Corporate Governance and the Voice of Labour: Board-Level Employee Representation in Europe

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At a time when the world of work is facing tremendous challenges and transformations – from the tragic consequences of the recent deep economic and social crisis on employment levels; to the redefinition of employment settings in traditional industrial sectors in the perspective of a ‘just transition’ towards a green economy –, one topic is of increasingly acute relevance, namely ‘industrial democracy’. This term, long widespread within the field of industrial relations, was first coined by Beatrice and Sidney Webb in 1897, since when this concept – also referred to, in the European Commission’s terminology, as ‘employee involvement’ – has found concrete form in numerous different shapes at the European level. The 1994 directive on European Works Councils1 and its 2009 recast version2, as well as the 2002 directive establishing a general framework for informing and consulting employees3, both represent good illustrations in this respect. When looking at scholars’ attempts to conceptualise - in a detailed fashion - ‘industrial democracy’ as different modalities of worker representation at company level (e.g. Blumberg, 1968; Bernstein, 1976; Dachler and Wilpert, 1978; King and Van de Vall, 1978; Locke, Schweiger, 1979; Gold and Hall, 1990; Kaler, 1999; Salamon, 1998; Marchington, 2005; Van Gyes, 2006), not only are those processes of information and consultation described as fundamental interactions between industrial relations actors, but so too, deliberately, is the process of worker participation, i.e. employee participation in company-level decision-making processes relating to matters of finance, strategy and investments. The most advanced form of such participation – which is our focus of interest here – is the representation of employees, with voting rights; on companies’ supervisory board or board of directors.

In fact, it is possible to count on one hand the number of studies specifically devoted to this subject (EIRR, 1991; Schulten and Zagelmayer, 1998; Kluge and Stollt, 2006), while observing that mention of legal provisions for employee representation in boardrooms is only occasionally to be found in European Commission reports dealing with industrial relations (the latest example of a report mentioning this specific form of worker participation is Calvo et al., 2008). This point appears even more striking, in our opinion, for at least three reasons. The first has to do with the fact that the European institutions have enacted a legal text taking into account this specific dimension of worker representation through the adoption of the European Company Statute [henceforth ECS] in 20014. The second is the existence of provisions for worker participation, based on legal texts or collective agreements, in 18 of the 27 EU Member States plus Norway, thus not limited to the exclusive and well-known German co-determination. The third and final reason is the dissemination of the

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claim according to which board-level employee representation [henceforth BLER] has to be acknowledged as an integral component of corporate governance (e.g. TUAC, 2005; TUAC, 2009). Indeed, the late 1990s-early 2000s have seen a revival of debates dealing with corporate governance as a tool for safeguarding the quality and the attitude to risk-taking of companies’ management and administration by means of soft law (OECD, 1999 and following) and corporate self-regulation. Typically in this regard, two schools of thought have opposed each other: backers of the shareholder theory versus those of the stakeholder theory. Rooted in the agency theory, supporters of the shareholder approach argue that new designs of corporate governance – such as the introduction of non-executive directors among board members – are needed in order to reduce the agency costs arising from the fundamental relationship between the Agent (CEO and top management) and the Principal (shareholders), the latter being the one and only group bearing the risk (e.g. Jensen & Meckling, 1976; Fama, 1980; Fama & Jensen, 1983a, 1983b, 1985). In the opposing camp, advocates of the stakeholder approach argue instead for corporate management and strategies to take into account the interests of those “who can affect or [are] affected by the achievement of the organization’s objectives” (Freeman, 1984: 46). Among the various stakeholders, employees occupy a specific place given the fact that, according to those authors, their investment of human capital is as risky as the investment of financial capital (Blair, 1995), and that a company strategy also oriented towards the defence of their interests could be cost-saving in terms of social risks (Cornell and Shapiro, 1987). According to this line of thought, employees should therefore have a say in their company’s management and sit on its board (Van Wezel Stone, 1993; Aglietta and Rebérioux, 2005).

The purpose of briefly expounding the dispute taking place around the issue of corporate governance is not so much to reveal the topicality of theoretical considerations on BLER as to use this dispute as an illustration of what we regard as the key dividing-line between the pros and cons of worker participation. Indeed, the underlying ideology behind each respective argument concerns the nature of the linkage between the economic and the social within the undertaking. They differ as follows: on the one hand, those actors considering that the economic and the social are two separate spheres of action, the former – the sphere of economic, strategic and financial decision-making – being the sole prerogative of the top management/shareholders duo, while the latter is referred to as “social dialogue” between top management and workers on working conditions such as salaries; on the other hand, those actors considering that the economic and the social spheres are intrinsically interdependent and that no decision can be made in one of the spheres without involving the other. Among the authors upholding the stakeholder approach, Jeffrey S. Harrison and R. Edward Freeman clearly illustrate our point: “The theoretical problem is that surely ‘economic effects’ are also social, and surely ‘social effects’ are also economic. Dividing the world into economic and social ultimately is quite arbitrary. Indeed, one of the original ideas behind the stake-holder management approach was to try to find a way to integrate the economic and the social” (Harrison, Freeman, 1999: 483-484).

When criticising the neo-classical paradigm prevailing in economics, as well as subsequent proposals aiming at redefining this initial paradigm, Michael Piore insists

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5 The Trade Union Advisory Committee – an international trade union organisation with consultative status vis-à-vis OECD – has been and still is particularly reactive towards OECD’s various publications on the topic of corporate governance.
6 We use the term ‘revival’ on purpose since coming across a founding publication dating back to the 1930s (Berle and Means, 1932).
7 For instance, Directive 2006/46/EC amending other Council Directives on the annual accounts and consolidated accounts of certain types of companies, requires company management to comply with a national code of corporate governance or to provide an explanation in the event of non-compliance.
on the fact that “view[ing] the distinction between the economic and the social realms [...] as itself a social construction” (Piore, 2003: 121). What could be stated within the framework of an epistemological thought could equally well be applied to the analysis of existing social phenomenon. Indeed, we would like to adopt this perspective in order to reveal the extent to which the topic of board-level employee representation consists of such a social construction in Europe. We therefore propose to demonstrate this social construction by, firstly, revealing the underlying conception that industrial relations [henceforth IR] actors at the European level have of the specific issue of worker participation at board level. Secondly, with the aim of better understanding what is at stake when talking about a ‘European’ approach and conception of this issue, we will address the degree of divergence among national provisions on BLER and the corresponding reactions of European IR actors, ranging from a desire to pursue harmonisation to a preference to preserve what already exists. Finally, our presentation of the preliminary results from a quantitative research we are currently conducting will also question the underlying conception of IR actors, but will do so by targeting the practitioners themselves, i.e. those employee representatives who sit on the board of companies with a right to vote.

1. BLER from the standpoint of European-level industrial relations actors

On the specific issue of BLER, and even on the broader one of worker representation, a large majority of cross-industry rules produced by European IR actors are still legal ones, in the form of Regulations and Directives. Therefore, when seeking to understand how those actors perceive BLER, we have to adopt the standpoint taken during the legislative process. Moreover, to make explicit the underlying conception of each of the IR actors, we suggest using an indicator derived from an angle chosen by some authors in their reading of this phenomenon (Ballerstedt and Wiedemann, 1977; Greenfield, 1998): the classification of the legal rules as either company law or labour law. Indeed, going back to our own reading of the underlying conception of IR actors – or their “project” as Jean-Daniel Reynaud would call it (Reynaud, 1997) –, according to the characteristics they attribute to the linkage between the economic and the social, we could transpose our perspective as follows: those actors considering that the economic and the social spheres are two separate universes would thus clearly operate a distinction between matters of company law and matters of labour law. On the other hand, actors considering the economic and the social to be two spheres but ones that are interlinked and interdependent would not pay so much attention to such a distinction or would emphasise the transposed inter-linkage between company law and labour law.

