

ETUC Position on a new EU framework on information, consultation and board-level representation for European company forms and for companies making use of EU company law instruments enabling company mobility
Adopted at the Executive Committee of 9-10 December 2020

Key messages

- Democracy at work is vital to get through the current social, economic and health crisis and to build a responsible and sustainable recovery for all.
- The ETUC insists that EU law must ensure that information and consultation about transnational issues takes place before central management takes decisions that have cross-border implications. This information and consultation process must be linked to information, consultation and negotiation processes at national level.
- This right of involvement of employees is equally relevant when companies re-order their legal architecture across borders, because such legal restructuring also has important implications for workers' rights under national law.
- With respect to workers' board-level worker representation, the 'escalator'¹ approach proposed as a fallback or subsidiary solution, would trigger companies to open negotiations with the workforce in order to reach an agreement on workers' board-level representation in the companies seeking to take advantage of EU company mobility provisions.
- ETUC efforts to strengthen board-level representation for European company forms and companies which make use of EU company mobility instruments should be accompanied by a reinforcement of information and consultation rights.
- The ETUC is strongly committed to securing gender equality and diversity in the supervisory board of corporations and is demanding binding legislative measures at European level for gender balance in company boards.
- The new EU framework should be a new "additional" legal instrument which has a horizontal effect in setting standards for workers' involvement. Alternatively, or in combination, it could be a legal instrument putting forward changes to the Directive on cross-border conversions, divisions and mergers, as well as the legal frameworks for SEs and European cooperatives frameworks or a combination or both.
- A new framework should be accompanied by renewed efforts to introduce the necessary improvements to the legal framework on European Works Councils.

¹ ETUC position paper - Orientation for a new EU framework on information, consultation and board-level representation rights: [ETUC position paper - Orientation for a new EU framework on information, consultation and board-level representation rights | ETUC](#)

The ETUC position on a new EU framework on information, consultation and board level representation builds upon the objectives and the priorities defined in the ETUC Action Programme 2019-2023, approved at the Vienna Congress, as well as on the previous ETUC position².

The ETUC position confirms and steps up its effort to call for more democracy at work, as a key priority for the European trade union movement. Democracy at work has become all the more relevant in the light of this unprecedented pandemic, as companies strive to adapt to the shifting demands of policymakers and markets to address the health, social and economic crisis. The pandemic has subjected some workers to repeated lockdowns and layoffs, while others have worked more than ever. The crisis has exacerbated existing inequalities, and workers have experienced wide-ranging transformations of the way they work and massive restructuring processes³.

It is crucial to ensure that all these changes and challenges are addressed in a socially responsible manner and in full compliance with workers' rights. It must be guaranteed that workers' rights to information, consultation and participation have been fully complied with before any management decisions that have consequences on employment or working conditions are taken. Where restructurings are planned, unions and workers' representatives must have access to the expertise necessary to engage with possible alternatives to management's proposals. It is equally important to ensure the full involvement of workers' board-level representatives in discussions and decisions on any planned restructuring. Taken together, all these forms of workers' involvement should underpin, and should lead to a meaningful consultation with management and with public authorities on the different options and alternatives in order to ensure that any restructuring is carried out in a socially responsible manner, seeking especially to avoid adverse consequences, including redundancies.

Democracy at work is vital to build a responsible and sustainable recovery for all. The actions to reinforce workers' information, consultation and participation rights should be embedded in a comprehensive trade union strategy for the recovery from the pandemic crisis. The EU should therefore engage in a reform of the EU legislation on workers' involvement via information and consultation, and board-level representation, for European company forms (such as SEs, SCEs) and for companies making use of EU company law instruments enabling company mobility (e.g. cross-border conversions, mergers, divisions, etc.) and to improve workers' involvement at the workplace and in restructuring processes; workers should have a greater say regarding the organisation and the choices of their companies that impact their work. These rights should be linked with trade union objectives and priorities on the 'Next Generation EU' instrument, on the European Green Deal and to the implementation of the European Pillar of Social Rights, the Industrial Strategy, amongst other.

Multinational companies have many reasons to adjust their legal structures of ownership and control across borders. They may seek to align their structures to their strategy, or they may need to comply with regulatory requirements. But such legal changes might also mean that certain national company law provisions no longer apply, which in turn could mean changes to workers' rights in that company. It is therefore very important that the ETUC continue to closely

² ibid

³ Eurofound is monitoring restructuring through the European Monitoring Centre on Change: <https://www.eurofound.europa.eu/observatories/emcc/european-restructuring-monitor>

monitor company law, with a view to ensuring that workers' rights are not undermined by cross-border corporate legal restructuring.

