



Board level employee representation in Europe: an overview

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1 Introduction

Board-level representation of employees (BLER)¹ refers to the phenomenon where employees elect or appoint representatives to the strategic decision-making body of companies.² BLER includes only the situation where the employee representative has voting rights³ and where the representative represents the interests of all the employees of the company regardless of their capital interests.⁴ Company structures vary under national legislation. BLER refers to employee representation in any structure, as long as the employees are entitled to representation in the strategic decision-making body of the company. In two-tier structures this would refer to the Supervisory Board, in one-tier structures to the Board of Directors or Management Board. Likewise, BLER does not refer to sub-board-level employee involvement in the form of, most notably, Information and Consultation procedures⁵ or national variations on these, or participation in the occupational health and safety work in the company.⁶ Although, these sub-board mechanisms may contribute with considerable employee influence on the company management,⁷ BLER refers only to board-level representation rights.

In EU law, board-level employee participation in companies is left to be determined by the Member States. There is no single European model for BLER applicable to all employees in Europe. The first attempt to reach a European consensus, the Draft 5th Directive on Company Law, was abandoned in 1988.⁸ Since then, the Member States have agreed to protect existing BLER rights in European Companies (SE),⁹ European Cooperative Societies (SCE),¹⁰ and in the event of cross-border mergers of limited liability companies.¹¹

¹ Conchon, A, *Board-level employee representation rights in Europe. Facts and trends. Report 121, ETUI 2011*, p. 6. Other terms include 'co-determination' and 'participation' the term adopted by the EU in Directive 2001/86/EC of 8 October 2001 Supplementing the Statute for a European Company with regard to the Involvement of Employees (SE-directive), Art. 2, (k): 'participation' refers the influence of the body representative of the employees and/or 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 the company's supervisory or administrative organ

² Conchon, A, 2011 (n 1) p. 8.

³ Conchon, A, 2011 (n 1) p. 8.

⁴ Conchon, A, 2011 (n 1), p. 8, and Seifert, A, *Employee participation at Board Level in Europe*, in Basedow, J, Su, C, Fornasier, M and Liukkunen, U (eds), *Employee Participation and Collective bargaining in Europe and China*, Max-Planck-Institut, Mohr Siebeck 2016, p. 210.

⁵ Directive 2002/14/EC of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure for the purposes of informing and consulting employees.

⁶ Directive 89/391 of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work.

⁷ E.g. Waddington, J, 3 questions on board-level representation, 14 July 2016, Hans-Böckler-Stiftung.

⁸ The Draft 5th Directive on Company Law, 1972-1988.

⁹ Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (SE Regulation) and the SE Directive.

¹⁰ Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) and Directive 2003/72/EC of 22 July 2003 Supplementing the Statute for a European cooperative society with regards to the involvement of employees.

¹¹ Directive 2017/1132 of 14 June 2017 relating to certain aspects of Company Law (codification), Art. 133.

The interest at European level has resulted in research carried out on board-level representation,¹² focusing on national¹³ and EU mechanisms¹⁴ as well as corporate governance.¹⁵ The European Trade Union Confederation (ETUC) in 2014,¹⁶ 2016¹⁷ and again in 2017¹⁸ called for a renewed effort to ensure board-level participation through binding EU law.

This paper elaborates on the current situation regarding BLER in Europe. First, by providing an introduction to the system in the SE/SCE Directives (the SE Directive), then by an overview of the current systems in the 31 EU/EEA countries, third, by discussing the elements of and potential impact of the latest ruling of the Court of Justice of the European Union (CJEU) regarding BLER in 2017, fourth, by providing perspectives on the calls for legislation at EU-level.

2 Overview – EU Law

2.1 EU-level mechanisms - the provisions in the Directives on SE/SCE

A right to employee 'participation' was recognised in the 1989 Community Charter of Fundamental Social Rights for Workers, Art. 17.¹⁹ The right to 'participation' was not included in the 2000 Charter of Fundamental Rights of the European Union²⁰ and as such BLER did not become part of the provisions in the Charter by the Lisbon Treaty in 2009.²¹ BLER is now recognised in the 5th recital of the Treaty of the European Union (TEU),²² where the Member States confirm 'their attachment to fundamental social rights as defined in the European Social Charter signed at Turin ... and in the 1989 Community Charter of the Fundamental Social Rights of Workers.' The mandate to legislate at EU-level on BLER is to be found in Art. 153 of the Treaty on the Functioning of the EU (TFEU)²³, that with a view to achieving the objectives of Art. 151, 'the Union shall support and complement the activities of the Member States in the following fields [...] (f) representation and collective defence of the interests of workers and employers, including codetermination, subject to paragraph 5.'

¹² E.g. Conchon, A, 2011 (n 1). See for an overview of research resources <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2/References-Employee-participation-and-corporate-governance2>.

¹³ Continuously updated country data available at <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2>. See also e.g. Taylor, R, *Worker participation at board level – tour d'horizon across the EU-15 countries and Norway*, pp. 67-85, and Kluge, N, Stollt, M, *Worker participation at board level in the new EU Member States*, pp. 87-99, both in Kluge, N, Stollt, M (eds.), *The European Company – prospects for worker board-level participation in the enlarged EU*, ETUI 2006, and.

