5. The state of democracy at work in the EU: institutions at the company level

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Topics

> EU social policy has reached a crossroads in terms of worker participation
>
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Introduction

This chapter takes stock of worker participation rights and institutions at the company level in Europe from both legal and empirical perspectives. It shows how the recent 'social' turn in EU policy (Crespy 2019; Pochet 2019) has affected worker participation at the company level in various and ambiguous ways, and why worker rights should be extended and strengthened if Europe is to build a sustainable, innovative and democratic economy and society amid global competition and overlapping crises.

Worker participation in Europe has regained political momentum in recent years, a process driven by renewed debates on workplace democracy in both academic and policy circles (Hyman 2016, De Spiegelaere et al. 2019, Frega et al. 2019, Ferreras et al. 2020) and predating the apparent 'social' reorientation of EU policy. Clear examples are found in the European Parliament's (2021) report on democracy at work, the 2023 exploratory opinion on democracy at work by the European Economic and Social Committee (EESC) and, most recently (2023), the conclusions of the Council of the EU on more democracy at work and green collective bargaining for decent work and sustainable and inclusive growth. While the EU acquis on worker participation rights at the company level was already significant in terms of the array of directives that were fostered and transposed into national law (Hoffmann et al. 2017), new directives have been approved since 2019, securing or furthering workers' collective voice at the company level (e.g. the Corporate Sustainability Reporting Directive (2022/2464/EU)). Moreover others are in the pipeline (e.g. the revision of the European Works Council (EWC) Directive (2009/38/EC)). Yet, despite these regulatory developments, a country comparison following 20 years of EU enlargement reveals ongoing, pervasive differences in terms of worker participation rights between countries that accessed the EU previous to the biggest enlargement of 2004 (pre-2004 countries) and those that joined in 2004 or after (post-2004 countries), with upward convergence remains a challenge. It is uncertain how these good intentions will further develop, and we are thus at a 'critical juncture' in Europe for democracy at work.

The chapter is structured as follows. The first section assesses worker participation institutions across EU countries based on a recent update of the European Participation Index (EPI) and compares pre-2004 and post-2004 countries. Focusing on more specific dimensions of worker participation, the second section examines EWC practice in the context of the debate on the revision of the EWC Recast Directive. Based on a literature review and empirical and legal research by the ETUI, it highlights critical problems that arise from the use of confidentiality provisions enshrined in national law and their impact on EWC activity. Issues such as a lack of adequate sanctions and varying degrees of legal manoeuvrability for EWCs are also addressed in a comparative analysis, the findings of which underline the positive effects that EWCs may have in terms of improving social and environmental performance. A third section examines the potential implications for board-level employee representation (BLER) of cross-border corporate mobility and recent European Court of Justice (CJEU) judgments, in particular of Case C-677/20 (*IG Metall and ver.di vs. SAP SE*) for the Europeanisation of trade union mandates in SE supervisory boards. This section is based on extant studies, legal assessments and data analyses of the ETUI cross-border mobility database, the Capital IQ platform and the provisions of SE agreements concerning BLER. A final section highlights the potential of the recent Corporate Sustainability Reporting Directive in terms of developing additional worker participation rights.

The overall message that emerges from this enquiry is that EU social policy has reached a crossroads in terms of worker participation. While the narrative and some developments seem to support EU worker participation rights at different levels, various challenges remain and will require specific responses in the coming EU legislative period.

Worker participation: still unequal after 20 years

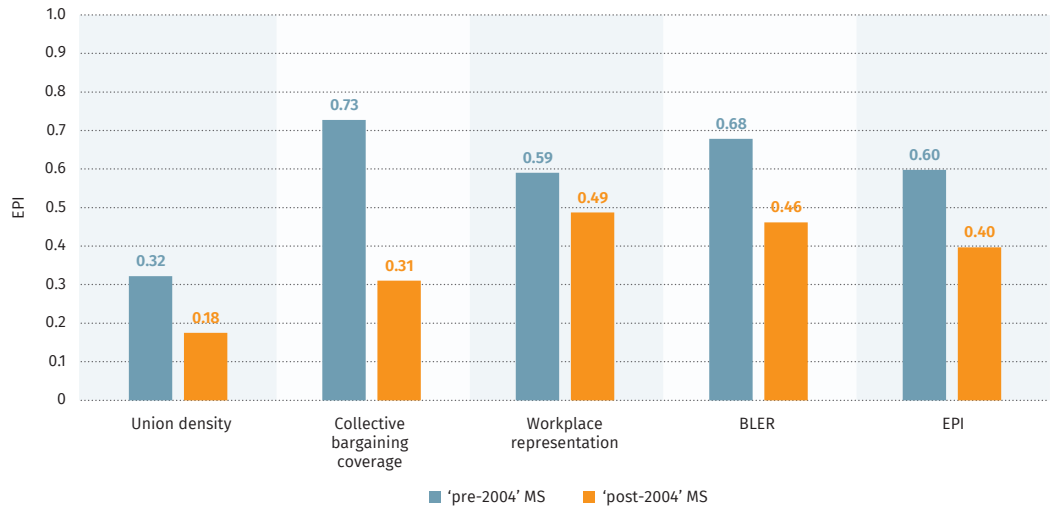
20 years after enlargement began, major gaps still exist between worker participation arrangements in the 'post-2004' and 'pre-2004' EU Member States

The EU labour law acquis contains strong commitments to support for worker participation. In theory, we would expect to see a substantial strengthening of information, consultation and participation rights for workers in the countries that have joined the EU since 2004. Yet, even 20 years after enlargement began, major gaps still exist between worker participation arrangements in the 'post-2004' and 'pre-2004' EU Member States. This conclusion has been reached from an analysis of the ETUI's EPI and its components in the 14 EU Member States that joined before 2004 and the 13 countries that became Member States in 2004, 2007 and 2013.

The EPI, developed by researchers at the ETUI, is a country-level indicator of worker participation rights. Given the variety of industrial relations systems in different countries, it includes components that measure the various levels and key mechanisms through which 'workers' voice' can be institutionally exercised: trade union representation in collective bargaining, workplace representation and BLER. Each component is awarded a score between 0 and 1 for each country, and the overall EPI is calculated as the weighted average of these components. Previous editions of *Benchmarking Working Europe* showed a strong association between the strength of the EPI and various outcomes, for example, a negative relationship between low levels of participation and income inequality and a positive association between labour force participation rates and research and development (R&D). Inequality between 'pre-2004' and 'post-2004' countries can be seen for each of the EPI components. Data analysis for 2019 reveals that the variation is most pronounced for components that specifically apply to trade unions and their role in collective bargaining (see Figure 5.1). In 'pre-2004' countries, trade union membership as a percentage of workers ('union density') is, on average, only slightly more than half that recorded for 'post-2004' countries (0.18 versus 0.32). Collective bargaining coverage (i.e. the percentage of workers whose working conditions are determined at least in part by a collective agreement) is less than half the level in 'post-2004' countries that it is in 'pre-2004' countries (0.31 vs. 0.73). The differences are smaller but still notable in terms of representation at the workplace level (0.49 vs. 0.59) and BLER rights (0.46 vs. 0.68). The overall EPI average is about 50% higher in the 'pre-2004' countries (0.60) than in the 'post-2004' countries (0.40).

