one can say with a clear conscience that, taken together, they are unable to prove any adverse economic effect of worker participation. Quite the reverse is true. Contrary to the conclusion reached by the Reflection Group, there are clear indications that worker participation can facilitate productivity (with stronger evidence for plant level rather than board level participation). Naturally, the extent of that positive effect will depend on local variables such as the functional efficiency of the social partners, the quality of the working environment and other economic factors.[3]

University of Trier Economics Professor Uwe Jirjahn (2011) observes convincingly in his excellent recent literature review that, specifically taking account of the most recent studies, it may be concluded 'that worker participation has indeed the potential to enhance economic performance'. In addition, from a trade union perspective, it must be added that worker participation constitutes both a protective right of workers and a right to have an active say and, thus, an essential component of the democratic social order which cannot be assessed simply by reference to economic criteria.[4]

Moreover, an assessment simply from the shareholder perspective overlooks the social policy dimension to worker participation which, follow-

2. For an overview of the latest research on the economic effects of worker participation see the various articles devoted to this theme in *Schmollers Jahrbuch* (2011). See also Bermig and Frick (2011).
3. For example, in his comparison of the economic effects of different typologies of works councils, Pfeiffer (2011) concludes that the greatest increase in productivity can be achieved where members of the works council adopt a different position to management but, ultimately, a compromise is reached.
4. For a more detailed analysis of this aspect, see Heuschmid (2008).

ing the Treaty of Lisbon, the Commission is obliged to respect (Article 153(1)(f) TFEU, formerly Article 137 EC).[5]

In relation to existing systems of worker participation at Member State level, the Reflection Group recommends that, in general, the Commission should take a neutral approach, neither encouraging nor discouraging worker participation unless those schemes are considered to discriminate. In those cases, the Commission should take action and commence Treaty infringement proceedings.

The Report regards discrimination of that kind to exist under the German system of board-level worker representation where workers in foreign plants or subsidiaries are excluded for the purposes of electing worker representatives. It states:

> The other area where the Commission in particular as the guardian of the EU Treaties should act is where a co-determination system discriminates against employees from other EU states. This is for example the case in the German regulations regarding the codetermination for the Aktiengesellschaft and the GmbH (Reflection Group 2011: 53).

In order to end this supposed discrimination, the Reflection Group proposes that the worker participation system established in relation to the European company (SE)[6] should be applied in relation to companies under national law and that the scheme of worker participation be determined by agreement at company level.

This chapter focuses on this discrimination thesis and the solution proposed by the Reflection Group and underlines the position of German trade unions in relation to the thesis and proposed solution.

2. Debates on worker participation

In Germany, debates concerning worker participation are sometimes highly fuelled and intense, at other times, calm and rational. Worker

5. Treaty on the Functioning of the European Union.
6. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22. On this, see Köstler (2011).

participation is acclaimed and celebrated, condemned and cursed. Only one thing appears certain, the debates on worker participation will continue.

Worker participation is characterised as something unique. It is said to exist only in Germany and nowhere else in the European Union:

> One reason why Germany is very often erroneously considered as the main, if not the only, country granting employees the right to be represented on boardrooms is that it was the first country to legislate on this issue. Indeed, the 1951 Act regulating board level employee representation in the German coal, iron and steel industries marks an historic step as 20 more years had to be waited until the enactment of the next board level employee representation legislation in Europe. The 1970s were a decade of lively legal action in this regard, as laws regulating board level employee representation were enacted in 7 other countries (the Netherlands, Austria, Ireland, Denmark, Luxembourg, Sweden and Portugal), while the German legislator has also introduced in 1976 an Act implementing parity board level employee representation in all companies with more than 2,000 employees. In the 1980s, 4 countries passed a similar law (Poland, France, Greece and Hungary) and 4 more did the same in the 1990s (Finland, the Czech Republic, Slovakia and Slovenia). However, since then no new country has joined this group of the most advanced countries in terms of industrial democracy (Conchon 2011).

In addition, assessment of worker participation often focuses simply on the number of worker representatives on the supervisory or administrative board and, given the rule establishing parity between the representatives of shareholders and workers, this number is higher in Germany than in many other Member States. However, such assessment ignores other factors.

The law on board-level worker representation is triggered in Sweden with 25 employees, in Denmark with 35, in the Czech Republic with 50, in Finland with 150 and in Hungary with 200. By contrast, in Germany, 500 employees are required to trigger worker representation involving only a third of the seats on the board and 2 000 employees for parity representation.

This aspect was emphasised by the academic experts on the commission appointed by the Government of Gerhard Schroeder in 2005 to develop recommendations for the modernisation of the German system of board-level worker representation. In their final report, they conclude:

> Taking account of all these elements, what characterises the German system of board-level worker participation is, above all, the fact that numerical parity applies in companies with 2 000 or more employees and, in general, the very high thresholds and not the mere existence of worker participation as such (Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung 2006: 30).

