

# ETUI Policy Brief

## European Economic, Employment and Social Policy

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### Participation rights in practice : what are the power bases of worker representatives at the board ?

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## Policy recommendations

The introduction of worker representation at board level concerns the rebalancing of power among the parties to strategic decision-making in companies. While this rebalancing is realised in practice in a number of instances, a substantial proportion of board-level worker representatives think that they fall short of full participation.

Participation rights thus need strengthening on three dimensions, each of which plays a role in the ability of worker representatives to exert power over corporate strategic decisions. First, the constitutional situation of worker representatives needs to be strengthened with the objective of ensuring that there is a 'critical mass' of worker representatives on the board. Second, corporate governance reforms must be implemented to ensure that board decisions are effectively discussed and made in the presence of board-level worker representatives. Third, support should be made available for effective articulation between

the various institutions of labour representation within and outside the company, as suggested by the new architecture of worker involvement called for by the ETUC.

## Introduction

Workplace democracy emerges from the coordinated action of numerous pieces of a jigsaw which comprises national and, increasingly, European institutions and practices of worker involvement in company decision-making (Kluge 2004). Systems of worker representation at board level constitute one piece of the jigsaw puzzle, and are present in 18 of 28 Member States of the European Union (EU), as well as in Norway. In addition, the European Company Statute (*Societas Europaea*, henceforth SE) adopted in 2001 stipulates rules on board-level worker representation within companies that opt for such a European-wide legal status. According to these systems, labour providers are granted the same rights of representation on the board of companies as capital providers, including the right to vote on corporate strategic decisions. Worker representation at board level is deemed a core part of the European social model, as illustrated by its inclusion in article 153 of the Treaty on the Functioning of the EU, which obliges the EU to protect and promote dialogue between management and labour.

Over the years, the ETUI has built an extensive knowledge of the national and European legal arrangements that underpin systems of worker representation at board level. In particular, the ETUI has shown that legal provisions are not uniform but vary from one country to another along a range of dimensions including sectoral coverage, whether worker representation at board level

is to be found in private and/or public sector companies; legal status of the company, in public and/or private limited liability companies; company size, from small to very large companies; corporate governance structure, in unitary board of directors or supervisory board in the dual board systems; eligibility criteria for board-level worker representatives; and the proportion or number of board members that are worker representatives (Conchon *et al.* 2015). Although the right varies in form and content, board-level worker representation is viewed as a key element of industrial democracy at company level, alongside works councils in dual systems of worker representation and trade unions in single-channel systems.

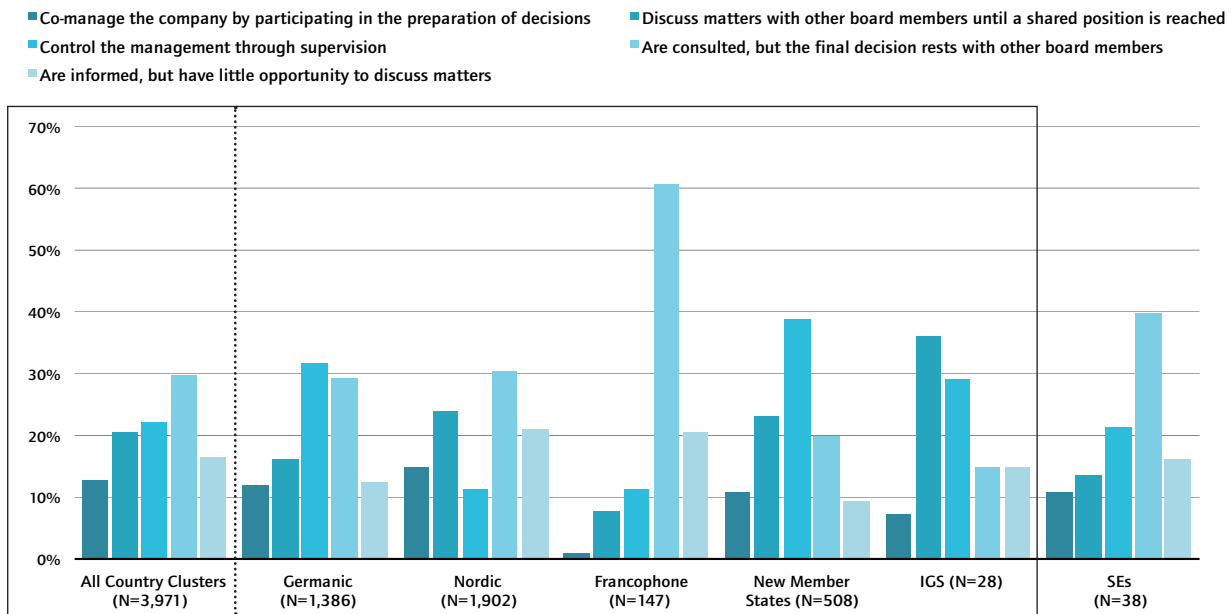
Whereas much is known about board-level worker representation from a legal perspective, a comparative understanding of how worker representatives operate in practice at board level is lacking.

