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REPORT

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EUROPEAN ELECTION

New EU Parliament, new EU Commission – new impetus for Workers' Voice?

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In collaboration with Oliver Emons, Norbert Kluge, Sebastian Sick and Marion Weckes

AT A GLANCE

- Strengthening workers' participation rights and thus collective rights must be on the European agenda in the next legislative period.
- Workers' participation is the democratic design principle of the social market economy. It involves searching for the best solutions all round. Global and European challenges can be met only if workers are adequately involved.
- Existing regulations in European company law, as well as, for example, on the European company (SE) make it easier to dodge board level employee representation (BLER). These loopholes have to be closed.
- A framework directive for information, consultation and participation with a dynamic element could reinforce the existing information and consultation rights of European works councils, as well as introducing European thresholds for workers' participation in supervisory and administrative boards. Such a framework directive would make it possible to systematically close numerous loopholes that are currently exploited to evade BLER.
- The long-term solution is the fundamental reorientation of European corporate governance under the aegis of sustainable company management, taking into account the interests of the various stakeholders.

CONTENT

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1 A WORKERS' EUROPE

Workers' participation features prominently in the European election programmes of many German parties. That is very much to be welcomed because workers' participation makes workers citizens in the workplace. As the democratic design principle of the social market economy, protecting and expanding workers' participation should at long last take its rightful place on the European agenda.

What should be the focus of the next European Parliament and European Commission in this regard? First of all, strengthening workers' participation must play a role in the hearings of the European Commission in the European Parliament, so that the Commission commits itself to initiating a framework directive on information, consultation and workers' participation in the coming legislative period, as advocated by the DGB.[1] This should include European minimum standards with a dynamic element for the participation of workers' representatives in the supervisory board and the administrative board in European company law and further expand European works councils' existing information and consultation rights. A framework directive would boost workers' participation rights in the workplace and the company and address many of the demands made in this report all at once.

Beyond the directive the interests of all stakeholders should be taken into consideration systematically in the basic orientation of European corporate governance. Diversity in supervisory boards for the sake of a socially and environmentally sustainable company management has a major role to play in this. Adopting such a stakeholder approach to company management, including employee board level representation, would show that more is at stake for European policymaking than the relationship between top management and shareholders.

Workers' participation strengthens democracy in the workplace and underpins the social dimension of the digital transformation of enterprises, the economy and society.[2]

2 EUROPEAN WORKS COUNCIL (EWC)

Today, with more than 20 years' experience under their belts, cooperation between European works councils (EWCs) and existing national employee interest representations – whose involvement by definition ends at national borders – is increasingly becoming a matter of course. It therefore does not make sense that their information and consultation rights have not been improved by making their participation in company decision-making more binding.

In this context in particular, European works councils as transnational bodies for workers' participation are especially important, as studies by, for example, Anke Hassel, Sophia von Verschuer and Nicole Helmerich have shown.[3] They can serve as a networking platform for workers, but also between workers and management. Furthermore, far-reaching regulations can be instigated, such as international framework agreements, which are becoming increasingly important, especially in the context of globalisation. It must be ensured, however, that the – European – trade unions are also able to negotiate with company managements and that company-level workers' representation is not played off against trade union interest representation.

According to Article 15 of the EWC directive the European Commission was supposed to deliver a report to the European Parliament and the Council on the implementation of the EWC directive and, as the case may be, to make appropriate proposals for revising the text of the directive. Although the evaluation study was available as early as March 2016 the report itself was published only on 14 May 2018. Among the main problems, the European Commission mentioned that there is neither a minimum body of information that must be made available to EWC members nor any kind of temporal guidelines governing an information and consultation process.

In fact, EWCs report that they are often informed of management decisions only after they have been taken or that their access to certain information is blocked on the grounds of confidentiality. The significance of EWC opinions is also very vague and their influence on company decision-making too weak. Although it mentions some problems the European Commission would prefer not to amend the directive, considering it sufficient to issue a manual on setting up European works councils. The problems show, however, that the next European Commission needs to come up with a proposal to revise the EWC directive as a matter of the utmost urgency.

