

Employee representation and co-determination rights in the EU

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In the EU, collective labour law covers:

- Collective bargaining law.
- Industrial action law.
- The law concerning the right to form employee representative bodies.

At EU level, collective labour law is undeveloped compared to individual employment law at EU level. In addition to the historical differences between the member states, there is a lack of a legal basis on which collective labour law can be developed further at EU level, such as the law regarding collective bargaining agreements, unions and strikes. However, there are certain common factors within the law of most of the member states, especially in comparison to the US.

This chapter considers the following:

- Employee representative organisations in the EU, including a summary of:
 - trade unions;
 - work councils;
 - the relative importance of these organisations in the 27 member states.
- Participation rights in the EU member states, summarising information, consultation and co-determination rights.
- Employee representation and co-determination rights in selected member states (Germany, France, Italy, Spain, Austria and the UK).

Employee representative organisations

In all EU member states, there are structures in place for employee representation at establishment, and company level.

Trade unions

The traditional form of employee representation, arising from the 19th century, is the trade union. However, trade unions vary greatly.

In most member states, trade unions are organised on an industry-wide basis. There is generally no requirement to obtain specific recognition as only one trade union is usually active per industry sector. Trade unions generally conclude collective bargaining

agreements (CBAs) on the main working conditions with industry-wide employers' associations.

The number of employees in the EU in trade unions has declined and is currently under 20%. However, in continental Europe over 60%, on average, are covered by CBAs. This is because in many member states:

- CBAs cover employees if the employer:
 - belongs to an association that has concluded CBAs; or
 - operates within a particular industry.

This applies, for example, in France, Spain and Austria.

- In many member states, for example in Germany, the government can declare a CBA to be generally binding on an industry sector.

In some member states (for example, the UK and Ireland) CBAs generally apply at individual company level and only regulate salaries and working hours. In those states, trade union membership is particularly low.

Works councils

In all EU countries there is employee representation at company or establishment level. In certain countries, the trade union provides this representation, in others the works council.

There are the following distinctions between trade unions and works councils:

- Trade unions are voluntary affiliations that exclusively represent the interests of their members. Works councils represent all employees in the company and are constituted by statute.
- Trade unions conclude CBAs which deal with remuneration and the main working conditions. Works councils generally have participation rights over operational issues at company level.

In practice, this dividing line is frequently difficult to draw, with trade unions often exerting a strong influence on works councils.

European works councils can be formed in companies with a transnational, European presence. The German and the French models of work councils formed the inspiration for European legislation.

Relative importance and responsibilities of trade unions and works councils

The relative importance and responsibilities of trade unions and works councils depends on the member state. Generally, the member states can be divided into four categories for this purpose:

- **Category one (Germany, Luxembourg, The Netherlands, Austria).** Trade unions and works councils have separate duties and are not linked at an organisational level.
- **Category two (Denmark, Finland, Cyprus, Italy, Czech Republic, Latvia, Lithuania, Malta, Poland, Romania, Sweden).** Employee representation in the company takes place primarily through trade unions.
- **Category three (Belgium, France, Greece, Portugal, Slovakia, Slovenia, Hungary, Spain).** Both trade unions and works councils have representation rights under relevant laws or binding CBAs. In some of these countries (for example, Greece and Portugal), works councils only exist in theory. In Spain, the works councils conduct collective bargaining negotiations and are closely linked to the trade unions. In Belgium and France, the trade union predominates.
- **Category four (UK, Ireland).** Currently trade unions are the only employee representative bodies. However, it is possible to set up elected works councils at company level in those jurisdictions.

Trade unions and work councils are considered in greater detail in Germany, France, Italy, Spain, Austria and the UK.

Participation rights in the EU member states

Employee participation rights are structured differently in the individual member states. EU law provides a basic core of rights which apply in all countries, even in member states which do not have real works councils or analogous structures, such as the UK and Ireland.

However, the member states (with the exception of the UK and Ireland) also have their own, more extensive rights. Generally, participation rights can be divided into the following categories:

- **Information.** This concerns the employer transmitting data to employee representatives. In many member states, works councils or similar employee representative institutions have rights to information, for example:
 - updates on significant financial and business events (for example, the yearly balance sheet, mergers, and takeovers);
 - regular information sessions on the progress of the company.
- **Consultation.** These are rights to be informed of planned measures in advance and to have an opportunity to express an opinion prior to implementation. The requirements are differently structured depending on the member state. There are often consultation rights relating, for example, to the following:
 - changes to the company's legal status;
 - the removal, expansion or downsizing of areas of the company or business;
 - the introduction of new technologies.

- **Co-determination.** Co-determination rights apply where the consent of the works council is a mandatory requirement for undertaking particular measures. In Germany, enforceable co-determination has developed to a very wide degree. However in most member states (including Spain and Italy), it does not exist.

