

# Key Points

## **Key points of the German Trade Union Confederation (DGB) for a European Framework Directive on Information, Consultation and Board-level Employee Representation (Company Codetermination) <sup>1</sup>**

Adopted by the DGB Federal Executive Board on 11.02.2020

### **1. The value of codetermination for a sustainable company policy**

The European Union is more than 'merely' an economic community: for all its national variety it also shares common basic values. Freedom, democracy and social justice are values that should apply not only at the societal and political levels, but also at the economic level.

To be sure, it is evident that implementation of these goals is occurring at different speeds. In terms of business freedom in Europe it is proceeding in leaps and bounds. When it comes to workers' interests, however, many important steps remain ahead of us. Protection of employees is part and parcel of strengthening democracy – also in the workplace – and creating more social justice. Workers' representation enshrined at top management level has its place in EU structural law for the Single Market. Especially in an ever closer Europe, companies in future will be successful only if they manage to link economic, social and also environmental goals together.

In these circumstances, board-level employee representation (or codetermination) is one of the key issues of the twenty-first century. It puts employees on an equal legal and economic footing with the shareholders, thereby contributing to a long-term ethical and sustainable company strategy.

Statistical data show that EU member states with strong workers' participation are more successful in implementing important European goals than member states without it. That applies to such objectives as a high employment rate, strong investment in research and development, and reducing the risk of poverty or social exclusion.<sup>2</sup>

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<sup>1</sup> While pertaining to Germany the term 'Mitbestimmung' is generally translated as 'codetermination', for other countries the term 'board-level employee representation' has generally been used, at least hitherto. The term 'codetermination' is increasingly becoming more prevalent, however.

<sup>2</sup> See 'Mitbestimmung bringt Europa voran' [Codetermination galvanises Europe], Böckler Impuls, 5/2016, p. 2.

Not only states, but also companies themselves benefit from codetermination. A recent study shows that since the financial and economic crisis companies with employee representatives on the supervisory board have outperformed firms without codetermination. That applies to operating profits, capital market valuation, employment development and investment in plant and research.<sup>3</sup>

Furthermore, workers' representatives in the supervisory board boost company sustainability by pressing for a sustainable company policy, improving the prospects for jobs, incomes and production locations in Germany and Europe.

At a time when the members of executive boards and top management change frequently and tenures are becoming shorter and shorter, it is incumbent on workers' representatives in supervisory boards with codetermination to keep an eye on the company's long-term future and to articulate stakeholders' interests in company bodies. This is manifest in, among other things, the fact that company codetermination tends to keep a lid on excessive CEO compensation and the extent to which it is based on the company share price.<sup>4</sup> Another benefit is the independent supervision of the board by workers' representatives.

Finally, the employees also benefit from strong European workers' participation. Companies with codetermination exhibit higher investment rates, tend to adopt sustainability practices more frequently, have higher training rates and a higher level of job security.<sup>5</sup>

## **2. Existing and future loopholes for avoiding codetermination**

If European goals are to be achieved, in particular more democracy and social justice, a European minimum standard is needed – progress must be made to ensure that employees' protection and options for participation are not left behind by the so-called freedom to conduct a business.

In Germany, in large companies freedom to conduct a business is reined in by codetermination in the supervisory board. This is broadly popular and a lesson learned from German history. Especially in periods of rampant financial capitalism such curbs are more pertinent and necessary than ever.

If money, goods, people and services are free to develop in the European Single Market, it should not be possible to shrug off workers' rights at national borders. Directives for the capital side – such as the recently revised Shareholders' Rights Directive – should be countered by instruments that strengthen the rights of stakeholders. But instead of establishing a high standard more and more options are being made available for circumventing workers' rights and the protection of employees is increasingly being hollowed out as a result.

Thus the basic conditions for company codetermination have changed over the past couple of decades: in the Single Market, companies with German legal forms (AG and GmbH, for example) are now competing with corporations with specifically European legal forms (SE, SCE), not to mention companies taking advantage of the transfer of seat option (Ltd, B.V. and so on).

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<sup>3</sup> See Rapp, Marc Stellen/Wolff, Michael (2019): Mitbestimmung im Aufsichtsrat und ihre Wirkung auf die Unternehmensführung: Eine empirische Analyse vor dem Hintergrund der Finanz- und Wirtschaftskrise [Codetermination in the supervisory board and its effects on company management: an empirical analysis against the background of the financial and economic crisis]. Available at: [https://www.boeckler.de/pdf/p\\_study\\_hbs\\_424.pdf](https://www.boeckler.de/pdf/p_study_hbs_424.pdf)

<sup>4</sup> See Vitols, Sigurt (2008): Beteiligung der Arbeitnehmervertreter in Aufsichtsratsausschüssen [Participation of workers' representatives in supervisory board committees], Hans-Böckler-Stiftung Working Paper No. 163, Düsseldorf.