Despite strong advocacy by the ETUC and the European Parliament, the 2019 Company Law Package failed to adequately define a high European standard for information, consultation and workers' board-level representation in cases where companies restructure across borders. Several loopholes and inconsistencies remain or even have been newly created in the new legal package. These suboptimal legislative outcomes have further underscored the need to better define the ETUC proposal for a horizontal framework for information, consultation and board-level representation rights, since it is the aim of this horizontal framework to permanently secure a high standard of rights in cross-border situations where national laws cannot be applied in a coordinated and equitable way.

Furthermore, the ETUC is strongly convinced of the need to ensure full respect of the information and consultation rights of public sector workers to effectively involve them in the decision-making process on how public services are organised and delivered. Building upon the Emergency Motion in support of Social Partner Agreement on Information and Consultation Rights for Workers in Central Government approved at the last ETUC Congress, the ETUC continues to demand that the Commission should propose and adopt a Directive reflecting the Social Partners' agreement ensuring that trade union representatives in public administration have information and consultation rights.

This position has been developed across several meetings of the relevant ETUC permanent committees, in particular in the Workers' Participation and Company Policy Committee and the Labour Law and Internal Market Legislation Committee, as well as in the framework of the new ETUC project on More Democracy at Work. It is the result of these fruitful and forward-looking exchanges with the ETUC affiliates⁴.

Scope

As outlined in the 2019-2023 ETUC Action Programme and in the previous ETUC position, **the scope for a new horizontal framework for information, consultation and board-level representation should address European company forms and (private or public-owned) companies making use of EU company mobility instruments** (including cross-border conversions, mergers and divisions). **The framework would not seek to modify the 2002/14 Directive establishing a general framework for informing and consulting employees in the European Community.**

Information and consultation

Full and timely transnational information and meaningful consultation before a decision is taken on the cross-border legal restructuring process⁵: it is necessary to ensure that an

⁴ [EESC opinion on Industrial transition towards a green and digital European economy: regulatory requirements and the role of social partners and civil society](https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/industrial-transition-towards-green-and-digital-european-economy-regulatory-requirements-and-role-social-partners-and-civil-society): <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/industrial-transition-towards-green-and-digital-european-economy-regulatory-requirements-and-role-social-partners-and-civil-society>
EESC opinion Social dialogue as an important pillar of economic sustainability and the resilience of economies taking into account the influence of lively public debate in the Member States: <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/social-dialogue-important-pillar-economic-sustainability-and-resilience-economies-taking-account-influence-lively-public-and-eesc-study>
An EU legal framework on safeguarding and strengthening workers' information, consultation and participation: <https://www.eesc.europa.eu/de/our-work/publications-other-work/publications/eu-legal-framework-safeguarding-and-strengthening-workers-information-consultation-and-participation>

⁵ Cross-border legal restructuring stands for forms of cross-border corporate restructuring leading to changes in the legal form of companies

adequate, comprehensive, and in-depth information and consultation process takes place at all affected levels of the company before the decision to restructure has been finalised. Workers' representatives need to be given the necessary information in good time about the envisaged changes in the company structure and organisation, the reasons for and objectives of the cross-border legal restructuring and on any potential impacts on employment and working conditions across the company.

Workers' representatives need to have the **necessary resources and time** to study the information and to form an opinion, and to be consulted and receive a reasoned reply to their opinion. **They should have access to the expertise needed to assess the implications of the cross-border legal restructuring processes.** Workers' representatives and trade unions must have **access to the relevant authorities where there are grounds to suspect that the cross-border legal restructuring process might lead to an artificial arrangement or might be designed to abuse or to limit workers' rights and worsen their working conditions.** The instrument will need to include the **most updated and effective definitions for workers' information and consultation** (in line with the trade union proposals in the Company Law Package), as well as – if relevant – an **effective definition of a legal restructuring process with cross-border dimension/implications.** Effective measures to **prevent abuses of confidentiality** should be taken.