Analysis of the EPI and its components also reveals that many workers in the EU lack representation along one or more of the dimensions of 'worker voice'. Moreover, this weakness is more pronounced in 'post-2004' Member States, particularly where trade union membership and collective bargaining representation are concerned (see also Chapter 3 in this volume), underscoring the need for trade union renewal strategies and legislative support for worker participation at both the national and EU level.

Figure 5.1 **European Participation Index and its components, by 'pre-' and 'post-2004' EU Member States**



Source: Vitols' analysis on the basis of 2023 EPI data.

European Works Councils: impacts and challenges

Confidentiality issues for EWCs

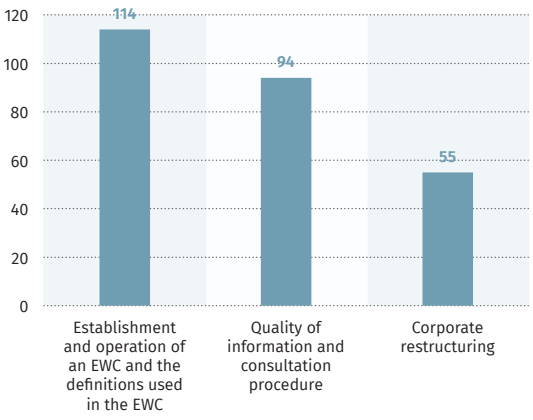
European Works Councils (EWCs) remain the flagship institution of worker participation at European level, since the EWC Directive (94/95/EC) introduced these bodies to ensure transnational information, consultation and worker representation in multinational companies which have over 1,000 employees and which operate in more than two EU Member States, with at least 150 employees in each. However, the significance of confidentiality of information at work is highlighted in part its abuse, which can obstruct effective information and consultation (I&C) and EWCs' relations with other workplace representatives (e.g. Kiss-Gálfalvi et al. 2022; European Parliament 2023).

ETUI research by Rasnača and Jagodziński (forthcoming) compares legal frameworks for confidentiality across 10 EU Member States between 2017 and 2018. It is observed that, in most countries, the task of designating confidential information and the choices around which information is not to be shared with workers' representatives lie largely with management. Tracing the developments of EWCs between two surveys in 2007 and 2018, De Spiegelaere et al. (2022) found that EWCs still function primarily as information rather than as consultation bodies, receiving considerable but selective information. Material on critical issues is frequently inaccessible, with managers commonly citing stock market regulation constraints for non-compliance with legislation.

Furthermore, confidentiality clauses are regularly invoked and misused for objectively non-confidential matters to diminish information sharing, sometimes even before an EWC has been established or in such a way as to hinder its establishment (Huybrechts 2021). Indeed, the timing of information release is crucial, yet EWCs are often presented with a 'fait accompli', especially when a transnational company undergoes restructuring, despite the intended role of EWCs in restructuring under the EWC Recast Directive (2009/38/EC) and despite the fact that we live in a digital era that requires stronger EWC tools. Most EWC representatives also perceive plenary and extraordinary meetings to be inadequate venues at which to address restructuring challenges reliably (De Spiegelaere et al. 2022).

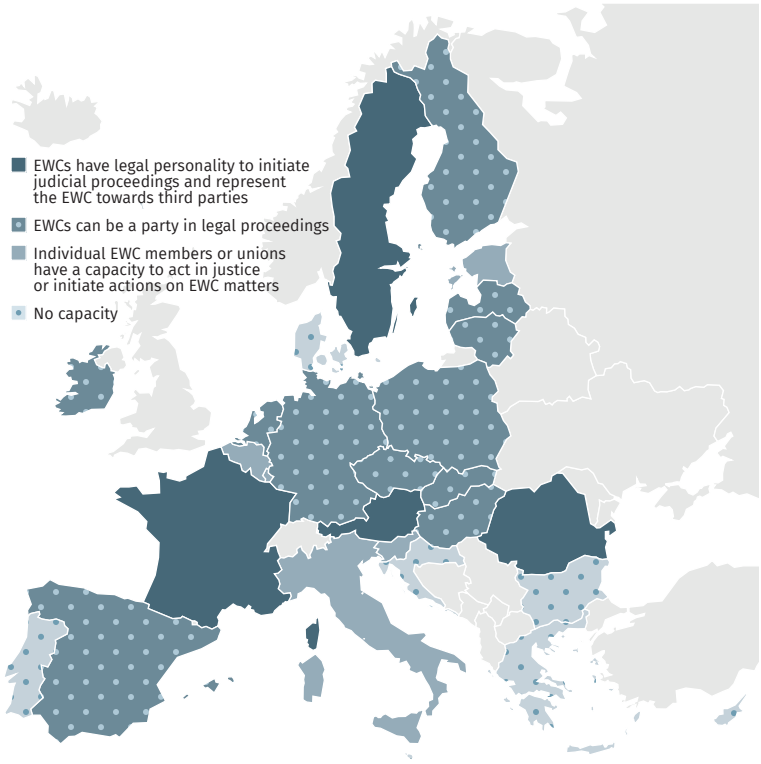
Regarding sanctions, EWC members who break confidentiality rules face fines, imprisonment or internal disciplinary measures in many countries, although no court cases are known to have been brought successfully against an EWC representative (Rasnača and Jagodziński forthcoming). Court rulings exist on managerial abuse of confidentiality, including in relation to restructuring and redundancies. However, the sanctions included in recital 36 of the Recast Directive's Preamble (rather than in its operative parts) have proven insufficient for ensuring managerial compliance. Nevertheless, the ETUI's EWC jurisprudence database has collected several court rulings on managerial abuse of confidentiality (e.g. in Spain, a court discerned that dismissing an EWC member for sharing information about planned collective redundancies with his local works council was a violation of freedom of association. In a UK case, a court dismissed an employer's claim that client confidentiality prevented it from fulfilling the obligation to provide information needed to set up an EWC). Furthermore, of 129 EWC court cases in the EU between 1997 and 2022, most concerned the quality of I&C procedures or corporate restructuring – both matters in which confidentiality considerations often feature (see Figure 5.2).