<sup>5</sup> This research result is based on the work of the Social Science Research Centre Berlin (WZB), which measures the level of company codetermination by means of the Codetermination Index (Mitbestimmungsindex, MB-ix), and analyses the extent to which sustainable company aims are supported by codetermination. More information on this is available at: <https://www.mitbestimmung.de/html/mbix-120.html>.

## European Company (SE)

In order to avoid company codetermination a fair number of companies are exploiting loopholes made available by ECJ rulings on freedom of establishment and existing EU legislation. For example, according to data from the Hans-Böckler-Stiftung at least 50 companies<sup>6</sup> with more than 150,000 domestic employees are currently evading German company codetermination, exploiting regulations governing the European Company (SE) to freeze a state of affairs with no or only a few codetermination rights.<sup>7</sup>

## Cross-border mergers

The regulations on codetermination in the case of cross-border mergers also allow for the avoidance and dilution of codetermination. To all appearances this is the purpose of virtually all such mergers. Not a single case has arisen in the course of trade union consultations of two companies merging that previously were not linked to one another (which was the original intention). Instead, cross-border mergers overwhelmingly occur within corporate groups. This involves merging a company with an affiliate established in another country shortly beforehand for that very purpose and with the aim of reducing codetermination rights or avoiding them altogether.

## Cross-border conversion and division

Presumably opportunities to avoid or dilute company codetermination will increase further. After the adoption of the Directive amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions (as part of the EU Company Law Package) there will in all likelihood be more possibilities to freeze a situation without, or with only a low level of company codetermination by means of a cross-border conversion or division. As is already the case under merger law it will also be possible, if a member state implements this option, to downgrade parity-based codetermination to only one-third participation after a cross-border conversion or division. Furthermore, it will be possible after only four years to discard a form of company codetermination agreed upon in the course of negotiations by means of a subsequent merger.<sup>8</sup>

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<sup>6</sup> The figure of at least 50 companies refers to companies on a growth trajectory that at the time of their transformation of legal form into an SE had just under 2,000 employees, so that, if they had had a German form of association, they would have been on the brink of being subject to the Codetermination Act (parity-based composition of the supervisory board). The figures refer to 2015. Trade union experience is that there is a constant stream of companies being transformed into SEs and it is safe to assume that their aim is to avoid codetermination.

<sup>7</sup> Alongside the 'freezing problem' there are also examples of companies (formerly with codetermination) that have reached agreement with their workers' representatives on a form of company codetermination that later proved its worth in practice. The frequent involvement of workers' representatives from production locations in other European countries has sometimes awakened interest in this system even in EU member states that have no national legislation on company codetermination. The above remarks therefore should not be misconstrued as fundamental criticism of the SE, but rather as a call to surmount the 'freezing problem'.

<sup>8</sup> The Directive has to be transposed into national law by the end of 2022. Only after that will it be possible to make a final judgement on the effects on company codetermination.

### 3. Policy options – a step forward instead of two steps backwards

It seems that the European institutions have missed a real opportunity to link companies' cross-border mobility with effective protection of employees.<sup>9</sup>

For this reason the DGB has called on the German government, with the upcoming transposition into national law of the new EU regulations on cross-border company mobility, to use its discretion to curb the risk of abuse.

Furthermore, the European institutions are strongly encouraged to make good the existing shortcomings of the Directive on cross-border company mobility with a framework directive on information, consultation and company codetermination. The European Trade Union Confederation made a similar demand as early as 2016, which the DGB strongly supports.<sup>10</sup>

At its twenty-first ordinary congress in May 2018 the DGB adopted the following, in addition to that:

The existing right to information and consultation makes workers in Europe into citizens with democratic rights in the firm. A directive on codetermination is intended to ensure that employees' existing codetermination rights are protected. This directive should set high standards on information and consultation and introduce ... minimum standards on company codetermination into European law. New directives from the Commission and ECJ rulings should not lead to new risks for codetermination. It must be excluded that the regulations planned by the European Commission can lead to a situation in which companies can simply shift their seat to the country with the weakest workers' participation rights.<sup>11</sup>

