



Employee representation and co-determination rights in Europe

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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 EC level, collective labour law is undeveloped compared to individual employment law at EC 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 EC level, such as the law regarding collective bargaining agreements (CBAs), 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;
 - works 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 (Belgium, Germany, Hungary, Italy, Switzerland, The Netherlands 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 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, Hungary and Austria (*see below, Case studies in selected member states*).

- 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 often 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 works 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 and 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 and Sweden).** Employee representation in the company takes place primarily through trade unions.
- **Category three (Belgium, France, The Netherlands, Greece, Portugal, Slovakia, Slovenia, Hungary and 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. In The Netherlands, trade unions usually conduct collective bargaining negotiations, and works councils can have an important role in decisions which influence working conditions or which may lead to redundancies.
- **Category four (UK, Ireland).** Trade unions are the only national employee representative bodies. However, it is possible to establish information and consultation arrangements with employee representatives at company level in those jurisdictions. These bodies are often referred to as staff councils or staff forums. The term works council is not used in the UK, except in the context of European works councils.

Trade unions and works councils are considered in greater detail in Belgium, Germany, Hungary, Italy, Switzerland, The Netherlands and the UK (*see below, Case studies in selected member states*).

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 (*see box, EU legal minimums*).

However, the member states (except for 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 before their implementation. The requirements are structured differently 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:

- Belgium.
- Germany.
- Hungary.
- Italy.
- Switzerland.
- The Netherlands.
- The UK.

For an overview of works councils and trade unions in these member states, see table, *Works councils and trade unions in selected member states*.

Belgium

In Belgium, employees are not represented at the board level of a company. The main body for employee representation at company level is the works council, which must be established in companies with more than 100 employees. In companies with more than 50 employees, a committee for prevention and protection at work must be established.

Both bodies are jointly made up of employee and employer representatives. Employee representatives are elected every four years by all employees. Since only the three representative trade unions (ACV/CSC, ABVV/FGTB and ACLVB/CGSLB) can submit candidates for those elections, the works council and the committee



EU LEGAL MINIMUMS

EU 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:

Council 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.

It only applies where the employer is making a certain number of employees redundant within a specific period of time. If the employer is planning mass dismissals, it must introduce and implement a procedure to provide information to and consultation with members of the employee representative body. This procedure must:

- Explore options to avoid or reduce the impact of mass dismissals and mitigate the consequences for employees that are to be dismissed.
- Reach consensus on how the employees are to be dismissed.

The Collective Redundancies Directive does not provide a genuine co-determination right for employee representatives. Therefore, in most of the member states, such as the UK, France, Hungary and Italy, employee representatives cannot force agreement on the employer. However, the consultation procedure must be finalised before the employer can issue notices of dismissal.

Council 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. The buyer and seller must inform the employee representatives in both companies concerning:

- The date or planned date of the transfer.
- The reason for the transfer.
- The legal, economic and social consequences of the transfer for the employees.
- Any envisaged measures relating to the employees.

for prevention and protection at work are dominated by the trade unions. Because of this prerogative of the representative trade unions, the works council and the committee for prevention and protection at work are more union bodies than employee bodies, although they represent all (not only unionised) employees.

The works council is entitled to economic, financial and social information on a yearly, quarterly and/or occasional basis. The works council also has the right to be consulted on a lot of mat-

Council Directive 2009/38/EC on the establishment of a European works council (EWC Directive) (formerly 94/45/EC). 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.

Council 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 establishments that are of a particular size, irrespective of the form of the company. How this right is implemented depends on the member state where the establishment is domiciled. The employee representation body must be informed and consulted about:

- The most recent developments and the probable further development of the company or establishment.
- The employment situation.
- Developments that can have consequences for the employment situation or individual employment agreements.

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

Council 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.

To enter into this agreement, a special negotiating body of employees must be formed, to negotiate measures with the employer to put into place a permanent representation body of employees and to structure its participation rights. The European Company Statute Directive does not provide a uniform European model for this. The parties can reach their own arrangement concerning employee involvement.

ters which could have an impact on the company, employment policy and/or labour organisation. The works council has the right to decide in a minor number of matters on the drafting and modification of work regulations and holiday planning.