Figure 5.2 **Topics of EWC-instigated court cases for the period 1997-2022**



Note : N=129
Source: De Spiegelaere et al. (2022: 227) using 2018 ETUI data from EWC representatives.

Figure 5.3 **EWC capacity in legal proceedings**



Source: adapted from European Commission (2023), which cites European Centre of Expertise Network (ECE) data from November 2017.

> Where there are no strong structures, EWCs often become subordinate to management

In most Member States, an EWC rather than one of its individual members can go to court (or seek redress before an equivalent body) to challenge an imposed duty of confidentiality. Generally, however, the capacity of EWCs to seek legal redress is limited (see Figure 5.3). Another commonality between countries is the continuing duty of non-disclosure incumbent upon representatives of EWCs and other work representation bodies after their functions expire, unless a different confidentiality period is determined by the central management (Parker forthcoming).

Contextualised differences in confidentiality approaches

Member States' varying emphasis on EWCs, trade unions and/or works councils as forms of worker representation, and the interdependencies between them, have implications for confidentiality. Where there are no strong structures, EWCs often become subordinate to management, making consultation a mere formality limited to the minimum required by EU and national law. In Hungary, for instance, where unions and works councils co-exist, members of the special negotiating body (SNB) for the EWC are appointed by the works council or central works council, where one exists, as the employer has only I&C obligations towards works councils. However, more than half (58.9%) of EWC representatives responding to the 2018 EWC survey reported the presence of an EWC coordinator in their EWC (De Spiegelaere et al. 2022), suggesting growing union influence, as EWC coordinators are usually selected by European Trade Union Federations (ETUFs).

Countries also vary in terms of the extent to which the definition of confidentiality is 'employer-led', as is the case, for instance, in Hungary, Poland, Slovenia and the UK (now not an EU Member State but relevant here given its transposition of European I&C legislation) (see Table 5.1). Of these countries, all but the UK are in central and eastern Europe. Furthermore, most are liberal market economies (LMEs) (Pulignano and Turk 2016), though some categorise Hungary, Poland and Slovenia as emerging market economies (EMEs) (e.g. De Spiegelaere et al. 2022). According to Hall and Soskice (2001) and the subsequent refinement of their 'varieties of capitalism' typology, LMEs reflect a relatively decentralised system of industrial relations, with collective bargaining occurring at enterprise or workplace level, while EMEs are economies in the process of development and sit between developing and highly developed economies. Coordinated market economies (CMEs) rely on non-market forms of interaction between economic actors and stronger institutions in their models of industrial relations, from the social partnership approaches of central western European countries like Belgium, Germany and the Netherlands, to the organised corporatism typical in Nordic countries such as Sweden and Finland (Nordic CMEs). The southern European countries, including Italy and France, generally fit within a mixed market economy (MME) category, where strong state intervention combines with market dynamics.

The 2018 ETUI survey, involving 1,520 EWC representatives across the EU, found that they perceived managers attending EWC meetings in MNCs headquartered in MMEs as most likely (42.9%) to withhold information on confidentiality grounds, compared to those in LMEs (41.1%), CMEs (37.4%) and the Nordics (37.1%). Representatives from LMEs and MMEs are also more likely to feel limited in reporting back to those whom they represent due to confidentiality concerns (De Spiegelaere et al. 2022). In some Member States, confidentiality constraints may furthermore be extended in legal terms to cover not only EWCs, but also national and local worker representatives. There are thus 'different expectations among EWC representatives regarding confidentiality

Table 5.1 **National confidentiality frameworks**

Country	Country clusters by economy type	Employer-dominated confidentiality definition	Cooperative/ bargained confidentiality definition	Statutory definition of confidentiality
Belgium	CME			X[1,2]
Finland	Nordic[3]/CME[4]		X	X[1]
France	MME		X	X
Germany	CME			X
Hungary	EME[3]/LME[4]	X		X
Italy	MME		X	X
Netherlands	CME			X
Poland	EME[3]/LME[4]	X		X
Slovenia	EME[3]/CME[4]	X		X
Sweden	Nordic[3]/CME[4]		X	
United Kingdom	LME	X		X

Notes:
[1] These countries have confidentiality rules specific to EWCs.
[2] Beyond EWC and SE works council members, confidentiality mainly concerns union representation at the establishment level, with no specific provisions related to confidentiality and secrecy applicable to the union delegation.
Unless specified, these categories are employed by [3] De Spiegelaere et al. (2022) or [4] Pulignano and Turk (2016).
Source: adapted from Rasnača and Jagodziński (forthcoming) and Parker (forthcoming).

and/or differences in the perception of national confidentiality regimes' (De Spiegelaere et al. 2022: 206). What is more, in most countries, the general approach to confidentiality is complemented by special rules for certain areas (e.g. company or competition law in merger cases); worker groups (e.g. stricter confidentiality rules typically applicable in the public sector); and worker representation bodies (e.g. EWCs, health and safety representatives). Rasnača and Jagodziński (forthcoming) also report that some of these 'special regimes' are triggered by certain EU-level rules (e.g. the EWC Recast Directive or the Market Abuse Regulation (Regulation (EU) No. 596/2014)).

Other features of EWCs also help to explain the various ways of handling confidentiality. As well as members' unionisation, recital 20 of the Recast Directive stipulates that Member States should determine who the employees' representatives are, with regard to gender, age and nationality if deemed appropriate. Most ETUFs advocate using formulae by means of which the number of EWC representatives from that country is determined on the basis of workforce size in that country - also laid down as a determining criterion by the EWC Directive fallback rules - and additional measures are usually introduced to help ensure representativeness. While the 2018 ETUI survey found a broad correspondence between EWC numbers from the individual EU countries and country size, the 'average' EWC representative has changed little since the 2007 survey, being male, aged 50, unionised and representing workers at five sites (De Spiegelaere et al. 2022). In total, 23.2% of EWC respondents are home-country representatives for their MNC, while 76.8% are foreign representatives. The former are likely to be more familiar with home-country managerial practices (including those around confidentiality) and to have more contact with central management than their counterparts from other countries. Furthermore, while managers generally regarded practice as superior to the content of EWC agreements (Pulignano and Turk 2016), 22.2% of surveyed EWC representatives perceived the reverse, and another 21.0% (over half of whom had held their role as representative for only a short time) were unsure. By extension, the latter are unlikely to instigate action to improve practice relative to the content of the agreement (De Spiegelaere et al. 2022) – which is likely to include confidentiality matters.

