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The Future of Employees' Board-Level Representation in The European Union

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Abstract

It can not be said that board-level employee representation is in the centre of attention in the European Union at the moment. Even though there are uncountable studies on how to enhance the EU legislation of board-level representation to ensure the workers participation in the employer's decision-making in spite of the Member States' regulations that vary greatly, there is no sign of such intention at European level at all. Member States without any legislation regarding board-level representation often argue that introducing such participatory rights would become an obstacle to the freedom of establishment and, in addition, would hinder the performance of companies. There is no proof that giving workers the right to participate would have catastrophic results, because Member States with strong participation schemes have strong position in the global and European market. Actually, the global financial and economic crisis proved, that those companies that strengthened participatory rights on board level mitigated the effects of the crisis, avoided redundancies and became profitable.

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1. Introduction

Since the global economic and financial crisis in 2008 was the first major economic challenge for the European Union (EU), it has brought some questions and problems out to the light regarding collective labour law and worker's involvement in companies' decision-making. Can the EU play a significant role in crisis management or

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the Member States need to solve the arising problems on the national level? Is it possible to reduce the negative effects of the crisis – e.g. collective redundancies – through collective labour law regulations and put the Member States' economies on the rise?

The crisis had a direct impact both on employers and employees all over Europe and naturally, after losing their status in the market, employers tended to undermine the mandatory minimum standards for terms and conditions in employment relationships to save costs and to stay 'alive' in the single market.[†] Therefore there could be two outcomes regarding collective labour law institutions such as workers' participation – either they weaken and lose their importance in industrial relationships, since the employees intentionally try to avoid cooperating with them as they mean an obstacle in business life, or right to the contrary, they are strengthened and make companies more efficient and profitable. Now it seems that the latter may come true, but it does not mean necessarily that employees' participation rights are actually on the rise and will be in the future. Even so the EU and the Member States should reconsider the present regulations of board-level employee representation (henceforth BLER), since the crisis has taught us one thing: cooperating with workers instead of confronting with them can enhance the performance of companies in some cases.

2. Connection between the right to information and consultation and the right to participate

Before analysing the present situation of BLER in Europe, we need to see whether the right to information and consultation ensured in the Charter of Fundamental Rights of the European Union (henceforth Charter) means the same as the right to participate, and if not, then whether there is a connection between them.

According to Article 27 of the Charter workers' right to information and consultation is a fundamental social right which means that workers or their representatives must be guaranteed information and consultation in good time and at the appropriate levels within the undertaking. To ensure this right both on national and European level, two important directives came to existence:

- Directive 2002/14/EC on establishing a general framework for informing and consulting employees in the European Community. By implementing this directive, Member States ensure workers' right to information and consultation in the undertakings on national level, and not only for the employees of Community-scale undertakings.
- Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees. This directive provide rules for transnational companies only, hence national undertakings have no obligation to establish works councils or similar structures or procedures.

Even so it must be noted that the right to information and consultation is not a weak version of the right to participate in the employer's decision-making, since the objective of Article 27 of the Charter is not participation, but the protection of workers' interests against the employer who owns a dominant position in situations in which those interests could be substantially affected. The article has two aims: on the one hand workers must be protected in extraordinary situations, such as collective redundancies and transfers of undertakings; on the other hand the EU needs to react to the globalisation of the economy and the problems created by it, such as the rise of transnational companies, mergers of undertakings and transfer of business from one Member State to another, and thus workers are made dependent on decisions taken in other Member States (Bercusson, 2006).

To sum it up, workers only have the right to be informed and consulted as a fundamental social right ensured Europe-wide, but not the right to participate and thus they rarely have the chance to influence the company's decisions and strategies regarding business and industrial relations. For instance, when the employer closes one of its plants based in a Member State, the only right employees have is to know what will happen to them, express their opinion regarding the process and the employer's decision, and suggest a different solution if needed – no more, no

less.

In most cases employees have no actual influence on the company's decision according to the right to information and consultation, since the employer's only obligation is to try considering the suggestions and opinions of the employees. Therefore workers' right to participate in the employer's (company's) decision-making is a completely different matter. Nonetheless, it can not be stated that there is no link between the right to information and consultation and the right to participate at all: participation rights can be regarded as a method of providing employees with information, and also create consultation opportunities, and thus these rights complement each other (Bruun, 2011).

