

The status of SE-directive transposition in Italy

Marcello Ries (September 2004 + update: January 2005, see last page)



1. The transposition of the Directive in Italy

The principles laid down in the directive are rather innovative for the Italian legal system. While employee representation is well defined also with regard to information rights (e.g. in the following laws, no. 223/1991, no. 428/1990, no. 626/94), the concept of “participation” has so far been defined only in collective bargaining agreements or jointly established regulations. The most relevant change for the Italian system will be dispositions regarding the composition of management or supervisory boards, in which the presence of employee representatives is foreseen.

Existing Italian company legislation excludes any form of employee participation in the governing body of a company. The board of administrators, who are elected/appointed by the shareholders, mainly following internal regulations, is in charge of governing the company. The correctness of financial management and company information is guaranteed by a committee of auditors, whose sole aim is to audit the financial information of the company as a whole, and in the interest of the company as a whole. The auditors do not act on behalf of one group of shareholders (or stakeholders), but on behalf of them all.

These legal provisions leave room for grey areas concerning corporate governance. For example, when a major bank introduced an employee shareholding scheme, the employees formed an association, holding over 4% of the shares. The other shareholders formed a syndicate and changed the company statutes in such a way that the employees’ association – despite being one of the largest shareholders – would not be represented on the administrative board. Another clear example of lack of transparency is the closeness of majority shareholders and management. In some cases, the majority shareholders choose the management – or even overlap with the management – and subsequently appoint management members to the board, so as to form a majority and run the company, as well as having a determining role in appointing the auditors.

Recently, the government took action to foster more stringent legislation and to fill these gaps, at the same time coming up with proposals concerning the introduction of employee participation rights.

Also because of the financial scandals involving major Italian companies, the reform of company legislation was accelerated, whereas the introduction of a “participatory” system is falling behind.

According to the government, one reason for this “dual-speed” approach is the difficulties encountered by the social partners in reaching a joint opinion on the matter. The government says it intends to respect the “Pact for development and employment of December 1998”, according to which it will follow the joint opinions of the social partners with regard to the transposition of EU social directives, as was the case with Directive 945/45 EC on European Works Councils. At present the social partners have yet to reach a joint opinion on Directive 2001/86 EC, so the government is proceeding with transposition of the SE regulation,¹ while the SE directive remains “on hold”.

Reform of company law

The need to simplify the organisational structure of companies led Parliament to approve law no. 366/2001 of 3 October 2001 which foresees the delegation of powers to the government to proceed with company reform by legislative decree. The first simplification is the reduction to two main forms of company: the “s.r.l.” (which corresponds to a limited liability company) and the S.p.A. (which is similar to the public limited company).

The S.p.A. may choose among three models of management and control:

- the present system (an administrative board and an auditor’s body);
- a dualistic system made up of a management board and a supervisory board;
- a monistic system with an administrative board, in which an internal committee is charged with internal management control.

¹ This is the government’s vision. The social partners take a different position according to which the government has so far failed to come up with a proposal which they could discuss with a view to reaching a joint opinion.

The subsequent and most recent legislative decree, no. 6 of 17 January 2003, reinforces these requirements and changes other aspects, such as the minimum capital required to form an S.p.A. adapting to the SE regulation.

It is striking, however, that the new legislation avoids any definition of “group of undertakings”, leaving a vacuum with regard to the SE regulation and directive. The regulation of “groups” is seen as an alternative model of governance as distinct from individual companies. In fact, the law only regulates two areas in relation to groups:

- publicity (including all forms of external communication);
- the protection of third parties, minority partners/shareholders and creditors of controlled undertakings, as they may be harmed and even put at risk by the “group dimension” and business logic.

Although the reform – through legislative decree no. 6 of 17 January 2003 – is by now well established (and as such from our perspective is to be considered certainly incomplete, as it fails to fully take into account the SE regulation and directive), it must be remembered that other areas of company law are under revision, too.

The present reform appears to be aiming for a law that would create a balance between the controlling undertaking’s interest in operating without “unnecessary financial burdens” (e.g. employee representation) and the need to protect other stakeholders, mainly other shareholders and creditors. It fails to recognise and address the role of employees as stakeholders in companies as such.