The committee for prevention and protection at work is entitled to be informed and consulted on all issues related to wellbeing, health and safety at work. The committee can also decide on these matters in a minor number of ways.



WORKS COUNCILS AND TRADE UNIONS IN SELECTED MEMBER STATES

Jurisdiction	Main body(ies) for employee representation at company level	Composition of works council-type bodies	Minimum thresholds for employee representation at company level	Powers	Rate of unionisation (in %)	Collective bargaining agreement coverage (in %)
Belgium	Works Council.	Employee and employer representative.	100.	Information and consultation.	Between 60 and 70	Around 90
	Committee for prevention and protection at work.	Employee and employer representative.	50.	Information and consultation.		
	Union delegation.	Only unionised employees.	Depends on sectoral agreements.	Collective bargaining.		
Germany	Works council (<i>Betriebsrat</i>).	Only employees.	5 employees: works council	Information, consultation, and co-determination.	22	64
Hungary	Trade union and works council.	Only employees.	15 employees: shop steward. 50 employees: works council.	Information, consultation, and co-determination.	16	25
Italy	Trade union. There are no works councils. Trade unions are represented in the workplace through a unitary trade union delegation (<i>Rappresentanze Sindacali Unitarie (RSU)</i>) which are provided for under collective agreements	Only employees.	15 employees: RSU.	Information and consultation.	33.3	80

In addition, a union delegation can also be established. Union delegations can be set up if sectoral collective labour agreements provide for their establishment at company level. In contrast with the works council and the committee for prevention and protection at work, a union delegation is not an informative and consultative body that represents all employees. The union delegation only represents unionised employees, and deals with:

- Collective labour relations.
- Negotiation of collective labour agreements.
- Representation of unionised employees.
- Implementation of social legislation.
- Individual and collective labour disputes.

However, a union delegation can take over the tasks of a works council, for instance in companies where no works council is established.

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 works 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).



WORKS COUNCILS AND TRADE UNIONS IN SELECTED MEMBER STATES						
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Switzerland	Employees' representative body.	Only employees.	50 employees.	Information and consultation, co-determination relating to special issues.	21	47
The Netherlands	Works council and if a collective bargaining agreement applies also trade unions.	Employees (who are sometimes also members of a trade union).	10 to 50 employees: employee representative body. 50 employees: works council.	Employee representative body has limited powers that can be extended through a covenant. Works council has the right to render advice or to give consent on limited decisions.	22 (employees)	80
UK	Trade union or staff council.	Only employees in staff councils. Trade union officials can be employees or employed by the union.	Depends on the circumstances, for example, consultation for collective redundancies triggered when 20 or more employees are to be made redundant; employers must have at least 50 employees before employees can make a valid request for a staff council.	Information and consultation.	28	34

- Social matters (including general conduct of employees, allocation of working hours, certain salary issues, technology, and health and safety).
- Economic matters (including substantive 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 the employer and employee must be specifically bound to CBAs for the employment relationship to fall under a CBA (principle of bilateral commitment).

Hungary

Employee representation occurs in companies at two levels.



Trade union level. Although trade unions played an important role during the socialist period, after the changes during the late 1980s and early 1990s they lost their practical importance. A trade union can be established as a social organisation with a minimum number of ten people, who decide on the establishment of the trade union and approve its statutes. Alternatively, a trade union unit can be established based on associations of sectoral trade union units, which form a kind of umbrella-organisation for the trade unions in the relevant sector.

The primary purpose of a trade union is to promote and protect the employees' interests. It is entitled to:

- Inform employees about their rights and obligations.
- Represent them before the employer and public authorities.
- Control the working conditions.

A trade union also enjoys the following rights:

- To consult with the employer in relation to planned measures affecting a larger group of employees (for example, a reorganisation and privatisation).
- To request information on any issues having an impact on the economic and social interest of the employees. In this sense, the trade union can initiate consultation with the employer.
- To control working conditions.
- To negotiate CBAs.
- Veto right (objection) relating to any illegal action or measure directly affecting the employees and/or their representative bodies. This veto right can primarily be exercised by the "representative" trade unions (referring to the presence of the trade union at the relevant employer). If the employer does not agree with the trade union's objection, after consultation the trade union is entitled to seek a remedy at the labour court.
- To nominate candidates for election to the works council.