¹⁴ Waddington, J, Conchon, A, *Is Europeanised board-level employee representation specific? The case of European Companies (SEs)*, Working Paper 2017.02, June 2017 ETUI, and Seifert, A, 2016 (n 4).

¹⁵ E.g. Thomsen, S, Rose, C and Kronborg, D, *Employee representation and board size in the Nordic countries*, *Eur J Law Econ* (2016) 42: 471-490, and Neville, M, Gregoric, A & Poulsen, T, *Insights on Employee Representation on Danish Boards*, 2015.

¹⁶ ETUC Executive Committee Resolution October 2014, <https://www.etuc.org/documents/towards-new-framework-more-democracy-work-etuc-resolution>.

¹⁷ ETUC Executive Committee Position Paper April 2016 (ETUC proposal 2016), https://www.etuc.org/sites/www.etuc.org/document/files/en-position-orientation_on_info_consult_board-level_repr.rights.pdf.

¹⁸ In the wake of the CJEU ruling C-566/15 of 18 July 2017, <https://www.etuc.org/press/ecj-ruling-commission-should-act-workers-participation-says-etuc>.

¹⁹ Art. 17 read: 'Information, consultation and participation of workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. This shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community'

²⁰ The provision on 'participation' was not continued in the 2000 Charter of Fundamental Rights of the European Union, Art. 27: *Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices, cf. Conchon, A, 2011 (n 1), p. 32*

²¹ Now Art. 6 of the Consolidated version of the Treaty on European Union, Art. 6, OJ C 326, 26/10/2012, 1.

²² Consolidated version of the Treaty on European Union, recitals.

²³ Consolidated version of the Treaty of the Functioning of the European Union, Art. 153(1)(f), OJ C 115, 9/5/2008, 114.

The Member States have agreed to protect existing BLER rights in the establishment of an SE/SCE.²⁴ The SE Regulation²⁵ aims to create a uniform legal framework within which companies from different Member States should be able to plan and carry out the reorganisation of their business on a Community scale.²⁶ The rules on the involvement of the employees in an SE are set out in Directive 2001/86/EC.²⁷ The system for employee participation reflects that the rules and practices of the Member States are varied and complex, and that it has been impossible to agree to a single European model for employee participation. Instead, the SE Directive introduces a special information and consultation procedure, when an SE is established, and ensures a right to BLER in the situations where the employees had a right to BLER under national law in one or more of the companies establishing the SE company. It is a precondition for the registration of an SE that the issue of employee involvement has been settled in one of the ways provided for in the SE Directive.²⁸

A special negotiating body must be set up, which represents all SE employees. The negotiating body negotiates on behalf of all SE employees with the competent organs of the companies directly participating in the establishing of the SE.²⁹ If the parties can reach an agreement on employee involvement, including BLER, they are free to decide on the content of such arrangement. This agreement is not subject to the standard rules provided in the Directive's Annex A, part 3. The agreement can however only reduce or terminate certain pre-existing BLER rights under national law with a 2/3 majority vote in the special negotiating body.³⁰ This protection applies to SE companies established by a merger, where at least 25% of the employees of the establishing companies enjoyed BLER rights.³¹ This also applies to SE companies established by setting up a holding company or a subsidiary, where at least 50% of the employees of the participating companies enjoyed BLER rights.³² In the understanding of the SE Directive, a reduction of pre-existing rights refers to 'a proportion of members of the board, which is lower than the highest proportion existing within the participating companies.'³³ If the required majority cannot be reached, the employees will have rights under the standard rules annexed to the SE Directive, which provides for a right to BLER to the highest proportion in force in the participating companies.³⁴ When an SE company is established by transformation,³⁵ all aspects of BLER in the pre-existing companies under national law shall continue to apply to the SE employees.³⁶ These rights cannot be reduced by negotiation.

The Special Negotiation Body (SNB) can, by a 2/3 majority vote, decide not to enter into negotiations or to cease negotiations. In this case, there is no agreement on BLER³⁷ and the employees will continue to be governed by the pre-existing national rules on information, consultation and participation.³⁸

The standard rules in Annex A, part 3 will apply, if the period for negotiations in Art. 5 expires without an agreement being concluded and without a SNB decision to cease

²⁴ Henceforth, the paper focuses only on SE companies.

²⁵ SE Regulation.

²⁶ SE Directive, recital (2).

²⁷ SE Regulation, Art. 1 (4).

²⁸ SE Regulation, Art. 12 (2).

²⁹ SE Directive, Art. 4 (2)(g).

³⁰ SE Directive, Art. 3(4).

³¹ SE Directive, Art. 3(4) and Art. 7(2)(b).

³² SE Directive, Art. 3(4) and Art. 7(2)(c).

³³ SE Directive, Art. 3(4).

³⁴ Annex A, part 3(a) and (b).

³⁵ SE Directive, Art. 7 (2) and 7 (2) a.

³⁶ SE Directive, Art. 4(1)(g) and Art. 4(4) and Annex A, part 3(a).

³⁷ SE Directive, Art. 3 (6).