The reform process will continue to realise national and community requirements which relate to the whole system of company law, including company crises, new requirements concerning accounting rules and balance sheets, and the creation of the necessary link between company law and anti-trust legislation.

The present Italian company legislation does not mention any possibility for employee participation and is completely separate from any legislation regarding labour relations.

Proposals for legislation on the introduction of a “participatory system”

Against this background, transposition of the SE directive will have a truly innovative character and even more so if we consider that it shall also activate the constitutional right of employees to participate in the management of their company (Art. 46 of the Italian Constitution).

In Parliament, a number of draft laws on employee participation have been presented for debate (draft laws 1003, 1943, 2023, 2778, 3642, 3926 and 4039). Given the fact that employee participation is not part of the Italian tradition (with the exception, according to some sociologists, of so-called “industrial districts”), all areas of participation need to be addressed. Thus in recent years, the debate has been rather wide-ranging, covering information and consultation, participation in decision-making and financial participation (share ownership and profit sharing). The trade unions are taking a rather holistic approach to employee participation and are trying to reach a common view on how existing participatory practices could be used to promote employee participation in decision-making. The employers’ organisations believe that each aspect of participation must be dealt with separately.

In the past two years, since the Parliament adopted the collective bargaining agreement and transformed it into the transposition law of Directive 94/45 EC on European Works Councils, there has been a stronger will to form a body of legislation on employee participation. This is in part also the effect of the European Charter of Fundamental Rights, the Social Charter and directives 2001/86 EC and 2002/14 EC.

Thus, the Parliament’s approach is to deal with the different forms of participation by treating the issues separately, while attempting to implement:

- Article 46 of the Italian Constitution, which recognises the right of employees to cooperate with the employer and participate in the management of the company, according to conditions and limitations established in company law.
- Articles 21 and 22 of the European Social Charter (implemented through law no. 30 of 9 February 1999) establish employees’ rights to information, consultation and participation;
- Council Recommendation 92/443/EEC of 27 July 1992, regarding the promotion of employee participation in company profits and results.

Some proposals (draft laws 3642, 3926 and 4039) aim exclusively at the introduction of employee shareholding schemes by means of company-level or branch agreements, with no links to any form of participation in decision-making processes, whereas other proposals consider both forms of participation (proposed laws 1003, 1943 and 2023).

Among this second set of proposals, draft law 2023 limits employee participation in decision-making to “information and consultation rights”, while the other two foresee the possibility of shareholding employees delegating members of the board of directors (1003, 1943).

In particular, with regard to “information and consultation” proposal 2023 mentions, among the minimum requirements for the adoption of a “participatory statute”, the introduction of formal and binding procedures guaranteeing, in good time, information and consultation and involvement by employee representatives in relevant company decisions. This may occur also through the institution of *ad hoc* representative bodies set up through collective bargaining agreements.

Another legislative change concerns financial participation and participation in decision-making deriving from it.

The proposed changes to Article 2349 allow companies to lay down in their statutes the apportionment to employees of part of their profits through the issue of special shares or bonds, up to the overall amount of company profits which can be allotted to the employees on an individual basis.

Alternatively, the company may allocate to its employees “other financial instruments”, connected with ownership or administrative rights, except for voting rights in the shareholders’ assembly. The definition of rights deriving from such instruments and their exercise shall also be defined in the company’s statutes.

According to the proposed changes to Article 2351 of the Civil Code, the statute may also establish specific voting rights for employees who may benefit from such financial instruments. These voting rights concern only specific subjects, to be defined in the company statutes, and may also confer on employees the right to appoint one independent representative on the board of directors, the auditors’ committee or the supervisory body, depending on the company’s chosen governance structure.

These options are left to the company, however, which can proceed unilaterally with the introduction of profit-sharing schemes under Article 2351 of the Civil Code.

With regard to participation in decision-making processes:

- Proposal 1003 foresees that shareholding employees in the banking, insurance, energy, transport, telecommunications and defence sectors shall designate, under specific circumstances, up to two or three members of the board of directors.
- Proposal 1943 foresees that shareholding employees’ associations may delegate their own candidates to corporate governance bodies (mainly auditors).
- Proposal 4039 goes beyond financial participation and contains large sections on employee “information and consultation” and on the presence of employee representatives on supervisory bodies independently of financial participation in the form of shareholding.