3. Workers' right to participate in decision-making

The phrase workers' participation is used to encompass various forms of workers' participation in decision-making, mostly at the enterprise level. The types of these arrangements differ widely, ranging from co-determination to board-level representation and sometimes the different forms complement each other. In addition not only the forms of participation vary greatly, but the institutions and legislation of workers' participation in the Member States as well. It must be clear that European regulations build on the existing diversity of national laws, and thus – according to the Commission and other EU institutions – harmonisation is out of the question at the moment. That is why even minimum standard provisions can not be found in EU law.

Member States strongly oppose the possibility of changing their national legislation – if there is at all – regarding workers' participation, mainly because of cultural reasons, even if legally enshrined workers' participation represents an expression of socially responsible economic behaviour. On the other hand, in the European Social Model participatory rights for employees are regarded as an essential element of corporate decision-making and as a strength for an inclusive and competitive labour market (Bruun, 2011). It means that BLER is also an essential part of the European democracy, especially if we consider the company as a social grouping, in which the company management and employees work together with a common purpose – mainly to make the company more profitable.

3.1. Board-level employee representation in national legislation

There are different board structures coexisting in Europe, and the structure of the company and the board determines whether there is employee representation, and if there is, then the impact of their actions and whether they have decision-making or counselling right is determined by the board they are in. The already existing board structures are deeply rooted in the country's economic and legal system, and usually the Member States have no intention of modifying these arrangements or introducing a new one, even though the EU acknowledges all forms.

A company either has a one-tier system ('single board' or 'monistic' system), a two-tier system ('dual board') or some kind of mixed system. Depending on the company's board system workers' representatives are on the supervisory board or the board of management. In the first case even though workers' representatives have the same rights as all the other members, the supervisory board does not make decisions regarding the company's life, only judges whether the activity of the management is contrary to the law, the constitution of the company, the resolution of the supreme body, or otherwise infringes the interests of the company [See e.g. the new Hungarian Civil Code. Act V of 2013 on Civil Code, Section 3:124 §], and therefore co-determination is out of the question. Workers' representatives can only inform the workers they represent whether the company works according to the law and whether it infringes their rights claimed by the law. In a one-tier board system it is possible for the workers' representatives to participate in the active management of the company as the members of the board of directors and one would think that they have a great influence on the decision, which is partly true, but regardless of which board the representatives are in, they are bound by the same obligations and thus they are to put the interests of the company first and foremost.

Ensuring BLER is beneficial not only to the workers, but to the company as well, because board composition plays a key role in a company's success. Effective oversight of the executive directors or the management board by the non-executive directors or supervisory boards leads to successful governance of the company. But why is that? The diversity of competences and views among the board's members facilitates understanding of the business organisation and affairs and thus enables the board to challenge the management's decisions objectively and

constructively. It must be concluded that the lack of diversity could lead to less effective oversight of the management board or executive directors [COM(2012) 740 final,]. Hence employees' representation in the supervisory board enhance the control over the board of management and improves the level of protection regarding workers' interests, while workers' participation in the board of management could make the operation of the company more effective and profitable by sharing the employees' ideas and experiences with the executive directors about the market and the risks the company might take.

Because of the different board structures the legislation of Member States regarding BLER varies greatly, but according to the arrangements they can be divided into three groups (Kluge-Stollt-Conchon, 2013):

- There is no legislation for BLER: Belgium, Bulgaria, Cyprus, Estonia, Italy, Latvia, Lithuania, Malta, Romania, the United Kingdom.
- Legislation for BLER is provided, but it is limited to state-owned or privatised companies: Greece, Ireland, Poland, Portugal, Spain.
- Legislation for BLER is provided for private companies, once they have reached a certain size: Austria, Croatia, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Luxembourg, the Netherlands, Norway, Slovakia, Slovenia and Sweden.