³⁸ SE Directive, Art. 3 (6) paragraph 3.

the negotiations and defer to existing rights under national law.³⁹ This means a right to BLER equal to the highest level in force in the participating companies.⁴⁰

Annex A, part 3 lays out standard mechanisms for appointing or electing employee representatives to the SE board. This is carried out by the representative body, representing employees from the various Member States, which either appoints the employee representatives to the board among their members, or decides on a procedure involving all employees to recommend or oppose the appointment of the members of the boards.⁴¹ The employee representatives on the board enjoy the same rights and obligations as the shareholder elected members of the board, including the right to vote.⁴²

The system builds on a principle of negotiation and a before-and-after principle.⁴³ The parties must settle the issue of employee involvement, including BLER. The parties can, to this end, (almost) freely negotiate BLER arrangements. The outer framework for such negotiations is the before-and-after principle. In case some of the employees were entitled to BLER under national laws, such rights must, under certain criteria, be continued in the SE. In case none of the participating companies was governed by rules allowing BLER, there will be no duty to establish BLER in the SE.⁴⁴

3 Overview – National Law

3.1 National mechanisms

Across the 31 EEA countries,⁴⁵ a right to BLER as well as the methods for involving employee representatives at board-level vary considerably. The “richness” of BLER rights,⁴⁶ i.e. the thresholds for the right to be activated, the number of representatives, the appointment or election methods, and the actual use of a right to BLER, is country specific.

3.1.1 Statutory right

In 12 of the EEA countries, there is no legal framework for BLER. This is the case for Belgium, Bulgaria, Cyprus, Estonia, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Malta, Romania and the United Kingdom, constituting roughly 1/3 of the EEA countries. In these countries, any board-level representation arrangements are the result of voluntary agreements or choices at company level. These could be agreements obtained between workers/trade unions and management,⁴⁷ structures chosen for the company in the articles of association of the company, a choice of the shareholders at the general assembly, or a choice of the board itself.

In the remaining 19 EEA countries, the right to board-level representation varies according to company ownership, liability structures, financials, type of industry, the number of employees or the position of the employees/trade unions.

³⁹ SE Directive, Art. 7(1)(b)

⁴⁰ SE Directive, Annex A, part 3 (b).

⁴¹ SE Directive, Annex A, part 3, paragraph 5.

⁴² SE Directive, Annex A, part 3, paragraph 6.

⁴³ Conchon, A, 2011 (n 1), p. 34.

⁴⁴ SE Directive, Annex A, part 3 paragraph 4.

⁴⁵ If not otherwise indicated, overview data is retrieved from the ETUI: <http://www.worker-participation.eu/National-Industrial-Relations/Countries> (2015, some 2017 updates), the map <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2> (updated 2017), and Comparative Table for 31 EEA states (updated July 2015) <https://www.worker-participation.eu/National-Industrial-Relations/Across-Europe/Board-level-Representation2/TABLE-Worker-board-level-participation-in-the-31-European-Economic-Area-countries>.

⁴⁶ Neville, M, et al 2015 (n 15) p. 1.

⁴⁷ E.g. in Italy and Belgium in some parts of the public sector.

3.1.2 Thresholds for the right to be activated

3.1.2.1 Type of company

First - in 5 countries, namely Greece, Ireland, Poland, Portugal and Spain, mandatory board-level representation is limited to state-owned, partially state-owned or formerly state-owned companies (henceforth state-owned).

In the remaining 14 countries, a right to BLER is applicable to private as well as state-owned companies.

Second - in some of these countries, the right varies according to the liability structure of the company as either public limited liability or limited liability company (Austria and Croatia), or applies only to public limited liability companies (France, Luxembourg, Slovak Republic).⁴⁸

Third - the right can vary according to the type of industry, e.g. iron, coal and steel (Germany), metal (Spain), iron (Luxembourg).

Fourth - an additional qualification criteria can be the sales turnover or asset value (Slovenia), or the equity capital (the Netherlands).

3.1.2.2 Number of employees

No minimum requirements: The lowest thresholds are in state-owned companies in France, Czech Republic, Greece, Ireland, Luxembourg, Portugal, Poland and Slovakia, and in privately owned public limited liability companies in Austria and Croatia, where the employees have a right to BLER regardless of the company size.

Requirements to number of employees: The group with the lowest thresholds of 25-50 employees is Sweden, Norway, Denmark, Slovak Republic and Slovenia (additional criteria apply). A second group with a threshold of 100-300 employees is the Netherlands (additional criteria apply), Finland and Hungary. Austria and Croatia have this threshold for BLER in limited liability companies. The third group of countries have requirements of 500-5000 employees. This is the case for Germany (500, 1000 or 2000 employees), Czech Republic (500 employees, certain companies), and France (1000 or 5000 employees). Luxembourg applies high thresholds for BLER in public limited liability companies. In Spain, the right to BLER applies only to state-owned companies with a minimum of 1000 employees (500 in the metal industry).

3.1.2.3 Employee/Trade Union action

In the Nordic countries, employee representation is initiated only if the employees or the local trade unions have an interest in this. BLER rights depend on a company level employee initiative. In Denmark, the trade unions/the employees must request representation and the majority of all employees must vote yes in a yes/no ballot. In Finland, two personnel groups representing a majority of the employees must request representation. In Norway, in companies with more than 200 employees, the majority of employees must request employee representation. In Sweden, representation depends on the decision of a trade union bound by a collective agreement with the company.