We do acknowledge that the traditional Dunlopian trilogy of IR actors – namely, employees and their trade unions; employers and their associations; the State and its public institutions (Dunlop, 1958) – can no longer, by itself, help in revealing the collective regulation of work and labour (Legault, Bellemare, 2008). It has been

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8 As a part of ‘secondary legislation’ in Europe – primary legislation being the treaties – Directives and Regulations are the most binding legal rules. A regulation is a general measure that is binding in all of its parts and is directly applicable, i.e. it creates law which takes immediate effect in all the Member States in the same way as a national instrument, without any further action on the part of the national institutions. Conversely, a Directive is binding on the Member States as to the result to be achieved but leaves them the choice of the form and method they adopt to transpose it into their national legal framework.

9 For Jean-Daniel Reynaud, when looking at collective regulation, i.e. the process whereby industrial relations actors “produce, sustain or change rules” [our translation], the researcher should bear in mind that “rules have a meaning only reported to a joint action (to simplify we will say, whatever the variety of purposes: to a project)” (Reynaud, 1997: 80) [our translation].
widely recognised that other actors and groups of actors play a major part within this game scene: these could be users (Bellemare, 2000) or customers (Dujarier, 2008) amongst others. However, whether one regrets it or not, the IR actors at the cross-industry level in Europe still are identified in accordance with the Dunlopian triptych, and even in a highly institutionalised way (within the Treaty on the Functioning of the European Union – Arts. 154 and 155\(^\text{10}\) – and EC communications – COM (93) 600 final) as follows\(^\text{11}\): organisations representing workers (ETUC, Eurocadres, CEC); organisations representing employers (BUSINESSEUROPE – formerly UNICE -, CEEP, UEAPME); European institutions (EU Parliament, EU Council, European Commission). For the purpose of this paper, we shall concentrate our analysis on two of those 9 players: the ETUC, since it represents more than 60 million workers – compared to 5 and 1.5 million members respectively represented by Eurocadres and CEC – and the European Commission\(^\text{12}\).

1.1 On the public institutions’ side: an implicit division of competence for labour law and company law within the European Commission

As already mentioned, the most far-reaching European legal rule on BLER is the European Company Statute, adopted in October 2001\(^\text{13}\) by the European legislator. For this reason, we shall explore the ‘project’ from the standpoint of the European public institutions on the basis of this particular topic.

The ECS has in fact been enacted as two separate legal acts: a Regulation setting out the Statute as such, and a Directive supplementing it with regard to employee involvement. Both legal texts are founded on the legal basis of Article 308 of the Treaty on the Functioning of the European Union [TFEU] (now Art. 352 of its consolidated version). By contrast, the other Directives dealing with worker representation – i.e. Directive 2009/38/EC on European Works Councils and Directive 2002/14/EC establishing a general framework for employee information and consultation – are both founded on the legal basis of Article 137 of TFEU (now Art. 153). Indeed, the latter stipulates that:

\[\text{The Union shall support and complement the activities of the Member States in the following fields: […] (e) the information and consultation of workers; […] To this end, the European Parliament and the Council: […] may adopt, in the fields referred to in paragraph 1(a) to (l), by means of Directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.}\]

While ‘the information and consultation of workers’ appears amongst the list of ‘fields’ in point (e), so does worker participation – “representation and collective defence of the interests of workers and employers, including co-determination” – in point (f). Even though this same Art. 137 lays down two different legislative

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\(^{10}\) Of the consolidated version of the FEU (former Arts. 138 and 139).


\(^{12}\) Undoubtedly, employers’ associations deserve the same attention and should have been included within our analysis. However we have not yet considered their standpoint. This could be remedied in further research.

\(^{13}\) Since then, another legislative act has been adopted which also contains provisions on BLER, namely Council Regulation No 1435/2003 on the Statute for a European Cooperative Society. However, partly because of its very limited scope and implementation, we shall not take this piece of European law into consideration here.

\(^{14}\) This excerpt comes from the 2010 consolidated version of the TFEU. However, it should be mentioned that the version of the TFEU in force at the time of the enactment of the three Directives was quite the same.
procedures for each of the two sub-topics, it does include worker participation within its scope. As a consequence, given the European legislator’s decision to enshrine provisions on worker participation within the ECS Directive, founded on another legal basis, should we have to conclude that BLER is not, in practice, considered as part of the traditional scope of labour law, but more as a part of company law?

The answer to this question is certainly negative, for at least two reasons. Firstly, the decision to ground a European legal rule in one TFEU article rather than another has less to do with the aim of qualifying the field within which the rule must be registered (company law vs. labour law) than with that of specifying the most suitable type of legislative procedure. Secondly, bearing in mind the different ways in which legal experts consider the field of belonging of the ECS Regulation and Directive (Table 1), the only conclusion we can draw is that no sound objective and unanimous assessment can be made. Indeed, even on the basis of a preliminary and non-exhaustive literature review as presented in Table 1, it appears that there is a great deal of leeway in interpreting the scope of each aspect of the ECS. For jurists specialising in company law, the Directive on employee involvement ties in with the ECS Regulation, as is the case for some jurists specialising in labour law. But this does not apply to all of the latter, since the Directive could also be treated as an independent element of labour law as such.

Table 1 Consideration of ECS Regulation and Directive within the publications of legal experts specialising in company law and labour law

<table>
<thead>
<tr>
<th>Scope*</th>
<th>Reference</th>
<th>ECS Regulation</th>
<th>ECS Directive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Company law</td>
<td>Andenas, Wooldridge (2009)</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>Grundmann, Möslein (2007)</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>Hopt, Wymeersch (2007)</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>3</strong></td>
<td><strong>3</strong></td>
</tr>
<tr>
<td>Labour law</td>
<td>Blanpain (2008)</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>De Vos (2007)</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>Neumann (2003)</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>Blanpain, Hendrickx (2002)</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td>Neal (2002)</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td></td>
<td><strong>Total</strong></td>
<td><strong>2</strong></td>
<td><strong>5</strong></td>
</tr>
</tbody>
</table>

*Inferred from the title of the reference, i.e. whether it contains the term “company law” or “labour law”.

Source: literature review and analysis of the authors’ tables of contents.

In other words, the final content of ECS legal texts, as a result of the European legislative procedure, does not provide any strong evidence of the underlying conception borne by the European public institutions. Even though the analysis of the result proved to be unhelpful, the study of the process undertaken by the European public institutions could, on the contrary, be meaningful. It has to be stressed that the process we are considering here is the internal procedure within the European institutions, i.e. the way in which the public actor has mobilised itself within the framework of the legislative process. Our aim is certainly not to deliver an exhaustive description of the history of the ECS and its detailed provisions.

15 The framework for the legislative process regarding worker information and consultation is the co-decision procedure, i.e. the European Parliament and the Council acting together; while the Council is expected to act unanimously - on a proposal from the Commission and after consulting the European Parliament – on the topic of co-determination.

16 In this regard, we depart slightly from the position advanced by Charlotte Villers (1998: 189) who, on the contrary, derived from the legal basis of Directives and Regulations the “closer links” existing with either social policies or economic policies.
Numerous authors have already provided a very comprehensive overview (e.g. Kolvenbach, 1990; Edwards, 1999; Barnard, Deakin, 2002; Keller, 2002; Blanpain, 2008; Gold, Schwimbersky, 2008; Fioretos, 2009; Rehfeldt, 2009; Dionisopoulou, 2009; Schwimbersky, Gold, 2009). From the early Memorandum published by the European Commission [henceforth EC] in 1966 in support of the French government’s proposal for a legislation on a European Company to the adoption of the ECS, more than 30 years of debates and reformulated proposals kept the European institutions busy (Stollt, 2006), especially the European Commission. Indeed, because of its crucial role in the European legislative process – the European Commission has a near-monopoly on initiating legislation and preparing draft proposals – the EC has proved to be a key player in the production of rules, as shown in Table 2.

