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Are employee participation rights under pressure? Trends at national and EU level

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Policy implications

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In 2001, the adoption of the European Company Statute was based on a unanimous political compromise according to which EU company law should not jeopardise but should safeguard existing national rights of employee participation at board level. Although these rights have since then undergone changes in most of the 17 Member States where they exist, employee representation in the boardroom, including the right to vote, remains a widespread phenomenon throughout Europe. However, elements of a regulatory competition have been introduced over the years by both the European Court of Justice and the European Commission, thereby paving the way for a European 'Delaware effect'. It is in this context that Commissioner Barnier's upcoming new Action Plan on Company Law and Corporate Governance is awaited: will it confirm the

possibility for companies to circumvent national employee participation rights? Or will it adopt alternatives to this 'race to the bottom' such as those promoted by, *inter alia*, the European Parliament and the ETUC?

1. Introduction¹

In 2001, the adoption of the Statute for a European Company (*Societas Europaea* – SE) not only brought to a conclusion more than 30 years of heated debate over the framing of an EU-wide company legal status which would ensure respect for the variety of national industrial relations systems; it was also the first time that employee *participation* rights were recognised and enshrined in EU secondary law². The European legislator thus adopted an unambiguous definition whereby employee participation refers to the representation of employees on a company's supervisory board or board of directors, with the same rights and duties as the other board members, including the right to vote (see Art. 2(k) of Directive 2001/86/EC). As well as recognising this key element of industrial democracy, which prevails in the majority of Member States, the main contribution of the SE Statute was to ratify a central principle, namely that European company law must guarantee the safeguarding of preexisting employee involvement rights at national level, and notably board-level employee representation (BLER hereafter).

Where do we stand 11 years later? Just a few weeks before the launch in autumn 2012 of a new Action Plan on Company Law and Corporate Governance by Internal Market Commissioner Michel Barnier, the time is ripe to assess the EU's commitment to this safeguarding principle. Concerns have been raised as to whether the relevant provisions of EU law do actually provide the requisite protection (Van het Kaar 2011) and the question is all the more topical in a current economic context which, in the opinion of some parties, should rather enhance employee involvement at company level. As the European Parliament put it in a June 2012 resolution: 'the financial crisis has demonstrated the need for a clearer corporate governance framework which focuses more strongly on stakeholder participation' (European Parliament 2012).

1 This ETUI Policy Brief is both a summary and an updated version of a more extensive ETUI Report published in November 2011 (Conchon 2011).

2 As opposed to participation rights, the two other forms of employee involvement, i.e. information and consultation rights, were enshrined earlier in EU secondary law, e.g. in the 1975 Directive on collective redundancies or the 1994 Directive on European works councils.

The question is thus also in the hands of Member States which may well be inspired by existing patterns, especially at a time when the German BLER model is considered by some managers to be one of the reasons behind Germany's success in mitigating the crisis³. On the basis of the expertise on employee involvement developed by the ETUI over the years, with the support of members of the SEEurope network⁴, this policy brief therefore seeks to review the evolution of BLER rights in the light of both national (3.) and European (4.) developments. It will begin with a presentation of the stakeholder model of corporate governance that prevails in Europe (2.).

