

A key part of the European model

PARTICIPATION One of the defining characteristics of European industrial relations is that employee representatives have an influence at board level. A recent representative survey makes a strong case for this model. The European Commission, which regularly chooses to ignore the facts in its proposals on company law, would do well to take heed.

By **NORBERT KLUGE**, Head of the Promotion of Co-Determination Department and **STEFAN LÜCKING** of the Research Support Department at the Hans Böckler Foundation.

Contrary to what the public debate on corporate governance in Europe might sometimes have us believe and to the content of many of the European Commission's European company law initiatives, the "voice of labour" at board level is actually enshrined in company law in more than half of the EU's member states. While Germany is undoubtedly one of the key players, it is certainly not the only one – board-level employee representatives are by no means an anomaly in Europe's national corporate governance models. The same is true at European level. Companies that decide to convert to either a European Company (SE) or European Cooperative Society (SCE) are required to retain any employee board-level positions that existed in a European legal form prior to conversion. And it is not only the large SEs such as Allianz, BASF and MAN that have been able to demonstrate that corporate governance can function successfully in practice with board-level employee representatives from several different European countries.

These are the preliminary findings of the research project "Corporate Governance and the Voice of Labour" that were recently presented in Brussels by the European Trade Union Institute (ETUI). This first ever representative survey of employee representatives who serve at board level in companies throughout the European Union was carried out by Aline Conchon, an industrial sociologist at the

ETUI, and Jeremy Waddington, an industrial sociologist at the Manchester Business School. There are of course significant differences between the 4,500 or so respondents from 17 European countries, both in terms of the influence of their local culture on how they perceive their role and in terms of the statutory provisions that exist in their respective countries. Nevertheless, all of them have a realistic understanding of their position as members of their company's supervisory board or board of directors who have been elected or designated by the workforce. Although even in the strongest German co-determination model where employee representatives occupy half of the seats on the supervisory board they still never have a controlling majority, they nonetheless make the most of their mandate to win concessions from management on behalf of the workforce. One thing they have in common as board-level employee representatives is that they have the same rights and responsibilities as the representatives of the company's owners. They are required to oversee the welfare of the company as a whole and are thus jointly responsible for its corporate governance.

DIFFERENT METHODS OF REPRESENTING EMPLOYEES' INTERESTS

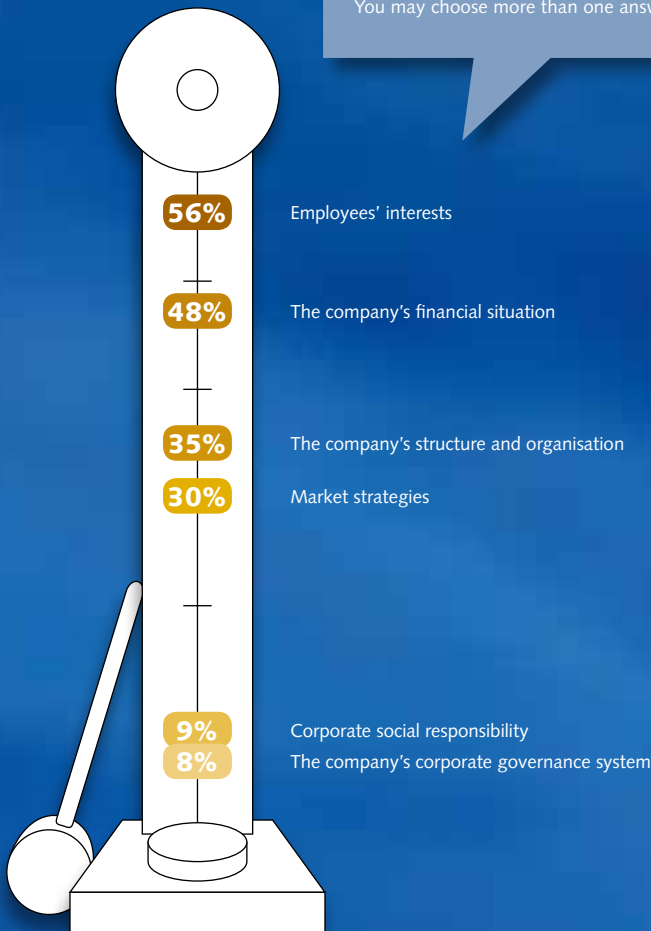
It became apparent that there are differences in how board-level employee representatives perceive their role when they were asked to rate the extent of their influence. If a presence on the super-

Photo: Harald Richter/Photolia

KEY THEMES

What are the most important topics of discussion for you as an employee representative on the supervisory board or board of directors?

You may choose more than one answer



► visory board or board of directors is understood as one element in a system of interconnected conduits that provide employee representatives with various different channels of influence, whether it be via the trade unions or via works councils, then the results of the study clearly demonstrate that while the goal of employee representation is the same at all the different levels, there are nevertheless major national differences regarding the methods employed to fulfil this function. However, the study's findings also indicate that a statutory entitlement to significant board-level participation, as encountered in Germany, Austria and Scandinavia, does help to give employee representatives a sense of their own strength and importance. This is underlined by the responses to the question about the extent of their influence over management restructuring initiatives. This issue was the subject of a lively debate with co-determination practitioners from several different countries during the presentation of the preliminary study results by the European Worker Participa-

tion Competence Centre (EWPPC) in Brussels in mid-February 2014. At first sight, the answers to this question appear somewhat disappointing. Just over 40 percent of respondents rated their influence as low or non-existent, while 32 percent regarded themselves as influential or very influential. On closer inspection, it becomes apparent that there are differences between different groups of countries. Employee representatives rate their influence as particularly low in the Francophone countries, where they are in a clear minority at board level. In both the Germanic countries and European Companies, on the other hand, there is a more even balance between positive and negative responses.

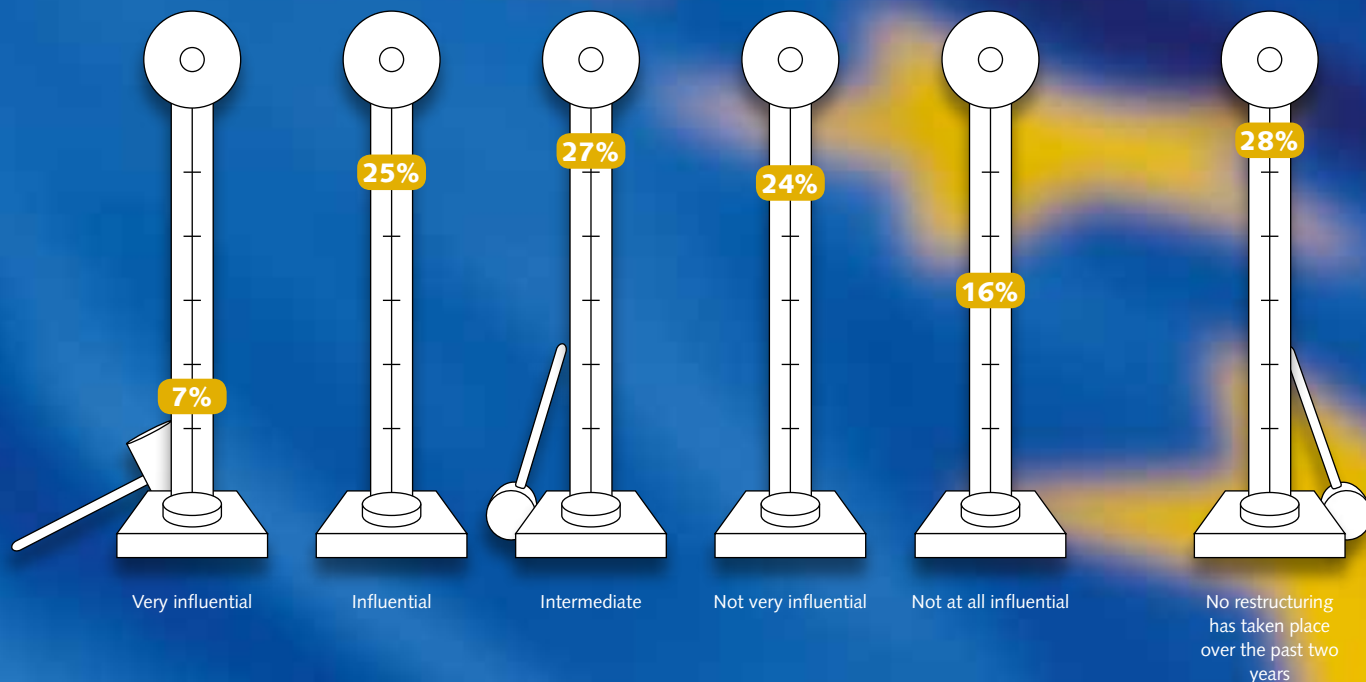
The goal of employee representation is the same, there are nevertheless national differences regarding the methods.

However, it soon became clear at the Brussels meeting that this is only half the story. Jean-Frédéric Dreyfus, who sits on the board of directors of French bank Crédit Agricole, summed it up as follows: when they are inside a meeting of the board of directors, the employee representatives are in the minority and therefore have no direct influence on its decisions. But outside of these meetings, their position as members of the board of directors actually invests them with considerable influence, for example when they are talking face-to-face with management or when they combine forces with the company's works councils and trade unions.

In other words, the actual influence wielded by a board-level employee representative depends on the strength of his or her connections with other people in the company. And these connections work in both directions – how can an employee representative draw on outside support in order to strengthen their own position within the supervisory board or board of directors? And how can they use their position on the board to support the other employee representation bodies? The results of the questionnaire provide a lot of interesting data on both aspects. Respondents from all countries regarded works councils and the trade unions as their most important source of information. The only difference between countries was whether it was the trade unions or the works councils that played a more important role. In this context, supervisory board

INFLUENCE ON RESTRUCTURING

If your company has restructured over the past two years, how influential were you on the process?



members from the Germanic countries were distinguished by the fact that they regarded the expertise of works councils and trade unions as equally important. Cooperation with employee representation bodies at other levels was also considered to be important by all the countries that took part in the survey. Once again, the differences regarding which level the respondents rated as most important can be put down to national traditions. The Germanic countries, the Netherlands and European Companies all place greater emphasis on working with works councils and the other employee representatives on the supervisory board, whereas in the Nordic and Francophone countries, as well as Ireland, Greece and Spain, greater weight is attached to cooperation with the trade unions present within the company.

WHAT THINGS ARE LIKE IN PRACTICE The extensive data set obtained from the survey makes it possible to paint a comprehensive picture of what employee representation in the different national systems is really like in practice. How does employee representation

differ in systems based on a board of directors, where supervision and management are combined in a single body, compared with the dual system where these functions are split between the supervisory board and board of management? How do board-level employee representatives perceive their own role? What exactly do they do? Where do their priorities lie? What sort of relationship do they have with shareholders and management on the one hand and works councils and trade unions on the other? How do they prepare for board meetings? How do they make use of their contacts outside of the board for their work as board-level representatives?

