



ETUC Resolution on workers participation at risk: towards better employee involvement

Adopted at the Executive Committee in Brussels of 7-8 December 2011

The mandate of the ETUC Congress

1. The “Strategy and Action Plan”, as adopted by the 12th ETUC Congress, specifies that “**worker participation is a key component of good jobs**” and the “**right to participation is a fundamental right in Europe**”. The Athens ETUC Congress 2011 upheld that it is necessary “*to establish a European basic standard*” while respecting different national traditions of workers’ involvement¹.
2. The Congress has given a clear mandate to the ETUC secretariat to fight for stronger rights: “*There should be a strengthening of worker voice through stronger rights for information and consultation and, in those Member States where such rights exist, a stronger right of representation for workers on company boards. There should be also more worker and other stakeholder participation and a new paradigm for corporate governance ... in which the European Works Councils must play a fundamental role.*”
3. Furthermore, the ETUC Congress demanded “**European minimum standards for worker participation** in order to strengthen the implementation of worker information and consultation rights in the EU and to confirm that the EU respects and promotes different forms of board-level representation in European legal entities like SE, SCE and SPE and in the Member States where such systems exist.”
4. The ETUC Congress demanded “**that a legislative general framework instrument be developed to achieve better coherence in the rules on worker participation for SE and SCE companies**”. This strengthening of rights concerns all existing, pending and upcoming legislation on company law, in particular on the European Company (SE), the European Cooperative Society (SCE), the European Private Company (Societas Privata Europaea; SPE): “All the legal forms of company entity at the EU level (SE, SCE, and pending SPE) must be **subject to binding regulations on worker participation in company boards** and on information and consultation with worker representatives regarding cross-border issues”.
5. A strengthening of worker rights of information, consultation and participation is key. The Strategy and Action Plan stipulated: “**The rights of information, consultation and participation in restructuring and change of ownership situations must be improved to ensure adequate ‘voice’ for workers and opportunities for trade unions to**

¹ The term employee involvement includes 1) information (one-way communication from management/employer), 2) consultation (two-way communication between management and workers’ representatives) and 3) participation (board level representation).

negotiate fair solutions on their behalf.” This process should take place “in a context of upward harmonisation”.

6. These commitments of the Athens Congress in favour of a new model of corporate governance and stronger rights are not easy to fulfil, but quite a challenge for the ETUC secretariat. However, it can build on work done in the ETUC Workers’ participation group.

Introduction

7. The main reason for this resolution is to identify potential risks and attacks on workers involvement and to propose action to counter these developments. On the agenda of “Work Programme 2012” of the Commission published on 15 November 2011 features the revision of the Directive 2001/86/EC on **employee involvement in the European Company**: “The initiative would aim to bring about *simplification*”. The objective would be to assess “whether the reasons for the smaller-than-expected number of SEs established to date is linked to the mechanisms laid out in the Directive or the Regulation and the extent to which a simplification of such mechanisms could be justified”. The “main problems” which this initiative intends to address are “in particular the rules on employee involvement”, “the scope of the ‘before and after’ principle”, “double requirements when a European Works Council already exists”. The question is “the extent to which a simplification of such mechanisms could be justified”. The timetable of the roadmap announces a second phase consultation of social partners in the first quarter of 2012. If Social partners do not decide to enter into negotiations following the second phase consultation, the proposal could be presented in the third quarter of 2012.
8. The second roadmap is on the **Statute for a European Company (SE)**: the Commission is reflecting on possible amendments to the SE-Statute in view of legislative proposals in 2013. As “problems” are identified: the lack of uniformity of the SE legal form across the EU, the high degree of complexity, a high minimum capital, the obligation to have the registered office and the head office in the same Member State, the SE’s employee involvement rules, the activation of shelf SEs. The Commission considers the “review” in parallel to the outcome of the ongoing negotiations on the SPE-Statute. The main policy objective would be “to modernise, *streamline* and make more effective and attractive the operation of the SE”. From the Commission point of view, the option to address the problems would bring “more advantages to enterprises” and would “entail *simplification* and reduction of administrative burdens”. The ETUC will not accept that workers involvement is sacrificed on the altar of the “better regulation”- or an highly ideological internal market agenda.
9. The third roadmap schedules a consultation on the Revision of Directive 2003/72/EC on **involvement of employees in the European Cooperative Society** in the 1st quarter 2012 and a second phase either in the 4th quarter 2012 or if social partners do not decide to enter into negotiations in 2013. The objective is to assess whether

existing arrangements on employee involvement “may be considered responsible for a very small take up of this legal framework and identify any feasible possibilities for *simplification*”. Both issues are dealt with under the premises of the better regulation agenda, the new codeword being “*simplification*”.

