

**Workers' participation at board level
in the EU-15 countries**

Reports on the national systems and practices

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Foreword

On 8 October 2001 the EU Council of Ministers adopted the two interlinked legal instruments necessary for the creation of European Companies (SE): a regulation on a statute for European Companies and a Directive on employee involvement within them. This move represents a breakthrough, coming 31 years after it was first proposed. This new legislation represents a historic compromise whereby workers' participation on management or supervisory boards becomes standard practice.¹

The SE-Statute and the Directive have to be transposed into national law by 8 October 2004. From this moment on companies will be able to set up a European Company (SE). We cannot know how many companies will, in future, have recourse to the European Company Statute. However, we do know that workers' representatives and their trade unions will be need to make preparations well in advance if they are to make effective use of the opportunities offered by the Directive.

Experience with the EWC Directive shows how important it is to develop a common understanding among workers' representatives from different EU countries who have to work together and for all trade union organisations of the EU to be prepared for such legislation as early as possible. We believe that in order for this to happen, we must develop knowledge and understanding of existing national systems, existing practical experience and the rules provided by the new legislation.

The 15 country reports included in this publication will be a valuable source of information on the different existing systems of board-level participation within the European Union. They have been prepared by national experts within the project **“Prospects for participation and co-determination under the European Company Statute”**. This project was carried out jointly by the Hans Böckler Foundation (Germany), SYNDEX (France) and the European Trade Union Institute, together with their partners the Labour Research Department (GB) and Sindnova (Italy). It was funded by the EU Commission under budget line B3-4003.

Within this project, information and experience was pooled at three seminars in Düsseldorf, Paris and Brussels with five countries represented at each. The seminars were attended by a national expert and workers' representatives (trade union officials and elected workers' representatives either at board level in a multinational or EWC members representatives) from the five respective member states.

¹ For more information on the question of “worker involvement in the European Company” see also the website www.seeurope-network.org

The reports presented below were commissioned as material for those seminars and were used to provide information for Robert Taylor's comparative essay and the brief national overviews in the book that came out of that project². However, there was not space in the book for the detailed and wide-ranging material that we present here. As these reports comprise a unique and particularly useful resource for those interested in the topic, we felt that it was necessary to make them available in their entirety. This is what we are doing here with this electronic publication.

We are grateful to the 15 authors whose work makes up this publication and to all those trade unionists and workplace representatives whose participation in the seminars was crucial to the success of the project.

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Norbert Kluge

Hans Böckler Foundation

European Trade Union Institute

Düsseldorf and Brussels, March 2004

² European Trade Union Institute and Hans Böckler Foundation: *The European Company: Prospects for board-level representation*. Brussels and Düsseldorf 2004.

Austria

by Wolfgang Greif*

Significance of co-participation on the supervisory board for employees' representation

Since 1974, representatives of workers have had the right to participate in the executive supervisory bodies of corporations in Austria. Their function is honorary and they take part in the work of the executive body with basically the same rights and obligations as the shareholders' representatives, and must bear in mind the interests of shareholders and the general public, as well as those of employees. In general, the participation of employees on the supervisory board, especially relating to commercial matters, plays a major role in workers representation in Austrian companies.

Pursuant to the Austrian Works Constitution Act (*Arbeitsverfassungsgesetz, ArbVG*), members of works councils have extensive rights at the operational and enterprise level. These include the right to receive information and be consulted as well as intervention rights regarding commercial and other matters. They also have many options for negotiating agreements with employers at the enterprise level. However, it is only the co-participation of workers on the supervisory boards of corporations that gives them the opportunity to take part in decision-making together with shareholders' representatives in issues relating to the business with a strategic significance for the company's future, and thus to contribute to the shaping of such decisions.

In this respect, workers' representation on the supervisory board is an important supplement to the other co-participation rights at the company level for members of the works councils in Austria. This is true even if the actual empowerment of employees to influence decisions of the supervisory board is limited by the statutory provision that restricts the number of works' council representatives that may be so delegated to one-third (one-third parity rule). In practice this means that the company's work council may delegate one member to the supervisory board for every *two* members delegated by the shareholders' representatives.

Corporate governance in Austria

The organizational structure of stock corporations in Austria breaks down into several tiers: The different functions for the operation of the company are organized as follows:

Executive Body	Competence
<i>Management board</i> (stock corporation, AG) or managing directors (public limited company, GmbH)	Management and representation
<i>Supervisory board</i>	Control and supervision
<i>Annual shareholders' meeting</i> or shareholders' meeting	Manifestation of shareholders' will
<i>Auditor</i>	Auditing of accounts

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The nomination of the members differs by executive body as well as by shareholder and employee representative:

- The annual general shareholders' meeting elects the shareholders' representatives to the supervisory board as well as the auditors.
- The employees' representatives are delegated pursuant to § 110 Works Constitution Act by the respective employees' representative body entitled to delegate members to the supervisory board.
- The supervisory board appoints the members of the managing board of the stock corporation. The managing directors of the limited liability companies are appointed by the shareholders' meeting.

Pursuant to the Austrian Stock Corporation Act, all members of the supervisory board as well as of the managing board shall undertake to exercise their functions in the interest of the company, bearing the interests of shareholders and employees as well as of the general public in mind. This fundamental principle applies to both shareholders' and employees' representatives on the supervisory board.

The supervisory board is the controlling body of a corporation. Its principal task is to supervise the management of the company. Basically, the supervisory board's duty to supervise extends to checking the legality, expediency, commercial efficiency and the social effects of measures taken by the management.

The status of the supervisory board varies in the different types of corporations. The most extensive supervisory rights are granted to the supervisory boards of stock corporations, more restricted rights to the supervisory board of limited liability companies and very limited rights to that of co-operative societies depending on the society's by-laws.

Responsibilities of the supervisory board

On the one hand, the supervisory board is responsible for checking retroactively if the management board has managed the business properly, and on the other hand, it is responsible for providing guidance to the management board in the case of extraordinary measures by consulting the management in advance.

Austrian law gives the supervisory board several statutory instruments for exercising its duty of supervision:

- The management must report to the supervisory board on a regular basis, at least quarterly, concerning the development of business and the overall economic situation of the company.
- The supervisory board may request at any time a report from the managing board concerning company matters, including the company's relationships with other group companies.
- The supervisory board may inspect and review all books and documents of the company, including its assets.
- The supervisory board's approval is required for specific issues of management policy that may have a major impact the future development of the company.
- The supervisory board may seek the assistance of outside experts.

- The supervisory board must call a shareholders' meeting if required in the interest of the company and the managing board fails to call such a meeting.

Apart from the competence to appoint and dismiss the members of the managing board as well as to inspect and approve the annual financial statements, the supervisory board must – within the scope of its preventive supervisory powers – be consulted and its consent obtained for major management decisions.

For example, according to the relevant law the following list of business transactions are subject to the approval of the management board or managing director only after obtaining the consent of the supervisory board:

- The acquisition, sale and closing down of enterprises and plants, the acquisition and sale of investments, the establishment and closing of branches.
- The acquisition, sale and encumbrance of land.
- Investments as well as the issue of debts securities, the taking out and granting of loans and credit that exceed a certain sum (as defined by the articles of association, statute or the supervisory board).
- The start and discontinuation of lines of business and types of production.
- The definition of general principles to govern business policies as well as rules for granting the management staff shares in the profit or sales of the company as well as company pensions, and for conferring the commercial power of attorney to officers of the company.

In addition to these transactions defined by law or the articles of association, the supervisory board itself may require certain types of transactions to be subject to its approval and thus increase even further the significance of the role of the supervisory board in the control of the company.

Companies with a mandatory supervisory board

Austrian law defines employees' co-participation in the supervisory board for the following types of companies:

- *Stock corporations (Aktiengesellschaften, AG)*; mandatory supervisory board pursuant to § 87 Stock Corporation Act
- *Limited liability company (Gesellschaften mit beschränkter Haftung, GmbH)*; mandatory supervisory board pursuant to § 29 Law on Limited Liability Companies under certain conditions; optional supervisory board, for example if defined in the articles of association;
- *Mutual insurance associations (Versicherungsvereine auf Gegenseitigkeit)*, mandatory supervisory board pursuant to §§ 43 and 47 Insurance Supervision Act;
- *Savings banks as defined by Savings Bank Act (Sparkassen im Sinne des Sparkassengesetzes)*; mandatory supervisory board pursuant to Federal Law Gazette 64/1979;
- *Co-operative societies (Genossenschaften)*; mandatory supervisory board in co-operative societies which permanently employ at least 40 persons pursuant to § 24 Law on Co-operative Societies
- *Private foundations (Privatstiftungen)*, mandatory employees' co-participation pursuant to § 22 Art. 4 Private Foundation Act if it employs more than 300 employees or is under

the majority management of an Austrian corporation; otherwise optional supervisory board with employees' co-participation

- *Associations (Vereinen)* pursuant to § 5 Association Law, option of installing a supervisory board under its by-laws
- Furthermore, there are special laws that provide for employees' representation on the supervisory board of *certain companies* whose function serves the *public interest* (among these are Austrian Broadcasting Company (*Österreichischer Rundfunk*), Austrian Postal Services (*Österreichische Post*), Austrian Railways (*Bundesbahn*), Österreichische Industrieholding AG, Austro-Control).

Several categories of companies in Austria are organizations in which employees' representatives are largely excluded from co-participation on the supervisory board. These are referred to in German as "Tendenzbetriebe". These are companies whose business directly serves political, associative, religious, scientific, educational or charitable aims, as well as administrative agencies and public law entities as well as the Austrian central bank.

For companies and enterprises whose business directly serves news reporting and the expression of opinions, the relevant provisions of the Works Constitution Act concerning the co-participation of employees' representatives on the supervisory board apply only with restrictions. The provisions on employees' co-participation on the supervisory board do also not apply to theatre enterprises.

According to the current records of the Austrian Chamber of Labour there are approximately 1,500 companies with a supervisory body in Austria (about two-thirds are stock corporations and one-third limited liability companies). All in all, more than 400,000 employees work at these corporations. This concerns approximately 15% of the entire workforce in Austria, with far more in the industrial and service sector than for example, in the financial sector.

The one-third parity rule in employees' representation

Since 1974, employees' representation has been defined by law under the Works Constitution Act which defines the applicability of the so-called one-third parity rule. Pursuant to this Act, the number of employees' representatives depends on the number of representatives appointed by the shareholders to the supervisory board. Thus, the Works Constitution Act goes beyond the former law of 1947 that had defined a static representation of two employees' representatives in every case.

The company's work council may delegate one member to the supervisory board for every two members elected by the capital representatives. The works council is entitled to appoint at least two mandates to the supervisory board. If the number of shareholders' representatives is odd, an additional employee representative will be delegated.

Accordingly, the number of representatives to be delegated is calculated as follows:

- | | |
|-----------------------------------|------------------------------------|
| • 3 shareholders' representatives | 2 employees' representatives |
| • 4 shareholders' representatives | 2 employees' representatives |
| • 5 shareholders' representatives | 3 employees' representatives |
| • 6 shareholders' representatives | 3 employees' representatives |
| • 7 shareholders' representatives | 4 employees' representatives, etc. |

This representation according to the one-third parity rule does not only apply to the plenary meeting of the supervisory board, but also to its committees. Employees' representatives are solely excluded from having either a seat or a vote in those committees that deal with the staff relations between the company and its management board.

A corporation's supervisory board must consist of three shareholders' representatives at least. Depending on the share capital, the maximum number of members on the supervisory board according to law may range from 7 to 20 shareholder representatives.

Delegation by the executive bodies of employees' representatives

Employees who are delegated to the supervisory board must be among the elected members of the works council and have active voting rights, i.e., they must be employed in an enterprise or company of the corporation. This excludes trade union representatives from being delegated to the supervisory board although they can be elected to the works council. Members of works councils (thus employees' representatives on the supervisory boards) cannot be made subject to restrictions or discrimination in pursuing their activities; furthermore, they also enjoy special protection against being given notice or dismissed. They must also be granted paid time off to perform their duties.

The employees' representatives are delegated by the central works council (obligatory joint council formed by the works councils of several enterprises of one company or group company) or, if there is only one enterprise, by the works council or joint works committee (obligatory joint committee formed by the works councils for blue-collar workers and white-collar workers in one enterprise). If no central works council has been established although several enterprises exist, co-participation on the supervisory board is not possible.

The responsible executive bodies of employees' representatives are bound by the proposals of the political groups represented when delegating employees' representatives to the supervisory board. The seats on the supervisory board are allocated according to the shares of votes won by the parties at the last elections of the (central) works council.

When preparing the nominations, an adequate representation of blue-collar workers and white-collar workers as well as of the individual enterprises of the company must be taken into account.

With regard to the rights of co-participation regarding commercial issues in the case of pension funds, there are plans to partly modify the provisions of the applicable Works Constitution Act to include not only to the employees of the pension funds themselves, but also to persons eligible for benefits from companies which have joined the pension funds.

The activity of employees' representatives in the supervisory board begins with the resolution of the competent executive body of employee representation to delegate a representative to the supervisory board and is ended only by themselves or the works council or central works council that delegated the representative. According to this regulation, there is no certain term of office. An employee' representative remains in office as long as he or she is willing as is not recalled by the competent body. Termination of office would thus occur when, for example, the (central) works council is obligated to recall its representatives because the number of shareholders' representatives in the supervisory board has changed, the employees' representative's mandate expires, he or she resigns or no longer fulfils the requirements for delegation.

Delegation of employees' representatives in group (parent) companies

If the right of employees' representation on the supervisory board is given in the case of the parent company of a group, the composition of the employees' representation on the supervisory board shall consist of the employees' representatives from both the parent company and the group companies. If employee representation has been established for the group, this group works council shall delegate the employees' representatives to the supervisory board.

The number of employees represented in the individual companies of the group shall define the number of mandates. However, regardless of the calculation according to the above mentioned ratio, one employees' representative must come from the parent company. This "secure" mandate does not apply if the parent company concentrates only on managing the investments of the group companies.

Austrian banks and insurance companies are generally excluded from this provision as parent companies of groups. In this case, the subsidiaries are exclusively entitled to delegate employees' representatives to the supervisory board of the parent company.

Since the amendment of the Works Constitution Act in 1993, works councils of subsidiaries may also delegate employees' representatives to the supervisory board of so-called "holding companies without employees" if their activities do not concentrate solely on managing the investments of the group companies.

Rights and duties of employees' representatives on the supervisory board

The employees' representatives perform their duties on an honorary basis. They are entitled to reimbursement of reasonable out-of-pocket expenses. However, in contrast to shareholders' representatives, employees' representatives are not entitled to separate remuneration.

Employees' and shareholders' representatives basically have equal rights and duties. Like the shareholders' representatives, employees' representatives are not bound by instructions when performing their duties. Furthermore, shareholders' and employees' representatives are both personally liable for their actions in exercising their mandate in the supervisory board.

There are no restrictions to the rights of co-determination or decision-making of the employees' representatives' as regards the supervisory board's tasks of supervising and controlling. The employees' representatives have unlimited voting rights regarding economically significant decisions, e.g., transactions which require the approval of the supervisory board or the approval of the annual financial statements. Disputes concerning these rights have to be referred to the Labour and Social Court for decision. Employee's representatives are entitled to representation before court by the Chamber of Labour, and if a member of a trade union, also by the responsible trade union organisation.

However, certain provisions of the Stock Corporation Act do not apply to employees' representatives. There are certain restrictions regarding the decisions to be taken by the supervisory board concerning the staff, e.g. the appointment and removal of members of the management board, the chairman of the supervisory board and his or her vice-chairman.

The employees' representatives in the supervisory board have special rights regarding the reports of the managing board on company matters including the company's relationships with a group company and can request such reports at any time from the management board. This collective right to be informed granted to the supervisory board may be exercised by two employees' representatives at any time.

Challenges faced by worker' representatives on supervisory boards

a) Conflicting interests between the company and employees'

Pursuant to the Stock Corporation Act all members of the supervisory board as well as of the managing board are obliged to perform their duties in the interest of the company taking into consideration the interests of shareholders and employees as well as of the general public. This guiding principle applies to both shareholders' and employees' representatives. However, this does not exclude the members of the supervisory board from defending the interests of the group that mandated them, i.e. the shareholders' representatives defend the interests of the shareholders and the employees' representatives defend the interests of the employees.

Although they are delegated to the supervisory board, the members of the works council still have to fulfil their duties as employees' representatives, i.e. to defend the interests of the employees. The employees' representatives on the supervisory board are therefore to a certain degree constantly in a conflict between their duties towards the company as members of the supervisory board and their commitment to the interests of employees as employees' representatives.

This conflict between the interests of the company and the interests of the employees becomes clear when it comes to the duty to observe secrecy as laid down in the Stock Corporation Act and in the context of the duty of diligence and liability. These obligations apply to the same extent to all members of the supervisory board including the employees' representatives.

b) Observing secrecy and duty of diligence and liability

Duty to observe secrecy: Without doubt, efficient co-operation between the management board and the supervisory board requires the duty to observe secrecy which basically covers all confidential information that the members gain access to in the exercise of their duty. The same as all other members of the supervisory board, employees' representatives are also liable for damages caused by breaches of their obligation to observe secrecy.

Nonetheless, from the employees' representatives point of view, a limited amount of information may be passed on – especially to the colleagues on the works council, representatives of trade unions or experts – under certain circumstances, as long as this is covered by the right to information and disclosure as laid down in the Works Constitution Act and is deemed necessary to represent employees' interests.

Duty of diligence and liability: Both shareholders' and employees' representatives on the supervisory board are liable vis-à-vis the company for their actions. Neither the fact that they were delegated to the supervisory board by the employees nor the one-third parity rule of their representation on the supervisory board may be interpreted as a reason to grant an exception for employees' representatives.

In order to avoid burdening the members of the works council delegated to the supervisory board with incalculable risks, the Austrian Federation of Trade Unions (*Österreichische Gewerkschaftsbund, ÖGB*) has therefore purchased a group insurance policy for all employees' representatives who are members of the trade union and have reported that they have been delegated to the supervisory board to the trade union. This insurance covers up to a certain amount financial damages that may result from a breach of the duty of diligence or the obligations of the employees' representatives on the supervisory board.

c) Deficits of the supervisory board authority mainly in the case of restructuring

Restructuring is increasingly becoming part of everyday life at companies. Often, this implies a loss of employees' rights, in particular, concerning the rights of workplace representatives to intervene. In this regard, the transformations of the legal form of a company may lead to the loss of mandates for employees' representatives on the supervisory board. In extreme cases, it might even completely eliminate the mandatory supervisory board of the company. Against this background, it is urgent to extend the competence of the employee representatives, and above all that of supervisory boards, to monitor and supervise in cases of restructuring.

Literature, Websites, Surveys

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Belgium

by Luc Triangle*

1. LEGAL ASPECTS

Employee representation in the executive bodies of companies does not exist in Belgium. Although trade unions are or were represented on certain public sector management boards, for instance ‘Nationale Spoorwegen’ (National Railways) and ‘De Lijn’ (public bus transport company in Flanders), in Belgium this is an exception.

The system of corporate governance in Belgium is based on the existence of a ‘Conseil d’administration’ (Board), which is elected/appointed by the shareholders of the company. This board appoints the CEO and main directors of the company (CFO etc.). As there is no system of participation in Belgian private companies, employees do not have an impact on the appointment of these directors.

Employee representation in **companies** exists in the form of information and consultation rights through the **Works Council (OR)** and the **Committee for Prevention and Protection at Work (CPB)**. Both consultative bodies are jointly made up of employee and employer representatives. The works council is chiefly entitled to information, such as economic, financial and employment information. It also supervises social legislation within the company. The works council is entitled to certain rights of decision, including the drafting and modification of employment regulations and holiday planning.

Crucially, with one exception, only the representative trade unions (there are three representative trade union umbrellas in Belgium: ACV – CSC, ABVV – FGTB, ACLVB – CGSLB) may submit candidates for election as members of the Works Council and the Committee for Prevention and Protection at Work. From a legal viewpoint, these two consultative bodies are legally elected ‘employee bodies’, as all employees are entitled to elect representatives in both bodies. In fact, however, they are ‘union bodies’, as only representative unions are able to put their candidates forward as members of these bodies.

Both bodies are elected every four years by means of so-called ‘social elections’ which are organised within a two-week period. Such social elections are events in themselves as they take place simultaneously over a brief period of two weeks. Approximately 3,500 Works Councils are elected in this way, as are around 5,000 Committees for Prevention and Protection at Work.

In addition to the Works Council and the Committee for Prevention and Protection at Work, Belgian workplaces also have **Shop Stewards’ Committees** or union delegations (SD), which were established through a National Collective Labour Agreement. The union delegation makes requests and demands on behalf of the employees within the firm, in contrast to the OR and CPB which are predominantly information and consultation bodies. The SD deals with labour relations, collective labour agreement negotiations, the implementation of social legislation, collective labour agreements, individual contracts, and individual and collective disputes.

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The shop stewards' committee acts on individual and collective conflicts, organises campaigns, negotiates and is the 'countervailing power' within the company. The trade union emphasis is (also for employees) more on this committee than on the Works Council or Committee for Prevention and Protection at Work. The latter bodies are more information and supervisory bodies, but are not used to formulate employee or union demands.

There is no conflict between these consultative bodies on one side and the Shop Stewards' Committee on the other, as all three are viewed as 'part of the instrumentation of the trade union movement'. A shop steward will often also be member of the Works Council or the Committee for Prevention and Protection at Work, or both. This means that members of the Works Council and Committee for Prevention and Protection at Work and the Shop Stewards' Committee can work properly and intensely together.

This structure means that trade unions (and therefore employees) are well established at enterprise level. There is no conflict between the three bodies, which complement each other: from information and supervision to union militancy and strength. Each body plays its part and they do not compete. However, this does not mean the system is without its weak points (see chapter 2). The main constraint is the fact that none of these bodies has the right of consent or consultation before decision. In other words, the employer is not obliged to consult the Works Council and respond to that advice before executing his proposal. Consequently, the Works Council and the other bodies are confronted with an 'accomplished fact' and then organise their counteraction, rather than being legally obliged to involve themselves in the phase preceding an ultimate decision.

2. DEMOCRATISATION OF THE COMPANY: Historical viewpoints

As is stated above, Belgium has no system of employee participation in the managing bodies of companies. However, this does not mean that ideas have not been developed in this field in recent decades, nor that concrete proposals for changing the current level of employee involvement have not been formulated.

Much can be attributed to the turbulent 1960s. This was a time in which student and other movements called for greater political involvement, participation and democracy. The same general social unrest applied to the industrial sector, which manifested itself in rife absenteeism and staff turnover, sabotage and 'wildcat' strikes. The analysis of this unrest was clearly established in the 1970 Socio-Economic Conference: the background to social unrest could be found in the powerlessness of the employee within his work situation and within the company. It was understood then that the principles of democratic society could no longer be left behind at the factory gates.

The ideas around the democratisation of industry then launched by several unions were multi-phased. Rome was not built in a day, and numerous plans were put forward to achieve systematic democratisation.

However, the concepts of liberalisation which arose in the '80s in Belgium, and the defensive position that unions were forced into by the economic crisis, did lead to these proposals for democratic industry being 'left on the back burner'.

These proposals dealt with the following aspects, among others:

1. Information and supervision: improving the effect of the existing consultative bodies

A basic condition of achieving true employee participation is the systematic provision of information to employees and their representatives. Employees must have a perspective on the employer's actions and proposals; only then can this be monitored and influence exerted on the employees' behalf.

A number of tools were developed for employees in this regard, for example:

- The Collective Labour Agreement n° 9 concerning information employment and staff policies
- The Royal Decree (1973) concerning Economic and Financial Information
- The monitoring of the firm's annual accounts by appointing company auditors

At the present moment, this information is provided, but its quality and clarity mostly leaves much to be desired. Too much information can also have a restraining effect.

It is also important to state that this information is given in order to enable a monitoring function, and does not bring about a greater impact on decisions made by the employer.

2. Employee consultation

A second significant idea that arose from the trade union movement in the '70s was that of involving the employee more in his work. Employees were entitled to opportunities to organise their own work more. Employee consultation and group responsibility were to provide a counterbalance to the old-fashioned, authoritarian power relationships in industry. In this way the concept of democratisation also took shape on the shop floor.

3. The establishment of employee councils

In Belgium, the Works Council is a joint institution consisting of employee and employer representatives. This type of Works Council was viewed as the one in which ideas and views of employees were obscured by 'joint' proposals and decisions.

Another proposal concerned the establishment of employee councils in which workforce representatives were able to express their own ideas and advice. The aim was also to provide the employee councils with the right of consent, and in various social fields also the right of decision, in accordance with existing works councils in certain other countries.

4. The reform of the Public Limited Company

A fourth proposal concerned the role of employees in the management of the company. The employee council allowed employee supervision, but there was yet no genuine form of board level participation. The board of the company was still made up of shareholders.

The aim was to put forward the workforce as a third party in company policy, alongside shareholders and management. A dual system in which management would sit on the board of directors was opted for, side by side with a Supervisory board comprising both shareholders and workforce representatives. The Supervisory board would be able to appoint and fire management staff, have unlimited viewing and supervision rights, and would have to give prior consent of

strategic company decisions. This allowed workforce representatives greater legal impact at crucial moments in the company's history.

The employee council's role would be to monitor the workforce representatives on the Supervisory board. Therefore, it is essential that there is good reciprocity between the two bodies.

In such a way, 'employee supervision' or 'co-supervision' (the key word of the 1970s trade union movement in relation to company reform) could be achieved, while union supervision would also remain possible through the 'Shop Stewards' Committee'. It was, however, essential that a balance was maintained between employee supervision and union supervision. For this reason, one of the proposals regarding the employee council was that it would permit non-union members to participate in this employee council. This was, and still is, an awkward issue as the modern Belgian Works Council has the advantage for trade unions, that they alone can submit candidates for election as workforce representative on the Works Council (with one exception).

However, one should not confuse this employee supervision with 'co-management'. It has always been thought that the latter would lead to an unhealthy conflict of interest in which employees and their unions would be unable to perform their duties. Thus, 'co-management' in that sense of the word was and remains a taboo among Belgian trade unions: the workforce and its representatives must be granted greater influence over company matters, but should not be allowed to lose their individuality and their own role.

3. SO WHAT ABOUT THE EUROPEAN COMPANY?

The first proposals regarding a statute for the European Company date from the early 1970s, at a time when the Belgian trade union movement was involved in heated discussions of the democratisation of the company. It is clear that the initial points of view regarding the European Company were influenced by the concepts around democratisation.

The previous two chapters also make it clear that at present, industrial relations between employee and employer in Belgium are based on the idea of 'each knows his place and plays his part'. Belgium does not have extensive rights of consent, obligatory consultative rights or participation via a supervisory board. The strength of employees within a company comes from utilising the information and supervision rights of the Works Council and Committee for Prevention and Protection at Work as effectively as possible and, and translating it into a strong, effective and efficient Shop Stewards' Committee. Therefore, and it is worth making this point again, there are no ideas of *Mitbestimmung* or co-determination at the foundation of current social relations within a Belgian company.

From this perspective, the current proposals on employee participation at the level of the European Company have forced the Belgian unions back to their old positions. 25-year-old discussions are rearing their heads again, though they must now be translated into the context of European legislation on the European Company. There are obvious fears of an 'unhealthy conflict of interest' or 'co-management' in which workforce representatives share the table with shareholders and management, and are held jointly responsible for redundancies, relocation of production, company closure etc.

However, the situation is of course different to thirty years ago. Firstly, the European company and the Directive for employee participation in this company are already in place. Secondly, each member state is expected to adapt the European regulation and Directive, giving some room to manoeuvre in some areas, though the main points cannot be altered regarding employees' rights of consent, consultation and participation in this European Company. Thirdly, Belgian unions also experience and conclude that the concept of participation is now accepted at the level of the ETUC, as well as at the level of certain European trade union federations such as the European Metalworkers' federation. The concept of participation will even be promoted by the European trade unions. The recent European steel merger, and the establishment of the Arcelor company, has already brought about employee seats on the supervisory board of this firm. Lastly, Belgian unions also state that few fundamental questions have been set regarding the principle of participation at European Company level, not only in countries where participation rights exist but also in those where they do not.

What this entails is that the Belgian unions will probably approve the principle of participation in the European Company. However, in view of the conditions made in that regard in the past and the ideas expressed within its scope, the Belgian employee representatives will scrupulously see to it that participation does not lead to an unhealthy conflict of interests.

Participation has to lead to more information and supervision, and a situation in which the interests of employees can more effectively be defended. The fundamental issues put forward by the Belgian trade unions have more to do with the part that we, as workforce representatives, will play in such participatory bodies. Another awkward point will be the flow of information from the workforce representatives in the participatory bodies to the lower echelons of the firm. If confidentiality prohibits us from passing on information acquired within that body to lower levels and using it, the entire purpose of participation will again be called into question.

Last but not least, the Belgian trade unions keep an eye on each other. Should one of the participating unions refuse on principle to sit in a participatory body, then future Belgian seats would automatically be passed on to the other unions. This may prove the deciding argument for reluctant involvement in a participation in a European Company.

Denmark

by Peter Dragsbæk*

The Act on Employee Representation on the Boards of Danish Companies

Historical Background

Before going into detail on the adoption of the act on employee directors, it is worth noting the social context in which it was adopted. Throughout the 1960s and 1970s, the democratisation of enterprises and organisations was debated in many parts of Danish society and the outcomes of these discussions were not limited to the legislation being looked at here. For instance, there was also a revision of the rules governing universities.

That said, the story of this particular piece of legislation dates back to 1965, when the Danish Confederation of Trade Unions (LO) set up a committee to look into a democratisation of the Danish business community and employees' rights to take part in general decisions about company policy within the existing representation system. The committee recommended a model similar to the German one and proposed that the issue be negotiated between the two sides of industry. Another proposition, aiming exclusively at making the employees eligible for board representation, could not get a majority, as it was believed that the employees would not have a real say until a profit-sharing scheme was adopted. Ownership and influence were thus linked closely together.

In 1967, the Social Democrat government addressed the democratisation issue and submitted a bill on profit sharing. The Danish Parliament threw out the bill.

In 1971, LO submitted a new proposal for a profit sharing scheme. In 1972, after Denmark had joined the EEC, LO and the Social Democrats submitted a proposal for employee representation on the boards of Danish companies as well as a proposal for a profit sharing scheme.

The Danish Employers' Confederation (DA) and the right-wing parties objected to these proposals, particularly the one recommending profit sharing via central funds.

As a result of the debate, two bills were put to the vote in the Danish Parliament. The act on profit sharing was rejected and the act on employee representation on boards was adopted. Employee representation was exclusively based on employment, not on membership of a trade union. The act was carried unanimously and was backed by the two sides of industry.

The act on employee representation was carried in 1973 and incorporated in the Danish Public Companies Act, the Danish Private Companies Act and the Danish Act on Commercial Foundations.

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The Content of the Act

Corporate representation

Corporate representation implies that the employees in a public limited company, a private limited company or a commercial foundation may – through a vote among all employees – elect two or more members to the company's board of directors on equal terms with the directors having been elected by the shareholders. Staff representatives have exactly the same rights and obligations as any other director, including the same secrecy, the same criminal liability and the same liability for damages.

Election of staff representatives to the boards of private limited companies and commercial foundations

The right to elect staff representatives to the boards of private limited companies and commercial foundations essentially follow the same rules as apply to public limited companies.

Employee representatives in public and private limited companies

In order for employees to submit a request for staff representation on the board, it is a prerequisite that at least 35 employees on average have been working in the company for the past 3-year period and that a majority of the employees have – in a vote among themselves – voted for employee representation on the company's board of directors.

The first condition for corporate representation is that the company must, for a certain period of time, have had a certain size. It follows directly from Danish law that employees in companies having had an average of 35 employees for the past 3-year period are entitled to request a vote among the employees for the purpose of deciding whether to elect directors and alternates among the employees.

The second requirement is that a majority of the employees want such corporate representation. Thus, in order for employees to become entitled to elect staff representatives, a yes/no vote must be held among the employees.