Table 2  The European Commission’s official interventions in the legislative procedure for the adoption of the ECS

<table>
<thead>
<tr>
<th>Date</th>
<th>References (official documents)</th>
<th>Sources (entity responsible)</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 June 1970</td>
<td>COM (1970) 600 final Proposal for a Regulation</td>
<td>DG15*</td>
</tr>
<tr>
<td>30 April 1975</td>
<td>COM (1975) 150 final Proposal for a Regulation</td>
<td>DG15*</td>
</tr>
<tr>
<td>8 June 1988</td>
<td>COM(88) 320 final Memorandum (White Paper) on the Statute for the European Company</td>
<td>EC Vice-President Internal Market, tax law and customs</td>
</tr>
<tr>
<td>14 Nov. 1995</td>
<td>COM (95) 547 final on worker information and consultation</td>
<td>DG Employment, Social Affairs</td>
</tr>
<tr>
<td>13 May 1997</td>
<td>C4-0455/97 Group of Experts “European systems of worker involvement”</td>
<td>DG Employment, Social Affairs</td>
</tr>
</tbody>
</table>

* Now called ‘DG Internal Market and Financial Services’


The above-mentioned authors who have published on the specific issue of the ECS and its history agree that the main difficulty in adopting the ECS was to settle the issue of worker participation17. They do also acknowledge that the successful

17 For example: “Negotiations took place across three distinct phases; one that roughly coincided with the consolidation of the European Economic Community (1965-1982), a second period that overlapped
adoption of the ECS – compared with the failure of the project of the Fifth Directive, first proposed in 1972 and never passed subsequently – has to be imputed to the combination of three elements: the conclusions drawn in 1997 by the group of experts chaired by Etienne Davignon, suggesting a more flexible and negotiation-based approach to BLER; the adoption of the EWC Directive in 1994 as it created a precedent by institutionalising the practice of preliminary negotiations at company level in order to find tailor-made configurations of employee information and consultation; and the splitting of the ECS into a Regulation and a Directive, the latter being devoted entirely to employee involvement. On the basis of Table 2, we would add that not only did a split between two pieces of law in 1991 help achieve this adoption, but so did the split of competent and responsible entities within the EC.

Just as the term ‘European legislator’ refers to an abstraction, it is difficult to see the European Commission as a uniform organisation. The point already made by John Dunlop himself when saying that “the view that a homogeneous union negotiates with a homogeneous management or association is erroneous and mischievous” (Dunlop 1967:173) applies to the third actor here, namely the public institutions. In other words, one should not underestimate the intra-organisational negotiations (Walton, McKersie, 1965) in the form, here, of the division of labour among EC entities. This should especially not be underestimated in that this division of competence has a meaning: what is clearly highlighted by Table 2 is the split between a Regulation dealing with company law and handled by DG Internal Market on the one hand; and a Directive dealing with worker representation, thus labour law, handled by DG Employment on the other. We can therefore conclude from this reading that, on the European institutions’ side, their underlying conception is one of the separation of the economic and the social spheres.

In actual fact, the same conception pertains today. As shown in the last row of Table 2, DG Employment, Social Affairs and Equal Opportunities organised a debate about the need for a review of the Directive on employee involvement, on the basis of an expert report and responses to a questionnaire-based consultation of Member States and social partners. Its 2008 conclusion was that there was no need for a review. It was only in 2008 that DG Internal Market initiated its own review process by launching a call for tenders for a study ‘on the operation and the impacts of the Statute for a European Company’, expected to focus only on the Council Regulation. However, separating out the two fields of company law and labour law does not seem

with the implementation of the internal market program (1988-1996), and a final phase that corresponds to the period of attempted institutional consolidation in the EU (1997-2004). In each of the three periods, disagreements over rules governing employee representation on company boards were the key source of contention between member-states” (Fioretos, 2009: 1177).

18 “Corporate Governance is regarded in a number of Member States as being the subject of ‘soft’ legislation. It is normally developed by market participants in codes of practice which remain responsive to changing business conditions. Historically, even in this respect, convergence on corporate governance issues and in particular on board structures and employee involvement has resulted in extreme difficulties. These are revealed not only by the legislative history of the European Company Statute itself, but also by the impasse reached on the Fifth Company Law Directive, which, like the Statute, started out by seeking to impose two-tier boards with obligatory employee participation across the European Union. However, the European Company Statute has undoubtedly contributed to the wider European debate on corporate governance in relation to employee involvement and the company board structure” (Sasso, 2009: 287).

19 Several authors have underlined the fact that those attempts at European legislation within the field of company law which failed (namely the 5th, 9th and 10th Directives) were also those dealing most directly with the issue of worker participation (e.g. Kolvenbach, 1990).

20 What could appear as a trivial detail, but which is symbolic in a digital world, is the fact that the Directive alone is classified under the heading ‘labour law’ on DG Employment’s website, while both the Directive and the Regulation are presented under the heading ‘company law’ on DG Internal Market’s website.

altogether straightforward – precisely because it comes from a social construction – since the study ordered by DG Internal Market and published in December 2009 makes much of employee involvement22 (Ernst & Young, 2009). As for DG Internal Market’s final decision about the need for a review, one will have to await the end of the public consultation launched in March and the conference organised in May 2010. One might wonder whether, in view of these conclusions, the division between the two spheres – the economic and the social –, the two legal fields – company law and labour law – and the two EC entities – DG Employment and DG Internal Market – will be maintained or changed.

1.2 On the trade union side: company law and BLER provisions go hand-in-hand as interconnected dimensions of a single phenomenon

The EC has obviously not been the only player producing the legal rules establishing the ECS. The role played by the Member States – through their representatives within the Council and the Parliament – has also been of great importance. Germany was – and still is – a great supporter of a statute incorporating mandatory worker representation at board level, whereas other countries – such as the Netherlands – raised some concerns because of their different system of co-determination, while others – e.g. the United Kingdom – had even strong reservations about this type of employee involvement (e.g. Kolvenbach, op. cit.; Goulding, 2004; Gold and Schwimbersky, op. cit.; Fioretos, op. cit.). At the national level and at the beginning of the ECS legislative procedure, some reluctance and disagreements among IR actors were also to be found in countries where co-determination rights did not previously exist in the private sector. Udo Rehfeldt (2009: 47) mentions the example of French, Belgian and Italian trade unions in this regard. However, he also notes that the ETUC’s position in favour of worker representation, especially at its 1988 congress, led most of its affiliates to change their view.

At first sight, it might sound merely tautological to state that a European trade union confederation favours any kind of institutionalised and recognised rules providing workers with a channel of expression and defence of their interests, even at board level. This could moreover appear as a commonplace when such a European trade union confederation counts among its ranks, and as its second largest affiliate, the DGB which strongly supports and defends co-determination. Actually, our aim here is less to analysis to what extent the ETUC is in favour of BLER than to understand its underlying project and conception, still bearing in mind our frame of reference, i.e. how the ETUC views BLER provisions, from a position separating this phenomenon between company and labour law, to a position considering that both are interlinked.

In order to do so, we set out to determine how the ETUC situates its claim or defence in favour of BLER rights. In other words, when – through its political machinery consisting of statutory bodies such as the congress and its executive committee – the ETUC issues an official statement claiming BLER rights, to which broader thematic area does it refer? In this regard, our initial hypothesis was that the great majority of such claims mainly arose in regard to the social consequences of companies restructuring or closures, which could then be taken as an opportunity to reassert the need for employee involvement as a relevant safeguard measure to avoid managerial dysfunction. So as to test this hypothesis, we developed an empirical study based on an analysis of the content of a corpus comprising official ETUC statements – resolutions and positions adopted at its congresses or executive committee meetings. We made the corpus as exhaustive as possible by taking into account every official

22 There are up to 105 occurrences of the expression ‘employee involvement’ within the report.
statement published since the ETUC’s foundation in 1973\textsuperscript{23} (see below for the detailed methodology we developed). Table 3 presents the results of this empirical study.