Five rounds of EU enlargement have taken place since the adoption of Directive 94/95/EC. While a growing proportion of EWC representatives come from central or eastern Europe, most still hail from (south-)western European and Nordic countries (see De Spiegelaere et al. 2022), with implications for the representation and cultural aspects of EWC engagement with management and other workplace worker representation bodies over matters relating to confidentiality. Additionally, EWC court cases are concentrated in the three countries with the largest number of EWCs operating under transposed provisions (France, Germany and the UK). The disproportionately high number of cases pursued in the French courts may reflect variations in the emphasis placed by different nations on adversarial and cooperative approaches to industrial relations, and in the level and nature of the advice offered by unions to EWC representatives (De Spiegelaere et al. 2022).

Most managers are not antagonistic toward EWCs, but instead see them as 'adding value' to human resources management (HRM) or as 'malleable tools' to promote managerial objectives (Pulignano and Waddington 2020; Pulignano and Turk 2016) rather than as a means of fostering EWC influence over corporate strategy development and the legal entitlement of workers to transnational I&C, as intended by the EWC Directive. The fact that many do not comply with the I&C requirements of legislation (De Spiegelaere et al. 2022) is also attributable to undue withholding or confidentialisation of information, and to constraints on the scope of an EWC's competence. Indeed, the effective use of information exchange and consultation depends largely on EWCs and their relations

with other worker representation bodies. The withholding of information and over-use of confidentiality provisions affect these relations, contributing to lower-quality I&C processes and, by extension, inhibiting workplace democracy, worker participation and worker empowerment.

EWCs align with better social performance

As noted, most managers see EWCs as functional to their needs, but some still fear that EWCs and other channels for workers' voice might hamper productivity or performance – a concern highlighted in current debates over the revision of the EWC Directive – while supporters of strengthened rights stress the positive contribution that EWCs can make to social dialogue and sustainability.

However, a new ETUI analysis of the profitability and sustainability scores of large EU companies shows that having an EWC does not impair profitability. A quantitative analysis of the STOXX600 (the 600 largest European-listed companies) between 2018 and 2022 shows that neither return on equity (ROE) nor return on assets (ROA) are significantly lower in companies with an EWC compared to companies without one. This panel analysis controlled for other factors which might affect profitability, including revenue, main sector of activity, home country, company age and shareholding structure. Financial companies were excluded, as their financial structure is significantly different to other types of companies. Neither the differences in ROE nor the differences in ROA were significant, even at the 0.1 level. This result is consistent with a previous ETUI study that tested the correlation between EWCs and social welfare impact (Vitols 2009). Financial data were obtained in 2023 from Capital IQ and the list of companies with EWCs from the ETUI EWC database (ETUI 2023a).

Furthermore, for the same sample of companies and based on sustainability data from Refinitiv for 2021 and 2022, companies with EWCs scored significantly higher on both overall environmental indicators and overall social indicators than companies without an EWC, confirming previous ETUI research into EWCs and company performance (Vitols 2009; Clauwaert et al. 2016). The same control factors were included as for the analysis of profitability (see above), and financial firms were excluded. This analysis thus supports the view that companies with EWCs have better social and environmental performance but do not suffer in terms of competitiveness.

Revision of the EWC Directive and other policy implications

As our analysis indicates, current EU legislation has proven insufficient to dissuade management from abusing confidentiality obligations or to encourage other claims by EWCs. The ETUC's reform agenda (2017) emphasises measures such as upscaling and widening binding legal sanctions and improving access to justice for EWCs to generate greater compliance, coupled with efficient appeal procedures that are still absent in most Member States (Hoffmann and Jagodziński, forthcoming). Full monitoring and control of the varying quality of national transposing provisions establishing the sanctions under Article 11 must also be addressed.

Ambiguity around the legal status of EWCs and SNBs in relation to MNCs, accentuating limits to the pursuit of legal redress (Jagodziński and Lorber 2015), has furthermore seen the ETUC and ETUFs seek clarification with a view to launching litigation more readily against MNCs over non-compliant management. Transparent definitions of 'confidentiality' and 'transnational' may mitigate managers' use of these terms to restrict EWCs' agendas, limit their effectiveness and exert undue influence over the operation of EWC legislation; the concept of the 'transnational character of a matter' should also be moved to the main body of the Directive. A right for union experts to participate in all EWC and Select Committee meetings and to access all sites is needed to support and synchronise an EWC's work. A stronger definition of 'consultation' is also required (under Article 2.1.g) so that an EWC's opinion will be fully considered by management.

At the ETUC EWC Conference in October 2023, and following two rounds of consultation with the social partners, unions welcomed the contribution by Nicolas Schmit (European Commissioner for Jobs and Social Rights) signalling a possible legislative response by early 2024 to challenges concerning imprecise and incoherent I&C frameworks. This would include the pursuit of a single approach to consultation methods, the effective setting-up of EWCs, more equal gender representation on EWCs and appropriate resourcing to address I&C challenges. Augmented efforts by union organisations to coordinate EWCs with other worker representatives at all levels,

promote union involvement and provide EWC representatives with comprehensive training – in conjunction with the actions of European policy-makers – could also redress a power imbalance in relation to managers' use of confidentiality provisions, the scoping of transnational issues and resources. More widely, the European Parliament's resolution of 2 February 2023 calls on the European Commission to revise the Recast with regard to various EU legal acts (e.g. the Whistleblower Protection Directive (EU) 2019/1937 and the Protection of Trade Secrets Directive (EU) 2016/943).

Notwithstanding country differences, the importance of upward convergence from minimum workplace confidentiality standards across an enlarging EU is highlighted by the push among unions and representatives for clarity on the grounds and circumstances under which information can be withheld and the length of time during which it can be withheld, and for the extension of the Directive's scope to cover voluntary agreements (ETUC 2017). The confidentiality provisions of the EWC Directive also need to be understood in relation to other relevant pieces of legislation in order to assist the efforts of EWCs and other workplace instruments in relation to workplace confidentiality arrangements.

Board-level employee representation in the spotlight

Cross-border conversions: escaping codetermination?

Cross-border corporate conversions (CBCs) – involving a company moving to another country and adopting a corporate form of that other country while retaining its legal personality – have been assessed as entailing potential risks in terms of regime shopping, affecting BLER in particular (Sick and Pütz 2011), but also other collective labour rights governed by the law of a company's country of incorporation. Compared with SEs or cross-border mergers, information on CBCs has been the less available to examine the potential implications of EU corporate mobility for existing national codetermination systems. However, the macroeconomic data available for CBCs in the Cross-border company mobility database (ETUI 2023b) do not allow a generalised regime-shopping effect now to be identified, which may signal that BLER is not a determining factor when companies move across borders in Europe.