Another criticism often levelled against board-level worker participation is the supposed absence of democratic legitimacy for the worker representatives on the supervisory board. Speaking at the biennial congress of German lawyers (Deutscher Juristentag) held in 2006, former member of the board at Mercedes-Benz Manfred Genz put it in the following terms:

> In today's world, a significant proportion if not the majority of the workforce employed many German companies subject to the regime of board-level worker representation are employed abroad and not in Germany. However, as only workers in Germany may stand as candidates and vote in elections to the board, worker representatives on the supervisory board lack in many cases the democratic legitimacy on which so much store is set (Genz 2006: M43).

The members of the Reflection Group go one step further and do not limit their criticism to a supposed lack of democratic legitimacy for worker representatives but contend that the German system of board-level worker representation discriminates against workers from other Member States. They propose that the foreign workforce should be included in the national system of board-level worker representation by means of negotiations similar to those provided for in Directive 2001/86/EC on employee involvement in the European company.

3. Negotiated forms of worker representation in Germany

The Reflection Group proposes that where companies that are using a domestic legal form have cross-border operations board-level worker

representation should be determined by negotiations. The report states that:

> There is an easy way to end this discrimination by simply introducing the codetermination system provided for by the EU Directive for the SE and the SCE … also for the domestic forms of company (Reflection Group 2011: 53).

In Germany, certain interested parties have long proposed that the statutory rules on board-level worker representation should be replaced by rules establishing a negotiating framework. Employer organisations started the ball rolling in 2004 with their proposal to modernise worker representation (BDA and BDI 2004). This was followed in 2006 by discussions at the 66th biennial congress of German lawyers and in the Government commission on the Modernisation of Worker Representation chaired by Professor Biedenkopf (Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung 2006).

The latest initiative in this connection at national level came in May 2009 from a working group on board-level worker representation composed of seven academic experts and which resulted in proposals for a negotiating framework to establish board-level worker representation and concerning the size of the supervisory board in such companies (Arbeitskreis Unternehmerische Mitbestimmung 2009: 885). One of the academics on that working group, Professor Baums, was also a member of the Reflection Group.

The German Confederation of Trade Unions (DGB) rejects the proposals of the working group. Its opposition centres on the fact that, under the proposals, the right to negotiate on behalf of workers is not accorded to trade unions and, in addition, many of the matters identified for negotiations aim to reduce the scope of worker influence.

All these national initiatives to introduce negotiated forms of board-level worker representation have not met with any success. Now it would appear that efforts are under way to achieve at European level what has failed at national level.

Moreover, this whole approach is flawed because of the fact that it rests on an incorrect presumption. The negotiation-based solutions for employee involvement established in relation to the European company

(SE),[7] the European cooperative society[8] and in the case of cross-border mergers[9] constitute a successful compromise between different European systems of worker participation. They are not intended as a model for national systems. The EU law requirements apply to undertakings operating on a cross-border basis and have to resolve the tensions between different national approaches to industrial relations. However, at a national level, the need to unify different approaches to industrial relations does not exist. Thus, there is no reason why, as a matter of EU law, fundamental changes should be made to the successful instruments of board-level worker representation established in Germany. For more details on this point, see DGB (2009).

In addition, the Directives on the European Company and the European Cooperative Society both make specific reference to national law which must establish fall-back solutions applicable where negotiations fail. Moreover, Article 16(1) of Directive 2005/56 on Cross-Border Mergers provides that the company resulting from such merger shall be subject to the rules in force concerning employee participation, if any, in the Member State where it has its registered office.

These provisions make it clear that the European legislative bodies regard the different rules on worker participation in the Member States as consistent with EU law. Quite specifically, the fundamental premise of these directives is to accept the diversity of the worker participation systems within the European Union. Thus, it is already clear at a legislative level that national systems of worker participation are not regarded as operating contrary to EU law.

4. Worker participation as an element of the democratic principle in Europe

The European social model and its values and visions have become part of a lively debate on the shape of European society. The discussion and analysis of the values implicit in social Europe is very much to be wel-

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

comed and something which is long overdue. For too long, the debate has focused simply on Europe's economic relevance.

Member States of the European Union are characterised by national social models with robust systems of employee representation and participation in company decision making. In 17 of the 27 EU Member States and in Norway, employee participation at board-level is a reality.[10] This system of participation is underpinned by a notion of active involvement in the decision making processes of the company.

Although, in light of the different traditions, culture and history of the Member States, these national systems are differently structured, they share many common features and, above all, the objectives of solidarity and social justice.[11] Worker participation is recognised as an element of the democratic principle in Europe and puts into practice workers' legitimate right of involvement. To restrict participation would undermine the objectives of the Lisbon Treaty and the notion of European social policy.