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Figure 1 'Regarding the actual practice of the board, do you...?'



Source: Waddington and Conchon (2015).

This Policy Brief outlines some of the results of a survey of worker representatives who serve on company boards in 16 European countries<sup>1</sup> and in European Companies (SEs) (for an extensive analysis of the findings of the 'Corporate Governance and Voice of Labour' project, run by the ETUI and funded by the Hans-Böckler-Stiftung, see Waddington and Conchon 2015). Questionnaires were directly distributed in the native language of the addressee to 17,430 board-level worker representatives and, in four countries where it was not possible to assemble a list of individual board-level worker representatives, to an additional 3,898 companies (in Czech Republic, Finland, Slovakia and in the German one-third codetermination system). A total of 4,155 questionnaires were returned and used for analysis.

For ease of presentation the data are grouped into seven clusters: *All Country Clusters* (responses from all, non-SE, respondents); *Germanic* (Austrian and German respondents); *Nordic* (Danish, Finnish, Norwegian and Swedish respondents); *Francophone* (French and Luxembourgish respondents); *New Member States* (Czech, Hungarian, Polish, Slovakian and Slovene respondents); *IGS* (Irish, Greek and Spanish respondents); and *SEs* (respondents based in companies that have adopted the European Company statute). The survey results illustrate the variation in European practice and demonstrate that some key conditions have to be met to enable worker representatives to exert power over board decisions. This Policy Brief also identifies areas in which participation rights require strengthening in order to achieve industrial democracy in European companies.

<sup>1</sup> Three countries with systems of board-level worker representation are excluded from the analysis. Croatia, not yet an EU member state when the survey was conducted, was for this reason not considered for inclusion. In Portugal, while legal provisions allowing for worker representation at board level do exist, there have been extremely few instances of implementation. As for the Netherlands, the responses received gave rise to suspicions that the questionnaires had been incorrectly distributed; as these seemed to have been filled in by persons other than board-level worker representatives, it was decided to exclude the Dutch data from the analysis.

### The exercise of power and influence by board-level worker representatives

Power is at the core of the study of worker representation. In the classic literature, influence and power are distinguished and treated as points on an axis of involvement in decision-making, usually expressed with polar positions of no involvement, where management has the sole responsibility for decision-making; and self-management, where decision-making rests in the hands of workers. The 'influence power continuum', for example, identifies five points: no involvement, information, consultation, joint decision-making and self-management (Heller 1971). In practice, situations of no involvement mean that workers are excluded from the decision-making process and have neither influence nor power. Where information or consultation takes place workers are able to exert an *influence* insofar as they can present their opinions and preferences during the decision-making process, but the final decision rests solely in the hands of management. In this context, information and consultation correspond to a situation of partial participation (Pateman 1970). Joint decision-making, which is classically associated with collective bargaining and codetermination assumes that workers have a capacity to exert *power* over decisions as they can ensure that their preferences are incorporated into decision-making processes. In this context, which is referred to as a situation of full participation, power is distributed among the parties, which jointly determine the outcome of decisions.