3.1.3 The strength of representation

The number and/or percentages of representatives on the board vary considerably from country to country. The strength also varies within the specific countries according to type of business structure and financing. Finally, in some countries, it varies according to number of employees (escalator system).⁴⁹

Non-escalating systems: In Croatia and Greece, in eligible companies, the workers are represented by 1 member on the board. In Spain, the trade unions eligible can appoint

⁴⁸ This reflects also the situation, where this is the only corporate structure available in the country.

⁴⁹ ETUC proposal 2016, p. 4.

one member each, i.e. 2 or 3 seats. In Finland, the default representation is 1/5 of the board with a maximum of 4 seats, unless the parties negotiate otherwise.

In a number of countries the representation is set at 1/3 of the board. This is the case for Austria, Czech Republic, Ireland, Luxembourg (privately owned companies) and the Netherlands. In Poland, the limit is 2/5 or 25%, depending on the state-ownership. In some countries, the level of representation can be varied with a minimum and maximum set by law. This is the case for Denmark (decided by the shareholders, min. 2 seats, max. 1/3), Hungary (can be negotiated, default is 1/3 of seats), Slovak Republic and Slovenia (defined in articles of association, min. 1/3 up to 1/2 of seats, not the chair).

Escalating representation rights: In a number of countries, the number of seats allocated for employee representation depends on the size of the company.

In France, the threshold is set at 200 employees in state-owned companies. 2 members and up to 1/3 of board members for the smaller companies, and 1/3 of board members for the larger state-owned companies. For privately owned companies, the threshold is set at 1000 employees (5000 worldwide). In boards with 12 seats or less, the employees have a right to 1 seat and on boards with 13 seats or more, they have the right to 2 seats. Representation rights in all boards can be negotiated, the maximum being 1/4 of the board or 4 (5) seats.

In Germany, the law provides for several steps in board representation. The first step is companies with 500-2000 employees, where the employees have the right to 1/3 of board members. The second step is companies with more than 2000 employees, where the worker representation is 1/2 of the board and the chairman, the casting vote, is elected by the shareholders. A distinct system is the original system in the iron, coal and steel industry for companies with more than 1000 employees.⁵⁰ The employees elect 1/2 of the board members and the casting vote is a neutral person agreed to by both the employee side and the shareholder side. Also, the employees have a member on the managing board, who can block the appointment of the labour director.

In Luxembourg, in state-owned companies, the employees can elect 1 board member per 100 employees, the minimum however being 3 seats and the maximum 1/3 of the board.

In Norway, the employees can elect a minimum of 1 member and up to 1/3 of the board, plus an additional member depending on the size of the company.

In Sweden, in companies with less than 1000 employees, the workers can elect 2 members and up to 1/2 of the board (depending on the general assembly). In companies with more than 1000 employees and which are operating in several industries, the workers can elect 3 members and up to 1/2 of the board (depending on the general assembly). In both systems, an equal amount of deputy representatives can attend board meetings with a consultative (not voting) voice.

Alternative rights: In Slovenia, in companies with more than 500 employees, the employees are additionally entitled to elect 1 member of the management board, or 1 executive member of the board of directors. In Poland, in companies with more than 500 employees, the workers can additionally elect 1 member of the management board.

Systems subject to negotiation: In Finland and Hungary, the legislation acts as the default structure, if the parties cannot reach negotiated agreements. This is somewhat also the case in Denmark, Norway and Sweden, as the trade unions (representatives or employees) must make the initial request to activate BLER in the company.

⁵⁰ Referred to as the Montan-system, e.g. Conchon, A, 2011 (n 1), p. 7.

3.1.4 Election of appointment

The methods for electing the representatives can be divided into two main categories, with or without general elections/elections by delegates among all employees.

Nomination + general elections: In some countries the process is twofold with a nomination by trade unions, works councils or the employees themselves followed up by a general election among all employees. This is the case for Norway, Ireland, Spain, France (conditions apply), Denmark, Greece and Finland.

No general election: In many countries there are no general elections among the employees. Some countries involve nomination of candidates by trade union/works council and election by the shareholders general assembly. This is the case for the Netherlands, Hungary (certain companies), and Germany (certain companies). In other countries the works council or trade union appoint the representatives directly to the board. This is the case in Sweden, Slovenia, Croatia (conditions apply), France (conditions apply), Spain (conditions apply), Luxembourg (iron industry only).

In some countries the method is a combination of direct appointment or nomination/election. This is the case for Portugal, Croatia, France, Slovak Republic and Germany (certain companies).

In one country the employer establishes the rules for electing/appointing candidates. This is the case for the Czech Republic.

3.1.5 Who is eligible

In some countries there is no legislation on who is eligible for election. This is the case in Poland, Croatia, Luxembourg (in the Iron and steel industry), Slovak Republic (for certain companies) and in Spain.

In most countries, the representative must be an employee of the company. This is the case for Slovenia, Sweden ('should'), Norway, Portugal, Slovak Republic (certain companies), Croatia (certain other criteria), Czech Republic, Denmark, France (certain other criteria), Greece, Hungary, Ireland and Luxembourg (not in the iron industry). In Austria, the representatives must also be members of the works council.

A few countries allow a representative to be appointed from outside the company. In Germany employees and external trade union representatives are eligible for election and in Luxembourg the iron and steel industry allows for trade union representatives to be elected.