A yes/no vote may be requested by:

- a) A majority of the employees in the company's works council;
- b) Organisations in the company, such as clubs and staff associations representing at least 10% of the company's employees; or
- c) 10% of the company's employees.

The request for a yes/no vote must be submitted in writing to the company's board of directors. Once in receipt of the request for a yes/no vote, the board of directors must ensure that an election committee be set up to organise the vote. The yes/no vote must be held not later than 4 weeks after the election committee has been set up. The vote must be in the form of a secret ballot.

Voters are all employees working in the company at the time of the ballot.

For the proposal to be carried, an absolute majority is required, meaning that more than 50% of the voters vote in favour of the proposal. If the proposal is rejected, a new request for a yes/no vote cannot be made until 6 months after the first vote.

If the proposal is carried, staff representatives must be elected to the board.

Appointment and function of the election committee

The board of directors in a company is obliged, within 6 weeks of their receipt of a request for a yes/no vote, to set up an election committee comprising representatives from the management and the employees. The employees must form a quorum in the committee.

Shop stewards, if any, in the company should – if possible – be represented in the election committee. As the committee is appointed for purposes of an election, the choice of staff representatives to the committee should not give rise to any problems. The committee appoints a chairman from among its own number.

Outline of time and deadlines relating to a yes/no vote

Below is a summary of the time and deadlines to be observed in connection with a yes/no vote concerning staff representation on boards:

- 1st week: Submission of a request for a yes/no vote to the company's board of directors
- 6th week: Deadline for the appointment of the election committee
- 10th week: Deadline for the holding of the yes/no vote. The result of the voting must be announced as soon as possible after the vote
- 36th week: Deadline for the election of staff representatives to the company's board of directors.

Election of staff representatives to the company's board of directors

If the outcome of the yes/no vote is a 'yes', the election committee must as soon as possible, and not later than 6 months after the result of the voting is available, arrange for an election of employee directors and alternates to the board. If this deadline is not kept, the resolution to elect employee directors will lapse and the procedure must begin all over, if relevant.

Number of directors

The number of employee representatives on the board of directors of a company depends on the number of directors elected by the company in general meeting. The employees must elect half the number of directors elected by the shareholders in accordance with the company's articles of association – however always at least two. If the number is not an integer, the number is rounded up. The majority of the directors are thus always elected by the company in general meeting.

Voting power, eligibility and election

All employees working in the company both at the time of the publication of the electoral register and at the election day can vote. At the time of the announcement of the election day, the election committee must have prepared a list of voters in the company.

Once the nomination deadline has expired, the election committee must draw up two lists: One showing the candidates and one showing the alternates. The employees must be notified of both of these lists not later than two weeks before the election.

It is only the employees of the company who can be elected. Members of the election committee cannot be nominated and elected.

Outline of time and deadlines relating to an election of employee directors

Below is a summary of the time and deadlines to be observed in connection with an election of employee directors:

- 6-10 weeks before the election day: The election committee announces the election day, and the employees are called upon to make proposals for candidates and alternates
- 4 weeks before the election day: Submission deadline for proposals for candidates and alternates
- 2 weeks before the election day: The election committee advertises lists showing candidates and alternates
- Election day: The election is held. The result of the voting is published as soon as possible after the election
- Annual General Meeting of shareholders: The members elected by the employees join the board of directors.

If, on the expiry of the deadline, only the number of candidates and alternates to be elected have been nominated, no election need to be held. Instead, the employee directors and the alternates will be appointed.

Ordinary election of employee directors

An ordinary election of directors and alternates is held every fourth year. Thus, the term of office is four years. An ordinary election requires that there are still more than 35 employees in the company – computed as the average number in the last three years –

on the expiry of the term of office. If this condition is not fulfilled, the right to elect employee directors will be forfeited.

Retirement from the board of directors

An employee director must/will retire from the board if he or she (I) is removed by the employees, (II) is no longer employed in the company, (III) wishes to retire, or (IV) dies. In such a situation the employees may request that a by-election be held. The same rules as apply to an ordinary election apply to a by-election.

The same parties who may request a yes/no vote may request that an employee director be removed. The same requirements as to form must also be observed if the employees wish the arrangement to come to an end.

Group representation

Group representation implies that the employees in a group of companies are entitled, through indirect elections, to elect employee directors and alternates in superior companies. The election is carried through by an electoral college comprising employee representatives from the group companies.

Employees' election of directors for parent companies

The conditions for obtaining group representation are largely the same as apply to corporate representation. However, special rules apply to group representation in a parent already having corporate representation.

Employment law

An employee director may sometimes be in a dilemma, as there may very well be several interests to look after. Therefore, two special rules have been laid down in the two executive orders issued in pursuance of the Public Companies Act regarding corporate representation and group representation. Those two rules lay down the framework for employee directors' position.

1. Protection against dismissal

Employee directors and their alternates are protected against dismissal and other impairment of their situation in the same way as are shop stewards in the same or similar industry. Any disputes arising in this connection will be settled through industrial disputes procedures. However, despite this protection, employee directors do not have the same obligations as shop stewards, including the obligation to seek to bring strikes in contravention of the collective agreement to an end. The protection is, actually, based on a wish to safeguard the employee director's right to freely put forward his or her points of view to the other board members.

2. Duty of notification

In companies and groups in which the employees have elected employee directors, the boards are required to ensure that the employees are provided with good and efficient information channels allowing the employees to keep abreast of the company's/group's affairs.

Such notification, which must be given in an adequate manner, may include financial, production and employment issues. The employee directors are not themselves obliged to notify all employees about the company's affairs in general, as this obligation rests with the board of directors and the executive board. Therefore, it is a challenge for the employee directors to be instrumental in ensuring that the board of directors and the executive board live up to the duty of notification.

The Danish courts of law have pronounced several judgments establishing that employee directors and directors elected by the company in general meeting have equal rights and obligations as far as liability and the size of directors' fee are concerned.

Employee directors' role on the board of directors

In 1995-99, the Copenhagen Business School (CBS) performed an analysis of employee directors in Danish enterprises. This present description of employee directors' role on the board of directors is based on the results of CBS' analysis. The analysis was performed by Søren Christensen and Ann Westenholz, both research professors.

Employee directors

According to the analysis, about 60% of employees were working in enterprises having employee directors. Employees that had decided to elect members to the board were mainly working in large companies. At the time the analysis was carried out, there were employee directors in 2/3 of all enterprises having at least 200 employees, whereas this trend showed only in 1/5 of enterprises with less than 200 employees.

The following question was posed in the analysis: What is important to the employee directors and the directors elected by the shareholders when they make large, long-term decisions about, say, corporate acquisitions, mergers, restructurings or the like?

The responses are illustrated in the following table showing five different weighting criteria. A high number indicates that much weight is being attached to the criterion, whereas a low number indicates a low weighting:

Table: How do you weight the criteria listed below when passing important board resolutions?

Weighting of the criteria as regards	Employee directors	Directors elected by the company in general meeting
Market	4.4	4.4
Innovation	3.9	3.9
Employees	3.6	3.4
Society	3.5	3.1
Shareholders	2.8	3.4

Note: The data derive from 41 enterprises representing a broad range of industries. In those enterprises, interviews were conducted with 100 employee directors and 28 directors elected by the shareholders. The material is not representative for Danish enterprises.

The table shows that the employee directors attach most importance to the company's market situation – its opportunities and threats – when making important decisions. Although the market criterion definitely takes the lead, the employee directors also attach weight to making innovative decisions – the criterion coming in second. The employee criterion takes third place, possibly reflecting the employee directors' attentiveness towards reactions from employees and trade unions.

Nearly as much weight is attached to society as a criterion, reflecting the attentiveness directed at reactions from the media, the local society and the legislators as well as considerations for the environment and society at large.

The criterion to which the employee directors attach least importance is shareholders, reflecting that the employee directors do not devote much attention to how the shareholders react, the size of dividends or how the stock market responds to the decisions they make as co-directors.

A comparison between the employee directors and the directors elected by the company in general meeting shows that the two groups do not differ much.

The latter group weights the market first, innovation second and employees third – even with precisely the same weight as the employee directors. Only the last two criteria differ in that the directors elected by the general meeting attach just as much importance to the shareholder criterion as to the employee criterion, whereas society is considered less important. A value of 3.1

does, however, indicate some weight. Thus, both director groups focus most on the enterprise and its surroundings when making their decisions, whereas their respective background groups – ie the employees and the shareholders – are not weighted equally high. This, however, does not mean that the employee directors do not see to the best interests of the employees when passing board resolutions.

In the analysis, the employee directors indicate that they look after the employees' interests. Such data are interpreted so as to indicate that the employees feel that they best attend to the employees' interests if they focus on the company's long-term survival. And that goes for the directors elected by the general meeting as well. They also find that their background group's interests are best safeguarded if they, as directors, focus most on the company's market situation.

The analysis reflects that the employee directors have developed a role as some kind of 'citizen of the international community', where they believe that the employees' interests are best protected if the company can survive in the long run. This view contradicts the usual wage earner culture where the general view is that the employees' interests are best looked after by maintaining a distinction between the employees ('us') and the management/owners of the company ('them').

Unions in Denmark

A number of cartels and trade unions in Denmark (CO-industri, GmK, BAT, Handelskartellet and IDA) have joined forces with CBS in performing an analysis of the part played by employee directors in the decision-making process.

The unions in Danish trade and industry encourage employees to seek influence through corporate representation. Under the auspices of the Danish trade unions, courses tailored for employee directors are offered in order to prepare them for their duties as directors.

Annual conferences are held for employee directors. The purpose of the conferences is to create networks and to inform and inspire.

Furthermore, all employee directors receive a newsletter four times a year. The newsletter communicates technical information as well as general information of relevance to the work of a board of directors.

Finland

by Jari Hellsten*

Legal aspects

1. Overview of national corporate governance system

The Finnish general Stock Corporation Act (*osakeyhtiölaki*) requires only one tier of corporate governance in the shape of a compulsory executive board. Supervisory boards are thus rare and can be found in only about a dozen big industrial companies with a significant state ownership (though no longer necessarily a majority shareholding). It is important to note that the CEO and other directors can be full members of the executive board.

Purpose and scope

In Finland the representation of the personnel in *corporate bodies* is arranged by law: the “Act on Personnel Representation in the Administration of Undertakings” (725/90), hereinafter “APRA”.

The act states that the personnel has the right to participate in decision-making in executive, supervisory or advisory bodies of the undertaking when they are handling matters of importance to business operations, finances and the personnel’s position in the undertaking in order to advance the functioning of the undertaking, to intensify co-operation between the undertaking and its personnel and to increase the personnel’s possibilities to exert influence in the undertaking (Section 1).

APRA is applicable to Finnish joint-stock companies, co-operatives and other economic societies, insurance companies and banks that have a regular staff of at least 150 working in Finland (Section 2). Enterprises of single traders, general partnerships, commandite companies and non-profit associations are not covered by APRA.

APRA is different to the Act on Co-operation within Undertakings (725/78, several times amended, at last by law 478/2001), hereinafter “ACU”. The latter covers in principal anything influencing the position of personnel within an undertaking (with a staff more than 30) but grants no seat in corporate bodies for personnel representatives. ACU is a diluted version of the Swedish *Medbestämmande* or of the German *Mitbestimmung* system. ACU also especially implements the EC Directive on Collective Redundancies (98/59/EC), as well as the Directives on EWC and the Representation of Personnel (01/23/EC). ACU is essentially a procedural act, highlighting co-operation between management and labour while APRA ‘simply’ means to ensure personnel representation in corporate bodies. I shall come back to the relationship between ACU and APRA later in the text.

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Implementation through Agreement

APRA prefers implementation through an agreement between the undertaking and the personnel. If no agreement can be reached, personnel is entitled to demand the application of the statutory minimum requirements (Section 3).

APRA notes that the agreement on personnel representation can be concluded in the ACU-procedure, hence either in a special meeting under ACU or in the co-operation committee under ACU. On the personnel side, there must be at least two personnel groups, in practice this means one blue-collar and one white-collar group or two white-collar groups. The groups supporting the agreement must represent the majority of the personnel (Section 4).

APRA does not limit - in principle - the contents of the agreement. The overall position of agreements concluded under ACU are not strictly defined. However, APRA sets up compulsory requirements on qualifications of representatives, protection against dismissal, professional secrecy and sanctions. This, in the context of the purpose of the Act, leads to the conclusion that an agreement giving a commitment by the personnel to skip the whole representation procedure would be null and void – as there could be a new majority of the personnel claiming an agreement or the application of statutory minimum requirements. However, there is no legal precedent for this. Still, the Act notes that application of the statutory minimum conditions can at any time be replaced by an agreement (APRA, Section 5(4)).

In this framework the essential point for an agreement under ACU is to agree upon *in which body the personnel shall be represented*. It is possible to cover every essential body: supervisory board, board of directors, management groups or similar bodies that together cover the profit units (economic entities) of the undertaking. Vice versa: any of these bodies may be left without personnel representatives.

Naturally, a binding agreement under ACU about personnel representation can be concluded also in companies with a staff less than 150.

Implementation by Statutory Minimum Requirements (Section 5)

If no agreement is reached, and the staff is at least 150, *two* personnel groups, representing the majority of personnel, have the right to demand the implementation of APRA – in the form of the minimum requirements set up by APRA, Section 5. This means in practice the right to nominate their representatives, with personal deputies, to one or more administrative bodies, *selected by the undertaking*, among the supervisory board, board of directors, or such management groups or similar bodies that together cover the profit units of the company. It is essential to see that *one* personnel group, that of blue-collar workers, cannot impose the implementation, even if it is in a majority position among the personnel.

It is also important to note APRA does not guarantee any representation in the board of directors (in separate companies or in groups of companies) and it is always up to the management to define the bodies to be equipped by personnel representatives. In so doing, it is enough to ‘let them in’ at the level of the management group in profit units of a company or a group.

Personnel representatives are always additional to the other members of the bodies concerned. They may total one quarter of the number of other members but never amount more than four. They have the normal term of office, unless agreed otherwise. Lacking any other provision, the term shall be three years. Statutes under Joint-stock Company Act have to be amended, when necessary, to allow at least one personnel representative into the body concerned.

The implementation term is *one year* following the demand of the personnel. Changes in the company structure need to be reflected accordingly, also *ipso jure* in case of transfer of undertaking or merger. These provisions can be set aside by agreement.

In the case that the undertaking neglects to respect the demand of the personnel to implement APRA, the county government may impose a penalty fine. The application for the penalty may be lodged by the representatives of the personnel groups, as well as trade unions representing them, and by the Ministry of Labour which is a supervisory authority.

Provisions on Personnel Representatives (Sections 6 – 11)

The reps have to be legally capable (not bankrupted, neither under a business ban), Section 6. If personal groups cannot agree on rep(s), election takes place, applying the procedure in electing the compulsory safety and health representatives (Act 131/73 etc.). The personnel groups under ACU nominate the candidates (Section 7).

Basically, the personnel reps have the same rights and duties and receive the same fees as the other members in the body concerned, including the ultimate duty to pay compensation for mismanagement or to be punished if breaking insider rules. These rights and duties are mainly prescribed by the relevant company law. However, the personnel reps are not entitled to participate in matters concerning election, dismissal or contract terms of the management, the personnel's terms of employment, or industrial action. Their voting rights may be restricted by agreement under Section 4. If a representative is nominated to board of directors, the deputy can participate in the meetings and voice his opinions (Section 9).

It is not possible to free the personnel representatives of the corporate bodies from the duties established by company law or other provisions outside APRA through agreement.

The undertaking must grant release from regular work for ordinary meetings, as well as for necessary preparatory work of the personnel representatives together. Accordingly, the employer must compensate for any loss of income. Further time off and compensation requires consent of the undertaking. Relevant expenses are compensated and a fee is paid for attending meetings outside normal working hours (Section 10).

According to the Stock Corporation Act the shareholders' general assembly may dismiss any board member (supervisory board included) or the whole board and appoint a new one. Representatives of personnel have no special status in this sense. Note that relevant changes may also occur in situations such as mergers cases. The law does not include special provisions on that although general civil law principles in mergers justify the assumption that a reasonable period for changes must also applied for personnel representation.

If there is an agreement on personnel representation, as is normal in companies that apply it, the agreement remains in force in the case that a representative of the personnel is dismissed from board. This leads to the appointment of a new board member. However, no case-law exists on this kind of situation.

APRA grants the reps the same protection against dismissal as that granted by the Act on Working Contract for shop stewards and elected representatives for academic professionals (Section 11). This protection under APRA means protection in terms of *job security*. As long as they are in the position of a personnel representative they can be dismissed from their job, thus from the whole

company, only under extremely limited conditions, in practice just when closing down the whole company. Any violation is punished under Penal Code, Chapter 47, Section 4.

Confidentiality

Under APRA, any information declared by the undertaking to “constitute trade and professional secrets and deemed potentially harmful to the undertaking or its contracting parties if disclosed to outsiders, may only be discussed by the workers, employees and personnel representatives who are affected by the said information. Even then, the information may not be disclosed to outsiders.” (Section 12)

However, while this wording of APRA is strikingly strict and refers to the bold announcement, only, it is clear that trade or professional secrecy is ultimately assessed *objectively*. At the same time, the personnel representatives have the overall secrecy rules applicable to any members of the body concerned. The possibilities to discuss matters with workers concerned are *lex specialis* in relation to these general rules.

Individual’s financial position, state of health or other private matters are equally subject to confidentiality – unless the person removes it himself.

Provisions for groups of companies

APRA doesn’t include special provisions for groups of companies. No board members are compulsory on the group (corporate) level. I recall that neither are they compulsory at the level of the board of a daughter company. What exists is the right to get information and be consulted by the group management on the basis of ACU. Its provision transpose also the provisions of the EWC-Directive.

2. Who are employee actors?

The representatives need to be members of personnel. Trade unions or any other outside organisations have no right to nominate candidates. However, in practice the representatives in most cases are union members, and nominating the candidates is a usual issue for union members and their union bodies, but, only within the company concerned.

APRA does not prevent the workers’ and employees’ representatives under ACU or the collective agreement concerned becoming representatives under APRA, too.

3. How do they interact?

There are no general rules on the interaction of the employee representatives. Neither of these laws (APRA and ACU) defines the ways how these representatives have to proceed inside their ‘own’ side, hence among the personnel groups, or how they have to act in the body in which they are personnel representatives. Hence, all this is left to unofficial or company-related procedures. However, it is clear that the undertaking may not intervene in the internal reasoning between the representative and personnel or workers and employees concerned. On the other hand, whether an agreement under Section 4 may validly include procedural *rules* for personnel representatives, so

as to legitimate their mandate, is a moot point. On the personnel side the prevailing interpretation is that such rules are not valid.

APRA does not include any clause on resignation of the representative based on any other reason than losing his formal qualifications (bankrupted or under business ban) or on being prevented (normally because of illness) from carrying out his duties. The personnel groups nominating have no right to recall their representatives.

While APRA does not include rules on the interaction, thus, on co-operation between the ordinary and deputy member. Accordingly, interaction between the two or more ordinary members is up to them. Every member is – in formal terms of law – independent also in that sense.

Practice

1. Practice / law

As a background factor a few words is needed about the trade union coverage and structure in Finland. The overall organisation rate is in the private sectors, too, over 80 %. During the latest decade especially the amount of organised salaried employees and managerial staff (academics) has grown.

Blue-collar workers are normally organised in the Central Organisation of Finnish Trade Unions (SAK), salaried employees in the confederation STTK and higher educated staff in their confederation AKAVA. Only a few marginal unions fall outside these three confederations. Notwithstanding some natural quarrels about their borderlines, the confederations are in co-operation at the national, industrial and company level. Depending on the number of personnel representatives they are normally able to agree upon the division of the seats, perhaps completed by a rotation or having a deputy from another personnel group. In traditional industry SAK is normally the biggest, followed by STTK and AKAVA. In some new branches recruiting specially educated employees, such as in IT-industry, STTK and AKAVA are sometimes bigger groups.

Hence, in most of the companies within the scope of APRA the organisation labour forms the majority within the personnel and is able – in principle – to launch the implementation of APRA. – I come back to the actual state of affairs below. Consequently, one can happily suppose that every single personnel representative is a union member while under the formal terms of APRA union members are by no means pre-qualified as personnel representatives. Such a pre-qualification would, besides, violate the principle of equal treatment.

I recall that the only official position the trade unions have under APRA is the right to demand the implementation of the minimum requirements before the county government which, by definition, means to give silent support to personnel groups. However, it is unclear if the unions thereby may challenge a *mala fide* implementation by a yellow agreement under Section 4. No precedent exists.

2. Studies

Researcher Kari Sairo of Finnish Metalworkers' Union published – in Finnish - in 2001 a study with survey method, called Personnel Representation in Companies of Metal- and Electronic Industry (Henkilöstön hallintoedustus metalli- ja elektroniikkateollisuuden yrityksissä,

Metallityöväen Liiton tutkimustoiminnan julkaisuja, ISBN 951-9470-66-2). I note – in brief – his conclusions in this report.

The Sairo report consisted of a survey sent to 262 blue collar shop stewards in metal and electronics out of which 203 replied. His conclusions were:

- In general terms, shop stewards are satisfied with the increased co-operation between management and labour.
- Personnel representatives' possibilities in the practical work of board of directors should be promoted.
- Trade unions should invest more in supporting training.
- Personnel representation fits well in the overall representation of interests.
- Personnel representation is lacking in too many companies.

The most important finding in the study was the amount of companies with no representation at all. Namely, in more than a half of companies with a staff of 150-200 there was no representation. Of bigger companies one third went without representation. Some of these problems stem from a failure of co-operation between the personnel groups. Namely, according to the law there must be *two* personnel groups inside the company demanding the implementation of APRA but it sometimes happens in smaller companies that salaried employees and managerial staff as groups are so small that they do not feel that they would be getting any added value through such representation and so they are not interested.

Another essential finding was that while the study covered 136 company entities (profit units), in 81 cases representation was realised in profit units, in 35 cases in the board of directors, in 8 cases in the supervisory board and in 12 cases in some other body.

History/culture/politics

1. Brief history

There were some experiments in state-owned companies during 70's and 80's, meaning mainly representation of employee representatives on the supervisory boards. In 1987 a State Committee Report (1987:18) was published and the first blue-red government of the country that started in spring 1987, pushed the law through the Parliament in 1990.

In the State Committee trade union members wanted above all an absolute right to representation in the board of directors. Industry highlighted the voluntary nature of any provisions. State officers were ready to allow a compulsory representation in the supervisory board if such a body existed.

The government had recourse to a typical blue-red compromise that endorsed and recognised the 'necessary' diversity, highlighted the agreement model and finally left the selection of bodies equipped with personnel representation up to management.

In sum, the Finnish model includes many possibilities but finally guarantees (for management) keeping personnel representatives outside the strategic bodies, board of directors in particular.

2. Actual Debate

There is no prominent public debate on board level participation in Finland for the moment. Various relevant actors are starting preparations with a view to implement SE Regulation with its consequent Directive on representation. This should also bring about some kind of debate on representation in other EC Member States, highlighting also the weaknesses of the Finnish system. There are no essential differing opinions among the national trade unions and their confederations.

At the time of writing, the programme of the next (centre-left) government was not known, only its composition. The aim of the trade union confederations has been to get a thorough redrafting all the representation systems (ACU, APRA, Act on Personnel Funds etc.) launched.

France

by Patrick Roturier*

A. LEGAL ASPECTS

The general lines of the system of management

French legislation (in the law of July 24, 1966) leaves shareholders complete freedom to choose between the two main systems of corporate governance in public limited companies: the monistic system with a single board of directors, or the dualistic system with an executive board and a supervisory council (or ‘supervisory board’). A combination of both is not permitted.

French legislation is thus already in accordance with Statute 21257/2001 of 8 October, 2001 regarding the European Company, which stipulates that the SE may opt for either system (article 38).

Nonetheless, one should note that the vast majority of businesses established in France have a preference for the monistic system and that this situation tends to prevail more and more. Statistics show that the number of companies opting for the executive board along-side a supervisory council is declining and that several of those who had previously opted for such an arrangement have switched back to the traditional system with a single board of directors.

The law of May 15, 2001 concerning the “new economic regulations” paved the way for a lot of flexibility in the way that boards of directors operate. More specifically, companies with a board of directors now have the choice between either separating the roles of President and managing director, on the one hand, and, on the other hand, maintaining a combination of these two posts.

So, now companies are effectively able to choose between three patterns for the organisation of management and control.

Regulations governing the participation of workers:

1. The participation of salaried employees in private companies’ boards of directors:

Two kinds of representation: wage earners and the share scheme employees.

One may make provision, in the statutes of joint stock companies in the private sector, for board members elected by the company’s salaried employees to sit on the board with a vote of deliberation.

Only the employees with a contract of employment signed by the company or by one of its subsidiaries are eligible. Moreover the number of board members elected by the company’s salaried employees should not make up more than one third of the other members of the board of directors.

* Syndex (Paris)

This framework for participation of wage earners in the boards of directors is just a possibility offered to shareholders and not an obligation. In fact, shareholders can even change their minds in an Extraordinary General Meeting and cancel the participation of salaried employees in the board of directors.

In addition to these provisions, companies have been invited – since the law of February 19, 2001 – to admit one or several representatives of ‘share-scheme employees’ onto the board of directors when they hold at least 3% of the registered capital (as against 5% under previous legislation).

If a level higher than 3% is reached during a fiscal year, then an extraordinary general meeting held before the ordinary general meeting is invited to make decisions concerning the participation of share-scheme employees (it is also supposed to come to a conclusion as regards the participation of wage earners).

The shareholders may reject the modification which is proposed. They will then have to be consulted again within three years (provided that the participation rate of employees still accounts for at least 3% of the capital).

At present, the vast majority of CAC 40 companies, whose wage earners have a significant share of the capital, still refuse to allow their representatives to be board members (a DARES survey had emphasized that in 1996 two-thirds of companies which had 5% or more of their capital in the hands of wage earners did not have board members representing those wage earners).

In all cases, the board members who are elected by the wage earners will have the same status, the same powers and the same responsibilities as the board members who are appointed by the shareholders’ general meeting.

Remuneration of the wage-earning board members

Remuneration of the wage-earning board members abides by what is known as ‘the general rule’. The general meeting sets the total amount of attendance allowance (fixed annual sum which represents the only possible payment for being a board member). The board is then free to make decisions about the distribution of this sum among their members. The terms of payment of the employees’ representatives in the supervisory council (dual system) are similar to those of the board of directors.

It is also necessary to note that the mandate of a board member elected by the company’s salaried employees in the private sector is incompatible with any kind of mandate as worker representative in the structures of works councils, central works councils, group councils or European works councils.

System of appointment of the wage-earning board members

The wage-earning members are elected by the company’s wage-earners but also, if it is mentioned in the statutes, by those of its direct or indirect branches, provided that their head office is located in French territory. The wage-earners are divided up in two constituencies – executives and non-executives. The applications or lists of candidates may be fielded by one or several trade unions, deemed representative in of employment legislation, i.e. by 5% of the wage-earning voters (100 of them if the number of wage-earners is higher than 2,000). The duration of the term is set by the statutes but cannot exceed 6 years. The terms of appointment of the employees’ representatives in the supervisory council (dual system) are similar to those of the board of directors.

System of appointment of the board members who represent the share-scheme employees

These appointments depend on the qualification of the ordinary general meeting of the shareholders. The candidates are appointed on the initiative of the president of the board of directors (or executive board) and prior to the general meeting of the shareholders:

- by the supervisory council of each open-end investment trust when the right to vote which goes with the shares held by the wage earners is exercised by the board members.
- by the share-scheme employees themselves, when the right of vote is directly exercised by them (in such a case, only the applications presented by a group of shareholders representing at least 5% of the share scheme employees can be accepted).

The exception of privatised companies

Since the law of July 25, 1994, in case of transfer of a company from the public to the private sector, the statutes of this company should be modified before the transfer is implemented so as to reserve a certain amount of seats in the board of directors for the representatives of the salaried employees:

- two seats for the representatives of the labour force as a whole and one seat for the share scheme employees if the board of directors is made up of less than 15 members.
- three seats for the representatives of the labour force as a whole and one for the share scheme employees if the board of directors is made of more than 15 members

2. The employees' representatives in the public sector companies:

The July 26, 1983 law regarding the democratisation process of the public sector opened the door to the representation of wage earners in the board of directors or in the supervisory councils of public sector companies.

The number of these delegates varies according to the workforce of the company: three representatives if this workforce represents between 200 and 1,000 employees, one third of the members of the board of directors for a staff of over 1,000 people. The employees' representatives in the board of directors are elected thanks to a one-ballot vote with proportional representation; One seat should be reserved for the executives.

The salaried employees' representatives serving in this function are unremunerated. However, they benefit from reduced responsibility compared to the general legal framework. First, when their responsibility is implicated, it must be judged by taking into account the absence of financial compensation for their mandate. Secondly, there is – whatever the situation- no joint and several liability with the administrators who represent the shareholders.

3. The representation of works councils in the boards of directors and supervisory councils

Since the law of October 28, 1982, in joint stock companies, the works council can appoint two members (one from the group of executives, technicians and supervisors, one from the group of employees and workers) to attend all the meetings of the board of directors or supervisory council. However, they only have an advisory role.

They may claim for the same documents as those given to the other members of the board of directors or SC. They are allowed to make proposals in the name of the works councils about which the board of directors or SC must give a motivated opinion.

Article 99 of the law concerning the May 15, 2001 new economic regulations intended to urge works councils to be 100% actors of the company law by introducing two new clauses (new article L 432-6-1 of the work legislation):

- in companies, the works council may resort to legal proceedings in order to appoint an assignee whose role is to call a meeting of the shareholders in case of emergency. It may also request the registration of termination plans on the agenda of the meetings.
- in companies, the works council may appoint two of its members - one of the group of executives, technicians and supervisors and the other of the group of employees and workers - to attend the general meetings. (This clause is useful only in the case of non-listed companies because, for the others, it is a long standing convention for them to have shares bought by one or several members of the works council). They must be listened to – upon their own request - in the course of all the proceedings which require the unanimous consent of the associates.

Conclusions

The participation of salaried employees in the management structures of companies is, in France, mainly optional and highly minority.

The influence of these employees is legally limited and reduced in fact, considering both the practises of the companies (few companies resort to the legal possibility of having the employees' representatives participate in the structures of management) and the prevailing monistic system which tends to limit the role of the boards of directors to the mere validation of decisions which are made at another level.

Moreover the French trade unions have, for a long period of time, shown very little interest in participation.

HISTORICAL ENVIRONMENT/ CULTURAL/ POLITICAL ASPECTS

How and why do we have this situation today?

In France the management of companies is historically dominated by the prevailing role of the state in the production network (post-war nationalisations then the 1982 nationalisation program). This situation has long influenced the nature of the management teams of big companies who, in the majority, have been trained in the same 'Grandes Ecoles' (ENA and the Polytechnics). This has frequently led to the domination of these 'elites' in the boards of directors.

Moreover, until the mid 80s, the structure of the capital of French companies compared to that in other countries has been largely based on bank financing, itself being under the control of the

state. Among the G7 countries, France was then the country in which one could find the highest concentration of shareholders. Company management has, for a long time, been characterised by stable and close relationships between managers and shareholders (comprehensive coherence of leading elites, concentrated shareholding, major impact of institutional financing).

Although the company concept which is put forward aims at targets which are more significant than the sole interest of the shareholders (“the social interest of the company” put forward, for instance, in the 1995 Vienot report about company management), the role of workers’ representatives in company management has never been significant in France.

Historically the French system of labour relations is characterized by poor negotiations and the prevailing logic of disputes. French employers have constantly striven to protect their power. French trade unions, politically divided, have shown little interest during the post-war decades for the taking of responsibility in the co-management of companies.

As for the works councils, they have focused for a long time on charitable, social aspects. The development of restructuring and the 1982 Auroux laws paved the way for the reinforcement of the works councils’ economic prerogatives and the development of information consultation processes.