The differences in terms of their priorities are not very pronounced. In the majority of countries and in European Companies, the number one priority is the situation of the company's employees, followed by financial matters and organisational issues. However, the Francophone countries, new member states and Ireland, Greece and Spain all rank financial matters and market strategies as the most important issues, possibly due to the weaker position of the board-level employee representatives in these countries. This ►

The Voice of Labour

The project “Corporate Governance and the Voice of Labour” was carried out at the European Trade Union Institute between 2009 and 2013 by industrial sociologists Jeremy Waddington and Aline Conchon with the financial support of the Hans Böckler Foundation. At the project’s core was a survey of employee representatives at board level in 16 EU member states and Norway. When it came to analysing the results, the countries were divided into six groups with similar regulations on employee representation at board level and a common institutional framework. The groups were as follows: “Germanic”: Germany and Austria; “Nordic”: Denmark, Finland, Norway, Sweden and the Netherlands; “Francophone”: France and Luxembourg; “New member states” (NMS): Czech Republic, Hungary, Poland, Slovakia and Slovenia; “IGS”: Ireland, Greece and Spain. Since “European Companies” (SEs) constitute a European legal form, they also had their own group.

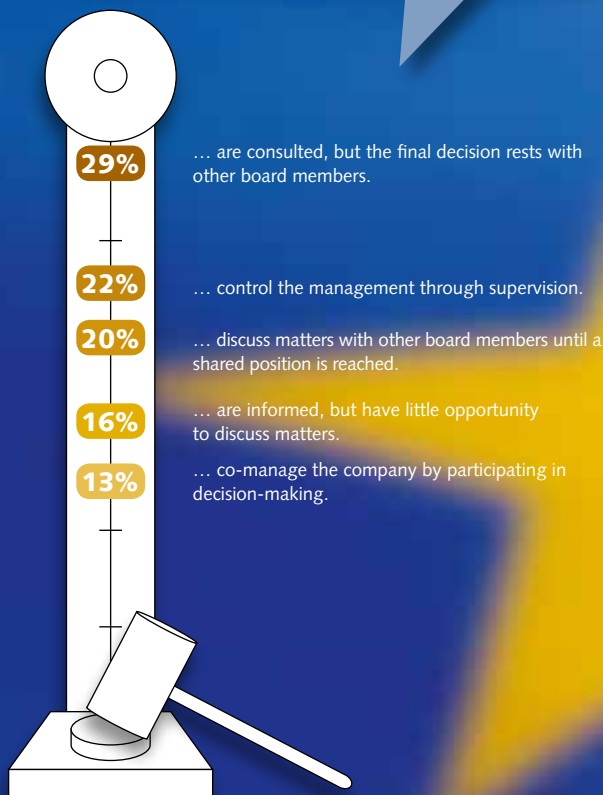
A total of 17,430 questionnaires were sent to board-level employee representatives, while just under 10,000 were sent to company management. The response rate was approximately 24 per cent. A detailed analysis of the results will be available in spring 2015. The preliminary findings are presented in the recent European Trade Union Institute publication “Benchmarking Working Europe 2014”.

Available for free download at: www.etui.org/Publications2/Books/Benchmarking-Working-Europe-2014

Further information about the European Worker Participation Fund and the associated European Worker Participation Competence Centre at the European Trade Union Institute is available at: www.worker-participation.eu/About-WP/European-WP-Competence-Centre

ROLE WITHIN THE BOARD

Regarding the actual practices of the supervisory board or board of directors, do you think that you ...?



► relative weakness makes it harder for them to influence the agenda of board meetings. There was an even greater consensus with regard to whose interests they primarily represent. The interests of employees in their own country came out clearly on top – and interestingly this was even the case in European Companies.

It is evident from the responses to the survey that there is as yet no recognition of the “European mandate” that the European trade unions have called for as a matter of policy, at least for the employee representatives on SE supervisory boards or boards of directors. It appears that national methods of electing board-level employee representatives continue to hold sway. Despite legislation on employee representation at transnational level – e.g. on European Works Councils or the European composition of SE supervisory boards – and the transnational structure of value chains, only faltering progress is being made towards the emergence of a European identity among ordinary employees going about their day-to-day business. A key challenge for the trade unions is to place greater emphasis on the European dimension in the preparation of their members for their roles within the organisation and in their ongoing training. The European Worker Participation Fund and the associated European Worker Participation Competence Centre at the European Trade Union Institute, both of which were unanimously adopted by the ETUC, provide a good framework for pursuing this goal.

WHAT NEXT? The debate regarding the introduction of more targeted and appropriate corporate governance rules has gained new impetus following the manifest failure of the liberal shareholder value model during the financial and economic crisis. The only people who still seem to believe that strengthening shareholder rights is the only way to promote sustainable corporate governance are the hardcore ideologues in the City and the European Commission's DG Internal Market and Services, although admittedly their ideas remain as influential as ever.

A review of what constitutes good corporate governance is now on the political agenda and should help Europe to negotiate its way out of the crisis. Companies and their employees can and must become drivers of European reindustrialisation. The study makes an important contribution to this goal. It provides valuable data right from the heart of an approach to corporate governance that is about more than simply making shareholders and investors rich.

Against this backdrop, it is gratifying to see that Europe's trade unions have started to debate their own role in good corporate governance and that in the process they have (re-)discovered the

The study will give the ETUC greater political momentum in its efforts to enshrine comprehensively the „voice of labour“ in European company law.

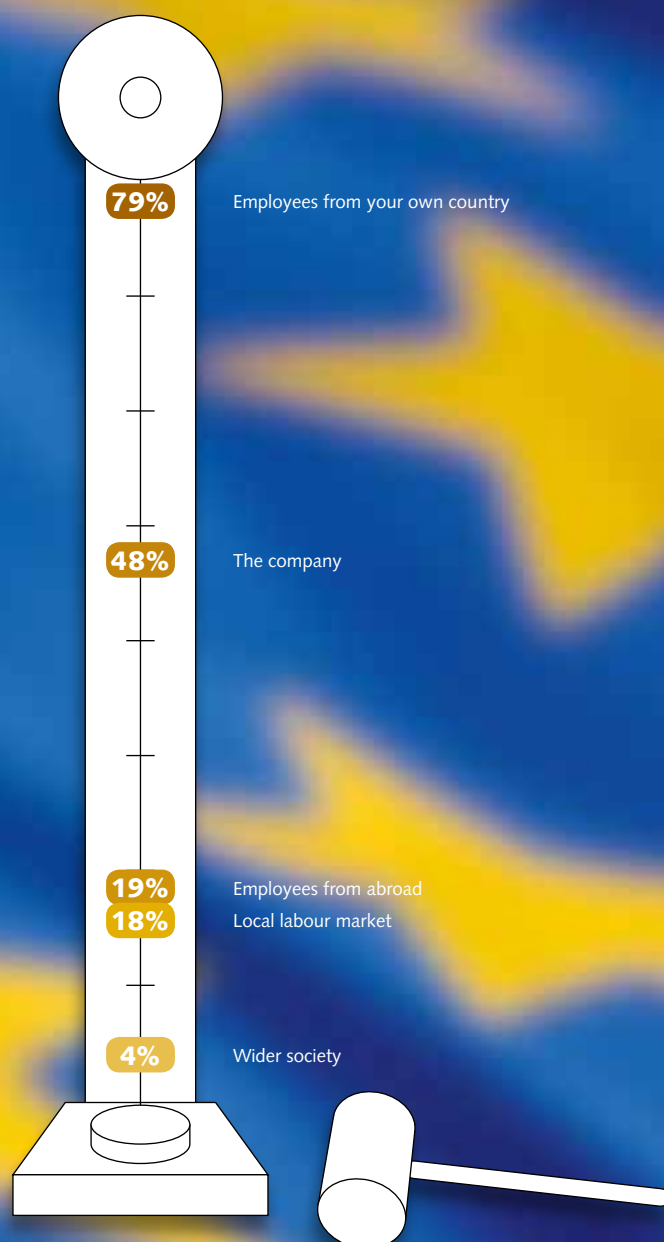
opportunities offered by obligatory employee representation at board level. This will give the ETUC greater political momentum in its efforts to convince Europe's politicians to comprehensively enshrine the "voice of labour" in European company law.

The main thing that the study shows, however, is that far from being the exception, employee representation at board level is in fact a defining characteristic of European industrial relations. As such, it can be used as a tool for bringing this point home to the European Commission, which systematically ignores the relevant facts in its draft directives on company law and keeps coming up with new proposals for European legal forms that are designed to undermine the practice of employee participation at board level. One especially blatant example of this attitude is the current proposal regarding "European single-member companies". What makes this policy all the more mystifying is that the Commission has set itself the goal of achieving sustainable corporate governance. And yet, it chooses to overlook employee participation at board level, even though it constitutes a particularly obvious means of delivering this goal and has already proved its value throughout Europe. ■

PRIORITIES

If international restructuring to improve economic performance should entail job losses, when the final decision has to be made what are your priorities?

You may choose more than one answer



Source for all graphs: Waddington/Conchon 2014

The Europe he is fighting for

EUROPEAN ELECTIONS 2014 Shortly before the elections to the European Parliament in May 2014, we asked Jean-Claude Juncker on what he thinks about employee participation in Europe's companies. Here are the answers of the future President of the EU Commission.

Where do you see the greatest deficits of the European social model?

Jobs and social security, growth and solidarity are inseparable. Just like growth and consolidated budgets, because credit-financed growth is not sustainable. Incidentally, solidarity also links the other two leitmotifs of my election campaign: experience and future, for solidarity is the issue for the future.

And while we're on the subject of the future: I firmly believe in the future of the European social model whose origins and future lie in the social market economy – an economic model that we Christian Democrats invented to a certain extent. This model centres on the primacy of people over profit, but also on the primacy of labour over capital. That's why we Christian Democrats stand for fair pay and decent jobs that provide a living wage.

This leads almost inevitably to my idea of minimum social rights in Europe. What I mean by that is a statutory minimum

wage, the level of which will be defined in each individual country and not in Brussels. It also means a minimum basic income, so that no one in Europe need be homeless or starve. Minimum standards with regard to codetermination in Europe's companies could also belong to these rights. In my view, this is a question of civilization, for as far as the social model is concerned, we have a model function for the rest of the world too.

What measures will be taken by the EU Commission under your presidency to correct these deficits?

As Commission President I intend to examine every measure taken in Brussels with regard to its labour market and social compatibility, because we need more consistency not only in economic policy, but also in social policy. For me, you see, economic policy and social policy are two sides of the same coin

with regard to the future. That is why I do not want to promote growth on the backs of the employees. After all, strong, sustainable growth is always growth of the common wealth, in other words growth of affluence in general and of work.

What can employee participation contribute to a more sustainable development?

The modern economy is like modern politics: it can no longer be decreed from above. In that respect, the European elections are democratising our common European politics. And for the same reason, our economy and our companies have to become more democratic. One way of doing this is to have more employee participation in Europe's companies. Here, Germany and its trade unions definitely constitute a role model for the rest of Europe.

Employee participation has proved itself above all in the present crisis which was caused neither by Europe nor by European employees. When there's a storm at sea, there mustn't be a mutiny. Employee participation prevents mutinies and we can only keep the European ship on course if we stick together. We have come through the eye of the storm and the European ship has not sunk – not least because the euro held the ship's planks together – and now we have to stay on course, repair our ship and steer our course towards new horizons. This is something I want to do together with Europe's employees and employers in equal measure. And that's what makes me different from others.