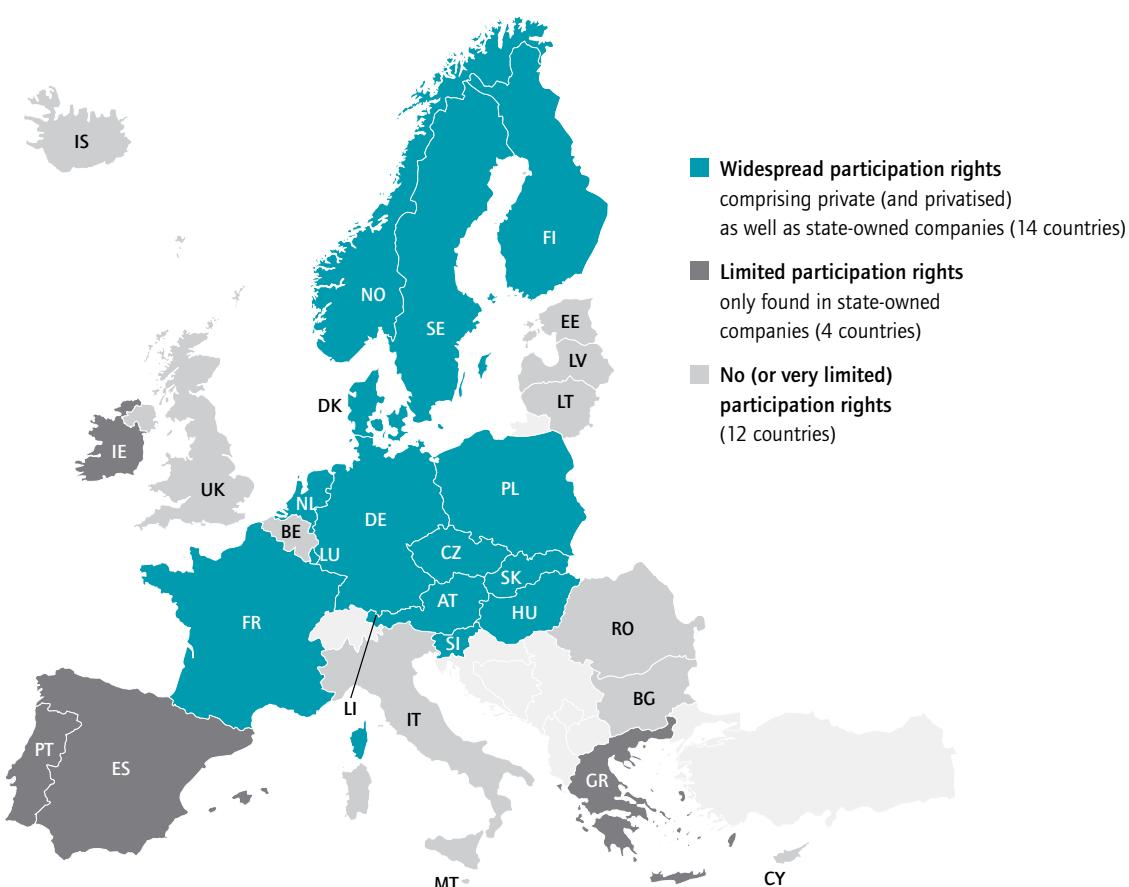
2. Prevalence of the stakeholder model of corporate governance in Europe

The corporate governance model whereby employees are given a say in companies' strategic decision-making is a distinctive feature of Europe compared with the US, for example, and this model is said to confer a distinct and competitive advantage in terms of both social and economic performance (Hill 2010). Far from

representing a German idiosyncrasy, BLER rights are to be found in no less than 17 of the 27 EU Member States, and equivalent rights exist also in Norway (which is part of the European Economic Area) and in a forthcoming new Member State, Croatia. BLER in Europe is thus best characterised not by its scarcity or marginality but by its institutional diversity.

Kluge and Stollt (2009) have established that national settings vary according to four factors. First, characteristics of companies have a significant impact on the extent of BLER rights. In particular, such rights may be found in both State-owned and private companies or, alternatively, in the public sector alone (see Figure 1); in both public and private limited liability companies or in the former alone (as in the Czech Republic, France, Luxembourg and Slovakia); and in a larger or smaller range of companies depending on whether the workforce threshold for applying the right is low (from 25 to 50 employees in the Czech Republic, Denmark, Sweden, Slovenia, Slovakia), medium (from 50 to 500 employees in Finland, Hungary, the Netherlands and Austrian private limited companies) or high (above 500 employees in Spain, Luxembourg and Germany).

Figure 1 Board-level employee representation rights in the European Economic Area



Source: Fulton (2011), updated by Conchon in 2012.

3 See, for instance, the statement made at the January 2011 World Economic Forum by John Studzinski, Managing Director at Blackstone, one of the world's largest private equity firms. Financial Times Deutschland, 27 January 2011.

4 Coloured text represents a hyperlink, to follow which readers may consult the electronic version of this Policy Brief at www.etui.org/publications.

Secondly, the characteristics of the board have to be considered, e.g. whether employee representatives sit on a board of directors (in charge of both the supervisory and managerial functions in a monistic system) or on a supervisory board (in charge of monitoring the day-to-day management of a dedicated management board in a dualistic system) – though it is true that more and more countries now allow companies to choose between these two corporate governance structures. A more strategic element is the composition of the board, in particular the number or proportion of seats allocated to employee representatives, which varies from a minimum of one seat (in Spain, France and Greece) to a maximum of half of the board (in the Czech Republic, Germany, Slovenia and Slovakia), with the most common proportion of employee representatives being one third of the board (Austria, Denmark, Hungary, Ireland, Luxembourg, France, the Netherlands).