It should be noted that in member states where enforceable co-determination rights do not exist, there are other ways of exerting influence (for example, strikes, collective bargaining policy or considerably lengthening negotiations with employers, such as in France). In addition, information and consultation rights can be structured in a very formal way so that the process leading up to the employer implementing a measure can take as long as a co-determination right.

Case studies in selected member states

To further explore the issues raised in this chapter, employee representation organisations and participation rights are considered in the following jurisdictions:

- Germany.
- France.
- Italy.
- Spain.
- Austria.
- UK.

Germany

Employees are mainly represented by the works council (*Betriebsrat*) at company level. The works council represents all employees in the particular company, except for executive employees. Members of the work council do not have to be either:

- Nominated for election by a trade union, like in France.
- Members of a trade union.

In practice, especially in large companies working in old industries (such as the metal and chemical industries) works council members are often associated with their trade unions.

Works councils have more power in Germany than any other member state. They have information, consultation, and co-determination rights in the following areas:

- Personnel (including recruitment, relocation of an employee to a particular office or a particular role, and dismissal).
- Social matters (including general conduct of employees, allocation of working hours, certain salary issues, technology, and health and safety).
- Economic matters (including material changes to the company such as partial closure, relocation, and amalgamation).

If the works council vetoes a co-determination issue, either a court or a conciliation board must make a binding decision on the matter.

Trade unions are not represented at company level. Only about 22% of employees are members of trade unions, typically in old industry areas, and this proportion is falling.

CBAs are of dwindling importance in Germany, although 64% of employment contracts refer to them. Many companies working in the new industry sector do not have CBAs. Collective bargaining negotiations are mainly conducted at the sector level. CBAs regulate a wide area of issues, such as:

- Remuneration for work.
- Shift work.
- Working hours.
- Conditions for part-time employees.
- Vocational training.

Unlike France, Spain, and Austria, in Germany both the employer and the employee must be specifically bound to CBAs for the employment relationship to fall under a CBA (principle of bilateral commitment).

France

Employee representation occurs in companies at two levels:

- **Trade union level.** Each trade union can establish its own trade union section in the company if it has one or more members in that company. That section can represent its members' interests and promote the trade union. A recognised trade union can designate union representatives (*Délégué syndical*). An unrecognised trade union designate representatives of trade union sections (*Représentant de Section Syndicale*).

Currently, the employees of many medium-sized and smaller members are not organised in trade unions. In the private sector, trade union membership is at 8%. Therefore, works councils and employee delegates often represent the interests of the entire workforce.

- **Works council level.** In contrast to other member states, the employer or employer representative chairs the works council (*Comités d'Enterprise*). There are few enforcement and veto rights. It is only necessary to obtain the works council's consent in a few areas. The works council must be informed and consulted about a number of matters (for example, social and cultural issues, and economic and HR matters). These rights go far beyond those provided by EC law. The works council has an operating budget (0.2% of the gross salaries paid to employees) at its disposal. Within the works council, the trade unions often play an important role. In particular, trade unions have sole authority to propose candidates for election in the works council in the first ballot.

CBA's are still of great significance in France, unlike in the UK. CBA's bind employers if they belong to the association that concluded the CBA (unlike in Germany, Portugal and Greece). The government can (and does) declare CBA's to be generally binding. CBA's can take place at three levels:

- Company level.
- Sector level.
- At the inter-sectoral level.

Italy

In Italy, trade unions play a central role in employee representation at company level. The most important employee representation body is the unitary trade union delegation (*Rappresentanza Sindacale Unitaria (RSU)*). The RSU represents all trade unions that operate in the company, and the company's entire workforce. The RSU performs a work council's usual tasks. Its main task is negotiating with the employer at company level. It is authorised as a collective bargaining party to negotiate binding agreements over its company.

In addition, notification and consultation rights exist:

- In certain areas required by statute, for example:
 - health and safety at work;
 - use of public funds for restructuring;
 - mass dismissals and transfers of business.
- More specific industry and company-wide agreements, covering issues such as the:
 - economic and financial situation of the company;
 - introduction of new technologies;
 - company's investments.

A genuine co-determination right does not exist in Italy. Participation rights do not grant as much power for the employees as in France and Germany. Only the trade union and the RSU exist as employee representation in Italy.

As in France, CBA's are of great importance. CBA's cover 80% of employees. They are mainly conducted at sector level. It is sufficient for the employer to be a member of the association concluding the CBA for employees to receive its benefit.

Spain

The elected work council (*Comité de Empresa*) mainly represents employees at company level. Although trade unions do not formally participate at company level, in practice, they play a key role. Trade unions nominate more than 90% of elected representatives, and more than 75% of them are members in the two largest and most important trade unions in Spain, the:

- General Union of Workers (*Union General de Trabajadores de España (UGT)*).
- Confederation of Workers' Commissions (*Confederación Sindical de Comisiones Obreras (CCOO)*).

In addition to the right to information (for example, on economic and financial issues) and consultation, the works council can also be entitled to negotiate on remuneration and working conditions at company level, when the CBA provides for this (*see below*). Unlike in Germany, France and Austria, the works council has no veto right.