I want to promote employee participation, because this will help us on our way not only socially but also economically. Nothing is better for a company than motivated employees. That's why we need both a new entrepreneurial spirit and a new spirit among employees. And we need companies that people can believe in again. Politics and business have much in common here, too, because people today need to be convinced. The subordinate mentality belongs well and truly in the dustbin of social history – and of EU history, too. ■



Photo: David Pias/Junkerepp/flickr

JEAN-CLAUDE JUNCKER, 60, designated President of the EU Commission, was the top candidate of the Christian Democrat/Conservative European People's Party (EPP) for the European Election in May 2014. He was Prime Minister of Luxembourg for 19 years and chaired the Euro Group of finance ministers from 2005 to 2013. "We must not abandon social policy to the Socialists" he says.

Four countries, one employee representative each

MERGER In the future, Belgium, Germany, France and Italy will all have one employee representative on the Board of Directors of credit insurance company Euler Hermes. But getting there was by no means easy.

By Berlin-based journalist **ANDREAS MOLITOR**

EULER HERMES EUROPE SA: Employee representatives occupy a third of the seats on the Board of Directors even though the company is domiciled in Belgium, where there is no right to co-determination.





Photo: Cordula Kropke

CENTRAL WORKS COUNCIL CHAIR THOMAS WAGNER IN FRONT OF EULER HERMES' GERMAN HEAD OFFICE IN HAMBURG: The size of the Board of Directors was not up for negotiation.

Thomas Wagner saw it coming – it was obvious that something was going on. His colleagues from Denmark, the UK, Finland and Norway were always on the phone to each other. Were they somehow plotting a rebellion? It was hard to say exactly what they were up to. Nine months later, the 51 year-old chairman of credit insurance company Euler Hermes Deutschland's central works council can at least now say what the main topic of discussion was. It was all to do with the fourth employee representative on the Board of Directors of group holding company Euler Hermes Europe SA. SA stands for "Société Anonyme", which is one of the terms used to refer to a public limited company in France and Belgium.

The need to review employee representation on the Board of Directors of the world's number one credit insurer was a consequence of plans to carry out an extremely complicated internal "cross-border merger" within the group. The two companies involved were Euler Hermes Deutschland AG and Euler Hermes France SA, both of which belong to the Allianz Group. Both companies were to become part of Brussels-domiciled holding company Euler Hermes Europe SA. All of Euler Hermes' other national businesses in Europe had already been integrated into the holding company over the course

of the past few years. Belgium was probably chosen as the domicile of the new company because the Belgian financial services authority's rules governing the reserves that credit insurers are required to build up in good years so that they are equipped to cope in years when high numbers of business failures occur are not as strict as in Germany and France. Business failures, i.e. bankruptcies, are the *raison d'être* of credit insurance companies – businesses take out credit insurance to protect themselves in case one of their customers goes bust and is unable to settle its outstanding invoices.

It is inevitable that a merger between a German company and a company from another EU country will have repercussions for co-determination at supervisory board level if, prior to the merger, there were employee representatives on the supervisory board of at least one of the two companies involved. In contrast, co-determination at works council level should in principle remain unaffected by a merger. According to a study carried out for the Hans Böckler Foundation by Jena University law professor Walter Bayer, only six percent of the 381 mergers involving Germany companies between 2007 and 2012 had "repercussions for co-determination". This is because the vast majority of the companies in question fell below the critical threshold of 500 employees and were therefore not entitled to employee representation on the supervisory board.

DOWNGRADING PROHIBITED BY LAW In principle, once a merger has been completed the applicable co-determination regime is that of the country where the new company is domiciled. This would have meant that Euler Hermes Europe SA's 6,000 employees would have been subject to Belgian regulations. For the 1,800 employees in Germany, this would in effect have resulted in the

complete loss of all their former co-determination rights. While co-determination at supervisory board level does not exist at all in Belgium, Euler Hermes' German business was subject to the provisions of Germany's One-Third Participation Act (*Drittelbeteiligungsgesetz*), according to which employees are entitled to one third of the seats on the company's supervisory board.

However, when the EU Mergers Directive was being negotiated, the German government was able to prevent companies from downgrading co-determination rights at this level through the ruse of domiciling the new company in a country where employees are not entitled to sit on the supervisory board. In essence, the 2006 Act on the Co-determination of Employees in Cross-Border Mergers" (*MgVG*) guarantees that existing co-determination standards will be preserved in the event of a merger. The exact number of employee representatives on the supervisory board, the electoral process and the detailed rights of employee representatives are negotiated with management by a specially created employee body known as the "Special Negotiating Body" (SNB). A statutory fall-back solution based on the "before and after principle" applies if employees and management fail to reach an agreement. If at least one third of the total workforce previously worked for companies with co-determination at supervisory board level, then this type of co-determination must also exist in the new company, even if the company's domicile is moved to a country like Belgium where it is not legally required. This allows German-style co-determination to be "exported" to those EU countries where representation on the supervisory board or Board of Directors was previously restricted to shareholders, i.e. the UK, Belgium, Romania, Bulgaria, Italy and the Baltic States.

On closer inspection, however, this apparent assurance that co-determination standards will be maintained turns out to be somewhat limited, since it only guarantees preservation of the status quo. Until now, if a German company's headcount rose above 2,000 employees in Germany, the proportion of employee representatives on the supervisory board would also increase from a third to fifty percent. In the case of cross-border mergers, however, the number of employee seats on the supervisory board is permanently frozen at a third – it can no longer go up to fifty percent.

AN SNB WITH 21 DELEGATES FROM 14 DIFFERENT COUNTRIES

ver.di member Thomas Wagner has an MA in economics and joined the field sales force of what was then Hermes AG back in 1993. He has been chairman of the central works council since 2009 and now occupies the post on a full-time basis. In theory, he had no reason to be concerned about the representation of Euler Hermes employees in the new Belgian holding company. It was all covered by a compromise agreement reached with the group management prior to the merger, which promised that employees would be no worse off once the merger had been completed. The previous co-determination rules according to which employees were entitled to a third of the seats on the supervisory board would continue to apply to the twelve seats on the new company's Board of Directors. In accordance with Belgian company law, the body that Euler Hermes SA refers to as its Board of Directors is a single entity that is simultaneously responsible for both the management and supervision of the business. However, it was also apparent that the

employee representatives on this body would have to represent all the employees in the 14 EU countries where the company has a presence and not just those of the two "merger countries", i.e. France and Germany.

Since management had made it abundantly clear that they were not prepared to tinker with the overall size of the Board of Directors, the SNB (an ad-hoc body comprising 21 delegates from the 14 countries in question) was now faced with the tricky task of electing representatives who fairly reflected the proportion of the total workforce present across the different countries. Wagner uses diplomatic language when describing how the employee representatives were elected using "procedures that were in some cases rather odd and at first not always very easy for us to understand". In one case, for example, they even sent the CEO's PA along as an employee representative. At another site, the 26 employees were summoned by their boss and basically told "We need one of you to go to this meeting in Brussels". He then looked through them one by one until his gaze came to rest on a female employee. "How about you?" he said.

Once the SNB had convened, the first problem was what to do about all the different languages. The only solution was to use simultaneous interpretation which, although necessary, is hardly ideal for facilitating communication. "You've got 21 people from 14 countries sat in a room, all with completely different ideas about what co-determination is and what it should be", says Martin Lemcke, who sat on the SNB in his capacity as Head of the Co-Determination Division at ver.di's Federal Head Office. "It is extremely difficult to get people to agree on what they want to achieve in the negotiations with management." The fact that certain countries are rather luke-

A compromise agreement reached with the group management prior to the merger promised that employees would be no worse off once the merger had been completed.

warm about co-determination at supervisory board level – especially, as Thomas Wagner adds, since this applies "not just to management but also to certain groups of employees" – was also not terribly conducive to achieving a consensus among the members of the SNB. Some wondered why it is that the Germans always make such a big deal about external trade union officials also being allowed to sit on the supervisory board. Meanwhile, instead of having just one delegate, the Italians initially wanted each of ►



EULER HERMES ADVERT: a global business

- the five trade unions that are present in the Italian company to be represented, as far as possible on a proportional basis. That would have meant a total of 15 Italian delegates, which is perhaps going a bit far for a country where the total number of employees is just 280.

Roland Köstler, who until 2013 worked as a corporate law expert for the Hans Böckler Foundation, has spent many years emphasising how important it is for the SNB members to be “extremely well prepared, especially when workers from many different countries are involved”. This has a “decisive influence on the outcome of the negotiations with management”. However, time was in short supply at Euler Hermes – management had made it plain that they would only be prepared to make concessions if the negotiations were concluded swiftly. Indeed, a single meeting of the SNB on 4 December 2013 was supposed to be enough to finalise both the identity of the employee representatives on the Board of Directors and the employee side’s goals for the negotiations.

A HARD-WON CONSENSUS _ At first, there was little sign that the negotiations within the SNB would end up resembling the plot of a political thriller. Management wouldn’t dare to try and alter the number of employee representatives on the Board of Directors. And the coun-

tries that the representatives should come from also appeared to be a done deal. Based on the percentage of employees of the new company in each country, Germany should have had two representatives, while the remaining two seats would have gone to France and Belgium. However, in order to prevent people getting the impression that proceedings were being dominated by Germany, the Germans had already agreed to give up their second seat on the Board of Directors to Italy. This also meant that all four regions where Euler Hermes is present in Europe would now be represented – Germany/Austria/Switzerland, France, southern Europe and the Nordics, which according to Euler Hermes’ own internal structures also include Belgium.

The Germans, French, Belgians and Italians, who between them represented around three quarters of the workforce, were already used to working together – they had been in regular contact with each other at national works council level for almost ten years. However, some of the smaller countries from the Nordics group who were not short on self-confidence but in some cases had only a basic understanding of co-determination at supervisory board level wrongly imagined that they were being stitched up by the big four. Thomas Wagner started trying to explain to the rebels why co-determination is so valuable. “It backfired spectacularly”, he recalls. “From their perspective, I was the guy who not only represented 20 times as many employees as they did but also knew all the ins and outs of a system that they hadn’t got a clue about.” It eventually dawned on Wagner that the problems were not just connected with a vague sense of exclusion but were in fact also related to something far more concrete. “There were undoubtedly those among them who harboured ambitions of gaining a place on the Board of Directors for themselves.”

There was a very real danger that the group would be unable to overcome these internal divisions and present a united front during the final negotiations with management. If that had happened, management’s tactic of consciously choosing to have a small Board of Directors with a correspondingly low number of seats for the employee side would have succeeded in creating disunity among the employee representatives. The prospect of such a fiasco filled Thomas Wagner with dread. In the end, he decided to summon up every last ounce of diplomacy. “I conducted a real charm offensive that evening”, he says, recalling the crucial one-on-one conversation that he had with one female delegate who had thrown her lot in with the rebels. “By the time we had finished talking, we both agreed that it would not be right for one of the smaller countries to have a seat on the Board of Directors.”