More specifically, with regard to information and consultation, proposal 4039 is intended to anticipate the transposition of Directive 2002/14/EC by foreseeing, in addition to the contents of the directive, the introduction of “consultative bodies” under certain circumstances, and a “social balance” to be added to the financial balance sheet and distributed to all employees.

Furthermore, proposal 4039 refers also to the participation of employees in decision-making bodies, thus anticipating the transposition of Directive 2001/86/EC.

The proposal foresees that in all SpAs and SEs set up in Italy with more than 300 employees and which adopt a dual tier system, employee representatives shall be appointed members of the supervisory body. The selection of such employee representatives shall take place through the trade unions.

These proposals have yet to be debated in Parliament. There have been consultations with the social partners as recently as February 2004. The adoption of some of these proposals, in particular with a view to the transposition of Directive 2002/14/EC, is planned for September 2004. There is no sign, on the other hand, of a parliamentary debate on the possible adoption of Directive 2001/86 EC.²

² The parliamentary agenda for September (in August there is traditionally a break) foresees discussions on the transposition of various EU directives: Directive 2002/14 is explicitly mentioned, but there is no mention of Directive 2001/86.

3. Discussions on the SE

The SE directive represents one further step towards reinforcing the EU's choice of competing in the global market on the basis of a social model built on partnership. However, in a number of member states, including Italy, employee participation has not historically been the principal vehicle of management–labour relations. The traditional adversarial approach to industrial relations has over the years shifted in a more cooperative direction, leading to the framework agreement of 1993 that established so-called “concertation” as a tripartite approach to handling macroeconomic issues, and was renewed in 1998.

Nonetheless, since the last general election, won by a centre-right coalition, there has been a return to more adversarial relations. In the meantime, the establishment of wider information and consultation rights, mainly due to the transposition of European directives, has created a framework for “social dialogue”, also at the company level. Thus there has been a trend towards decentralisation of collective bargaining, weakening institutional tripartite dialogue which had already been undermined by the high level of conflict between the government and Confindustria on one side and the trade unions on the other.

Against this background, transposition of the SE directive has not taken place on fertile ground. In February 2002 the government encouraged the social partners to meet to begin negotiations leading to transposition of the SE directive. The government stated its wish to receive a “common opinion” from the social partners, which could be transposed into law following the general agreement on social dialogue of December 1998, and urged the social partners to commence negotiations.

Almost one year later, in February 2003, the industry confederation Confindustria accepted an invitation from the three main trade union confederations – CGIL, CISL and UIL – to set up a round table for direct discussions on how to shape employee participation structures, in particular with regard to the SE and its decision-making bodies. This round table is presently debating the issues, with the positions presented later in this section as points of departure.

At the same time, the trade unions held informal talks with Confcommercio (the confederation of commerce, in particular wholesalers and retailers), ABI (the national association of banks) and ANIA (the national association of insurance companies) with the aim of setting up a round table with a view to reaching an interconfederal agreement (or “common opinion”), signed by all the representative organisations of industry, trade and finance on one side and by the employees' representatives on the other. Such an agreement could be validated by the government and consequently become a legally binding text for implementation of the directive. A similar approach was followed rather successfully for implementation of the EWC directive. In that case, the parties reached a collective bargaining agreement which was legally binding for all signatories as early as 1996, to be transposed into law in 2002, so setting an example of a positive *modus operandi*.

The three trade union confederations, which adopted a common approach on this matter, believe that an interconfederal collective bargaining agreement is the best way of implementing the directive in accordance with industrial relations in Italy. The directive itself, they argue, refers more than once to the autonomy of the parties and related issues, such as procedures for selecting members of the Special Negotiating Body (SNB), and ultimately the aim of that body, which is to reach agreement on the modalities of employee participation through negotiations rather than legal imposition.

In June 2003 CGIL, CISL and UIL entered into internal discussions on the main issues of directive transposition. They defined a priority list, which refers to the commencement of negotiations between the SNB and company representatives. They recommend that such negotiations find satisfactory solutions to the points listed below, which must first be discussed and resolved in the interconfederal collective bargaining agreement, which the Parliament should use as the basis of the directive transposition law.