Figure 1 shows how worker representatives define their intervention at the board. Results are presented in the form of a hierarchy of involvement in descending order, which is directly drawn from the influence power continuum. By definition board-level worker representation comprises some involvement and thus the category no involvement is excluded from the analysis that follows. The two lower rungs on the continuum, 'are informed, but have little opportunity to discuss matters' (hereafter informed)

and 'are consulted, but the final decision rests with other board members' (hereafter consulted), refer to situations where worker representatives can influence the outcome of decisions. The two upper rungs correspond to joint decision-making and assume that worker representatives have some power. These two positions are: 'discuss matters with other board members until a shared position is reached' (hereafter, reach a shared position) and 'co-manage the company by participating in the preparation of decisions' (hereafter, co-manage the company). An intermediate position is added through the variable 'control the management through supervision', which is intended to reflect the particular situation of board-level worker representation in two-tier board systems. Within this corporate governance structure, workers are represented on the supervisory board, the principal duty of which is to oversee the activities of the management board. Implicit to this form of involvement is that management takes initiatives that are then rejected, refined or accepted by the worker representatives on the supervisory board.

If the two variables on the continuum associated with influence ('informed' and 'consulted') are treated as one, and the same procedure is adopted for the two points associated with the exercise of power ('reach a shared position' and 'co-manage the company'), two points become immediately apparent from Figure 1.

First, there is marked variation between country clusters in the character of the interventions reported by board-level worker representatives. In the Germanic and New Member States clusters, where dual board systems predominate, worker representatives are most likely to consider that they 'control the management through supervision'. In contrast, a greater proportion of IGS and Nordic board-level worker representatives define their actions as exercising power over board decisions as they report either 'discussing matters until a shared position is reached' or 'co-managing the company'. A majority of Nordic respondents (51%), however, indicate that, at best, they influence strategic decision-making. This situation is replicated in SEs, as half of SE worker representatives at board level (55%) assess their own situation as one of influence over board decisions. Nowhere is the absence of power and limitation to influence more pronounced than in the Francophone cluster, where 81% of board-level worker representatives report that they participate through either information or consultation.

Second, the diversity of practices and perceptions is reflected in All Country Clusters data. One-third of all board-level worker representatives (33%) report either reaching shared positions or co-managing the company and, hence, are in a position to exert power over board decisions. In these instances, the initial intention of the legislator to foster industrial democracy is met as full participation takes place. A fifth of all respondents (22%) define their role as controlling the management, confirming the practices of worker representation in two-tier board structures. Finally, no fewer than 45% of all respondents think that they intervene at the board by means of information and consultation. In these circumstances, board-level worker representatives are able to influence board decisions, but fall short of exerting power over the content of long-term strategic company decision-making. A substantial minority of board-level worker representatives

thus report operating in a situation of partial participation. In a number of cases, therefore, compliance with the legal obligation of having worker representatives on boardrooms is combined with a circumvention of the spirit of the law, which, originally was intended to rebalance power within companies.

## **Factors at play in moving from partial to full participation at the board**

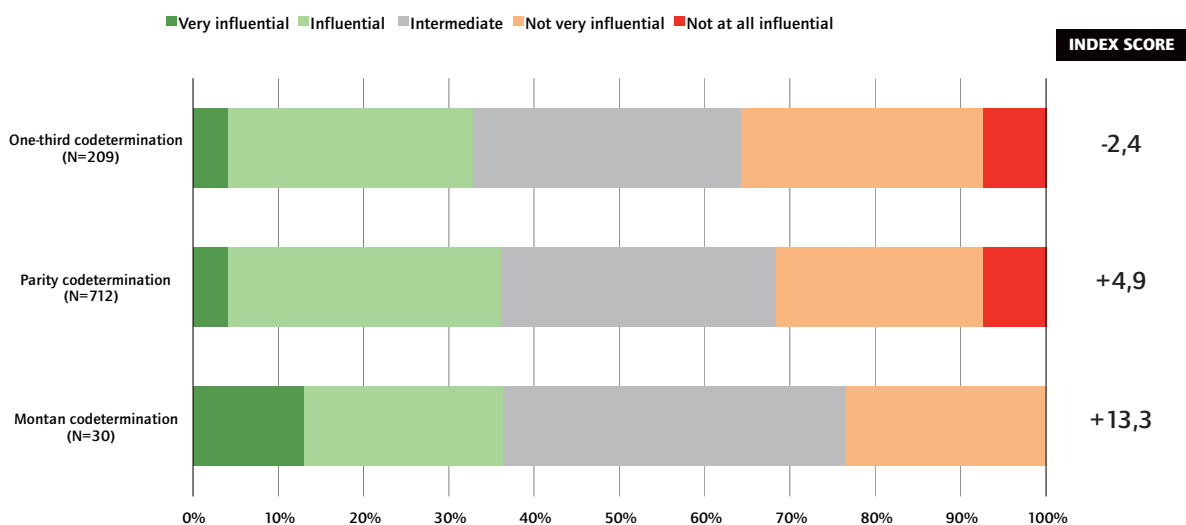
With the exception of the Francophone cluster, the absence of power and exercise of influence cannot be explained by reference to the information provision as board-level worker representatives report that they are content with the timing and the quality of information. It is thus not an information shortfall that precludes full participation of worker representatives in board-level decision-making. The absence of power also cannot be explained by reference to worker representatives' activities at the board, the majority of whom make active interventions in a variety of ways: for example, by requiring a topic to be included on the agenda or by requesting reports on company affairs. In contrast, the survey data show that two factors facilitate the achievement of full participation: the strength of the constitutional situation of board-level worker representatives and whether the board is the actual location of strategic decision-making.