Wagner had not come empty-handed to those representatives of the Nordic countries who felt they were being steamrolled. A new international staff representative forum will help to ensure that the voice of Euler Hermes’ 6,000 employees is heard at the SE works council of Europe’s Allianz Group, home to a total of almost 150,000 employees. And the Nordic countries will account for half of the delegates on this forum, more than they would normally be entitled to. Wagner’s approach had the desired effect – the next morning, the female delegate who he had spoken to the night before wasted no time in telling her co-conspirators, much to their consternation, that “What we are doing here is a waste of time. You no longer have my vote.” Now that they had secured a majority, the negotiations with management could begin. They were concluded later that very night. The Special Negotiating Body also voted unanimously in favour of the proposed employee representatives on the



**CO-DETERMINATION EXPERT
LEMCKE AT VER.DI'S HEAD OFFICE
IN BERLIN:** "Exporting" co-determination can be a positive side effect.

Both cross-border mergers and the establishment of European Companies are frequently accompanied by reduction in the size of the supervisory board.

Board of Directors. The fact that the vote was unanimous is a promising sign for the new forum that will hold its first meeting in September. As well as Italy, France, Belgium and Germany, the forum will also have delegates from Finland, the UK, Poland and the Netherlands.

EUROPEAN CO-DETERMINATION STRATEGY In mid-May, the Board of Directors held its first meeting with the newly elected "directors who are employee representatives", as they are formally known. This was the first time that the representatives from Belgium, France and Italy had sat around the same table as the holding company's management and been allowed to provide input into the decision-making process. After the two-hour meeting had concluded, "my three colleagues were on cloud nine", recalls Wagner. No wonder: "They had, after all, just had their first taste of their newly-won co-determination rights."

However, as a German, Wagner himself finds it hard to share his European colleagues' euphoria about the new co-determination arrangements. His scepticism seems to be backed up by what he has read and heard about other mergers and European Companies (SEs). He has yet to be convinced that a mix of employee representatives from different countries will be stronger than if they all came from Germany. In a recent piece on how employee representation is becoming increasingly splintered, the Frankfurter Allgemeine Zeitung made the rather sardonic observation that, although anyone who champions workers' rights and believes in internationalism is bound by their principles to accept the involvement of colleagues from other countries, this does not mean that their presence on a body makes it any stronger. "After all, these people know little if anything about the legal framework in Germany and are particularly concerned about their personal liability."

One thing is for sure: both cross-border mergers and the establishment of European Companies are frequently accompanied by a significant reduction in the size of the supervisory board. And it is mainly the trade unions that end up having fewer seats of their own on these smaller bodies. For example, four years ago, when the HypoVer-einsbank was merged with its Italian parent company UniCredit, the number of seats on the supervisory board was cut from 20 to twelve and two of the three seats that had previously been reserved for external trade union representatives were among the casualties. According to ver.di division head Martin Lemcke, "Businesses can intentionally use mergers and the establishment of European Companies to minimise the influence of the trade unions." However, he believes that cases like Euler Hermes where co-determination is "exported" are an extremely positive phenomenon. It is important for the wider European debate that other countries should gain practical experience of co-determination. "The members of these supervisory boards have a mandate to represent the entire workforce." If they are to fulfil this mandate, they will undoubtedly need to change their attitudes. "But it will ultimately be absolutely essential for them to do so if we wish to find a constructive way of countering management's Europeanisation strategy." ■



“A genuine milestone”

INTERVIEW BASF, one of the powerhouses of German co-determination, has gone European. When it adopted European Company status six years ago, it also changed its regulations on employee participation. We ask the chairman of BASF's European Works Council, Robert Oswald, what has been gained as a result.

Robert Oswald was interviewed in Ludwigshafen by **CORNELIA GIRNDT** and **MARGARETE HASEL**, editors of *Mitbestimmung*.



PROFILE

ROBERT OSWALD, 59, combines the two senior co-determination roles of works council chairman and deputy chairman of the supervisory board. His confident assertion that “we know the company better than anyone” is certainly true of Oswald himself. He is able to devote his energies to the group’s overall strategy thanks to the fact that the Ludwigshafen site has 1,500 shop stewards who look after workers’ day-to-day interests. Now that the supervisory board elections, works council elections and AGM are over, Oswald is off to the Dolomites to do some hiking. When his current term of office ends in four years time he will be 63. Does he have plans to retire? Absolutely not! His hopes for the future? “I hope that what we have achieved endures, so that the business can keep moving forward successfully.”

“Robert Oswald, can you let us into the secret of co-determination at BASF?”

Secret? That question reminds me of Stephen Green, a senior executive who used to sit on BASF’s supervisory board and went on to become the UK Minister of State for Trade and Investment. At the end of his second meeting, Green took me aside and said “Herr Oswald, I get the feeling that there’s some sort of secret to how things work here.” He was referring to our culture, the way we interacted with each other. The foreign shareholders in particular are struck by the fact that the employee representatives have a very detailed knowledge of the business and bring an extensive skill set to the table without which co-determination would not be able to function properly. It is essential to discuss things openly. That is key to a company’s future prospects.

BASF isn’t just any old business; it’s the world’s largest chemical company. When the European Company (SE) was established back in 2007, the number of seats on its supervisory board was cut from 20 to twelve. At the time, this raised a few eyebrows among people outside the BASF group.

Our attitude was that if we couldn’t stop them reducing the number of seats we would at least try to ensure that the same standard of co-determination was maintained and we could continue to work as equal partners. That is reflected in the composition of the supervisory board’s committees where half of the seats go to the employee side. Of course, I can’t discuss the content of supervisory board meetings with you. But what I can tell you is that the quality of the discussions and of co-determination in BASF’s supervisory board is just as high as it was before.

What are the differences in BASF SE’s supervisory board?

We no longer have any senior managers on the supervisory board. And we were able to replace a complicated election process with a simpler and more European one. The 26 members of our European Works Council – who come from 22 different countries – have the final say on the identity of the six employee representatives on the supervisory board.

You adopted a rather cautious approach to increasing the presence of employee representatives from other European countries on ►

► *the supervisory board by appointing Denise Schellemans. She ticks all the diversity boxes – she’s a woman, she’s young, and she’s a member of a Christian trade union at BASF’s Antwerp site. The two external trade union representatives on the supervisory board both come from the German chemical workers’ union. How exactly are the supervisory board representatives appointed?*

Although IG BCE has the right to nominate two external trade union candidates, they still have to be elected by the European Works Council. Of the four in-house representatives on the supervisory board, three are from Germany and one is from Belgium. This composition is purely down to arithmetic, i.e. it reflects the number of people that BASF employs in Germany.

So at BASF, the employee representatives on the supervisory board are appointed by the European Works Council. Does this mean that they have a European mandate?

Yes, I think they do. The significant contribution that the EWC makes to representing our European workforce is carried through into the supervisory board. All six employee members of the supervisory board see it as their duty to represent the views of the company’s European employee representatives as expressed in the EWC. We now have a relatively good understanding of the company across the rest of Europe. It is this European perspective that informs the advice we provide to the board of management. And this applies just as much to me as it does to our Belgian colleague Denise Schellemans, who is the deputy chair of the European Works Council. Denise is a feisty and combative character, which is just as it should be. So no, the way that co-determination operates at supervisory board level isn’t just designed to look after German interests, as some critics would have it.

„We do make full use of our European-level consultation and co-determination rights.“

The European Works Council is a very diverse body. Does anything point to the emergence of a kind of European identity?

Our work in the EWC makes it clear to everyone involved that co-determination is intrinsically valuable. It has become abundantly clear to our colleagues from the rest of Europe that the rights enshrined in the Works Constitution Act and the fact that employee representatives sit on the supervisory board mean that in Germany we do enjoy a certain standing. This standing allows us to demand participation and even win concessions from the company that we would never be able to achieve through campaigns and protests alone.

In 2010, in your capacity as chairman of the works council, you signed an agreement to secure the future of BASF’s largest production site in Ludwigshafen. BASF promised to invest up to nine billion euros in the plant, while the works council agreed that flexible working time arrangements which had previously only

been used in emergencies could now be implemented as standard. Presumably none of the other sites have signed agreements on a similar scale?

OK, I admit that it is easier to do something like that at Ludwigshafen, where there is a large integrated site with 36,000 workers. However, we do also try to actively support employees at BASF’s other European sites. We do what we can to mediate and try to get the company to find solutions that are as socially responsible as possible. The work of the EWC is really all about establishing the same high BASF standards throughout Europe. We even manage to do this at sites where there are no employee representatives – our SE Employee Participation Agreement states that the EWC is allowed to play an active role, even in those locations.

So have the hopes that industriAll Europe President and IG BCE Chairman Michael Vassiliadis had for the SE been fulfilled? Six years ago, he said “We want to bring co-determination and employee participation to every site in the EU. That is our main goal, together with the Employee Participation Agreement”.

The European Works Council that we have today really is a significant step forward compared to the old “Euro Dialogue” – it is a genuine milestone. We are now able to interact and share experiences on a much more regular basis – we have a minimum of three meetings a year and under some circumstances may even meet every two months. This creates continuity and enables BASF’s European employee representatives to get used to working with each other.

In the Employee Participation Agreement, the EWC is charged with coming to an agreement with the company following the conclusion of comprehensive discussions. How do you manage that with 22 different countries?

What is absolutely key is that when transnational issues such as restructuring or site closures arise, we personally invite all the EWC members from the affected countries to attend an extraordinary meeting. This is because it is the EWC as a whole that has the right to information and consultation and not just its steering committee. There is no doubt that this approach works – by structuring our EWC in this way we have managed to steer clear of one of the biggest mistakes you can make in this type of body. We only have three people on the steering committee, which ensures that our EWC is not top-heavy. For any matters that do not relate purely to the steering committee, we always make sure that all the affected EWC members are involved.

Is the obligation for the EWC and management to reach a consensus on transnational issues compatible with the fact that, as a global business, the company must be able to react quickly?

It isn’t our goal to inhibit the company’s ability to act swiftly. Just like in the economic committee, there comes a point when the EWC has to say “OK, we now accept that the information provided is comprehensive, final and exhaustive”. Of course, management may

Extensive information and frequent meetings

IG BCE and the members of BASF's works council did everything in their power to ensure that the decision to convert the world's largest chemical group into a European Company did not have a detrimental impact on co-determination. The fact that the number of seats on the supervisory board was cut from 20 to just twelve raised eyebrows among some observers who felt that this was at odds with the goal of a more international approach.