<table>
<thead>
<tr>
<th>Methodology used in elaborating Table 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>References:</td>
</tr>
<tr>
<td>On the basis of a lexical analysis, we considered an ETUC statement to deal with BLER whenever one or more of the following phrases are identifiable:</td>
</tr>
<tr>
<td>“workers’ rights of representation and participation” / “workers’ rights to information, consultation and participation”</td>
</tr>
<tr>
<td>“rights of participation” / “employees’ rights to participation”</td>
</tr>
<tr>
<td>“representation at board level” / “workers’ participation at board level”</td>
</tr>
<tr>
<td>“employee representation on the supervisory board”</td>
</tr>
<tr>
<td>“workforce representation on the management board or supervisory board”</td>
</tr>
<tr>
<td>“codetermination rights”</td>
</tr>
<tr>
<td>“participation of workers” / “worker participation”</td>
</tr>
<tr>
<td>“involvement in decision making at board level or in supervisory boards”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Topic related thereto:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Here again, the analysis of content is based on a lexical frame of reference. Thus the topic related thereto is deduced from terminology appearing as such within the text and, most often, in its title.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Scope:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The scope has been defined by the authors themselves as a means to categorise the field to which each topic - within which the ETUC statement broadly falls - refers.</td>
</tr>
</tbody>
</table>

\textsuperscript{23} Unfortunately, finding the resolution adopted by the first and founding ETUC congress held on 7-8 February 1973 proved impossible. On the other hand, we were able to gain access to all the other materials, and we would like, here, to emphasise our gratitude to the ETUI’s documentation centre officers, most especially Giovanna Corda.
Table 3 **Classification of official ETUC statements on worker participation, according to the topic related thereto.**

<table>
<thead>
<tr>
<th>SCOPE</th>
<th>Topic related thereto</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>COMPANY REGULATION</strong></td>
<td></td>
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</table>
|  | 9th Directive on groups of companies | ETUC, 1976: II.4-5  
ETUC, 1979: 13  
ETUC, 1976: II.3  
ETUC, 1991: 17  
ETUC, 1997: 51; 54-55  
ETUC, 1999a: 51-52  
ETUC, 2003a: 25  
ETUC, 2008b |
|  | European Company Statute | ETUC, 1976: II.3  
ETUC, 1979: 15  
ETUC, 2003a: 25  
ETUC, 2008b |
|  | EC Communication on corporate social responsibility | ETUC, 1976: II.3  
ETUC, 1979: 13  
ETUC, 2001: 52  
ETUC, 2004a: 33 |
|  | 10th Directive on cross-border mergers | ETUC, 1991: 17  
ETUC, 2003a: 25  
ETUC, 2004a: 32-33  
ETUC, 2004b: 35  
ETUC, 2004c: 45, 66  
ETUC, 2004d: 195  
ETUC, 2004e  
ETUC, 2007e: 105 |
|  | EC Action Plan on the modernisation of company law and enhancement of corporate governance | ETUC, 2003c: 20  
ETUC, 2004a: 33  
ETUC, 2004c: 66  
ETUC, 2006b: 32  
ETUC, 2007c:d: 79-83  
ETUC, 2007e: 105 |
|  | 14th Directive on cross-border transfer of registered office | ETUC, 2003c: 20  
ETUC, 2004a: 33  
ETUC, 2004c: 66  
ETUC, 2006b: 32  
ETUC, 2007c:d: 79-83  
ETUC, 2007e: 105 |
|  | European private company statute | ETUC, 2006a: 2-3  
ETUC, 2007d: 83  
ETUC, 2008a: 98-100  
ETUC, 2010 |
| **EUROPEAN UNION POLICIES** | | |
|  | Treaty of Amsterdam | ETUC, 1999b: 31-32  
ETUC, 2000: 8  
ETUC, 2004c: 45 |
|  | Lisbon Strategy | ETUC, 2000: 8  
ETUC, 2004c: 45 |
|  | Europe’s social policy agenda | ETUC, 2007c: 59-60 |
| **GENERAL STATEMENTS** | | |
|  | Economic democracy | ETUC, 1976: II.2  
ETUC, 1979: 15  
|  | Waves of restructuring, mergers and takeovers of enterprises | ETUC, 1991: 17  
ETUC, 2004a: 32  
ETUC, 2005: 75 |
|  | Industrial relations (social dialogue, collective bargaining, etc.) | ETUC, 2007a: 10 |

*Source: ETUC resolutions and positions adopted by its statutory congress or executive committee, analysed by the authors.*

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24 Which has never been adopted nor even reached the stage of being an official EC proposal.
Table 3 ultimately invalidates our initial hypothesis. Indeed, the inclusion of a claim for BLER rights within a statement related to the economic context and its waves of restructuring proves to be a minority phenomenon (3 occurrences), compared to the inclusion of such claims with reference to debates on the 10th Directive on cross-border mergers (8 occurrences), on the DG Internal Market Action Plan on the modernisation of company law and corporate governance (6 occurrences) and on the ECS (6 occurrences). Moreover, the vast majority of ETUC statements dealing with BLER fall under the scope of what we entitled as ‘company regulation’. On the basis of this observation, which illustrates ETUC willingness to see BLER provisions taken into account into every piece of European company law, we can conclude that, from the standpoint of this IR actor, BLER provisions and company law go hand-in-hand; thus the economic and the social spheres must be regarded as a single, indivisible dimension, both sphere being tightly interlinked.

Following our analysis of the underlying conceptions borne by both the European Commission and ETUC, observers may better understand the game that is currently being played out. On one side – the EC – company law and labour law are two distinct spheres of action, while on the other side – ETUC – they are regarded as interconnected. What is more, the confrontation of these two ‘projects’ is still ongoing, especially around the current debate on the proposal for a European private company statute. Here again, DG Internal Market took the lead on the proposal for a Regulation on the statute for a Societas Privata Europaea [SPE], DG Employment not being involved in the procedure, meaning that the EC standpoint disregards BLER so far. ETUC, consistent with its basic conception, called and still is calling for BLER provisions to be considered along with the statute as it is proposed. We therefore have here a renewal of the opposition of the ‘projects’ identified during the ECS adoption process: “The Commission considered that reopening a debate on participation rights at European level would expose the SPE to an ‘unreasonable political risk’. This political assessment was erroneous. The detailed and protracted debates on the SPE proposal have shown that it is precisely the absence of serious European-level reflection on co-determination that hinders progress on European company law” (Picard25, 2010: 106).

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25 Séverine Picard is a legal adviser at ETUC.
2. The challenge of a harmonised European approach to BLER

The ongoing debate surrounding the proposal for a SPE automatically reminds us of the difficulties encountered by IR actors at the European level in the ECS adoption process. The first part of our paper gives one of the reasons for these difficulties, namely the different, and conflicting, conceptions held by the EC and ETUC. Another reason lies in the nature and divergence of pre-existing national rules on BLER. With their goal of establishing a European Company Statute taking into account employee involvement, IR actors face the challenge not of creating a model of worker participation from scratch, *ex nihilo*, but of adjusting a European rule on BLER based on rules or agreements already adopted at national level.

2.1 How divergent are national rules governing BLER within the European area?

To understand the extent to which setting up a Europeanised model of worker participation proves to be a major challenge for European IR actors, we need to go back to the relevant national legal provisions. In doing so, we risk making ourselves somewhat redundant since, as far as we can conclude from our literature review, looking at the nature and content of national legal provisions on BLER has always been the main approach developed by researchers in the study of worker participation in Europe (Carley, 1990; Schulten and Zagelmayer, *op. cit.*; Taylor, 2006; Calvo *et al.*, *op. cit.*; Fulton, 2009). They actually did so for the same reason as is causing us to repeat the exercise: presenting national legal provisions consists in providing observers with the basic knowledge of the matter; moreover, this knowledge is the easiest one to access when considering more than 10 different countries and almost as many different languages. However, our aim here is not to reinvent the wheel, so we borrow most of the description below from our colleagues Michael Stollt and Norbert Kluge, researchers at the ETUI, and especially following Table 4.

