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BELGIUM: THE PATH OF THE ADOPTION OF THE NEW LAW ON WORKER PARTICIPATION IN THE CAPITAL AND PROFITS OF COMPANIES

The adoption of a law governing worker participation in the capital and profits of companies was voted unanimously by the Belgian Parliament on 22 May 2001, and came into force on 1 January 2002.

This success meant that the new government, led by Prime Minister Guy Verhofstadt, was breaking with 30 years of hesitation, in the course of which the idea had been tabled before many successive governments without ever having come to fruition.

How did this change happen so quickly? It took only 22 months to reach a political agreement which was also acceptable to the social partners, to draw up the draft, to discuss it in Parliament, to vote on it and then to get the new law on to the statute books.

The new Prime Minister had brought to bear his own personal authority and conviction.

To start with, he had called on a personal friend, an eminent professor of economics at the University of Louvain, and a senator, to chair an ad hoc working group made up of 10 people, all of them high-ranking experts, representing each of the ministers concerned, every political party in the government coalition, and both of the two major workers' union organisations as well as the main employers' organisation.

This small group very quickly got down to work – where the traditional social consultation bodies had produced nothing positive for many years.

After a few weeks of work, the working group completed the drafting of a report, attached at annex, called the 'De Grauwe report' after its president.

Apart from a direct reference to the 'PEPPER' principles defined by the European Union, the report defines 12 principles which secured general agreement, to create a 'legal framework for worker participation'.

In this way, the group succeeded in striking a balance, which paved the way for the adoption of a legal framework while respecting the various demands of freedom for companies, respect for collective labour relations and social consultation, openness to all wage-earners, the safety of remuneration (a clear distinction was drawn between remuneration on the one hand and financial participation on the other), the safety of the fiscal and quasi-fiscal advantages granted to financial participation schemes, and safety of employment.

Another remarkable feature of the work carried out is that it led to the adoption of a very broad framework law, making it possible to define an extensive range of systems for financial participation, at the discretion of the companies and wage-earners: participation in capital, participation in results, with variations tailored to large companies, SMEs, and even organisations in the public and non-commercial sector.

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A legal framework for worker participation

Report by the working group on worker participation

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1. Introduction

The objective of the Verhofstadt government is to create a legal framework so as to make worker participation more attractive in Belgium. The philosophy underlying this objective is that worker participation offers significant advantages. By way of an introduction, it may be interesting to highlight some of these advantages.

• The growing competition caused by the globalisation of the economy and by the introduction of the euro, creates major challenges for businesses. In the new competitive environment, only those companies which stimulate internal collaboration between all workers can achieve a certain success. Worker participation in these conditions constitutes an instrument, like a favourable social climate. It contributes towards ensuring that collaboration becomes the leitmotiv within the company. And collaboration leads to high-performing companies which are better able to cope with the pressure of globalisation.

• The economic power of a country depends to a large extent upon how effectively a country succeeds in stimulating, disseminating and utilising its knowledge. Knowledge and know-how can arise and be developed only in an environment in which people collaborate. Knowledge is a collective adventure. The days when one isolated person could shout 'Eureka' are long gone. Today, a large part of the knowledge is generated within the company. And the same principle applies inside the company: knowledge will arise if it is created and utilised together. Because worker participation stimulates collaboration, it is also an instrument in improving the dynamic of the acquisition and dissemination of knowledge.

• Worker participation does not mean just workers' interest in the profits of the company. Ultimately, the participation will also serve to get the workers more closely involved in the policy of the company. When a worker is sharing in the profits, he will want to be better informed about the company's results. The company's results thus also become the worker's own results. In a culture of participation, the company will therefore be encouraged to develop greater transparency, which will be favourable to the quality of the management (corporate governance). This will also make it possible to start up a dynamic within which the better informed workers will need to be more involved in the policy of the company. Ultimately, this should lead to greater democracy in the company.

• Despite the fact that in the past, Belgium had already taken a number of legislative initiatives allowing for worker participation (stock options, Art. 521 septies, Monory bis), there is no legislative framework to attract people towards the mechanisms for financial participation with regard to all companies and all workers. The objective is therefore to create a complementary legal framework which will stimulate a climate favourable to the introduction of a generalised mechanism for worker participation, without affecting the existing legal systems. [1]

In this report, we have framed the principles which need to underpin this legal framework. Then, we have discussed the concrete form which should be given to this legislation.

2. The principles

At the initiative of the European Commission, some general principles have been formulated with which worker participation schemes must comply. These principles originate in the two reports entitled Pepper. They must thus form the basis for the Belgian legislation in this connection, and may be summed up as follows:

• The participation mechanism must be installed **at the level of the company** [2]. It must rest upon the **voluntary participation** of the company (voluntary basis).