Photo: Pressephoto BASF

BASF SE in Ludwigshafen, the world's largest chemical complex

However, the company placated the employee side by agreeing to establish a genuine employee forum, the BASF European Works Council. The SE's Employee Participation Agreement, which sets out the new ground rules for participation throughout Europe, provided a sound basis for the European Works Council (which consists of 26 employee representatives from 22 countries) and its potential future development. The provisions include extensive information and frequent meetings, as well as the right to convene extraordinary meetings to discuss decisions being planned by the company. The document also contains a commitment that employee representatives and management will try to reach a consensus in a spirit of partnership. Finally, it grants EWC members a form of protection against wrongful dismissal and provides for national meetings of EWC delegates. And the trade unions are also included in the process – a representative of IndustriAll Europe is entitled to take part in the discussions at EWC meetings, while this right to attend meetings as a guest is also extended to all the employee representatives on BASF SE's supervisory board. ■

still decide to go ahead with its plans regardless of what we say. We can't override their right to manage the company as they see fit, it's not our place to try and abolish capitalism. But we do make full use of our European-level consultation and co-determination rights based on Germany's Works Constitution Act and what we know from our involvement in the economic committee. That is what we are here to do and we are perfectly entitled to require management to comply with its obligations in this regard.

How is management dealing with your new-found self-confidence as an institution?

There were a few dirty tricks to start with. It's a learning process. It took time for word to get round in the group that there was this new Employee Participation Agreement and every manager throughout the whole of Europe realised that the company wants to engage with its employee representatives. Today, I can truly say that the signal the company sent out to its managers to cooperate with us hasn't merely been acknowledged by them, but is actually leading to changes in their behaviour. And if the odd individual does give us any trouble, then – let me try and phrase this diplomatically – we have ways and means of restoring the appropriate standards of partnership between management and the employee representatives.

The SE's Employee Participation Agreement provides for contact between BASF employee representatives at national level so they

can reach a common position. What are the benefits of this approach?

It's valuable for the EWC's work as a whole. These national meetings are most advanced in France – our French colleagues have established an impressive annual programme of meetings. My colleague Sonja Daum plays a pivotal role in all of the EWC's work – she fields all the different questions and concerns that our members raise with us. The French are particularly active on our works council. Sonja sees to it that our colleagues receive first-hand information, including information direct from the HR department and employee relations director. You simply couldn't do that without the organisational structure that our European Works Council has within a European Company. And we make good use of this facility.

The European Works Council has the right to information and consultation, but in principle has no mandate to negotiate agreements. How is this tricky issue approached at BASF?

The European Works Council issues advisory opinions highlighting the transnational impact of certain company decisions. However, it is the relevant national bodies that are directly responsible for the employees in the different countries and it is up to them to negotiate agreements. We have no wish to supplant them in this role. Nevertheless, we can sometimes develop solutions at group level and – in partnership with the national bodies – thereby ensure that the European dimension is incorporated into national agreements. ■

Breaking new ground again

ALLIANZ Eight years after the Allianz Group became a European Company, management and employee representatives have negotiated a revised set of co-determination rules. They can be rightly proud of the result.

By Kassel-based journalist **JOACHIM F. TORNAU**

It was uncharted territory. In 2006, Allianz became the first major German company to adopt the recently created legal form of the European Company. Since then, the insurance group's official name has ended with the letters "SE", which stand for "Societas Europaea". However, unlike other companies that would subsequently go down the same route, Allianz was not simply trying to circumvent inconvenient co-determination regulations. On the contrary, the employee participation agreement negotiated by management and employee representatives prior to the company's change of legal status was regarded as exemplary at the time and remains so to this day.

The agreement provided for a supervisory board comprising equal numbers of employees and shareholders. The SE works council was accorded a whole host of rights so that it could represent employees' interests effectively. Moreover, in the preamble to the 30-page document, Allianz explicitly undertook to comply with the ILO core labour standards and OECD standards. The company understood that its employees' interests also formed an important part of the interests of the business as a whole. According to SE works council chairman and supervisory board vice-chairman Rolf Zimmermann, "It was a huge step forward compared to what we had before".

ADAPTING TO THE NEW GROUP STRUCTURE Nevertheless, a new agreement is now in force. It was signed in Trieste in early July following two years of negotiations.



Photo: Alexander Paul Engert

SE WORKS COUNCIL ROLF ZIMMERMANN: There are plans to make English the sole working language.

And corporate law expert Roland Köstler believes that it is “now even more exemplary than before”. The retired lawyer, who spent several years working as the Head of the Hans Böckler Foundation’s Business Law Unit, acted as an expert for the employee side during the recent negotiations, just as he had done the first time round. He explains that it was more a case of making improvements and adapting the agreement to the company’s new structure rather than introducing any fundamental changes. “Neither we nor management were looking to tear the agreement up completely and start from scratch again.”

However, the changes did require them to break new ground once more. There was a need to find workable solutions to two new phenomena. Firstly, in recent years some Allianz subsidiaries have also started trading as SEs and have set up their own SE works councils. And secondly, the rise of globalisation has meant that the group’s business units are now structured transnationally rather than on a local basis. But before the new agreement was signed, the delegates on the Allianz works council only represented either countries and regions or a handful of large companies in the group with more than 2,000 employees. Employee representative Zimmermann describes how “that was no longer a good fit for the new structures”. He talks about how they had to “strike a delicate balance”. Changing the works council’s composition so that it could continue to operate effectively without excluding the incumbent employee representatives would prove to be a major challenge. “But we managed to pull it off.”

As for the works councils of subsidiaries that are also SEs – of which there are currently two –, under the new arrangements they are entitled to at least one delegate on the Allianz Group works council, irrespective of the size of the company. Meanwhile, in cross-border business units such as the credit insurance group Euler Hermes (see the article on page 10), according to the new rules it is now enough for the business unit as a whole to have more than 2,000 employees rather than the individual companies. This has led to a modest increase in the number of seats on the Allianz works council, from 31 to 36.

FIXING THE SHORTCOMINGS The main goal that management and employee representatives set themselves when embarking on the negotiation of a revised co-determination agreement was to adapt the organisation’s structures to the new reality. Additionally, they set out to clarify the relationship between the different SE works councils. However, they also wanted to take the opportunity to discuss some of the shortcomings of the old agreement that had become apparent in practice, notwithstanding its exemplary nature. “We had tended always to look at things from a German perspective”, says Zimmermann, “and we had to learn not to assume that the things we take for granted here also exist everywhere else.” For example, there is now an explicit provision that works council members are entitled to time off work for preparing and debriefing before and after meetings. They are also entitled to a smartphone with Internet access. “These issues had been a constant source of frustration and annoyance.”

The works council was also granted some additional rights. For example, it is now easier for it to consult experts, it must be informed and consulted about cross-border changes to work organisation and it has greater scope to play a proactive role – the restriction of its right of initiative to certain subjects has been removed. There is also better protection against discrimination. All employee representatives, whether members of the works council or the supervisory board, are now covered by rules based on the German Dismissal Protection Act.

And what did the employees have to give up in exchange for all of this? “Nothing at all”, says works council chairman Zimmermann. “It was one of those rare occasions when we didn’t have to do anything in return. Even I wasn’t expecting that.” The only minor concession made by the employees was to agree to eventually make English the works council’s sole working language, in order to reduce translation and interpreting costs. But even that involved nothing more than a declaration of intent, at least for the time being.

The relative harmony at Allianz might also be due to the fact that both sides exercised a degree of diplomatic restraint during the recent review of the agreement. “Our main goal was to adapt to the new circumstances that the group is operating in”, says Zimmermann. “And we wanted to build our experience from the past eight years into the revised agreement.” As for management, its key concerns were the number of seats on the future SE works council and the formulation of more precise electoral and procedural rules.

The principal bones of contention that arose during the negotiation of the original agreement were studiously avoided. They didn’t even make it onto the agenda. No attempt was made to revisit either the size of the Allianz supervisory board (the employee side had been forced to accept a reduction from 20 to twelve seats in the original negotiations) or the question of which issues require the works council’s consent. As Rolf Zimmermann puts it, “Nobody wanted to try and square the circle”. ■

“Benefiting from our expertise”

INTERVIEW Sebastian Sick works as a company law expert for the Hans Böckler Foundation. He speaks to us about his contribution to SAP SE’s co-determination agreement and an ongoing dispute about a point of law.

Sebastian Sick was interviewed by **MARGARETE HASEL**.

“One of the reasons behind software group SAP’s decision to adopt the legal form of the European Company (SE) was clearly to try and get rid of the external trade union representatives on its supervisory board. This constituted a serious assault on the provisions of the 1976 Co-Determination Act.

You are absolutely right. It was the first time anything like this had been attempted by a company where the employees had half the seats on the supervisory board. As well as doing away with the guaranteed seats for trade union representatives, the company initially also wanted to bring in a general ban on anyone from outside the company standing as a candidate for the supervisory board.

Würzburg University Professor of Law Christoph Teichmann prepared a legal opinion for the Hans Böckler Foundation containing a number of key arguments that helped to scupper these plans. What did he say in his report?

Teichmann comes to the conclusion that it is not legal for a company to negotiate the exclusion of trade union representatives in the event that it converts to an SE. The legislators were conscious that companies might try to circumvent the regulations in this way, which is why they insisted that all components of a company’s co-deter-

mination arrangements should be preserved in cases like this. That includes the distribution of the employee seats on the supervisory board. Indeed, this was one of their fundamental conditions for passing the law that allowed public limited companies (AGs) to convert to SEs in the first place.

A compromise deal has now been struck that you yourself were involved in negotiating. However, since both you and the trade unions believe parts of the final document to be in breach of the law, you refused to vote in favour of the agreement. On the plus side, for an initial period lasting until 2019, the number of seats on the supervisory board will be increased from 16 to 18.

Yes, in future there will be seven German employee representatives on SAP’s supervisory board, including two trade union representatives, one senior manager and one representative of the SE works council. There will be a further two representatives from sites outside of Germany. Although RWE Generation SE leads the way with 20, MAN SE is currently the only other European Company with 18 seats on its supervisory board. When large German companies like these choose to become SEs, they normally reduce the size of their supervisory board. At present, SAP is the only company where the number of seats has increased. ►



ZUR PERSON

SEBASTIAN SICK, 42, is proud that he was able to take part in the tricky SAP SE negotiations as the only external trade union representative on the Special Negotiating Body (SNB). As he himself puts it, his involvement was “by no means a foregone conclusion”. Having gained a PhD in Law and completed an additional postgraduate degree (LL.M.) in European Law, Sick has been head of one of the Hans Böckler Foundation’s Business Law Units since 2003. He has also served as a member of the supervisory board of Georgsmarienhütte GmbH since 2007 and is the author of numerous publications on company law. Sebastian Sick has been involved in several other SE negotiations.

On the minus side, however, the external trade union representatives' seats are only guaranteed for five years. Thereafter, there is a danger that the number of seats will be cut to twelve, which is what SAP's management team wanted all along.

That's right, the guaranteed seats could be done away with in 2019 if the supervisory board pushes for a reduction to twelve seats and a motion to this effect is proposed at the Annual General Meeting, AGM. The trade unions have a problem with the fact that the participation agreement for this smaller supervisory board would no longer allocate any seats to the trade unions – and the senior manager seat would also be dispensed with. That is why I ultimately voted against the agreement.

But it appears that the majority had a different opinion.