Effective links between the different levels of (and the different instruments for) information and consultation: the framework needs to provide the **necessary resources and time for the full involvement and procedural interlinkage between the different levels (national and transnational) and, where relevant, instruments (e.g., transfer of undertakings, collective redundancies, insolvency, etc.) for workers' information and consultation.** The instrument should also ensure that workers' representatives receive comprehensive information on companies' supply and subcontracting chains and appropriate linkage and mechanisms for the **involvement of workers of companies in supply/subcontracting chains that might be affected by the cross-border legal restructuring process should also be considered.**

Transnational body for information and consultation rights in any new transnational company resulting from the cross-border legal restructuring process: it is essential to ensure that **negotiations with the workforce are opened for the creation of a transnational body for information and consultation in any new transnational company resulting from a cross-border legal reorganisation.**

Enforcement and access to justice are key. This is an area where **improvements are urgently needed at European level. Sanctions for non-compliance should be effective and dissuasive, thus should ensure that decisions and restructuring processes taken without full respect of workers' information and consultation rights are null and void.** The framework should also include instruments and mechanisms to ensure **access to justice** for the transnational body for information and consultation in the event of a violation of workers' rights.

Board-level representation

Legal acts

Several European legal acts deal with workers' board-level representation rights. Those acts include important shortcomings and loopholes. Most importantly, they do not establish minimum requirements for board-level representation for European company forms and for companies making use of EU company law instruments enabling company mobility but are based on the before-after principle and – under certain conditions – the safeguarding of board-level

representation rights for a limited period of time. In order to ameliorate the situation for the workforces of companies taking EU company law forms and using EU company law instruments to restructure their legal architecture across borders, **improvements are necessary in the frameworks regulating SEs and European Cooperative Societies, as well as in the Company Law Package.**

This position is part of an assessment of possible avenues for strengthening “Europeanisation⁶” of board-level representation, as ways to establish European minimum standards for workers’ board-level representation rights, which do not exist yet. The ETUC recognises the need to establish European minimum standards for workers’ board-level representation rights for European company forms and for companies making use of EU company law instruments enabling company mobility. Such a European minimum standard does not yet exist; instead, in this area, the provisions of the European Company Statute and the other relevant legislative acts such as those regulating cross-border mergers, divisions and conversions, merely extend sometimes very different national rules into the European regulatory space following the logic of the before-after-principle: this before-and-after principle which relies on perpetuating individual national standards results in a patchwork of different standards existing next to one another in the European space. Applying a before-and-after principle without any alignment is thus not an appropriate European standard setting principle. This situation causes unequal treatment of workers and creates an uneven playing field for companies. It is thus contrary to the spirit of the European Treaties and of the Charter of Fundamental Rights of the European Union.

Escalator

To remedy this situation and to foster the development of a genuinely European standard, the escalator approach adopted by the ETUC Executive Committee⁷ is a fallback or subsidiary solution. It would apply to all the companies included in the scope of the horizontal framework, i.e., European company forms and for companies making use of EU company law instruments enabling company mobility (regardless of workers’ board-level representation rights in the company prior to the application of the horizontal framework Directive). **It would oblige companies to open negotiations with the workforce in order to reach an agreement on workers’ board-level representation in all transnational companies resulting from cross-border legal restructuring.** The new framework would therefore introduce **a right for workers to put in place a system for workers’ representation in the board.** This can either be the board of directors or board of management (for one-tier systems) or supervisory board (for two-tier systems). If an agreement is not reached within the time-limit defined in the horizontal framework for the negotiations with the company management, subsidiary provisions would apply, including the escalator approach. New negotiations should start automatically in case a threshold is reached after the cross-border legal restructuring.

The escalator approach foresees a lower proportion of workers in boards for small enterprises. This proportion would increase depending on the size of the company (both for the monistic and the dualistic systems) as follows:

- small companies with 50 to 250 employees (within the company and its direct or indirect subsidiaries) should have 2 or 3 workers’ representatives.
- companies with 250 to 1,000 employees (within the company and its direct or indirect subsidiaries) one third of a board consisting of at least nine board members should be employee representatives.

⁶ There are two dimensions of Europeanisation which are relevant here. The first is that in line with closer European integration, the ETUC welcomes that the composition of worker board-level representation in multinational companies which apply EU legislation serves to reflect the multinational character of their workforce. The second one is the one the position addresses whereby there is the need to establish European minimum standards for workers’ board-level representation rights.

⁷ see footnote 1

- big companies with more than 1000 employees (within the company and its direct or indirect subsidiaries) employee representatives should have parity (half of the seats) on the board.

Many shortcomings in the EU framework would be overcome with the introduction of the escalator approach. In this framework, it would not be necessary to introduce a dynamic element in the legal framework, to address the shortcomings in the before-after principle. Such a dynamic element would however be needed in the absence of the escalator (as a second-best option). However, **other loopholes and shortcomings in the existing legal frameworks would need to be addressed**, including

- workers' board-level representation rights should be safeguarded without any time limit and
- certain limitations currently foreseen in the legal framework should be eliminated.