Mandatory BLER rights for the private sector do not, in fact, exist in all Member States (Fulton 2022; Lafuente forthcoming), so they can be lost or weakened when a company moves its seat from one country with strong BLER rights to another without, or with weaker, rights. Yet CBCs could potentially also lead to the spread of codetermination rights and an increased coverage if a company were to move from a country without codetermination to one that grants BLER rights, or has better or more inclusive regulations in that regard (Lafuente 2023). Finally, CBCs may not show any visible effects from the perspective of codetermination as a result of regime-hopping.

A source of data that can be used to gauge these possibilities and identify some potential effects is the ETUI cross-border company mobility database (ETUI 2023b), which systematically collects data on CBCs by country and identifies inward and outward cases according to national registries and the Orbis corporate database (Biermeyer and Meyer-Erdmann 2021). The potential cumulative effects for 2019 to 2022 can be estimated by comparing results for two country categories: the 'BLER countries' category includes 10 Member States with CBCs registered over that period and mandatory board-level codetermination in the private sector (i.e. Austria, Slovakia, Germany, Denmark, Hungary, Finland, France, Czechia, Luxembourg and Sweden), while the 'non-BLER countries' category includes 13 Member States that registered at least one CBC over the period but had no mandatory rights in the private sector (i.e. Bulgaria, Portugal, Romania, Belgium, Cyprus, Ireland, Poland, Italy, Spain, the Netherlands and Malta, plus the UK – a Member State at the time – and Liechtenstein).

However, employee numbers could too often not be collected in the database, and other relevant criteria which determine whether or not a company falls under the scope and thresholds of mandatory national codetermination rules, and which can vary enormously, are not collected. Furthermore, information is not available on whether or not BLER was actually in place before and after the CBCs, or on the origin and destination of each conversion case, since a new incorporation in a Member State does not necessarily indicate where the case came from; vice versa, a case registered as moving out of a country does not indicate where it moved to, which could be outside the EU. An analysis of corporate reports from 2019 allowed only four cases to be identified as potentially relevant for BLER rights, although the number could be higher. Following the transposition of Directive (EU) 2019/2121 amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions, such data should be more transparent, as the Directive obliges companies carrying out cross-border operations covered by its provisions to prepare a report explaining the consequences for BLER, among other matters. For the period between 2019 and 2022, the potential implications in terms of any regime-shopping effect could therefore be quantified only as very rough estimates and in aggregate terms.

The findings (see Figure 5.4) indicate that, overall, BLER rights do not discourage

> BLER rights do not discourage companies from moving to 'BLER countries'

companies from moving to 'BLER countries': these countries accounted for 60.6% of the incorporations registered over the period and registered a slightly higher proportion of incorporations (49.3%) than non-BLER countries (45.7%). This conclusion supports the argument that codetermination rights do not have direct negative macroeconomic effects or, in other words, that they do not serve as a repellent to the incorporation of companies or investments by companies in countries with BLER. Admittedly, BLER rights do not seem to make countries particularly attractive for corporate inward migration either: 'BLER countries' registered more outward CBCs (50.7%) than inward CBCs (49.3%). Other considerations may thus be more influential on corporate relocation decisions, such as efficiency or cost-saving factors (e.g. taxation), market or asset-seeking factors (Barbieri et al. 2019), or the institutional distance between the locations of corporate and intermediary headquarters within the same group (Valentino et al. 2019).

A regime-shopping effect is thus not generally observable when comparing BLER and non-BLER countries, but the situation varies across countries within the same category. Looking at those with over 100 cases of CBCs within 'BLER countries' over the period, Luxembourg, Germany and France recorded 855, 488 and 153 cases of CBCs respectively, yet while France and Luxembourg had positive rates of 62% and 18% respectively, Germany had a negative rate (-55%), meaning that more companies moved out of Germany than into Germany. This may mean that German companies with strong codetermination rights could potentially have been affected, but further micro-analysis is needed to confirm this. In the 'non-BLER countries' category, the Netherlands (446), followed by Malta (140), Belgium (131) and Spain (128) recorded over 100 CBCs for the period. With the exception of Belgium (89%), all had negative rates (-43% for the Netherlands, -84% for Malta, and -19% for Spain). In summary, a pattern of outflows was found less often in 'BLER countries' than in 'non-BLER countries'.

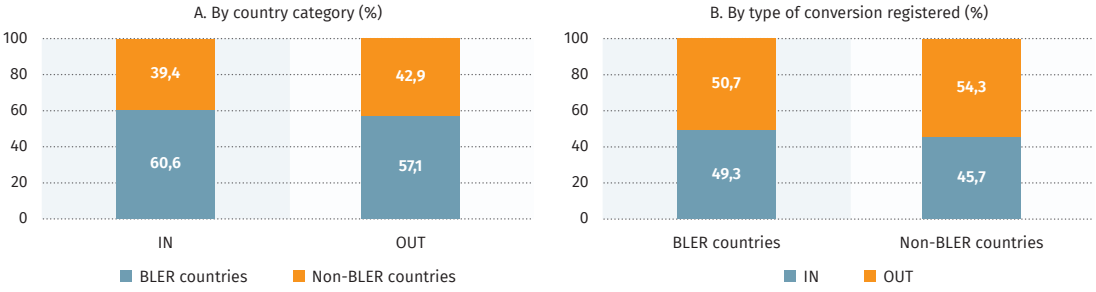
Yet conclusions about the significance of such movements, based on the data to hand, are tentative at best. More detailed company and employee data are needed to evaluate authoritatively, at the micro level, whether mandatory rights are being circumvented by CBCs on a basis, although national corporate registries and official statistics do not often contain the information needed to assess when mandatory rules are applicable (Lafuente 2022). This points to a need to collect further data through case study research.

Europeanising trade union seats on corporate boards

Cross-border corporate mobility and EU corporate law have also increasingly attracted the attention of researchers and the CJEU, particularly in terms of their implications for the composition of worker representation on corporate boards.