The present environment of company management is yet very different from this historical picture, resulting from certain amount drastic changes from the mid 80s onwards. More specifically:

- major restructuring of companies from as early as the late 1970s
- important waves of privatisation: the 1986 privatisation law led to the sale of 65 companies up to 1991. In 1993 the new right-wing government implemented a new program of privatisation (twenty or so companies). The Jospin government followed suit from 1997 onward, thus reinforcing the structural aspect of the privatisation process and the opening up of the capital of public companies. This mutation has led to an increasingly greater number of new shareholders (institutional investors) in the capital of French companies, which deeply modified the balance between the concerned parties to the benefit of shareholders.
- transformation of the means to finance companies: prevailing indebtedness disappeared in favour of self-financing (increase in company profitability and an increasing ratio of profits in the value added).
- larger role of the stock market and impacts of *financiarisation* (deregulation and liberalisation): transfer of capital between the companies and their shareholders, mergers-acquisitions operations etc.
- globalisation of French companies

Parallel to these financial and capital evolutions, several reports (the Vienot reports, the September 2002 Bouton report) have urged high-rated companies to adopt management methods which are more and more focused on the Anglo-Saxon model (see footnote). For instance, recently, the more and more central promotion of “independent administrators” within the boards of directors tends to emphasize a concept of company management which is already more and more controlled by external power.³

³ There are two main types of approach to company management. One is based on the concept of company considered as a group made up of a variety of intervening parties who are defined by their status (shareholders, workers, managers). The other one focuses on the only shareholder whose management is supposed to guarantee

Conclusion

The French system of company management can thus be seen as highly destabilised, its historical background being largely under question today. The extremely brisk and substantial emergence of foreign investment in the capital of many groups tends to strengthen the role of policies focused on security for shareholders, whereas the participation rate of the employees' representatives is still very low.

Nevertheless a certain amount of changes have been visible for a few years. On one hand the participation of the employees in the process of decision-making has been reactivated by the development of the employees' financial participation (corporate performance schemes, profit-sharing schemes, company savings schemes, employee share-schemes, stock options..).

However a recent survey (Rébérioux, 2003) confirms the complexity of the issue of the participation of employees in the process of decision-making. It paid particular attention, through an econometric study, to clearly defining the links between the structure of the financial capital (quotation and identity of the shareholders) and the rate of participation of the wage earners in the management of companies. It brings out a negative impact of quotations on the quality of the information passed to the employees' representatives about the most strategic topics as well as on the integration of wage earners in the process of decision-making. A listed firm will thus tend to pass less information to their employees' representatives and to consult its wage earners to a lesser degree than a firm with an unrestrainedly negotiable capital.

From a general point of view, Europe seems to be under the influence of two heavy contradictory trends which refer to the two main patterns of company management (see supra): the rising emphasis on a financial logic supported by the globalisation of financial markets on one hand and the increasing integration of wage earners in the process of decision-making in the company on the other hand.

It remains that the issue of the participation of the wage-earners, nowadays in France, seems to be less of a taboo subject, even in trade unions.

The prospect of the European Company is thus able to offer them a good opportunity to further promote their claims for increased involvement in the process of decision-making in companies.

a maximum return on investment. This latter approach tends to become the reference in today's debate on company management.

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Germany

by Roland Köstler *

Foreword

From October 2004 on, it will be possible to found a European Company (SE): a company with a European legal identity. Employee involvement in an SE is governed by a supplementing Council Directive and by national laws on transposition. 'Involvement of employees' is defined in the Directive as any mechanism that includes information, consultation, and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.

In Germany, participation is a long-standing tradition:

The recognition by law of unions as the collective bargaining party and also as a legal basis for electing works councils at plant level started after the First World War. Shortly after, in 1922, a law was created for delegating one or two members of the works council to the supervisory boards of stock companies. Since then, we have had a dualistic approach for representing workers' interests: collective agreements by trade unions, and 'legally independent' works councils.

All that resumed after the Second World War. The experiences with fascism were among the reasons why representation at board level was expanded.

From 1951, through 1952 and 1976 (see the details of the laws illustrated below) to the present day, the legislative acts have been one thing; practice and, in particular, the interlocking of the various players quite another:

Everything is dependent on the corporate legal structures: in Germany we have the two-tier system with a board of management that runs the company and a supervisory board to appoint and control management. However, the size and the internal structure of the workers' representation in the boards differs under the various laws (even the details for Groups of Companies differ). These particulars must then be viewed against their respective historical backgrounds (as will be shown below). The election procedures are also different, although the election period is generally for about 5 years.

It is also important to note that according to two of the laws (Acts of 1951, 1976), we have trade union representatives on the supervisory board who are not employees of the company (only unions with members in the company can make proposals for these seats).

The work in the supervisory boards proceeds adequately only if it is related to the day-to-day work of the works councils in the plant, the company, and even the group (for example, with preliminary meetings where certain information is assembled and strategies are discussed), and naturally also that of the trade unions.

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And you must always consider that the work of the unions, especially the collective bargaining process, is distinct from the discussions in the supervisory boards and the business of the works councils.

So, representation of workers' interests at board level (employee involvement, in the language of the SE, or co-determination as it is called in Germany) is only one tool for serving workers' interests.

The following pages should provide an idea of that form of participation. They also explain why for us – in the light of our traditions and our awareness of that tool's possibilities – that representation is so important for the forthcoming European companies.

Legal foundations

Corporate Co-determination is based on three laws:

- **the Coal and Steel Industry Co-determination Law of 1951,**
- **the Works Constitution Act of 1952 &**
- **the Co-determination Law of 1976.**

They regulate the election process, but for the practice of the Board of Management and the Supervisory Board in the last analysis, the legislation applicable to public limited companies is relevant:

Corporate legal structures

according to the German Stock Corporation Law (AktG). The structure is called: The Two-tier / Dualistic System because of the two organs:

The board of management

- manages the company, plans, coordinates and supervises the company's activities.

The supervisory board

- appoints and monitors the Board of Management
- possesses rights of information and audit
- has the right to approve business decisions

and we have naturally: ***The General Meeting of Shareholders***

- elects representatives of the shareholder side to sit on the Supervisory Board
- formally approves the actions of the Board of Management and the Supervisory Board
- makes decisions on the articles of incorporation and disposal of profits

Company co-determination in detail

1. Appointment of management

The Supervisory Board appoints the members of the Board of Management for a fixed period of time and is also responsible for the employment contracts (salary) and the size of top management.

Every board member is appointed on the basis of a majority decision. In the spheres covered by the Coal and Steel Industry Co-determination Act and the 1976 Act, a so-called Personnel Director has to be appointed. In the Coal and Steel Industry this cannot occur against the votes of a majority of the workforce representatives on the Supervisory Board, so in effect the trade union representatives on the Supervisory Board have a right of nomination in this respect. In the case of the Co-determination Act 1976, the first vote has to produce a two-thirds majority in the case of all managerial (also the Personnel Director) appointments. If this is not forthcoming, the matter goes to arbitration by a committee based on equal representation of both sides of the Supervisory Board. In practice, therefore, decisions on such matters are usually made on a consensual basis.

2. Monitoring of the Board's management of the company's business operations

The task of the Supervisory Board is to monitor the management. The latter is obliged to inform the Supervisory Board on business policy and other basic aspects of corporate planning at least once a year and to provide information on business operations on a regular – at least quarterly – basis. This should not only occur within the framework of meetings (minimum number of meetings varies from 4 to 2 – with a individual minority right to special meetings) but also in other contexts. The Supervisory Board and individual members can request further information required for the purposes of monitoring and discussion.

The Supervisory Board as a whole can also decide to launch investigations either by individual members or by experts.

3. Business operations requiring Supervisory Board approval

The Supervisory Board has to draw up a list of business operations that are important for the company and which it has therefore decided will require its approval. It is, however, not permitted for management activities to be transferred to the Supervisory Board. The Board of Management may not then undertake such activities without the approval of the Supervisory Board. It is thus possible, via discussion, to exert an influence on company policy, even when you don't reach a majority in the Board. This is one of the reasons why, in practice, disagreements can occur over the range and the details of such lists. If the Supervisory Board withholds approval, the meeting of shareholders can reverse this decision but only by a 75% majority vote.

4. Scrutiny of annual accounts

The Supervisory Board scrutinises the annual accounts, the annual report and the proposals for disposal of profits and has to provide a written report on these to the shareholders' meeting. To help it in this task it also commissions an auditor, who makes a written report for the members of the Supervisory Board and reports during the Supervisory Board meeting on the main results of his audit. The profitability of the company also has to be discussed at this meeting.

In its report, the Supervisory Board also has to inform the General Meeting of Shareholders about the manner and extent to which it has scrutinised the management of the company's business operations during the business year.

In public limited companies, the Board of Management and the Supervisory Board can jointly approve the annual accounts. This means that the accounts have then been certified and the Meeting of Shareholders can only make decisions regarding disposal of the net profit for the year.

5. Duty of care and confidentiality

The Supervisory Board and every member thereof is bound by the duty of care of any properly authorised scrutiner. By the nature of things, the different origins of the members of the Supervisory Board mean that in practice there can be disagreement on this. The same goes for the corporate goals pursued by management and their implementation within the company (especially with regard to human resources measures.)

Confidentiality has to be maintained on matters related to company secrets. Properly interpreted, this is provision intended to protect the company from its competitors and not to isolate the employee representatives on the Supervisory Board from their colleagues in the works councils and the unions.

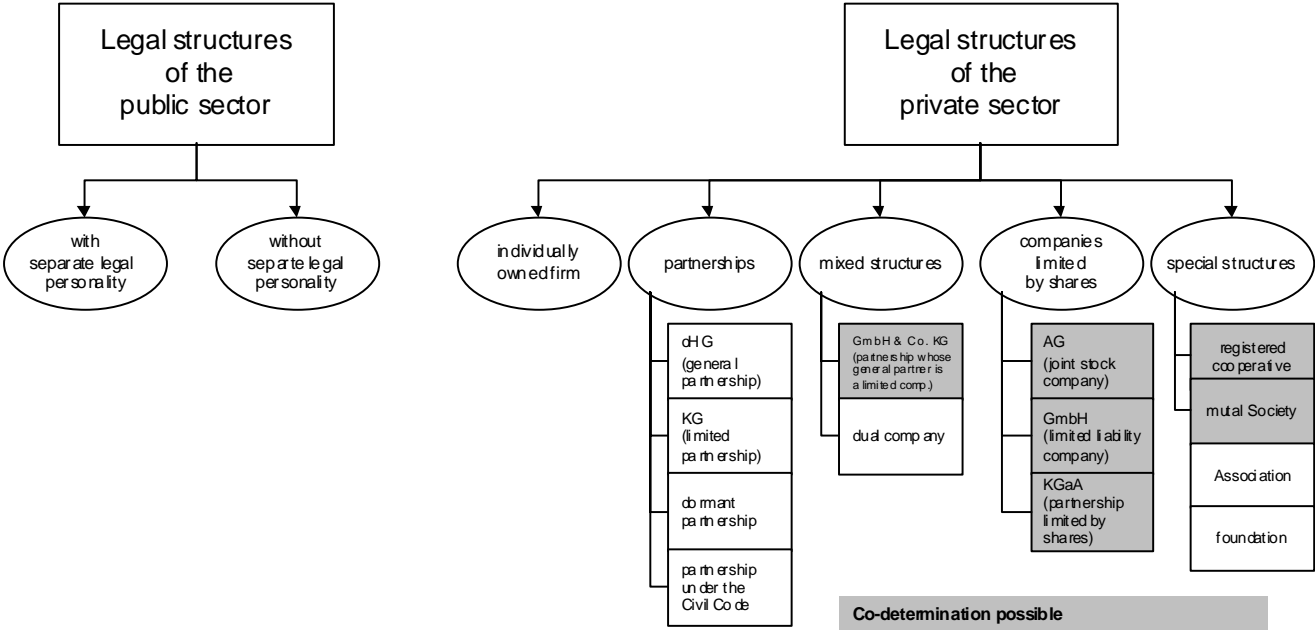
6. Workforce representatives on the Supervisory Board

The individuals elected to represent the workforce on a body within an incorporated firm clearly have a special role allocated to them. On the other hand: they have the same rights in the Board as the shareholder-members, even in the matter of remuneration they get extra to their fees as workers or works council members (by agreement, union members contribute a certain amount of the remuneration to the Hans-Boeckler-Foundation).

To come back to the special role: There is no such thing as ‘company interests’ which have priority above all else and the interests of the employees are an element brought in here as well as those of the shareholders. In practice, the two principles of co-operation and the representation of diverse interests can be compatible, provided there is a proper and timely flow of information. This includes the workforce representatives on the Supervisory Board regarding themselves as part of the system of employee participation. Work on the Supervisory Board should be linked to the activities of the Works Council members and carried out in collaboration with the trade unions represented within the company / group.

The employee representatives can and should elucidate the problems related to their work also to the workforce in general. This can be done in such a way that it does not conflict with their duty of confidentiality.

Survey of Legal Structures of Companies in Germany



MATRIX

Scope of the Coal, Iron and Steel Industry Codetermination Act, the Codetermination Act of 1976 and the Works Constitution Act of 1952

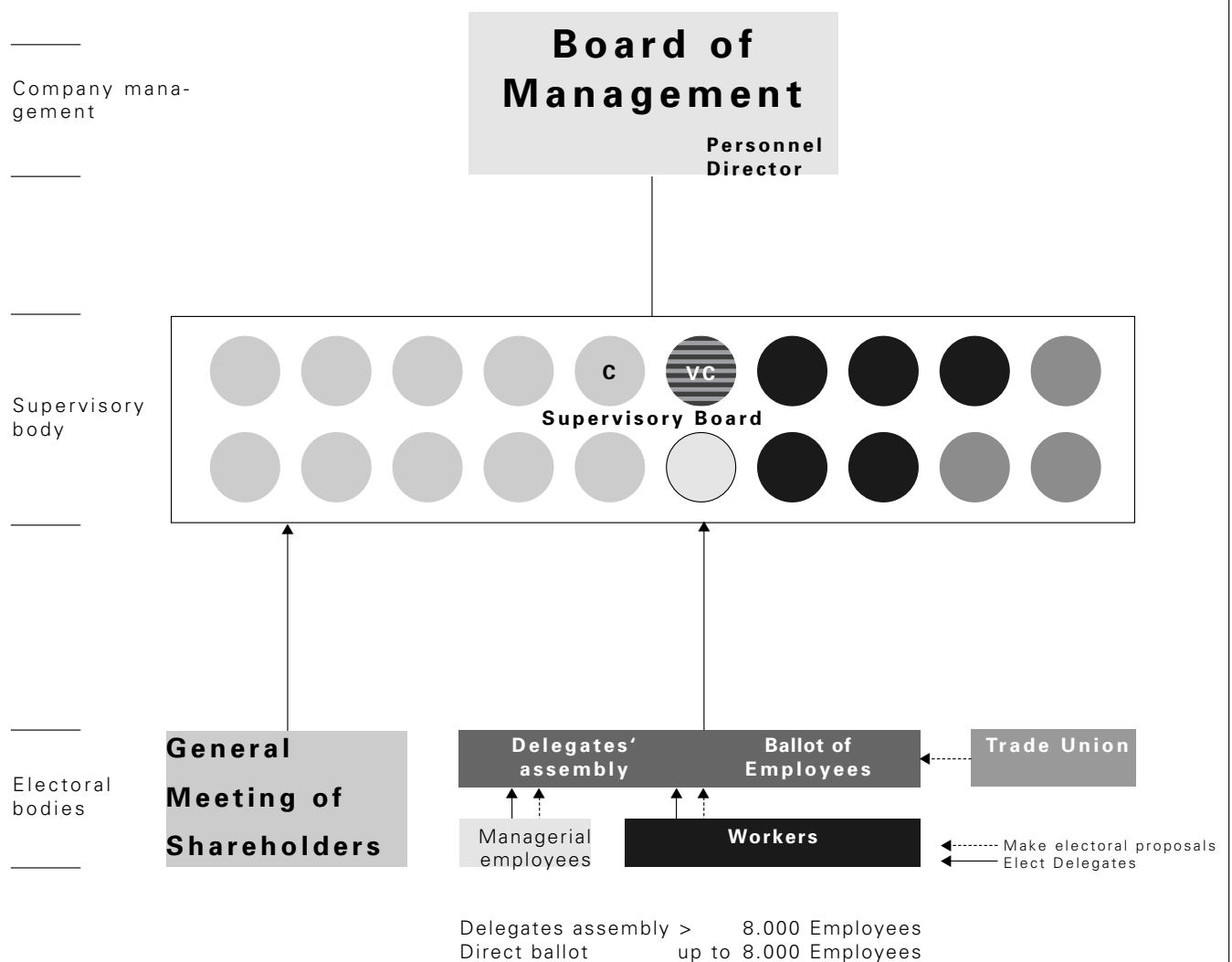
Object and /or legal form		No. of employees*			
		0 – 500	> 501 – 1000	1001 – 2000	over 2000
Ideological establishments (§ 81 Works Const. Act 1952; § 1 IV Codetermination Act)					
Undertakings under private law (except ideological establishments and coal, iron and steel companies)	Individually owned firm				
	OHG (general partnership)				
	KG (limited partnership)				
	GmbH & Co. KG				Codeterm. act, § 4**
	Mutual insurance society		§ 77 II		
	Registered cooperatives		§ 77 III		
	GmbH (limited liability company)		§ 77 I		
	KGaA (partnership limited by shares)	No codeterm. (if registration before 10.8.94 only if family enterprise, § 76 VI)	§ 76 I Works Const. Act of 1952 in connection with § 129 I Works Const. Act		Codeterm. act, § 1 I
AG (joint stock company)		§ 76 I			
Coal, iron and steel companies acc. to 11 Coal, Iron and Steel Industry Codetermination Act	AG (joint stock company)		§ 76 I		
	GmbH (limited liability company)		§ 77 I		Coal, Iron and Steel Industry Codeterm. Act, § 1 II

*Possibly additions according the respective relevant rules for groups.

**Only the general partner (GmbH, AG) is liable to practice codetermination, whereby under §4 of the Codetermination Act the employees of the limited partnership are numbered among those of the general partner.

THE SUPERVISORY BOARD

COMPOSITION ACCORDING TO 1976 LAW ON CO-DETERMINATION

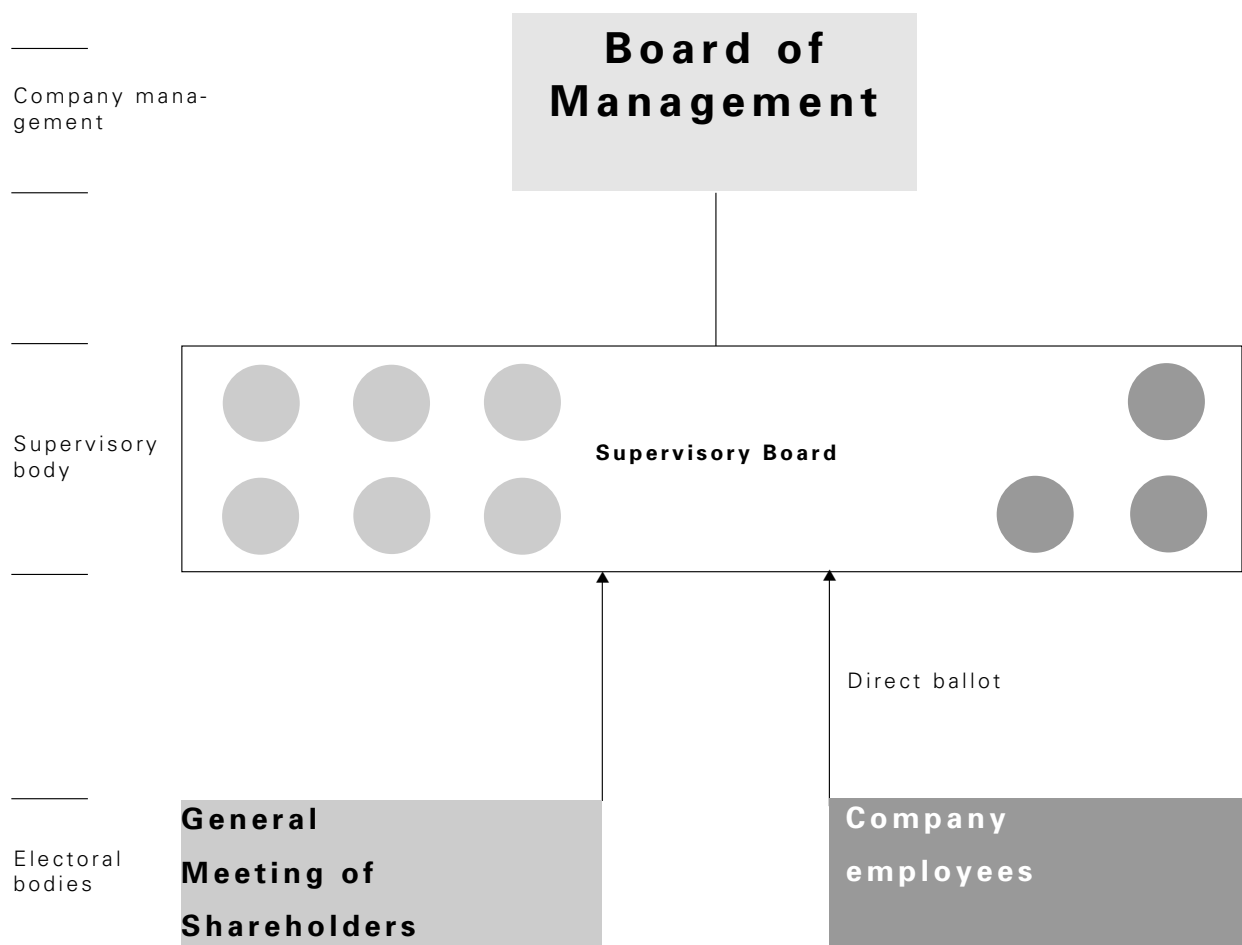


Size of the Supervisory Board:
12 up to 10.000 Employees
16 up to 20.000 Employees
20 more than 20.000 Employees

Actually about 767 Companies

THE SUPERVISORY BOARD

COMPOSITION ACCORDING TO 1952 WORKS CONSTITUTION ACT

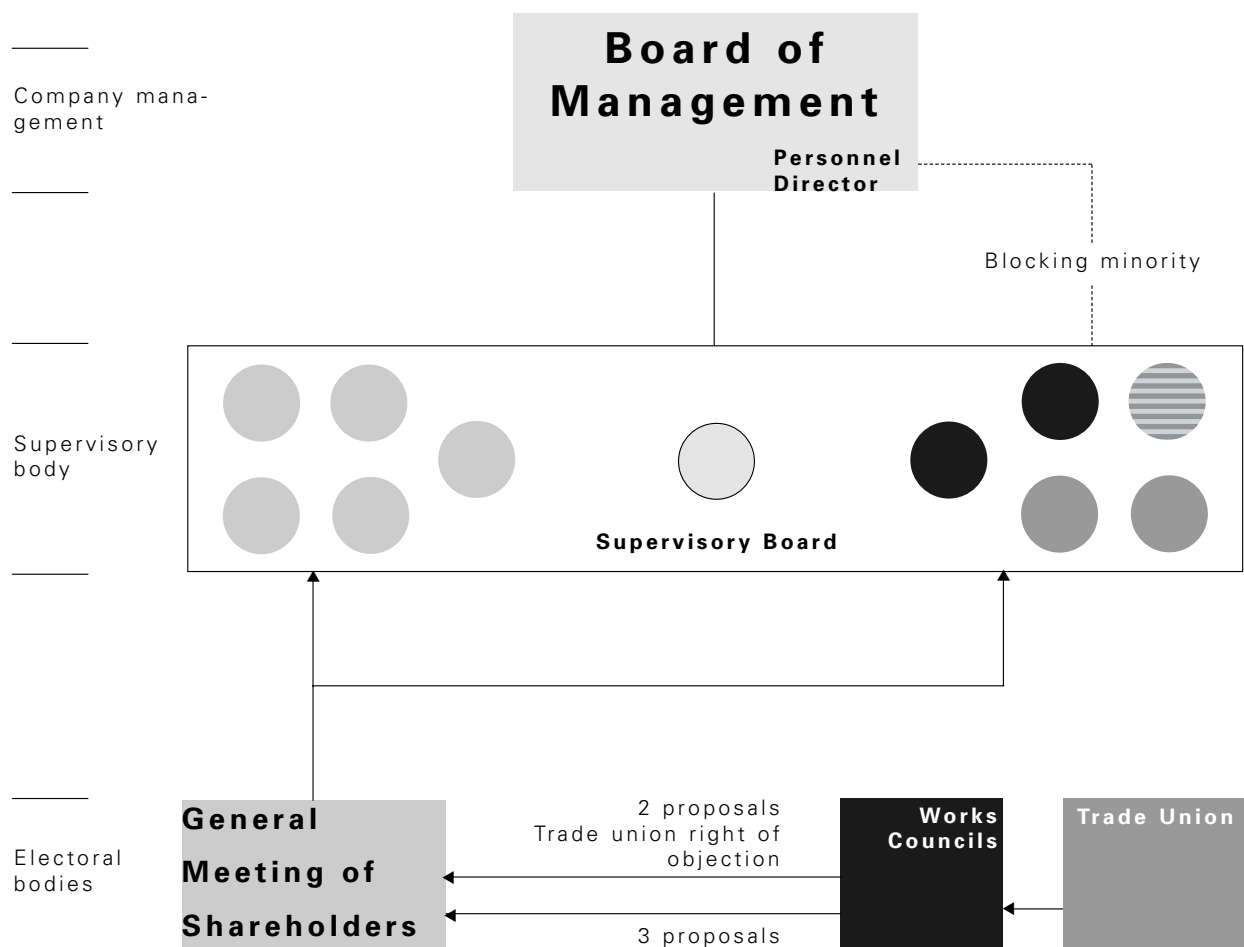


Size of the Supervisory Board:
3 up to 21 (depending on share capital)

Actually about 2.000 Companies

THE SUPERVISORY BOARD

COMPOSITION ACCORDING TO COAL AND STEEL
CO-DETERMINATION LAW OF 1951



Size of the Supervisory Board:
11, 15, 21 (depending on share capital)

Actually about 50 Companies

Greece

by Christos A. IOANNOU*

INTRODUCTION AND OVERVIEW.

The EC Regulation concerning the Statute for a European company (SE), and the Directive supplementing the Statute for a European company with regard to the involvement of employees, provide a rather innovative framework for board level representation of employees in Greece, where the national system of corporate governance has been traditionally single-tier.

Greece belongs to the countries of the EU where there has been no tradition of board level representation of employees for years. This is associated with two factors. On the one hand with the adversarial model of industrial relations that prevailed for decades and the relevant absence of participation practices in the regulation of industrial relations. On the other hand it is associated with the structure of the national economy, which has been dominated by small and medium size enterprises in the private sector, while the large enterprises were mainly under the state control.

However, it is noteworthy that since the early 1980s, after the rise of the PASOK socialist party to power in 1981, there have been, under various schemes and occasions, legal provisions for board level representation of employees. These provisions for direct board level representation of the employees referred to state controlled and public sector utilities companies, or to private companies that were brought under the state control. Since the mid-1990s, namely after 1994, on the way to public sector modernization and to successive waves of privatizations, in a context of “rolling back the state” policies, board level representation has been given a new impetus.

The conversion of public sector companies and organizations into *Societes Anonymes*, with the aim of bringing them into the system of private Corporate Governance, has been coupled with the introduction of labour representation in the administrative boards. But the further privatizations of their 50% shares, have, since the early 2000, undermined the existing provisions for board level representation of employees. Not surprisingly privatizations are in all cases followed by the abandonment of board level representation of employees provisions. Thus, currently board level representation is maintained in public sector utilities that still remain under the majority control of the state. For instance, board level representation of employees is observed in public sector utilities such as the Public Power Corporation (DEH) which is still the state controlled electricity producer and distributor in Greece, the Hellenic Post Office (ELTA), and the National Bank of Greece (ETE) which is the main state controlled bank in Greece.

Therefore, in the Greek context the main issue with regard to board level representation of employees is twofold. Firstly, there is the question of why board level participation hasn't emerged in the private sector, and whether the new EC regulation and directive may radically change this tradition. Secondly, there is the question of whether the experiments of board level representation of employees in the public sector Corporate Governance system may survive under the privatization plans and the opening up and the integration of the network industries in the context of the internal market.

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1. LEGAL ASPECTS

The national Corporate Governance System is mainly based on the provisions of Law 2190 of 1920 that regulates the operation of *Societe Anonymes*. This has been a single-tier system of Corporate Governance. Although the relevant legislation has been amended and updated since its first adoption, it is still considered as requiring major codification and modernisation. The national system of Corporate Governance has remained a single-tier system. Throughout its development the legal framework on the Corporate Governance system has never had any provisions concerning the board level representation of employees.

Elements of board level representation of employees in Corporate Governance systems of public sector companies were introduced in the early 1980s on a rather ad hoc basis. On the occasion of its attempt to introduce “social control” in the governance of public sector utilities the then newly elected socialist government of PASOK introduced a labour supervisory council (Law 1365/1983 on the socialization of public sector companies and public sector utilities). The model was one for a supervisory council of 27 members of which 9 represented the employees, 9 represented the state, and 9 represented other stakeholders such as local government, economic and technical chambers, labour and employers confederations, agriculture organizations etc (an indicative example was the ASKE, i.e. High Council for Social Control in the Public Electricity Corporation DEH).

In the same period there were legal initiatives to introduce participation practices in the Corporate Governance system of the private mining industries, through the Law 1385/1983 that provided for sectoral supervisory boards in the mining industries. That Supervisory Board, that was, to a certain extent, moving towards a sectoral double-tier model, consisted of 13 members of which 4 state representatives, 3 labour representatives, 3 employers representatives, and 3 local government representatives.

A similar attempt was made through Law 1386/1983 that concerned the setting up of the Organisation of Economic Restructuring of Companies (OAE), which provided for direct board representation of employees in the companies that were brought under the control of the Organisation of Economic Restructuring. Although the companies that were brought under its control were mostly ailing private companies, the provisions of board level representation in fact applied again to state controlled companies, as the board level representation of employees provisions were applicable after the state obtaining control of the private company.

A second wave of introduction of board level representation of employees in the Corporate Governance system in the public sector utilities developed in the mid-1990s in the context of attempts to modernize public sector utilities and their corporate governance systems. Under the umbrella of Law 2414/1996 concerning the Modernisation of Public Sector Companies and Organisations the board level representation of employees in many public sector utilities has been consolidated. Indeed Law 2414/1996 in its article 6 referring to the composition of the Board in the new *Societes Anonymes* set the pattern for employees representation at the board level, by defining that boards may have an odd number of members, with a minimum of 7 and a maximum of 13. In these Boards the company employees, in any case, would be represented by two elected representatives, and there was also provision of one representative of the National Economic and Social Committee (OKE), that in most cases would have been a labour side representative.

As the introduction of board level representation of employees in the Corporate Governance system in the public sector companies, utilities and organizations, since 1996 was only aiming at easing their conversion to *Societes Anonymes* according to the Law 2190, and not aiming to establish board level representation in the new Corporate Governance system, in 1999 the government legislated (article 25 Law 2682/1999) that companies that were subject to the provisions of Law 2414/96 and especially to the board level representation provisions, can be excluded by these provisions following a joint ministerial decision of the Minister of Economy and the Minister that overviews and is responsible for the relevant company (e.g. transports, energy, telecommunications, port authorities, etc). Ministers were given the right to withdraw board level representation of employees (including the OKE representative) in cases where they decided to transfer to private shareholders a minimum of 50% of the public sector *Societes Anonymes*.

In a nutshell, board level representation of employees in the single tier Corporate Governance system is not part of the legal framework that covers the private sector companies. It only emerged since the early 1980s as a means for developing “social control” and participation in state controlled companies and public sector utilities. It has been also used as a means in facilitating the conversion of public sector organizations and companies into legal entities, i.e. *Societes Anonymes*, compatible with the private company law, and in introducing private sector principles and management tools. In the intermediate stage of conversion and modernization of the public sector organizations it was stressed that they maintain their character as public utilities, at the later stage of privatisation the Corporate Governance system returned to the traditional scheme of shareholders and single tier governance where there has been for decades no room for board level representation of employees.