10. In the field of company law, the guiding principle anchored in the SE and SCE Directives (recital 3), according to which companies are not allowed to make use of European legislation so as to reduce or circumvent existing national participation rights, is losing ground. Provisions related to the negotiation of board-level employee representation in the cross-border merger (CBM) Directive already presented a cutting back compared to the SE pattern. A similar assessment could be drawn about the proposal for a European Private Company (SPE) and doubts are legitimate as regards the forthcoming proposal related to the cross-border transfer of companies' registered office. While national and European rights of information and consultation remain untouched in the CBM Directive and projects for the SPE statute and the cross-border transfer of registered seat, existing rights for board-level employee representation are under big pressure.

Addressing the failures of corporate governance

11. The current discussion on the global economic and financial crisis focuses mainly on financial and monetary issues. However, the failures of corporate governance in controlling risks and in promoting sustainable corporate decision making are still unresolved. The shareholder value paradigm has dominated policy debates and company law for more than two decades in Europe and much of the rest of the world. This shareholder short-termism model is one of the major causes of the crisis. It creates powerful incentives to create shareholder value by externalising costs onto society; it favours excessive risk-taking and myopic management decisions by insisting that shareholder value ought to be the only goal pursued by corporate management. Questions must be raised how the flawed basic assumptions of the model, that stock markets are the best yardstick for company value and share-based remuneration the most efficient way to reward top management, can be directed in a more long-term and sustainable way of corporate governance.
12. For the ETUC, the answer to shareholder economy and short-termism is to safeguard and develop employee involvement rights and practice in all kind of companies. The lesson of the crisis is to develop workers' involvement on all levels. A stronger participation of workers in strategic business decisions which are often taken at European or global level is necessary and the current crisis must be considered as opportunity to strengthen worker involvement to strengthen the long-term viability and sustainability of companies. A company is a social organisation with cooperating parties and conflicting interests. A corporate law that gives control rights by default exclusively to shareholder exposes executives to strong pressure to maximise returns to shareholders in the short term. Managerial autonomy is one of the mechanisms to govern an enterprise in the interest of all stakeholders.

13. The question of industrial or social democracy is a key question of the 21st century and the future of Europe. If the European integration continues to be perceived as doing damage to Social Europe, as stirring Europe in permanent austerity governance, it will generate an unprecedented anti-European backlash in many Member States. Today, there is already a negative shift in public opinion towards the Internal Market: 62% believe the Internal Market only benefits big companies; 58% think that it has flooded the Member States with cheap labour (Special Eurobarometer 363). From an ETUC perspective, it is essential that there is light at the end of the tunnel. The financial crisis led to a power shift from democracy towards financial industry. It is time to shift it back: The way must be paved for a new era of more democracy at the workplace, stronger industrial policy, and stronger workers' participation rights. This objective is an ambitious one and will not be reached within a few months but it should be possible to introduce a new momentum into these developments. And the ETUC believes that there is a strong momentum for strengthening workers participation in Europe.

14. The SE-Directive has set a political precedent. For the European Company Statute (Societas Europaea, henceforth: SE) a historic compromise around the involvement of workers was found after 30 years of discussions and negotiations. The ETUC considers this compromise as the benchmark for any EU legislation touching upon board level representation and a step towards a European minimum standard on participation rights which now has to be taken as basis for a deepening and an extension of those rights, for promoting board level representation in the 16 EU Member States where such systems exist (AT, CZ, DE, DK, ES, FI, FR, GR, HU, IE, LU, NL, (NO,) PT, SE, SI, SK) and in European legal entities. Employee involvement in the decision making process at company level is a central component of the European social model.

15. The EU has adopted a rather disjointed *acquis* concerning employee involvement. It presupposes existing national systems of employee involvement. Currently, in Poland for instance the system of board level representation is being abolished which sets a major backlash. What is needed is common requirements for employee involvement.

Activities on European level and next steps for the ETUC

16. In June 2011, the ETUC responded to the European Commission consultation on the results of a study on the implementation of the Statute for a European Cooperative Society (Societas Cooperative Europaea, SCE). In July 2011, the ETUC gave its response to the European Commission Green Paper on "The EU corporate governance framework", which has neglected the benefits of European Works Councils, International Framework Agreements and board-level employee representation in reorienting the way companies are governed towards a longer-term and more sustainable perspective. Reports on both issues are under discussion in the European Parliament (EP) and scheduled for adoption in February respectively March 2012. The ETUC has to make sure that the compromise on workers' involvement in the SCE will not be questioned and that some general conclusions on the promotion of workers' involvement will be supported by the EP.

17. In the European Parliament, an own initiative report on the 14th Directive on transfer of seats is under discussion and scheduled for approval by the EP Plenary in February 2012. The discussions on the proposed SPE Statute have further highlighted the need to ensure that businesses do not abuse the opportunities offered by the internal market to evade their legal obligations that would otherwise be applicable under national law. Accordingly, the ETUC is renewing its call for an open debate on a **14th Company Law Directive on cross-border transfers of registered offices**, based on the minimum requirements on workers involvement anchored in the SE-Directive and with a view to preventing the establishment of 'letterbox' companies. Such an initiative is an essential prerequisite to any further development of European company law, including in particular the adoption of the SPE Statute. The ETUC will monitor closely the developments and try to make sure that the reference point will be the minimum standard anchored in the SE.