Case C-566/15 (Erzberger versus TUI AG) before the CJEU highlighted the potential for unequal treatment of workers by multinational groups in terms of workers' rights to participate in elections for representatives to the supervisory board of the parent company, when the latter is governed by national law (Lafuente and Rasnača 2019). As BLER rights are not yet harmonised across the EU, the CJEU established that territoriality should prevail and that Member States are sovereign in deciding whether, and how, to extend their national participation systems to workers in the foreign subsidiaries of companies falling under their jurisdiction. However, this does not seem to provide a

Figure 5.4 **Cross-border conversions for the period between 2019 and 2022**



Note: N =2,652
(N 'IN cases' = 1,268; N 'OUT cases' = 1,384)
(N 'BLER countries' =1,558; N 'Non-BLER countries' = 1,094)
'BLER countries' = 10 Member States.
'Non-BLER countries' = 13 Member States including the UK and Liechtenstein.
IN refers to cases registered as 'inward CBC' in the destination country; OUT refers to cases registered as 'outward CBC' in the origin country.
Source: analysis by Lafuente of the ETUI cross-border mobility database (2019-22 data) accessed July 2023.

definitive solution for workers' rights in an increasingly integrated EU market. The national law and practice of five Member States (Germany, Sweden, Norway, Denmark and France) recognise the transnational dimension of the workforce in their participation systems. While Germany and Sweden allow trade unions to share their board mandates with foreign representatives, this has only very rarely happened in practice. Furthermore, although Norway and Denmark have established more sophisticated systems of transnational elections across the workforce of multinational groups, such elections have been infrequent. When they have taken place, the lack of EU-wide minimum standards and legislative coordination has fostered conflict and great uncertainty about the conduct of electoral processes and the legitimacy of mandates (Lafuente 2023). Finally, in 2013, French law introduced a new role for EWCs by granting them the possibility of appointing one worker director in cases where two directors must be appointed. A legal change in 2019 lowered the thresholds for boards to have two worker directors, so EWCs could more often be responsible for appointing a second worker director, a practice that is becoming normalised in French MNCs (Lafuente 2022). Once again, however, the EU legislator did not foresee this role for EWCs in the EWC Recast Directive, and national law does not suffice to address all of the implications. These include potential conflict and insecurity arising as a result of the process, because many rules are not pre-established but are left to the management to decide, including in terms of equal treatment and the protection of candidates and representatives accessing the mandate, especially when they have non-French employment contracts (Lafuente 2022).

The lack of EU-wide minimum standards and legislative coordination has fostered conflict and great uncertainty about the conduct of electoral processes and the legitimacy of mandates

As for European Companies (SEs), the SE Directive (Directive 2001/86/EC) imposes obligations to negotiate on workers' involvement and, under certain circumstances, to retain previously existing BLER rights while granting European diversity in BLER mandates. However, the CJEU has only recently clarified that this Directive's safeguards imply respect not only for the previous proportions or number of workers in the composition of SE boards, but also for keeping other qualitative or procedural rules concerning the participation system in place, especially in respect of trade union seat reservation, and that these elements need to be Europeanised. In Case C-677/20 (*IG Metall and ver.di vs. SAP SE*), the German Federal Labour Court asked the CJEU whether the right of German trade unions to nominate candidates to supervisory boards under the German Codetermination Act of 1976 should be considered as a core element of the German codetermination system to be preserved according to the SE Directive in the event of SE transformation. In this case, the SE agreement of SAP SE had included a provision under which the size of the supervisory board could be reduced; if this provision was activated, German trade unions would lose their right to nominate and have members elected to the supervisory board through a special ballot. German trade unions thus brought the issue to court, arguing that the SE agreement was in breach of the SE Directive.

In its ruling of 18 October 2022, the CJEU concluded that this separate ballot for the election of trade union candidates to the supervisory board must be considered to be part of the non-negotiable elements of employee involvement that must be preserved at the same level after SE transformation according to Article 4(4) of the SE Directive 2001/86. Thus, the Directive's safeguards affect not only the numbers and proportions of board composition, but also the qualitative and procedural aspects of the codetermination system. German unions welcomed the ruling, since it means that German companies will not find it so easy to circumvent trade union rights by transforming themselves into SEs (Sick 2023).

The CJEU went further, however, arguing for the overall protection of trade union rights and equal treatment of workers in the transformed SEs: all employees within the subsidiaries and establishments of the SE should be treated equally regarding the trade union reservation of board seats. This means that all trade unions represented within the SE – not only those from Germany – should have the right to nominate candidates for election as supervisory board representatives, and 'all employees of SAP must be able to avail of the electoral procedure laid down by German law, even in the absence of any indication to that effect in that law.' The judgment concerns only SEs established by transformation and SE workers in the EEA, so does not contradict the reasoning of *Erzberger*, which applied the territoriality principle and sovereignty argument to the case of a multinational governed by national law (Lafuente and Rasnača 2019).

Yet, in the same vein as the subsequent ruling by the German Labour Court, the CJEU did not clarify how the mandating procedures should be Europeanised; it opened an avenue and left it to the German and European trade unions (and potentially the legislator) to articulate adequate solutions for Europeanising their mandates in SE boards. Innovative mandating procedures could be explored, such as those developed in the context of transnational company agreement

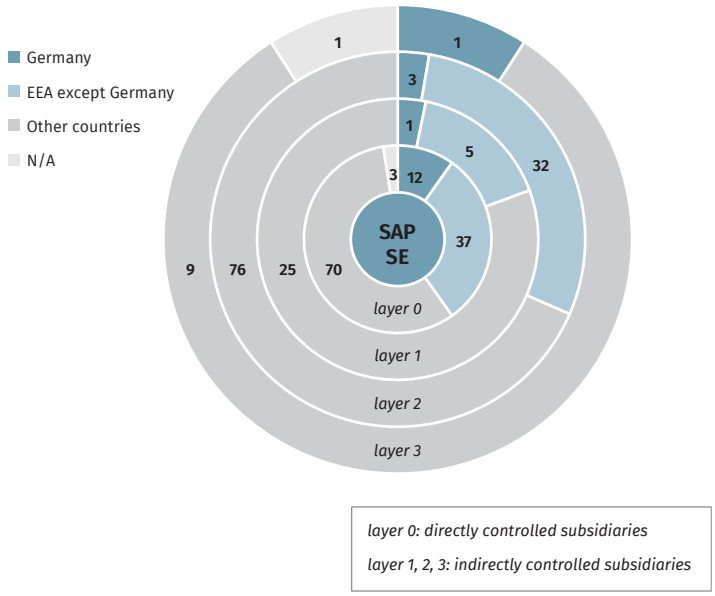
negotiations to improve political legitimacy (Lafuente 2023). Explicit roles could be granted to relevant ETUFs for the nomination of trade union candidates to SE supervisory boards governed by German codetermination rules (and eventually also to boards of other multinational companies), to works councils of SEs (SEWCs) in connection with appointments, and/or the workforce electing board representatives could be enlarged. The European Commission will have the opportunity to address this issue in its evaluation of Directive (EU) 2019/2121 by 1 February 2027, including an assessment of how the rules and safeguards on employee participation rights can be preserved in cross-border operations, contemplating 'the possible need to introduce a harmonised framework on board - level employee representation in EU law, accompanied, where appropriate, by a legislative proposal.'