A recent ETUC resolution put the matter in the following terms:

> The Treaty is clear on this issue and explicitly asks [the EU] 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).

These basic principles must be recognised by the members of the Reflection Group and, above all, by the European Commission. For many years, the European Union has been losing support and approval amongst its citizens. According to a recent Eurobarometer survey on the internal market, 62% of people believe that the internal market only benefits big companies and 58% think that it has flooded the Member States with cheap labour (Special Eurobarometer 2011). These figures suggest that European politics pays too little attention to the social dimension and

10. For a good overview, see Conchon (2011).
11. For a comparative law analysis, see Heuschmid (2008).

that disregard for this aspect has increased considerably in recent years. Improvements in the opportunities for competition, freedom of establishment for companies, deregulation and harmonisation: these are the notions which Europe's citizens associate with EU policies. The Commission's decision to bring a further action before the European Court of Justice (ECJ) challenging the terms of Germany's Volkswagen Act has enraged workers' leaders. Addressing 18 000 workers at VW's main plant in Wolfsburg on 7 December 2011, the head of the group's works council Bernd Osterloh condemned the Commission's cold-heartedness (Osterloh 2011: 14).

The latest EU initiatives to harmonise company law also bring with them fewer opportunities for employee involvement. For example, mention should be made here of the proposal for a European private company (SPE),[12] which would allow Member States to restrict the proportion of worker representatives on the supervisory or administrative board of the company to a maximum of one third. This is clearly a proposal which undermines the system of parity of representation, a system which is valued in Germany and has helped the country overcome the financial crisis. It is reported that other Member States, for example, Austria, the Netherlands and Finland are also concerned about the threat to their system of worker participation (Sick and Thannisch 2011). In addition, the proposal to allow the cross-border transfer of the registered office of limited companies,[13] thereby allowing companies to have their registered office and administrative headquarters in different Member States, would pave the way for the spread of shell companies (also known as letterbox companies) to the detriment of workers, creditors and consumers.

These examples demonstrate that Europe is not on the correct path. Worker participation must not be seen as a barrier, as a necessary evil, something which must be tolerated in establishing the internal market. It has to be understood that companies do not simply constitute a private

12. Proposal for a Council Regulation on the statute for a European private company, COM(2008) 396 final. The latest compromise proposal was presented by the Hungarian presidency in May 2011. See Council document 10611/11.
13. Planned proposal for a 14th company law directive on the cross-border transfer of the registered office of limited companies. The Commission has not published any formal proposal for this directive. For details of this project, see the Commission's website www.ec.europa.eu/internal_market/company/index_en.htm

affair but are institutions which have social responsibilities. Europe does not need fewer opportunities for worker participation. Instead, more opportunities are needed in order to establish transparent and controllable business structures and to ensure respect for the interests of workers and society at large. The Occupy Wall Street movement together with its slogan 'This is what democracy looks like' currently bringing people onto the streets worldwide is specific evidence of the fact that people want to exercise more democracy and to claim ownership of it. Direct democracy in the form of worker participation is part of that project.

One of the first steps towards more democracy can be seen in the European Works Council Directive,[14] one of the first common instruments to advance worker participation within the EU. Likewise, mention must be made of the Information and Consultation Directive[15] and of the directive on employee involvement in the European Company.[16] These are signs of the increased European commitment to worker participation:

> There is no longer any doubt that the promotion of workers' participation in a company's decision making has become an essential part of the Community's mainstreaming strategy in its social policy agenda. It has definitely crossed the 'point of no return' (Weiss 2004: 229).

We have to follow this path further.

5. Worker participation and the prohibition on discrimination

In its assessment of worker participation as a stumbling block to the harmonisation of company law, the Reflection Group has adopted a diametrically opposed path. In that regard, it has concluded that the German legislation on worker participation (and seemingly that of other Mem-

14. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (recast), OJ L 122, 16.5.2009, p. 28.
15. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ 2002 L 80, 23.3.2002, p. 29.
16. Council Directive 2001/86/EC of 8 October 2001, cited above.

ber States too) cannot continue in its present form as it (supposedly) infringes EU law.

Its report states: 'The discrimination against employees in other Member States is in clear conflict with basic principles of the common market' (Reflection Group 2011: 53).

For several years, various authors in the German legal literature have considered whether the German rules on worker participation are compliant with EU law. For example, Hellwig and Behme conclude that, as the legislation completely excludes the foreign workforce of German companies from all participation on the supervisory board, the rules on the composition of the supervisory board in their current form infringe the prohibition on discrimination and the principle of free movement for workers established by Community law (Hellwig and Behme 2009). Therefore, according to the authors, the German rules cannot be applied and, as a consequence, the supervisory board of German companies must remain free of worker participation.

The complaint levelled is that the rule established in the German legislation on worker participation restricting the electorate and possible candidates for elections to the supervisory board to the workforce based in Germany contravenes EU law.