18. On November 15, the European Commission published the results of the consultation on corporate governance ("feedback statement") and intends now to combine it with the company law stream. It is not clear in which direction the Commission will go, but it seems that harmonisation and flexibility are still high on the agenda. It must be clear for the Commission that workers' right to information and consultation within the undertaking is considered a fundamental right according to Article 27 of the EU Charter of Fundamental Rights (CFREU) guaranteeing the "worker's right to information and consultation in the undertaking". The Commission, has not only to respect but also to promote these rights (Article 51(1) CFREU). Article 152 TFEU which has been introduced by the Lisbon Treaty as the main improvement in the Social policy Title requires the Union (and its institutions) to promote the role of Social Partners at EU level and to "facilitate dialogue between the social partners, respecting their autonomy". Against this legal background, in particular the Commission is obliged to do all it can to improve the information, consultation and participation at the appropriate levels. Further, the EU should, according to the Treaty, support and complement the activities of the Member States in this field and may to that end adopt minimum directives (Article 153 TFEU). The ETUC must stress these facts and try to convince the Commission that strengthening of employees' involvement is a step in the direction of less short-termism and less shareholder value, more stakeholder value and sustainability, in short: it would be a step towards a sustainable company. The Commission shouldn't look at companies as money-machines seeking the highest returns from global markets.

19. The Commission must understand that the compromise found for the SE is a yardstick and that it was wrong not to respect this minimum standard in the cross-border mergers directive and the proposed SPE, both representing backward steps compared to the SE provisions. The Commission must come back on these and further issues: Problems with shelf SEs must be tackled and the question of employment growth as "structural change" which makes it necessary to renegotiate the participation rights. Forms of escape from co-determination (e.g. by choosing a legal statute provided by another Member states, such as the British public limited company statute) should no longer be possible; existing loopholes and bypass strategies must be addressed and tackled. The Treaty is clear on this issue and explicitly asks to "support and complement" and thus prevent circumvention of co-determination and other forms of

workers participation: “With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields: (e) the information and consultation of workers; (f) representation and collective defence of the interests of workers and employers, including co-determination (Article 153)”.

20. It is not acceptable that the European Commission does not respect the minimum standard of worker participation as anchored in the SE and tries to dilute it further. The first step backward was done with the Directive on cross-border mergers, the next with the European Private Company. The ETUC asks for the minimum standard of the SE being generalised to all other legal forms, the European Private Company, the cross-border mergers and the forthcoming 14th Directive on the transfer of seat. There is a real and unique chance to do some steps to extend this minimum standard on participation rights. Once the SE-provisions on workers participation established as minimum standard, there will be less ambiguity about the Commission position on workers involvement.
21. The ETUC is strongly opposed to the Commission’s proposal for a **European Private Company Statute**. Whilst the ETUC encourages initiatives that improve market conditions for businesses and welcomes any proposals designed to improve the market performance of SMEs, it is adamant that the flexibility of SMEs must not be enhanced to the detriment of workers’ rights to sit on the Boards of their companies. It is crucial that the SPE Statute be accompanied by rules governing minimum standards on workers’ involvement. It is also essential that the SPE does not put national legal forms – and the participation rights that are attached to it – under pressure. A cross border dimension and minimum capital requirements are therefore essential prerequisite to the establishment of an SPE.
22. Overall, the ETUC recommends **a more sustainable approach in relation to workers involvement in European company law**. As business is increasingly becoming global, the Union must reflect if and how a streamlining at European level of the provisions on employees’ involvement can be achieved. Such reflection should not be geared towards downsizing existing national provisions but rather to see how the Union can promote competitive and socially responsible European company forms. The ETUC calls on the Presidency to stimulate such a debate.
23. Following an initial discussion at the Executive Committee, the next steps could include to lobby the European institutions to come forwards with an agenda to promote workers’ participation and to deepen the internal discussion by consulting our experts on other aspects of employee involvement rights like questions of international framework agreements and financial participation. The follow up of the congress should include a conference to discuss and present the ETUC proposals.
24. This work should be done in view of going from a defensive to a more offensive strategy. Until now, the ETUC strategy has been to fight for European Company law respecting national choices for employees’ involvement. The rules of financial capitalism are global, yet, the applicable standards on workers’ participation are still shaped at national level. With ongoing globalisation it is becoming more and more

difficult to defend subsidiarity approaches defending national provisions. As business goes global and ignores national boundaries, a rethinking of the role of workers' involvement in companies can only be meaningful at European level. The aim would be to provide the European Commission, the Council and the European Parliament with an elaborated ETUC proposal for European standards for employee involvement. This standard should help prevent that registration and localization of the company seat can be organised with a view to avoid workers' participation. A good starting point for this work is the fact that employee influence is now a fundamental right under the Treaty (TFEU).