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26 Michael Stollt and Norbert Kluge set up - initially with the support of the Hans-Böckler Foundation, and nowadays in cooperation with the Amsterdam Institute for Advanced Labour Studies – a network of experts in the field of worker involvement in the European Company and related developments, named SEEurope Network (see detailed information on www.worker-participation.eu). This network has been of great value in producing country reports on BLER, on which the information presented here is based.
### Table 4  Employee board-level participation in the 30 countries applying ECS legislation

<table>
<thead>
<tr>
<th>Companies concerned</th>
<th>Proportion of board-level employee reps</th>
<th>Selection of board-level employee reps by WC</th>
<th>Eligibility criteria: only employees?</th>
<th>Company board structure</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>State-owned</strong></td>
<td><strong>Private sector</strong></td>
<td><strong>Trade union</strong></td>
<td><strong>Vote</strong></td>
<td></td>
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<tr>
<td><strong>AT</strong></td>
<td>•</td>
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<td>1/3</td>
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<tr>
<td><strong>BE</strong></td>
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<td><strong>BG</strong></td>
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<td><strong>CY</strong></td>
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<tr>
<td><strong>CZ</strong></td>
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<td>1/3</td>
<td>•</td>
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<tr>
<td><strong>DE</strong></td>
<td>•</td>
<td>•</td>
<td>1/3 – 1/2</td>
<td>•</td>
</tr>
<tr>
<td><strong>DK</strong></td>
<td>•</td>
<td>•</td>
<td>1/3 (min. 2 mbrs) max. 1/2 in group C. (min. 3 mbrs)</td>
<td>•</td>
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<tr>
<td><strong>EE</strong></td>
<td></td>
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<tr>
<td><strong>ES</strong></td>
<td>•</td>
<td>•</td>
<td>2-3 mbrs</td>
<td>•</td>
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<tr>
<td><strong>FI</strong></td>
<td>•</td>
<td>•</td>
<td>Based on agreement (max. 4 mbrs)</td>
<td>•</td>
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<tr>
<td><strong>FR</strong></td>
<td>•</td>
<td>( *)</td>
<td>Min. 2 mbrs Max. 1/3</td>
<td>•</td>
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<tr>
<td><strong>GR</strong></td>
<td>•</td>
<td>•</td>
<td>1-2 mbrs</td>
<td>•</td>
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<tr>
<td><strong>HU</strong></td>
<td>•</td>
<td>•</td>
<td>D: 1/3 M: Agreement</td>
<td>Must be consulted</td>
</tr>
<tr>
<td><strong>IE</strong></td>
<td>•</td>
<td>•</td>
<td>(mostly) 1/3</td>
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<td><strong>LT</strong></td>
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<tr>
<td><strong>LU</strong></td>
<td>•</td>
<td>•</td>
<td>Min. 3 mbrs, max. 1/3</td>
<td>•</td>
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<tr>
<td><strong>LV</strong></td>
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<td><strong>MT</strong></td>
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<tr>
<td><strong>NL</strong></td>
<td>•</td>
<td>•</td>
<td>Max. 1/3</td>
<td>•</td>
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<tr>
<td><strong>NO</strong></td>
<td>•</td>
<td>•</td>
<td>Max. 1/3</td>
<td>•</td>
</tr>
<tr>
<td><strong>PL</strong></td>
<td>•</td>
<td>•</td>
<td>Min. 2-4 mbrs Max. 2/5</td>
<td>•</td>
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<tr>
<td><strong>PT</strong></td>
<td>•</td>
<td>•</td>
<td>C articles of association</td>
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<td><strong>RO</strong></td>
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<tr>
<td><strong>SE</strong></td>
<td>•</td>
<td>•</td>
<td>2-3 mbrs</td>
<td>•</td>
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<tr>
<td><strong>SI</strong></td>
<td>•</td>
<td>•</td>
<td>D: 1/3 – 1/2 M: 1-3 mbrs</td>
<td>•</td>
</tr>
<tr>
<td><strong>SK</strong></td>
<td>•</td>
<td>•</td>
<td>Min. 1/3 Max. 1/2</td>
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<tr>
<td><strong>GB</strong></td>
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</table>

* including privatised companies

C = company / TU = trade union / WC = works council or elected workplace representatives
M = monistic structure (board of directors) / D = dualistic structure (supervisory board and management board) / M+D = companies can choose one model or the other mbrs = members

According to Norbert Kluge and Michael Stollt (2009), national legal provisions on BLER vary according to four factors: the characteristics of the company; the characteristics of the board; the ways in which workers are represented; and the manner in which BLER is introduced.

Characteristics of the company determining whether or not it falls within the scope of BLER provisions vary from one country to another on the basis of: the company’s ownership (only state-owned enterprises or also private ones); the company’s legal status (e.g. in Czech Republic, Slovenia and Slovakia the scope only includes public limited companies); and the size of the company. The latter point is of great importance given that current debates on the SPE proposal come up against the question of fixing the workforce threshold above which a SPE can be founded. Indeed, the workforce threshold levels above which BLER provisions must be implemented differ significantly: from Member States with no or low thresholds (no thresholds are fixed in Austria for triggering BLER provision in PLCs, and very low ones apply in the Nordic countries, e.g. from 25 employees in Sweden); to Member States with medium-level thresholds (50-500 workers); to Members States with high thresholds (a Luxembourg-based company is not compelled to apply BLER provisions unless it has a minimum of 1000 registered employees).

Two elements should be considered when looking at the characteristics of the board. Firstly, the board structure itself – which could be a monist structure consisting of a board of directors, or else a dualistic structure comprising a supervisory board and a separate management board – is likely to make a huge difference. Indeed, under a dualistic structure the two functions of corporate management on the one hand and supervision of business administration on the other hand are strictly separate, while they are more ‘confused’ under the monistic model. In actual fact the convergence in national company laws owing to the extension of the choice between the two models in countries where, previously, only the monistic system existed (such as France) is tending to dilute the distinctiveness of this feature (Hopt, Leyens, 2004). Nevertheless, the former more strict distinction was of importance, especially from a trade union viewpoint, since, in some European countries, it explained – and still does – the reluctance of employee representatives to be directly involved in company management (cf. the fear of ‘class collaboration’ within private firms expressed by the French CGT in the early 20th century) and their preference for being involved in a more supervisory capacity under the dualistic model (cf. the favourable reactions from some trade unions received by Pierre Sudreau after the publication of his report to the French government in 1975 which recommended a company law reform promoting the setting up of supervisory boards partly composed of employee representatives). The second important element related to the characteristics of the board is the number or proportion of seats allocated to board-level employee representatives [henceforth BLEReps], which varies from a minimum of 1 seat in Greek state-owned companies to the well-known German parity co-determination with half of board’s seats allocated to BLEReps in companies with over 2000 workers. The most frequent proportion of worker representatives is in fact 1/3, which is the case in Austria, the Czech Republic, Denmark and Hungary for instance.

Then there is the fact that workers can be represented at board-level in different ways. In some countries (Germany and Czech Republic) some seats are ‘reserved’ for external trade union representatives, but the vast majority of BLEReps are employees of the company on whose board they sit (which is not incompatible with them also being trade union members or – with a few exceptions, e.g. France – holding other employee representative mandates within or outside the company). The only odd exception is the Netherlands. There the works council can make proposals for a third of the board but these persons cannot be employed by the company, nor can they be
trade union representatives. As a consequence, the representatives nominated by the works council often come from academia or from the political sphere.

Finally, we should also stress that in most countries BLER has to be introduced automatically, i.e. when a company fulfils the legal criteria in this regard. This does not however mean in practice that representation at board level is always ensured where it is legally foreseen (especially in SMEs). However, in some countries an initiative from the workers’ side is needed to trigger the application of BLER provisions. For instance, in Slovenia the works council holds such a right while in Denmark an initial yes/no vote of the workforce has to take place.

This description, lengthy though it may be, gives only a limited idea of the diversity of national types of rules governing BLER provisions. But it was a necessary step in reaching a better understanding of what is at stake when addressing the issue of a European approach and understanding of BLER.

2.2 From the aim of harmonisation to an ultimately flexible approach to EU regulation

Bearing in mind the variety of national legal provisions on BLER can help us to understand the move away from the initial content of the first EC proposal for the ECS to the ‘format’ finally adopted with the Council Directive on worker participation (Stollt, op. cit.). Indeed, the first draft of the ECS provided for a compulsory dualistic board structure with one third of the seats filled by employees elected by the European Works Council. Worker participation was made mandatory unless a minimum of two third of the employees of the SE decides not to apply this provision. In the procedural stages, the German model of co-determination was clearly the guiding ideal. The 1975 revised EC proposal introduced a slight change by indicating that “the supervisory board shall consist as to one-third of representatives of the shareholders, as to one-third of representatives of the employees and as to one-third, of members co-opted by these two groups” (p.44).