It is said that these rules restrict the freedom of movement for workers (contrary to Article 45(2) TFEU) and infringe the general prohibition on discrimination on grounds of nationality (established by Article 18(1) TFEU). However, as the following sections will demonstrate, those arguments are unconvincing.

5.1 Restriction on the freedom of movement for workers

It is correct to assert that the ECJ has extended the prohibition on discrimination established in Article 45 TFEU to become a prohibition on restrictions.[17] As a result, that article applies to national legislation which in law or in fact restricts the ability of domestic workers to exercise their

17. Case C-415/93 *Bosman* [1995] ECR I 4921. For a critical assessment of this judgment see Heuschmid (2011) .

right to free movement (Franzen 2012). For example, if, as a result of German legislation, a worker in Germany is prevented from taking up employment in another Member State, this constitutes a restriction on the freedom of movement for workers.

The fact that workers employed in Germany lose both their right to vote and to be a candidate in elections to the supervisory board once they move to work at a foreign plant or subsidiary of their company is regarded in this context as a restriction on the freedom of movement for workers.

The same argument applies in relation to the loss of any seat on the supervisory board consequent on a move to another Member State.

This loss of voting and candidature rights is said to make the move from Germany to another EU Member State so unattractive that workers are restricted in their ability to participate in the European labour market. According to this argument, workers would rather reject lucrative and interesting job offers abroad in order to retain their voting and candidature rights in elections to the supervisory board and, in a relevant case, their seat on the supervisory board.

This argument is divorced completely from reality. There is no worker in Germany whose decision whether or not to take up work in another Member State depends solely on his voting and candidature rights in elections to the supervisory board. The decision to take up work abroad is influenced by a mixture of factors. Better quality of life, better working conditions and better career opportunities are the reasons most commonly cited by European citizens for wanting to work abroad (European Commission 2010: 105).

The increasing number of workers in the European Union exercising rights to mobility (Franzen 2012) further disproves the argument. It cannot be said that the possibility to participate in elections to the supervisory board restricts workers from leaving Germany or that workers from other Member States choose to work in Germany in order to participate in elections to the supervisory board. The factors which are decisive for migration always concern living and working conditions.

Moreover, this argument (which, in any event, is somewhat absurd) ignores the fact that the loss of rights connected with board-level employee representation is counterbalanced by the acquisition of new rights in the

new country of employment, for example, the more generous right to strike provided for under French or Italian law.[18]

Similar arguments apply in the case where a worker from Germany loses his seat on the supervisory board as result of moving to a job in another Member State. This is, in practice, an extremely remote possibility. There are only 3 448 worker representatives on the supervisory boards of German companies.[19] Although this figure is not relevant for the legal assessment of any alleged discrimination, it is important that the reader is aware of the dimensions of this issue. Moreover, not every move to work at one of the employer's foreign plants necessarily involves the loss of that worker's seat on the supervisory board. The worker will retain his seat if he continues to perform activities which are within the organisational structure of the German plant.

In order to round off this picture, it must be emphasised that any restriction on the freedom of movement will in all cases be justified.

Germany cannot adopt legislation providing for worker participation in other Member States (Teichmann 2009). German laws can only apply to German matters. National laws can only go as far as a country's borders. This principle of territoriality applies in all European States which have legislation on worker participation. For that reason, German legislation on worker participation does not apply in Austria and the Austrian legislation on worker participation does not apply to workplaces in Germany.

5.2 Infringement of the general prohibition on discrimination on grounds of nationality

One of the fundamental principles of EU law is the general prohibition on discrimination on grounds of nationality (Article 18(1) TFEU). Consequently, the question which needs to be answered is whether exclusion of the workforce in another country from participation in elections to a German supervisory board constitutes discrimination on grounds of nationality. The answer is quite clearly 'no'.

18. See also the discussion in ZIP – Zeitschrift für Wirtschaftsrecht (2009).
19. See the data on supervisory boards compiled by the Böckler Foundation available on its website www.boeckler.de/38347.htm.

In Germany, the right to participate in the system of worker participation is accorded to workers without any distinction between German nationals and nationals of other Member States. Instead, under the 1976 Worker Participation Act, the crucial requirement is an employment relationship with a domestic company. The nationality of the worker is irrelevant.

However, as Iliopoulos-Strangas points out, Article 18 TFEU covers not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, such as a residence requirement, lead in fact to the same result, as is the case, for example, where a national provision appears to apply generally but in fact predominantly impacts on nationals of other Member States because the distinguishing criteria used typically only place obstacles in the path of nationals of other Member States (Iliopoulos-Strangas 2010: 1120).

In the present case, however, there is no indirect discrimination of that kind, as the adverse treatment of the foreign workers results specifically, as Wißmann correctly observes, from the fact that they remain in their home country and do not take advantage of their right to freedom of movement (Wißmann 2011: Vorbem. par. 63b).