Employees holding a position in a trade union enjoy special protection during their appointment and for a certain period afterwards. For example, the trade union's prior consent is required to dismiss the relevant employee in ordinary dismissal proceedings. In extraordinary dismissal proceedings, the employer must consult with the relevant trade union.

Works council level. Works council (or the shop steward) is the primary body to exercise the employees' joint participation rights. A works council or a shop steward must be elected, in compliance with a detailed statutory procedure, if the employees' headcount is over 15 employees. The works council has the following rights:

- Information rights, including in the following areas:
 - the employer's economic situation;
 - any change in the employer's scope of activity;
 - salary trends;
 - teleworking trends;

- Consultation rights, including in the following areas:
 - planned measures of the employer affecting a larger group of employees;
 - the structure of the HR registry;
 - training and support plan;
 - internal policies affecting the employees' material interests.
- Co-determination rights, which only apply if there is a CBA that specifies any welfare funds or institutions/properties. In this case, the works council has a co-determination right about how to use these welfare benefits.

If the employer fails to comply with the works council's above rights, the relevant measure of the employer is invalid.

The members of a works council enjoy the same protection (for example, in the case of the ordinary or extraordinary dismissal) as trade union officers (*see above*).

A labour safety committee elected by the employees can represent the employees' rights and obligations concerning non-harmful and safe working conditions. However, in practice, it is less important than the trade union or works council.

Only trade unions are entitled to bargain and sign CBAs, which can take place at two levels:

- Company level.
- Sector level.

The CBAs are mostly concluded at company level, covering about 25% of all employees. The sectoral extension of a CBA has only taken place in a few sectors (such as the electricity, catering and food and construction industries), therefore its significance is low (covering only about 6.1% of all employees). The implementation of these sectoral CBAs is doubtful at smaller or medium-sized companies where no trade union or works council exist.

A comprehensive (nationwide) study has not been carried out concerning the coverage of trade unions or CBAs. Therefore the data set above and in the table (*see box, Works councils and trade unions in selected member states*) are approximate.

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 can be established in all public bodies and in all active private organisations with more than 15 employees. The RSU performs the usual tasks of a works council. 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.

The RSU is formed by election and the term of office is three years. On expiry of the three-year term the RSU lapses automatically and new elections are necessary. All employees with an indefinite employment relationship are entitled to vote. 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. The trade union and the RSU are the only means of employee representation in Italy.

As in France, CBAs are very important. CBAs 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.

Switzerland

If a company in Switzerland has 50 or more employees, the employees are entitled to representation in the company. An employer must hold a ballot on the introduction of representation if requested by at least 20% of the employees or, in a company where more than 500 persons are employed, if requested by 100 or more employees. The number of members of the representative body is fixed by the employer and the employees together, but the minimum number is three.

Whether or not the employees are represented by such a body, the rights of employees are very restricted in comparison with other countries. The employer is only obliged to inform employees about the impact of the business on the number of employees once a year. In practice, this obligation is mainly performed in the event of mass dismissal.

Further, employees' co-determination rights only exist in relation to:

- Occupational health and safety protection.
- Working hours.
- Transfer of the undertaking to a new owner.
- Mass dismissal.
- Occupational benefit schemes.

Except for occupational benefit schemes, co-determination means that the employer must consult with the employees or their representative body before he makes a decision. Employees' representatives can only participate in decision-making in relation to occupational benefit schemes.

There are no official enquiries as to whether employees' representatives are members of trade unions. Trade unions do not have a legal right to take a seat in the employees' representative body.

However, trade unions in Switzerland play an important role in negotiating CBAs. Although only about 21% of employees are members of trade unions, about 47% of all employees are affected by a CBA. A CBA can apply because of any of the following:

- The employer and the employee belong to an association or a trade union that is party to the CBA.
- The employer has declared it to apply.
- It has been declared generally applicable by the state or the canton.

CBAs can regulate issues such as:

- Employment agreements.
- Remuneration.
- Continued payment of wages in the event of illness, accident or motherhood.
- Holidays.
- Working hours.