Finally, the Netherlands have their own system as the representatives must have no connections to the workers of the company. This rules out employees and trade unionists engaged in collective bargaining with the company. The representative would be an external person with a special interest in or qualification for discussing issues of interest to the employees at the board-level.

3.1.6 Duties and responsibilities

In most countries the employee representative works at par with other board members. The worker representative is bound by a duty of confidentiality. The employee representative has the same legal rights and responsibilities as the shareholder-elected board members. The worker representative becomes liable for board decisions at par with the other board members.

4 Discussion – New perspectives

4.1 The methods – Political, economic and social background

The broad variety of *methods* and *structures* in place for board-level representation is evident.

In a recent case before the CJEU,⁵¹ the legislated method for electing worker representatives was the subject of dispute. The case concerned, in short, whether the German legislation on BLER constituted a breach of Art. 18 TFEU or Art. 45(2) TFEU, as employees outside the German territory are not entitled to participate in elections. The national mechanisms became the subject of dispute as being either discriminatory or a barrier for the free movement of workers.⁵²

The claimant argued that the free movement of workers in Art. 45(2) TFEU should be interpreted as to require harmonisation of the national rules for electing board-level worker representatives. The view of the claimant was that national legislation not allowing employees in international affiliations to participate in elections or to be elected as worker representatives to the board of the national company, was a barrier to the free movement of workers.

Neither the General Advocate nor the Court agreed that Art. 45(2) TFEU required national legislation for board-level employee representation to apply equally to employees within the territory of Germany and employees outside the territory of Germany. Indeed, the Member States are free to set the criteria for the territorial scope of application of their legislation, to the extent that those criteria are objective and non-discriminatory.⁵³

The General Advocate further examined whether such a barrier would be justified, in case the Court would find that the legislation did constitute a barrier under Art. 45(2) TFEU. The German government argued *that*: the mechanisms for electing board representatives serve the interests not only of the specific employees but general interests of the broader society, *that* the mechanisms express the national values of cooperation and integration, and *that* they lock into pre-existing structures for dialogue and cooperation.⁵⁴ Furthermore they argued *that*: the method is adapted to the German business, societal and trade union structures, and is a central element of the culture of cooperation in Germany: and indeed *that* it constitutes the statutory development of the freedom to form and join trade unions and permits the exercise of that freedom which is guaranteed by the Grundgesetz (Basic Law).⁵⁵

The General Advocate noted that 'in this case' the method of electing board-level representatives is a matter in accordance with national social, economic and cultural particularities, it constitutes an essential element of the German employment market and, more broadly, of the German social order.⁵⁶ As such, the elements in the mechanism were deeply tied to the social and economic considerations in the state, an area where the EU leaves the Member States a margin.⁵⁷ For these reasons, in the view of the General Advocate, even if the Court would find that the German legislation constituted a breach of Art. 45(2) TFEU, such a breach would be justified.⁵⁸ In the case of Germany, an attempt to harmonise the national regulation for employees inside and outside the territory would necessitate a modification of the fundamental characteristics of the system. This would include transferring the responsibility for conducting elections to the German parent company, which would run counter to the principles on which the system is based.⁵⁹

⁵¹ CJEU ruling in Case C-566/15 of 18 July 2017 *Konrad Erzberger v TUI AG*, and Opinion of Advocate General Saugmandsgaard Oe delivered on 4 May 2017 regarding Case C-566/15. The case and opinion is discussed in Heuschmid, J, Munkholm, N, *Zur Unionsrechtskonformität der Unternehmensmitbestimmung*, EuZW 11/2017, 419-424.

⁵² Case C-566/15 point 38, Opinion C-566/15, point 99. See also on the issue of German co-determination for foreign workers, Conchon, A, 2011 (n 1), pp. 29-30.

⁵³ Case C-566/15 point 36 and 37, Heuschmid, J et al 2017 (n 70), p. 420.

⁵⁴ Opinion C-566/15 point 100 and 111.

⁵⁵ Opinion C-566/15 point 102.

⁵⁶ The General Advocate discussed the justification of such a barrier, had the Court found, that the German legislation constituted a barrier to the free movement of workers.

⁵⁷ Heuschmid, J et al 2017 (n 70).

⁵⁸ Opinion C-566/15 point 103.

⁵⁹ Opinion C-566/15 point 109, Heuschmid, J et al 2017 (n 70), p. 420.

On the notion of BLER, the ruling exhibits that *methods* which lock in closely with economic and social values and traditions, the social order, basic rights and underlying structures of business and social dialogue, can rightfully challenge claims for EU-harmonisation of the issue.

As the national systems vary on most elements chosen to express BLER rights, a legislative initiative from the EU regarding BLER applicable to national corporate mechanisms should be carried out carefully in respect of the national particular economic, social and political traditions and values.⁶⁰

4.2 A fundamental social right?

Board-level worker representation is related to both corporate law and labour law.⁶¹ In most countries, worker representation is embedded in corporate law (e.g. Denmark, Germany, indeed in the EU), in other countries in labour law (e.g. Austria). This influences the legal status of the right to board-level representation as either a fundamental employment or social right, which must be observed, or an element in corporate governance regulation, subject to economic deliberations.

The scholarly debate on corporate governance revolves around economic cost/benefit models,⁶² where the issue at company level is whether employee representation yields more economic benefits than the costs of such representation, and the issue at national level is whether employee representation is an element detrimental to the competitiveness of the national companies.⁶³

On the other hand, the scholarly debate on employment rights is based on the duties and obligations of the parties, where any employment rights must be observed by the employer, even at a cost.