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1 Offensive Mitbestimmung: Vorschläge zur Weiterentwicklung der Mitbestimmung' [Proactive codetermination: proposals for the further development of codetermination], resolution of the DGB national executive committee of 12 July 2016. https://www.dgb.de/++co++3f0504bc-fe03-11e8-9849-52540088cada [05.08.2019].

2 EGB-Strategie für „Mehr Demokratie am Arbeitsplatz" [ETUC strategy for 'More democracy in the workplace'] https://www.etuc.org/en/publication/more-democracy-work [05.08.2019].

3 Anke Hassel, Sophia von Verschuer, Nicole Helmerich: Workers' Voice and Good Corporate Governance (2018). Hans-Böckler-Stiftung. https://www.boeckler.de/pdf/mbf_workers_voice_academical_final_report.pdf [05.08.2019].

European policymakers should thus commit themselves to

- the automatic triggering of negotiations on setting up an EWC, as well as the implementation of fallback provisions in the event of resort to instruments of European company law;
- a requirement to take into account EWC opinions in relation to certain management decisions (for example, like those in the works constitution acts of the Netherlands and Germany);
- serious sanctions – such as the suspension of measures – in the event that the EWC is not consulted before a company takes a decision;
- clarification of principles governing how information can be classified as 'confidential', a tactic often used to avoid consulting the EWC;
- ensuring EWCs access to justice, so that they can take legal action against companies as a legal entity;
- ensuring efficient coordination of employee representation by means of an EWC right of access to all company premises;
- the establishment of objective criteria for decision-making on where the EWC has its seat in order to avoid regime shopping or resort to letterbox firms;
- increasing the number of mandatory meetings to at least two a year;
- participation rights for trade unions in EWC negotiations, as well as participation rights for meetings of the EWC and its main bodies;
- strengthening EWC rights to better networking between the various works council levels.

3 BOARD LEVEL EMPLOYEE REPRESENTATION (BLER)

Employee Board Level Representation (BLER) entails the right to exert influence at the highest level of management, via supervisory boards, over fundamental strategic decisions taken by the board of directors. In Germany, limited companies are statutorily subject to BLER if they have more than 500 employees. Although the relevant regulations differ, 18 out of 28 EU member states and Norway have some form of employee representative presence on the supervisory or administrative board of companies. The relevant arrangements, requirements and thresholds may vary, but traditions of workers having a say at board level are widespread.

3.1 Board Level Employee Representation (BLER) in the case of cross-border transfer of seat and online company foundation

When companies merge, divide or transfer their seat across borders legal uncertainties arise, not only for the companies themselves, but also for their employees. Because of the variety of legal regulations in the individual member states therefore European regulations are needed concerning an orderly procedure, but also providing protection for stakeholders, such as employees and minority shareholders.

On 25 April 2018 the European Commission presented a Company Law Package, comprising a draft directive on cross-border mobility of companies and a draft directive on the digitalisation of European company law, which the European Parliament and the Council provisionally adopted in April 2019. The new regulations are intended, on one hand, to facilitate and bring within a single framework procedures, such as transformations, mergers and divisions of companies, which hitherto were unregulated. It will also make possible the digital establishment of limited companies.

Under the directive on cross-border mobility the existing rules on mergers will largely be retained. The new regulations are to be introduced in the case of cross-border transformations and divisions of companies.

The new EU directive provides for an orderly procedure for cross-border transformations and divisions, especially because of the variety of regulations on transfer of seat and division in the EU member states. The lack of tax harmonisation in the EU means that there is tax and investment competition between the member states. In the new orderly procedure the European Commission has provided for a list of criteria for assessment by the relevant member state (the exit state), which is to be applied by the member states and independent experts in the case of a transfer of seat to another member state (or in the case of a cross-border division of a company). One of these criteria is the consequences of transfer of seat (or division) for the employees.