• The participation mechanism must be the result of **collective consultation** between the employer and the workers.

• The mechanism is of a **collective** nature, in other words it is accessible to all the workers in a company.

• The participation mechanism must be based on a **pre-established formula** where the link with the company's results appears clearly.

• The participation does not replace the salary, it is an **additional income**.

These principles insist primarily on the fact that the setting up of a worker participation mechanism must be done on a voluntary basis. Companies are not obliged to set in place a financial participation mechanism.

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[1] This report applies only to the private sector. However, the working group takes the view that there is a need for a revalorisation of remuneration in the public sector and the non-commercial sector.

[2] The definition of the company, for its part, will be addressed later.

Secondly, it is important to stress the collective aspect of the participation. This participation must not be just the result of collective consultation; it must, in addition, be open to all workers. The workers' participation must have a mobilising effect. It encompasses all workers because the commitment of every individual is important. The participation of the workers is thus not an instrument of individual motivation. On this subject, there are other techniques, for example stock options. The objective of worker participation is to stimulate all workers so that they make a commitment to the company.

Thirdly, worker participation calls for wide transparency in the management of the company in such a way as to clearly reveal the link with the company's results. This principle immediately makes the link with corporate governance. Companies which are well managed create the confidence necessary for the smooth running, as should be the case, of worker participation mechanisms.

Finally, these principles insist on the fact that worker participation can under no circumstances be a substitute for remuneration. Workers are not company executives who have to carry the risks of this. Workers must be able to benefit from their normal income when the company's results are less satisfactory.

The group added two further principles to those contained in the Pepper report:

- The advantages granted in the framework of participation mechanisms which meet the conditions formulated by the working group do not fall under the normal fiscal and quasi-fiscal scheme applicable to remuneration. The working group has mapped out the specific fiscal and quasi-fiscal scheme to which these advantages will be subject.
- Companies will be able to avail themselves of two participation formulas: participation in capital and participation in profits.

3. Conditions requiring to be met by the participation mechanisms in order to be able to benefit from a specific fiscal and quasi-fiscal scheme

The participation mechanisms offer a fiscal and quasi-fiscal advantage which the authority is minded to grant. Accordingly, some essential conditions have to be set so that these mechanisms can come into consideration for the granting of these specific advantages. The conditions set out below must be considered as the standards to be complied with in order to obtain a 'quality label' giving entitlement to the fiscal and quasi-fiscal advantages.

When these conditions were drafted, the working group also took as a guide the idea that the formal prescriptions applicable to the participation mechanisms should be as flexible as possible. Otherwise, the point is that the participation ceases to be attractive. The method proposed to guarantee this flexibility consists of giving companies sufficient freedom in the choice of a suitable participation mechanism. The working group thus recognises that various models of participation may be envisaged. The result must be that it can satisfy small and medium-sized enterprises, expanding companies and companies in recession equally. This is the only way to make participation attractive for all companies.

The working group has framed a series of conditions. Some of these conditions are obvious and do not call for any long commentaries. This is not the case with other conditions, which do need a commentary.

1. The initiative to set up a participation mechanism lies with the management of the company. This initiative is the subject of consultation in the framework of the legal consultation bodies within the company. In companies where such consultation bodies have not been set up, although they should have been in accordance with the law, it will first be necessary to set up these bodies before a participation mechanism can be started up. In the absence of the consultation bodies provided by the law, a consultation procedure will have to be followed in line with the provisions laid down in the employment regulations.

This condition puts flesh on the bones of the idea that every company should be free to decide whether or not to set up a participation mechanism. This freedom is guaranteed by the demand that the initiative fall within the remit of the company management. However, once a proposal has been formulated, it is necessary to start up a consultation process within the company. This consultation must be organised within the consultation bodies provided by the law. So there is no need to create new consultation structures, unless the normal consultation bodies provided by the law (in companies with over 50 workers) have not yet been set up.

2. This collective consultation must lead to the conclusion of a specific company Collective Labour Agreement which gives concrete shape to the formal conditions in the participation plan. In companies traditionally outside the mechanism of company collective labour agreements (companies with fewer than 50 workers and no union delegation), workers will have to sign an act of accession which will be submitted for the minister's approval. The minister will have to indicate his reply within 2 months.

This condition has been introduced in order to comply with the government declaration. At the same time, this condition gives concrete shape to the general principle whereby participation mechanisms have to be set in place in the framework of a collective consultation procedure which must take place within the company. In addition, there must also be a specific collective labour agreement, in other words a collective labour agreement dealing only with the participation mechanism.