A third point relates to the arrangements for appointing employee representatives who can be either directly nominated by trade unions or else elected by the workforce. Moreover, although in most countries company employees are alone eligible to participate in the boardroom, in some cases a number of seats are 'reserved' for external trade unionists (especially in the iron and steel industry in Germany and Luxembourg). The Dutch case presents a peculiarity, for board members proposed by the works council can be neither employees nor trade union officers so that they frequently come from the academic or political spheres.

Finally, national BLER rights vary also according to the manner in which they are implemented. In most countries, legal provisions become automatically applicable as soon as a company fulfils the statutory criteria. In some countries, especially the Nordic ones, an employee initiative is needed to trigger the application of BLER provisions, e.g. in Denmark (with similar provisions being found in Norway) where an initial for-or-against vote must first be held among the workforce.

All in all, it can be seen that the 'intra'-diversity of institutional settings across the 17 countries that have adopted provisions on BLER is thus a feature far more prominent than the 'inter'-diversity which prevails between Member States with and without BLER rights.

3. National rights: an evolving landscape

In addition to this inter- and intra-diversity, BLER rights are characterised also by the fact that this is a moving institution. Over the past few years several developments have taken place in European countries, some of which have been to the detriment of BLER rights, while others have served to further them.

Two phenomena have been particularly damaging to BLER rights at national level, namely, the – sometimes drastic – privatisation processes and the revisions of national Companies Acts which have, in some cases, been used as an opportunity to diminish, if not to completely eliminate, BLER rights.

Privatisations obviously trigger a direct reduction in the extent of BLER rights in those countries where such rights are restricted to

State-owned companies, as illustrated by the Maltese, Polish, Irish, Greek and Spanish cases. In the last three cases, although the process may have begun some years ago, the crisis has acted as a catalyst for faster and more widespread privatisation, not least because this was one of the numerous policies demanded by the troika in return for financial support. The reform of the banking sector in Spain did not wait for the June 2012 European bailout; the restructuring of savings banks (subject to BLER rights) had begun as far as back as mid-2009, reducing their number from 45 in December 2009 to 12 in March 2012. In Malta, BLER rights disappeared completely as a result of privatisations combined with the application of a political will and a relative absence of trade unions' reaction. In Poland increasing privatisation has already led to a dramatic decrease in employee board-level representatives: there were 618 such representatives in November 2009 compared with only 392 just two years later⁵. A government bill, submitted in January 2010, would have led to the complete elimination of BLER rights in these companies if the legislative procedure had not been stalled.

In contrast to the Polish case, a Czech government bill revising the Companies Act was actually adopted which not only allows public limited companies to choose between a board of directors or a supervisory board but also to have a worker-free board since none of the previous BLER rights were repeated in the new law⁶. Similar developments took place in both Hungary and Slovenia, where the introduction of the monistic system in company law in 2006 led, albeit not to the complete elimination of BLER rights, to their weakening. As opposed to the dualistic structure, no minimum BLER standards apply to the Hungarian companies which opt for the monistic structure. Indeed, in this case, BLER is not backed up by law but subject to a negotiated agreement. In Slovenia not only are BLER rights weaker in the monistic structure, but the revised Companies Act introduced a minimum threshold of 50 employees where none existed previously. The Dutch case constitutes a counter-example in that the introduction of a monistic structure⁷ does not affect the works council's right to propose board members.

Conversely, a number of initiatives aimed at reinforcing BLER rights have been (re-)launched. On a political level, proponents of BLER have taken visible measures in Germany, France and Italy. In spring 2010, proposals to extend BLER rights were submitted by two German parliamentary groups, the **SPD** and **Die Linke**, suggesting, *inter alia*, the lowering of the existing thresholds. Although the vote in the Bundestag on 28 June ended in rejection of both proposals, they did serve to fuel a debate on, especially, the topical issue of German operating companies registered under a foreign legal status and thereby freed of the need to comply with German BLER rights. In France, extending BLER rights was part of François Hollande's presidential manifesto. Further steps have been taken since his election with the adoption of a '**Social Roadmap**' in July which foresees a government bill by the end of

5 According to the [online database of the Polish Ministry of Treasury](#).

6 The Czech Companies and Cooperatives Act No 90/2012 will enter into force in January 2014.

7 However, the entry into force of Act 275 of June 2011 is still pending.

2012 on the regulation of remuneration policies through, *inter alia*, the participation of employee representatives on the company's remuneration committee, and the launch of a debate at national level on expanding BLER rights in the private sector. In Italy, the [law reforming the labour market](#) which was adopted on 28 June includes an article aimed at improving industrial democracy and requires the government to adopt a decree in the next nine months allowing (but not requiring) private limited companies and Italian-based SEs with more than 300 employees and a dualistic structure to have employee representatives on their boards.