The Federal Ministry for Labour and Social Affairs (BMAS) also indicated some sympathy for such a solution in its white paper 'Work 4.0':

In order to achieve a stable anchoring of company codetermination in Europe the BMAS also supports the European Trade Union Confederation's demand that minimum standards for workers' participation be firmly established. To this end negotiations should commence on a minimum standards directive. Such a directive could also tackle the questions discussed under the heading 'freezing codetermination' in relation to the SE and the demand for 'dynamisation' when national thresholds are exceeded, although without calling into question the consensus achieved on the SE.<sup>12</sup>

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<sup>9</sup> The Council is particularly worthy of mention here, whose unwillingness to protect codetermination was disappointing. The European Parliament, by contrast, passed a very progressive resolution on the directive on cross-border conversions, mergers and divisions on 17 January 2019 by a large majority of 502 to 112. This resolution contained important elements of ETUC resolutions, although ultimately it was not possible to implement much of this in the course of negotiations with the Council.

<sup>10</sup> ETUC Position Paper: Orientation for a new EU framework on information, consultation and board-level representation rights, adopted at the extraordinary ETUC Executive Committee on 13 April 2016 in The Hague and the ETUC Executive Committee on 9 June 2016 in Brussels. Available at: [https://www.etuc.org/sites/default/files/document/files/egb-positionsrapport\\_vorgabe\\_fur\\_einen\\_neuen\\_eu-rahmen\\_u-ber\\_die\\_rechte\\_auf\\_betriebliche\\_und\\_unternehmensmitbestimmung.pdf](https://www.etuc.org/sites/default/files/document/files/egb-positionsrapport_vorgabe_fur_einen_neuen_eu-rahmen_u-ber_die_rechte_auf_betriebliche_und_unternehmensmitbestimmung.pdf)

<sup>11</sup> Resolution 'B013: Rechte sichern - Rechte durchsetzen - Gewerkschaften stärken' [Safeguarding rights – implementing rights – strengthening trade unions], 21<sup>st</sup> ordinary DGB federal congress, May 2018. Available at: <https://www.dgb.de/-/Rnn>

<sup>12</sup> Federal Ministry of Labour and Social Affairs (2016): Weißbuch 'Arbeiten 4.0' [White paper 'Work 4.0'], pp. 161/162. Available at: <https://www.bmas.de/SharedDocs/Downloads/DE/PDF-Publikationen/a883-weissbuch.pdf?blob=publicationFile>

#### 4. Key policy issues for a framework directive on information, consultation and board-level employee representation (company codetermination)<sup>13</sup>

##### Information and consultation

It is an important aim for the DGB and its member unions to establish a Europe-wide **standard for employee information and consultation**, which will be explained in what follows.

Employees' right to information and consultation is among the European fundamental rights (Article 27 of the Charter of the European Union). Companies that rely on European directives in order to modify their corporate constitution (for example, SE, SCE, cross-border conversion or transfer of seat, merger or division) must therefore be legally obliged to conduct **negotiations on a European body of workplace interest representation**, if none exists. In doing so it must always be ensured that all European workforces are included in the abovementioned negotiations, to the extent that these companies rely on European directives to alter their corporate constitutions. The relevant regulations should correspond to those of the SE directive in relation to the SE works council.

From a trade union standpoint it is only logical that a company that makes use of single-market freedoms and European directives for its own advantage should also satisfy the minimum requirements arising from the social dimension of the European Union.

In order to be conducive to European goals these requirements can only be applied on top of national legal provisions. The rights of German works councils, central works councils and group works councils are not affected by the new requirements and remain unchanged.

##### Board-level employee representation

Another important aim of the framework directive is to prevent firms from being able to evade board-level employee representation (company codetermination). A further aim is to prevent companies from avoiding having to adopt such codetermination ('freezing of a situation in which there is no code-termination or in which there is one-third participation'), as well as from wriggling out of an existing form of codetermination. Thus the framework directive should include a mechanism to ensure board-level employee representation, based on the ETUC's so-called 'escalator principle'. This principle provides for Europe-wide thresholds to make up for patchy national thresholds for board-level employee representation as they affect certain companies. The following principles should be applied here:

- The framework directive's scope of application encompasses companies that rely on European directives to amend their company constitution (for example, SE, SCE, cross-border conversion/transfer of seat, merger or division). From a trade union standpoint it is only logical that companies that seek to optimise their corporate architecture by means of European directives pretty much come within the purview of European standards on protection of board-level employee representation (company codetermination).