2. THE EXPERIENCES AND THE PRACTICE OF BOARD LEVEL REPRESENTATION SCHEMES.

Despite the fact that the governmental attempts to reshape Corporate Governance systems have been one element of socialist party policies in the 1980s and in the 1990s, yet there are no systematic and in depth studies of these practices, going beyond the description of legal provisions. The Greek experiences and the practice of Board level representation of employees can be classified in two sets. First, in these associated with the legal initiatives of the 1980s, and, second, in these associated with the initiatives since the mid-90s, through the provisions of Law 2414/1996. We start with reference to the later, as the former is now part of the Greek industrial relations history.

According to these provisions the scheme of employee Board representation with two representatives (and the representation of OKE with one member) was applicable to a list of 37 organisations and companies. These included all the state monopolies in electricity, telecommunications, urban transports, railways, airways, gas and oil companies, state companies for tourism, water and sewage companies, stakes and lotteries, radio-television, airport and port authorities and defence industries. The list later included other public sector organizations thus increasing the aggregate to 50 public sector organizations. In fact these were the majority of the large employers in the Greek economy accounting for more than 10% of employees in employment. To these we may add the segment of the state-controlled banks that have been also practicing since the mid-80s the board level representation of employees.

In all of the above-referred cases, the employees have had the right to elect two members of the companies' administrative board as employee representatives. The pattern has been for the new Board to serve for five-year terms – and this has been applicable also for employees representatives and the OKE representative. The procedural aspects have been also prescribed by the Law 2414/ 1996. There has been no automatic provision, but the election of representatives has to be initiated by the trade-union following the invitation of the CEO or the Minister. The employees representatives have had to be elected through a general ballot, based on proportional representation. The ballot has to be regulated by the provisions on trade-union rights for representation and election of union officers, which in the Greek case have to be supervised and certified by a judge.

The initiative for calling the ballot lies with the most representative trade-union at the secondary (federal level) or in case of absence of a secondary level trade-union with the most representative primary level union. Not surprisingly in the case of the public sector utilities, which remain the area where trade union densities are high and where, in fact, lies the major and active part of Greek trade unionism, candidates for board level representation of employees are proposed and supported by the political fractions of the company trade unions. After their election, the major shareholder, which is the government (i.e. the Minister) appoints the two representatives next to the other Board members. A similar procedure applies in the case of the OKE representative, as the Minister of Economy invites OKE to appoint, in a two-month period, its representative.

With regard to eligibility criteria, in the case of employees representatives only company employees are eligible to be elected to the company board. In the case of the OKE representative there is a clause about selecting a person who has relevant experience and knowledge of the company concerned. Therefore, trade-union officers or experts are not excluded, but the practice has been to elect employees acting in the high ranks of the trade-union structures. With regard to re-election rights, in some cases there has been an explicit provision according to which employee elected representatives can only serve a single term and have no right to be re-elected (e.g. public Power Corporation DEH, according to article 43 of Law 2773/1993 on liberalization of electricity generation and dissemination). Further, it is also noteworthy that there has been in Law 2414/1996 a specific provision according to which the Board in all the companies concerned, can operate legally even a) in the absence, b) before the appointment of the employee and OKE representatives, and c) after their resignation.

With regard to rights and duties of Board members there has been no specific provisions for the workers representatives. The general rule and the provisions of the company statute applies to all Board members, and the same status is also applicable as far as remuneration is concerned. Overall, board members remuneration differs (around an average of, approximately, 3,000 euros per month) from company to company and from sector to sector.

In existing state controlled public sector utilities that operate under the *Societes Anonymes* Law, there is still board level representation of employees. Prominent examples are the Public Power Corporation (DEH) which is still the state controlled electricity producer and distributor in Greece, the Hellenic Post Office (ELTA), the National Railways (OSE) and the National Bank of Greece (ETE) which is the main state controlled bank in Greece. However, it is noteworthy that the process of privatisations has had a direct impact on provisions for board level representation of employees. For instance, one can sit the gradual privatisation of the Hellenic Telecommunications Organisation (OTE), which until recently held the monopoly of network telephone services in Greece. This privatisation resulted in dismantling the provisions for board level representation of employees, which, during the period in which the state had the majority

share holding, had a provision for 3 employee representatives among the 11 members of its Board.

The operation of board level representation for employees requires the appropriate legal provisions, as incorporate in Law 2414/1996, despite the fact that the provisions reflected, in the majority of cases, the strong bargaining power of the company employees in the public sector organizations and utilities. There are no cases where board level representation has been agreed and managed on the initiative of the corporate management, between management and the unions. The locus of the regulation is in the political sphere and appropriate legal provisions on both the rights and the procedures of electing labour representatives have been major prerequisites.

Let us now turn to the 1980s experiences with regard to board level employee representation. Twenty years after the introduction of the “labour supervisory councils” (Law 1365/1983) in the Corporate Governance systems of public sector companies with the objective of “social control” in the governance of public sector utilities, we can hardly say that these councils are an established practice with more than a marginal role. This is for two reasons. First, because the locus of interest representation remained with the company trade-unions (namely the company Federations in the public sector organisations and utilities) and, second, because, later on, the board level representation of employees has been institutionalised only on an “ad-hoc” or “fixed-term” basis in the public sector companies.

With regard to legal initiatives that concerned the Corporate Governance system of the private mining industries (Law 1385/1983 on the sectoral supervisory Boards in the mining industries) it is noteworthy that were followed by capital flight and abandonment by the private management of ailing mining industries that sooner or later were brought under the state control through the Organisation for the Economic Restructuring of Companies (OAE). Therefore, the “sectoral supervisory boards” became redundant and had no role to play. Mining industries operated then under the provisions for board level representation of employees in state controlled ailing companies, and not many of them stayed in the market for long. The mining areas became areas in crisis hardly hit by high unemployment.

The setting up (through Law 1386/1983) of the Organisation for the Economic Restructuring of Companies (OAE), which provided for direct board representation of employees in the companies that were brought under the controlled of the OAE, provides a long experience of board level representation of employees under very specific circumstances. Nearly 60 ailing private companies were overall controlled by OAE and were managed by government appointed managements. These represented nearly one third of the manufacturing employment of the period (1980s), and more than 10% of the total number of employees in employment. Their boards included at least one employee representative appointed by the trade union. In most cases the restructuring ended up to liquidation. In a minority of cases the restructuring ended with privatisation. In all cases of privatisations board level representation of employees has been abandoned. OAE itself ceased operating in 2000 and liquidation followed.

Board level representation of employees in the Corporate Governance system still is observed in the public sector utilities following the attempts in the mid-1990s to incorporate and involve employee representatives and the trade unions in modernizing public sector utilities. However, as mentioned earlier in this chapter, as the modernization of public sector utilities has been the initial stage towards their privatisation, in all cases of completed privatisations, board level representation of employees has been abandoned.

Another marginal set of cases has been that of local government *Societes Anonymes* that also have practiced board level representation of employees – normally by including one representative in

the Board, and which are not yet a major employer nor in a sector which is planned to be privatised.

The main issue arising from the experience of ‘labour supervisory councils’ for “social control” in the 1980s and board level representation in the 1990s is an interesting and open question regarding the extent to which the councils and the employee representatives (including the OKE representative) represented the broader interests of the public or were in practice restricted to express the interests of the company employees in monopolistic state controlled public sector utilities. The pattern has been for the representatives to seek a role ‘in favour of the public good and interest’, in a rather politicised social and economic environment, while at the same time they had to deal with company specific issues. The lack of studies, of joint activities, of networks, of exchange of views by the employee representatives in Boards concerning their experiences and problems in Board participation calls for further research.

3. DETERMINANTS OF THE CURRENT SITUATION: HISTORY, CULTURE, AND POLITICS.

Over most of the decades of the 20th century Greek industrial relations have remained adversarial and conflict oriented. The state has had a strong interventionist role in regulating both wage formation and industrial relations. It is noteworthy that only in the early 1980s, with Law 1264/1982, labour representation rights at the company level were properly recognized. Indeed, the right to company collective agreements was only recognized in 1990 through Law 1876/1990.

However, even before their formal recognition in 1990, since 1975 (in 1974 Greece returned to parliamentary democracy after a seven year dictatorship and a post war period of political instability) informal company collective bargaining and “illegal” but operational company collective agreements were practiced according to the bargaining power of trade unions in the workplace. In the period 1975-1980 it has taken record strike activity at the plant level to introduce and establish company trade unions and collective bargaining rights.

In this adversarial context of industrial relations there has been no room for the development of participation and social dialogue practices. Even the successive attempts of the socialists throughout the 1980s to introduce and develop legislation providing for participation mechanisms at the company level (through legislation on Occupational Health and Safety, Works Councils) did not succeed. Especially in the private sector industrial relations remained adversarial.

Labour representation and participation practices expanded only in the public sector of the economy, where in fact one finds the strongholds of Greek trade unionism as well as of the organized labour associated with the PASOK socialist party. Overall, at the national level social dialogue practices have been developed only after the early 1990s. In the same period, in the context of policies aiming at meeting the Maastricht Convergence criteria and in the context of policies aiming at rolling back the state through privatisations, the environment started becoming less friendly for board level representation of employees in the Corporate Governance system of the public sector organizations, companies and utilities. The dominant trend has been towards abandoning, or dismantling, board level representation provisions for employees prior to the run up to privatisation.

Therefore, for historical and political reasons, the issue of board level representation of employees has remained a strictly public sector issue. This is not only associated with the fact that the large-scale industry and service-sector companies have been mainly state controlled companies. Despite

the existence of large-scale private companies the issue of labour representation in the Corporate Governance system has never been an issue in any agenda.

Not surprisingly, the current level of debate mainly concerns the defensive views of public sector utilities trade unions, which focus on their opposition to privatisation and then, among other things, on the resulting abandonment of rights for board level representation of employees. Trade unions, government and employers associations have not yet considered systematically the implications of the EC Regulation concerning the Statute for a European company (SE) and, from this point of view, the innovative implications of the Directive supplementing the Statute for a European company with regard to the involvement of employees. Although the Regulation and the Directive provide a rather new framework for board level representation of employees in Greece, there has been no real debate based on taking stock of past national experiences.

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Ireland

by Kevin O'Kelly and Pat Compton *

Corporate Governance in Ireland

Because of the close political and business links between Ireland and Great Britain, the approach to corporate governance in Ireland closely reflects the British model. Consequently, Irish companies operate with a single-tier board structure and it is at this level in State-owned companies and agencies that employee representatives participate.

Having tried, unsuccessfully, to get the social partners to come to agreement on the most suitable model of employee participation for the Irish system of industrial relations, in the mid-1970s the Government took the view that if anything was to happen regarding worker participation that it would have to take the lead. Consequently, in 1977 legislation was enacted giving employees in seven State-sponsored commercial companies the right to elect a third (4 out of 12) of the membership of the boards of these organisations, known as 'worker directors', for a period of three years'. (Worker Participation (State Enterprises) Act, 1977).

Following a review of the workings of this legislation by an advisory committee in the mid-1980s, and recognising that the 1977 Act failed to provide any guidance on how worker directors should link with the work colleagues who had elected them, through some sort of reporting back process, the new legislation also provided for the establishment of sub-board consultative arrangements, not just in organisations with worker directors, but also in other organisations - in total thirty-six State companies and agencies. This aspect of the new Act was very flexible on the type of consultative forum which should be set up within each organisation, as the structure needed to reflect the objectives of the organisation, the size and location of its workforce, the employee/management relations, its culture, its national role or the business environment in which it functions.

There are, however, some basic provisions which must be provided for, such as:

- An exchange of views on information provided by the organisation to the participative forum;
- the giving of relevant information, in good time, on decisions which may affect the interests of employees;
- the dissemination of information to the full body of workers through agreed communications channels.

With regard to worker directors, the new legislation gave trade unions, staff associations or other designated bodies, recognised for the purpose of collective bargaining and with members in the company or agency, the sole right to nominate candidates for election. All employees, including certain part-time workers, are entitled to vote in the election of these board-level representatives. Elected directors are entitled to stand for re-election, following nomination by a designated body. Once elected, and appointed by the relevant Minister, worker directors have the same rights and duties as ordinary directors (who are generally appointed by the Minister or, in some

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organisations, interested sectoral organisations) and are entitled to the same privileges, expenses and remuneration as other directors. These are at the discretion of the board and varies from organisation to organisation. (Worker Participation (State Enterprises) Act, 1988)

As regards the private sector, the Government showed a reluctance to impose participation through legislation, if it was not acceptable to employers and managers. Its preference was for the social partners to reach a voluntary agreement on the future of employee involvement in private sector enterprises.

Experiences of Worker Directors

Following the introduction of these two Acts and the extension of the concept to other State-owned enterprises and agencies, there are now 54 employee representatives who are members of over 20 boards. There are also a few worker directors on the boards of former State companies which have now been privatised.

Representation ranges from five worker directors in An Post, the national postal service, to four, under the original Acts, on the boards of such companies as Aer Lingus (national airline), CIE (national transport) or ESB (national electricity company). Under separate legislation setting up a number of more recently established State-sponsored companies, for example, An Coillte (forestry company) or the Railway Procurement Agency, employees are entitled to just one representative on the boards of these bodies.

There have been some difficulties for worker directors in balancing their need to communicate with their fellow workers but, at the same time, respect the confidential nature of discussion and decisions taken at board meetings. This issue is an ongoing challenge to board-level representatives and is not easily resolved, as in most companies worker directors are required to sign a confidentiality clause. A second problem, which had to be overcome, was the hostility and suspicion of ordinary board members and of senior management in the companies and, initially, the exclusion of worker directors from key decision-making and from important sub-committees, such as finance. In a review of the operations of the system in 1989 it was considered to be 'broadly successful'. Employees in the companies expressed satisfaction with the process and management, though still having some reservations, has accepted the role of worker directors in the decision-making process. (Kelly, 1989)

A third difficulty for worker directors has been access to training to equip themselves for their role as board members – in particular on finance, legal responsibilities, marketing, corporate governance and other technical issues. In a small survey carried out by the Worker Directors' Group in 1996, 82% of the group said that finance was the topic in which they were least comfortable with in discussions at board meetings. Consequently, 40% considered financial issues as the most important training need to help them carry out their duties, while communications skills was second (30%)

The Training and Advisory Service of the ICTU has been addressing these issues for worker directors and a comprehensive and ongoing training programme is now in place to assist them in meeting their board responsibilities. The SIPTU College also provides training, support and a network for employee representatives, including worker directors, who are members of that union.

Worker directors also have their own formal organisation, which meets once a month to exchange information and experience and to provide mutual support. It also co-ordinates relevant training programmes and other developmental projects.

A further problem which has been identified with the present system in that of continuity of representation. If in the case of all worker directors not seeking renewal of their mandate (which has happened, for example, in Aer Lingus), or are not re-elected, there is the difficulty of the newly elected worker directors taking time to learn the operations of the board and, at the beginning, to make an impact in representing the views of the workforce and in influencing company policies.

Originally there was concerns that worker directors might pose a challenge to the traditional collective bargaining and trade union structures. Kelly found that this had not happened as the unions have the sole right to nominate, thus giving them a dominant role in the process.

However, in a reviewed of industrial relations in the ESB, under the chairmanship of Peter Cassells, then General Secretary of the ICTU, found that there were concerns about the involvement of certain worker directors in industrial relations issues and their continued front line responsibilities for ongoing industrial relations issues. The report of this review group says that there appears to be a 'lack of clarity' on their role, which needed to be addressed. (Cassells, 1993)

Impact of Privatisation

In recent years, with the privatisation of State assets, the system of board level employee representation has come under threat. Of the eleven original companies covered by the Acts four have been privatised. In one, B&I Shipping Co., the new owners immediately terminated the system of worker directors. In two of the others, NET (fertiliser manufacturing) and CSE (sugar production), management and its advisors argued that stock market equity would not be forthcoming if worker directors remained on the boards of these companies. A compromise arrangement was arrived at in which the former boards were retained, including the worker directors, in a consultative role, but all commercial, operational and policy decisions are taken by a second board, representative of the private shareholders and from which the employee representatives are excluded, thus having little influence on company strategy or decision-making. (McCarthy, 1997)

In the fourth, Telecom Éireann (the national telecommunications company), 20% of the company was sold to a joint Swedish / Dutch consortium, in 1996. In a parallel development the company and Government also transferred 14.9% of the company equity to an ESOP trust fund owned by the coalition of unions, in exchange for changes in work practices and cost reductions. ⁴ In 1999 the Government decided to divest itself of the remainder of its shareholding in Telecom (now re-named Eircom). In preparation for the full privatisation of the company the then Minister for Public Enterprises removed the four worker directors from the board, so as not to discourage any possible international investment in the company, arguing that the equity holding gave the workforce adequate representation on the board.

⁴ As this company again changed ownership in 2001, the ESOP Trust now controls 29.9% of the shares of the company.

Labour Relations Commission Review

As part of its review of the worker director system, as agreed under the national tripartite Programme for Prosperity and Fairness (2000-2002), the Labour Relations Commission carried out a small survey of the worker directors in 2002. Some of the findings confirm the previous studies referred to above:

- 96% of the respondents had a positive experience as worker directors and the role gave them greater insights into the operations of their companies;
- 76% felt the system had helped to improve industrial relations;
- 83% felt their involvement had helped to improve communications;
- 62% believed the process had helped the development of partnership;
- 62% said it had helped the change process in their organisations.

The respondents were split 50-50 on the attitudes of management to the process, between ‘only tolerated by management’ and ‘fully accepted by management’.

In line with the 1996 survey carried out by the Worker Directors’ Group, this recent small study high-lighted similar concerns among worker directors, for example, the experience with privatisation; the confidentially restrictions and the consequential limits on communicating relevant information to the workforce; a lack of knowledge in technical issues, such as finance; and exclusion from key board sub-committees.

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Italy

by *Dario Iossi* *

1. The constitutional basis and the evolution of industrial relations

Analysing the Italian experience of worker's participation in companies must take, as its departure point, Article 46 of the Constitution. This article stipulates "the worker's right to co-operate in company management, according to the mode and limits established by law". The Italian Constitution came into force on 1st January 1948. Participation, at this time was not merely a theoretical question, as experience already existed in the so called "management councils". These had been established by workers in many Northern Italian companies during the fight for liberation from nazism/fascism in order to retake control of production. However, the resulting constitutional article, while certainly binding, is in practice it is only "programmatic"; a compromise achieved between the various political powers inside the Constituent Assembly each with highly differing opinions as to the role of workers in the post-fascist Republic. It is also worth noting at this point that that Article 47 deals with another aspect of participation, through shareholdings. On this point it stipulates that "the Republic...facilitates access to popular investment... in direct and indirect share holdings in the large production sites of the country".

The constitutional programme remained substantially unimplemented, as will be shown later in more detail . However, while the divergent political opinions on this matter remained – and still do - they alone can not explain Italy's continued legislative weakness on this point. Rather, this should be understood as the result of a succession of events and decisions which determined other priorities in the political and industrial relations arena:

First one must note that Italian trade unions have always preferred to seek their goals through bargaining rather than legislation. Even though there are differentiated and shaded opinions among the trade unions (pluralistic views of society, evaluations of context and the political and institutional situation) the principle that legislative intervention in the workplace should merely standardise and support the results of collective bargaining continued across the board. This undoubtedly contributed to a strengthening of the trade union presence and role, but also had a notable influence on the legislature's attitude to topics related to trade unions and negotiated evolution.

Secondly, one should consider two major problems for trade union action that have repeatedly often and often simultaneously occurred since the end of the Second World War. On one hand, there are the resolutely conservative positions of Italian employers and of a number of governments during this period, especially during the first decades. This has meant that the trade unions have been deeply engaged in what has often been a very hard conflict to improve the living and working conditions and affirm the fundamental rights of Italian working people (the law commonly known as 'the workers constitution' was approved in 1970). On the other hand, trade union politics has been complicated, characterized by organisational and content related conflicts between organisations, as well as by strong dialectics inside the organisations themselves.

Remaining on the topic of trade union history , one should also remember the big split in 1950 which lead to the birth of Cisl and, a shortly afterwards, to Uil. The trade union context was strongly influenced by the political confrontation at national level and by the events of the cold

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war. Then, a period followed where a big effort was made by the confederations to maintain or to earn organisational presence and to consolidate their own identity. At the beginning of the 60s, the debate on wage items is faced with the political and economic opportunity to establish negotiation at company level. The second half of the 60s sees the trade unions engaged on the “reform” objective from a social point of view, concentrating on aspects which were fundamental for the quality of life (housing, health care, social protection). This engagement led to the big social movement known as the “hot autumn” (1969) concentrating on the renewal of the main working agreements.

The beginning of the 70s represents a turning in Italian industrial relations, in terms of the direction of the movement as well as through the construction of a more stable structure defining the role of negotiations and the social actors. It is in this period that the first rights to information and consultation were agreed through collective bargaining in the so-called “first parts” of the national agreements - though not without the strong resistance of employers’ organisations.

However, this first participatory approach is still fitted into a context of a strongly claim-orientated trade union culture and does not develop in the immediately following years. The economic situation, which progressively deteriorated with inflation rates at more than 20% at the beginning of the 80s, leads the focus of debate to the automatic indexation of wages. Beginning with some very sensitive trade union disputes and followed by a referendum, the indexation system was first frozen and then replaced by new principles for social contracts established 23rd July 1993 by the tripartite co-operation agreement called “Protocol on income policy, employment and contractual levels”.

This very brief *excursus* on the evolution of Italian industrial relations is intended to show how the topic of the participation, despite a favourable constitutional basis, has not been able to develop itself in a climate of pressing economic and social situations, fundamentally opposed and deep-rooted positions of social partners and different orientations between the trade union organisations themselves. It is only during the 90s, in an more “standardized” economic and social context that trade union debate once again took up the theme of participation and of economic democracy more generally. Many factors favoured this theme coming back to prominence: the depletion of the economic planning that had been experienced in the past, the practical absence of credible radically alternative socio-economic patterns; the success of the forces of neo-liberalism, as well as the search for instruments able to temper its effects and lastly the more widespread evaluation of the limits of democracy as defined exclusively within the framework of the political representation. The need to extend *economic democracy* and *industrial democracy* is now a consolidated position among trade union objectives, even if there are some diversities of approach and of evaluation on specific aspects. It is generally seen as a *continuum* from the macro-economic general level to the company one.

The relation between participation and negotiation is particularly relevant to the Italian experience. It has been evidenced that there are numerous links between the two, there is a proximity of methods and context, almost like communicant vessels. While many European workers representation systems separate the two functions (*double channel*), Italy has only one representation channel, make the two functions more intricate, with various typologies and significant cases, that we will try to analyse here.

2. The forms of the participation

It is stated above that the evolution of the debate on and implementation of workers’ participation in Italy is somewhat removed from the constitutional basis of the topic. In fact, it takes a number

of diversified shapes in terms of objectives, intensity and forms. It is therefore useful to look at some classification typologies. For the purposes of this paper this will be limited to the theme of *indirect participation*, in other words participation which includes collective dimensions in its specific institution and/or in workers representation.

Therefore, we will briefly examine the Italian situation concerning the following:

- Information and consultation rights
- Distributive economic participation
- Strategic-organisational participation (outside the company bodies)
- Strategic and distributive financial participation

In some cases, we will use the distinction between *weak participation*, intended as a whole regarding the forms, procedures and bodies of information and consultation bodies, joint or bilateral, and *strong participation*, intended as a whole of powers and institutional forms of influence and intervention in the strategic and managerial decisions. We will not give to the adjective *strong vs. weak* a signification of value, since the evaluation of “strength” should take into account not only the typology, but also the intensity of various experiences linked to the specific socio-economic, legislative and of industrial relations context.

On the other hand, it is evident that the recalled scheme is not often possible to be implemented *sic et simpliciter* in the real cases, that are often the result of complex evolutions and have in many cases more and intricate typologies of participation. We also have to take into account that we will not consider the participation typology itself as a presence or a power of influence for workers representatives in the management bodies of the companies since this experience has been very limited in Italy.

3. Information and consultation

Though in the past there were some procedures (even some legal procedures) for information and consultation of trade unions in particular cases (for example for collective dismissals, the law of 1966 already scheduled prior information and conciliation procedures), the implementation of a “weak” form of participation through an appropriated regulation dates from the renewal of national agreements in the first half of 70s.

The present set-up of this information system, since it became more and more active during a period of 20 years characterized by successive claims and experiences, is very articulated and similar to the national agreements of the principal sectors of production.

In the meantime, one can note the implementation of “sectoral observatories” with a joint composition (employers & trade union federation signatories to the agreement). These bodies aim to analyse all the main dynamics of the relevant sector, including economic, productive, technological and organisational developments, as well as the employment profile and prospects of covered companies in an international context. This is done through regular meetings that allow an exchange of information and opinions, putting into evidence some elements of possible criticism as well as possible forthcoming orientations. The Observatories are scheduled at national level, but often take place also at regional/territorial level in order to analyse the sectoral matters which are more specific to these areas. Moreover, the Observatories often have sections dedicated to specific themes such as environment/health and safety at workplace, or vocational training.

A second level of information rights concerns companies and undertakings, where it is scheduled, during periodical (generally annual) meetings, to provide information regarding the economic situation, employment, research, development, etc.

Afterwards, the partners can make a *joint examination* of the information received and the emerging problems. Information at single company level is provided by companies which are over a threshold (from 100 to 350 employees, according to the specific rules of each national agreement).

It is interesting to underline some aspects of this regulation. First of all, because of its contractual nature, it is not regulated by law. Moreover, it concerns first the sectoral level (over the company), and that gives relevance to the possible influence on industrial policies and related decisions (remembering that there are similar Observatories, for example for the chemical sector and for the fashion system, established by the Ministry for Production Activities, with a tripartite composition).

The sectoral level also concerns the legal ownership of the information system; actually, the involved partners are the employers associations and the trade union professional federations (also for the company level, trade union is often, with the assistance of the company body, in charge of employee representation). Finally, we can note a right to specific information for 'exceptional circumstances' comparable to that generally scheduled for European Works Councils. However, it is possible to say that these minima have been widely surpassed in the actual practice of industrial relations and that can sometimes contribute to making the normal meeting of information at company level rather ritual.

4. The economic distributive participation

The co-operation agreement of July 1993 also sets out the new principles of collective bargaining by specifying its competences at the two main levels: the sectoral-national level and the company level (also, in some cases, the regional). For the latter, regarding wages, the agreement of '93 allocates the task of negotiating wage quotas, complementary to the minimum remuneration established by national collective agreement, and linked to the income and productivity of companies where these are negotiated.

It is a relevant innovation since it tends to generalize the adoption of a *variable part of the wage*, often linked to objectives of company *performance*. Nowadays, it is calculated that company negotiation takes place in around 40% of the companies (there are understandably greater organisational difficulties implementing it in the small and medium sized companies that from a remarkable part of Italian industrial production).

Company negotiation has produced a rather wide range of formulations for the calculation of this varying wage "bonus". These formulations are usually composed of the sum or the product of two different functions:

- a variable parameter of profitability (the most widespread is the gross operational margin) of the company or more rarely the group that the company belongs to or
- a productivity parameter (for example added value) but here combinations of parameters even with a very different nature, like for example the number of customers in the case of a *public utility*) are often used.

It is important to note that the general set-up of the bonus (formula, index to be adopted, linked wage quantity, recurrence, etc.) as well as its actual allocation are linked to the initial negotiation and to further verifications between the company management and workers representation. It is easy to perceive that these phases entail at least potentially on behalf of workers representatives a rather deep capacity of knowledge of the company's economic and organisational variables and of the possible choices aimed to optimise the final result..

Trade unions strongly underline this aspect (it is not a coincidence if many of these wage practices are called "participation bonuses") and this seems in a certain way to be a trend to pass the simple form of the *profit sharing* towards a form of strategic participation.

5. The public sector and the privatisations

From 1985 on, some partial operation of privatisation of the important economic activities of public ownership started and found a strong acceleration through specific legal rules in 1992, 1993 and 1995.

At this time, the public companies were present in many industrial and service sectors, with a variety of juridical forms. In the public service utilities (mail, railways, national roads, etc.) the public enterprises assumed the form of "State autonomous companies", under direct control of Ministries; a similar form was adopted for the State Monopolies (mainly tobacco industry). At local level (water, gas, local transports, etc.), these autonomous companies were depending on municipalities ("Municipal companies"). In the industrial sector, there were three "bodies for public participation" controlled by the Ministry with the same name: IRI, with important activities in steel industry, metalworking and agro-industry; ENI, active in the petrochemical, energetic and chemical sectors; EFIM in the manufacturing activities. These bodies had the character of real public holding companies, taking part, for the above mentioned activities, to various joint-stock companies forming sometimes themselves groups of companies. In the services sector, IRI was still present in the so-called "banks of national interest". Moreover, there were big credit institutes of public law.

The methods of implementation of the privatisation (not yet completed in some cases) are many. The usual method for the State autonomous companies has been transformation, from 1985 on, into "public economic bodies", having the quality of specific legal person.. Afterwards, these and the other bodies have been transformed into joint-stock companies depending on the Ministry of the Budget for the cases of national relevance; then total or partial independence – still in progress – was realized. In some cases, the controlled companies have been sold by private negotiation; more often a public offer of sale has taken place. In some cases the ex holding-bodies have been wound up; in other cases (ENI) the holding-body has been transformed into a joint-stock company and therefore privatised (in the ENI case, 30% of the shares are still in possession of the Ministry).

These complex operations have presented, for our objectives, some common characteristics. In the meantime, we have to remember that the State autonomous companies scheduled the presence of workers' representatives in their Management Committee (named CdA). The Italian Mail had, for instance, 4 representatives elected by the workers among a total of 15 CdA members. The elections were organized by mean of Union lists. Furthermore, workers' representatives were also members of other technical-managerial bodies (Upper technical Committee, Discipline Council).

With regard to the "bodies for public participation", the case of ENI is notable because its statute provided, within CdA, a workers' representative elected by blue-collar workers, and a workers'

representative elected by white-collars and managers. CdA was further composed by 6 high-level officers from various Ministries and 5 experts appointed by the Minister of Public Participations. It is interesting to point out that the structure of *governance* in ENI was practically dualistic: direction and management were assigned to an Executive Board, whilst the CdA mostly performed tasks of surveillance (administrative trend, passing the annual accounts, etc.). The companies coming under the ENI-holding, being under private law, had no workers' participation forms.

With the reform of public sector and/or privatisation processes these forms of participation have been substantially bypassed. First we have to consider that Trade union had, on its side, already developed critical considerations on the efficacy and opportunity of this presence, being more orientated in looking for "alternative forms of participation and control". Criticism was based on the fact that the most relevant strategic and managerial choices were beyond CdA competencies, because they were determined by law or regulations from political authorities. Secondly, the minority presence of workers' representatives made in any case difficult a serious conditioning of the choices, also exposed to pressure from political lobbies. The role of workers' representatives seemed consequently neither clearly distinct nor properly effective. Due to these reasons, in several cases the representatives left CdA after decision of confederal Unions.

With passing the State autonomous companies to public economic bodies, the absence of workers' representatives in CdA was formalized. In other cases this happened with the passing to the company form of private law, where the presence of workers representatives misses on a juridical point of view or, - for a better understanding - this possibility is all remitted to the specific statute or para-statutory deals of the single company. In some particular cases it has been implemented in relation to workers shareholdings (see at 7.2), in many other a shared worry for the possible negative effects of a "participative forcing" when the shares have been offered on the financial market did not allow to follow this way.

Moreover, it is also important to remember that, at least at the beginning, with the public offers of sale, the wish was to achieve the implementation of *public companies* (meaning widespread shareholding by many small shareholders), with a small part of shares going to the employees (even in the more significant cases, Alitalia excluded, it didn't cover more than 4% of the capital). But in other cases, groups of private or institutional investors reached the control of the company (Banca Commerciale, Telecom).

The subscription of shares of privatised companies by salaried employees is another common characteristic that we will analyse afterwards. Here, we put into evidence that the subscription of employees to buy shares from their own company is generally higher (for example, in the case of Acea, more than 90% of workers) than for the subscribed capital. As has been noted, the high adhesion of the workers seems to elude an explanation based on the simple economic advantage..