In the present paper it is not possible to analyse the national legislations in detail. Even so, there is no doubt that national rules on BLER show high diversity [for differences in national legislation of BLER, see: Fulton (2013)]. According to the practice of the European Court of Justice (ECJ) having so many different arrangements in the EU regarding workers' participation may have unexpected results. Firstly, it is possible that employers see board-level representation as a restriction of the freedom of establishment and thus they will not transfer their seats to Member States with a strong participation scheme. Secondly, some companies might use the freedom of establishment in order to avoid the mandatory rules regarding board-level representation applicable in certain countries. Even though the ECJ has confirmed that companies are to a great extent free to transfer their de facto head office to a Member State at their discretion, it definitely does not allow companies to use this freedom to avoid ensuring BLER rights.

3.2. The possibility of a European-level regulation

To some extent, the EU does have mandatory provisions relating to the Member States in connection with BLER, but only in cross-border relationships. According to Directive 2001/86/EC on SE Company Member States must lay down rules on employee involvement which must satisfy at least the so-called 'standard rules' set out in the Annex of the directive [Article 7]. Naturally, Member States may have different legislation, but it can not result in a weaker participation system than set out in the directive. These standard rules are applicable in the Member State in which the registered office of the SE is to be situated. Noticeably, in case of a transfer of the registered office the management shall draw up a transfer proposal which shall cover – besides many other issues – the implication the transfer may have on employees' involvement. In the process of the transfer the management of the SE is free to determine which arrangement of the employee involvement will be applied after the transfer – the one regulated in the legislation of the Member State of the previous seat or the arrangement and standard rules of the Member State of the new seat. Clearly, the management of the SE have a choice, because each Member State shall have at least standard rules in case the Member State of the new seat has no legislation regarding BLER at all.

Besides setting standard rules for employee participation on board level, the Directive on SE has another remarkable provision. The directive offers a precise definition of participation which is completely different to the involvement of employees. The latter means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be taken within the company [Article 2 (h)]. Therefore employees' involvement means not only the right to information and consultation – which is regulated in the EU by Directive 2002/14/EC on establishing a general framework for informing and consulting employees –, but includes the right to participate as well. In the application of the directive participation means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by ensuring either 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

mentioned organs of the company [Article 2 (k)].

By defining these two phenomons, the EU recognised the right to participation, at least on board level. In addition it can be considered as the first step to the Europeanisation of BLER. Even if some observers conclude that the implementation of the SE statute has no significant effect, it can be the starting point of a possible legislation of minimum standard requirements regarding national rules on BLER that is applicable to national companies as well, not only in case of establishing or transferring an SE, but, even if they do not have cross-border operations. Board-level employee representatives in the SE shall defend the common interest of all employees, even if they are in other Member States, thus the SE directive presents one of the most important elements of European democracy and the European Social Model. In addition, the employees of an SE located in a Member State without national BLER rights must be covered by the specific SE arrangements on participation, thus later the legislation can take a turn towards the spreading of BLER rights in the EU. The same seems to happen with works councils and similar structures, since by implementing the Directive 2009/38/EC on European Works Councils (EWC), community-scale undertakings shall establish either an employee information and consultation procedure, or a European Works Council. In the latter case each Member State needed to adopt subsidiary requirements that set out minimum standards.

It is clear that the legislator is quite careful and thus has a tendency to only set the minimum standards for workers' participation regardless – as it is seen in the Directive on EWC – to avoid the opposition of countries in which there is no legislation regarding workers' participatory rights. Later, as the effect of the minimum standards of the Directive on SE, ensuring BLER rights might not be an extraordinary phenomenon anymore, and then the legislator will be able to move on to make more strict rules that has to be applied even by companies without cross-border operations.

It is necessary to move forward on this road, because it should not be forgotten, that the EU is not only an economic community, but a social one as well, and sometimes the social aims are more important – or at least that should be the case. Even more so since, by considering social factors, ensuring workers' social rights and making a decision together with the employees, companies may become more profitable and efficient in the competition compared to those that disregards the workers' point of view on an important issue, such as risk management. If the legislator wants to make the EU into one of the most dynamic and competitive economic area in the world, highly qualified workers are needed to be committed to their company. Together with good profitability BLER rights help to bind skilled workers to the undertaking (Kluge-Wilke, 2007). One way to achieve that is to make them interested in the business of their employer by letting them take part in the decision-making and make them feel as if the company's problems are their problems, and the company's success is their success.