The General Advocate, in case C-566/15, stated that the right to vote and stand for election, as provided for in the German legislation, falls within the scope of 'other conditions of work and employment' in Art. 45 (2) TFEU.⁶⁴ As such, the right to BLER, as provided for in German law, is an individual employee right in the view of the TFEU.

Further, the General Advocate viewed the German mechanisms for participating in elections, involving trade unions, works councils and elections, as an essential element of the German labour market and of the German social order.⁶⁵ The mechanisms for participation are not only an individual right, but also an expression of societal values and as such part of the social order. This view on BLER as an individual social right is entirely in line with the original thoughts of Hugo Sinzheimer on employee self-determination at the workplace.⁶⁶

The opinion, however, does not express that a right to co-determination is a fundamental social or employment right at EU-level, not even with reference to Art. 45(2) TFEU. In his opinion, the General Advocate concluded that national legislation provided a right to participate in the election of representatives as an employment right, and as such this right fell within the scope of Art. 45(2) TFEU. The opinion does not assist in determining that a right to participation at board-level constitutes a fundamental social or employment right at EU-level, nor in Member States where such right is not provided for in statutory law.

⁶⁰ Heuschmid, J et al 2017 (n 70), p. 421, and ETUC 2016, p. 1-2.

⁶¹ As also noted by the CJEU in Case C-566/15 point 38.

⁶² E.g. Forth, J, A Bryson, A George, *Explaining cross-national variation in workplace employee representation*, *Eur. J. Ind. R.*, 2017 vol 23(4), 415-455, at 417; Neville, M et al 2015 (n 15); and Thomson, S et al 2016 (n 15) p. 488.

⁶³ An 'instrumental' approach, where a positive link has been difficult to prove, cf. Conchon, A, 2011 (n 1). See e.g. the Danish Report of the Governmental Committee on Modernising the Companies Act (*Modernisering af Selskabsretten, betænkning 1498/2008*) p. 379.

⁶⁴ Opinion C-566/15 point 44.

⁶⁵ Opinion C-566/15 point 103.

⁶⁶ See e.g. Kaufmann, F-X, *Thinking about social policy: The German Tradition*, Springer 2012, p. 71.

5 Discussion – EU legislation considerations

EU legislation on the issue of BLER depends on the political will in the EU institutions. The legal basis for EU legislation is provided in Art. 153(1)(f) TFEU.

The calls from the social partners for EU legislation on BLER are promoted with an aim to ensure equal competition between companies in the internal market, help companies perform better, and to create a counterweight to company mobility (i.e. forum shopping). Moreover, BLER is promoted as a natural extension of the existing EU law on employee involvement and as an element of democracy rights at the workplace. As such, BLER is a tool for a more democratic and successful society and economy. A few perspectives will be offered in the following, two general considerations on legislation on BLER, point 5.1 and 5.2, and two perspectives on the substance, point 5.3 and 5.4.

5.1 A distinct phenomenon

It is notable that from a purely analytical point the issue of board-level representation differs from the systems of employee involvement in consultation or information. There are significant variations between the right to be involved in information and consultation on the one hand, and the right to be involved in the strategic decision making mechanism at board-level, including sharing the responsibility for such decisions at par with the other board members, on the other hand.⁶⁷

First, the purposes of the right to information and consultation are many, but mostly revolve around guaranteeing an information flow to the workers and the opportunity to make the views of the employees heard. The purpose of the right to board representation is likewise not limited to one single purpose, but again the aim revolves around ensuring information from the workers to the management, and give workers power to influence the company's strategic development by direct participation in the decisions at management level.⁶⁸

Second, the two systems provide different burdens of expectations on the representative. The employees participating in arrangements providing information and consultation are expected to look after the interests of the employees by providing responses and engaging in discussions. On the other hand, the worker representatives at board-level must look after the general interests of the company, like the other board members.

Third, the type of performance varies. Information and consultation organs receive and discuss information, with a view to consult. In contrast, board work is strategic decision-making, where the discussions and deliberations are with a view to decide.

Fourth, the scope of issues discussed varies. Information and consultation procedures typically take place on selected information of importance to the company as a place of work. In contrast, board work concerns overall strategic issues in the company and discussion is based on deliberations of all available information.

Finally, the question of liability differs. Employees participating in information and consultation procedures are not liable for the final decisions made by the management, whereas employee representatives on the board become liable, like other board members, for board decisions.

These, and other, elements distinguish BLER from other forms of employee involvement. Board-level representation in this sense does not merely constitute an extension of a right to information and consultation, but an expansion of employee involvement to a new set of obligations and duties.

⁶⁷ Seifert, A, 2016 (n 4) at 210.

⁶⁸ E.g. Seifert, A, 2016 (n 4) at 210, and Danish Report 1498/2008 (n 85) at 374.

It could thus be argued that BLER, as a distinct mechanism of employee involvement, requires considerations for employers as well as for workers. As such, BLER and its methods, in my view, needs to be discussed on its own merits.