The main points for discussion are:

- The relationship between Regulation and Directive: determination of points of friction or conflict between the regulation and national legislation, especially on the choice between a monistic or a dualistic structure, as well as employee involvement, where it is foreseen.
- The relationship between the Regulation and Italian company law. This relates particularly to the interest that Italian companies may have in becoming an SE. The trade unions' idea is that the social partners may annex a joint statement to the interconfederal collective bargaining agreement, in which they express their views on how the SE can be made attractive to Italian companies. Such a statement would influence the government when transposing the regulation into Italian company

- law.
- Definitions of participation, information and consultation, as foreseen in the Directive.
 - Procedures for setting up the Special Negotiating Body, with the participation of trade union organisations in the selection of such a body.
 - Procedures for SNB negotiations and composition, utilisation of experts, relations between the SNB, national trade unions and European federations.
 - Composition of the employee representative body and its relationship with the national trade unions and European federations.
 - Rights and legal guarantees/protection of employees in the SNB.
 - Costs related to the setting up and functioning of the SNB, as well as the use of experts.
 - Agreement contents.

4. State of the transposition process

In June 2004, during a seminar³ organised by CESOS⁴ and CISL on employee participation in the SE, the representatives of the three trade union confederations CGIL, CISL and UIL reiterated their desire to reach a joint opinion with the representative organisations of industry (Confindustria), banking (ABI), insurance (ANIA) and commerce (Confcommercio) by October 2004. This joint opinion would then be transmitted to the government as a basis for the law transposing Directive 2001/86EC. Thus the path to transposition appears to be clear.⁵

However, it appears that the social partners have different views and that there still is a long way to go before a joint opinion may be reached. To appreciate the full extent of diverse opinions on the SE directive, a list of the various organisations' views, where available, is presented in the next section.

There appears to be unity on one point: on the question "What form of participation do we want?", the social partner representatives all agreed that they did not want a "German model". The trade union confederations CGIL, CISL and UIL have already reached a joint position and invited the employers' organisations to present their thesis so that a fruitful debate could begin.

Given the consensus among social partners and government that a law will be discussed following the reaching of a joint opinion, parliamentary debate on the transposition of Directive 2001/86EC cannot be expected before November 2004. It is not on the agenda of the September session.

5. Views of the government and representative organisations

Comments of Minister of Welfare Roberto Maroni

According to the Minister, the Government is convinced that employee involvement is useful for economic development. Employee involvement will be introduced on the basis of consensus, leading to transposition of the directive within the expected time frame.

Concerning a model of employee participation, the government intends to remain neutral, leaving it to the social partners to determine the level of employee involvement in company management, even though the government favours the participation of employee representatives in the management board rather than in a supervisory body. The setting up of a supervisory body would mean the creation of a double command chain which would probably create problems and conflicts.

In any case, the government will do everything necessary to transpose the social partners' joint opinion, whatever it may be. With regard to the "opt-out clause", the government's inclination is not to transpose it.

On tax advantages for SEs, it is the government's opinion that only preferential fiscal treatment Europe-wide would encourage the setting up of SEs.

However, with regard to the Italian economy, it must be ensured that the SE represents an opportunity also for the many small and medium-sized enterprises; it is important to avoid a situation in which SE tax benefits work against companies that are already weaker by virtue of size.

³ "La società europea, la partecipazione dei lavoratori e la governance delle imprese", Rome, 14–15 June 2004.

⁴ Centro di Studi Economici, Sociali e Sindacali, a CISL research institute.

⁵ While there has always been a consensus on the approach which consists in the social partners' reaching a joint opinion as a basis for the transposition law, there have been different views on how such an opinion should be reached. See note 1.

CONFINDUSTRIA

Confindustria has a new attitude to employee participation. At the national convention of 2002 the president of the young entrepreneurs declared that the traditional antagonism between employer and employee was outdated: for one thing, it was linked to a Fordist concept of work which no longer existed. It had been replaced by a more participatory notion of company management. However, if participation is to be beneficial for the business the model of participation to be adopted must be carefully considered.

Profit-sharing, for instance, is considered beneficial because it increases productivity and reduces strikes. The information and consultation procedures introduced through European legislation have been equally effective because they improve management–labour relations.