The same conclusion is reached by Teichmann. He observes:

> The suggestion that persons living outside a Member State and who do not even wish to enter it should be accorded the benefits of domestic law would appear, to put it mildly, a borderline case as regards the EU principle of non-discrimination. Namely, there are many instances of a difference in treatment based on the place of employment. Are workers employed in Spain by [the German company] Siemens now to be regarded as protected under the German law of dismissal protection? Can Lufthansa continue to accord to its pilots employed in other European countries terms and conditions less favourable than those enjoyed by its pilots whose contract is with the German parent company? If cross-border group management of a German holding company is regarded as sufficient to trigger the comparability of two fact situations, the ECJ is going to be very busy in the near future (Teichmann 2010: 874-875).

Nothing further needs to be added to this argument.

In addition, the contention advanced by supporters of the discrimination thesis, that is, that German worker representatives are only interested in the fortunes of German plants and are 'more likely than not to vote against the establishment or expansion of foreign plants and subsidiaries' (Hellwig and Behme 2009: 269), fails to acknowledge corporate realities and turns the task of codetermination on its head. Foreign workforces have no reason to fear German worker representatives on the supervisory board. These are not the individuals responsible for closing plants and restructuring measures. Those matters are still decided by a company's management. The fact that, in this context, the supervisory board has a right of codetermination serves to protect the German and foreign workforces and constitutes an element of the carefully balanced system of German industrial relations. In common with the (European) trade unions and the works councils at national and European level, the worker representatives on the supervisory board aim to safeguard the interests of all the workforce specifically by reason of the fact that they do not regard redundancies as a cure-all and, instead, seek to develop innovative solutions and do not adhere to the principle of shareholder value. A good example of this approach can be seen in the successful opposition to the closure of the Bosch plant in Vénisseux (France) in 2011.

To presume in all seriousness that foreign workforces would be better protected against redundancies if the German rules on worker participation did not apply and only shareholder representatives were to be present on the supervisory board (a legal consequence of the supposed infringement of EU law) is nothing but an ideological construction.

Although the previous discussion has already disproved the thesis that discrimination results from national rules on worker participation, the following section will consider the legal consequences arising. This examination of the legal consequences of that supposed discrimination will further underline the absurdity of the debate.

5.3 Legal consequences of the supposed discrimination

A further issue which deserves consideration concerns the possible consequences of a finding that the rules on board-level worker representation infringe EU law. Three possibilities are conceivable.

(a) There is no requirement on German companies to have board-level worker representation. 'As the legislation completely excludes the foreign workforce of German companies from all participation on the supervisory board, the rules on the composition of the supervisory board in their current form infringe the prohibition on discrimination and the principle of free movement for workers established by Community law. Therefore, those rules cannot be applied and, as a consequence, the supervisory board of German companies must remain free of worker participation' (Hellwig and Behme 2009: 261).

To afford the principle of equality established under EU law such a wide interpretation would constitute a new development. Usually, the order not to apply a certain section of the law relates to the provision which discriminates, not the provision conferring a benefit (Teichmann 2010). In addition, a consequence of this kind would not affect not only the German legislation on board-level worker representation but the legal framework for board-level worker representation across Europe. With the exception of Denmark and Sweden, all remaining EU Member States do not include foreign workforces within the scope of their legislation on board-level worker representation. In Denmark, following the entry into force of the new Companies Act in 2010, 'employees in foreign subsidiaries [have the possibility] to vote and be eligible as board-level employee representatives on the board at group level. This right is not, however, automatic and depends on the decision of the general meeting of shareholders' (Conchon 2011: 29). In Sweden, 'the right for employees working in foreign subsidiaries to be represented on the board of a .. Swedish parent company is not enshrined as such in dedicated legal provisions, but results from the interpretation of the legal definition of a "group" of companies' (ibid). Thus, in both of those Member States, under certain conditions, workers in foreign subsidiaries have the possibility to participate in the election of board-level worker representatives at group level. In all other Member States, no such possibility exists. Thus, under this interpretation, throughout Europe, at a stroke, board-level worker representation would disappear. However, an outcome of that kind touches a core element of the national legal order in the Member States. In Germany, worker participation has become an important pillar of economic, legal and social stability. In the German system, it constitutes a uniform concept operating on multiple levels and something which addresses the employment relationship from multiple angles. Those who wish to disturb the overall system of worker participation must be capable of

justifying an interference with the freedom of association and freedom of occupation of workers. In particular, they must recognise that such interference will undermine the finely balanced symmetry which ensures a coherent order and settlement in the workplace (Hexel 2006: M70).

In addition, the repercussions of this solution for the European company (SE) may not be ignored. In relation to employee involvement in the European company, the 'before and after' principle applies, that is, if worker participation rights were in force prior to the company's establishment, these must be retained.