The new EU directive does not provide for a dynamic element in the case of changes in company size or the number of employees after the measure. This provides a further option for undermining the participation of employees in boards in the case of cross-border company mobility, instead of closing it in the interests of legal certainty for employees. Furthermore, the new possibility of founding a company online will give further impetus to the practice of letterbox companies, which are a par-

ticular problem in certain sectors, such as construction.

Substantial improvements, in particular to the directive on corporate mobility, have failed in the Council of Ministers, after the European Parliament took up many trade union demands in its report. Demands aimed at strengthening collective rights at European level are thus a priority, with a view to ensuring that erasing or evading BLER by resorting to European legal instruments is no longer possible.

European policymakers should thus commit themselves to

- minimum standards for workers' participation in the form of a framework directive on information, consultation and participation in the case of cross-border matters, including a dynamic element (escalator);
- legal certainty for employees by allowing them to retain their acquired participation rights in the event of a company's transfer of seat;
- a clear determination that a company's registered office has to be where its head office is actually located ('real-seat approach'). The 'head office' is taken to mean the effective administrative headquarters, where senior management's fundamental planning and decision-making are actually put into practice on an ongoing basis;
- a ban on resort to artificial letterbox firms;
- legislation providing for sustainable company management and the inclusion of all relevant interests.

3.2 European Company – Societas Europaea (SE)

The European Company or Societas Europaea (SE) is a European legal form. It was brought into being by Regulation No. 2157/2001 of the Council of 8 October 2001 and corresponds in many respects to the traditional limited company. The rules of the SE Regulation are supplemented by the national law of the member state in which the relevant SE has its seat. Together with the SE Regulation, a supplementary Directive 2001/86/EC on workers' participation in the SE was adopted, which in Germany has been transposed into national law with the SE Participation Act (SEBG).

In the case of an SE, BLER rights that deviate from the national provisions of workers' participation law are regulated by an agreement between the employee side and the company management. If no agreement can be reached in negotiations on the organisation of BLER a statutory fallback solution comes into play. The SE Directive provides for the formation of an SE works council. This is similar to a European works council, but supersedes it and enjoys additional rights, such as further consultation if the company management does not follow the recommendations made by the employees' side in the course of consultation, as well as the right of access to financial reports, the agendas of supervisory board meetings and all documents presented to the general meeting.

Companies also resort to transforming themselves into an SE if they look likely to reach the workforce thresholds laid down in German law: companies with 501 employees or more must have BLER in the supervisory board, while companies with 2,001 employees or more have to institute parity-based employee representation in the supervisory board. This move enables companies to 'freeze' their current BLER status (no participation or one-third participation). Even in the event of a further increase in the number of employees, beyond the thresholds laid down in German law, no renegotiation is triggered on existing participation rights in the SE.

Hence, once an SE has been established, subsequent changes in the number of employees in Germany basically do not result in changes in employee representation in the company's supervisory or administrative board.

European policymakers should thus commit themselves to

- renegotiation of employee representation at the board at an SE with a new fallback regulation if the number of employees in the relevant member state exceeds the thresholds laid down in the relevant legal provisions. The new fallback regulation is then oriented towards the level of employee participation triggered by the thresholds that have then been exceeded.

3.3 Shareholders' Rights Directive

The EU Shareholders' Rights Directive has to be transposed into national law by June 2019. Its shortcomings from a workers' participation standpoint are already evident, however. It needs to be put back on the European policymaking agenda without delay so that it can be reformed. The legislative process of the implementation act (ARUG II) is currently under way. German transposition, after some delay, is now expected by the end of 2019.

The object of the Shareholders' Rights Directive is to put the shareholders in a stronger position

against the company management. The law thus one-sidedly boosts their (short-term) gain seeking interests. Employee representatives in supervisory boards with BLER, however, are interested in the company's long-term prosperity. This can clearly lead to conflicts of interest between those concerned.