Somewhat separate to this, although deserving a mention here, is the topic of Public Administration. Until 1980, since there was no formal recognition of collective bargaining for public employees, the trade unions were involved in forms of organic participation with their presence as workers representatives in the CdA of Ministries (1/3 of total members) and in other "collective bodies" established by the regions or by local bodies in the public services (school, transports, health, etc.) with tasks even including joint management for staff administration (promotions, disciplinary measures, transfers, competitions, etc.).

This presence has been important, calculated in 1970 at more than 18 000 employee representatives and, as we have seen, has been critically reviewed by the trade union themselves.

The obligations and the behaviours linked to the particular juridical nature of the public employment working relations pushed therefore the main trade union organisations to require with determination to put into the collective agreements the wage and legal aspects through the privatisation of the working relations. In 1993, this change has also been implemented by law, by introducing a new system of trade union relations. Therefore, the forms of participation with a character of direct management have been cancelled. The forms which are scheduled at the moment are regulated by collective agreement and regard information, consultation and co-operation, also through joint bodies (Committees, Observatories, Commissions) distinct from management bodies.

Lastly, a mention should be made of the bodies (called Institutes) for managing and paying public social security (mainly INPS, which pays out public pensions to c. 15 millions ex-workers from private enterprises and self-employed persons; INPDAP, which pays out pensions to c. 2.5 million ex-civil servants; INAIL, for compulsory insurance against occupational accidents). Also in these institutes workers representatives were present in CdA, from which they left in the mid 80s in a fully analogous way as mentioned above. Following the reform of these Institutes, still in force, a quasi-dualistic form was introduced, with workers representatives (and employers representatives as well) as members of bodies, distinct from CdA and named CIV (Committee of Stance and Surveillance).

6. The strategic-organisational participation without presence in the company bodies

The development of industrial relations has brought some interesting realizations of strategic-organisational participation that do not fit into the “strong” model of the presence in the company bodies. This concept takes origin in the public participation companies. These companies and these undertakings wanted to remain apart from the private companies from the associative point of view (that means that they did not join Confindustria, but they created their own association) as well as from the contractual one (they stipulated collective agreements different from the private sector ones) and for a philosophy of trade union relations bases on the recognition of its legitimacy and of the role, even if different.

On this basis, two important agreements have been defined in 1985 in two important industrial groups with public participation, IR and ENI. These agreements are “protocols” of industrial basis defined on a typology that today could be defined as ‘participative’. The Protocols had the objective to develop a confrontation between the partners more based on dialogue and on the prevention of conflicts through the implementation of a number of structures and procedures regarding information and discussion of industrial, organisational and employment matters as well as behavioural guidelines orientated to problem solving.

The ENI protocol is characterized by a set-up based more on the guidelines of a programmatic nature while the IRI one gives more details on regulations and procedures regarding in particular trade union conflicts and the cooling of conflicts in general. Both have in common a system of information and consultation that is more advanced than the prescriptions of collective agreements, and in particular the implementation of joint committees at group level, at controlled companies level and of territorial articulation for the analysis of production innovations and strategies.

The implementation of these protocols can be seen nowadays as more limited than it could have been, due on one hand to persistent reluctance in the *management* of some companies as well, or because of the coming evolution towards privatisation. But a problem of dissemination remained

and afterwards involved public privatised public companies (Ferrovie dello Stato, Anas) as well as fully private companies..

Among these last ones, we have to mention **Electrolux-Zanussi**, where a “Single text”, widely inspired by the IRI protocol has been negotiated. This text establishes many Joint Committees at plant level (for ecology and safety, organisation of production, training, conflicts and equal opportunities), and at group level. At this level, the National Commission for Guarantee, for the resolution of conflicts and the Monitoring Committee, with right of prior consultation on the industrial and organisational choices.

Unfortunately, this interesting experience showed and still shows sensitive difficulties, due to moment of opposition between participative bodies and bodies of workers representation at workplace, doubts on behalf of the company management until the cancellation of the agreements and also to different orientations and difficult relations between the trade union organisation, added to the load of the Electrolux restructuring plan in Europe

The **ENI** case is more recent and as much interesting. This company has maintained its structural identity during the privatisation process and has shown a strong continuity in the group identity, in the company culture, as well as in the industrial relations style. In June 200à, a new “Protocol of industrial relations” was signed with the trade unions. This Protocol goes in the direction of the participative model, based on the “prior information, consultation and experimentation of new models of participation”.

A Committee for industrial relations with a joint composition has been implemented at national level, with competences for the group strategic themes and other ones as training, environment and safety. The Committee meets three times, in event of important moments of evaluation and strategic elaboration: the ongoing economic accounts and investment plan, the previsions of evolutions of the macroeconomic and sectoral framework, the updating of the strategic guidelines and of the four-year Strategic plan. The Committee, on request of one of the partners, can moreover meet for exceptional circumstances. For the occupational problems, a “joint table for employment” has been established.. Moreover, similar Committees has been established for business lines and controlled companies..

An attached protocol, dedicated to international industrial relations and that improves the agreement on the European Works Council, as well as a global agreement on social responsibility that commits ENI to the respect of social rights wherever le group is present, with moments of information and verification on this aspect and on the development of the activities in the various areas of the world are also relevant.

Here, we have to put into evidence that such participative experiences do not consider the simultaneous presence of forms of employee financial participation, even if in some cases the drawing-up of agreements concerning share participation has led at the same time to the constitution of similar bodies.

7. The financial participation

In general

The interest for the financial participation of workers grew, as noted previously, when the privatisation processes, especially through public offers, generated a number of diversified experiences that cover – often intricately – the various known typologies. At company level, there were cases of share investment with use of saving or of the deferred wage for workers, with

mainly of economic /income intents. In other cases the objective of the strategic participation to the company decisions was clear. Finally, there were some cases aimed at distribution according to the “para-wage” function.

In general, the most relevant aspect for trade union organisations is undoubtedly the strategic one. It has been noted that also the distributive financial participation tends to make the shareholder employee aware of value creation. But without the possibility to influence decisional processes, the exposure to the risk of an uncontrolled company raises. Even with the intervention of a strategic nature a kind of *auto conflict of interests* can be generated. The expectations of employees can privilege the short-term economic result, maybe at prejudice of working conditions, neglecting the long-term innovative development, which is however the only one able to correspond to the solidity of employment.

There is a sign of this intrinsic difficulty in the different approach that the three trade union confederations expressed on this matter. CISL strongly supports the shareholding since it is considered the easiest way to follow in Italy towards forms of “strong” participation. CGIL rather tends to underline the risks and the contradictions of this approach by preferring forms of strategic influence based on industrial relations and investments financed through Funds. UIL seems to prefer participation forms based on the dual model of companies. Such a different approach, among others, has contributed in many concrete cases to make the experiences of financial participation in companies difficult.

At the normative level as well, the modifications made to the “Single text” of 1998 introduce methods “*to favour the shareholding of employees*” turned out to be seriously lacking in terms of the possibility for collective intervention to create shareholders associations able to receive delegation, as the collecting of delegations has to be repeated for every convocation of the Members Assembly. The very recent provisions on company law still has strong limits as is underlined in the point 9. Regarding the tax issues, the existing facilitations are rather limited: the conferring of shares on employees up to a maximum of €2000 p.a. are tax-exempt, provided that the shares are conferred to all the employees of the companies and not sold before 3 years.

Some relevant cases of workers shareholding

The **Alitalia** case is undoubtedly the most advanced and complex experience. In 1996 the Italian national air company found itself in a rather serious financial situation. Competition was increasing with the progressive removal of protection barriers and the privatisation process was accelerating. The confederal trade union organisations and the professional associations accepted a recovery plan with reduction of labour costs through participative involvement based, first of all, on the subscription on behalf of employees of shares for more than 20% of the capital. The protocol of agreement that regulated these questions scheduled the presence of 3 representatives of the shareholder-employees in the Management Committee. Moreover, a new model of industrial relations with the implementation of various bilateral bodies has been set up.

The real core that arises is the collective representation of the workers shares. A first form of associationism does that does not go through the Stock Exchange authority (Consob). Clashes between trade union and professional organisations lead one of them to promote a cooperative company, where the employees can confer the shares through a public offer of exchange. But the operation has only a rather limited impact. CISL promotes a collection of delegations, and the association of P & M shareholder participation staff does the same. With these instruments, the 3 categories have been able to express a representative for each one of them in the Management Committee.

The shareholding experience at Alitalia is therefore both advanced and interesting, but it was also not very easy due to the limits of the regulations and the different evaluations of the concerned associations, in addition it maybe also be seen as somewhat extraneous compared to the processes coming from the new model of industrial relations.

The **Gucci** case is different since it is not linked to the privatisation process, but finds its origin in a consolidated practice of industrial relations that, even in event of a hostile takeover attempt, gave origin to a proposal for an *Employees Stock Ownership Plan*. This proposal, valid for all employees of the various countries where the group operates, became the object of negotiations leading, at the beginning of 2000, to a trade union agreement. This latter schedules the progressive assignation of 32.25 shares for each employee with the obligation to keep the shares for 3 years and the creation of an association of shareholders employees. Furthermore, the agreement also deals with industrial relations, establishing new joint bodies “for the development of more participative relations, information and responsibility”.

This experience, even if it is characterized by the distributive aspect, refers a lot to a strategic influence. However, the process hardly took wing, due to the conflicts between the organisations after the creation of the Association and the difficulties of implementation of the commitments regarding the industrial relations system. One should also add that the assignment of the allocated shares is nowadays very attractive as their market price has increased 30% on the assigned value.

In the case of **Dalmine**, number one Italian producer of steel pipes, the question of the employees shareholding originates with the privatisation of the ILVA company (IRI group) which was planed to be sold to private entrepreneurs. In July 1998, further to a specific trade union claim, a principle agreement was reached and, in 2000, there was an operational agreement establishing the possibility for employees to buy ordinary shares, with the possibility of payment through an advance on severance pay (a part of the remuneration that it is compulsory for the company to put aside and paid to the employee only at the end of the working contract). The implementation of a voluntary association that, in event of possession of shares for at least 10% of the capital, would give the right to the nomination of a Management Committee member, was also scheduled.

This agreement, which is interesting since it is clearly orientated towards strategic financial participation experienced a double difficulty. Some structural problems with the offer (doubt on the purchasing price, lack of economic facilitations or promotions), probable ambiguity of perception on behalf of the employees between economic and strategic aims, conflicts in the trade union orientation allowed to achieve a subscription of less than 2% of the capital. The comeback of the initiative has been stopped afterwards due to the assignment of the company to the Tenaris group, that also made an offer of public purchase, still open, for the shares not yet purchased. The outcome of this experience is therefore uncertain and also showed how difficult it is to launch these forms of participation given the speed of the market mechanisms.

We shall finish this overviews of company cases with that of the of the **ENI** company. This is because of the relevance of the privatisation operation as well as the lack of impact of the shareholding proposal for employees on participative industrial relations, which developed on the though the more typical method of confrontation between partners, as described above.

The ENI privatisation started in 1995 with a public offer of sale in four subsequent *tranches*, which put 70% of the capital on the market for a capitalization of more than 50 billion Euros. The offer to the general public scheduled a slight discount on the price and a *bonus share* of 10% for

shareholders who keep the shares for more than one year. ENI also allocated payment through an advance up to 70% of the severance pay of the put aside value to its employees. About the half of the employees subscribed to the offer, creating an initial possession of about 3% of the share capital on the market.

It was therefore an operation clearly considered as a financial investment. As such, it enjoyed a healthy success for the employees' "calculated trust" in terms of the group's value. Despite the adverse stock market situation, Eni shares are rated today at more than four times the price of the first "tranche" and still more than the price of the fourth one. The distributed dividend allowed a significant return that can be calculated, for two years, at up to 6%. Undoubtedly, the revaluation of the share value pushed to the sale: the part that the employees still own is calculated to be at around 1% of the capital. At the end, we have to mention that at ENI there are practices of *stock grants* and *stock options*, but only for the managers of the group.

8. Other forms of participation

Among the other forms of participation, different from the ones we have analysed up to now and that deserve to be mentioned briefly, we shall now look at the so-called Bilateral Bodies.

These are bodies established at the end of the 1980s through agreements between social partners with a joint composition: representatives of the main trade union organisations and of the correspondent employers organisations. The purpose of the Bilateral Bodies is to approve initiatives and to provide a succession of services to companies and employees in fields like training, some aspects of social protection as well as technological and organisational innovation.

Important experiences have been implemented in the industrial sector and in training activities, like the implementation of an inter-industrial body (Confindustria/trade unions confederations). Moreover, the experience in the artisan sector is very significant, where a complex of bilateral bodies, articulated at national level, are playing an important role- including the implementation of specific funds - to support this branch of activity with objective structural limits and less social protection.

Another form of participation that we will mention, and that can also be defined as of a financial nature regards the subsidiary pension funds. In Italy, their constitution and diffusion is rather recent and it is of course widely due to the need to integrate – increasingly so – the pension incomes paid by the public system which the economy shows have severe and increasing difficulties.

The funds that we look at here (so-called "closed funds" since there are not accessible to anyone other than the interested workers, while the funds managed by the insurance companies are "open" since they are accessible to anybody) are mainly sectoral (for example, for chemical workers) and originate from national trade union agreements. These agreements schedule a voluntary subscription from the worker himself and are supplied by own contributions from the worker himself and the company he works for. The amounts paid by the fund are liable to tax advantages.

Without going into the complex matter of the funds financial management, we have to note that the management orientations are decided by the management bodies where representatives elected by the employees are present. Moreover, consultative bodies of evaluation and orientation, formed by representatives of social partners signatories of the constitutive agreement have been established.

One thing that is important to remember is that, beyond this “institutional” participation in the management of the funds, trade union organisations conceive the same funds as a piece and – even more important according to the relevance of the controlled capital – in the mosaic of economic democracy instruments, in particular for the possibility to have some influence with their choices of companies and markets in which they invest.

9. The reform of the company law

In January of this year, the Government issued a legislative decree on “the organic reform of the capital companies and cooperative companies discipline” which brings serious innovations to Italian company law and tries to solve some requirements established by the EU legislation on the European Company.

The Decree introduces first of all new patterns for joint-stock companies. Close to the previous pattern which schedules a management committee and a trade union council, a “monistic” pattern, which schedules only a management committee which elects a control body and a “dualistic” one, with a council having company management tasks – elected by a monitoring council which also has the task of approving the budget.

However, this innovation does not bring Italian legislation close enough to the European: the presence of employees is not only not scheduled, but in a certain way also impeded since the those having a working relationship with that company cannot be elected to its monitoring council. Similarly this applies to bodies and procedures for information and consultation such as the European Company.

Moreover, the theme of economic democracy through workers’ shareholdings is substantially bypassed. The new discipline scheduled that shares can be assigned to employees without the right to vote, other special “financial instruments, other than shares with property or administrative rights, excluded the right to vote in the General Assembly of shareholders and, among others, make it difficult to be sold or negotiated on financial markets. In this case, there could be the possibility to nominate a member of the management or monitoring committee, but this possibility is only referred to the constitution of the single company.

The CGIL, CISL and UIL confederations have therefore considered this reform of company law “a lost opportunity to favour the development of industrial relations practices useful for employee participation and for a more mature planning of *corporate governance*”, also expressing strong criticisms that the reform has been implemented without scheduling any consultation with trade union organisations.

10. The transposition of the 2001/86/CE and 2002/14/CE directives

The general preference of the Italian trade union organisations for the contractual negotiation is clear in the case of the transposition of the “Directive on workers implication in the European Company” and of the “Directive establishing a general framework regarding information and consultation of workers” with the possibility given by the treaties to the social partners, who therefore made a formal request in this sense.

In a recent parliamentary hearing regarding a legal proposal on employee participation at financial and decision-making level, the General Manager of the employers confederation (Confindustria) announced the availability of that organisation to start a negotiation with trade union organisations

with the objective of achieving “common opinions” for the transposition of the above mentioned directives.

However, such disposability towards negotiation does not conceal the probable difficulty of this matter. In order to understand the current Confindustria philosophy, it is sufficient to remember that in the same hearing it has been said, for example, that “a generalized participation of all employees in the decision-taking process for the management of the company would create some distortions in the combination of production factors, dangerous for company stability and for the system as a whole”.

With this premise, it is easy to understand that Confindustria will try to reduce the profile of the transpositions as much as possible, trying to use the *opt-out* scheduled by the 2001/86 directive, or to take advantage from the suspending options scheduled by the 2002/14, on the basis of the presumed lack of “a general and permanent legal system” of information and consultation. However, it has to be said that trade union positions on this matter are very solid, careful and unified.

11. Hypothesis of perspective

The diversity of these forms and experiences of participation in Italy show the increased interest of trade unions and of some entrepreneurs.

The prescriptions of articles 46 and 47 of the Constitution, as we have seen, have not yet been implemented in a comprehensive and organic way, despite some marginal legislative interventions in the framework of prescriptions dedicated to other matters. Since the implementation of the constitutional law is left to the common law, in past (and present) legislation there have been many proposals for legal change. However none have yet achieved their objective.

We must also remember that the present Government seems very reluctant to innovate regarding work and workers rights, with the exception of innovations of a ‘free-trade’ nature, as is proven by the recent reform of company law. The refusal to use the term “cooperation”, replacing it with the vaguer “social dialogue” shows – beyond the terminological conflict – how it is more complicated to achieve legal prescriptions in a mutual way, and many of the questions analysed here need precisely these provisions.

At legislative level, therefore, an evolution of participation towards “strong” forms close to the established forms typical of the Northern and Central European experience, the German one in particular, does not seem probable in the middle-term. This evolution will, in the short term, probably be limited – following a difficult path between Government and social partners – to the harmonisation of the EU directives. Nevertheless, the workers’ participation issues are still present in the agenda of the parliamentary commissions responsible for discussing the aforementioned proposals of law.

The path of negotiation, which seems to offer interesting possibilities - at least in particular cases, remains still possible. In this regard the recent “Financial Law 2004” passed by the Parliament on December 24th, 2003, has established a Fund of €30 million by the Labour Ministry, to support programmes – defined for the implementation of union agreements or single company constitutions – for promoting workers’ participation in the “results” or “managerial choices” of the enterprise. Of course, the scope, rules and efficacy of this measure are not predictable at the moment.

In the meantime, the debate and the development of the European regulation regarding participation is destined to have a more than marginal influence. The principles on information and consultation rights of workers, stated again in the Nice Charter, that will also in one way or another be transferred to the European Constitution, will form a solid basis to strengthen at least the “weak” forms of participation. The dissemination of information and consultation on a wide scale in the small companies, together with a more precise definition of prior information and consultation in due time will have also a cultural impact on management and the worker representation bodies. In the same direction, in a more limited way regarding the number but with the added value of the transnational dimension, we can already see this regarding European Works Councils.

Regarding the state of participation in Italy, the European regulation offers the possibility of a very positive impact, since it evidences, in the implementation of actual cases, the contractual method in good combination with the “classical” Italian union action. Moreover, the contact with “strong” forms of participation through the constitution of European companies can give a contribution to the growth of consensus regarding this form of employee participation in the company bodies of the entrepreneurial world - although not only this.

More in general one can foresee the persistence of the contiguity between negotiation and participation, also due to the very probable persistence of the single channel of representation, with the development of participation forms referable to the industrial relations context. On this matter, we have to signal the relevance of the sectoral level also as a form of indirect influence on company policies. Incidentally, these data correspond well with the desired intensification of European sectoral social dialogue as well with the ever more relevant European legal interventions with direct effects on the production sites. At company level it will be possible to establish other participative relations of the ENI kind. That, however, will only be possible where a pre-existing company and industrial relations culture will be favourable. On the other hand, an extension of the economic participation forms like *profit sharing* is probable in its quantity compared to the fixed wage as well as in its implementation to non traditional economic sectors.

Regarding employee shareholding, the interest for this form will partially survive, but actually it will be still only implemented in limited cases. On one hand, the difficulties of the strategic participation will emphasize the aspect of financial investment; on the other hand, the vicissitudes of the stock markets and some notable bankruptcies of companies with episodes of criminal opacity regarding their *governance* will have the consequence of encouraging great caution in middle term.

In any case, the most critical theme remains that of an efficient and stable collective representation of the shareholders employees. Therefore, it necessary to modify the present regulation regarding the associations and the presence in the company bodies.

In the end, we have to remember these diversified approaches to the theme of participation – not always and not on everything – of the three trade union confederations. Since it seems rather obvious that the intrinsic nature of this theme does not make it possible to claim participative experiences in event of reluctance or opposition between the organisations, that are not even attractive for companies, we can foresee that these experiences will extend more easily if the trade union positions become more convergent. It is to be hoped that that this will now become possible on many aspect of workers participation.

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- N° 7/8, may 2001, on financial participation

Luxembourg

by Marc Feyereisen*

CHAPTER 1 - Companies covered

Since the amended Companies Act of 10 August 1915, Luxembourg ‘commercial’ legislation has introduced a ‘monistic’ form of company based on the general meeting of shareholders, the board of directors and the College of Auditors.

Legislation of 6 May 1974 brought in workers’ representation at Board and Auditors’ level. Limited companies are covered as follows:

a) at a quantitative level:

workers’ representation at Board level is mandatory for all companies based in Luxembourg and employing at least 1000 workers over a three-year reference period; there are actually about ten companies employing at least 1000 workers.

b) at a qualitative level:

workers’ representation is also compulsory for all companies based in Luxembourg with:

- 1) a State interest of at least 25%, or
- 2) a State concession in its main activity, irrespective of the size of the workforce.

In this context, a Grand-Ducal Decree of 11 August 1974 lists the Compagnie Grand-Ducale d’Électricité (Cegedel), the Compagnie Luxembourgeoise de Télédiffusion (RTL) and the Compagnie Luxembourgeoise de Navigation Aérienne (Luxair).

A Grand-Ducal Decree of 8 April 1989 amended the earlier legislation by the addition of the Société européenne des satellites (SES).

Companies established and operating on the basis of an international treaty are excluded from the scope of the Law of 6 May 1974.

CHAPTER 2 – Employee representation on the board of directors

a) The extent of employee representation

As regards companies covered by the quantitative criterion, the law fixes workers’ compulsory representation at one third of the number of Directors on the Board.

By establishing that there shall be a minimum of nine Directors on a Board, the law ensures that employees are represented by no fewer than three members.

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As regards companies covered by the qualitative criterion, workers' representation on the board of directors is delivered through one Director per 100 employees (the number of Directors representing staff not exceeding one third of the number of Directors on the Board).

b) The appointment of employee representatives

In this respect, the law departs from the normal practice whereby Directors are appointed by a general meeting of shareholders; it empowers staff representatives to appoint Directors representing staff by a list system under the rules of proportional representation.

- These Directors must be appointed from among the company's workforce.
- The electoral colleges of blue- and white-collar representatives shall conduct separate ballots.
- The law allows the most representative national trade unions to make a direct appointment of three Directors to represent employees in companies in the iron and steel industry.
- The Directors must not be chosen from among company personnel.
- A prior inter-union agreement shall determine how individual unions may distribute the seats they appoint directly.
- Employees may be appointed Directors only if they have two years' service with the company.

c) Status and protection of employee Directors

Basically, the rights and duties of the workers' representatives are the same as of the other members of boards. Directors representing staff shall be appointed for the same period of time as Directors representing shareholders. Their term of office may be renewed. This term of office may be terminated early in the event of:

- death;
- resignation;
- termination of employment.

The law also incorporates the principle whereby employee Directors may be removed from office either by staff representatives or by the trade union that appointed them.

The legislation extends to Directors representing staff the common law whereby Directors appointed by the general meeting of shareholders are responsible for errors committed during their period of office. However, it exempts them from the statutory obligation to lodge shares as a guarantee against their actions as managers.

Directors representing staff may not be members of more than two Boards simultaneously. At no time may they be Directors of companies engaged in the same areas of activity. Similarly, they may not be employed by a company engaged in the same areas of activity as the company covered by the legislation.

Directors who constitute at least one third of the Board's membership may, by indicating the agenda, call a meeting of the Board in circumstances where it has not met for over three months. The Chairman of the Board is obliged to place on the agenda of the next meeting any issues specified in a request presented by one third of Board members.

Directors representing staff may not be dismissed during their term of office without authorisation from the Labour Tribunal. However, in the event of serious misconduct by the Director in the performance of his/her professional duties within the company, the senior manager may initiate the procedure pending a final decision by the Labour Tribunal. The law also extends Directors' protective provisions to candidate Directors for a period of six months and to former directors for a period of six months.

CHAPTER 3 – Employee representation in the college of auditors

The law of 6 May 1974 requires the appointment to the college of auditors of a supplementary independent auditor. This appointment is subject to the unanimous agreement of the board members representing the shareholders and those representing the workforce.

CHAPTER 4 – The Luxembourg model in practice

The above title should serve to convince the reader that, where employee participation is concerned, Luxembourg numbers among the most progressive countries. The law of 1974 is widely enforced and, as such, accepted by employers. Little difference is to be observed between the terms of the legislative requirements and actual practice. Not that there has been any scientific research conducted on the effects of this specific form of participation which, quite simply, is part and parcel of the Luxembourg model and just one additional component of the partnership between the two sides of industry.

History and culture

Industrial relations in Luxembourg – often referred to as the Luxembourg model – are based on institutionalised forms of bargaining and social dialogue at all levels. Luxembourg seems to be one of the few countries in which the bargaining and dialogue practised over the last sixty years have come to form the basis of a status quo of social peace that is conducive to social progress, social justice and respect for labour.

The worldwide recession of the 1970s and 1980s gave rise in Luxembourg to a set of arrangements designed to deal with the effects of recession by recourse to tripartite instruments (government/employees/employers) or participatory models.

A brief enumeration of these arrangements is as follows:

Staff delegations

The institution of the staff delegation was reformed by the law of 18 May 1979. Under the terms of this law, any employer regularly employing a workforce of 15 employees or more is required to appoint staff delegates.

The general task of staff delegations under the law is to safeguard and defend the interests of employees in relation to working conditions, job security and social status. The staff delegation has the task of preventing or smoothing over the conflicts liable to arise between employer and employees, whether they be individual or collective in nature.

Joint works committees

A law of 6 May 1974 introduced joint works committees, composed of representatives of both sides of industry in equal proportion, in all private sector companies in Luxembourg employing a workforce of 150 employees over a reference period of three years.

The employer is required to inform and consult the joint works committee at least once a year on current and foreseeable labour requirements in the firm and on any workforce training, further training and retraining measures likely to be entailed by these requirements.

More generally, the joint works committee is empowered by law to issue opinions on economic and financial decisions that may have a decisive effect on company structure or workforce size.

The committee also has co-decision powers in relation to the adoption or amendment of general criteria for staff selection in matters of recruitment, promotion, transfer and redundancy and also in relation to the adoption or amendment of general staff assessment criteria.

The tripartite coordination committee

The tripartite coordination committee, composed of four members of the government, four employer representatives and four representatives of the most representative trade unions in the country, plays an important role in the framework of measures to be taken by the government to stimulate economic growth and maintain full employment.

This committee (set up by a law of 24 December 1977) is required to issue its opinion in advance of implementation of such measures on the basis of an examination of the overall economic and social situation and an analysis of the nature of unemployment. It may, furthermore, draw up its own proposals.

What it is important to realise is that the current situation is the fruit of a long-term development in the course of which all social partners and successive governments have invested much sweat, resources, ideas, effort and concessions on all sides and which has been able to be achieved only as a result of mutual respect and concern for a single goal, namely the creation and safeguarding of the social peace that is a prerequisite for social progress.

An eloquent description of the Luxembourg model is to be found in the June 1977 issue of the OGBL magazine *Actualités* in a contribution by OGBL President John Castengaro:

“It is on the basis of the Luxembourg model that the national Tripartite system with its action plan for full employment and economic growth was able to be realised and that widespread unemployment and poverty could be prevented, unlike in all the other countries, fostering political stability and contributing a spirit of innovation by means of which not only did it prove possible to overcome the crisis (author’s note : the recession of the 1970s and 1980s) but also to conduct a successful economic and employment policy.”

Accordingly, though it has to be observed that the social partners may have trouble in getting harmoniously to grips with the big issues, they invariably find one institutionalised body or another in which they manage to reach agreement and even to develop a common strategy.

The Netherlands

*by Joan Bloemarts**

Introduction

1. This paper is written as an expert contribution to the project entitled ‘Prospects for participation and co-determination under the European Company Statute’ and undertaken by the Hans Böckler Stiftung and the European Trade Union Institute. It provides an outline of the situation regarding workers’ participation at board level in the Netherlands from the point of view of law and practice.

2. The term ‘workers’ participation at board level’ is used in a sense corresponding to the definition of ‘participation’ under article 2 of the ‘Council Directive supplementing the Statute for a European Company with regard to the involvement of employees’. It means: the influence of the employees’ representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company’s supervisory or administrative organ or the right to recommend and/or oppose the appointment of some or all of the members of any of those organs.

3. The basic statutory form of workers’ representation in Dutch businesses is through works councils. A works council (‘ondernemingsraad’, ‘OR’) has to be established in all undertakings employing at least 50 people, irrespective of the undertaking’s legal form. It is equipped with information rights, has advisory powers in economic affairs and its agreement is necessary for a range of social issues⁵,

The Works Councils Act (‘Wet op de ondernemingsraden’) provides for the establishment of a central works council (‘centrale ondernemingsraad’, ‘COR’) if a plurality of works councils is established within a group of companies.

4. Businesses in the Netherlands are – as elsewhere – generally incorporated as limited-liability companies. Dutch company law provides for two types of these: the public limited company (‘naamloze vennootschap’, ‘NV’) and the private (closed) limited company (‘besloten vennootschap’, ‘BV’). The main distinctive features of the BV are that it may issue no bearer shares and that its registered (nominative) shares are not freely transferable.

Both NV and BV qualify for participating in the formation of an SE.

5. Workers participation at board level is obliged by statute for so-called ‘large’ companies (both NV and BV). It takes the form of the right of the works council to recommend and oppose the appointment of all of the members of the supervisory board of these companies.

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⁵ See: ‘Information and consultation of workers across Europe: part two’, EIRR 335 (December 2001).

Corporate governance of limited liability companies⁶

6. The statutory standard model of the company (both NV and BV) provides for a single (administrative) board ('bestuur') only. The general meeting of shareholders appoints and dismisses the board members. The annual accounts are drawn up by the board and adopted by the general meeting of shareholders.

7. The company's articles of association may provide for a supervisory board ('raad van commissarissen') and, by doing so, opt for a two-tier board structure. The supervisory board's statutory (dual) task is to supervise the work of the administrative board and the general affairs of the company and its business as well as to advise the administrative board. The supervisory board members ('commissarissen') should act in the best interest of the company and its business, i.e. take into account all the stakeholders' interests involved. They are appointed and dismissed by the general meeting of shareholders, except for the articles of association stipulating otherwise for up to a maximum of one third of them.

8. However, a two-tier model with a supervisory board is obligatory for companies (both NV and BV) meeting statutorily specified growth criteria. For these 'large' companies specific rules regarding the composition and competencies of the supervisory board were enacted in 1971.

Two-tier board system of large companies: 'structure regime'⁷

9. The specific two-tier board system for large companies – called 'structure regime' ('structuurregime') – is obligatory for companies having met the following three criteria simultaneously during three consecutive years:

- the company has an equity capital of at least 13 million Euro;
- the company (or one or more subsidiaries) has (obliged by statute) established a works council;
- the company (and its subsidiaries) employs at least 100 people in the Netherlands.

Exceptions are provided for:

- companies being a subsidiary of a company applying the 'structure regime';
- holding companies of an international group, i.e. a group a majority of whose workforce is employed outside the Netherlands (nota bene: the structure regime must than be implemented by the Dutch subsidiaries or a sub-holding covering these subsidiaries).

10. Companies that do not meet the above criteria as well as exempted companies may apply the 'structure regime' on a voluntary basis. Companies having implemented the structure regime obligatorily or voluntarily are referred to hereafter as 'structure regime companies'.

⁶ Dutch company law is embodied in Book 2 (Legal Persons) of the Civil Code. There is no freely accessible websites providing the relevant legal texts. An English translation of these texts is available only in a commercial edition: Netherlands Business Legislation (Kluwer, www.NBLonline.com).