Therefore, should worker participation no longer apply to national companies, worker participation would not be triggered on their conversion to a European company.

In my view, this solution is the most absurd.

(b) A further possibility is interpretation of the rules on worker participation in conformity with EU law in a manner which involves levelling up. This means that the disadvantaged group is henceforth treated in the same way as the group which was previously advantaged (Teichmann 2010: 875).

In my view, this approach is impractical and infringes the principle of territoriality.

Specifically, this would mean that the German legislation on worker participation (and logically also the legislation on worker participation in other Member States) must be interpreted as requiring the national rules on election of worker representatives to include foreign workforces. The strict limitation of such rights to domestic workforces would thereby be removed. In my view, that is not only extremely difficult but also quite simply impractical. Under that solution, the electoral rules governing the election of worker representatives to the supervisory board would apply to all the plants within the company or group regardless of whether those plants are located in Germany or another Member State. This presupposes, however, that the German electoral rules are regarded as binding in all the relevant States. Naturally, this requirement for the rules to be regarded as binding applies likewise to the rules of other Member States governing the election of worker representatives to the relevant company organ.

To that extent, the principle of territoriality would no longer apply and national law would apply on the territory of a foreign State. In this connection, the argument is advanced that only the territorial aspect of board-level worker participation infringes EU law and, as a consequence, only this aspect need not be applied. Inclusion of foreign workforces, whose participation might require, in certain circumstances, underpinning with legal rights to challenge election results and the composition of the supervisory board, would allow the worker participation legislation to be interpreted in a manner in which discrimination is absent and, hence, in conformity with EU law (Rieble and Latzel 2011: 166).

(c) Finally, the Reflection Group proposes that in relation to worker participation in Germany a negotiating model should be established in line with the rules governing the European company (SE) (Reflection Group 2011: 53).

In my view, this approach is only possible for companies established under the rules of EU law.

Nonetheless, this raises the interesting question of which default rules should apply if the negotiations on worker participation fail. If, as has been suggested, in the event of a failure of negotiations, recourse should had to the rules of national law, for example, the law of the State where the company has its registered office, a further series of legal problems is raised casting doubts on the proposal's logic.

Namely, if in such a case the company had its registered office in Germany, the German legislation on worker participation would apply by default. However, according to the Reflection Group, this legislation infringes EU law and the mere fact of prior negotiations is incapable of curing such an infringement.

It is clear that the default rules applicable to a European company (SE) cannot apply as they govern a different fact situation. That is why the Reflection Group suggests that they apply only by analogy (although it is unclear exactly how).

Finally, I should like to observe that this Reflection Group proposal does not stand any realistic chance of adoption in the near future as unanimity is required for legislation on worker participation.

It would be more sensible, therefore, for the European legislative bodies to concentrate on worker participation rules in relation to corporate forms established under EU law.

6. Foreign companies with administrative headquarters in Germany

From the non-discrimination perspective, it would appear more productive to address the fact that foreign companies with administrative headquarters in Germany are excluded from the system of board-level worker representation.

During the period 2006 to 2010, a further 26 cases were recorded in Germany in which companies adopted a foreign legal form not subject to German rules on board-level worker representation. This increases the total number of companies that have adopted this approach to 43 confirming that this phenomenon has more than doubled in under five years (Sick and Pütz 2011: 35-36). These facts all suggest that the legislation on board-level worker representation should be extended to include foreign companies operating in Germany thereby counteracting the disadvantage experienced by the workforce in those companies. As a result of the increasing number of companies with a foreign legal form but administrative headquarters in Germany sections of the labour market have emerged in which board-level worker representation is absent. However, it is by no means evident why the workforce in such companies, unlike those in German companies, should not have the right to participate at board level. That distinction is illogical, unjust and undemocratic.

For that reason, trade union demands for legislation to include foreign companies with administrative headquarters in Germany within the scope of German rules on board-level worker representation are logically consistent and do not involve any infringement of EU law. According to Weiss and Seifert, 'ensuring the continued existence of a national system of worker participation constitutes .. an overriding reason in the public interest which can justify a restriction on the freedom of establishment for companies from other Member States with administrative headquarters on the national territory' (Weiss and Seiffert 2009; see also Sick 2011). Likewise, the academic experts on the commission appointed to develop recommendations for the modernisation of the German

system of board-level worker representation point out that 'Community law does not preclude the German legislature from subjecting such companies [foreign companies with an administrative headquarters in Germany] to the rules on board-level worker representation in such cases, at any rate, where the substance of that company's organisation including its workforce are to be found in Germany and, under the law of the country in which that company is incorporated, those workers do not have any worker participation rights' (Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung 2006: 35). For that reason, the academic experts recommend that 'the establishment of such companies should be closely observed and, in the event that they appear in appreciable numbers in a size relevant for the purposes of board-level worker representation, appropriate measures compatible with the requirements of EU law should be taken in order to maintain the integrity of the system of board-level worker representation' (ibid).[20]

7. Outlook for the future

The future of worker participation in Europe and the development of this instrument must be viewed increasingly in light of the demands of society for greater democracy in economic affairs. In this area, Europe must have the confidence to adopt its own path and create a regulatory framework which strengthens worker participation.