The conflicts become evident in the details. In future, a vote of the shareholders will be mandatory at the general meeting on the remuneration of the board and the supervisory board. There must be a vote on remuneration policy in the event of all substantial changes, but at least every four years. Besides that, a remuneration report must be put to a vote at the annual general meeting. This should contain a comprehensive overview of the remuneration of individual members of the company management, granted or owed by the company and its group entities. Even if the vote at the general meeting is not binding on the supervisory board it can nevertheless exert influence over remuneration policy due to fears of a 'no' vote. The problem is illustrated by the voluntary consultation of the general meeting in the cases of Deutsche Bank and Munich RE.

The Shareholders' Rights Directive harbours the danger that decision-making competences will shift from the codetermined supervisory board to the investors, even if Germany uses its voting rights so that voting there remains at the level of the supervisory board. More competences are being bestowed on the general meeting, especially in the area 'say on pay', which is a prerogative of the supervisory board, even if the latter has the final say on board remuneration. This no doubt corresponds to an Anglo-Saxon notion of corporate governance, but not to the German variety. A creeping erosion of the rights of the codetermined supervisory board must not be permitted.

European policymakers should thus commit themselves to

- strengthening stakeholders' rights on an equal footing;
- no further shift of competences from the supervisory board with employee representation to the general meeting;
- development of an EU framework directive that includes the interests and participation of all societal interest groups and does not take account only of shareholders' interests (Stakeholder directive);
- sustainable corporate governance that gives a higher priority to prospects for jobs, production locations, regions with a good quality of life and workers' participation than to investors' pursuit of short-term profits.

4 CORPORATE SOCIAL RESPONSIBILITY (CSR)

The notion of Corporate Social Responsibility (CSR) encompasses a company's social, environmental and economic contributions to the voluntary acceptance of social responsibility, beyond compliance with statutory provisions.

As early as May 2010 the DGB national conference called on German and European policymakers to adopt mandatory accountability and reporting with regard to the environment, social affairs and human rights, identifying transparency, verifiability, comparability and participation as indispensable criteria for CSR. This should include separate reports on working and employment conditions in the whole company, employees' opportunities for participation, cooperation with employee representatives, support for disadvantaged staff members and reconciliation of work and family life.

In 2014, the European Parliament and the EU member states adopted the CSR directive, extending the reporting obligations of large capital market-oriented companies, credit institutions, financial services institutions and insurance companies. The aim of the directive is primarily to increase transparency concerning environmental and social matters with regard to companies in the EU. Germany has transposed the directive into national law with the CSR Directive Implementation Act.

Under the CSR Directive Implementation Act, from 31 December 2016 onwards, large capital market-oriented firms employing, on an annualised basis, more than 500 workers have to issue a non-financial declaration. This declaration may not be included as part of the financial statement or 'buried' in a separate sustainability report. The auditor only has to ascertain whether the declaration or separate report exists. While the supervisory board has an obligation to ascertain compliance, a substantive external review is not required, although the supervisory board is at liberty to commission one. In this instance the assessment of the findings must be made publically available.

As regards contents, besides a short description of the company's business model, the non-financial declaration must address, at a minimum, environmental, employee and social concerns, as well as respect of human rights and efforts to combat bribery and corruption. The relevant approaches taken by the limited company must be described and their results reported on, and the main risks associated with the company's own business activities or its business relationships, products and services must be noted. Furthermore, non-financial performance indicators of significance for the company's business activities must be presented.

If a company has not developed a strategy in relation to one or more of the abovementioned

matters, it must clearly explain and justify why it has failed to do so in the non-financial declaration, in place of information on the relevant matters.

A description of the company's diversity strategy as it pertains to the composition of the company's management organs must be appended to the declaration.