⁷ The relevant legal provisions are articles 152-164 (public limited companies) and 262-274 (private limited companies) of Book 2 of the Civil Code; see note 2.

11. The supervisory board of a structure regime company consists of at least three members. The members' session is four years; they are eligible for reappointment without restriction. They can be prematurely dismissed on serious grounds by the Amsterdam Court of Appeal only, at the request of board itself, the general meeting of shareholders or the works council. They are appointed, at each occurring vacancy, by the board itself (co-option) or, in case of all seats being vacant, by the general meeting of shareholders.

12. The appointment procedure is as follows:

- the general meeting of shareholders (GMS) and the works council (WC) should be informed about any forthcoming vacancy;
- GMS and WC can recommend any person except for employees of the company and trade union officials engaged in the settlement of their terms of employment;
- the supervisory board should communicate to GMS and WC the name and relevant data of whom it intends to appoint;
- GMS and WC may oppose the intended appointment only on the grounds that the candidate is unsuitable for the job or that the appointment would result in an unbalanced composition of the board;
- the appointment of a person opposed to by GMS or WC is blocked, unless the Amsterdam Court of Appeal declares the opposition groundless on request of the supervisory board.

In case of a structure regime company covering a group of companies, the central works council exercises the works council's procedural rights on behalf of all works councils established within the group.

13. All supervisory board members have the same legal rights and obligations, irrespective of whether or not their respective appointment follows from a recommendation of the general meeting of shareholders or the works council. Their remuneration is decided upon by the general meeting of shareholders, normally on the basis of the supervisory board's own proposal. There are no statutory provisions on the level or structure of the remuneration. Research data on the average and range of remuneration are not available.

14. The specific legal powers of the supervisory board of a structure regime company are considerable:

- a. appointment and dismissal of the members of the administrative board;
- b. adoption of the annual accounts (leaving it to the general meeting of shareholders to accept or reject them only);
- c. approval of major decisions of the administrative (management) board, such as:
 - increase or reduction of share capital;
 - important long-term co-operation of the company or its subsidiary with another company;
 - mergers, acquisitions and investments at the value of at least 25 percent of the equity capital;
 - proposals for amending the articles of association or dissolution of the company;
 - application for suspension of payment or filing the company's petition in bankruptcy;

- collective dismissal or major alteration of the working conditions of a significant number of employees of the company or any of its subsidiaries.

However, the powers mentioned under a and b do not apply to a structure regime company that is a subsidiary of an international holding company or a foreign law company, provided that the majority of the workforce of this (holding) company and all of its subsidiaries is employed outside the Netherlands.

15. It follows from the above (par. 9 and 12), that the structure regime statute fully takes into account the phenomenon of a group of companies as an economic entity. Workers' participation at board level has to be established at the level of the parent company in principle (with subsidiaries being exempted), with all the group's employees engaged through the central works council and a supervisory board at parent level extending its statutory task to the group as a whole.

16. It follows from the above (par. 9 and 14) also, that the structure regime statute takes into account the international dimension of a group of companies. The holding company of an international group, i.e. a group whose workforce is predominantly employed outside the Netherlands, is exempted. The reason for this is that the Dutch (central) works council represents the group's employees in the Netherlands only and therefore cannot legitimately exercise participation rights at international group level.

The structure regime then has to be established at the level of the Dutch 'large' subsidiaries or at the level of a Dutch sub-holding covering those subsidiaries. Moreover, the statutory powers of the supervisory board at that level are then restricted in order to allow the group's central management to pursue its group policy: appointment and dismissal of the management board members and adoption of the annual accounts remain with the general meeting of shareholders, notably the parent company.

Number of companies and employees involved in workers' participation at board level⁸

17. As of 1 January 1999, 393 companies were registered with the Public Trade Register as structure regime companies, i.e. companies with workers' participation at board level⁹. Of these, 71 were listed companies and 18 were subsidiaries of listed (international) companies.

An analysis of the articles of association of 184 listed companies showed, however, that 111 of them were companies to whom the structure regime applied. Of these, 30 applied the structure regime on a voluntary basis (8 did not meet the statutory criteria and 22 qualified for exemption as an international holding).

No aggregated data are available on the number of employees covered by the Dutch system of workers' participation (i.e. employees employed by structure regime companies and their subsidiaries).

18. It should be noted, that most of internationally known Dutch companies (e.g. Philips, Unilever, Akzo Nobel, ING, Ahold, Aegon) are parent companies of groups whose economic

⁸ H.J.M.N. Honée and L. Timmerman, Rapport inzake de toepassing van de structuurregeling (Report on the application of the structure regime), Ministry of Finance, February 2000. See also: SER Abstract 01/02 'The Functioning and Future of the Structure Regime', p. 8/9.

⁹ Likely, the real number of these companies is much higher, because of under-registration.

predominance shifted from the local to the international level in course of time, with the majority of the workforce becoming employed abroad. They had the choice of calling on the exception for international holding companies (see 16) – then having to apply the structure regime to their ‘large’ Dutch subsidiaries – or to maintain application of the structure regime to themselves on a voluntary basis and thereby avail of the statutory exemption for ‘large’ subsidiaries (see 15).

Initially, many parent companies that attained this status of an international holding company, decided to voluntarily maintain the structure regime after consultation with their central works council and thereby passed the legal argument that this works council no longer could legitimately represent the majority of the (international) workforce. Nowadays, however, more and more of these companies choose to avail themselves of the statutory exemption and to establish the structure regime at the level of a Dutch sub-holding formed to cover all Dutch subsidiaries.

The right to recommend and oppose appointments in practice

19. Research¹⁰ shows that the right to recommend was rarely exercised by the general meeting of shareholders, except for cases (notably subsidiaries) where the majority or all of the shares was concentrated in one or a few hands. Recommendations by the works council were more frequent. But the overall picture is diffuse both for the number of works councils using their rights and for the incidence of formal recommendations and for the number of formal recommendations having been followed up. It is far from unusual that the composition of the supervisory board and the filling of vacancies are discussed by the board and the works council informally.

In a survey among a non-representative platform of works councils of multinational companies, it was observed that 80 % of them exercised the right of recommendation one or more times in 1987. A combination of the over-all findings, however, justifies the conclusion that works councils on average exercised their right of recommendation in about one out of ten appointment cases. Leaving out the works councils that never exercise their right of recommendation (one third), results in one out of six appointment cases.

20. The same research shows that formal opposition against appointments was even rarer. Objections were normally discussed and settled in an informal way beforehand. Occasionally the opposed candidate retires, in other cases the supervisory board and the works council reached a compromise about a series of subsequent appointments.

Figures are available on the incidence of formal objections only as far as these objections resulted in judicial requests by the supervisory board to declare them groundless and invalid. From the date of the structure regime statute coming into force (1971) up till 1997, 13 cases only were brought before court, out of which 11 were works councils objections. In only 2 of these cases were the objections of the works council upheld by the court and therefore the supervisory board’s request refused.

21. The prevailing impression from 30 years’ experience is that the structure regime has not brought a lively engagement of works councils and trade unions with the composition of the supervisory board. Lassitude has prevailed. Do supervisory boards so wisely anticipate potential objections of the works council? Do works councils lack knowledge about their legal rights? Are works councils and trade unions so sceptical about the relevance of the board’s composition for

¹⁰ H.J.M.N. Honée, *De benoeming van commissarissen bij grote vennootschappen* (The appointment of supervisory board members in large companies), Nijmegen 1979; R.H. van het Kaar, *Ondernemingsraad en vertrouwenscommissaris* (Works council and ‘trust commissioner’), Amsterdam 1995.

the workers' interests? Do works councils not know how to find eligible candidates? Do they lack trade union support? The proper answer is likely to be a mixture of all these factors.

Nevertheless, a gradual reform of the personal composition of supervisory boards may be observed, probably due to informal consultation and compromise on the one hand, and anticipation by the boards themselves on the other. Nowadays many boards' composition has been broadened to include (in addition to corporate management and financial institution professionals) representatives from the political and academic world and former trade union officers as well.

Trade unions' position

22. Dutch trade union confederations certainly welcomed the introduction of the structure regime in 1971 as a result of long years of argument for workers' participation. They had advocated that supervisory boards be appointed directly or indirectly by the workers and the shareholders on an equal footing, but contented themselves with the compromise formula worked out by the Social and Economic Council and adopted by the legislator. They expected that this formula – co-option combined with the right to recommend and oppose appointments – would stimulate a 'contractual' practice wherein recommendations from the works council and the general meeting of shareholders be adopted in a balanced proportion. The prevailing reality they perceived was, however, that supervisory boards filled vacancies in their ranks in consultation with the management board, with works councils depending on the supervisory board's benevolence for having their opinion bear weight in the appointment procedure.

23. It should be noted, however, that trade unions did little to endorse works councils in the exercise of their legal rights to recommend and oppose candidates. They never succeeded in setting up a professional and workable register of persons specifically qualifying for being recommended by works councils; only a year ago they decided to participate in a general register founded in co-operation with the employers confederations. They never decided to undertake a common effort to assist works councils in exercising their rights consistently and strategically.

24. One could say that trade unions always kept aloof, in a way, from the structure regime in practice. The main statutory anchorage ground for workers to assert their influence on the undertaking's affairs and to defend their interests was considered to be the works council. Works council involvement in the composition of the supervisory board was looked upon as an additional instrument only. Trade unions justified their reticence also by referring to the lack of legitimacy of the co-option procedure and the restricted grounds for opposing an appointment. They did not want to have the works councils bear a pound of responsibility for an ounce of influence. Indeed, the statutorily valid reasons for opposing candidates are restricted (see 12). However, works councils could have been far more influential if they had learned to use the right to oppose as a threat, since supervisory boards are always averse to open conflict and to having to bring the works councils' objections before court.

25. It never has been a controversial issue that the structure regime statute excluded those trade union officers from standing for the supervisory board's membership, who are engaged in the settlement of the employment conditions for the company's employees. This legal incompatibility was considered to be crucial to maintain a clear division of responsibilities between trade unions and company boards. For a similar reason, it was undisputed that the works council membership was incompatible with supervisory board membership. Trade unions gradually distanced themselves, however, from the legal incompatibility with regard to other employees of the company. Subordination as an employee to the management is not intrinsically incompatible with

supervising that management as a member of the supervisory board, on the understanding that the employee board member – like all board members – be mentally and practically capable of aligning the workers’ interest with the general interest of the company.

The pending amendment of the structure regime statute

26. Since the end of the seventies Dutch trade unions have expressed their criticism (see 23) and advocated that the structure regime statute be amended in order to enable the works council and the general meeting of shareholders to directly appoint, each of them, at least one third of supervisory board members of large companies. Trade unions criticism on the co-option procedure was joined in the nineties with the wave of shareholder activism and worldwide corporate governance debate. The main concern of this debate was for transparency and accountability of company boards towards shareholders.

These two lines of argument have set the parameters for debate, instigated by the coalition government of social democrats and liberals in 2000, in the Social and Economic Council (SER)¹¹. The SER delivered a unanimous compromise opinion in 2001¹². Government then presented a bill in accordance with the SER proposals to parliament in 2002. Both SER and government feel that the central objective of the structure regime – to ensure that both investors and employees are able to exert influence in large companies by participating in determining the composition of the supervisory board – remains to be entirely appropriate. However, the general meeting of shareholders (GMS) and the works council (WC) should be involved to a greater degree than at present.

Due to parliamentary elections in 2002 and 2003 and the formation of a new coalition government of christian democrats and liberals, parliamentary debate of the bill was retarded. Only recently, september 2003, the bill was amended and adopted by the Second Chamber.

27. The (amended) bill proposes to replace the co-option system by a regulation whereby:

- members of the supervisory board be appointed by the GMS, nominations being submitted to it by the supervisory board;
- the supervisory board’s nominees be deemed to be appointed, unless the GMS rejects a nomination by an absolute majority of votes, representing at least one-third of the subscribed capital; in the case of such rejection, the supervisory board should submit a new nomination;
- in the event of a seat in the supervisory board becoming vacant, the GMS and the WC may submit names of candidates to the supervisory board who will consider them when deciding on the nomination;
- in respect of up to one-third of the seats, however, must the supervisory board nominate the candidate submitted by the WC, unless the Amsterdam Court of Appeal declares – on the supervisory board’s request – that the board has good reasons to reject that submission, namely on the grounds that the candidate is likely to be

¹¹ ‘Sociaal-Economische Raad’: the central advisory body to government composed of representatives of trade unions’ and employers’ confederations as well as independent experts.

¹² SER, Advies over het functioneren en de toekomst van de structuurregeling (The functioning and the future of the structure regime), 19 January 2001, an abstract of which was issued in English, French and German (www.ser.nl; ser.info@ser.nl).

unsuitable or that his appointment would result in an unbalanced composition of the board;

- the present right of the GMS and the WC to object to a proposed appointment be withdrawn.

At the same time, it is proposed, however, that:

- the GMS have the power to dismiss the supervisory board by an absolute majority of votes, representing at least one-third of the subscribed capital;
- the GMS should only be able to exercise this power after the WC has been given the opportunity to express its opinion on the matter and to explain its view before the GMS;
- in the event of such dismissal, the management board should immediately ask the Amsterdam Court of Appeal to appoint one or more independent persons to perform the supervisory functions temporarily and to arrange for a new supervisory board to be appointed in accordance with the above regulation.

28. The bill is on the agenda of the First Chamber (senate), now, and will likely be adopted by it at the end of 2003. The amended structure regime will probably come into force in 2004. However, political debate about the structure regime will continue. The Second Chamber has asked for, and the government has announced – for 2004 – a fundamental reconsideration of the structure regime in the light of the ongoing international debate on corporate governance.

Portugal

by Reinhard Naumann*

1. Legal aspects of the corporate governance system in Portugal

1.1 Legal types of company organisation (management)

Today, large companies in Portugal have generally, the legal form of an Anonymous Society (Sociedade Anónima / S. A.). The S. A., whose minimum capital is € 50.000, may go to the stock market (or not). During the nationalisations in 1975 the most important large firms were transformed into Public Enterprises (Empresa Pública / E.P.), but since 1989 almost all of these companies have been transformed into S. A. and their capital has been largely privatized.¹³

Normally a S. A. is governed by a board of directors (Conselho de Administração / CdA) whose members may be appointed in the company's founding contract or elected by the general assembly (of shareholders) and have plain powers to run the business. The CdA's members of large companies are generally divided into two sub-groups (executive and non-executive members). Executive members use to be professional top executives. The CdA is controlled by a Council of Auditors (Conselho Fiscal / CF). The Council of Auditors is elected by the general assembly (of shareholders).

Table 1.1.1		
S. A. Type "A" (Sociedade Anónima / Anonymous Society)		
Body	Mode of appointment	Legal attributions
board of directors (CdA)	Appointed in the company's founding contract or elected by general assembly	Manage the undertaking, decide on acquisition / sale of immobile goods, decide on opening or closing establishments etc.
Council of Auditors (CF)	Elected by the general assembly	Control board of directors, accomplishment of law and company's contract, control books etc.
General Assembly (Assembleia Geral / AG)	<u>Assembly of shareholders</u>	Elect and dismiss members of board of directors and Council of Auditors
Source: Code of Commercial Societies (Código das Sociedades Comerciais, DL 262/86)		

Companies that belong to this dominant type of Anonymous Societies (type "A") may create a particular body for the executive managers, thus creating a differentiated structure with a board of

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¹³ A third possible legal form of large firms may be the Limited Company (Sociedade Limitada / Lda.) with a minimum capital of € 5.000.

directors and its President defining the firm's overall strategy and responding, in the first place, to the shareholders' interests, and an Executive Committee headed by the CEO and depending on the board of directors. In any of these two cases, this type-“A” company must be considered a “single-tier” model of corporate governance.

Anonymous Societies may also take the legal opportunity to create another type of internal organisation with a third governing body called the General Council (Conselho Geral / CG). The CG is composed by share holders who are appointed in the founding contract or elected by the general (or constituting) assembly. In this case, the Management (Direcção) is appointed, supervised and controlled by the CG. The control of the accounts is carried out by an Official Auditor (Revisor Oficial de Contas / ROC)¹⁴. This might be considered a “double-tier” model.

Table 1.1.2		
S. A. Type “B” (Sociedade Anónima / Anonymous Society)		
Body	Mode of appointment	Legal attributions
Management (Direcção)	Appointed in the company's founding contract or elected by the General Council	Manage the undertaking, decide on acquisition / sale of immobile goods, decide on opening or closing establishments etc.
General Council (CG)	Appointed in the company's founding contract or elected by general assembly	Appoint / dismiss and supervise / control directors
Official Auditor (Revisor Oficial de Contas)	Appointed by general assembly	Control board of directors, accomplishment of law and company's contract, control books etc.
General Assembly (Assembleia Geral / AG)	<u>Assembly of shareholders</u>	Elect and dismiss members of Management and official auditor
Source: Code of Commercial Societies (Código das Sociedades Comerciais, DL 262/86)		

There are still a few large companies with the statute of a Public Enterprise (E. P.).¹⁵ According to the new legislation on the public sector (DL 558/99) the internal structure of E.P.s is regulated according to the legislation on Anonymous Societies. Thus the specific regulations for the internal

¹⁴ The auditor may be a single person or na agency of Official Auditors.

¹⁵ In 2001/2002 state owned companies with the status of Public Enterprise (Empresa Publica) were only to be found in the transport sector: The National Railway company “Caminhos de Ferros de Portugal E.P, the Lisbon Underground “Metropolitano de Lisboa E.P.”, the Air Navigation of Portugal (NAV E.P.) and the Railroad Network (REFER E.P.). Cp. Secretaria de Estado do Tesouro e das Finanças, March 2002

organisation of Public Enterprise under the previous legislation (Lei 260/76) , and in particular stipulations regarding workers' representation at governing bodies, have been abolished.¹⁶

According to experts, the overwhelming majority of companies opts for the type "A" model, that is the "single-tier" model of corporate governance.

1.2 Workers representation at governing bodies

According to the Constitution (1976) and specific legislation (1979, 1984) workers have the right to be represented at all governing bodies in companies that are completely owned (directly or indirectly) by public entities (state, regions, municipalities). This right is specified for the board of directors and the Council of Auditors (see below).

According to the Constitution, workers' representatives at public companies must be elected by the majority of workers of the respective company. Elections shall be regulated analogously to elections for Workers' Commissions. All workers of the company are allowed to vote. The candidates must be workers of the company. Candidates may be nominated by the Workers' Commission and/or by 10% of the company's workforce (or by 100 workers). The mandate of workers' representatives at governing bodies generally corresponds to the mandate of the Workers' Commission in the company (in most cases three years), not to the mandate of the company's governing body. There is no limit to re-election. A "Re-call" is possible if its demanded by the Workers' Commission and/or by 10% of the company's workforce (or by 100 workers). Workers Representatives' rights and duties are identical with those of the other members of the governing bodies.

The law explicitly allows social partners in non public companies to agree upon a workers' representation at the governing bodies that would be analogous to the model in public owned firms, but it seems that this possibility has never been used by any company. There was never specific regulation on group companies.

After the revolution in 1974 a vast program of nationalisations created a large universe of Public Companies (Empresas Públicas, E.P.), regulated by specific legislation (1976) that included stipulations regarding workers representation at governing bodies.

¹⁶ In the context of privatization and subsequent concentration of capital, legislation on alliances between companies has become increasingly important. The Code of Commercial Societies distinguishes 4 types of Allied Societies (Sociedades Coligadas), namely those linked by a) simple participation, b) reciprocal participation, c) a relation of domination or d) a group relation. There is specific legislation on Holdings (Sociedade de Gestão de Participações / SGPS). Experts alert that responsibilities of these alliances as a whole (or their dominating society) for acts or omissions of one of its parts are not sufficiently regulated, a situation that may prejudice workers and which might raise the question of European minimum standards regarding this problem.

Table 1.2			
Workers Representation at Governing Bodies in Portuguese Companies			
Level of organisation	S. A . Anonymous Society		E.P. Public Enterprise
	Private capital (in part or total)	100% public capital	100% public capital
Governing bodies in general (Executive, supervisory and controlling bodies)	No legal guarantee of right to workers' representation, but the law on Workers' Commissions (Law 46/79, Art.º 30º) establishes that social partners may agree upon a workers' representation at the governing bodies.	According to constitutional law (Art. 54º, CRP ver. 1997), Workers' Commissions have the right to "promote the election of workers' representatives at the governing bodies [órgãos sociais] of companies owned by the state or other public entities." Furthermore Art.º 90º establishes that "in the productive units of the public sector an effective participation of workers in the respective management is guaranteed." The law on Workers' Commissions (Law 46/79, Art.º 30º) establishes that Workers' Commissions in the public sector "promote, ..., the election of workers' representatives at the governing bodies [órgãos sociais] of the respective company". ¹⁷ The number of workers' representatives is defined in the company's statute. ¹⁸	
Executive body (board of directors, Management)	No legal guaranty of right to workers' representation.	The law on Workers' Commissions (Law 46/79, Art.º 31º) establishes that workers in the public sector have "the right to elect at the minimum one representative to the respective executive body." According to the "Law on Workers' participation in governing bodies of the public enterprise sector (Lei 29/84, Art.º 8º) "one of the members of the board of directors represents the company's workers and will be elected ... by the majority of the represented workers."	
Supervision (CG)		No specification of the right to workers' representation at this level.	
Control (Council of Auditors)		According to constitutional law (Art. 54º, CRP ver. 1997), Workers' Commissions have the right to "promote the election of workers' representatives at the governing bodies [órgãos sociais] of companies owned by the state or other public entities." This applies to the Council of Auditors, too. ¹⁹	
Sources: Constitution of the Portuguese Republic; Law on Workers' Commissions (Lei 46/79); Law on Workers' participation in governing bodies of the public enterprise sector (Lei 29/84)			

¹⁷ The law on Workers' Commissions also allows that workers' representatives at governing bodies may be appointed by the Workers' Commission, but the Constitution obliges to election of all representatives.

¹⁸ E.P.s statutes are defined by law decreed by government (Decreto-Lei).

¹⁹ According to the "Law on Workers' participation in governing bodies of the public enterprise sector (Lei 29/84, Art.º 10º) one of the members of the Council of Auditors [CF] "will be proposed by the workers' representative body ...", but the Constitution obliges to election of all representatives.

Since the beginning of privatisations in 1989, almost all Public Companies (E.P.) have been transformed into Anonymous Societies (S. A .) and most of them have been (partially or totally) privatised, even though there exist still a number of important companies with this status (a set of 100% publicly owned S.A . and some E.P.)²⁰. Thus, the universe where constitutional and other legal provisions for workers' representation at governing bodies would apply [in theory, not in practice!] has been drastically reduced (to less than 2% of the workforce in 2000).

In 1999 new legislation on the public sector (DL 558/99) abolished all previous stipulations regarding workers' representation at governing bodies²¹, eliminating with this move a central legal instrument for making workers' right of representation effective. This was a further step on the way to the complete erosion of a constitutional right that always had been obstructed by government (see below).²²

1.3 Workers' representative bodies inside companies

The most important entities representing workers at company level are

- The Workers' Commission (Comissão de Trabalhadores, CT) which is elected by all employees,
- The workplace union committee (Comissão Sindical / Intersindical, CS/CIS) which is elected by union members,
- The Workers Representatives for Health and Safety at the Workplace (Representantes HST) who are elected by the company's employees,
- The European Works Council (Conselho de Empresa Europeu / CEE) that is appointed by Workers' Commission and / or Trade Unions or elected by the company's employees.

The **Workers' Commission (CT)** has a set of information and consultation rights guaranteed by the Constitution (Article 54) and by specific legislation (Lei 46/79). According to the law on CT's, the CT has the right to be informed about the company's strategy and planning, the budget, the internal organisation, the organisation of production, personnel management etc. . The proceedings for getting information are legally defined. Management decisions on contracts for company recovery, dissolution or bankruptcy, closing of production sites, reduction of workforce etc. demand obligatorily CT's previous statement. In case of restructuring of the company, the CT has the right to be heard and give its statement on plans, to be informed on progress, to have access to the final restructuring plan, to talk to the responsible institutions and people inside the company and to criticize and make suggestions. Furthermore, the CT's have the right to

²⁰ The state still holds directly 100% of about 30 companies, some of them with considerable importance in branches like fishery, media, postal service, banks, major infrastructures and transports (rail, bus, underground and airlines).

²¹ In the context of privatization and subsequent concentration of capital, legislation on alliances between companies has become increasingly important. The Code of Commercial Societies distinguishes 4 types of Allied Societies (Sociedades Coligadas), namely those linked by a) simple participation, b) reciprocal participation, c) a relation of domination or d) a group relation. There is specific legislation on Holdings (Sociedade de Gestão de Participações / SGPS). Experts alert that responsibilities of these alliances as a whole (or their dominating society) for acts or omissions of one of its parts are not sufficiently regulated, a situation that may prejudice workers and which might raise the question of European minimum standards regarding this problem.

²² Cp. Footnote 8.

“scrutinize” management (controle de gestão) and to appoint (or to promote the election of) workers’ representatives at the companies’ governing bodies (see section 1.2 and section 2 on practice).

The Constitution guarantees the trade unions’ right to carry out their activities inside the companies (Article 55). The Trade Union Law (Lei 215-B/75) specifies that unions have the right to promote the election of workplace union representatives (delegados sindicais) on the shop floor and that union members in a company have the right to elect a **workplace union committee** consisting of workplace union representatives belonging to the respective trade union organisation(s). The Trade Union Commission may belong to a single union (workplace union committees: Comissão Sindical / CS) or to a group of unions who decided to create a common representative body (workplace multi-union committee: Comissão Inter-Sindical / CIS).

The Constitution guarantees information and consultation rights and legal protection to the trade union representatives (Article 55), guarantees to the unions (as well as to the CTs, see above) the right to participate in company restructuring (in particular with regard to VET and work conditions) and the capacity to collective bargaining (Article 56). According to legislation, unions have the exclusive right to sign legally binding collective agreements and to initiate a strike. Thus, legislation attributes to workplace union committees a major centrality in the industrial relations system at company level.

The law on **Health and Safety at the Workplace** (DL 441/91) guarantees a set of information rights for employees, establishes procedures for the election of **workers’ representatives** in this area and establishes their information and consultation rights.

It was only in 1999 that the Directive on European Works Councils (94/45/CE) was transposed to Portuguese Law (Lei 40/99), guarantying the respective consultation and information rights. In Portugal, representatives to EWC’s are appointed by

- a) agreement between Workers’ Commission and trade unions, or
- b) by agreement between Workers’ Commissions (if there are no trade unions), or
- c) by agreement between trade unions who represent together two thirds or more of the workforce, or
- d) by agreement between trade unions who represent each a minimum of 5% of the workforce.

If none of these options is valid, the representative is elected by the firms employees (according to the regulation of elections to the Worker’ Commissions, Law 46/79).

The members of workers commissions and union committees and EWCs and the workers representatives for health and safety have a legally guaranteed **time credit** for their activity and enjoy a **specific protection against discrimination**.

Table 1.3	
<u>Workers’ Representative Bodies – Legal Attributions</u>	
Workers’ representative body	Legal attributions at firm level
Workers’ Commission	According to constitutional law (Art. 54º, CRP ver. 1997): <input type="checkbox"/> Be informed,

<p>(Comissão de Trabalhadores, CT) Elected by employees</p>	<ul style="list-style-type: none"> <input type="checkbox"/> Scrutinize management, <input type="checkbox"/> participate in company restructuring (in particular with regard to VET and work conditions), <input type="checkbox"/> manage or participate in management of company's social institutions, <input type="checkbox"/> promote election of workers' representative at governing bodies (applies exclusively to public sector) <p>According to Law 46/79 (1979):</p> <ul style="list-style-type: none"> <input type="checkbox"/> Art.º 23º: Specification of information rights (company's planning, budget, internal reglementation, organisation of production, personnel management etc.) <input type="checkbox"/> Art.º 24º: Specification of management decisions that demand obligatorily CT's previous statement (contracts for company recovery, dissolution or bankruptcy, closing of production sites, reduction of workforce etc.) <input type="checkbox"/> Art.º 25º: Procedures of passing information <input type="checkbox"/> Art.º 29º: Definition of right to scrutinize management (controle de gestão) (apreciation of and statement on company's planning and budget; watch over proper use of resources, promote rationalisation of production and administration etc.) <input type="checkbox"/> Art.º 30º: Designation or Election (promoted by CTs) of workers' representatives to governing bodies in Public Enterprises. <input type="checkbox"/> Art.º 31º: Workers have the right to elect a representative for the board of directors of Public Enterprises. <input type="checkbox"/> Art.º 33º: Specification of CT's right to participate in restructuring (to be heard and give statement on plans, be informed on progress, to have access to final restructuring plan, talk to responsible organs and cadres, to criticize and make suggestions) <p>According to Law 29/84 (1984):</p> <ul style="list-style-type: none"> <input type="checkbox"/> Art.º 8º: In public enterprises, one of the members of the board of directors represents the workers of the company and will be elected according to Art.º 31º of Law 46/79 ... by majority of the represented workers. <input type="checkbox"/> Art. 10º: In public enterprises, one of the members of the Council of Auditors will be proposed by the workers' representative body.
<p>Workplace (multi-) Union Committee (Comissão (Inter-)Sindical, CS/CIS) Elected by union members amongst workplace union representatives</p>	<p>According to constitutional law (Art. 55º and 56º, CRP ver. 1997):</p> <p>Trade unions have the right to carry out their activity in the company.</p> <p>Trade union members have the right to participate in companies' restructuring processes, in particular in the area of VET and change of work conditions.</p> <p>Trade unions have the legal capacity to exercise the right of collective bargaining.</p> <p>According to law 215-B/75:</p> <p>Art.º 25º: Guarantees Workers' and unions' right to carry out union activities inside companies (workplace union representatives, union and inter-union committees)</p> <p>Art.º 26º and 27º: Regulates union meetings (out of / during working hours)</p> <p>Art.º 29º: union members elect workplace union representatives, workplace union representatives may constitute committee</p> <p>Art.º 33º: Establishes number of workplace union representatives with working time "credit" according to number of employees</p>
<p>Workplace Representative for Health and Safety (Representante para Higiene e Segurança no Trabalho, RHST) Elected by employees</p>	<p>Information rights (Law 441/91)</p>

<p style="text-align: center;"><i>European Works Council</i></p> <p>(Conselho de Empresa Europeu, CEE)</p> <p>Appointed by workers' commissions and/or Union Committee or elected by employees</p>	<p>Information and consultation rights according to European Directive (94/45/CE) and Portuguese Law (Lei 40/99)</p>
<p>Constitution of the Portuguese Republic; Law on Workers' Commissions (Lei 46/79); Law on Trade Unions (Lei 215-B/75); Decree Law on Health and Safety at the Workplace (Decreto Lei 441/91); Law on European Works Councils (Lei 40/99)</p>	

1.4 Conclusions

The overwhelming majority of Portuguese large companies²³ opt for a legal form (Anonymous Societies type "A", see above) **that stipulates one executive body with comprehensive responsibilities in relation to share-holders and with regard to relations inside the company** (namely with the workforce). There are examples of "type A"-firms that created a differentiated structure of a board of directors primarily responding to shareholders and an Executive Committee for operative management tasks. In any of these two cases, the type-"A" company must be considered a **"single-tier" model of corporate governance**.

The second type of Anonymous Society (type "B", see above) which applies to a very small minority of large companies, creates two autonomous bodies, that is the General Council (responding to share-holders) and Management (responding to operative needs).

As workers' rights to be represented at governing bodies apply exclusively to companies with 100% public capital privatisation of the huge majority of public enterprises during the last 14 years has drastically reduced the **group of firms where this right of representation in theory might have some impact**. Furthermore, new legislation on Public Companies (1999) abandoned completely any reference to this constitutional right, thus opening the way to its practical abolition.

The legal possibility of social partners in private companies to agree upon workers' representation at governing bodies (created in 1979) had no practical consequences, and the legislator never took the necessary steps for an effective promotion of workers' representation at private capital's management.