### **The constitutional situation of worker representatives on the board**

The German case is unique for being the oldest arrangement of worker representation at board level (with origins in a first legislation enacted in 1922) and for providing for no fewer than three different systems. The 'Montan codetermination' system applies to companies in the iron, steel and coal industry with more than 1,000 employees. In these circumstances, employee and shareholder representatives are present in equal numbers on the supervisory board and an additional 'neutral' member (whose nomination requires acceptance from both sides) has, de facto, a casting vote in the event of a tied vote. The 'parity codetermination' system applies to companies with more than 2,000 employees (except in the iron, steel and coal industry). Within this system employee and shareholder representatives are also present in equal numbers on the supervisory board, but the chair (who is usually appointed from among the shareholder representatives) has a casting vote in the event of a tied vote, which is why this system is sometimes referred to as 'quasi-parity' codetermination. Under these first two systems, therefore, workers never hold a majority of board seats. The 'one-third codetermination' system applies to companies with between 500 and 2,000 employees whose representatives constitute 33% of the supervisory board. The German case constitutes the best model on which to test the role played by different constitutional situations of board-level worker representatives, since assessment of this factor in a coherent national context avoids the 'comparing oranges and apples' pitfall which characterises many comparative studies.

Taking the proportion of worker representatives on the board as an indicator of their constitutional strength reveals unambiguous results. There is a positive relationship between the exercise of power

Figure 2 'If your company has restructured over the past two years, how influential were you on the process?', findings of the three German codetermination systems



Source: Waddington and Conchon (2015).

Note: the index score was calculated by subtracting the sum of the percentage scores recorded for 'not very influential' and 'not at all influential' from the sum of the percentage scores recorded for 'very influential' and 'influential'.

by board-level worker representatives and the proportion of worker representatives at the board, as illustrated by the results to two of our survey questions. First, considering the same question as assessed in Figure 1 with the German respondents disaggregated by the codetermination system in which they operate: 31% of worker representatives on boards covered by Montan codetermination report participating by means of information or consultation, a proportion that rises to 34% in parity codetermination and to a majority of 54% in one-third codetermination. Power is thus positively related to the proportion of the board comprising board-level worker representatives. A second survey question confirms the significant difference made by the size of worker representatives' presence on the board. Figure 2 shows the variations in perceived influence exercised by board-level worker representatives in the three German codetermination systems when companies restructured.

Figure 2 indicates that more board-level worker representatives in the one-third system report that they were 'not very influential' or 'not at all influential' than report having had an influence on restructuring. As a consequence, the index score is minus 2.4. Conversely, where the Montan system operates board-level worker representatives were more likely to think they had an impact over restructuring decisions, illustrated by a positive index score of 13.3. Board-level worker representatives covered by parity systems occupy an intermediary position between their counterparts covered by Montan and one-third codetermination systems.