The fact that we were able to threaten management with falling back on the statutors fall back solution helped us convince them to increase the number of seats on the supervisory board to 18 for the time being. That should have been enough to guarantee the inclusion of the trade unions. The surprise for those of us who have experience of how co-determination usually works was that there was also a majority within the Special Negotiating Body (SNB) in favour of future German employee representatives on the supervisory board

being directly elected. This was supported by the supervisory board, the Executive Board and the works council. Since it is unprecedented in other companies of this size, the only explanation is that it must be connected with SAP's special corporate culture. Conversely, there was no majority in favour either of all the employee representatives on the supervisory board being elected by the group works council – as in fact provided for by the subsidiary requirements – or of there being any trade union representatives on the smaller, 12-seat supervisory board. The SNB, which contained 32 members from 26 different countries, was bitterly divided on this issue.

I shouldn't imagine there were many trade union members on the SNB.

No, there weren't. Of the seven German members, the only two trade union representatives were an in-house representative from the German Bank Employees Association (DBV) and myself – in other words I was the only external trade union representative. I had been jointly nominated by ver.di and IG Metall, both of which have a presence within SAP, but it was the group works council that elected me. It was actually a huge achievement to get an external trade union representative elected onto the SNB at all.

AT A GLANCE

The SAP SE participation agreement

The SE participation agreement signed at SAP's head office in Walldorf on 10 March 2014 after negotiations that lasted exactly six months contains a number of problems from a trade union and co-determination perspective. It is true that the Special Negotiating Body (SNB) was able to come to an agreement with management to increase the number of seats on the supervisory board from 16 to 18. In future, there will be seven German employee representatives on the supervisory board, including two trade union representatives, one senior manager and one representative of the SE works council. There will be a further two representatives from sites outside of Germany. If SAP had not converted to an SE, however, the number of seats on the software company's supervisory board would have risen to 20, since it has had more than 20,000 employees in Germany for some time now.

Although RWE Generation SE leads the way with 20, MAN SE is currently the only other European Company with 18 seats on its supervisory board. When large German companies like these choose to become SEs, they have generally tended to reduce the size of their supervisory board. The earliest that SAP's management will be able to cut the size of the supervisory board to 12 seats – which is what they wanted all along – will be in five years time if, after consulting the SE works council, the supervisory board tables a motion to this effect at the AGM. The fact that the agreement for this 12-member supervisory board would no longer allocate any seats to the trade unions and would also dispense with the senior manager seat would, in the opinion of the trade unions, be in breach of EU law. The trade unions are not ruling out legal action.

What was it that convinced the majority of the group works council to vote for you?

Both trade unions felt that they would benefit from being associated with the expertise for which the Hans Böckler Foundation is renowned. This proved to be a wise strategy, since SAP's employee representatives also realised that they needed the expertise, connections and negotiating experience that only the trade unions can provide.

Quite a few people rolled their eyes when you turned up at the Special Negotiating Body?

No, I was accepted and supported in my capacity as an expert. Thanks to my presence on the body, issues were discussed that would never have been touched upon otherwise. Even though they often chose not to follow my advice, at least they discussed it seriously. Given the make-up of the body, the trade unions were never going to have it all their own way. However, I was able to put a convincing case to both the foreign and German members of the SNB that the trade unions are reliable and constructive partners. I've always been very clear in my role about what I could support. I'm sure that

“SAP's employee representatives realised that they needed the expertise, connections and negotiating experience that only the trade unions can provide.”

helped to bring the formerly entrenched pro- and anti-trade union lobbies closer together. It may also have contributed to a change in the way the trade unions are perceived at SAP, as witnessed in their improved performance at the recent works council elections.

Where were the battle lines drawn within the SNB?

There were actually several. Firstly, there was a split between the large German contingent and the representatives of all the other countries, especially when it came to discussing the distribution of seats on the supervisory board and SE works council. Then there was the divide between the anti-union majority and a minority of delegates who had a more open-minded attitude towards trade union concerns. Finally, there were the cases where the larger countries ganged up on the smaller ones – or vice versa.

The first elections for the new 18-member supervisory board will take place in the spring of 2015. Until then, an interim supervisory board will remain in place. It will be largely unchanged in terms of personnel, except for the addition of two employee representatives from outside of Germany.

The 34 members of the new SE works council – including seven from Germany – will meet four times a year. The experts are talking about a “quantum leap in terms of SAP becoming more European”. All the works council delegates will be entitled to the same special protection against wrongful dismissal enjoyed by German works council members. A wide-ranging but ultimately closed list defines the topics on which the SE works council is entitled to information and consultation. Management will be required to delay the implementation of restructuring

plans until the consultation procedure has been concluded, although admittedly this will only be for a short period of time. In countries with several sites but no central works council, the local employee representatives will be entitled to hold national-level meetings with their SE works council delegates.

The agreement with management was negotiated by an SNB made up of 32 members, seven from Germany plus 25 representatives from 25 sites outside of Germany. The only external trade union representative on the SNB was Sebastian Sick, an expert on company law and co-determination who works for the Hans Böckler Foundation and who had been jointly nominated by IG Metall and ver.di. ■



Photo: SAP AG

SAP'S WALLDORF HEAD OFFICE: The scene of a marathon ten weeks of negotiations with representatives from 26 countries.

► *How did the employees' attitudes towards each other change during the negotiations?*

I think that some of the SAP employee representatives came to realise that they would only be able to make any headway with management if they spoke as one and stuck to their guns.

How familiar were the SNB members with all these issues?

It often becomes obvious during the negotiations that the SNB members lack experience in this area. Only a handful of them had a trade union or works council background. Even in Germany, there has only been a works council since 2006 and it only has limited links with the supervisory board. Having said that, the employee repre-

sentatives on the Special Negotiating Body were all highly qualified and confident individuals.

The agreement was only signed on 10 March – the very day when the statutory six-month deadline for the negotiations would have expired. It looks like both sides played a waiting game right up to the last minute to see who blinked first.

It was a very difficult and bitterly disputed process. The negotiations could have fallen through at any point right up to the very end. We spent a total of more than ten whole weeks between September 2013 and March 2014 locked in negotiations at the head office in Walldorf. They were the longest SE negotiations that

we have ever come across, due in part to SAP's culture of always discussing everything at great length. Matters were further complicated by the fact that the SNB ignored my advice to use interpreters. As a result, the negotiations were conducted in English, even though the legally binding version of the agreement was supposed to be in German. I would strongly advise against anyone else trying this approach. In addition, our negotiations were to some extent overshadowed by SAP's works council election campaign which was conducted in a relatively antagonistic manner and even involved litigation.

SAP is notorious for its anti-union stance.

SAP has a very individualistic corporate culture, with lots of people in highly specialised roles and little tradition of employees being represented collectively. They have never had any external trade union representatives on the supervisory board until now. The seats that were supposed to go to external union representatives were occupied by members of small breakaway unions who stood as trade union reps despite actually being SAP employees. This was enough to tick the formal legal boxes. And all this in a company that is extremely important in the overall context of employee representation. SAP is a successful software business with 67,000 employees worldwide and ranks as one of Germany's top five companies in terms of its market value. SAP is typical of the situation in one of our key future industries where – unlike in traditional industry – the trade unions still have their work cut out to gain any influence.

As well as the supervisory board negotiations, the SNB also negotiated on the SE works council where you achieved a very positive outcome.

Yes, I believe SAP is the first company where the SE works council is entitled to meet four times a year. That provides an excellent basis for a more European approach among the employee representatives. The 34 SE works council members also enjoy an exceptionally high standard of protection against wrongful dismissal, based on the German model. One further positive feature is that the works council can delay the implementation of company decisions. Measures such as restructuring plans cannot be rolled out until the consultation procedure has been concluded. Finally, in countries with several sites but no national employee representation body, the local employee representatives are entitled to hold national-level meetings with their SE works council delegates.

The list of topics on which the SE works council is entitled to information and consultation is extremely wide-ranging.

True, but it is also a closed list. It would definitely have been better just to list examples of the kind of topics that should be addressed. That is actually one of the points that the trade unions are not happy with.

Was management's strategy to take a softer line on the works council whilst at the same time trying to weaken co-determination at supervisory board level? After all, the company's ultimate goal was always to reduce the number of seats on the supervisory board to twelve.

That isn't something that was discussed openly. But it's perfectly possible that management's strategy involved being willing to compromise on the works council so that they could win more concessions in the supervisory board negotiations. After all, the majority of the SNB members were from countries other than Germany and they are the ones who stand to gain the most from a strong SE works council.

“Within the SNB there was no majority in favour of all employee representatives on the supervisory board being elected by the group works council.”

So would you say the glass is half full or half empty?

It's a complicated situation. There are a lot of good things in the agreement that we negotiated. However, it also contains one point that is extremely problematic for the trade unions and for co-determination in general. The trade unions have not ruled out taking the company to court over their possible exclusion from the supervisory board as of 2019. Numerous other legal experts share my opinion that the agreement is in breach of the law on this particular point. ■

FURTHER INFORMATIONEN



A German summary of the legal opinion prepared by Würzburg University Professor of Law Christoph Teichmann on the “Protection of Existing Co-Determination Rights when a Company Converts to an SE” is available on the Hans Böckler Foundation web site at: www.boeckler.de/pdf/pb_europ_ag_teichmann.pdf



MAX MUSTER SUP

An open invitation to set up letterbox companies

COMPANY LAW Following the demise of its European Private Company initiative, the European Commission is now launching another foray into the realm of company law. Its proposal for a Directive on Single-Member Companies is completely devoid of co-determination regulations. As such, it could have potentially disastrous consequences.

By Kassel-based journalist **JOACHIM F. TORNAU**

Rarely can a European Commission proposal have been greeted with such universal disapproval. Whether it be the Bavarian Ministry of Justice, the Left Party parliamentary group in the German Bundestag, the German Confederation of Skilled Crafts or the trade unions, hardly anyone in Germany has a good word to say about Brussels' latest foray into the realm of company law. The President of the Confederation of German Trade Unions (DGB), Reiner Hoffmann, fears a "sell-out of the successful code-termination model". Meanwhile, the President of the German Notaries' Association, Oliver Vossius, sarcastically refers to its "significant contribution to Europe's growth, wealth and convergence in a 'multi-criminal' single market".

The object of all this bitter criticism bears the rather grand Latin name of "Societas Unius Personae", or SUP for short. The Commission wants to create a single European legal framework for single-member companies – in other words, something not dissimilar to the European Private Company, but restricted to companies with a single shareholder (who may be either a natural or a legal person). The European Commission put forward a proposal for a Directive on this issue at the beginning of April. The goal is apparently to facilitate the establishment of small and medium-sized enterprises. In particular, they want to make it easier and cheaper to set up subsidiaries in other EU member states.

A LICENCE FOR FISCAL AND SOCIAL DUMPING – The Commission argues that the results of an online consultation carried out last year point to an urgent need for action in this area. After all, 55 percent of those who took part said they thought that harmonised regulations for single-member companies would lead to more cross-border engagement. On the other hand, the response to the survey could hardly be described as overwhelmingly enthusiastic. Just 242 responses were received from all over Europe and fewer than half were from businesses.