The Commission’s 1988 Memorandum dropped the idea of imposing a single model of worker participation and introduced the possibility of a choice, made by companies after consultation of their workers, between three types: (1) still a duplicate of the German model, in the form of a supervisory board composed for a third by employee representatives; or (2) the setting up of a body representing employees but separate from companies’ organs; or (3) a model of worker participation collectively agreed between employees and management. The 1989 EC proposal took up the content of the 1988 Memorandum, while introducing some new possibilities: companies could choose either a monistic or a dualistic structure; the Dutch model of BLER was introduced with the possibility for board members to be co-opted by the board and the right for employees to object to their appointment; the fact that provisions on worker participation should be concluded by negotiation and no longer merely by a ‘consultation’ of employees, with, however, a prerogative reserved for the management alone to make the final decision if negotiations failed; the possibility for Member States to restrict the choice of models of worker participation which can be adopted by an SE having its registered office on their territory. The greatest difference between this 1989 proposal and the 1991 one lies in the method for implementing BLER provisions, since it stated that “where no such [preliminary] agreement [on the model of employee involvement] can be reached the employees’

27 COM (70) 600 final.
28 COM (75) 150 final.
29 COM (88) 320 final.
30 COM (91) 74 final SYN-219.
representatives may make a written statement setting out why in their opinion the formation of the SE is contrary to the employees' interests and what measures should be taken with respect to the employees; this report was then to be submitted for approval to the general meeting of shareholders.

In 1995, the EC published a Communication on the general topic of worker information and consultation and expressed the following view: “The never-ending discussions on the types of [employee] involvement are leading the Commission increasingly to the view that, as things stand, success is most likely using a solution along the lines of the ‘European Works Council’ Directive” (p.8), i.e. a solution based on the principle that the model of employee involvement should be freely negotiated among IR actors at the company level, without any obligation to imitate models contained in predefined proposals. The 1997 experts group convened by the EC to formulate recommendations to break the deadlock reached by the European institutions in the legislative process on ECS came up with the same idea: a special negotiating body, freely negotiating arrangements for employee involvement with, in the event of failure, fallback standard rules according to which “workers’ representatives account for a fifth of the members of the management board or supervisory board, with a minimum of two members” (p.15). The Directive supplementing the Statute for a European Company with regard to the involvement of employees, adopted at the end of the legislative procedure, follows the expert group’s recommendations for the most part, albeit diverging from them with regard to the fallback standard rules. In effect, the Directive applies a ‘before and after’ principle whereby, to put it simply, pre-existing national legal provisions on BLER applicable in at least one of the companies intending to become part of a new SE must be applied the same way.

The point of summarising in three paragraphs a process lasting more than 30 years is to demonstrate the shift from the EC's initial goal to the final results, i.e. the change from its aspiration to ensure a harmonised, European right for workers to be represented at board level, to the pragmatic approach of respecting pre-existing rights through a flexible understanding of employee involvement. Indeed, the initial 1970 EC proposal clearly indicated that the desire was to make BLER provisions compulsory and, in the event they were not applied in practice by companies’ IR actors themselves, to help the board to function without the presence of BLEREps:

“The laws of the Member States differ on whether employees should be represented on the Supervisory Board of the company. The Commission of the European Communities is of the opinion that such representation is necessary in the case of the European Company. The Statute makes provision for employees to be represented on the Supervisory Board of the European Company by members whom they have elected. These members will be in the same legal position as the members of the Supervisory Board who have been elected by the General Meeting. The Commission of the European Communities is aware of the fact that certain trade unions in the Member States consider that the presence of employees’ representatives on the governing bodies of the company, and on the Supervisory Board in particular, is not desirable. The result may be that the employees of a European company refrain from appointing representatives to the Supervisory Board. To ensure that the administrative organs of the company are able to function in spite of this, the Statute provides that the Supervisory Board has power to take decisions notwithstanding the absence of employees’ representatives” (COM (70) 600 final: 88).

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31 COM (95) 547 final.
32 C4-0455/97.
As long ago as the EC’s 1988 Memorandum, this ideal was abandoned and a flexible approach clearly preferred: “the system of worker participation [...] must be based on the principles governing the participatory systems in the States that have developed them and at the same time it must be flexible enough to allow for a consensus to be reached between the social partners” (COM (88) 320 final: 14). The experts’ group convened in 1997 endorsed this new approach even more strongly: “the diversity of existing systems in the countries of Europe and the specific nature of participation systems rule out the possibility of a general harmonisation in this field” (C4-0455/97: 8): “clear priority has therefore been given to a negotiated solution tailored to cultural differences and taking account of the diversity of situations” (op. cit.: 17).

Charlotte Villiers (2006: 187) arrived at the same conclusion: the ECS “does not aim to introduce new or additional aspects of employee involvement but rather it seeks to prevent the disappearance or reduction of what already existed prior to the establishment of an SE. This specific regulation is not about any kind of European ‘harmonization’ but about the preservation of nationally institutionalized rules and standards” (quoted by Keller and Werner, 2008: 170).

We would like to complete our analysis by adding that the trend at ETUC seems to be going in the opposite direction. However, we would emphasise our use of the word ‘seems’, since the change took place only at the latest ETUC congress in 2007. Indeed, at its second statutory congress, ETUC resolved to:

“support all the efforts made by its member organisations to fight for improved or additional rights of representation and participation in plants and undertakings in their countries on the basis of the statutory regulations or regulations laid down in labour agreements already in force, the goal being to achieve greater influence for all workers on the organisation of workers’ individual work posts and on the work routine in plants, and also to achieve greater influence on the decisions taken by undertakings” (ETUC, 1976: II.2).

In other words, at that time, the ETUC project had nothing to do with a willingness to develop a common European approach of BLER but everything to do with further developing pre-existing rights at national level, which could be compared with the more flexible approach finally applied by the European legislator in enacting a Directive protecting national rights. This ETUC positioning, i.e. to develop or, at least, safeguard national provisions on BLER rather than demanding an extension of these rights to all the Member States, was replicated into a 2006 ETUC position about the debate around SPE:

“since a harmonisation of company law provisions concerning employee participation rights at board level has proven to be beyond reach so far, there is no other acceptable solution than to safeguard pre-existing rights and/or to require Member States to impose analogous application of the participation provisions of national company law” (ETUC, 2006a: 2).

What we do believe to have changed is highlighted by the following excerpt from the document adopted at the latest ETUC congress:

“The ETUC must reach positions common to all its member organisations in areas which constitute a common base in all Member States: [...] development and improvement at national and at the European level in firms and branches and on a global plan, of negotiation and worker participation” (ETUC, 2007b: 20).

The current economic downturn, which began, at least officially, in September 2008, has given the ETUC an opportunity to reassert its position:

“The ETUC demands [...] stronger workers’ participation and industrial democracy to give workers a say in managing the current crisis at company level, to make sure massive lay offs are avoided and to be able to
anticipate future restructuring. Participation rights must become a constitutive and integrated part of corporate governance and of European company law. Stronger involvement of workers in company policy avoids a management style focussed on short term objectives with negative repercussions on workers. It contributes instead to the long term sustainability of the enterprise” (ETUC, 2009: 12).

Thus one might wonder whether this call for a harmonisation of BLER – ‘worker participation’ – provisions in each Member States and at European level may presage future EU and national changes in company law.

3. BLER from the standpoint of practitioners: a research project investigating the roles and activities of BLEReps in Europe

So far we have concentrated our efforts on an analysis of the challenge that developing a European approach of BLER represents – on the basis of national legal rules – and the underlying conception borne by the European Commission and ETUC to their handling of this challenge – that is, the study of IR actors active at European level –. For sure, much more has to be done in order to present an exhaustive and systematic scientific interpretation of this phenomenon, such as for instance conducting a political analysis of the positioning of each actor at the European level – e.g. employers’ associations – and at the national level – national trade union confederations, employers’ associations, and public institutions –. The same attention paid to the legislative procedure which led to the adoption of the ECS could be devoted to the adoption of each national law governing BLER. Going down this road from the macro- to the micro- analytical level, studying the conception borne by the practitioners themselves, i.e. board-level employee representatives, represents, in itself, a challenging and promising venture. With this in mind, we developed a research project aimed at investigating the roles and activities of BLEReps in SEs as well as in every national company registered in countries providing BLER rights.