Besides expanding the understanding of SE Directive safeguards, and inviting reflection on more inclusive solutions for trade union mandates in SE boards, the judgment entailed some immediate effects. Firstly, the potential reduction in supervisory board size was declared invalid for the SAP SE agreement, but questions remain regarding trade union mandates in the current right-sized supervisory board, still exclusively reserved for German trade unions. Figure 5.5 shows the corporate structure of SAP SE worldwide, resembling that of TUI AG in an earlier publication (Hoffmann et al. 2018). SAP SE is headquartered in Germany and controls (i.e. holds more than 50% of their capital), directly or indirectly, 275 subsidiaries, among which 74 are located in the European Economic Area (EEA). Currently, only trade unions representing workers in the 7 German subsidiaries can nominate members for the seats on the SAP SE supervisory board reserved for trade unions, while, following the CJEU judgment, trade unions representing workers in the 74 EEA subsidiaries of SAP SE should have equal opportunities in terms of nomination, as should their workforces regarding the election of their representatives. The EEA subsidiaries of SAP SE are spread across 25 Member States: France and the Netherlands account for 10 each, followed by Italy (six subsidiaries), Norway, Ireland, and Belgium (four each), and so forth. The number of employees and the economic relevance of each subsidiary is unknown, but Figure 5.5 shows the potential spread of workers' interests across SAP SE that should be considered with regard to trade union board mandates with a view to Europeanising procedures.

Finally, the judgment triggers questions about other German SEs created through transformation that currently have seats reserved for trade unions on parity supervisory boards. According to ETUI data collected on the participation-related provisions of SE agreements (last updated in 2019), at least 11 additional German SEs resulting from a transformation could be affected (i.e. BASF SE, Bilfinger SE, BP Europa SE, Dekra SE, E.ON SE, Fresenius SE, Hannover Rück SE, Man Diesel SE, MAN SE, SGL Carbon SE and Uniper SE). Some of their agreements explicitly provide for seats to be reserved for German trade unions, so the question that remains is how they should be updated. Interestingly, MAN SE already foresaw a role for the European Metalworkers' Federation (merged into IndustriAll) to propose candidates to its SEWC for appointment.

A crucial pending task for trade union policy and EU legislation in the coming legislature will thus be to assess the implications of corporate mobility for board composition and to enforce fairer and more transparent solutions for appointing European worker representatives within multinational companies and to SE boards.

Figure 5.5 **Structure of the SAP SE, by layer of control, country and number of subsidiaries**



Note: N=275 subsidiaries. Capital IQ limits its 'corporate trees' information to capital connections, i.e. shares ownership only, so other organisational, economic or political dependences are not considered (i.e. special voting rights).
Source: Lafuente based on Capital IQ 2023 (XTRA_SAP). Corporate tree information as of 19 November 2023.

Worker participation and sustainability reporting

> By 2025, the Corporate Sustainability Reporting Directive will apply to all large limited liability companies based in Europe

Transparency is also essential for assessing responsible business conduct and corporations' contributions to initiatives such as the European Green Deal. Not surprisingly, the European Parliament's (2021) Report on democracy at work called, among other things, for EU and national policies to promote corporate governance practices and, in particular, corporate reporting that, with workers' voice and participation, will contribute to corporate sustainability. The Corporate Sustainability Reporting Directive (Directive (EU) 2022/2464 (CSRD)), adopted in December 2022, represents a major step forward by requiring companies to publish information about their impacts on 'people and planet'. The CSRD will successively require different categories of companies to compile information on many environmental, social and governance (ESG) topics and to publish these in their annual management reports. One reason why the CSRD is a potential game-changer in fighting greenwashing is because it gives workers' representatives I&C rights in relation to sustainability reporting. By 2025, the CSRD will apply to all large limited liability companies based in Europe (including subsidiaries of non-EU companies), defined by the EU Accounting Directive as certain types of companies that fulfil two of the following three criteria in that they: (1) employ at least 250 workers, (2) have net revenue of at least 40 million euros and/or (3) have a balance sheet total of at least 20 million euros. Eurostat data on enterprises with 250 or more employees allow a rough estimate of the number of companies covered and the number of workers that they employ. For 2021, there were over 50,000 EU companies employing more than 55 million workers that could fall under the scope of the CSRD (see Table 5.2). In subsequent years, reporting requirements will also apply to listed small and medium-sized enterprises (SMEs) and to non-EU companies with significant business in the EU. Voluntary standards will also be developed for non-listed SMEs.

The CSRD is a key part of the European Green Deal since it requires large companies to report on their fulfilment of the EU's five main environmental objectives: climate change mitigation, climate change adaptation, sustainable use and protection of water and marine resources, transition to a circular economy, pollution prevention and control, and protection and restoration of biodiversity. However, the CSRD also requires companies to report on their business strategy and due diligence procedures, value chain, human rights (as defined by international instruments including the United Nations Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance for Responsible Business Conduct), as well as working conditions, social

Table 5.2 **Estimated number of companies and workers covered by the CSRD in 2021**

Country	Number of enterprises with 250+ employees	Number of workers employed
Austria	1,391	1,215,623
Belgium	1,432	1,477,721
Bulgaria	750	550,845
Croatia	412	356,362
Cyprus	N/A	N/A
Czechia	1,716	1,301,787
Denmark	868	754,697
Estonia	165	94,724
Finland	713	602,794
France	5,727	9,062,936
Germany	14,790	16,217,349
Greece	570	529,025
Hungary	951	889,116
Ireland	783	664,570
Italy	4,367	4,386,746
Latvia	217	148,927
Lithuania	420	308,832
Luxembourg	234	140,846
Malta	100	54,954
Netherlands	2,526	3,315,006
Poland	3,508	3,605,980
Portugal	1,075	N/A
Romania	1,651	1,517,314
Slovakia	646	492,445
Slovenia	269	200,999
Spain	4,354	4,943,300
Sweden	1,693	1,816,077
EU27 – total	**51,000**	**55,643,165**

Source: Eurostat (2023) structural business statistics (sbs), enterprise statistics on the whole business population (sbs_ovw), data for 2021, last checked 1 December 2023.

dialogue, adequate wages, health and safety, social protection and other social issues.