The ETUC will explore ways to a Europeanisation of the different systems for the appointment or election of workers' board-level representatives based on the provisions of the SE Directive (2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees). As laid down in the SE Directive, any workers' board-level representative "shall be a full member with the same rights and obligations as the members representing the shareholders, including the right to vote". These rights should be linked with strong trade union representation.

The provisions regarding **confidentiality** requirements and measures to **prevent the abuse of confidentiality** rules should be clarified with regard to board-level representation.

The adequate **protection of workers' representatives** from reprisals needs to be introduced as well, with reference to relevant international standards and of the European Social Charter's provisions and interpretation by the ECSR.

The **right to appropriate and specific training** for workers' board-level representatives and to **paid release from duty** for such training should be defined.

Strengthening the capacities and rights for board-level representation in European company forms and companies which make use of EU company mobility instruments, steps forward must always be accompanied by a reinforcement of information and consultation rights throughout the company. In particular, when board-level representation is established, a **transnational body for information and consultation** rights in the company resulting from the cross-border legal restructuring process should also be created with a negotiations mechanism similar to the SE Works Council foreseen in the SE Directive.

Gender and diversity in boards

The ETUC is strongly committed to secure gender equality and diversity in the supervisory and administrative boards of corporations and demands **binding legislative measures at European level for gender balance in company boards and a coherent comprehensive approach**⁸. With regard to the composition of company boards, gender balance should be ensured, and where possible supportive of diversity. Initiatives in this area should be considered,

⁸ See: ETUC Resolution adopted 23 September 2020: Enhancing gender balance in company boardrooms (<https://www.etuc.org/en/document/enhancing-gender-balance-company-boardrooms-etuc-resolution>). The resolution requires the application of a 40% gender quota to both non-executive and executive boards (independently considered), both in private and public-owned companies, with progressive adaptation of the national legislation necessary. This includes medium-sized companies, while foreseeing a transition period for SMEs to adapt the changes where necessary. It calls for transparent selection procedures, including women from diverse backgrounds and life experiences. The ETUC also sees the need for providing access to training opportunities and promoting business tailored training plans to ensure that a broad range of women are available and prepared for appointment. The selection procedure should ensure that selection to be a Board member has regard to both formal and substantive qualifications and should guarantee that no indirect discrimination against women occurs on the ground of the qualification/experience/knowledge required to cover the post. The balanced representation of women also should reflect a balance between women representing workers and women representing shareholders.

including changes to the Non-Financial Reporting Directive (in particular with regard to the 'diversity policy').⁹

Functional equivalence and financial participation

The “**functional equivalence**” approach should also be assessed and further discussed. Developed in 2019 in the framework of the multinational and multidisciplinary project on “Workers’ Voice”¹⁰, this approach aims to assess, on the basis of common objectives with regard to workers’ involvement, the extent to which different institutional and organisational paths can lead to similar outcomes.¹¹ The question is whether different and complementary possible instruments and/or avenues could achieve trade union objectives and ensure the respect of workers’ rights and in this way enable the accommodation of different national legal frameworks and traditions. This approach should be interpreted as being complementary to the objective to establish minimum standards for workers’ board-level representation and for the interlinkage between different institutions for workers’ involvement at all levels of the companies falling under the scope of the proposed new horizontal framework.

In the framework of European company law and corporate governance, the ETUC supports employee financial participation according to the ETUC position of 2013: employee financial participation should be embedded in a system of worker involvement at all levels; it should provide additional income and not undermine pay rises and must benefit all workers within the company; it should be subject to prior consultation and agreement with worker representatives and trade unions; pay special attention to its impact on gender equality.¹²

The fight against artificial arrangements and their impacts on democracy at work

Artificial arrangements and letterbox companies can also be used to undermine democracy at work and workers’ rights through regime shopping, in particular with regard to cross-border company mobility, outsourcing measures or supply/subcontracting chains. The establishment of a horizontal framework for workers’ information, consultation and board-level representation could also represent an **important opportunity to make progress in the fight against letterbox companies and artificial arrangements. Any company using a European company form or intending to operate a cross-border legal restructuring, should be obliged to:**

- be established in the same Member State in which it has its head office (**‘real seat’ principle**)¹³
- **have an actual and fixed establishment and pursue genuine and substantial economic activity in the Member State in which it is established** (genuine economic activities).

⁹ Directive 2014/95/Eu of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, Article 20.