In contrast, “power sharing” is seen as a rather remote and potentially negative option for Italian companies. According to Confindustria the structure of Italian businesses does not allow for any such option: the German model in particular, with a balanced presence of employee representatives regardless of their share ownership cannot be adapted to Italian companies. The unspecified mixture of interests of employee members of supervisory boards, who are supposed to act in the interest of company profitability while also representing the workers’ interests is considered contradictory and potentially bad for the company. (Some trade unions share this view.)

Furthermore, Confindustria understands that the proposed composition of such participatory bodies would distance them too much from day-to-day company management, which must be carried out within an extremely short timeframe and under the responsibility of a manager who is in charge of meeting the objectives set by shareholders. Thus, according to Confindustria the dualistic model cannot work and it was a mistake to include it in the SE directive.⁶

The adoption of a participatory structure should not be by law but as the result of collective bargaining. Although the subject matter of employee participation, hitherto defined in company and/or national collective agreements, will shortly be enshrined in legislation, the agreements reached between the social partners must be taken into account by the legislator.

On 12 February 2004, Confindustria reported its point of view on “employee participation in the management and results of companies” and the proposed legislation to the Lower House of Parliament, in the form of the joint meeting of the Finance and Labour Affairs Committees.

Confindustria believes that the transposition into Italian law of the employee participation rights laid down in directives 2002/14 and 2001/86 should occur separately. Parallel to these laws, a third form of participation through employee shareholding should be dealt with, again in separate legislation.

As far as the proposed law 4039 is concerned, Confindustria expects an initiative from the government which will give the social partners scope to reach an understanding, as laid down in the Social Pact on development and employment of December 1998. Legislation drawn up outside this framework is considered counterproductive.

While Confindustria recognises the need for more employee involvement in the workplace to ensure competitiveness, it believes that there is no necessary link between employee shareholding and employee participation in company management. Employee shareholding is not a sufficient condition for creating more democratic forms of corporate governance. Thus the Parliament’s decision not to link the two forms of participation, as proposed in draft laws 3642, 3926 and 4039, is deemed correct.

The question then remains whether it is more opportune to promote merely the economic participation of employees, with the aim of integrating employee remuneration, or more extensive, “strong participation” which also encompasses the attainment of “strategic objectives”.

In both Italy and abroad, financial participation and employee shareholding have numerous forms, aims and functions. When financial participation is directly bound to reaching strategic objectives it significantly changes the typical employment relationship and the traditional logic of exchanging labour power for money characteristic of traditional industrial relations.

For this reason, in Confindustria’s view, a body representing shareholding employees should not coincide with the trade unions, which have a different role and might find themselves in a conflict of interest. Company decision-making must be carried out by bodies in which minority shareholders are represented, but must remain independent of bodies representing the employees so that financial participation linked to reaching strategic objectives cannot be manipulated or misused by employees as means of obtaining their

⁶ These opinions were expressed by Confindustria’s General Director Stefano Parisi during a European Seminar on Social Dialogue, held in Rome, 7–8 February 2002.

demands.

These points alone show how important and delicate an issue employee shareholding is. It can change the organisational balance and influence many of the variables of enterprise functioning, such as human resources, remuneration and social policies, industrial relations and employee participation in capital building.

The introduction of an employee shareholding scheme therefore requires an in-depth study in which the “recognition”, “incentive” and “market-related” motivations are bound to full sharing of the objectives and modalities of implementation. If all those concerned are not involved in the process, employee shareholding can turn from opportunity to threat by unbalancing industrial relations. It is therefore best to leave it to the social partners – based on suggestions and practice at European level – to come up with innovative solutions for the implementation of participation in line with the guidelines determined nationally for transposition of information and consultation rights and the SE.

Negotiations between the social partners are the only way of constructing a participatory system, as such a system is extremely complex, given the different types and sub-types of participation, and cannot be imposed by one side. Furthermore, the plurality of mechanisms and bodies needed to set up such a system must suit each individual company: a single, mandatory solution for all companies would be unrealistic. Negotiations allow the mutual establishment of a system which will best guarantee that both parties will be satisfied and the good of the company.

Recent changes to articles 2349 and 2351 of the Civil Code have opened the way for new forms of financial participation. Their effects remain to be seen. They allow for consistency with the SE regulation and introduce numerous possibilities for setting up a participatory system at company level through negotiations, guaranteeing an appropriate level of autonomy to those involved. Additional legislation on financial participation is therefore deemed unnecessary and likely to be confusing.

