

ETUC position paper Orientation for a new EU framework on information, consultation and board-level representation rights (Part I)

Adopted at the extraordinary ETUC Executive Committee on 13 April 2016 in The Hague

Background

The Athens ETUC Congress mandated the ETUC Secretariat to start some in-depth work on board-level representation. Several expert groups dealt in particular with the possibilities to draft cornerstones for the directive on European Company Statute to ensure that the directive fulfils its purpose and discussed different options to broaden board-level representation in Europe. On the basis of a new consensus in October 2014, the ETUC Executive Committee adopted a Resolution calling for a Directive introducing a new and integrated architecture for workers' involvement in European company forms. Building on the existing EU acquis, the Directive should set high standards on information and consultation, and introduce ambitious minimum standards on workers' board level representation.

This Resolution is another significant step for the European trade union movement. It is the first time that we are calling for a common level playing field on workers' rights to board-level representation. The Resolution stressed, however, the need to preserve national traditions. The idea is not to intervene in purely domestic situations, but to propose a sustainable vision for EU company law. Whenever a business wishes to rely on the opportunities offered by European company law, it must at the same time adhere to shared European values. The new framework would become the single reference on information, consultation and board-level representation for all European company forms (e.g.: SE, SCE, upcoming statute on SMEs). It would also apply to companies wishing to undergo a cross-border merger, cross-border divisions or cross-border transfer of registered office – to the extent that these operations are regulated by European law.

To devise an instrument that applies to European company law without adversely affecting national traditions is a delicate exercise. The ETUC Secretariat has carried out extensive work to transform our 2014 general demand into concrete proposals, in particular an expert-workshop on workers' involvement of 18-19 February 2016. This document reports to the executive committee the progress that has been made.

The rationale for a Directive – what is the added value of workers' board-level representation?

The ETUC strategy to defend this proposal is to demonstrate its positive impact on the long-term interest of EU companies and smart growth in Europe. We intend to highlight indicators showing that companies with workers' board level representation ('WBLR') perform better economically, but also with regard to social and environmental considerations than companies without workers' participation on the board¹.

More democracy at the workplace is what workers want. Information, consultation and WBLR function as communicating triangle. WBLR is an additional source of influence at the heart of company decision making.

¹ See for instance ETUI publication *Benchmarking Social Europe 2016* at p.69:
<http://www.etui.org/Publications2/Books/Benchmarking-Working-Europe-2016>

It can be a source of reliable and early information, and a tool for improved access to management decisions at an early stage. This means that WBLR should be treated as an integral component of an overall information and consultation procedure, with a view to achieving meaningful social dialogue at the workplace.

Last but not least, a common level playing field would address the gaps and inconsistencies in the EU acquis, reducing incentives for abuses and circumvention of national standards. It should indeed underline that WBLR tradition exists in 18 Member States, and that 36% of the European workforce benefit from participation in the boards. Trade union contributions to further integration of EU company law will be significantly enhanced by the prospect of minimising regime shopping.

Shaping ETUC demand – what standards for information, consultation and board-level representation rights?

The Directive should leave as much space as possible to negotiations at transnational company level with a view to enable the parties to design an information, consultation and WBLR procedure that best fits their needs and tradition. Key principles should thus be laid down in binding standards, and ambitious subsidiary requirements should be designed. These requirements would apply as fall-back provisions in the absence of an agreement or if the parties wish so.

The ETUC Secretariat is shaping concrete demands around the following cornerstones:

Stronger information and consultation rights

The Directive should strengthen the existing minimum standards for the creation and functioning of a works council, which will be the discussion partner of management for employees' involvement in the company. Building on the existing acquis (e.g.: EWC Recast Directive, SE Directive), the Directive should provide solutions for the composition of the works council, its competence and functioning rules while protecting national practices and higher levels of information and consultation procedures.

The competence of works councils can be usefully extended to include decisions to have recourse to external labour (subcontracting, temporary work agencies), data protection, environmental issues, introduction of new technologies, large loans, etc².

The functioning of the works council can be improved by requiring more than one meeting a year and the creation of specialist committees with the assistance of experts (e.g.: economic committee).

Above all, there is the delicate question of enforcement. What to do when information and consultation does not take place, or is handicapped by poor and/ or late information? One approach would be to state that in case of grave violation of information and consultation procedure, the planned management decision cannot take place until the procedure is completed. At the same time, it can be anticipated that the introduction of WBLR standards will considerably help works councils to receive timely and quality information.

² As an illustration of the current acquis, the EWC Recast provides the following:

The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.

The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express;

New standards for workers' board-level representation

The Directive should introduce an obligation to put in place a system for workers' representation in the board. This can either be the board of directors (for one-tier systems) or supervisory boards (for two-tier systems). This Directive has indeed no vocation to regulate companies' board structure.

Every workers' representative on the board should be a full member with the same rights and duties as the members representing shareholders, including the right to vote. This means that workers' representatives should receive an invitation to the board meetings in time and with sufficient documents. They should have the right to discuss and ask questions individually. They should have an individual right to convene extraordinary meetings and to request that a topic is included in the agenda.

In full respect of different corporate structures, the Directive could contain a non-exhaustive list of the topics that should appear on the agenda of the board. The ETUC will also have to be vigilant that in accompanying European company law instruments, sufficient provisions are inserted to compel all board members to act in the long-term interests of the company.

Workers' representatives, both on the board and in the works council, must enjoy protection against dismissal and discriminatory treatment. Sufficient time off and training must also be secured.

Confidentiality is a topic that will have to be addressed very carefully. Too many topics are nowadays qualified as "confidential" by management. This leads to poor or absent information to works councils. It is therefore essential that the Directive tries to define sensibly what the notion of confidentiality entails. A delicate balance will have to be established between, on the one hand, the need to restrict confidentiality and, on the other hand, establishing workers' representatives as trustworthy partners. Failing that, board meetings may become empty events, with most important decisions being discussed outside its walls.

The ETUC would propose an escalator approach with a low proportion of WBLR for small enterprises and increasing to higher proportions depending on the size of the company (as well in the monistic as in the dualistic system):

- small companies with 50 to 250 employees (within the company and its direct or indirect subsidiaries) should have a low proportion of WBLR (2 or 3 representatives)
- companies with 250 to 1,000 employees (within the company and its direct or indirect subsidiaries) one third participation
- big companies with more than 1000 employees (within the company and its direct or indirect subsidiaries) should have parity (half of the seats).

The Directive should not lead to a situation where workers' board-level representatives have no works councils to report to. It must therefore be ensured that there is consistency between, on the one hand, the rules fixing the number of workers' representatives and, on the other hand, the thresholds for the establishment of a works council. The thresholds contained in the EWC Recast cannot serve as a reference.

The ETUC believes that gender equality and diversity in the boardroom of companies is a key democratic principle with positive economic side-effects. The principle of gender equality should however be kept separate from that of diversity: women are neither a group nor a minority, but more than half of the world's population not to mention 45% of the European workforce.

Therefore, the balanced participation of women and men in decision making bodies is not only merely a question of diversity, but an essential imperative of the fundamental principles of democracy and human rights, as enshrined in the EU Treaties and the Charter of Fundamental Rights. Each gender should be represented at a level of between 40% and 60% in decision-making structures. This principle should apply to publicly-listed and non-listed companies and to both executive and non-executive board members.