In addition, Spanish law provides that the trade unions have a special function in the company. A distinction must be drawn between trade union sections (which comprise all the members of the trade union in the company) and trade union delegates (which exist in companies with more than 250 employees). The trade union delegate is of particular interest compared to other member states as it has special rights, some of which go beyond the rights of the works council. For example, the employer must consult the delegate before taking disciplinary measures against union members. In contrast, the works council only needs to be notified after the measures are taken.

CBA's are of great importance in Spain, as in France and Italy. Compared with some other member states, the proportion of employees that are covered by CBA's of 82% is relatively high. The CBA applies if the employer is a member of the association concluding the CBA. Collective bargaining negotiations are mainly conducted at industry level.

Austria

Employee representation at company level takes place through the works council, like in Germany. The works council members are elected by all the employees, except for the executive employees. Trade unions play a major role within works councils, as more than 75% of the members of the works council are members of trade unions. However works council members do not have to be nominated for election by a trade union, nor do they have to be members of a trade union.

The works council in Austria has comprehensive powers, particularly in social security and employment-related matters and regarding economic issues. To implement certain measures, the employer requires either:

- The works council's consent.
- The ruling of a conciliation commission, if the works council refuses consent.

These measures concern matters such as:

- Work procedures.
- The start and end of daily working hours.
- The day on which salaries are paid.

In other areas, for example when introducing disciplinary procedures or monitoring systems (such as closed circuit television), measures cannot be introduced by an employer without a work's agreement between the employer and the works council permitting such measures. In effect, that gives the works council a veto right.

Besides the works councils, separate trade union structures are only rarely found in establishments in Austria. CBAs, which mainly cover particular industries, are of great importance. 98% of employees are covered by CBAs, the highest rate in the EU. This is particularly due to the fact that negotiations on the part of the employer are conducted by the Chambers of Industry and Commerce of which all employers must be members.

UK

In the UK, employee representation structures and, notably, employee participation rights differ greatly from the structures common in other member states. Historically, employee representation consisted exclusively of trade unions, and CBAs were concluded between the union and the individual employer. Works councils have been introduced recently. Therefore, there is now the opportunity to establish elected employee representation bodies at the company level in addition to existing trade union structures. In practice, however, most companies where trade unions are not represented do not introduce employee representation, and in some organisations there may not be any employee representation at all. Where there are elected representatives, their influence is limited compared to their counterparts in other member states. Participation rights exist only in areas within the scope of EU law, for example, in relation to:

- Collective redundancies.
- Transfers of businesses or undertakings.

Genuine co-determination rights do not exist.

In companies where trade unions are recognised, the representatives (also known as shop stewards) perform different tasks, such as negotiating remuneration and working conditions. However, trade union membership is very low and CBAs only cover 34% of employees. The employer must recognise trade unions as being entitled to conduct collective bargaining. Such recognition can be by agreement between the union and the employer, through an arbitration committee or statutorily imposed. The radical change from an industrial society to a service society has contributed to a further weakening of trade unions. Therefore, for these and other reasons CBAs in the UK are of very minor significance in contrast to the other member states.

EC legal minimums

EC law has affected the organisation of employee representation bodies and their participation and co-determination rights. This provides legal minimums with which all member states must comply.

The following directives are relevant:

- **Directive 98/59/EC on collective redundancies (Collective Redundancies Directive) (formerly 75/129/EEC).** The Collective Redundancies Directive (whose procedure was introduced in 1975) harmonises the laws of member states concerning mass dismissals. It was introduced to prevent multinational companies engaged in restructuring from reducing personnel in the member state in which dismissals are the simplest and cheapest.
 - **Directive 2001/23/EC on safeguarding employees' rights on transfers of undertakings, businesses or parts of businesses (Transfer of Undertakings Directive).** The Transfer of Undertakings Directive regulates the employment law consequences concerning a transfer of business on the grounds of contract, merger, and spin-off.
- **Directive 94/45/EC on the establishment of a European works council (EWC Directive).** Companies that employ at least 1,000 employees throughout the EU, with a minimum of 150 employees in each of at least two member states must form either:
 - a European works council;
 - an alternative employee information and consultation procedure agreed to by the central management of a Community-scale undertaking and a special employee negotiating body.

The European Works Council has no right of co-determination. Rather, it has the right to be informed and consulted on any transnational company matters.

- **Directive 2002/14/EC on informing and consulting employees (Information and Consultation Directive).** The Information and Consultation Directive provides a general right for information and consultation for employee representatives in all establishment that are of a particular size, irrespective of the form of company.

If the employer or employee representatives do not comply with the duty to inform and consult, the member states must provide for appropriate sanctions.

- **Directive 2001/86/EC supplementing the statute for a European company (European Company Statute Directive).** The European Company Statute Directive provides the rules for creating a European Company (*Societas Europaea (SE)*). The incorporation of an SE can take place in different forms. However, an agreement on employee participation is required before the SE can be entered in the register and validly come into being.