3.1 Corporate governance and the voice of labour: the research design

In November 2008, the research team – composed of Norbert Kluge (ETUI), Jeremy Waddington (University of Manchester) and Aline Conchon (ETUI) – launched the research, with the support of the Hans-Böckler Foundation. Based on a questionnaire-based survey common to all BLEReps, irrespective of their national background (with the exception of 5 country specific questions related to independent variables, out of the total 76 questions composing the questionnaire), the objective is to target each BLERep, meaning that we are not working with a sample of the population but in an, as much as possible, exhaustive manner.

Our starting hypothesis is that, when looking at BLEReps roles and activities, observers would find more similarities among countries than differences. To be more specific, the differences in the roles BLEReps attribute to themselves and the activities they undertake have less to be imputed to their national background, in particular with regard to their singular national legal framework of action, than to factors and elements which are intrinsic to their inscription within the peculiar industrial relations systems at their company level.

In order to test the validity of our initial hypothesis, our aim is to confront those two dependent variables – BLEReps’ role(s) and activities – with a set of independent variables. In this regard, some intuitive factors prevail which have, once again, to be tested. Trade union membership, experiences in employee representation, level of
qualification are often considered as determinants for BLEReps’ behaviour on board, but, so far, without any sound scientific evidence supporting its universal relevance. For instance, Danish research indicates that trade union membership and the networks derived therefrom do not contribute effectively to the influence on company policy (one expected role of BLEReps) exerted by BLEReps (Rose and Kvist, 2004), whereas Swedish research suggests that trade unions are integral to the functioning and influence of BLEReps through the support and networking that they foster (Levinson, 2001).

To assert that employee involvement and, particularly, board-level employee representation, helps in tackling mismanagement and company crises is to assume that BLEReps have a greater say and involvement in economic matters. Existing national studies have concluded that BLEReps prioritise ‘social’ issues and employ ‘social’ criteria more than other board members. Given the fact that those conclusions are nationally embedded and not related to an economic environment hit by a major crisis, one might question the pertinence of this assumption. Finally, because of the current transformations faced by the world of work and the economy, BLEReps are likely to evolve in an increasingly complex and inter-linked system of information, consultation and participation involving new actors. The failure of the shareholder-oriented model of corporate governance since the ENRON case and the more recent economic downturn has led to a shift, still in its early stages, towards increased stakeholder value. Under the banner of ‘corporate governance’ or ‘corporate social responsibility’, the prime idea is for the company to take more account of extra-financial elements and information coming from new actors such as NGOs and local authorities.

The above questions and observations naturally led us to divide our first key issue (“What do BLEReps do?”) into four research questions. What are the roles and activities of board-level employee representatives: towards employees, trade unions, company management, shareholders, etc.? What elements influence their actions and behaviour: their personal profile; their links with other institutions of employee representation; their potential unionisation; the company’s industrial relations system, etc.? What are BLEReps’ prior subjects, interests and activities: which criteria do BLEReps employ in identifying priorities for their range of duties? How, in particular, do they respond to negative issues raised at the board, such as social dumping, relocation and restructuring? Finally, what network(s) do BLEReps have, especially with trade unions? How do these links operate? What quality of resources is available through these channels? Do employee representatives with more wide-ranging and intense intra-company links actually intervene more proactively?

To date, the research project is still in its empirical phase. Indeed, key to the distribution of the questionnaires is access to, or the collection of, databases of BLEReps’ addresses, which in itself is a huge challenge. As a consequence, we are confined to presenting preliminary findings only here, and, obviously, not ones linked to our entire set of sub-questions but those dealing directly with the frame of reference we have so far set out in this paper.  

### 3.2 How do BLEReps define the balance between the social and the economic?

18 of the EU Member States plus Norway provide workers with representation, with voting rights, at board level. For the practical purposes of the research, we split them into two batches. The first, composed of 10 countries – Austria, Germany, Denmark, Spain, Finland, France, Ireland, Luxembourg, Poland, and Sweden – has been completed, since we sent the questionnaire to no fewer than 11,856 BLEReps in those
countries. However, data has so far only been entered for France and Denmark, which are thus the two countries for which we intend to give preliminary findings. We would stress the qualification 'preliminary', since data entry has only been completed for those replies received from the first mail-out. Data from the remainder are still being entered. A total of 1,180 questionnaires were distributed to Danish board-level representatives, of which 215 have been returned, constituting a return rate of 18 per cent. The corresponding figures for France are 519, 105 and 21 per cent.

Over 87 per cent of the Danish respondents were male and the median age was between 51 and 52. On average, Danish respondents had been employed by the company on whose board they sat since 1986 and had served on the board for between 5 and 6 years. Over 92 per cent of Danish respondents sat on the board of a limited company, the majority of them based in Denmark (77.7 per cent). Almost 73 per cent of the French respondents were male and the median age was between 50 and 51. On average, French respondents had been employed by the company on whose board they sat since 1984 and had served on the board for between 4 and 5 years. Over 53 per cent of French respondents sat on the board of a public limited company, all of them based in France. In both cases, Danish and French BLEReps had mainly been appointed to the board through a direct election by employees (respectively 92 per cent and 96.8 per cent).

In addressing the question of the underlying conception held by BLEReps with regard to the linkage between the economic and the social spheres, at least three of the questions contained in the questionnaire help to provide evidence.

Table 5 What are the interests that guide your decision-making on the board?

<table>
<thead>
<tr>
<th></th>
<th>Danish representatives</th>
<th>French representatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employees</td>
<td>81.8</td>
<td>94.8</td>
</tr>
<tr>
<td>The company</td>
<td>61.4</td>
<td>64.5</td>
</tr>
<tr>
<td>Shareholders</td>
<td>24.2</td>
<td>1.0</td>
</tr>
<tr>
<td>Trade unions at the workplace</td>
<td>10.3</td>
<td>6.3</td>
</tr>
<tr>
<td>Local labour market</td>
<td>5.6</td>
<td>4.2</td>
</tr>
<tr>
<td>Wider society</td>
<td>4.2</td>
<td>15.7</td>
</tr>
<tr>
<td>Trade union confederation</td>
<td>2.8</td>
<td>/</td>
</tr>
<tr>
<td>Environment</td>
<td>2.8</td>
<td>2.1</td>
</tr>
<tr>
<td>Federal/sectoral/national trade union</td>
<td>1.0</td>
<td>1.0</td>
</tr>
<tr>
<td>Other</td>
<td>1.4</td>
<td>/</td>
</tr>
</tbody>
</table>

Note: respondents were asked to rank the interests that guide their board–level decision by marking 1, 2, 3 and so on. The above table presents the results from the first two positions in the ranking, hence the percentage figures add up to more than 100 per cent.

According to Table 5, and in both cases, the defence of employees’ interests - the social – is ranked in first place. However, it is worth noting that the interest of the company – the economic – comes second, well ahead of other items. One might have expected the social dimension represented by both employees’ and trade unions’

33 The gender balance of BLEReps is quite similar to that of board members in total (82% of Danish board members in the largest listed public company are male according to the DG Employment database on women and men in decision-making, from 2000 data: http://ec.europa.eu/social/main.jsp?catId=777&langId=en&intPageId=675). By contrast, BLEReps are more feminised than the overall population of board members in France (73% of French BLEReps are male, vs. 90% of total board members). It is far too early to go into more depth and draw definitive conclusions; rather, we plan to wait for the collection of our full set of data and, critically, a detailed analysis of our target population, i.e. the disclosure of possible bias.
interests to occupy the top two places. These initial findings could lead us to believe that the economic and social dimensions are considered equally important.