Two observations arise in relation to the proposals on participation in decision-making processes. Proposal 1943 on the representation of shareholding employees’ associations foresees the possibility of such associations designating an auditor. In public companies minority shareholders already have the right to designate one or two auditors, following a complex mechanism. Indeed, this mechanism is so complex that in most cases it becomes impossible to nominate such auditors. Confindustria believes that the proposal would add unnecessary complexity to an already difficult mechanism. Furthermore, auditors have to act in the interest of the company as a whole and not on behalf of one small group.

A better solution would be to foresee participation of employee investment fund representatives on the board of directors, as outlined in proposals 3642 and 3926.

Another aspect which appears problematic to Confindustria is the social balance as foreseen in proposal 4039. This would increase the burden on companies without bringing about real advantages for the employees.

In summary, with regard to the legislation promoting employee participation and transposing the relevant EU directives, Confindustria believes the following:

- Legislation should be limited to recognising the legitimacy of a wide range of schemes of financial participation and/or employee shareholding, which may be unilaterally defined by the company.
- The same law should define the forms of representation of shareholding employees.
- Information and consultation rights shall be implemented through the transposition law of directive 2002/14/EC, taking into account one or more joint opinions of the social partners.
- A law imposing the representation of shareholding employees in the management or auditing bodies of the company should be avoided. A law may lay down the institutions and norms of such representation, but not the obligation to adopt them. Such a law would serve to encourage the social partners to discuss the matter and implementation procedures within the framework of industrial relations.

CGIL

The largest Italian trade union confederation has often experienced internal controversies regarding employee participation. It has often been regarded with suspicion as something which would undermine the existing adversarial relationship between management and labour in favour of something “watered down”, which may eventually result in rather unsatisfactory social consequences. Thus the more traditional wing of the union confederation had a negative view of participation, as something whose benefits were merely deceptive.

In more recent years, however, as the confederation leadership assumed a new political stance, the discussion has become more pragmatic and open.

CGIL's vision of employee participation differs little from those of the other major confederations, CISL and UIL, outlined below. However, CGIL has expressed reservations concerning the form of employee participation in the current economic context, which in the wake of the dramatic events of 11 September 2001 is characterised by profound crisis. The SE directive was approved at a time when, on account of the negative economic situation, companies are putting great emphasis on creating "value", but little or no emphasis on creating or respecting a balance between social and economic aims. This has had a devastating effect on the "Italian way" of participation, which is built on strong bilateral agreements and permanent dialogue to ensure quality of production and quality at work. As companies adopt a one-sided, hierarchical management style and impose their will on employees without listening to them, there is more and more resistance in the workforce, leading to social unrest. The SE directive is the result of a long process in which social stability and social equality were considered fundamental factors in business competitiveness. Management attempts to change these conditions unilaterally are causing Europe to lose competitiveness in global markets.

Against this background, the SE directive should be seen not merely as an obligation/opportunity limited to some companies, but as a chance for the trade union movement to create a participatory system in leading European businesses and thus to reaffirm the European Social Model as the key to EU competitiveness in global markets.

However, the present combination of directive and regulation is deemed insufficient to encourage companies to chose a participatory model. Clarity about the fiscal aspects of the SE must be attained to make it attractive. If the SE does become attractive, and many SEs are established with strong employee participation, it may be possible to strengthen European competitiveness and social stability.

With regard to the form of employee involvement in the SE, CGIL clearly favours a supervisory board which is sufficiently informed concerning the company's strategic plans so as to allow thorough, well-structured and focused collective bargaining. This would make it possible to reinforce the Italian system of participation, which is considered "weak" in comparison to the German one, for instance, because of weak, ad hoc legislation, although it is strong in terms of collective bargaining and the inclusion of information and consultation clauses in collective agreements.

The participation of employee representatives in management boards could jeopardize strong collective bargaining, as those representatives would be called upon to participate in decision-making.

A single-channel supervisory board system is therefore considered the most appropriate form of employee involvement in the SE.

Recent company law reforms in Italy do not foresee any form of supervisory body with employee participation, and so do not correspond to the SE directive. This makes it more urgent for the government to consult with the social partners and adopt the necessary provisions for transposition of the SE directive.

CISL

This trade union confederation expressed views on the EU regulation and directive on the SE which are similar to those of the other trade unions.