Granting BLER rights to workers will help shape their working and living conditions, and the employer's business will become more effective by cooperating with the employees, and the employer will not need to confront with them and deal with the market competition at the same time. It must be understood that BLER is not a competitive disadvantage to the companies. There were attempts to prove that ensuring workers' participation has a negative effect on the company's results in the competing market in contrast to employers without such schemes, but these attempts have failed, since empirical studies do not show any evidence of a correlation between BLER and the performance of the companies [see e.g. Report of the Reflection Group On the Future of EU Company Law (2011)]. For instance, in Germany the strong participatory rights do not hinder foreign direct investment and only a few companies avoid transferring into Germany because of the board-level representation. Actually countries with strict rules on BLER have a strong position in world and EU markets, such as Germany or the Nordic countries. The economic performance of these Member States does not justify the argument that abandoning BLER rights would enhance productivity. The truth is that empirically it has not been proved that Member States without any BLER rights fare comparatively better either – even though the United Kingdom (UK) has no legislation regarding workers' right to participate on board level at all, economically it is one of the strongest Member State in the EU and companies stated in the UK are important actors in the single market. Mainly this is the reason why the Reflection Group on the future of EU Company Law stated that BLER is basically not an economic related question, but rather an issue of a consciously taken political choice which must be respected. According to the report of the Reflection Group the EU should be neutral to Member States' systems on the condition that this does not contradict principles and freedoms of the internal market. If the European legislator finds that there is such a system, necessary steps shall be taken to provide for a discrimination-free regulation on the Member States' level.

The Reflection Group disregarded an important matter: employee participation forms are a main element of the social policy of the EU. It is important to strengthen the social dialogue in every possible way to promote mutual trust within the undertakings in order to improve risk anticipation and make work organisation more flexible [Directive 2002/14/EC Preamble (7)] which can increase the competitiveness of the company. In my opinion, introducing BLER rights is one of the most effective way to ensure social dialogue between the employer and the employees, because if the employer has to make a decision together with the employees instead of only having a possibility to start a dialogue without any legal obligation, it is a guarantee for workers that their social interests and rights will not be intrigued or disregarded. As it was stated above, the ECJ has found that companies often use business transfer as a mean to avoid applying BLER schemes, so it is clear that some kind of minimum standard legislation is needed which binds all companies in the EU equally and stops this tendency of avoiding BLER rights.

4. The effect of the global financial and economic crisis

The global financial and economic crisis caused an increase of the competition in the market. Employers can be divided into two groups according to the measures they have undertaken in order to raise productivity. The first group started to cut costs and decided on collective redundancies, thus there was a radical increase of unemployment rates in all Member States. The other group learned the lesson the crisis taught us: they opened the possibility for employees to take part in the employers' decision-making and started a healthy argument on risk management and working conditions in order to achieve profitability again.

Therefore the EU should learn from the crisis' effect on companies behaviour towards BLER rights and start to establish a legislation to ensure at least minimum standards for employees regarding participatory rights on board level, since such processes are frequently used tools during periods of crisis. Then why not use it to avoid such crisis or to mitigate a future crisis in advance?

5. Conclusion

In my opinion after the global financial and economic crisis EU legislation on BLER rights both on national and European level should be improved to avoid the negative effects of a future crisis and to let the employers and employees start a conversation in order to enhance profitability and risk management. There is no need to harmonise the Member States' legislation as the EU is founded on the respect of cultural diversity. Even so, setting some minimum standards would definitely improve the European social policy, the employees' working conditions and enhance the companies' growth and competitiveness. At least in those Member States that has no legislation regarding BLER, some kind of regulation is needed to complement other participatory structures and to avoid the possibility that in some countries workers will not be protected. That would be an obstacle to the freedom of movement for workers. And last, but not least, giving employers and employees the chance to start a dialogue and make decisions that respect the interests of both parties would lessen the need for the state and the EU to interfere in order to protect the mentioned interests. All in all, strengthening the present legislation of BLER rights would make the single market and its actors more efficient, and would protect workers at the same time.

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