Nevertheless, the Commission saw this as sufficient grounds to press ahead with a fresh attempt at harmonising company law throughout Europe, following a hiatus of several years. It was in 2011 that their most recent initiative to introduce a European Private Company – formally referred to as the Societas Privata Europaea (SPE) – came a cropper, when Germany was one of two countries to veto it. One of the main sticking points was employee co-determination. The Commission wanted to impose significantly worse conditions on employees than those found in European Companies (SEs), a legal form that was created back in 2004. According to the historic compromise that was struck at that time, before a business can register as a European Company it has to negotiate specific co-determination arrangements. If it proves impossible to reach a settlement on this matter, employees automatically retain all the rights that they had prior to the SE's establishment. This is a model that the trade unions can live with.

But in the case of the SUP, not even a watered-down version of this compromise has been adopted. The draft Directive contains not a single word on the contentious issue of co-determination. The Commission claims that it wanted to take a neutral stance in order to avoid encroaching on national regulations.

At best, however, that is only half the story. This is because the recent proposal also resurrects another feature of the planned SPE statute that was hotly disputed at the time: the ability for a company to have its registered office and its administrative headquarters in different locations. This would mean that even single-member companies that only trade in one EU country could be registered in the member state of their choice.

"That's an open invitation to set up letterbox companies", says DGB legal advisor Marie Seyboth. Not to mention an invitation to circumvent inconvenient co-determination and tax laws, since the applicable law is that of the country where the company is registered. "It would mark the start of a disastrous race to the bottom for fiscal and social standards", adds Seyboth. "Companies cannot be allowed to have their registered office and administrative headquarters in different locations."

If a company wanted to get rid of the employee representatives on its supervisory board, it could simply transfer its registered office to a country like the UK, where there is no co-determination. And, as Seyboth points out, the proposed Directive is by no means aimed only at small-scale operations that would never have enough workers to entitle employees to representation on the supervisory board anyway. Many larger subsidiaries are also able to trade as single-member companies, for example companies like Galeria Kaufhof GmbH, which is part of the Metro Group.

PRESSURE ON EXISTING LEGAL FORMS – German companies can in fact already get round co-determination regulations by choosing foreign legal forms such as the British limited company (Ltd.) or the US corporation. In that sense, the European single-member company would not be offering businesses anything radically new, according to Sebastian Sick, who works as a corporate law expert at the Hans Böckler Foundation. However, Sick argues that unlike the limited company (Ltd.), which has been widely adopted in Germany because of its relatively low employment standards but nonetheless has a poor reputation, the fact that SUPs would be endorsed by the EU would lead to them being perceived as something altogether more respectable. "After all, an SUP's letterhead doesn't tell you what country it is registered in." ►

An assault on supervisory boards

The European Commission's proposal to amend the Shareholder Rights Directive in favour of shareholders would undermine the role of supervisory boards with employee representatives.

On 9 April, the European Commission presented a series of proposals on European company law and corporate governance that, if adopted, would result in significant changes for German businesses. In addition to a proposal concerning the new legal form of the European single-member company (SUP) and a recommendation on corporate governance reporting, the package also includes a revision of the Shareholder Rights Directive. The proposals, which originate from Frenchman Michel Barnier's DG Internal Market and Services, are now scheduled for discussion by the Parliament, Council and Commission.

The revision aims to encourage shareholders to take a more active role and to improve companies' transparency vis-à-vis their shareholders. One criticism of the proposal is that it is based on the Anglo-Saxon corporate governance model where there is no supervisory board to act as an arbiter between shareholders and the board of management. By attempting to unilaterally strengthen the rights of shareholders – whose actions are often governed by short-term interests – it overlooks the interest that the employees and other stakeholders represented on the supervisory board have in the long-term success of the business.

This is clearly demonstrated by two of the proposal's key points: the requirement for executive remuneration policy to be subject to a binding shareholder vote ("say on pay") and the plans to make the AGM responsible for approving transactions with major shareholders (related parties).

According to the proposed amendment to the Directive, a binding vote on executive pay would have to be held at the AGM at least once every three years. In other words, there would be a binding shareholder vote as opposed to the voluntary, non-binding vote that currently exists in Germany. Shareholders would also hold an annual vote on the management remuneration report, which in German joint-stock companies is prepared jointly by the board of management and the supervisory board. If the shareholders voted against the report, the company would be required to come back the following year and provide them with details of the measures it had implemented in response to their criticism. While the supervisory board would still retain responsibility for setting compensation levels and developing the company's remuneration policy, its room for manoeuvre would be substantially



Photo: BMW Group

BMW Annual General Meeting at the Olympic Hall in Munich, May 2014

curtailed. The Commission's proposal to strengthen shareholder oversight of related party transactions also shows little regard for the role of the supervisory board. Until now, transactions carried out with the companies and individuals known as 'related parties' had to be subsequently disclosed in the company's accounts. However, the Commission now wants transactions with related parties representing more than five percent of the companies' assets, or transactions that could have a significant impact on profits or turnover, to be subject to shareholder approval.

This is particularly relevant in groups, for example, with regard to transactions between or mergers involving several majority-owned subsidiaries, especially since according to the proposal, the related party in question would not be allowed to take part in the vote. Giving these additional rights to smaller shareholders, whilst at the same time weakening the position of the major shareholders, is an approach that is alien to Germany company law, which has other means of ensuring that minority shareholders are protected. It should be the supervisory board and not the shareholders' meeting that is strengthened, for example by empowering it to decide whether or not to authorise related party transactions based on a list of requirements for their approval.

Clearly, the Commission's sole concern is to promote the active shareholder model in the interests of shareholder value. However, its proposals threaten to undermine the role of supervisory boards with employee representatives. As such, they cannot expect to win the backing of employees. ■

By **SEBASTIAN SICK**, Hans Böckler Foundation, Düsseldorf

► Far from delivering the promised harmonisation, in Sick's view the Commission's proposal would in fact result in competition between SUPs and member states' established legal forms. While the latter would continue to exist in theory, they would in all likelihood find themselves at a disadvantage because of their higher employment standards. Company law expert Sick predicts a race to the bottom in which the losers would be the employees and other stakeholders. "Anyone wanting to start a company will obviously choose the most liberal legal form available." Why go for a traditional German limited company ("GmbH") when there are simpler and cheaper alternatives?

Although the draft *Societas Unius Personae* Directive stipulates very few conditions, those that it does contain are guaranteed to raise eyebrows. For instance, the minimum capital requirement is set at the symbolic level of one euro. Moreover, it allows for the registration process to be completed online in no more than three days, without even requiring an identity check of the person founding the company. And this, even though SUPs can be established not only by converting existing companies, but also from scratch, as completely new start-ups.

These are the main aspects that have drawn fierce criticism even from quarters beyond the trade union movement. Bavarian Minister of Justice and CSU politician Winfried Bausback is on record as saying that "if you don't check everything very carefully right from the start, you can end up opening the flood-gates for all kinds of shady dealings". And notaries' association president Vossius warns that "anyone could start a company using a stolen identity or simply giving their name as Joe Bloggs, Donald Duck or Batman." It would provide certain people with the ideal opportunity to defraud their creditors and engage in illicit dealings and money laundering.

One might think that a draft Directive with such dubious content had no chance of actually being adopted. But the Commission has anticipated this problem, too. Having learned its lesson from the failed European Private Company initiative, this time round it is seeking to take the line of least resistance. It is not planning to repeat the mistake it made with the SPE by proposing the SUP as a new European legal form that can only be adopted by a unanimous vote of the Council. Instead, the Commission is launching its initiative under the banner of harmonisation, classifying it as a measure to help promote freedom of establishment. By employing this ruse, it only needs a majority vote in the Council to get the Directive rubber-stamped and doesn't even need the approval of the national parliaments.

However, there are those who dispute the legitimacy of this approach. The Commission's assertion that the SUP will not intervene as profoundly in the law of individual nations as the European Private Company Directive would have done is described as "a bold claim" by Hans Böckler Foundation expert Sebastian Sick. After all, what they are doing is forcing the member states to introduce a low-cost, low-standard alternative to their existing legal forms, even for companies that only trade on the domestic market. There is no shortage of critics who regard this as a breach of the EU principles of subsidiarity and proportionality. Austria has in fact already submitted a reasoned opinion arguing that the proposals are contrary to the subsidiarity principle. And in Germany, the Left Party parliamentary group tabled a motion asking the Bundestag to follow suit. However, at the end of May this year, the Bundesrat

eventually decided not to issue an opinion, against the advice of its own committee on legal affairs.

UNEQUIVOCAL OPPOSITION FROM EUROPE'S TRADE UNIONS

The trade unions are not prepared simply to hope that the Commission's proposal will be rejected because of its flawed legal basis. Instead, they are putting their trust in political campaigning. They aim to raise awareness among parliamentarians and the member states' finance ministers, who may not necessarily prove any easier to convince. It is the finance ministers who are responsible for

At a meeting in June the ETUC's Executive Committee expressed unanimous opposition to the proposed Directive.

this issue within the Council. "Each individual country must take action to ensure that the Directive is not adopted", says Claudia Menne, Confederal Secretary of the European Trade Union Confederation (ETUC) in Brussels. One of the key requirements to make this happen is already in place, since Europe's trade unions are united in their agreement that the SUP proposal needs to be stopped. At a meeting in June the ETUC's Executive Committee expressed unanimous opposition to the proposed Directive.

In other words, the opposition is by no means confined to the German trade unions because of their concern about the impact on co-determination. For one thing, there are several other member states that also have regulations on employee participation at supervisory board level. Indeed, in some countries the threshold is much lower than in Germany, where a company's workforce must number at least 500 before its employees are entitled to sit on its supervisory board. In Sweden, for example, the company only needs to have 25 employees, while the threshold is 50 in the Czech Republic, Slovenia and Slovakia, 100 in the Netherlands and 150 in Finland. Furthermore, according to ETUC Confederal Secretary Menne, co-determination is now recognised as a legitimate concern even by the trade unions in countries that do not actually have it themselves. "There's a lot of solidarity on this issue."

But there are also far more fundamental reasons for Europe's trade unions wanting to mobilise opposition to the Commission's proposal. "The SUP is the latest step in the EU's deregulation agenda. What really worries us is that this is the first time they have tried to use harmonisation as a pretext for lowering standards," says Menne. "If a precedent is set this time round, we can expect even more problems in the future."

An exercise in mislabelling

REFIT INITIATIVE Under the pretext of better EU law and a reduced administrative burden, the outgoing European Commission is conducting a revision of employee protection and participation regulations. They have also declared open season on three information and consultation Directives.

By Brussels-based journalist **ERIC BONSE**

It sounds innocent enough. By calling its initiative “REFIT – Fit for growth”, the European Commission has chosen a name that is suggestive of physical fitness. Rather than shedding those extra pounds, however, what it is actually about is “regulatory fitness” and leaner administration. How could anyone object to that? After all, even in Germany there is a consensus surrounding the urgent need to cut the amount of red tape. Indeed, the former Minister-President of Bavaria, Edmund Stoiber, was sent to Brussels a few years ago for precisely this purpose.

But there is more to REFIT than its catchy name suggests, as revealed by the story of how it came into being. Outgoing European Commission President José Manuel Barroso launched the initiative in autumn 2013, after Britain’s Conservative Prime Minister, David Cameron, threatened that the UK would leave the European Union unless powers were returned from Brussels to national governments. Cameron argued that the Brussels bureaucracy was stifling growth.