CISL at first welcomed the directive on the assumption that the proposed model of the SE would improve the present system of industrial relations, principally by filling a gap with regard to employee participation in strategic decision-making processes. Overall, CISL believes that through introduction of the concept of employee participation in Italian law collective bargaining will be reinforced.

Thus, long before negotiations on the possible transposition of the directive were called for, CISL issued two major requests:

1. Political initiatives at Community level promoting tax advantages or at least equal fiscal treatment for SEs in order to encourage entrepreneurs and investors to take an interest in this form of association.
2. The avoidance of any clauses in the Italian transposition referring to "opting out" of subsidiary prescriptions in the case of mergers. The government's first reaction to this request was rather positive.

UIL

Federation secretary Lamberto Santini expressed the following views on a number of draft laws on “employee participation” to be discussed in the Lower House of Parliament.⁷

First, each of the proposed laws targets a specific aspect of employee participation (for example, financial participation, information and consultation rights), without taking into account the broader picture. Thus there is the risk of generating confusion and contradictions. To avoid this, UIL proposes the integration of all the proposed laws into a single framework which should build upon the contents of European Directives 94/45/EC on European Works Councils, 2001/86/EC on employee involvement in the SE and 2002/14/EC on employee information and consultation rights. This would furnish implementation with clear principles and methodology.

Besides the legal obligation to transpose the directives, their transposition has the clear advantage of specifying what the implementation of information, consultation and participation rights at the company level would mean in concrete terms.

Furthermore, following the content of these directives would also allow harmonisation between the transposition law of Directive 94/45/EC and the other two directives, which need to be transposed in 2004.

UIL would therefore like Parliament to take these issues as point of departure.

The second consideration is that the text of the law must also be harmonised with the new company laws which have opened the way to a “dual tier system” of corporate governance. However, while the law allows for the creation of a supervisory board, it does not foresee the participation of employee representatives in such a body. This is a contradiction in terms of the historical experience of dual tier systems: by excluding employee representatives this turns the supervisory board into an alternative to the auditor’s committee.

UIL believes it is important that the law recognises the contribution that employees are able to make to their company by giving employees the right to nominate employee representatives to the supervisory body. In UIL’s view employee representatives on the board of directors (single tier system) is well-founded but less convincing.

With regard to the traditional Italian form of corporate governance, according to which an auditor’s committee (made up of three auditors) supervises the accounting practices of a company, UIL has an innovative proposal.

The financial scandals which have hit a number of Italian companies prove that the present system is not functioning correctly, particularly with regard to the autonomy of administrators and the independence of auditors. UIL proposes that in companies which decide to stick to the traditional approach, one auditor shall be appointed by the employees’ representatives from a professional group of independent auditors who have no relationship with the company.

This solution has the advantage that there would be no confusion of roles between employee and company representatives – who in UIL’s view should always remain such – while allowing for effective controls and auditing, thus ensuring the necessary transparency which is a crucial asset of both markets and workers. Although this is a “mediated”, indirect form of participation, UIL argues that it would be more effective than employee involvement in the board of directors. With regard to the proposed laws, this would mean that the content of Article 5 of Law 1943, which currently applies only to share owning employees’ associations, should be extended to all employees, so implementing Article 46 of the Italian Constitution.

UIL believes that financial participation is a useful tool as long as it is implemented on a voluntary basis and not used as a replacement for other forms of remuneration. The possible recognition of collective representation deriving from share ownership through ad hoc associations or investment funds, which is proposed in some laws, is considered at least interesting. As a trade union organisation UIL does not seek to promote such bodies among employees, rather concentrating its efforts on collective bargaining. However, it does recognise the potential role of share-owning employees’ associations. In this sense, the proposed laws 3642, 3926 and 4039, which recognise the trade unions’ rights to negotiate company shareholding schemes and combine them with specific tax advantages, but which foresee different actors for the management of such agreements, reflect UIL’s vision of a diversity of roles between trade union and share-owning employees’ associations.

In summary, UIL would like Parliament to:

- make a law on employee participation which is strictly consistent with European legislation;
- establish a clear framework of information and consultation, which in particular ensures that they

⁷ The following paragraphs reflect UIL’s views expressed during a parliamentary hearing on 22 January 2004.