The present revision of labour law (see below) does not imply any new regulation on workers' representation at governing bodies. Thus, we may consider that the **Portuguese legislator has been deliberately passive in relation to the absence and decline of workers' constitutional rights for representation at management in state owned companies**. The present situation of non-compliance may be seen as a violation of the constitution by omission.

The **absence of workers' representatives at executive bodies has hindered** the workers' representative bodies at company level in exercising their extensive information and consultation rights guaranteed by the Constitution and by specific legislation. This refers in particular to the **effectiveness of the workers' commissions' right to "scrutinize management"** (controle de gestão) that depends on the activity of workers' representatives at governing bodies, in particular at the board of directors.

²³ According to experts this applies to almost all large companies.

2. Practice (History)

2.1 Workers representation at governing bodies: the practice

During the 1980s, trade unions and workers' commissions made a major effort to implement a network of workers' representatives at governing bodies in the public sector. The most large companies were at that time still state owned. Unions and Workers' Commissions successfully promoted elections in almost all Public Enterprises (E.P.s), but a large part of elected workers' representatives were not allowed to enter into office. Representatives had obligatorily to be installed into office by the Ministry in charge for the respective branch. At executive level, it seems that since 1979 (when the law on Workers' commissions that stipulates workers' representation at governing bodies in the public sector came into force) there has only been one company where a workers' representative at the Board of Directors was installed by the responsible Ministry.²⁴ Despite of new legislation in 1984 that explicitly stipulated workers' right in public companies to be represented at Boards of Directors and Councils of Auditors, this situation did not change.

With the same method, government prohibited many elected representatives to Councils of Auditors to enter office, but obstruction was less extensive and a considerable part of the elected representatives to Councils of Auditors actually entered into office.²⁵

After a decade experiencing the impossibility to get the elected representatives into office, trade unions' and Workers' Commissions' mobilisation for their election lost momentum. By abolishing any reference to workers' representatives at management level, new legislation on public companies (1999) eliminated a central legal instrument for workers to elect representatives and thus opened the way to the complete practical abolition to this constitutional right.

2.2 Workers' representative bodies inside companies: existence

CGTP is the only trade union organisation that publishes statistical data on Workers' Commissions on a regular base. In the period 1996-1999, CGTP identified 314 elected Workers' Commissions whose members had been published in the Labour Ministry's official bulletin.²⁶ In 1999, there were 234,850 companies registered at the Labour Ministry. A small part of them (2,731) employed 100 and more people. Only 308 employed more than 500.²⁷ We may consider that Workers' Commissions actually tend to exist (almost) exclusively in larger companies with more than 100 employees.

²⁴ This was the public Airline in the Açores-Islands SATA where a workers' representative at the board of directors actually entered into office.

²⁵ It would require further comprehensive research to know the number of companies with a workers' representation at that level.

²⁶ See CGTP, Relatório de Actividades (1996/1999). According to a study at the Labour Ministry that applied more rigid criteria than CGTP's report (namely by excluding those commissions whose mandate had expired), in 1999 there were only 226 Workers' Commissions whose statutes were published in the Labour Ministry's official bulletin and whose mandate had not expired until that date. See Alberto Teixeira, *Comissões de Trabalhadores e Comissões Coordenadoras em exercício legal do mandato em 31 de dezembro de 1996 a 1999, por distrito de Portugal Continental*, 4 of April 2000.

²⁷ Cp. Ministério do Trabalho e da Solidariedade, *Quadros de Pessoal 1999*.

In a sample of 76 companies with about 82 thousand workers CGTP analysed elections to Workers' Commissions. According to CGTP's figures, 43% of workers participated in the elections. 68% voted in lists of candidates identified with CGTP. These figures cannot be cross-checked with other statistical data, but the dominant role of CGTP in the Workers' commissions has been observed in several case studies in large companies.

Institution	Total	100-500 employees	> 500 employees
Workers' commissions (Comissões de Trabalhadores)	15	11	40
Workplace union representatives (Delegados Sindicais)	39	34	72
Selected figures from a survey amongst Portuguese companies with 100 and more employees; for details see Alan Stoleroff, <i>Elementos do padrão emergente de relações industriais em Portugal</i> , in: <i>Organizações e Trabalho</i> , Number 13, pgs. 11-42, Lisbon April 1995			

There is empirical evidence that trade union organisation is more widespread in Portuguese companies than the workers' commissions.²⁸ Furthermore, it may be stated that in the relation between Workers' Commissions and union organisation at company level, the latter is usually the dominating part. Workers' Commissions generally reflect the power relations between the competing unions inside the company and follow –with some exceptions- the orientations of the respective trade union.

2.3 Workers' representative bodies involvement in decision making

Comparative studies have shown that workplace participation in Portugal is very weak.²⁹ The percentage of companies with consultation or negotiation on wage and non-wage issues with workers' representatives is far below the percentage of firms with some kind of representative body. Management clearly privileges unilateral decisions and direct communication with employees (see tables 2.3.1, 2.3.2 and 2.3.3). These and other findings indicate that there is a considerable gap between the legal right of workers' representative bodies to be involved in decision making at company, on one hand, and management's practice on the other. As one author put it: "In Portugal, it is much more frequent than in other countries to modernise companies without involvement of people. ... there is not any involvement of affected [workers] at all in the planning period for the introduction of new technologies, only in the implementation phase there is some involvement in its less developed forms (information, consultation). ... The large majority of employers does not want to promote workers' involvement. Workers' representatives

²⁸ See Stoleroff (1995) and Kovács (1994).

²⁹ See FRÖHLICH, D., C. GILL and H. KRIEGER (1993), "Roads to Participation", *Workplace Involvement in Technological Innovation in the European Community*, and J. Wallace (1990), cited in Kovács (1994).

themselves have similar positions. These results are related to the reduced development of industrial relations in Portugal and subsequently with the lacking consciousness of benefits resulting from workers' involvement as they have been demonstrated in countries with more developed industrial relations, ...³⁰

Table 2.3.1		
Workers' and their representatives involvement in most recent act of fixing pay and working conditions (%)		
	Pay	Working Conditions
Direct application of collective agreement by unilateral management decision	55	46
Direct application of collective agreement by unilateral management decision, after consultation of workers' representatives	10	11
By negotiation (even informal) with workers' representatives	6	6
By flexible, individualized and decentralized method (by department, according to results)	27	33
Selected figures from a survey amongst Portuguese companies with 100 and more employees; see Alan Stoleroff, Elementos do padrão emergente de relações industriais em Portugal, in: Organizações e Trabalho, Number 13, pgs. 11-42, Lisbon April 1995		

Table 2.3.2			
Modes of passing Information to Workers and their Representatives (%)			
	Meetings with Workers	Meetings with representatives	Written Information handed to Workers
Regularly	30	19	26
Sporadically	46	20	34
Never	23	52	39
Selected figures from Stoleroff (1995)			

³⁰ Kováčz, p. 26

	Workers' commissions	Workplace union representatives	Affected employees
Change of Equipment	7	1	45
Restructuring of tasks / functions	18	6	38
Restructuring of careers	18	18	24
Selected figures from a survey amongst Portuguese companies; see Ilona Kovács, A participação no contexto de competitividades, in: Organizações e Trabalho, Number 12, pgs. 11-29, Lisbon October 1994			

2.4 Conclusions

There is an enormous contrast between legislation on workers' participation rights and social reality in Portuguese companies. Despite of extensive legislation stipulating workers' representation at governing bodies in the public sector and forgoing rights of workers' representatives to "scrutinize" management, Portugal is one of the Western European countries with the lowest indicators in terms of de facto participation in decision making.

From the beginning, workers' constitutional right to elect representatives to governing bodies in state owned companies has been obstructed by government. Effective access to management was always denied and limited to the Councils of Auditors. But even this **restricted implementation** of the constitutional provisions for workers' representation **came to an end** when new legislation on public companies came into force (1999).

3. History, culture, politics and the near future

The governments' obstruction of workers' representation at governing boards in public enterprises resulted from a political decision in a particular historical context. In the 1980s, the dominant trade union confederation CGTP-Intersindical mobilised its considerable power resources (namely its numerous members and militants) in a fierce struggle against the creation of a liberal economy promoted by the major political forces (Socialists and liberal-conservative Popular Democrats). In this conflict, workers' representatives at governing bodies in the (still very large) public sector were expected to become an important factor in CGTP's strategy for a politically controlled economy.

20 years later, the conflict that provoked government's obstruction of workers' representation at governing bodies has disappeared and a completely new situation has emerged. But the project of an effective workers' participation and representation has been buried under the havoc of the earlier struggles and never re-emerged. The second trade union confederation, UGT (founded in 1979/80), made an effort to introduce a new pattern of collective work relations at company level,

but due to several factors (weak implementation of its organisation, opposition from competing unions and from employers) it did not succeed.

Nowadays, there is a tough and tense struggle of unions and workers' commissions to safeguard and exercise their legal information and consultation rights at company level.³¹ Some discussions on the question of participation take place at tri-partite concertation at macro level, but there is no real debate inside and between union and employers' organisations about this question. The recent change in government (a conservative coalition gained power in March/April 2002) threatens to shatter positive results regarding workers' participation that might have been produced by the macro-level agreements on employment and on health and safety signed by all social partners and the Socialist government in 2001.³²

Currently, the conservative government is promoting a profound review of labour legislation. The new labour code (Código de Trabalho) weakens the trade unions' position in relation to employers (in particular with regard to collective bargaining) and omits the question of workers' representation at governing bodies in companies.³³ Taking into account the "logic" of the new Portuguese government's strategy, future legislation on Workers' Commissions (predicted in the Labour Code) will probably not bring any impulse for more workers' participation at company level.

³¹ Strategy and method of this struggle by Workers' Commissions are outlined in Comissões Coordenadoras de CT's Regionais and Comissões Coordenadoras de CT's Sectoriais, Guia Prático das CTs para defender, afirmar e conquistar direitos, 2001

³² See "Acordo sobre política de emprego, mercado de trabalho, educação e formação" and "Acordo sobre condições de trabalho, higiene e segurança no trabalho e combate à sinistralidade", both signed on February 9th 2001 and published by the Portuguese Economic and Social Council (www.ces.pt).

³³ The Labour Code has already been approved by the majority in Parliament and its enactment is scheduled for November 1st 2003.

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Spain

by Armando Fernández Steinko*

1. Legal Aspects

a.) Overview of national corporate governance system

The Spanish corporate governance system is inspired by the French legal tradition. It is regulated by the Public Limited Companies Act of 1989 (Ley de Sociedades Anónimas - LSA). This Act makes no distinction between setting up supervisory bodies for family owned companies and corporations calling on financial markets. The responsibility of the company may be entrusted to a board of directors (consejo de administración), to a sole director or to two directors acting jointly. The governing board has a unitary structure (one-tier) and it does not distinguish between management and supervisory functions. The members of the governing body are elected at the shareholders meeting or named in the articles of association at the corporation's genesis. Members of the governing body may be elected for an unlimited number of terms, each term may not exceed five years. The LSA does not make any mention of workers participation on company boards. Only the law regulating the government of savings banks (Cajas de Ahorros) opens the possibility of assigning minority employee representatives to management boards.

The Spanish Constitution (1978) includes as fundamental rights the "right to collective bargaining" and the "right to strike" (§§ 38 and 37) but the right to participate in the management of enterprises (§ 129.2) is not included in the block of basic rights and is quite vague and imprecise. In the preliminary section it talks about the obligation of public powers to "promote the participation of all citizens in economic life" (§9.2). Representation and participation at enterprise level are mainly regulated through the Workers Statute (Estatuto de los Trabajadores - ET) passed in 1980 and later amended several times. It includes obligatory information (§64) and non obligatory consultation rights (§64.2), the right to participate in the management of social services and the obligation of collaborating in the improvement of productivity (§64 .1). Although there is no legal provision for a regular presence of employees at board level and no co-decision rights, there is something like that for fixing holiday periods common for all employees. In firms where there is no health and safety committee, employee representatives have a unilateral right to decide in situations when health and safety legislation has been ignored by the employer. The health committees are compulsory in firms with more than 100 employees and in smaller workplaces with dangerous activities. Since 1995 they are based on parity representation.

There is also the legal possibility of agreeing additional participation rights through collective bargaining which theoretically opens the possibility to negotiate additional management issues. Thus, although there is no legal norm regulating co-determination rights, in 1986 an agreement was signed by the one of the most representative unions (UGT) and the government about trade union participation in state owned enterprises. According to this agreement in enterprises with more than 1.000 employees, the unions can take part in management, either through a minority representation at board level (consejo de administración) or through the creation of a parity

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committee for information and control (“comisión de información y seguimiento”). This nationwide agreement does not reach de participation standards of the Fifth EU directive, would only become effective when specified in collective agreement. Above the collective agreement on company level, there are three other levels for collective bargaining between the most representative unions and the employers organizations: the state level, the regional level and the lower territorial level. All three of them can be very important for democratisation of corporate governance as big firms have work centres all over the territory and in different sectors.

There only two types of firms where there is some kind of legal presence of workers representatives in management board: the saving banks and the public firms. The 46 savings banks have 110.248 employees (Sep. 2003) and the 26 still public firms have 21.575 employees (Dec. 2002). The agreements on co-management from 1986 are formally still valid in them. The two most representative Trade Union, namely CCOO und UGT can send one representative each.

b.) Who are employee actors?

Participation of employees in management issues takes place through employee representatives and works councils elected by all employees, irrespective of trade union affiliation. In workplaces with more than 10 and less than 50 employees, representatives are elected (delegados de personal). This is also the case in workplaces employing between six and ten persons if the majority of workers decide it. In establishments with 50 or more employees the elected representatives constitute a works council (comité de empresa). In enterprises with more than 250 employees and trade union members presence in works councils, trade union shop stewards can be also elected (delegados sindicales). They have the same information and consultation rights as the members of the works council and they can assist to its meeting without the right of voting. For elections to the works councils and representatives employees are divided into two electoral groups, one for skilled and unskilled workers, and one for technical and administrative staff. The different groups of employees are represented proportionally to the number of employees in each group. The representatives are empowered with information and consultation rights, the right to negotiate collective agreements and to call strikes.

c.) How do they interact?

As seen above, in Spain there is a dual structure of employee representation. Formally non union bodies (comités de empresa – “committees”) play a predominant role at workplace and company level. Unions sections (“secciones sindicales”) are allowed to operate in the workplace, but trade union activities should primarily be present at more aggregate levels (branch or territory). Powers of both kinds of representatives are identical and, although the works council are unitary bodies including unionised and non-unionised representatives, in practice 90% of representatives elected are trade union members. In fact there have always been many functional and organizational links between workers delegates and workers’ committees. In recent years the trend towards the integration of both has even increased: in the committees there is growing presence of unionised members, and union delegates are being more and more present on work places.

2. Practice

a) How does practice differ from law? (or does one exist without the other?)

Internal control of Spanish corporations is more important than control through financial markets. It is highly concentrated with an important presence of family investors and of banks controlling the boards but also assuming the main risks. There is almost no other source of capital as 90% of the private funds are invested in public debt and the stock capital in relation to GNP is significantly lower than in Anglo-Saxon countries. That means that in most cases the directors are important shareholders of the companies so that control, management and propriety are in most cases linked together: the “managerial company” based on a separation between ownership and management is not relevant in Spanish companies. The situation is slightly different in state owned companies which have been recently privatised, although they are still very much under control of the government through golden shares, personal links to the government and price regulation politics. In Spanish companies, the supervisory board must generate, sign the annual accounts and submit them to the general meeting of shareholders and responsibility may not be delegated, but in practice the executive director (*consejero delegado*) has important executive powers in many cases not even mentioned in the statutes of the corporation. The board also plays a prominent role in nominating directors proposed to the considerations of the shareholders (ability to fill vacant posts and to submit appointment proposals to the consideration of the shareholders) as the free floating capital does not usually participate in the general meeting. The cooptation practices within the board are permitted by law in exceptional cases and they must be accepted in by the general meeting of shareholders (§ 138) but in practice they are the absolute norm. The co-opted members often play an active role as *de facto* directors even during the general meeting which is supposed to elect them. Relevant information and personal implication in management seems to be very unequally distributed among Spanish directors and that also facilitates the concentration of executive control. In one third of Spanish family firms there is no board at all and, in many cases, when there is one it has a quite formal character or is not really active (Salas Fumás). All this means that in practice the management is very much based on personal decisions of the founder or main owner(s). This makes Spanish firms react faster but makes them also poorer in diversity of opinion and in their capacity for considering complex situations. It also makes them more authoritarian.

In the 1980's there was a certain growth in forms of direct participation and of discussions on democratic corporate governance (Plataforma Sindical Prioritaria signed in 1989 by the most representative unions). In the 1990's these initiatives lost intensity. Thus, although the agreement about trade union participation in state-owned enterprises has had in the beginning some kind of influence in certain firms of the private sector in the eighties, the agreement was not renewed in the nineties and did not spread to other sectors. Work councils are usually not taken into the decision-making processes when forms of direct participation are introduced. When enterprises do so, the councils are often sceptical and passive. In practice the spaces for potential participation opened by law are not being used in collective agreements. Some temporary veto-rights based on the information and consultation rights can be very effective in practice as the employer can be interested in a fast agreement. There have been also important advances in the incorporation of employees delegates in the health committees since 1997 although the rate of work accidents has been growing dramatically anyway. Nevertheless, participation practices do not exist to a significant degree. The percentage of firms without a health delegate is still very high (56% in 1999), the percentage of workers that have not been consulted in the organization of work (72%) and that don't discuss work related problems with employee representatives (88%) are almost the

highest in the EU (EC 1997). In general terms political democratisation has not affected corporate culture and practices. Since 1979 political powers were not active in promoting participation on firm level (A. Saracibar), the employers monopoly on corporate governance is basically the same as before the democratic Constitution (Montoya Melgar). Even in health committees of sectors with high accident rates (construction sector) or considerable environmental impacts (energy sector) the capacity or the interest of the employees representatives in negotiating forms of participation potentially opened by the ET (specially § 61) is very small, the possibility for using these potentials are not being taken up.

b.) Studies that have been made on practice

Salas Fumás (2002) and Borrego/Francés (1999) give concrete data on structure of boards, remunerations, formal and informal procedures and propriety structure of Spanish limited companies. Gallo (1998) include valuable data on family companies and corporate government cultures. As the culture of employees participation is not very extended but the legal possibilities are relatively important, there are many detailed studies on legal aspects, but not on real participation practices. The main source of qualitative information are the collective agreements (CCNCCa 1999-2002), the periodical analysis of their contents (CCNCCb1990-2002), the Observatory on Industrial Relations (CES 1997-2003) and some individual case studies (Greenwood/González 1989, Borja 2001, Alos et al. 2000, Albalade 2003). Spanish quantitative studies don't explore participation practices except on health issues (Encuesta I-IV) but international ones include some valuable data (EC 1997, Poutsma et al. 2003).

3. History, culture, politics

a.) How and why did the current situation arise?

The military defeat of the II Republic in 1939 led to an oligarchic organisation of Spanish society and enterprises. The Public Company Limited Act of 1951 is inspired by nineteenth century liberal tradition (De Castro y Bravo). It enhances the management functions of the boards and the profile of charismatic business leaders, and weakens the "interventionist" supervisory functions and the social responsibility of companies. The apathy within general meetings of shareholders gave even more power to the executive staff, reflecting the general apathy of Spanish society to public affairs and democratic control. Democratic transition did not change this corporate culture. From the beginning of the industrialization, the financial sector has had a decisive influence in big Spanish firms (construction of railways, mining and steel industry), after 1939 their modernization was financed by banks and families, many of them supporting Franco during the Civil War. Since then, the banking sector occupied a strategic position in the organization of social and economic life and also within company boards as important shareholders. As the public sector has been traditionally (and is) quite smaller than in all other European countries, the influence of political powers on firms was less important than the other way round (dominance of USA-educated technocrats linked to big business in Franco governments and not elected "Cortes" from 1950 on).

The Spanish Civil War represented a destruction of labour culture, labour skills and advanced experiments in industrial democracy. To find a partial support of the skilled work the Regime needed desperately for the reconstruction of the country, labour legislation became a curious combination between authoritarian, capitalist and communitarian principles (“Labour Charter” of 1938 (Fuero del Trabajo), “Spaniards Charter” of 1945 (Fuero de los Españoles) and “Work Committees Act” of 1947 (Ley de Jurados Mixtos). The workers “constructive collaboration” and some information rights, are mentioned together with the “exclusive right of managers” to decide within the enterprise taken as an “harmonious community”. This mixture between corporatist messages, capitalist restoration and some elementary participation rights converged after 1950 with the restorative practices in other West European countries (Fernández Steinko). But, as the trade unions were corporatist bodies and its membership compulsory for workers and employers, as there was no political pact between labour and capital, and as the employers were identified with the Regime, Spanish workers mistrusted the Workers Participation Law (1962) which gave labour a minority representation in the board of companies with more than 500 employees considering it “pure propaganda”. That does not mean that there were no discussions and even advances experiments of workers self management and industrial democracy during the years of dictatorship (for example in the Basque Country Greenwood/González 1989). But the main aim of labour movement was to build up autonomous powers, to put an end to the authoritarian industrial relation model based on the institutional duty to seek the common interest of the enterprise and on a fundamental asymmetry between capital and labour. As corporate culture and governance were not affected by democratic reforms, the democratisation of Spanish industrial relations system meant, above all, the recognition of the conflict relation between capital and labour and the end of the paternalistic tradition (see Spanish Constitution 1978).

The dual structure of employees representation (unitary bodies representing an enterprise’s entire workforce and trade unions representative bodies on industry and national level) has its origin in the different strategy of the main trade unions during Franco dictatorship. CCOO and USO followed an effective strategy of infiltration in the official trade unions, unitary presence in the workplaces and direct participation culture proximate to the Italian experiences of 1943 to 1949. UGT had almost no presence in Spanish firms and followed a more institutional and centralized strategy inspired by the more ‘delegating’ model of German industrial relations. As participation rights are mainly dependent on voluntarism and self-help (bargaining and pressure capacity), real participative practices are very vulnerable in situations of high unemployment, neo-liberal politics and corporate strategies based on short-term and low cost strategies. The stagnation of participative dynamics after the NATO referendum (1986) and the persistence of authoritarian and paternalistic cultures within firms lead to a return to a culture of passivity in these issues and to a defensive strategies from trade unions in relation to participation practices and cultures. Other important reasons are related with the continuity of the Spanish production model. Economic sectors (“agriculture/fishery, construction and hotels and restaurants”), tasks-occupations (“elementary occupations”) and forms of employment (“temporary contracts”) with an important absence of participatory culture in any country, have a significant weight in Spanish socio-economic structure (EU 1997). Competitive strategy of Spanish firms is still mainly focused on short-term cost savings and flexibility, and on revenue gains more than on R&D and intangibles like brand value. As the latter depend more on financing on capital markets, the dependence of Spanish corporations on these is less important than its strategic links to private banks. In the absence of a legal framework for workers participation on board level, the persistence of this competitive strategy makes them more inclined towards authoritarian governance methods

b.) Debate on subject including position of trade unions, government and employers, flagging-up any sensitive or controversial issues.

The organization of corporate governance is not satisfactory solved by present legal regulations. It is full of holes which experts consider should urgently be filled, as they are basically the same as those regulating the Public Company Limited Act of 1951. There is an extended opinion that there is a lack of ethical behaviour in Spanish firms and that the present corporate governance practices are not transparent enough (Price Waterhouse Cooper). In the 1990s the private sector played a key role in stimulating the discussion of corporate governance. It's interest in corporate governance reform was influenced by the following factors: a.) by the concern that Spanish listed companies would have to compete for investment capital within the EU, b.) by the political decision of reducing the State ownership and participation in business, c.) by the criticism of boards protecting minority shareholders, d.) by the criticism of neo-colonial practices in Latin America and e.) by the criticism of non transparent and speculating practices. The neo-liberal government of the Partido Popular headed a reform based on self regulating codes (Olivencia Report). This reform breaks with Spanish and Continental business law delivery based on imperative regulations developed by elected parliaments and discussed by public opinion. A majority of experts consider this soft reform to be insufficient and that a real reform of the Public Limited Companies Act and Capital Market Act based on sanctions and imperative norms are urgent and indispensable, especially in the light of various company scandals (Ibercorp, Banesto, Tibigarden) and the Enron affair (Fundación para el Análisis de los Estudios Sociales 2000). Nevertheless there are different opinions about the concrete points which should be included in such reform. There is a general agreement in considering the necessity of strengthening the powers of the general shareholders meeting, in improving participation of shareholders and, especially, of institutional investors in company governance (creation of pluralistic boards), in the necessity of regulating the directors remunerations in a more transparent way and in finding one way or another for separating supervision and management functions to promote a better control of the latter. The necessity of finding appropriate sizes of the managerial body, of establishing more information duties and of creating independent audit committees are also proposed recommendations.

Deeper and more systematic studies consider that the main part of expert committees are based in a too simplistic a conception of corporate government, the so called "financial perspective". This perspective of Anglo-Saxon origin, reduces the corporate government to the orientation of the firm to shareholders interests. It does not understand the company as a complex balance of different actors, ignores its competitive strategy and the stakeholders and community interests (Salas Fumé 2002) and is not based so much on OECD reports or Continental traditions, but on the English Cadbury Report. It even represents a fundamental shift in legal philosophy from a concept based on "social interest" to the so called "economic analysis of law" which represents a return to nineteenth century liberalism as it is based on the equivalence between economic efficiency, social development and ethic/democratic principles (A. Alonso Ureba in Esteban Velasco 1999, Borrego/Francés 2000). The critics against the mainstream of "expert reports" are also based on the fact that they don't consider the far more concentrated propriety structure of Spanish firms so that the effect of financial markets on corporate control and transparency ("external control") will be necessarily less important than in the Anglo-Saxon area. The recommendation of incorporating "independent" directors in the boards, which has a deep meaning in British report, have a completely different meaning in Spain as the percentage of

executive “non independent” directors is already much higher in Spanish (69%) than in British firms (25%). Structure of propriety of Spanish firms is much nearer to the south and Central European than to the British and North American shape (importance of family and bank owners, importance of other firms al owners), and this structure has been even reinforced in the last years with the exception of the privatised State owned companies. In most “expert reports” community and other stakeholders’ rights are treated a peripheral issue. The question of employee representation in company boards are not even mentioned or, when considered, treated marginally as a obsolete or not effective formula. The Aldama Report (2003) partly tries to revise the Olivencia Report introducing corporate social responsibility and ecological arguments and practices although it is still based on self regulating codes.

Workers representatives are not particularly active in these discussions. The reduction of State Ownership was made without taking them and the opposition parties into account. As the codetermination rights existed almost only in public firms and as their privatisation is being used for introducing Anglo-Saxon models of corporate structure, the reduction of state ownership is related with a fundamental shift from a central European corporate governance model based on participation of all stakeholders, to another based on the “financial perspective” and the reduction of industrial democracy. Unions tend to support the politics of “hard core shareholders” as it gives priority to a certain stability and public control over important industrial sectors towards speculative manoeuvres of multinationals and high mobility of floating capital. In recent times there seems to be a certain renaissance of these discussions within trade unions. UGT has incorporated the demand for a new and more precise and compulsory participation law in a programme of its last Congress. On the contrary, employers don’t wish to have binding participation procedures, but only through collective bargaining. The question now is whether it will be socially and politically possible to force a strategy based on the financial perspective and the erosion of participation rights.

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Sweden

*by Roger Nilsson **

Historical Background

The upcoming discussion on Board representation has its background in the 68 year movement on democratisation of the working life and society. The outcome of this discussion led to several changes in the legislation of the labour market in Sweden at the beginning of the seventies.

One of the new acts was the act on Board representation from 1973, which was implemented on a temporary basis for two years and then made permanent in 1975. The discussion was criticised in many ways from both the right and the left wing parties. From right-wing politicians and representatives of the employers association came the idea that this was an issue which will have to be solved on a voluntary basis, and that they would therefore invite workers representatives to participate in the meetings with the Board of directors. This was not a successful arrangement as it was only a few companies which took such steps for opening the doors to their meeting rooms. From the left-wing came the traditional criticism of collaboration with capitalists.

The act on Board representation was rewritten in 1987.

Federations and representation

Together with the act on board representation we have two other instruments of perhaps greater importance for the work of co-determination and participation in the workplace: the act on co-determination and the national agreement on Development at the workplace. Depending on the situation, these instruments more gives the framework for the daily activities at the workplace for the local parties.

The Swedish Trade Unions are organised by Industrial class into two main federations: LO (blue collar) and TCO (white collar). Together with those two federations we also have some occupational unions present at the workplace: SACO (academics) and Ledarna (supervisors). The three white collar Unions are also organized in a the private-sector bargaining cartel called PTK. Svenska Metall which is affiliated to LO organize today nearly 4 000 members who have the role of employee representative in boards of directors.

All rights to co-determination, participation and negotiation at the workplace are distributed through the Unions, which have the collective bargaining agreement at the company, by law. Therefore it is only the members of the unions which have the right to elect representatives to all bodies connected to those two acts and the agreement.

* Trade Union official, Svenska Metall

Board Representation Act (1987:1245)

The Act is divided in six different parts:

- Introduction, section 1-3
- The entitlement to board representation, section 4-5
- Appointment of board representatives, section 6-10
- Duties of employees' representative, etc, section 11-14
- Damages, etc, section 15-16
- Miscellaneous provisions, section 17-19

In this section , I will try to give a presentation of the act by given the legal texts together with comments how its works in practise:

Introduction

Section 1.

The purpose for this Act is to afford employee's knowledge of and influence over the Company's activities through representation on the board of directors.

Comment:

The meaning of the first section is to give the employee the opportunity for knowledge and influence on company activities. Even if the direct influences in general are limited, it will give some more opportunities for information and for giving their own opinion. In connection to the two years of temporary legislation, the official agency SIND conducted research on the legislation and made the following conclusion: "even if the legislation has not particularly increased employees influence, it has increased the employees knowledge and also lead to better contacts between the management and the local Trade Union organisations." This conclusion probably remains true today.

Section 2.

Company means, for the purpose of this Act, limited liability companies, banks, mortgage institutions, insurance companies and economic associations.

Comment:

The section gives the different kinds of companies, which are covered by this legislation. This will mean that employees have no right to participate in i.e. the boards of Trade Unions, political parties, religious organisations etc. See also comments on section 14.

Group means, for the purposes of this Act, Swedish legal entities which according to the provisions of Chapter 1, section 5 of the Companies Act (SFS 1975:1385), Chapter 1, section 6 of the Banking Companies Act (SFS 1987:618), Chapter 1, section 2 of the Saving Bank

The Swedish system on corporate governance is given in the Companies Act and the only system mentioned for the private sector of public companies are the single-tier system of board of directors.

Act (SFS 1987:619), Chapter 1, section 5 of the Members' Bankers Act (SFS 1995:1570), Chapter 1, section 9 of the Insurance Business Act (SFS 1982:713) or Chapter 1, section 4 of the Economic Associations Act (SFS 1987:667), are defined as parent companies or subsidiaries in relation to another.

Section 3.

An employee of a principal or parent Company, who is permanently engaged in business in an agent or subsidiary, without being employed there, shall also, in the application of this Act, be treated as an employee of the agent or subsidiary.

In the application of this Act, a collective bargaining agreement between a local employee's organisation and a principal or parent Company, shall also be treated as a collective agreement in relation to the agent or subsidiary.

Comment:

This means that it is not only those employed in the local company who can stand for election to the board of directors, even employees in a mother-company can be elected for such a position. Probably will this be very important for the European Company statue (SE). We will probably see that there will not be any transition of the mother companies structures into the SE depending on the whether they want to do so, they will need a new registration on the stock market, and this will probably lead to decreased influence for the control of the company for the owners. We will probably see that they will reorganise their business segment into an SE owned and controlled by the mother company. Therefore we think that this opportunity/demand for employees at the mother company can be a good contribution for the upcoming legislation and agreements to be decided in the coming negotiations for the SE;

The last paragraph supporting the first paragraph in section 3. See also section 6.

The entitlement to board representation

Section 4.