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<sup>13</sup> The following is based on the ETUC position paper 'Orientation for a new EU framework on information, consultation and board-level representation rights' – see footnote 10 above.

- Similar to negotiating procedures on codetermination in the case of the SE, **negotiations on board-level employee representation take priority**. What is more, the election of workers' representatives should be conducted along similar lines to the regulations enshrined in the SE directive and the national SE transposition laws. In contrast to the regulations pertaining to the SE, however, negotiations in this instance take place only where there are above 50 employees.
- In cases in which the employees' special negotiating body and company management cannot reach agreement our proposal envisages the Europe-wide **application of uniform fall-back regulations in accordance with the escalator principle**:
  - Small firms with between 50 and 250 employees (in the company and in direct or indirect affiliates) should have two or three employee representatives in management bodies. This regulation protects in particular board-level employee representation in the Nordic states, in which even limited companies with between 25 and 50 employees are subject to company codetermination.
  - In medium-sized companies with **between 250 and 1,000 employees** (in the company and in direct or indirect affiliates) one-third of the seats in management bodies should be reserved for employee representatives. It must be ensured that the relevant supervisory or administrative board comprises at least nine persons, so that there can be no deterioration with regard to the first threshold of the escalator principle.
  - In large companies, with over 1,000 employees (in the company and in direct or indirect affiliates) seats on management bodies should be allocated on a parity basis to employee and shareholder representatives. Parity-based employee representation in the supervisory board is a key feature of German codetermination. It is therefore of the utmost importance to the DGB and its member trade unions that any new European regulation on codetermination provides for mechanisms that ensure the parity-based participation of employee representatives. Trade union nomination rights also need to be protected and respected in the broader debate.
- It is crucially important that, when a new escalator-principle threshold (50/250/1,000) is passed, **new negotiations on board-level employee representation are held automatically and must involve the trade unions**. In the event of a breakdown of negotiations the new fall-back regulation shall kick in. This ensures an effective procedure to avoid the 'freezing' of a situation without board-level employee representation or only at a low level.

Given the widely varying systems of board-level employee representation (or codetermination) in Europe, it also makes sense to establish a series of **general principles and considerations**. In our view, a European standard on codetermination cannot be established without the Europeanisation of company codetermination (board-level employee representation). It must therefore be ensured that all workforces in Europe should always be included in the abovementioned negotiations if their company relies on European directives to amend their corporate constitution. It is important to note, however, that companies with a national legal form that does not rely on any of the abovementioned directives continue to be subject only to national codetermination and company law and are not covered by the escalator principle. This exemption is based on respect for existing national codetermination systems.

It is also very important for the DGB and its member trade unions that **balanced representation of men and women** in decision-making bodies is ensured. The ETUC also called for this in its resolution, cited above.

Furthermore, the abovementioned procedures must apply to both the **dualistic system**, comprising supervisory board and executive board, and the **monistic system**, which has only an administrative board or board of directors. In the case of the monistic system adjustments are conceivable, depending on the design of the relevant national system. Regardless of whether there is a dualistic or a monistic system, however, an electoral mandate (for example, in a works council) may not preclude taking up a seat on a supervisory or administrative board.

From the standpoint of the DGB and its member unions it remains very important that all members of a management body should **enjoy the same rights and obligations. There must be no distinction between employee and shareholder representatives.** A **general right to training** should also be ensured for all members of management bodies.

## 5. Summary and outlook

Board-level employee representation (codetermination) is a successful model: for society, companies and employees.

In the era of digitalisation, socio-environmental transformation and advancing globalisation codetermination offers both opportunities and protection. Combating climate change, achieving a socially just transformation and respecting human rights in value and supply chains will be possible only with and not against employees.

The DGB and its member trade unions call on the European institutions and the German government to take up the reflections on a framework directive on information, consultation and board-level employee representation in the political debate and to close the loopholes that make it possible to avoid them.

This intention is in line with Germany's coalition agreement, which expressly states: 'We are committed to ensuring that national provisions on codetermination are safeguarded also in the case of company cross-border transfers of seat'.<sup>14</sup> The directive outlined in this paper would perform this task.

From a trade union standpoint it makes sense to use Germany's presidency of the EU Council for this important task.

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<sup>14</sup> See 'Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land, Koalitionsvertrag zwischen CDU, CSU und SPD' ['A new start for Europe. A new dynamic for Germany. New solidarity for our country.' Coalition agreement between the CDU, the CSU and the SPD], lines 2332 to 2334.