These results confirm previous evidence (Greifenstein and Kißler 2010) and demonstrate that the stronger the constitutional position of worker representatives (which not only embraces the question of the proportion of board-level representatives but also the rights they may enjoy such as the right to paid time-off, to training, to access

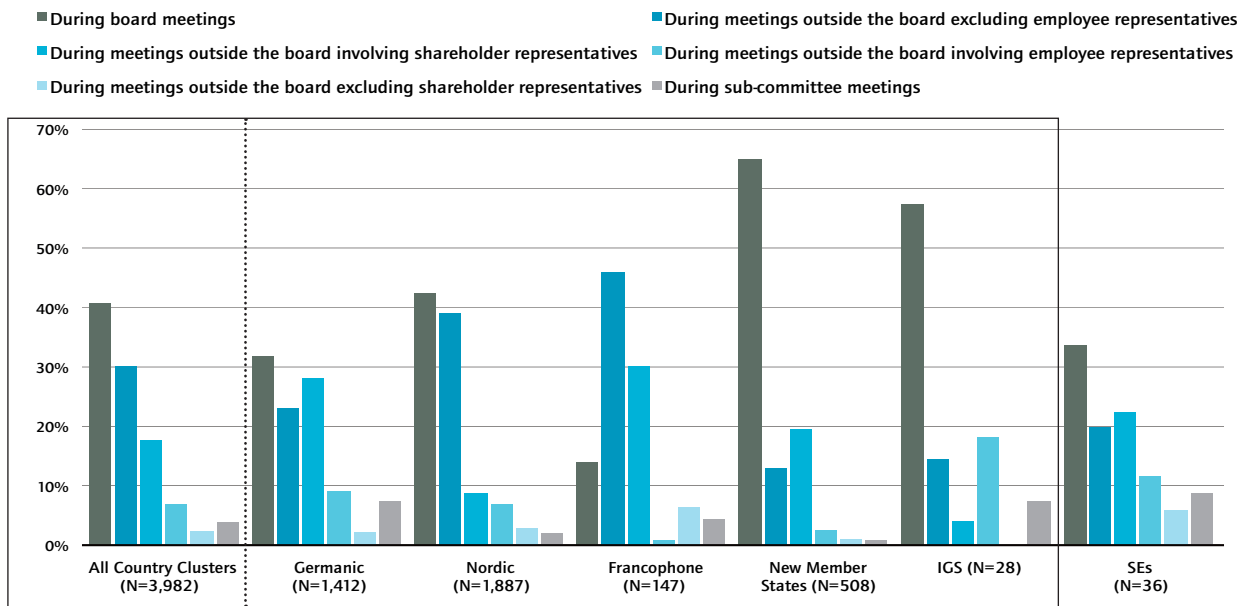
to expert advice...), the more power they can exercise over board-level decision-making. In other words, data on the constitution of the board confirm that a 'critical mass' of worker representatives is required if they are to exert power over corporate decision-making.

While the German findings are clear, repeating the statistical test between the proportion of worker representatives on the board and their perceived influence on restructuring decisions over the All Country Clusters data reveals no more significant relationship. In other words, the constitutional position of worker representation is an important variable, but not the only one at play.

### The board as the actual location of strategic decision-making

Significant relationship is attained, however, when cross-tabulating the variable 'perceived influence on restructuring decisions' with that related to the organisation level at which the board is located. Whether worker representatives sit on the board of an 'independent' company (single or holding companies) or on the board of a 'controlled' company (subsidiaries) makes a substantial difference on their perceived impact on board decisions. Worker representatives in subsidiaries report exerting far less influence than their counterparts in independent companies: 46% of worker representatives on the board of a controlled company think they were either 'not very influential' or 'not at all influential' during corporate restructuring compared to 36% of their counterparts on the board of independent companies. These results illustrate variations in influence arising from the roles undertaken by the board within the corporate decision-making process. A further factor that explains why some board-level worker representatives exert influence and others exert power over strategic company

Figure 3 'In your view, where are the main decisions on board-level issues really made?'



Source: Waddington and Conchon (2015).

decision-making is the location at which strategic decisions are actually taken. Figure 3 explores this issue further in showing where board-level worker representatives think that board decisions are made in practice. .