However, anyone who takes a closer look at the proposals drawn up by Cameron’s own specially created Business Task Force will soon realise that there is a hidden agenda. Their main focus is not on “smart regulation” or cutting red tape, but on getting rid of what they appear to consider burdensome environmental, data protection and social standards. Right from the outset, the UK government’s initiative always had a strong anti-union spin and this is reflected in the REFIT programme.

SOCIAL PARTNERS OVERRULED One of the first measures that Barroso announced as part of the REFIT initiative involved a dramatic assault on European social policy. The Commission took the unprecedented step of blocking an agreement on health and safety that had been negotiated by the trade unions and employers within the framework of the social dialogue and was ready to be signed. The agreement concerned members of the hairdressing profession who are particularly at risk from skin conditions and musculoskeletal disorders. Brussels now wants to prevent these new regulations from being adopted.

The social partners regarded the agreement as an important step towards reducing the risks to hairdressers’ health. Hairdressing has the highest risk of work-related skin disease of any profession. When the “fitness” programme was launched in October 2013, Annelie Buntenbach of the DGB’s Federal Executive Committee criticised Brussels’ rejection of the agreement as “an unprecedented attack on health and safety legislation – and an incredible show of arrogance towards the social partners”. As far as the trade unions were concerned, the REFIT programme had not got off to a good start.

Unfortunately, things were not about to take a turn for the better. In its very first Work Programme, the Commission called for a review of the highly charged issue of employee information and consultation and three related Directives. Its pretext for doing so was to reformulate the regulations so that they do not place an unnecessary burden on small and medium-sized enterprises (SMEs).



TRADE UNION PROTEST IN BRUSSELS IN EARLY APRIL: “An unprecedented attack on health and safety legislation”

However, the Commission failed to explain why this required it to launch an assault on core areas of European employment and social legislation that do not even directly affect the majority of SMEs.

THE COMMISSION TRIES TO PLAY IT ALL DOWN_ The first interim report, published in June 2014, still leaves a lot of questions unanswered. It states that the Commission’s internal “fitness check” on employee information and consultation has been completed and that consultation of the social partners will commence in September. But what exactly have they checked? And what is the consultation supposed to achieve? Are they just looking at an ultimately harmless “consolidation” of the relevant EU law, or is the legislation to be revised and rewritten? Are they seeking to completely do away with important regulations like the health and safety rules for hairdressers?

The Commission has tried to play it all down. According to one of Barroso’s advisors, all they want to do is reduce the administrative costs associated with the three Directives and make things less “complex” for businesses. They have no intention of tinkering with the Directives’ goals, i.e. the timely and comprehensive consultation of employees on important matters relating to the business. REFIT

should not be confused with the UK government’s attacks on workers’ rights and will not result in the “erosion of social standards”.

The arguments employed by the Commission with regard to its “fitness” programme are similar to the ones it has used in connection with the controversial Transatlantic Trade and Investment Partnership (TTIP). In both cases, it keeps insisting that no-one will be worse off and that European protection standards will be maintained. The trade unions, however, remain to be convinced. Wolfgang Kowalsky, who represented the European Trade Union Confederation (ETUC) during the “fitness check”, acknowledges the fact that the Commission treated them fairly. “We were able to participate fully on the issue of workers’ rights”, he says. And he doesn’t anticipate any problems with the consultations this autumn either. However, like many other members of the trade union movement, Kowalsky remains on his guard. He sees REFIT as part of a wide-ranging deregulation agenda that is ultimately aimed at eroding social rights, despite the Commission’s strenuous denials.

According to ETUC expert Kowalsky, it was no coincidence that the REFIT initiative was announced on the very same day that the EU Commissioner for Employment, Social Affairs and Inclu- ►

An assault on social rights

The trade unions distance themselves from the planned free trade agreement with the USA.



Photo: Kay Nietfeld/dpa

Anti-TTIP demonstrations have been held all over Europe – here at the Brandenburg Gate, Berlin, in early May.

More market, more competition and more free trade. That is the neoliberal recipe that EU leaders are planning to use to steer Europe out of the crisis. And a key pillar of this policy is the proposed Transatlantic Trade and Investment Partnership with the USA. At the EU summit in June, the heads of state and government called for the TTIP agreement to be signed and sealed by 2015 at the latest. They even included the ongoing negotiations in their new “strategic agenda” for the next five years.

However, they are in danger of losing the trade unions as a key strategic partner in this endeavour. Although their initial response to the free trade negotiations was cautiously positive, both the ETUC and the DGB are now distancing themselves from the TTIP. In May, the DGB Federal Congress called for the negotiations to be temporarily suspended. The delegates demanded that this break should be used “to establish a fundamentally new approach to global trade policy”. The aim would be to “create an equitable policy framework for globalisation that reflects the interests of workers and consumers, instead of simply increasing competition through market liberalisation and deregulation.” This would require public services to be completely excluded from the agreement. The DGB also joined a host of environmental and consumer organisations in calling for the controversial investor protection and out-of-court arbitration arrangements to be dropped.

This arbitration procedure, known as the ISDS (Investor-State Dispute Settlement), would allow large corporations to turn their fire on unpopular environmental and social standards. One example of its potential negative impact is provided by Swedish energy giant Vattenfall, which is suing Germany for damages

over the losses that it claims to have suffered as a result of Germany's decision to phase out nuclear power.

Given the contentious nature of the issue, the European Commission launched a public consultation on the ISDS before the European elections in May. However, the main aim of this exercise was obviously to try and defuse the situation. At the beginning of July, before the consultation had even been concluded, the European Commissioner for Trade, Karel De Gucht, made it plain that there were no plans to drop the ISDS completely. His remarks drew a swift response from the ETUC. In an open letter to De Gucht, ETUC General Secretary Bernadette Ségol condemned the fact that the option

of dropping the ISDS had been ruled out from the very outset. She claimed that this cast doubt on whether the results of the consultation would be assessed impartially.

OPPOSITION TO CO-DETERMINATION – Investor protection is not the only point that is causing concern among the trade unions. In view of the significantly lower employment standards prevalent in the US, both the DGB and the ETUC are fearful for European workers' rights. This time, the negative example is provided by the massive smear campaign that surrounded the vote on the establishment of a works council at VW's Chattanooga plant in Tennessee. The UAW union's plans to set up a German-style works council there met with fierce opposition from local Republicans.

Consequently, the DGB also sees the TTIP as an “assault on the German co-determination model”. If the free trade agreement resulted in higher levels of investment in the US, there is a danger that US states with an anti-union stance would be the preferred destination for this extra cash. These concerns are shared by the ETUC. Ségol calls for the United States to adopt the ILO's core labour standards in order to ward off the impending threat to social standards. She argues that failure to make progress on this point should lead to the suspension of the TTIP negotiations.

However, it does not appear that a change of course is in the offing. After all, the Commission's stance has the backing of the EU's heads of state and government – and in their new “strategic agenda” they are lobbying harder than ever to get the TTIP adopted.

By **ERIC BONSE**, Brussels

► sion, László Andor, unveiled a much-anticipated (and much-delayed) Communication on the social dimension of the Economic and Monetary Union. However, while the proposals on the social dimension were entirely non-binding in nature, the REFIT measures were far more specific, involving what Kowalsky describes as “the dismantling of laws designed to protect workers and the weakening of the social dialogue”. This has been par for the course since the liberalisation and deregulation agenda was set at the Lisbon Summit in the year 2000. While they have been happy to palm off their “left-wing constituents” with vague promises, they have been all too willing to implement concrete measures to benefit the business community.

Isabelle Schömann of the European Trade Union Institute goes even further. In a study carried out for the Hans Böckler Foundation, labour law expert Schömann warns that the Commission’s REFIT programme is a massive exercise in mislabelling. The Commission claims that the initiative is mainly targeted at small and medium-sized enterprises. However, employee participation does not constitute an excessive “burden” for SMEs at all. What the Commission is really trying to do is “to erode employee participation rights under false pretences.” According to Schömann, the Commission is concealing its true intentions and pursuing them in an indirect and non-transparent manner. Tellingly, in the interim report on REFIT the talk is now suddenly of regulatory costs rather than administrative costs. Schömann is also critical of the fact that “until now, it wasn’t the laws themselves that were the burden, but the way they were implemented. It would seem that their focus has now shifted”. This adds fuel to the suspicion that ultimately it will be the regulations themselves that are changed and not just the rules governing their implementation.

THE TRADE UNIONS CALL FOR A HALT TO DEREGULATION Single-member companies (Societas Unius Personae, SUP) provide a cautionary tale of what can happen. In 2008, the European Commission put forward a proposal to create the legal form of the European Private Company (SPE). This was rejected in 2011, in no small measure thanks to a German veto. Among the sticking points was the fact that the proposal did not provide for adequate employee co-determination rights.

Now Brussels is trying to push through a proposal on single-member companies instead, this time with no employee co-determination arrangements at all. The proposal has sparked huge controversy, including opposition from the trade unions.“

This is the first time the European Commission has come up with a proposal that is completely devoid of co-determination arrange-

ments”, says an indignant Kowalsky. If adopted, it would mean that a medium-sized business could circumvent German co-determination laws by setting up a letterbox company registered in Malta. Labour law expert Schömann also has issues with SUPs. She regards them as symptomatic of the underhand tactics employed by the EU in its REFIT initiative. Instead of directly attacking regulations designed to protect employees and their rights, they simply withdraw

“The real purpose of smart regulation is to scale back the role of the State.”

EGB RESOLUTION „RETHINK REFIT“

the relevant proposals and replace them with texts that favour employers.

The European Trade Union Confederation is no longer prepared to play along with this approach. It is demanding that the EU calls a halt to deregulation and rethinks the “smart regulation” initiative. According to the ETUC resolution “Rethink REFIT”, the programme has nothing to do with making legislation more efficient. Nor is it the EU’s intention to make legislation more beneficial to the public. “The real purpose of smart regulation is to scale back the role of the State.”

However, it does not appear that the EU is about to have a change of heart. On the contrary, at the EU summit in June, it actually strengthened its REFIT strategy, ensuring that it will be binding for the incoming European Commission when it begins its work programme this autumn. So nothing is going to change – if anything, deregulation will become even more of a priority. According to the summit’s conclusions, the only difference will be the adoption of a more socially conciliatory tone for the purposes of communication. In future, more attention should be paid to “consumer and employee protection and health and environmental policy issues”. In view of the recent initial attempts at undermining employee rights, it is hard not to detect a note of contempt in these words. ■

FURTHER INFORMATIONEN



Isabelle Schömann: **GUTER KLANG, ABER SCHLECHTE FOLGEN FÜR EUROPAS ARBEITNEHMERSCHAFT.** Wie die EU-Kommission mit REFIT Etikettenschwindel betreibt. Hans-Böckler-Stiftung, Mai 2014. Available for free download (in English) at: www.boeckler.de/index-mitbestimmung.htm



Wolfgang Kowalsky: **REFIT – A BREAKTHROUGH TOWARDS A STRENGTHENED AND MORE ENCOMPASSING DEREGULATORY AGENDA?** In: Transfer, issue 2/2014

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