There must be more focus on the connections between worker participation and the system of political democracy. In Kluge's view, today's Europe would be more 'social' if the political intentions of the 1960s and 1970s had been realised. If the institutions of industrial democracy had been inserted across the board throughout the European Economic Community, from the outset, the economy would have been subject to greater social control. The idea of board-level worker participation was central to that approach. The Commission's 1972 proposal for a Fifth Company Law Directive envisaged that in all companies of 500 or more employees operating on a cross-border basis day-to-day management should be separated systematically from the task of controlling company management by a supervisory board. Half of the seats on such a body were to be filled by worker representatives (Kluge 2009: 111).

20. See on this Seyboth (2007).

Trade unions must have a role in shaping future social policy at the European level. The question to be answered, however, is how trade unions can exercise an influence at the European level in order to facilitate a constitutive social policy. The underlying objective of European social policy, that is, to maintain and develop national welfare state models through the adoption of political initiatives and minimum standards at a European level is currently far from being achieved; more accurately, it has been turned on its head. This is all the more critical following the Treaty of Lisbon as a result of which fundamental social rights are now binding and intended to guide the Union in its social policy actions. In the area of worker participation, this means the implementation of a minimum standard of board-level worker representation in all companies incorporated under EU law. 'Whenever a company takes on a European corporate form or exercise its EU law right to cross-border mobility, the workforce must have the opportunity to be present in the governing bodies of that company' (DGB 2010: 4).

However, it is important to counsel against unrealistic expectations. From the outset, European social policy has always been the snail which has advanced very slowly on the tails of integration in the internal market, heavily dependent on the political complexions in the Member States. Ultimately, European social policy is determined by the Council in which, at present, conservative governments are in the majority. This does not make the matter any easier. At the same time, discussions must be continued and taken forward with a view to ensuring minimum standards for worker participation in companies which have adopted a European legal form. This is a demand which the ETUC has advanced repeatedly. Its Executive Committee resolution of December 2011 put it as follows: 'Furthermore, the ETUC Congress demanded European minimum standards for worker participation in order to strengthen the implementation of worker information and consultation rights in the EU and to confirm that the EU respects and promotes different forms of board-level representation in European legal entities like SE, SCE and SPE and in the Member States where such systems exist' (ETUC 2011: par. 3).

References

Arbeitskreis Unternehmerische Mitbestimmung (2009) 'Entwurf einer Regelung zur Mitbestimmungsvereinbarung sowie zur Größe des mitbestimmten Aufsichtsrats', ZIP – Zeitschrift für Wirtschaftsrecht, 19, 885-899.

BDA and BDI (Bundesvereinigung der Deutschen Arbeitgeberverbände/ Bund der Deutschen Industrie) (2004) 'Mitbestimmung modernisieren', Report by the commission on worker representation established by the BDA and BDI.

Bermig, A., and B. Frick (2011) 'Mitbestimmung und Unternehmensperformance: Der Einfluss von Arbeitnehmervertretern im Aufsichtsrat auf den Unternehmenswert', *Die Betriebswirtschaft* 71 (3), 281-304

Conchon, A. (2011) 'Board-level employee representation rights in Europe: Facts and trends', ETUI Report 121, 10.

DGB-Diskurs 23 (2009) 'Mitbestimmungsvereinbarung und Größe des Aufsichtsrats', Berlin: DGB.

DGB (Deutscher Gewerkschaftsbund) (2010) Soziale Marktwirtschaft durch Unternehmensmitbestimmung in Deutschland, Resolution J 001 adopted at the 19th Federal Congress of the German Confederation of Trade Unions May 2010, p. 4.

ETUC (European Trade Union Confederation) (2011) Resolution on workers participation at risk: towards better employee involvement. Brussels, 7-8 November 2011. www.etuc.org

European Commission (ed.) (2010) Geographical and labour market mobility Special Eurobarometer 337 http://ec.europa.eu/public_opinion/archives/ebs/ebs_337_en.pdf.

European Commission (ed.) (2011) Internal Market: Awareness, Perceptions and Impacts. Special Eurobarometer 363 http://ec.europa.eu/public_opinion/archives/ebs/ebs_363_en.pdf.

Franzen, M. (2012) in R. Streinz (ed.) *EUV/AEUV*, 2nd edition, Munich: Beck, Article 45 TFEU, paragraph 86.