- take place in good time, providing employees with a real opportunity to influence company decision-making;
- define with greater clarity cases in which information may be withheld or treated as confidential, so as to avoid future difficulties;
 - recognise a right of appeal against a company's use of the above mentioned rights, if deemed necessary by employee representatives.

With regard to employee representation in company governing bodies, UIL has the following wishes:

- In the case of companies which adopt the dual tier system employees should have the right to appoint employee representatives to the supervisory body.
- In the other cases, the employees should have the right to nominate auditors.
- The law should not foresee giving the right to appoint such representatives to the trade unions or share-owning employees' associations, as it would unnecessarily complicate the law.

With regard to financial participation, UIL agrees with the government's proposals and, last but not least, welcomes initiatives in the field of Corporate Social Responsibility (CSR) and in particular the proposal regarding a social balance in Article 18 of draft law 4039 regarding accounting rules. UIL stresses that social balance and CSR necessitate auditing and certification well beyond the present proposals and tailored to each company's specific circumstances. Thus rules for social accounting and certification should be negotiated case by case rather than being imposed by law.

*AREL*⁸

General Secretary Enrico Letta (a former minister in the centre-left coalition government), welcomed the introduction of a mechanism for employee representation, which would improve quality of work, organisational efficiency and the influence of employees, as well as the mechanism for transposition of the directive, which builds on the EWC experience to foster agreements between the social partners.

AREL also underscored the need for equal fiscal treatment and taxation levels of Community-scale undertakings so as not to render their establishment unattractive.

He also commented on the establishment of financial participation systems. Different EU states have different solutions in this connection and the absence of common EU legislation has given rise to conflicts, despite the general recognition of its potential in light of the promotion of economic democracy. Setting up common mechanisms of financial participation should go hand in hand with fiscal harmonisation and employee participation in the SE.

(Author's note: this appears to be the personal opinion of the General Secretary, as AREL has not released any official documents.)

⁸ AREL stands for "Agenzia di Ricerche e Legislazione" (Agency for research and legislation). It is composed of members of parliament, scholars, managers and entrepreneurs and has the aim of analysing and discussing possible legislative innovations, their impact on Italian society and the positioning of Italy within the European and international context. It is close to the opposition parties and some trade union organisations.

Update on the status of SE-directive transposition in Italy

January 2005

During the week preceding Christmas 2004, the social partner delegations met to finalise a draft agreement on transposition of the SE directive.

The meeting was successful. The resulting agreement must still be subject to internal discussion and approved by all the social partner organisations. Thus it is not an official document and not available to the public. For this reason it is impossible to give a detailed overview of its contents. However, some important points are clear:

1. There will be no opt-out.
2. There is a preference for a *dualistic model*, with employee representation on a supervisory board.
3. There is agreement between the three major trade union confederations that *employee representatives* on the supervisory board (or, where that is impossible, the administrative board) shall not be elected, but *jointly appointed by the trade unions*.
4. Also, provisions for experts, etc., were defined in detail (in more detail than in the CBA transposing the EWC directive).
5. The social partners did not lay down any sanctions, as this is not their role (although they did recommend some).

This agreement constitutes major progress towards transposition. However, while the way forward is simple on paper, it is quite complicated in reality.

The CBA will (probably) be signed and registered by mid-February (by the end of January, according to optimists). At this point, it can be submitted to the government, which will probably enshrine it in law by decree. At this point the government will inform the European Commission and the directive will be considered officially transposed.

In any case, in Italian jurisprudence collective bargaining agreements have juridical value, as the *erga omnes* principle is normally applied. This means that the CBA is legally binding from the moment it enters into force, even if there is no government decree – a temporary solution that allows the government time to tackle (and possibly resolve) the contradiction between the SE regulation and directive and the recent reform of company law (the so-called *Vietti reform* – see *Country Report* on Italy). In this case, however, sanctions would not apply.

As a matter of fact Italy finds it itself in a paradoxical situation. The government must “reform the Vietti reform” if it wants to transpose the directive. On top of that, while technically all the necessary conditions are in place for transposition of the SE directive, the SE regulation still needs to be adopted.

Or will Italy find itself in a situation in which employee participation in the SE is defined, but it is impossible to establish an SE under Italian law? For some time – particularly with general elections coming up – this will probably be the case.