The CSRD also recognises the contribution that sustainability reporting can make to improving social dialogue. It defines broad I&C rights for workers' representatives in relation to 'relevant information and the means of obtaining and verifying sustainability information,' including the right to formulate an opinion that must be communicated to the company's board(s). These rights have the potential to comprehensively involve workers' representatives in reporting, thus ensuring that key issues are discussed with management and accurately reported. However, since the CSRD does not specify 'who, how or when' – that is, which workers' representatives must be consulted, in what manner and at what stage – its transposition will thus be a crucial factor in ensuring that the rights are properly defined at the national level. The deadline for transposition is 6 July 2024. Furthermore, workers' representatives will need specific training and the chance to learn about 'good practices' if the CSRD is to realise its potential as an important mechanism for worker participation (ETUC and Vitols 2024).

Conclusions

> The revision of the European Works Council Directive could provide an opportunity to reinforce the links between EWCs and other worker representation bodies

This chapter took stock of the broad extent of democracy at work in the EU in terms of worker information, consultation and participation institutions at the company level. While emerging narratives and some developments seem supportive of EU worker participation rights, our analysis points to areas that need improvement and require policy and legislative action, after 20 years of enlargement and at a time when EU social policy on worker participation is at a crossroads.

Firstly, based on analysis of the EPI and its components, our findings showed how worker participation institutions across the EU Member States still vary between 'pre-2004' and 'post-2004' countries, even years after enlargement, and how the different institutional dimensions of worker voice are still under-used in many countries, despite the current EU acquis on worker participation. Looking at EWCs, confidentiality obligations still appear to be a key obstacle to full EWC activity, although the precise nature of this obstacle varies from country to country, with employer-led definitions of confidentiality more apparent in central-eastern and southern European countries. This issue needs to be addressed if EWCs are to fulfil their role, in the process supporting companies' social and environmental performance and 'adding value' in managers' eyes. With regard to BLER, it emerged that cross-border corporate mobility through conversions has a less evident general effect in terms of regime-shopping than might be expected. Notwithstanding greater outward rates from Germany than from other countries and limited access to employee and other corporate data, our study points to other factors driving corporate mobility to a greater extent than the circumvention of BLER rights. However, cross-border mobility is bringing to the fore new challenges for national and EU legislation and trade union policy in terms of how to Europeanise trade union mandates in a fairer and more transparent way on multinational company boards. This implication is especially important given the uncoordinated developments identified in national law and practice, as well as recent CJEU jurisprudence concerning transformed SEs and supervisory board seats reserved for trade unions. Finally, we underscored the relevance of a new legal instrument, the Corporate Sustainability Reporting Directive, for introducing greater transparency and reinforcing worker participation rights.

As the ETUC *Action Programme 2023-27* observes, 'in many Member States, the effective exercise of democracy, unfortunately, decreases where most citizens spend a considerable amount of their time: at the workplace (ETUC 2023: 15)'. The effective exercise of democracy at work by involving workers in strategic decision-making, helps to protect their workplace rights, quality jobs and working conditions, thereby ensuring companies' sustainability as well as reinforcing the basis of democratic society. The strengthening of I&C and the participation rights of worker representatives and trade unions across Europe thus remains a top priority. This includes building on EU and national legislative initiatives, in particular, by means of responses to the European Parliament's call for the revision of the EWC Directive with, among other changes, adequate deterrent sanctions and infringement procedures in cases of wrongful transposition. Moreover, the revision of the EWC Recast Directive could provide an opportunity to reinforce the links between EWCs and other worker representation bodies, in particular, BLER, and to introduce procedural security for situations where EWCs are granted new roles to appoint board-level employee representatives, as is the case in France. As the chapter also highlights, a second key development will be the evaluation of Directive (EU) 2019/2121 as regards cross-border conversions, mergers and divisions, due by 1 February 2027, during which the European Commission will need to assess the effectiveness of safeguards for employee participation rights in the context of cross-border operations. It will, in fact, need to consider the pertinence of 'a harmonised framework on board-level employee representation in Union law, accompanied, where appropriate, by a legislative proposal.' By then, the ETUC proposal (published in 2020) for a Directive on a new EU framework for I&C and BLER rights for European company forms and other EU company law instruments could be a strong basis for discussion and could even be developed further to extend the scope of a coordinated framework of this kind to multinationals covered by the EWC Directive. Our findings also point to the need for a general policy shift such that corporate planning and shareholder interests are not prioritised over a worker participation agenda. Trustful employment relations must be supported, as they underpin the application of confidentiality provisions and worker agency. When such relations are absent,

the timing of management's engagement in I&C can circumscribe worker representatives' involvement in decision-making. Indeed, 'involving, trusting and influential' types of establishments score markedly better than moderate- or low-trust enterprises on establishment performance and workplace well-being (Eurofound and Cedefop 2020). Moreover, worker representation institutions at the company level, be they EWCs, BLER or others (e.g. health and safety representation), should be regarded as 'insiders' that enhance corporate strategising (Jagodziński and Stoop 2021; Parker and Jagodziński 2023) rather than as 'contested institutions'. They are pivotal to enhancing workplace democracy, employee involvement and mutual trust on transnational matters, even though it must be recognised that systems of industrial relations in Member States mature at different rates and from different baselines.

Notwithstanding this, union organisations must also continue to improve their performance and develop their own policies to Europeanise and strengthen worker participation at all levels. Wide-ranging policy initiatives are needed from ETUFs if unionised EWCs, together with the assignment of an EWC coordinator acting on an ETUF's behalf, are to become more prevalent. Union and EWC training that recognises cultural, gender and other diversity among the EWC's representatives, workers and management, cultivates representatives' knowledge of regulations and agreements and their assessment and negotiation skills, and develops an internal 'protocol' (e.g. sessions on handling conflicting interests around confidentiality) that is a vital precursor to contesting undue withholding and the confidentialisation of information (Parker and Jagodziński 2023). The ETUC and ETUFs have essential roles in supporting national trade unions and worker representatives, conducting in-depth exchanges, building networks and helping them to monitor – and challenge when needed – the national transpositions of directives on worker participation. Important steps must also be taken to promote the Europeanisation of worker representation at all levels, including company boards.

At this critical juncture for Social Europe and European worker participation, a lesson from our research is that it cannot be assumed that legislation unfolds naturally along a progressive path; at the same time, trade unions have the opportunity to act not only as key agents for change, but also as promoters of Euro-democratisation from different vantage points and via a wide array of activities.

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