The employees of a Company which, in the most recent financial year, in Sweden, has employed an average of not less than 25 employees, shall be entitled to two representatives on the board of directors (board representatives) and one alternate for each such member, If the Company conducts business in different branches, and if it has, in the most recent financial year, in Sweden, employed an average of at least 1.000 employees, the employees shall be entitled to

Comments:

The general regulation on how many members the board of directors shall have is given in the Companies Act, which states that a company shall have at least three members. There is no other threshold given in the legislation according i.e. to how many employees the Company have (as in the German legislation). To exemplify that following could be a good example in practice, the Swedish mother company of a big multinational Company which employs more than 15.000 workers in Sweden may have only a board of three members, one representatives for the owners and one employee representative and the Managing Director.

The most common size of board in Swedish companies is of seven members, two of them are employee representatives.

Depending on the situation, the deputies for the employee

three representatives on the board of directors (board representation) and one alternate for each such member.

The employees' entitlement to board representation pursuant to the first paragraph may not, however, result in the number of employee representatives exceeding the number of other board representatives.

If the is a parent Company, the provisions of the first and second paragraphs relating to the companies, shall relate to the group in its entirety, and the right to board representation shall accrue in favour of all employees in the group.

Section 5.

Once the employee members have been appointed, the employees' right to board representation during the period of the mandate shall remain unchanged, notwithstanding any decrease in the number of employees or number of other board members.

Appointment of board representatives

Section 6.

The decision to appoint employees' board representatives shall be taken by a local employee organisation which is bound by a collective bargaining Agreement with the Company.

If the decision relates to a parent Company, the decision shall be taken by a local employees' organisation which is bound by a collective

representatives also have the opportunity to participate in the meetings, do we also often find agreements where the local parties have decreased their rights to employee representation to only two ordinary and two deputies even if the Act gives the right to appoint three of each i.e. in SKF and Sandvik.

No comments:

Comments:

Only the Trade Unions, through the collective bargaining agreement, have the right to decide if they want to appoint employee representatives to the board or not. If the company does not have any collective agreement the employees do not have any rights to raise such demands for employee representation.

The relevant situation where the second paragraph is applicable is i.e. in the Holding Companies, which normally do not have so many employed. In this situation the right to representation moves from the companies in the group to cover the board of directors in the holding company as well.

bargaining Agreement with one of the Companies in the group.

The Company's board of directors shall be informed in writing of the decision to appoint employees' board representatives. Section 10 second paragraph, contains provisions concerning the time at which employee members or their alternates (employees' representatives) may take up their appointment.

Section 7.

The employees' representatives shall be appointed by the local employees' organisations which are bound by collective bargaining Agreements with the Company or, in parent Companies, by the local employees' organisations which are bound by collective bargaining agreements with a company in the group.

Comments:

Look last paragraph in the section of federations and representation on page 1.

Section 8.

Unless the organisations otherwise agree, the following system shall apply for appointment of the employees' representation.

Comments.

Normally the organisations do not have any problem to reach a voluntary agreement by them selves for the appointment of the employee representatives. We find different systems in many companies depending on traditional, regional and practical solutions.

If more than four-fifths of the employees bound by the collective bargaining Agreement at a Company or group belong to the same local employees' organisation, that organisation may appoint all of the employees' representatives. If another such organisation represents at least one twentieth of the employees bound by a collective bargaining Agreement, that organisation may. However, appoint one alternates.

If they have any problem, the four last paragraphs in the section gives the regulation.

If there is no organisation which represents more than

four-fifths of the employees bound by a collective bargaining Agreement with the Company or group, the two local employees' organisations which represent the largest number of such employees appoint one member each and one alternate. If the employees are entitled to three members and three alternates the larger of the two organisations may appoint two members and two alternates.

If, pursuant to the provisions of section 4, second paragraph, only one employees' representative and one alternate are to be appointed, this will be done by the local employees' organisation which represents the greatest number of employees bound by a collective bargaining Agreement with the Company or the group.

In applying the provisions of this section, local employees' organisations which belong to the same central organisation shall be deemed to be one organisation.

Section 9.

The employees' representatives should be appointed from the employees at the Company or, so far as a parent Company concerned within the group.

A person who is an employees' representative on the board of one Company, may not, except with the specific authority of the Board Representation Tribunal, be appointed as employees' representative for another Company. The aforementioned shall not, however, apply, if the Company agrees otherwise or

Comments:

The companies concerned employ 99,9 percent of all the employee representatives on the board of directors. It is very unusual that the representation comes from outside the company, i.e. by appointment of Trade Union Officials. Sometimes this will occur in the situation when the employee representative gets subsequently employed by the union and holds the seat in the board of directors until finishing the term of appointment.

if the companies form part of the same group.

Section 10.

The term of an employees' representative's appointment shall be fixed by the party appointing him. The mandate may not, however, exceed four financial years. The term of the appointment shall be fixed so that it concludes at the close of an annual general meeting at which the Board of directors is discharged.

The party appointing the employees' representatives shall determine when the representative may take up his appointment. Unless the Company's Board indicates otherwise. The representative may not, however, take up his appointment until at least three months after the board of directors received notice pursuant to section 6, third paragraph.

Duties of the employees' representative, etc.

Section 11.

Unless this Act provides to the contrary, the provision of other acts or legislative instruments concerning members of the Boards of Directors and alternate members of a Company's board of directors shall apply to employee members and alternate for such members.

Comments:

The limited period for an employee representative's appointment to the board of directors is four years. It is only the bodies that have elected the employee representative, which can dismiss him. In special circumstances the employer can dismiss him by legal action from the appointment if the representative has misused his appointment for damaging the company business. In fact, this situation has never occurred.

Comments:

Here is one of the most important section in the Act. It clarifies that the employee representatives have the same responsibilities and duties as the other members of the board appointed by the stockholders.

But how does it work it works in practise? One of the big issues at European level today is the level of remuneration to for board members. Compared with other European countries that have employee representation at the board, the Swedish representatives can seem like 'the poor cousins from the country'. But, almost all of the Swedish representatives are comfortable with the situation and solution.

One survey made in 1998 showed the following result in this field:

	LO	PTK
Remuneration for reading papers, etc	15%	13%
Remuneration as the Stockholders members	9%	7%
Remuneration which is lower than the Stockholders members	12%	12%
No remuneration at all	64%	68%

The figures have their background in the common situation that the board or the shareholders meeting decide that members of the board who are employed by the company shall not have any remuneration for their appointment. Normally the board also includes the managing Director who is also affected by such a decision.

The most important issue is not the question of remuneration. It is probably rather how the employee representatives are treated by the President and Managing Director of the company in the area of participation and information in the work of the Board.

When the Act was introduced one of the statements from the shop floor was “now they will move the decision making to another room”. And in some Companies that happens as well, but most companies continue the decision making in the board meetings. Below there are some examples of how the employee representatives act in conducting their work in the board

Section 12.

An alternate for an employee member is entitled to be present and express his view at meetings in the board of directors and at the Company’s shareholders’ meetings, notwithstanding that the members are present

Comments:

One of the most interesting regulations in the Swedish Act on Board Representation is the right for deputies to participate and also give their own opinion and contribution in this position at the board meetings. It seems that this aspect of the regulation is only found in practice in Sweden.

The regulation has also an important influence in the discussions on the distribution of seats between the different unions involved at the company. See also section 8, paragraph 2.

Section 13.

One of the employees’ representatives may be present and participate in deliberations when a matter, which is later to be dealt with by the board of directors, or representatives of the Company, specifically

Comments:

In the situation where the board makes special activities or has standing committees for preparing further decisions the employees representatives always have the right to one seat in those activities.

Matters for such activities can be, restructuring, finance, remuneration or profit sharing programs etc.

appointed for that purpose.

If, pursuant to a decision according to Chapter 7, section 6, second paragraph of the Banking Companies Act (SFS 1987:618) or Chapter 3, section 6, second paragraph of the Saving Bank Act (SFS 1987:619) or Chapter 6, section 6, second paragraph of the Members' Bankers Act (SFS 1995:1570), an assignment is given to a regional board or a similar organ in a region, the employees within the region are entitled to determine that one representative for them and one alternate shall be a part of the assignment. Such representative shall have the same rights as are referred to in the first paragraph.

If the employees' organisations do not otherwise agree, the representative referred to in the first and second paragraph shall be appointed by the organisation which represents the largest number of employees bound by a collective bargaining agreement with the Company or, with respect to a parent Company, within the group.

Section 14.

Employees' representatives may not participate in the treatment of issues which relate to the collective bargaining agreement or industrial action or other issues where a Union organisation at the workplace has a material interest which may conflict with the interests of the Company.

If the business of a Company is of such a nature or has an object as is referred to in

Comments.

We shall not participate in decisions, which can harm our interests as Union members.

Section two of the Employment (Co-Determination in the Workplace) Act has the following wording "An employer's activities that are of a religious, scientific, artistic, or other non-profit making nature, or that have co-operative, labour union, political or other opinion-forming aims shall be exempted from the scope of this act with respect to the aims and focus of such activities."

This means that in this kind of company such a scope of activities are excluded from co-determination at the workplace, but it doesn't cover other areas of interest for

section 2 of the Employment (Co-Determination in the Workplace) Act (SFS 1976:580), the employees' representatives are not entitled to participate in a decision which concerns the object or focus of the business.

discussion such as work organization, training programmes etc between parties at the workplace.

Damages, etc

Section 15.

An employer, or an employee organisation, which breaches this Act, shall pay damages for any damage sustained. The damages shall cover both compensation for any loss sustained and compensation for the infringement of rights consequent to the breach of the Act. If it is reasonable, the damages may be reduced in whole or in part.

Comments:

In fact there has been no legal action according to the regulation in this Act. And therefore will no damages have been paid.

Disputes appear mostly in the area of the day-to-day co-determination activities at the workplace. Normally when the company have failed to handle their activities and responsibilities in a proper way in their contacts with the local organisations.

An employees' organisation may not, on basis of this Act, claim damages from another employees' organisation.

Section 16.

Any person wishing to claim damages pursuant to this Act shall give notice to the other party of his claim within four months from the time the damage arose. If during that period, negotiations have been requested with respect to the claim pursuant to the Employment (Co-Determination in the Workplace) Act (SFS 1976:580), or on the basis of a collective bargaining agreement, proceedings shall be commenced within four months after the negotiation have been concluded. In other circumstances, proceedings shall be commenced within eight months from the time the damage arose.

Comments:

The Swedish systems for handling disputes in the labour market are divided in three different levels. The first level is the local parties have to negotiate on the issue, in a meaningful way and with a willingness for solving the problems (local negotiation). If they cannot or are not successful in their negotiation, one or both parties have to call for the National organisations to solve the problem in a central negotiation. If the National bodies fail to solve the problem the final decision will be made by the Labour court.

Miscellaneous provisions

Section 17.

An exemption may be granted from this Act if employees' board representation would result in material inconvenience for a Company because:

1. the composition of the board of directors is dependent upon relative political strength or on the relationship between different interests or interest groups which appear from articles of association, the constitutive documents, agreements or other circumstances; or

2. the articles of association or other equivalent provisions prescribe a qualified majority vote for the adoption of decisions by the board of directors.

An exemption to the first paragraph may only be granted if the inconvenience cannot otherwise be avoided. The exemption shall be combined with conditions concerning measures, which in some or other manner, satisfy the employees' interests in insight into, and influence over, the business of the Company.

Section 18.

The Board Representation Tribunal shall determine the issues arising pursuant to section 9, second paragraph, or exemptions pursuant to section 17.

The Tribunal may, until such time as final decision is reached, order that an employees' representative

Comments:

It is very unusual that the leadership of the company will try to use the legal aspects of this section. If they do or if they want to find another solution instead of Board representation they will take up the issue for negotiation with the local employee organisations for making other bodies for information and consultation.

Sometimes do we find such solutions, mostly in investments and holding Companies with a several different business areas, where most of the strategy discussions on the business development are handled by the local management. We will therefore not find any common interest by involved organisations for having employee representation in the investment or holding companies board.

The solutions, which appear in that situation, almost always extend the activities for co-determination at local level.

No Comments:

may not take up an appointment as board member or alternate.

No appeal shall lie from decisions of the tribunal.

Section 19.

In other respects, the provisions of the Labour Disputes (Judicial Procedure) Act (SFS 1974:371) shall apply with respect to proceedings concerning the application of this Act, to extend the dispute relates to the relationship between the Company and the employees.

Comments:

See the comments on section 16 regarding the procedure for handling disputes at the labour market.

Survey on Board representation

In the Comments to section 11 a survey from 1998 was mentioned. This survey was made on the 25th anniversary of the Board Representation Act. 326 Presidents of the Board, 422 Managing Directors, 405 employee representatives from LO and 433 employee representatives from PTK answered the survey.

The following figures are a short summary of the survey, which may be of interest.

Table 1. What is the general summary -positive or negative - of the company's experience with the employee representation on the board (question to Managing Directors (MD) and Presidents (P)).

	MD	P
Very positive	19%	23%
Positive	42%	46%
Neither positive or negative	30%	26%
Negative	8%	5%
Very negative	1%	-

Table 2. The Presidents and Managing Directors own experiences of the employee representatives participation in the Board.

	MD	P
They contribute to a positive climate for cooperation.	64%	61%
The understanding of the employees at the Company concerning decisions of the board have improved.	59%	65%
Difficult decisions are easier to carry out.	47%	55%
The disagreements in the Board can arise.	7%	6%
Its getting harder in the decision making process.	12%	13%
Too many issues of irrelevancy coming up.	17%	17%
The risk for leak on confidentiality will increase.	40%	37%

Table 3. Difficulties in the board work of representatives for LO and PTK.

	LO	PTK
The decisions are made outside the Board.	31%	21%
Not enough of time for preparation.	29%	23%
Time pressure during meetings.	18%	15%
Too many issues are complicated and difficult to understand.	16%	8%
Language problem when another language than Swedish is used in the meetings.	13%	6%
Have not received information they have asked for.	9%	4%

Table 4. Has the board representation got importance for other Trade Union activities at the workplace.

	LO	PTK
Very big importance.	21%	19%
Big importance.	44%	39%
Less importance.	20%	19%
No importance.	6%	11%

The survey also made the conclusion that the employee representatives were most active in discussions and decisions on the following issues:

- Human resources,
- Production,
- Reorganisation and,
- Work environment.

Training

The general training program for employee representatives are provided by the central organisations LO and PTK. The company pays the training during five independent weeks with studies at home during the training program. The program contains the following headlines:

- Week 1. The legal framework for the role as an employee representative. Responsibilities and authority.
- Week 2. Knowledge on accountancy principals and to make relevant analysis of this information.
- Week 3. Knowledge on the Company's strategically, budget, calculation methods.
- Week 4. Knowledge at the Company's crisis, investments and accusations.
- Week 5. Knowledge on the National economy principals as well the economical conditions in the Company in the procedure of decision making in the Board.

Final conclusion

It's very important to divide the activities between the Employment (Co-Determination in the Workplace) Act and the Act on Board Representation.

The Act on Board Representation with the Companies Act gives the regulation that the employee representatives together with the stockholders representatives always shall act in the best interests of the company's development as an assignment for their appointment.

The Co-determination Act together with the National Agreement on development at the workplace has the starting point of the situation that the employer and the Trade Unions are in opposite positions and different interests.

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Websites

Translated legal texts in English are available at

www.naring.regeringen.se/bestallning/arbetsliv/index.htm

25-year anniversary on board representation are available in Swedish at www.ptk.se

UK

*by Lionel Fulton**

The current system of corporate governance

There are some 3.7 million businesses in the UK (defined as a legal unit, person or group of people producing goods or services). Of these some 2.5 million are sole traders or partners without employees. There are around 1.2 million limited companies and the vast majority have fewer than ten employees (see table).

Size of company	Number of companies in category
Less than 10 employees	1,010,000
10 to 49 employees	170,000
50 to 249 employees	26,000
More than 250 employees	7,000
Source: <i>Modern Company Law for a Competitive Economy: Developing the Framework. A consultation document from the Company Law Review Steering Group</i> (DTI March 2000)	

All companies are subject to the same broad framework of company law, which has developed, largely in response to particular scandals, since the nineteenth century. The most important piece of recent legislation on companies is the 1985 Companies Act, which consolidated key legislation up to that time. However, there has been a large amount of subsequent legislation on companies, including the Insolvency Acts of 1985 and 1986, the Financial Services Act in 1986 and the 1989 Companies Act, as well as changes introduced without new primary legislation. The legislation covers among other things the duties of directors, the rights of shareholders and reporting and accounting.

Overall, as a recent consultative document from the Department of Trade and Industry (DTI), the government department responsible for company law, makes clear:

“The present structure of the law reflects three purposes. Companies are formed and managed for the benefit of *shareholders*, but subject to safeguards for the benefit of actual and potential *creditors*. Accounting and disclosure requirements, too, operate for the benefit of actual, and potential, shareholders and creditors (including investors and savers) and, through public disclosure of information, for the benefit of *the community as a whole*.” (*Modern Company Law for a Competitive Economy: The Strategic Framework: A consultation document from the Company Law Review Steering Group*; DTI February 1999)

The law distinguishes between three different types of company. These are

- private limited companies (Ltd);
- public limited companies (plc) and
- listed companies (also public limited companies but listed on the Stock Exchange).

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There are 12,000 public limited companies, of which some 2,400 are listed. All the others are private companies.

The legal differences between private and public companies other than listed companies are relatively minor and technical. For example, public companies must have at least two directors (a private company need only have one) and an issued share capital of at least £50,000 (There are no upper or lower limits on share capital for private companies.). Public companies must file information at Companies House sooner than private companies. Among private companies there are also some distinctions based on size, assessed on turnover, balance sheet and number of employees, in terms of the extent of the information that they must provide and the extent to which their accounts must be audited.

There is a greater distinction between listed companies and other sorts of companies. Listed companies must provide much more information about their operations, primarily to protect current and potential investors. They are also subject to a code of good practice, known as the Combined Code, which deals with the appointment and roles of directors, directors' pay, relations with shareholders and accountability and audit. Listed companies are not obliged to follow the rules of the Combined Code but they are required to state whether and how they apply its principles and, if they do not apply them, explain their actions.

The 1985 Companies Act says very little about the way directors control a company. There is no reference to a board of directors or to a chairman, the roles that specific directors exercise or the difference between executive and non-executive directors.

The Combined Code is more specific. It states that

- “every listed company should be headed by an effective board which should lead and control the company”;
- there should be a separation between the chairman, who runs the board and the chief executive, who runs the business”, with the aim that no-one has “unfettered powers of decision”;
- the board should include a balance of executive and non-executive directors(including independent non-executive directors, with the aim that “no individual or small group of individuals can dominate the board’s decision taking”.

Companies are not legally obliged to follow the recommendations of the Combined Code (see above) but research carried out in 1999 found that most do. In total 87% of companies separated the roles of chief executive and chairman and 93% had boards where at least one third were non-executive directors (*Compliance with the Combined Code*; PIRC September 1999).

There is no requirement, either in legislation or the Combined Code, for a two-tier structure with a supervisory board. However, the DTI believes that it would be legally possible to establish such a two-tier body. In its briefing document on the European Company statute published in May 2003 it states:

“The Department is of the opinion that nothing in law presently prevents PLCs incorporated in the UK from adopting articles under which the powers that are granted are divided between two tiers of directors, one exercising management functions and the other a supervisory role in relation to those functions”.

The actors involved

The UK legal position is clear. The directors run the company in the interest of the shareholders. In this sense there is no formal position for employee representatives in the running of the company and certainly no requirement for employee participation at board level.

Companies are legally obliged to inform and consult employee representatives on a number of issues (see below) but do not have to involve them in management.

The issues on which consultation takes place and the bodies that must be consulted are set out below. It is important to remember that in the UK no statutory permanent structure of employee representation, like works councils, exists, so in most cases it is trade union representatives who are informed and consulted.

Issues requiring information and/or consultation	Body informed and/or consulted
Collective redundancies (20 or more employees made redundant within 90 days)	Recognised* trade union, where there is one, or other form of employee representatives, either already existing or specially elected for that purpose
Transfer of undertakings	Same as collective redundancies
Information required for collective bargaining without which trade union representatives “would be impeded to a material extent” in carrying out negotiations	Recognised* trade union
Health and safety	Safety representatives appointed by a recognised* trade union if these exist, otherwise the employees directly or their elected representatives
Occupational pension schemes (under certain circumstances)	Recognised* trade union
European works councils	Members of European works councils – precise methods of election depend on the European works council agreement. UK members of the special negotiating body, who negotiate the initial agreement, must be directly elected by the work force
*A recognised union in this sense is one with whom the employer is prepared to negotiate on pay and conditions. Since 1999 it has been possible to compel medium and large employers to recognise a union, even when they are opposed, provided certain conditions, essentially the majority support of the workforce, are met.	

Practice of employee participation

There is no evidence to suggest that, other than in a few very exceptional cases, the practice in the UK differs from the legal position in terms of their participation at board level. Almost always employee involvement is limited at best to information and consultation and in many cases even this will not take place, particularly if there is no union presence. A major survey of more than 3,000 workplaces in 1998 found that “almost three in five workplaces had no worker representatives of any kind and this was true of nine out of every ten workplaces where there were no union members” (*Britain at Work: as depicted in the 1998 Workplace Employee Relations Survey*; Mark Cully, Stephen Woodland, Andrew O’Reilly, Gill Dix, Routledge 1999).

Consultation is also largely limited to questions linked directly to employment. A survey of 366 workplaces, carried out for the TUC in 2002 found that unions are more likely to be consulted about these issues, including those of redundancies and transfers where law requires consultation, than broader concerns such as the company’s activities or economic situation (see table).

Consultation arrangements with the unions	
	Percentage consulted
Activities of the organisation	26.5%
Economic situation of the organisation	21.6%
Employment issues (including future plans)	52.2%
Substantial changes affecting the workforce (other than redundancies and transfers)	57.7%
Redundancies and transfers	66.4%
Source: <i>Trade union involvement in information and consultation – a survey of current practice</i> (Labour Research Department October 2002)	

The same survey did, however, produce two examples where there was employee participation at board level. Both are in the public sector and both are municipally owned bus companies. They are interesting in indicating that board level participation is not completely unknown in the UK and that mechanisms can be found to choose employee directors. However, they are very much the exception. The details are as follows.

At Nottingham City Transport 82% of shares are owned by Nottingham City Council. There are two employee directors who are elected by the whole workforce every two years. They sit on the company's board and report back to the joint shop stewards meeting. In addition the union has a meeting with senior managers after each company board meeting in the Joint Consultative Committee.

Lothian Buses is wholly owned by the local authorities (91% Edinburgh 9% the adjacent councils). There is one worker director on the board of the company, who is elected every three years by the whole workforce. The Joint Trade Union Committee makes a recommendation but other candidates can and do stand. The worker director receives a normal salary plus non-executive director payments and has one day a week release to visit depots and other sites. It has recently been agreed that the individual can only be a director for two terms. The current worker director is a bus driver and was elected in September 2001.

In addition to this handful of worker directors there have also been a small number of trade union officials who have held company directorships, normally in state-owned companies. A recent

example was Sir Ken Jackson, who was a director of the nuclear waste company Nirex while he was general secretary of the AEEU.

History

Employee participation in management structures has been the subject of debate in the UK trade union movement in the past. In 1944 in discussion on post-war reconstruction the General Council (executive committee) of the TUC opposed employee participation on the boards of nationalised industries. It argued that “it does not seem by any means certain that it would be in the best interest of the workpeople of a nationalised industry to have, as directly representative of them, members of the controlling board who would be committed to joint decisions”.

However, by the 1960s and 1970s, with trade unions growing in strength, the issue was again being taken up, this time in a more positive way. Industrial Democracy a 1974 report from the General Council of the TUC called for 50% trade union participation on the boards of both state-owned and private companies. However, some within the trade unions remained concerned that they could be committed to decisions they opposed and the 1975 TUC Congress, while backing 50% trade union membership of boards, passed a motion which rejected “any form of participation which would tend to weaken ... essential trade union independence”.

At the same time a number of companies, particularly those which were state owned introduced worker directors on their own initiative. The best-known examples, were British Steel, which introduced worker directors on divisional boards in 1967, and the Post Office, which introduced them in 1978.

The CBI (Confederation of British Industry), the main employers’ body, opposed these developments. In 1973 a CBI document stated

“In the British situation, representation on a supervisory board would certainly be union dominated. Taking account the known views of the TUC on this question, the [CBI] has little confidence that union members of the board would acknowledge either a responsibility for the decisions in which they had participated, or the responsibility implicit in board membership to act in the company’s interests as a whole.” (Quoted in *Industrial democracy: a trade unionist’s guide* Labour Research Department 1976)

In 1976 the then Labour government set up the “Committee of Enquiry into Industrial Democracy” chaired by a distinguished academic Lord Bullock. The committee reported in January 1977 proposing an equal number of representatives of both shareholder and employee representatives on the governing board of companies employing more than 2,000 with these two groups appointing a third group of independent directors. It expected that the chairman would generally come from the shareholders, although this would not necessarily be the case. It proposed that the employee directors should be appointed through trade union channels. However, a minority report from the employers’ representatives on the committee opposed these recommendations calling for no more than one-third employee representatives on newly created supervisory boards.

In response the government published a White Paper (*Industrial Democracy* HMSO 1978) in May 1978. This proposed giving employees in companies employing 2,000 or more the right to one third of the seats on the board, either on the existing unitary board or on a newly created policy

board, separate from the board responsible for day-to-day management. The representatives would not come exclusively from the unions as proposed by Bullock, although the details were not spelt out. The proposals would also be a fall-back, employers and unions could reach other agreements if they wished. Finally there would be a delay of three or four years before worker directors would be appointed, as they were to follow the creation of new Joint Representation Committees, with whom management would have to consult about company policy.

The TUC saw these proposals as a “first step” although it was concerned about a number of issues, including the delay and the possible involvement of non-trade union employees. In November 1978 the government promised legislation. However, the government lost the election in May 1979 before it could be introduced.

In June 1979 the newly elected Conservative government announced that it would not be legislating on the issue. The first years of the Conservative government also saw the abandonment of the initiatives in worker participation on the board of state-owned industries. The two-year experiment in the Post Office was ended in December 1980, and in 1983 the practice of appointing British Steel employees as non-executive directors was also terminated.

In the years that followed trade union attention was increasingly directed at more central concerns, such as protecting the right to strike and to organise, while most employers were happy to see the issue disappear from the agenda.

Current discussions

Employee representation at board level is not a major issue for UK trade unionists at present. In the area of employee involvement and participation they are much more concerned with the implementation of the directive on information and consultation at national level (Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community). An agreement between the CBI and the TUC was reached in June 2003 and the government published a consultative document and draft regulations on 7 July.

The CBI continues to be hostile to employee participation. It opposed the directive on employee involvement accompanying the European Company Statute arguing that the precedent that it set was “extremely unhelpful”. It considers having employee representatives on management boards not to be “in the culture of UK enterprise” and it therefore believes that very few companies will set themselves up as European Companies.

The UK government has also shown no great enthusiasm for employee participation at board level. It produced a briefing document on the European Company Statute, including employee involvement in May 2003, and it published a consultative document setting out its proposals for the implementation of the directive and the options it proposed to take on the regulation on 6 October 2003 (see next section).

In the press release accompanying the document the DTI minister responsible, Gerry Sutcliffe chose to present it as a technical issue, giving new freedoms to UK companies. His only quote in the press release said:

"The statute potentially offers benefits to British companies by creating a framework by which they will be able to engage in cross-border mergers with companies from other member states. At present, there are no harmonised rules in the EU governing cross-border mergers."

There has been a much more extensive debate on the government's proposals to reform company law. One element of discussion has been on the possibility of extending the directors' duties so that they also have to take act on behalf of other interests not simply those of the shareholders.

The government decided essentially to leave matters as they are, with directors acting for the shareholders, although enlightened self-interest might also mean taking other groups into account. It stated in its white paper *Modernising Company Law* (HMSO July 2002) that:

“the basic goal for directors should be the success of the company in the collective best interests of shareholders, but that that directors should also recognise, as the circumstances require, the company's need to foster relationships with its employees, customers and suppliers, its need to maintain its business reputation, and its need to consider the company's impact on the community and the working environment.”

This was a disappointment for the TUC, which had called for a more pluralist approach. However, it is interesting that the possibility of having employees as directors played no significant role in the debate.

Implementing the legislation in the UK

As already noted the UK government produced a consultative document setting out its proposals on how the European Company Statute legislation should apply to the UK on 6 October 2003 (*Implementation of the European Company Statute - the European Public Limited Liability Company Regulations 2004 – A Consultative Document*). The consultation was set to close on 9 January 2004 and as elsewhere the regulation will come into force on 8 October 2004 and the directive should be incorporated into national law by the same date.

The bulk of the consultative document sets out the requirements of the regulation and the directive. However, it also indicates how the British government proposes to introduce them into UK law.

On the issues covered by the regulation, essentially dealing with company law, the general approach is to interfere as little as possible in company decisions. As the consultation document states, the legislative framework should “provide for maximum flexibility in the way in which SEs are structured”.

Three examples make this clear.

The first deals with authorisation. In a two-tier SE structure the regulation provides that an SE's statutes should list the categories of transactions which require authorisation by the supervisory board. But it allows member states to influence how this works, either by permitting the supervisory board to decide which issues must be referred to it, or by the government itself listing the categories to be included in the statutes. However, in SEs based in the UK there this will not occur. As the consultative document states: “It is not proposed that either of these options be adopted, as it is appropriate that the competence of the two organs to take decisions should be a matter for the company's constitution as set out in its statutes”.

The second example deals with information, where the consultative document rejects the option that allows member states to give rights to each individual member of the supervisory board to require information necessary to carry out his or her duties. The document argues that this option

is not necessary, that the supervisory board should take this decision collectively and that “provision could be made where appropriate, in the statutes”.

Finally on the size of the boards, supervisory, management or single-tier, the British government does not intend to move away from the current situation which gives almost a free rein to companies. (The exception is an SE with employee participation on a single-tier board, where the document accepts that the regulation requires that, the board must have at least three members.) Otherwise the current rules apply as the consultative document states:

“Section 282 of the Companies Act 1985 requires PLCs to have at least two directors and it is proposed that like provision should be made for SEs. In the case of an SE with a two-tier board it is proposed, therefore, that both the management organ and the supervisory organ should each have a minimum of one member. There is no limit on the maximum number of directors a PLC may have and it is not considered appropriate to impose any such limit on SEs.”

In other words the only requirement in terms of size in a two-tier board structure will be that each board must have at least one member.

On the more general issue of setting up two-tier boards, the British government believes that is no need to change the law to achieve this in the UK, because, as already stated, it considers that there is currently no legal bar to companies setting a two-tier structure. They only need to change their articles of association, the rules that they themselves agree, to do so.

The decision to allow changes to be introduced through changes to a company’s articles of association is in line with the UK government’s general approach of leaving as much as possible to companies themselves to determine.

On the directive, much of the consultative document is taken up with setting out the measures already agreed at EU level. However, the UK government has to decide on a number of practical issues to take account of the specifics of the UK’s industrial relations system.

Its proposals on these are included in the consultation document.

The directive gives member states some discretion in deciding how the members of the Special Negotiating Body (SNB) will be chosen. The British government favours election by employees or, where such a body exists, appointment by a representative body, described as a “consultative committee”. To be able to choose the SNB members the consultative committee must, in the words of the draft regulations be a body,

- “whose normal functions include or comprise the carrying out of an information and consultation function;
- which is able to carry out its information and consultation function without interference from the management of the participating company;
- which, in carrying out its information and consultation function, represents all the employees of the participating company; and
- which consists wholly of persons who are employees of the participating company, its concerned subsidiaries or establishments.”

This consultative committee will in most cases be a trade union body, although there will also be some cases where other bodies have this role.

On membership of the SNB, the draft regulations specifically propose that, as well as employees, full-time trade union officials will be entitled to be members, although this is subject to management agreement.

On complaints, they are to go to the Central Arbitration Committee (CAC), the government appointed body that currently deals with issues like union recognition and information disclosure. The maximum penalty that can be imposed on companies which fail to comply with the rulings of the CAC is £75,000, imposed by the Employment Appeals Tribunal.