These political initiatives find support on the trade union side as they reflect longstanding demands that the unions have reiterated more recently (e.g. the DGB in Germany, the CFE-CGC, CFTC and CGT in France). In two Benelux countries, unions have also called for more BLER rights, asking for either a reduction in the applicable threshold (LCGB and OGBL in Luxembourg) or a higher proportion of proposed board members (CNV, the Dutch Christian union, in 2007). In the United Kingdom the crisis has triggered a heated debate over excessive remunerations, which the TUC has taken as an opportunity to reiterate its call for worker representation on the remuneration committees of large companies. The UK Department for Business, after including the proposal in its 2011 consultation, eventually [rejected this option](#), while the TUC continues to push for it.

Actual changes and foreseeable trends at national level reveal that BLER rights are to some extent being maintained in Europe, albeit in a somewhat uneven manner with some countries having abolished (Czech Republic) or diminished (e.g. Hungary, Slovenia) previously existing rights, and others having moved in the opposite direction and created or extended participation rights or being about to do so (France and Italy, with similar developments also in Norway). These trends do not merely reflect the commonly described divide between the EU15 and the new Member States; they rather underline the extent to which BLER is dependent on political circumstances which, in most of the new Member States, have recently led to the disintegration of existing social models (see [ETUI Working Paper 2012.04](#)). Our findings confirm, in any case and at the very least, that the stakeholder model of corporate governance is still prevalent and enjoys some considerable degree of support in Europe.

4. EU company law: securing or threatening national rights?

In EU primary law, BLER has been recognised as a European fundamental right: it is enshrined in the 1989 Community Charter of Fundamental Social Rights for Workers (to which Member States are attached according to the 5th recital of the EU Treaty) and in EU social policy (Art. 153(1)(f) of the Treaty on the Functioning of the EU). In EU secondary law, the 2001 SE Statute paved the way for the adoption of the 2003 Statute for a European Cooperative Society and the 2005 Cross-border Mergers Directive, both of which include BLER provisions based to a large extent on the SE Directive. Therefore, in the early 2000s the EU regulatory approach to BLER seemed to favour flexibility (in these three EU laws, BLER arrangements are negotiated) while safeguarding

existing rights (in line with the 'before and after' principle of the SE, if BLER rights applied before the SE Statute was adopted, they should be maintained afterwards). However, a closer look at past and current initiatives reveals that EU company law could lead to the undermining or even circumvention of national BLER rights on three grounds: 1/ existing loopholes in current EU legislation; 2/ a lack of additional EU legislation safeguarding existing rights; 3/ an emerging EU legal approach promoting regulatory competition.

As far as the first point is concerned, Van het Kaar (2011) has pointed out that the provisions of the SE Statute and the Cross-border Mergers Directive are not strictly the same. For instance, merged companies opting for a monistic structure can limit BLER to one third of the board, meaning that this Directive could serve to cut back representation. Nor is the SE Statute immune from criticism. Of the 1,286 SEs registered as of June 2012, only 213 are considered to be 'normal', i.e. having more than five employees and involved in genuine business activities⁸. In the vast majority of cases, therefore, no negotiations took place and BLER rights actually exist in a mere 40 SEs. Moreover, the SE Statute can in theory be used by companies to circumvent national BLER rights, insofar as negotiations on employee involvement have to precede SE registration and be based on the BLER situation prior to adoption of the SE Statute. Theoretically, therefore, firms could choose to avoid BLER by adopting the SE Statute before reaching the workforce threshold that would otherwise have triggered application of national rights. Similarly, they could effectively 'freeze' the existing proportion of employee representatives, which would otherwise have increased above a second threshold⁹. These strategies are conceivable because of the uncertainty surrounding the re-opening of negotiations on employee involvement and BLER after SE registration, even in the case of a workforce increase that would have generated BLER rights under national law. Although some transposition laws made provision for new negotiations and although a German court case¹⁰ confirmed that the activation of an SE (i.e. when a formerly 'empty' SE with no employees starts hiring staff) should trigger negotiations, the situation remains vague. Reliable empirical studies (Rehfeldt *et al.* 2011, Köstler 2012) confirm that such attempts to circumvent the law are, in reality, rare. It remains to be seen whether the revision of the SE Statute will address this key issue.