¹⁰ <https://www.imu-boeckler.de/en/workers-voice-16034.htm> ; <https://www.imu-boeckler.de/en/workers-voice-breakfast-16035.htm>

¹¹ *Workers’ Voice in European corporate governance – an invitation to open up new perspectives for participatory democracy*, Workers’ Voice, Mitbestimmungsreport No. 52, 08.2019, Institute for Codetermination and Corporate Governance. See also A. Hassel and S. von Verschuer, *Ein europäischer Rechtsrahmen für Arbeitnehmerbeteiligung in transnationalen Unternehmen*, WSI-Mitteilungen 2/2019..

¹² ETUC Position on conditions for employee financial participation (EFP)
<https://www.etuc.org/en/document/etuc-position-conditions-employee-financial-participation-efp>

¹³ The ‘real seat’ approach is already established in the legal frameworks for SEs and for European Cooperative Societies. *COUNCIL REGULATION (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)*, Article 7; *COUNCIL REGULATION (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE)*, Article 6.

Non-regression and review clauses

Any legal instrument in the area of workers' information, consultation and workers' board-level representation should include a robust non-regression clause. Finally, an ambitious **review clause** should be included, which should be linked to the review clause included in the 2019 Directive on cross-border conversions, mergers and divisions.

Possibilities for the legal instrument

Type of legal instrument

The new EU (horizontal) framework should be a **new “additional” legal instrument or a legal instrument putting forward changes to the Directive on cross-border conversions, divisions and mergers and the SE and European cooperatives frameworks or a combination or both.** A combination of both would be the most ambitious solution. The **effective tool would be a Directive rather than a Regulation,** considering the existing legal framework, the possible legal basis and the need for Member States to maintain more ambitious/protective frameworks.

Legal basis

The legal basis for such an instrument should be Article 151 (improvement of living and working conditions) **and Article 153(1)(e)** (information and consultation of workers). The **legal basis for workers' representation (including worker board-level representation / referred to as 'co-determination') is Article 153(1)(f).** This legal basis would, however, require unanimity in the Council (and would only provide for consultation of the European Parliament). Due to the different procedures, this legal basis is not compatible with Article 153(1)(e). This element should also be taken into consideration in the definition of the objectives of the proposal.

In proposing changes to the SE Directive, the legal basis that was used for that Directive should also be taken into consideration (it was Article 308 of the Treaty establishing the European Community, now Article 352 TFEU). Article 50 TFEU (freedom of establishment) and/or 114 TFEU (internal market) should also be considered, but – in order to avoid negative interpretation by the CJEU – it would be important to include a legal basis linked with the Social Policy Title of the TFEU.

In deliberations about the legal basis, the ongoing debates on the so-called “**Passerelle clauses**” and the ETUC position thereof, should also be taken into consideration.¹⁴

Revision of the EWC Directive

The effort to introduce a horizontal framework for information, consultation and board-level representation will be **accompanied by renewed efforts to introduce the necessary improvements to the legal framework on European Works Councils.** The horizontal framework should include the necessary references and links to the EWC Directive. **The two legal instruments should however remain separate.**

In this context, the **ETUC will continue to advocate for a revision of the EWC Directive**

¹⁴ See *inter alia* Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *More efficient decision-making in social policy: Identification of areas for an enhanced move to qualified majority voting*, COM(2019) 186 final; *ETUC Position on the Commission's initiative for the enhanced use of Qualified Majority Voting (QMV) in the social field (the 'Passerelle clause')*

based on the 10 demands/priorities¹⁵. In addition, further actions to strengthen EWCs in the existing legal framework should be pursued.

In addition to supporting and easing the EWCs' access to courts, the ETUC will actively support the establishment of a European EWC Ombudsperson, as an out-of-court conflict resolution mechanism, to address issues that arise from the transnational exercise of workers' participation rights. Without prejudice to the rights of national social partners, a European EWC Ombudsperson should play the role of voluntary mediator in conflicts on the interpretation of EU law, such as EU legislation on EWCs, SEs and cross-border mergers, to help to resolve disputes and thus support trade unionists who are unable (e.g., for lack of legal clarity or financial resources) to go to court. An appeal to the Ombudsperson as mediator should not prevent a case from going to court.¹⁶

¹⁵ ETUC Position paper/For a modern EWC Directive in the Digital Era
<https://www.etuc.org/en/document/etuc-position-paperfor-modern-ewc-directive-digital-era>

¹⁶ *ETUC Action Programme 2019-2023*, adopted at the XIV ETUC Congress in Vienna.