

Proposals for Employee representation at board level in UK companies

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[Theresa May](#), and latterly [Owen Smith](#), have both announced their intention to put employees on company boards. Employee representation on company boards in Europe is commonplace and speculation is rife as to what model either political party proposes.

Shortly before she became the new Prime Minister, Theresa May unexpectedly announced her intention to put employees on the boards of major companies if her Conservative party leadership campaign was successful. Less surprisingly, Owen Smith's workplace manifesto during the Labour party leadership contest contained a pledge to fight for worker representation on all Remuneration Committees. Although many political commentators have been quick to flag that this is not a topic that has been seriously discussed in mainstream British politics for the last 40 years, it has been on the agenda of many worker representative organisations, including the Trades Union Congress ("**TUC**"), for some time. The TUC in particular points to examples of worker representation on company boards in Europe. Nor should we forget that employee representation has been in place in respect of the trustee boards of pension schemes since 1997.

At this stage we have few details of what exactly the Prime Minister envisages, and, of course, this proposal still needs to be more widely discussed. Many questions arise. Would the reforms apply to companies of all sizes? What role and powers will the employee representatives have? If made compulsory, what would be the penalty for non-compliance? Further, careful consideration will have to be given to the number of employee representatives and the election process. In respect of this first issue, the UK Corporate Governance Code (the "**Code**") suggests that the boards of public companies should be comprised of a majority of "independent" non-executive directors (i.e. not employees). Therefore, either the Code will need to be amended or the size of boards will need to be increased, contrary to the streamlining policies over recent years. In respect of the second issue, consideration will need to be given as to the mechanics of the election process as a whole and whether, for example, there should be any eligibility criteria for employee representatives, such as a minimum qualifying service.

There are also questions about how this new regime would interact with the current corporate governance regime in the UK. Could this for example lead to any conflicts with the general director duties in the Companies Act 2006, in particular, the duty to promote the success of the company for the benefit of the members (e.g. the shareholders). Although the interests of company's employees may be taken into consideration when making decisions, the underlying factor should be the benefit of the shareholders (i.e. financial gain). Tensions may therefore arise between employee representatives and other Board members, concerning the motivation behind certain decisions. Another practical consideration is that the addition of employee representatives to company boards may well slow down and perhaps even "politicise" corporate decision-making. With the effects of the EU Referendum still being felt for the foreseeable future, some commentators have flagged that this could be a risky time to tinker with the current corporate process. Worker representation on company boards in Europe is commonplace, including Germany, France and the Netherlands. There is no single model and workers participation rights vary. Variations include: eligibility,

nomination and election processes, proportion of employee representatives and the level of board structure to which workers' participation rights apply (e.g. one tier or two tiers). Commentators have suggested that the inspiration behind Theresa May's proposal is the German system. However, the German corporate model is completely different to the current UK system, as German companies often have two separate boards. One board is the Management Board, which takes responsibility for the day-to-day management of the company and consists of company appointed employees/executives. The other board is known as the Supervisory Board, made up of independent directors and employee representatives, and this keeps the Management Board in check, in particular in respect of the Management Board's remuneration. In Germany, employee representatives must comprise 50% of the members of the Supervisory Board for companies employing over 2,000 staff (33% for companies with 500- 2,000 employees).

One model of employee representation already in place in the UK is in the pensions arena. Subject to limited exceptions, at least 33% of the trustees of an occupational pension scheme must be members of that scheme. Such member representatives are referred to as member nominated directors ("**MND**") or member nominated trustees ("**MNT**"). Any pension scheme member may become an MND/MNT. However, the nomination process is only required to include all the active members and all the pensioners (i.e. no requirement for deferred members to be involved). Trustees can specify eligibility criteria which potential nominees must fulfil, but the criteria should fulfil the three overriding principles of proportionality, fairness and transparency.

Some may view this as a politically-motivated move by the Prime Minister in a bid to connect with many ordinary workers who would not traditionally be Conservative supporters. Nevertheless, the impact of such proposal is now the subject of speculation and uncertainty. What we can say is that, despite the result of the EU referendum, workers representation rights within the European Union look set to have a significant influence upon the framework of employee representation and corporate governance within the UK.

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