Another pressure on national BLER rights, coming in the wake of rulings of the European Court of Justice, is the way in which companies are henceforth explicitly allowed to indulge in 'regime shopping'. According to several ECJ judgments, a firm can register in one country and thus be subject to its national company law while conducting all of its business activities in another Member State to whose company law it will not be subject (Van het Kaar 2011). Concerns here arise because, as opposed to employee

8 Source: [ETUI European Company \(SE\) database](#).

9 The case of German companies with more than 500 employees, which are subject to the one-third codetermination, and less than the threshold of 2,000 employees which, triggers 'parity codetermination'.

10 OLG Düsseldorf, 30.3.2009, I-3 Wx 248/08.

information and consultation procedures which are governed by labour law, BLER rights pertain to the field of company law. This places companies in the position of being able to choose whichever national legal framework they prefer and to decide to register in a country that might well be the one with the least stringent rules on BLER. For instance, Sick and Pütz (2011) found that 43 large companies operating in Germany are not required to comply with Germany's BLER rights since they are registered in a BLER-free country (e.g. as a British PLC) and are, according to the case law, perfectly within their rights to arrange their operations in this manner. By acknowledging that it is legal to establish a 'letterbox company', the ECJ rulings have thus transformed BLER 'from an obligatory to a voluntary institution' (Höpner and Schäfer 2012: 21). This threat to national BLER rights is so great that it has prompted the European Parliament to call for European action in the form of adoption of a 14th Directive on the cross-border transfer of company seats. Although the EP June resolution (see Introduction) is its fourth request in this regard¹⁰, the European Commission has not yet given serious consideration to the Parliament's demand, except for including a related question in its spring public consultation on the future of EU company law, the policy implications of which will be revealed this autumn.

Not only has 'regime shopping' yet to be properly addressed, but the recent proposal for a Statute for a European Private Company (*Societas Privata Europaea* – SPE) has cast doubts on a regulatory competition strategy supported by the European Commission. In order to enhance the benefits of the internal market for SMEs, in 2008 the European Commission presented a proposal for an EU-wide legal status specifically tailored to private limited-liability companies. Unlike SEs, these SPEs could be created *ex nihilo* and could locate their registered office and actual headquarters in two different Member States. In short, the 2008 proposal for an SPE Statute would have introduced, if adopted, a European 'Delaware effect': any company opting for the SPE Statute would have been able to choose as its country of registration the country with the least stringent rules on BLER (and taxation) and to set up its operations in countries where national companies are subject to BLER rights. It was mainly, albeit not solely, for this reason that the 2008 proposal was opposed by several Member States, as were too each of the eight subsequent political compromises submitted to the Council. Although the last political compromise of May 2011 incorporated provisions resembling those of the SE Directive, it failed to achieve unanimity as the provisions offered much less protection: by introducing a threshold of 500 employees enjoying higher BLER rights than that of the country of registration for triggering negotiation on BLER arrangements, the proposal would have threatened the national rights that apply in the eight countries with low BLER thresholds in private limited companies (Austria, Denmark, Finland, Hungary, the Netherlands, Norway, Sweden and Slovenia). As the SPE proposal has been in an *impasse* for more than a year, DG Internal Market used its public consultation on the future of EU company law as an opportunity to revive the proposal by gathering opinions on possible alternatives from a range of actors (public authorities, trade unions, business federations, investors, academics, civil society organisations, etc.).

5. Conclusion

Employee participation rights at board level are currently under pressure partly because of a number of national developments that have diminished or eliminated them but mostly because of shortcomings in the rules of European company law. Indeed, given the diversity of industrial relations systems in EU countries (and more generally varieties of capitalism), especially as regards BLER, the ECJ found itself in such a powerful position that it partially reversed past political compromises aimed at preserving national BLER rights (Höpner and Schäfer 2012). Instead of restoring balance to the situation, the European Commission's recent legal strategy has tended to support regulatory competition, as illustrated by the SPE proposal. This 'race to the bottom' has given rise to concern over the past few years, with various actors denouncing the current threats and calling for the European Commission to take action (e.g. European Parliament 2009) or to promote alternatives such as upstream harmonisation (e.g. ETUC 2012).

The long-term strategy to be advocated in DG Internal Market's forthcoming new Action Plan on Corporate Governance and Company Law is therefore eagerly awaited. Will it confirm the recent trends that have emerged (regulatory competition, 'regime shopping') as the new European legal strategy? Or will it reject the downstream harmonisation approach and instead favour the founding political compromise that underpinned the SE, according to which EU law, while not imposing BLER in countries where no such provision already exists, must prevent any corrosion of existing national rights?

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