The directive, however, only lays down an obligation to publish existing strategies; it says nothing about expanding them or even implementing new approaches. Furthermore, works councils or trade unions are not involved in drafting such reports. On top of that, analyses of published reports show that, because of the lack of uniform figures and of a binding list of topics, company reports sometimes vary wildly. Fixed topical areas could foster more uniformity and improve comparability.

European policymakers should thus commit themselves to

- specific CSR reporting on working and employment conditions in the whole company, employees' opportunities for participation, cooperation with employee representatives, efforts to assist disadvantaged groups and reconciliation of work and family life;
- the inclusion of works councils in the analysis of and mandatory reporting on CSR activities in companies;
- a mandatory reporting system concerning compliance with human rights and environmental standards along the supply chain.

5 WORKERS' FINANCIAL PARTICIPATION

In Europe, employees are mainly confined to non-material participation in company decision-making and profits via BLER rights. Material participation takes the form of employees' permanent, contractually regulated shareholding and/or participation in their company's economic success.

Since the early 1990s efforts have been made at European level to support and foster workers' financial participation as a matter of policy. The European Commission has set up two expert groups to identify obstacles to the further extension of workers' financial participation and to promote harmonisation of the legislative framework at European level.

Unfortunately, efforts to harmonise the regulatory framework at European level in the area of workers' financial participation have so far not been particularly successful.

European policymakers should thus commit themselves to

- a framework strategy to facilitate participation models (for example, profit sharing, employee shares, employee savings schemes) and to remove tax barriers in the case of international companies' cross-border participation schemes. Employee remuneration must only be supplemented by the introduction of workers' participation, however, and it must be voluntary.

6 A NEW UNDERSTANDING OF EUROPEAN CORPORATE GOVERNANCE

These days, important issues relevant to national company law and thus also for national corporate governance are regulated at European level.

Freedom of establishment is a cornerstone of the European single market and the EU has thus provided broad scope for its implementation. The regulation of companies' freedom of movement within the EU also affects the issue of corporate governance. EU regulations and directives, such as the Shareholders' Rights Directive, have consequences for national corporate governance because they affect, among other things, the distribution of competences between the supervisory board and the annual general meeting. In light of recent developments the shift in the balance of power in favour of investors and asset managers, such as BlackRock or Cevian, needs to be examined more critically.

Similarly with regard to the directives on digital instruments and procedures in European company law and cross-border transformations, mergers and divisions. The intention is to offer companies the opportunity to settle in the member state, and thus under the aegis of the legal order, of their choice. National regulations and principles of corporate governance, as well as the involvement of notaries in the protection of creditors, workers' participation in the supervisory board and the actual pursuit of economic activities at the company's registered seat are increasingly being called into question by European regulations.

It is high time that certain questions of European company law, as well as shareholders' rights, company transfer of seat or the digitalisation of company foundation ceased to be considered in isolation, and a holistic debate was instigated on European corporate governance. A purely national understanding of corporate governance is no longer adequate in a period in which the EU is issuing key

regulations that undermine national doctrines. There must therefore be a European-level debate on what kind of corporate governance should be sought in the EU. In this context we also need to talk about what tasks, as well as rights and obligations, companies should have in a modern society. Companies are already social actors and have to take responsibility for their workers, but also for the consequences of their business decision-making for society and the environment as a whole. Companies themselves are increasingly becoming social policy actors, in particular where there is little statutory regulation, for example, due to a lack of competences, to some extent in the EU, but also at global level. There must be a discussion on who makes decisions in companies and also who has a justified interest in decision-making. Such actors need legal rights. They include employees and consumers, but also society as a whole for example, when it comes to environmental issues.

The interests of shareholders in company decision-making are already taken into consideration in European law and their right to a voice in company decision-making has been strengthened through the abovementioned Shareholders' Rights Directive. But shareholders are only one group that needs to be involved in company decision-making. A genuinely European corporate governance should be distinguished by the fact that employees, consumers and other social actors are given a voice.

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