If an employer dismisses an employees' representative or a member of a trade union, because of his membership or for lawfully exercising a union activity, the notice of termination is regarded as abusive by law. The employer would have to compensate the employee with up to six months wages.

The Netherlands

Works council. In The Netherlands, an entrepreneur must create a works council if the company employs 50 employees or more. The number of works council representatives depends on the number of employees, with a minimum of three members. The elections are held through a secret written ballot from lists of candidates. The employees' organisations are allowed to provide a list with candidates consisting of employees who work for the enterprise.

The works council has two main rights:

- An advisory right for each important contemplated decision (for example, mergers, transfer of undertaking, and a change in company structure).
- A right of consent for decisions that concern the social policy of the enterprise (for example, regulations concerning staff appraisals, working hours, pensions, and handling and protection of personal information).

The works council has the right to take external advice which, if reasonable, is fully paid for by the enterprise. In case of a contemplated decision subject to advice, the works council must be informed about the:

- Grounds for the decision.
- Consequences for the employees.
- Manner in which these consequences are compensated.



The timing of works council involvement in transactions is essential. Case law shows that works councils can even delay or prevent a transaction from being implemented.

As of 1 July 2010, the works council of a public limited company has the right to present its opinion at the shareholders' meeting on a number of decisions, such as:

- Significant changes to the company's identity or structure, including transfer of (practically) the entire company to a third party.
- Remuneration of board members.
- Appointment, suspension and dismissal of (supervisory) board members.

Trade unions. In The Netherlands, an employer usually does not know whether its employees are members of a trade union. This membership becomes clear if the individual employee has a conflict with the employer or in light of negotiations concerning CBAs. The level of employee membership of trade unions is 22% (April 2010) and this usually relates to more senior employees in old industries such as metal and trade. The level of employers who are member of an employers' organisation is high, at about 90%. The main reason is that employers gain benefits from their membership, through which they participate in CBAs.

CBAs. Basically there are two types of CBAs, one at company level and one at industry level. An employer who is a member of an employers' organisation that is party to a CBA is bound by it, and must apply the CBA within its enterprise. Some CBAs are declared legally binding by the Ministry of Social Affairs, and as a result all employers and employees who fall within its scope are legally bound by it. This applies irrespective of the employer or the employee's membership.

UK

In the UK, employee representation structures differ from the structures common in other EU member states. Historically, employee representation consisted exclusively of trade unions, and

CBAs were concluded between the union and the individual employer. Some general information and consultation obligations exist in certain circumstances, for example where there are collective redundancies and on the transfer of undertakings. However these obligations are only triggered by particular circumstances and do not need an established employee representation structure to be in place, as employee representatives can be elected as and when the circumstances arise.

Specific legislation requiring employers to inform and consult more generally with employee representatives was introduced in 2005, but even this only applies if certain criteria are met. For example, the legislation only applies to employers with at least 50 employees and even then (unless the employer voluntarily sets up a structure) the employees must request the information and consultation arrangements through a formal procedure. Therefore, there is the possibility of establishing elected employee representation bodies at the company level in addition to existing trade union structures. Such bodies are often called staff forums or even staff councils, but the term works council is usually only used in the context of European work councils.

In practice, many companies in which trade unions are not represented do not have employee representation. Where there are elected representatives, their influence is limited compared to their counterparts in other EU member states and genuine co-determination rights do not exist.

In companies where trade unions are recognised, the representatives (also known as union stewards or 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 or under a statutory procedure through the Central Arbitration Committee (CAC). However the influence of trade unions has generally decreased over the past few years and CBAs in the UK are of minor significance in contrast to other EU member states.

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- Advised Suncor Energy Inc on the sale of its subsidiary Petro-Canada Netherlands for EUR445 million. Advising Petro-Canada Netherlands on labour law and co-determination aspects.
- Advised Holtzbrinck Networks and Verlagsgruppe Weltbild on their sale of HTW Medienhandel Holding, the German holding company of bol.com, to Cyrt Investments and NPM Capital.
- Advising Black & Decker on employment issues, among others on restrictive covenants in The Netherlands, director's rights and duties, and employment and dismissal agreements.

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Clients are astounded by the speed and quality of the service and the lawyers' genuine understanding of their needs (...).

Chambers Europe

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