5.2 Underlying milieu

In some countries, the right to participate in elections is be found in societal values and traditions and the legislation is an expression of social, political and economic choices.⁶⁹ The method can be so closely connected to fundamental rights, such as freedom of association, that participation in BLER becomes an essential part of the employment market and the social order.⁷⁰

In the view of the General Advocate, the Union should take a moderate view on requiring harmonisation on the method, when such connectedness between legislative choices and underlying values is apparent.⁷¹ This approach is entirely aligned with the deliberations of Otto Kahn-Freund in 1974,⁷² as harmonisation of BLER and its methods across European states resembles transposition of legal methods from one legal system to another.

In Kahn-Freund's words, when considering a 'transplant' of legal methods from one country to another in order to obtain a legislative reform, one should examine closely the nature of the regulation to be 'transplanted'. Methods that are closely related to the power structure, whether that be formal constitutional functions or social groups playing a decisive role in the law-making and decision-making process, are less likely to create the desired legislative reforms, as the method does not necessarily 'fit' with the power structures in the receiving legal framework. In the area of collective labour law and industrial relations, methods and regulations are often very closely linked with the existing power structures in the state.⁷³ This makes such legislative initiatives, in the view of Kahn-Freund, almost 'untransplantable'.⁷⁴ Reform by 'transplantation' of such methods or institutions is thus more likely to cause conflicts and resistance rather than the desired reform.

Kahn-Freund's perspective corresponds with the opinion of the GA. When the issue ties in closely with the existing power structures, which is particularly so in the area of collective labour law and industrial relations as seen in the case of BLER in Germany, the requirement of a 'legal transplant' in the form of harmonisation should take a moderate approach. Likewise, the perspective ties in with the opinion that even what could be viewed as minor adjustments could potentially change and alter the very foundation and the values expressed through the existing methods.⁷⁵

Indeed, the social and cultural 'milieu' of dialogue, consultation and cooperation at the sub-board-level as well as the interplay between the mechanisms at board-level and sub-board-level should not be underestimated. This 'milieu', or a lack of the same, at company level or at state level may have a significant, if not a decisive, influence on the success of BLER.⁷⁶

Kahn-Freund's perspective thus means that consideration of EU legislation in the area of collective labour law and industrial relations, such as BLER and its mechanisms, should carefully take into consideration existing structures, traditions, values and cultures of the social order and the business environment in the Member States.

⁶⁹ Heuschmid, J et al 2017 (n 70) p. 422.

⁷⁰ Opinion C-566/15 point 103.

⁷¹ Heuschmid, J et al 2017 (n 70), p. 421.

⁷² Kahn-Freund, O, *On the Uses and Misuses of Comparative Law*, *The Modern Law Review* 1974, p. 5.

⁷³ Kahn-Freund (n 94), pp. 18, 21 and 24.

⁷⁴ Kahn-Freund (n 94), p. 22.

⁷⁵ Opinion C-566/15 point 109.

⁷⁶ Waddington, J, 2016 (n 7).

5.3 Strength of the representation

Turning now to more specific elements of legislation on BLER, the existing EU legislation on BLER in an SE does not promote a certain proportion of representation in the boardroom.⁷⁷ On the other hand, the existing national systems vary considerably on the issue of strengths and thresholds, as outlined above in section 2.2 and 2.3.

The recent ETUC proposal includes a suggestion for an escalator approach:⁷⁸

- small companies with 50 to 250 employees should have 2-3 representatives;
- companies with 250 to 1000 employees should have 1/3 participation;
- companies with more than 1000 employees should have full parity, 1/2 of the seats.

Based on the overview of national models above, the ETUC suggestion would conflict with the existing models in most EU Member States. The lowest and middle levels of representation would interfere with existing models in that many countries have additional criteria for representation at this level, many countries include the option to negotiate different systems at company level, many countries do not allow representation in all types of company structures or financial structures, and many countries do not allow up to 1/3 representation even in larger companies (up to 1000 employees).

Whereas the lowest and middle levels interfere somewhat with national models, the highest level (for more than 1000 employees) would be innovative in all national systems. Only Sweden, Germany, Slovak Republic and Slovenia have the possibility of parity on company boards, and in Sweden, Slovak Republic and Slovenia a right to parity can be obtained only through a company level decision (general assembly or articles of association). The suggested level of BLER (almost) reflects the 1951 system in the coal, iron and steel industry in Germany,⁷⁹ with full parity on the board in companies with more than 1000 employees. In Germany, outside the coal, iron and steel industry, parity on the board is a requirement only in companies with 2000 employees. Promoting full parity on boards in all companies with 1000 employees would be a considerable development of employee board-representation rights in any country, including Germany.

5.4 Circumvention – Practical considerations

An issue of practical relevance is the risk of circumvention at the company level. Some countries express a scepticism that the shareholder board members merely tolerate the worker representatives, instead of fully accepting them as equal board members.⁸⁰ One strategy to undermine the representatives' participation in decision making, is to have unofficial meetings without the representative and discuss more superficially at the official board meeting before voting.⁸¹

Should the EU institutions decide to legislate for a BLER at European level, certain considerations are worth mentioning.

5.4.1 Support systems for employee representation

In order to enable the representative to participate and contribute on the best possible terms in the board work,⁸² some countries recommend the employer provides training for the employee representative and allows time for preparation of and participation in board meetings.

⁷⁷ SE Directive Annex A, part 3.

⁷⁸ ETUC proposal 2016, p. 3.