Table 6  **Which are the most important issues among this set of issues raised at board meetings, for you as a board-level employee representative?**

<table>
<thead>
<tr>
<th>Issue</th>
<th>Danish representatives</th>
<th>French representatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adoption or review of accounts and balance sheet</td>
<td>82.8%</td>
<td>86.5%</td>
</tr>
<tr>
<td>Employment situation/trends</td>
<td>61.4%</td>
<td>49.0%</td>
</tr>
<tr>
<td>Sale or closure of plants/relocation of production</td>
<td>60.9%</td>
<td>12.5%</td>
</tr>
<tr>
<td>Acquisitions or mergers</td>
<td>34.9%</td>
<td>37.5%</td>
</tr>
<tr>
<td>Investment</td>
<td>34.4%</td>
<td>45.8%</td>
</tr>
<tr>
<td>Research and development</td>
<td>29.3%</td>
<td>38.5%</td>
</tr>
<tr>
<td>Health and safety</td>
<td>27.9%</td>
<td>17.7%</td>
</tr>
<tr>
<td>Taking out of loans and credits</td>
<td>24.7%</td>
<td>14.6%</td>
</tr>
<tr>
<td>Appointment/removal of management board/executive committee/senior managers</td>
<td>23.7%</td>
<td>11.5%</td>
</tr>
<tr>
<td>Purchase or sale of subsidiaries</td>
<td>23.3%</td>
<td>27.1%</td>
</tr>
<tr>
<td>Product market policy</td>
<td>18.1%</td>
<td>30.2%</td>
</tr>
<tr>
<td>Environmental matters</td>
<td>17.2%</td>
<td>13.5%</td>
</tr>
<tr>
<td>Profit distribution, dividends or settlement of losses</td>
<td>14.9%</td>
<td>28.1%</td>
</tr>
<tr>
<td>Vocational training</td>
<td>13.5%</td>
<td>11.5%</td>
</tr>
<tr>
<td>Increase/reduction in the company’s share capital</td>
<td>13.0%</td>
<td>6.3%</td>
</tr>
<tr>
<td>Industrial relations</td>
<td>11.2%</td>
<td>31.3%</td>
</tr>
<tr>
<td>Appointment/removal of auditors</td>
<td>6.5%</td>
<td>3.1%</td>
</tr>
<tr>
<td>Gender policy/promotion of women</td>
<td>2.8%</td>
<td>10.4%</td>
</tr>
<tr>
<td>Remuneration/remuneration of senior managers</td>
<td>2.3%</td>
<td>16.7%</td>
</tr>
</tbody>
</table>

Note: each respondent could tick up to five categories, hence the percentage figures add up to more than 100 per cent.

Table 6 tends to confirm our initial reading. Indeed, the top two places are both occupied by a financial and economic issue – the company’s accounts and balance sheet – and a socially-oriented one – the employment level and trends. Next come two other economic issues identified as amongst the most important ones for French and Danish BLEReps, namely ‘acquisitions and mergers’ and ‘investment’\(^{34}\). On the other hand, the social issues which – according to the duties attributed to the board by the law, the company’s articles of association or the manual of board procedures – may be raised at board level, such as ‘health and safety’, ‘vocational training’ and ‘industrial relations’, do not appear to feature prominently among the priorities of BLEReps. But this might be explained by the fact that those issues ‘may’ be raised but are not always or often raised in practice. Precisely in order to avoid such a bias deriving from the interdependency with formal board duties, we developed a less directive and more general question, which produced the results presented in Table 7.

\(^{34}\) For the time being, we have refrained from analysing the place occupied by the item ‘sale or closure of plants/relocation of production’ since we first have to find an explanation for the significant difference between French and Danish BLEReps’ answers.
Table 7  Which of the following tasks are most important to you as a board-level employee representative?

<table>
<thead>
<tr>
<th>To:</th>
<th>Danish representatives %</th>
<th>French representatives %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maintain employment levels within the company</td>
<td>50.2</td>
<td>31.3</td>
</tr>
<tr>
<td>Raise employee issues at the board</td>
<td>40.0</td>
<td>48.0</td>
</tr>
<tr>
<td>Inform board members of the situation of the company</td>
<td>37.2</td>
<td>34.4</td>
</tr>
<tr>
<td>Prevent business administration abuses, corruption or maladministration</td>
<td>30.7</td>
<td>13.6</td>
</tr>
<tr>
<td>Provide employees and their representatives with information</td>
<td>14.5</td>
<td>20.8</td>
</tr>
<tr>
<td>Emphasise long-term strategy, rather than short-term objectives</td>
<td>12.1</td>
<td>32.3</td>
</tr>
<tr>
<td>Maximise dividends</td>
<td>6.5</td>
<td>/</td>
</tr>
<tr>
<td>Represent union issues at the board</td>
<td>1.9</td>
<td>10.4</td>
</tr>
<tr>
<td>Represent other commercial stakeholders, such as customers, suppliers or contractors</td>
<td>0.5</td>
<td>1.0</td>
</tr>
<tr>
<td>Represent other non-commercial stakeholders, such as NGOs or environmental actors</td>
<td>0.5</td>
<td>1.0</td>
</tr>
</tbody>
</table>

Note: respondents were asked to rank the tasks that are most important to them as board-level representatives 1, 2, 3 and so on. The above table presents the results from the first two positions in the ranking, hence the percentage figures add up to more than 100 per cent.

The findings presented in Table 7 tend to confirm the fact that the social and the economic dimensions are both considered together. Indeed, as for Table 5, a social element is ranked first: ‘maintain employment levels within the company’ for Danish and ‘raise employee issues at the board’ for French representatives. ‘Informing board members of the situation of the company’, with an equivalent percentage, is also identified as important among the tasks fulfilled by BLEReps in both countries. A more economic consideration comes next, albeit a different one for the two nationalities: ‘preventing business administration abuses, corruption or maladministration’ for the Danes, and ‘emphasising long-term strategy, rather than short-term objectives’ for the French BLEReps.

These preliminary findings lead us to believe that BLEReps’ activities are a matter of a judicious combination of economic and social considerations, without one strongly prevailing over the other. However, not least in view of the stage reached by our research project, we are cautious, deliberately using the term ‘idea’ rather than ‘conclusion’. Not only are these findings derived from answers received from only 2 out of the 18 countries investigated, but we are still awaiting final receipt of replies from all the countries before embarking on a cross-variables analysis.
By way of a conclusion, be it on the European trade union side or on the BLEReps’ side – whereby the latter must be treated with caution for the time being – the underlying project is far from being one in which the social dimension constitutes the single main priority. For both of these IR actors, the economic and the social spheres are considered interlinked and interdependent. At the risk of being too cautious, we would nevertheless emphasise that what is valid for the actors investigated must not lead to the assumption that it is equally valid for the entire range of trade unions and employee representatives engaged in worker participation. In this regard, only a detailed study of the positioning of each European and national trade union would help to substantiate what we view as a valid premise.

Conversely, European public institutions, and particularly the European Commission, clearly operate a distinction between the social and the economic spheres, as revealed by the manifest division of competence over labour law and company law. Far be it from us to claim that we are the first to apply this frame of reference to European regulation. In this regard the invaluable input provided by the work of Charlotte Villiers (1998) must not be forgotten. While studying the state of development of EU regulations, this author, referring in large measure to Brian Bercusson’s publications (especially Bercusson, 1986), also observed a split in conception between labour law and company law in the mind of the EU institutions:

“The two spheres of labour law and company law tend to be divided between social and economic goals. Generally, labour law is more concerned with social goals, aiming to regulate the relationship between employer and worker. [...] Company law, on the other hand, focuses more directly on economic issues and on the relationship between managers and shareholders. The traditional company law discipline of profit-maximisation, as Bercusson remarks ‘goes to the heart of the economic system’ [Bercusson, 1986: 144]. In correspondence with these general distinctions, the European Directives also tend to be categorised as social legislation in the labour law field and as single market (i.e. economic) provisions in the company law field” (Villiers, 1998: 188-189).

The author further expresses her view that: “this distinction does not explain why employee participation should be acceptable in the social sphere but not in the economic sphere, when the reality is that measures adopted in the social sphere will have an impact on the economic sphere” (Villiers, op. cit.: 1900) - and may we add, vice versa.

Our analytical framework would undoubtedly benefit greatly from the theoretical framework developed by authors prominent in the recently established schools of economic sociology, belonging either to the new economic sociology (Smelser and Swedberg, 2005) or to the French-speaking approach of the nouvelle sociologie économique (Lévesque, Bourque, Forgues, 2001). We are convinced that this may well represent an interesting way forward for further research.
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