Genz, M. (2006), paper delivered in the labour law section of the 2006 congress of German lawyers, thesis no 10, Verhandlungen des 66. Deutschen Juristentages Stuttgart 2006, II/1 Sitzungsberichte, p. M43.

Hanau, P. (2009) 'Abschluss und Inhalt von Mitbestimmungsvereinbarungen', ZIP – *Zeitschrift für Wirtschaftsrecht*, 48, Supplement, 6-9.

Hellwig, H.-J., and C. Behme (2009) 'Gemeinschaftsrechtliche Probleme der deutschen Unternehmensmitbestimmung', *Die Aktiengesellschaft*, 8, 261-278.

Heuschmid, J. (2008) Mitentscheidung durch Arbeitnehmer – ein europäisches Grundrecht, PhD thesis, University of Bremen.
Heuschmid, J. (2011) in W. Däubler (ed.) *Arbeitskampfrecht*, 3rd edition, Baden-Baden: Nomos, § 11 paragraph 67.
Hexel, D. (2006) paper delivered in the labour law section of the 2006 congress of German lawyers, thesis no 1, published in *Verhandlungen des 66. Deutschen Juristentages Stuttgart 2006*, Volume II/1 Sitzungsberichte, p. M70.
Iliopoulos-Strangas, J. (2010) *Soziale Grundrechte in Europa nach Lissabon*, Baden-Baden: Nomos
Jirjahn, U. (2011) 'Ökonomische Wirkung der Mitbestimmung in Deutschland: Ein Update', *Schmollers Jahrbuch*, 131 (1), 3-57.
Kluge, N. (2009) 'Mitbestimmung als Bestandteil des europäischen Sozialsystems' in D. Hexel, (ed.) *Never change a winning system*, Marburg: Schüren, 103-112.
Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung (2006) 'Bericht der wissenschaftlichen Mitglieder der Kommission mit Stellungnahmen der Vertreter der Unternehmen und der Vertreter der Arbeitnehmer', http://kohte.jura.uni-halle.de/recht/Kommissionsbericht_Endfassung.pdf.
Köstler, R. (2011) '*Die Europäische Aktiengesellschaft', Arbeitshilfen für Aufsichtsräte 6*, 5th edition, Düsseldorf: Böckler Stiftung.
Neye, H.-W. (2011) 'Europäisches Gesellschaftsrecht – Quo vadis?, *Der Betrieb*, 40, Standpunkt, 67-68.
Osterloh, B. (2011) report of 7 December 2011 in the German newspaper Handelsblatt, p. 14.
Pfeiffer, C (2011) 'The Heterogeneous Economic Consequences of Works Council Relations', *Schmollers Jahrbuch* 131, 59-71.
Reflection Group on the Future of EU Company Law (2011) Report of the Reflection Group on EU Company Law, Brussels, 5 April 2011.
Rieble, V., and C. Latzel (2011) 'Inlandsmitbestimmung als Ausländerdiskriminierung', *Europäische Zeitschrift für Arbeitsrecht*, 2, 145-170.
Seyboth, M. (2007) 'Kommission zur Modernisierung der deutschen Unternehmensmitbestimmung: Bewertung as Arbeitnehmersicht', *Arbeit und Recht*, 1/2, 15-19.
Sick, S. and L. Pütz (2011) 'Der deutschen Unternehmensmitbestimmung entzogen: Die Zahl der Unternehmen mit ausländischer Rechtsform wächst' WSI Mitteilungen 1, 34-40.
Sick, S., and R. Thannisch (2011) 'Die Europäische Privatgesellschaft – Damoklesschwert für die Mitbestimmung', *Arbeit und Recht*, 4, 155-159.

Sick, S. (2011) 'Unternehmensmitbestimmung für ausländische Gesellschaften - Inkonsistenzen beheben!', *Die GmbH Rundschau*, 1196-1200.
Teichmann, C. (2009) 'Europäisierung der deutschen Mitbestimmung', *ZIP – Zeitschrift für Wirtschaftsrecht*, 48, Supplement, 10-17.
Teichmann, C. (2010) 'Europäisierung der deutschen Mitbestimmung durch Nichtanwendung des Gesetzes?', *ZIP – Zeitschrift für Wirtschaftsrecht*, 18, 874-875.
Weiss, M. (2004) 'The Future of Workers' Participation in the EU', in C. Barnard, S. Deakin, and G. Morris (eds.) *The Future of Labour Law*, Oxford: Hart, 229-252.
Weiss, M., and A. Seiffert (2009) 'Der europarechtliche Rahmen für ein „Mitbestimmungserstreckungsgesetz"', *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 38 (4), 542-580.
Wißmann, H. (2011) in O. Wlotzke, H. Wißmann, W. Koberski, and G. Kleinsorge (eds.) *Mitbestimmungsrecht*, Munich: Vahlen, Vorbem. paragraph 63 b.