⁷⁹ Seifert, A, 2016 (n 4), p. 214.

⁸⁰ E.g. Ireland, Taylor, R et al 2006 (n 13) at 74.

⁸¹ Waddington, J, 2016 (n 7), and ETUC proposal 2016, p. 3.

⁸² Also included in the ETUC proposal 2016, p. 3.

The ETUC additionally suggests that the employee representative should receive invites to board meetings in time and with sufficient documents, have the right to discuss and ask questions individually, and be able to convene extraordinary board meetings and request topics to be put on the agenda.⁸³ These natural and essential elements of performing proper board work would seem to be self-evident, as the employee board member is liable for decisions like the shareholder board members. If a duty to involve employee representatives at board-level is promoted, national laws could ensure that all board members, regardless of who elects them, must be able to perform their duties under the same terms. This improves the quality of work of all the votes and thus the board work to the benefit of the company.

However, even in countries where the legal framework is clear and sets out measures to support the employee representative, the spread of worker representatives on boards is limited and the shareholders maintain to view representation with scepticism.⁸⁴ Even in countries with a strong tradition for social dialogue and worker participation, this can be the case.⁸⁵

5.4.2 Protection against dismissal

In the existing systems for employee involvement in discussions with management or employee representation, the employee enjoys an increased protection from dismissal or discrimination on grounds of the duties carried out as a representative. This is the case e.g. for employees participating in information and consultation procedures as representatives, health and safety representatives, and, under certain criteria, company level employee representatives. Likewise, it is found in national legislations on board representatives.⁸⁶

In respect of existing dismissal and discrimination legislation in the Member States, it would seem essential to extend such special protection to board-level representatives, as suggested by the ETUC proposal.

5.4.3 Confidentiality

Board work establishes a dilemma on the issue of confidentiality for the representative as well as for the company. The same duty of confidentiality applies to all board members, but in the case of worker representatives the employer has a specific interest that certain information is not conveyed to the rest of the workers.

According to the Information and Consultation Directive, an employer can choose not to give information or to conduct consultation, if it would seriously harm the functioning of the company or would be prejudicial to it.⁸⁷ The intention of the Directive is that only information that can seriously harm or damage the functioning of the business and is necessary according to the company's legitimate interests, i.e. business, customer interests, or economic difficulties, or consideration of selling, can be withheld from the information and consultation procedure as 'confidential'.⁸⁸

The ETUC in their proposal suggests that too many topics are marked 'confidential' by management and this leads to poor or absent information to works councils.⁸⁹ This deters the quality of the board work on these topics, as the employee representative lacks essential information in order to participate meaningfully.

Another avenue is to mark certain information as confidential, with the consequence that the representatives cannot confer the information received to the rest of the

⁸³ ETUC proposal 2016, p. 3.

⁸⁴ Thomsen, S et al 2016 (n 15).

⁸⁵ Thomsen, S et al 2016 (n 15).

⁸⁶ E.g. the mandate to the Minister in the Danish Companies Act (*Selskabsloven*), section 143, 5) and 6), and the Executive Order on Employee Representation (*Bekendtgørelse om medarbejderrepræsentation*).

⁸⁷ Directive 2002/14/EC Art. 6(2) and Directive 2009/38/EC of 6 May 2009 Art. 8(2).

⁸⁸ E.g. in Denmark, the preliminary works for the Act on Information and Consultation, L 17 2004-05, remarks for section 7.

⁸⁹ ETUC proposal 2016, p. 3.

workers, e.g. Art. 6(1) of the Directive on Information and Consultation. This would, in the context of BLER, mean that all board members would be on the same terms with regards to access to information and confidential treatment of information. The worker representative would still be entitled to confer or discuss issues of particular interest with the trade union representatives or the employees, when this is strictly necessary in order to perform the duties as representative.⁹⁰ In this case, a duty of confidentiality would follow the information and also apply to the external advisers or trade union representatives.

Sanctions could apply on similar terms to all board members for breach of confidentiality. As breaches of confidentiality are linked to the representation work, not to the work as an employee, a breach of confidentiality should not be sanctioned with disciplinary measures.

The ETUC in their proposal suggests that the topics qualifying as 'confidential' need to be addressed and considered very carefully in order to improve the quality of the board work.

Likewise, it is suggested that the available consequences of marking information as 'confidential' should be addressed carefully, as not all solutions are suitable for transposition to board-level work.

6 Summary

The mechanisms for employee representation at board-level vary across Europe. The eligible companies vary, the thresholds vary, the proportions vary, and the mechanisms for elections vary. In 1/3 of the EEA countries, there is no right to BLER. At EU-level, the CJEU ruling in 2017 stated that Art. 45(2) TFEU does not require national legislation to give equal BLER rights to employees working inside and employees working outside the territory. There is no recognition of board-level representation as a fundamental social right in EU law. Since the 5th Company Law Directive was abandoned in 1988, small steps have been taken towards ensuring BLER in EU law. At national level, the rights have fluctuated during the last decade and it is difficult to find common ground. The ETUC proposal includes elements for consideration, but also includes an escalator mechanism that would give parity on boards at a new level for all European countries, including Germany.

⁹⁰ CJEU rulings *Case C-44/08 Fujitsu-Siemens* and *Case C-384/02 Grøngaard & Bang*.