It is apparent from Figure 3 that only a minority of 40% of all board-level worker representatives think that board decisions are taken at formal board meetings. This proportion rises to 65% in the New Member States and to 57% in IGS. The New Member States and IGS are the two country clusters where the proportions of board-level worker representatives who report that they only influence ('informed' or 'consulted') board decisions are the lowest (respectively 28% and 29%). In contrast, a substantial number of board-level worker representatives in the other country clusters and SEs think that the decisions they are at the board to make are made elsewhere. Furthermore, 30% of all board-level worker representatives think that board decisions are taken 'at meetings outside the board excluding employee representatives'. The rate of exclusion of worker representatives from board-related decision-making, rises to 39% in the Nordic and to 46% in the Francophone clusters, which are the two country clusters in which the highest proportions of respondents (respectively 51% and 81%) perceive their actions to be limited to influence ('informed' or 'consulted').

Further examination of the character of participation that takes place when the main decisions of the board are taken 'during meetings outside the board meetings excluding employee representatives' reveals the efficacy of exclusion as a means to limit the power of worker representatives. Figure 1 showed that 45% of all board-level worker representatives are only either 'informed' or 'consulted' and thus exert, at best, an influence on board decision-making. This proportion rises to 67% among all board-level worker representatives who think that the main decisions of the board are taken 'during meetings outside the board meetings excluding employee representatives'. Similar rises

are recorded for each of the country clusters: Germanic 41% to 59%; Nordic 51% to 71%; Francophone 81% to 93%; and the New Member States 28% to 49%. In other words, if management and shareholder representatives create circumstances in which the location of strategic decision-making is shifted away from the formal board meetings, a greater proportion of board-level worker representatives view their participation as being partial.

### Conclusion

In brief, the democratisation of corporate governance through the allocation of board seats to worker representatives does not lead to a rebalancing of power within the company unless conditions for full participation are met. In particular, the constitutional situation of board-level worker representatives granted by law should be strong enough to allow them to exert power rather than influence over board decisions. In addition, the board should be the actual location of deliberation over strategic corporate decision-making: that is, an institution of consensus building on board-related issues. It is thus necessary that policy-makers, when drafting legislation, and managers and shareholder representatives, as parties to board decision-making, share responsibility in achieving full participation.

Board-level worker representatives and those serving on other institutions of labour representation also share this responsibility. Although this Policy Brief focused exclusively on what happens in the formal board meeting, participation in strategic corporate decision-making should be viewed through the broader lens of labour representation within the company. Viewed through such a lens, worker representation at board level becomes one of a range of components at company level of industrial democracy, alongside, particularly, trade unions and works councils. In this context, articulation between these institutions is key to the mutual reinforcement of information, consultation and

participation procedures. Worker representatives at board level are aware of the benefit of such an interconnection and view themselves as one link of the labour representation chain (Gold 2011). Not surprisingly, they show a high degree of articulation with other institutions of labour representation. For instance, 85% of the survey respondents report back on board-level affairs to either trade unions, works councils or employees, and 90% of respondents meet with other worker representatives within the company to discuss board-related matters, albeit at different frequencies. Rebalancing power within the company is thus also dependent on the intensity of articulation between the different institutions of labour representation within the company.

As long as almost half board-level worker representatives view their position as one of influence and not of power over board decision-making, participation rights will require strengthening if the democratising intentions of the earlier legislators are to be achieved in current circumstances. The ETUC has resolved that worker representatives at board level must be in receipt of 'complete information on strategic choices before decisions are taken to increase the control and influence workers have on the strategic decision-making process within a company or public service' (ETUC 2013). Sharing the same broad perspective as that of board-level worker representatives, the European trade union movement considers participation in boardrooms not to be an end in itself but a means to achieve greater worker power over company decision-making. Concerned about the need to strengthen the integrated architecture of worker involvement in companies which make use of EU company law instruments (such as that of the SE statute), the ETUC has called for a new Directive that would set high standards on information and consultation and introduce ambitious minimum standards on board-level worker representation in cross-border situations (ETUC 2014). If enacted, this proposal would strengthen the power of worker representatives over corporate strategic decision-making as a precondition for genuine industrial democracy.

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