3. The wage standard must be respected. This means that the financial participation can be set in place only where the wage standard has been exhausted. Control over this condition will occur at regular intervals in line with the deadlines laid down for the establishment of the wage standard. In the event of failure to comply with this condition, the penalty will be a ban on the extension of the participation mechanism. The control will be exercised by the Minister for Employment and Labour.

This condition gives concrete shape to the principle that the participation cannot be a substitute for remuneration. In order for this condition not to remain inactive, regular control is provided for, which will need to be carried out within the deadlines within which the wage standard is applicable.

4. The participation mechanism may be set up at the level of the company or the group of which the company is part. If the participation is set up at the level of the company, the profit statement must be made under Belgian legislation on company accounting. If it is at the group level, the ad hoc accounting standard on the consolidation will be applied. In this case, only one collective labour agreement will be concluded for all the Belgian subsidiaries of the group.

Certain companies are subsidiaries of a parent company. These companies have to be able to opt for a participation plan of their own, or for a plan applicable to all the Belgian subsidiaries of the same group. This option makes it possible to promote staff mobility between the subsidiaries of one group.

The establishment of a participation mechanism at the level of the group raises a series of technical and legal problems which can be resolved in different ways. In Appendix 1, a set formula is proposed to this end. It is clear that other formulas might be envisaged and that this does not resolve all the problems.

5. A dual ceiling is provided:

• The total advantages granted in the framework of the participation mechanism may not exceed 10% of the total wage bill (gross remuneration) of the company.

• The total advantages granted in the framework of the participation mechanism may not exceed 20% of the profits. 'Profit' here means the profit in the accounting year to be allocated. (In the case of a group, the figure to be used is the net result of the accounting year).

The advantages deriving from the participation mechanism are uncertain and create risks for the workers. That is why it is necessary to establish a ceiling to cap the extent of the participative advantages with regard to remuneration. We have opted here for a ceiling of 10% of the total wage bill. De facto, companies naturally have the possibility of remaining below this ceiling depending on their specific situation.

The second ceiling sets a maximum for the participative advantages as a percentage of profits (20%). This second ceiling takes account of the concern of shareholders not to have to award too much of the profits to the workers, when profits may be unpredictably low.

Both ceilings have to be complied with. In companies where the wage bill is high when compared to profits, the second ceiling will often be reached faster than the first. The opposite will often happen in the case of companies whose profits are high when compared to the wage bill. In the case of the Belgian economy as a whole, the ratio of wage bill/profits settled at about 2 in 1998. Appendix 2 goes into more detail about the way in which these ceilings have been set.

6. Every participation mechanism must be open to all the workers in a company. The specific company collective labour agreement will determine whether or not workers are compulsorily required to be part of the participation mechanism.

This condition is a compromise between two ideas. The first idea is that the individual workers must be free to decide whether or not to join the participation mechanism set up by the company. The second school of thought focuses on the collective aspect of the participation and lays down the principle that all workers should participate when the company decides to set up a participation mechanism.

The compromise lies in the idea that the employers and the workers decide in the framework of their collective consultation whether membership of the participation mechanism should be on a voluntary individual basis or not.

7. By a worker, we mean a salaried worker. No distinction is drawn between limited-term contracts and unlimited-term contracts. The company collective labour agreement may lay down a seniority condition. However, the latter may not be longer than one year (accounting period). Where a contract ceases, the worker (or, in the event of death, those entitled under him or her) will benefit from the participative advantages accrued during the year, in line with the principle of pro rata temporis.

8. The advantages deriving from the participation mechanism are in principle the same for all workers. The specific company collective labour agreement may, however, make departures from this rule. In such cases, only the remuneration may be taken as an objective criterion for the distribution of the benefit, it being understood that the maximum advantage may not be more than twice as high as the lowest advantage.

This condition is great influenced by the idea that the participation is a collective affair. it constitutes an instrument likely to mobilise all the members of the staff. This may be best achieved by guaranteeing an egalitarian principle. Larger and smaller players will all receive the same thing. This sort of choice also maximises the likelihood that the participation will be accepted both within and outside the company. This egalitarian principle also allows the same contribution to be made by the authority for every worker in the participation mechanism, in the form of the fiscal and quasi-fiscal advantages granted.

However, the working group was of the opinion that a certain flexibility in the application of this egalitarian principle was desirable. That is why provision has been made for a departure from this principle. The maximum disparity proposed, of 2 between the highest and lowest advantages, allows the financial participation to retain a strong egalitarian character (compared to remuneration, for example).

The choice made in this way is liable to curb the use of the participation mechanism as a technique for the motivation of individual workers. The working group was nevertheless of the opinion that there are other techniques (individual bonuses, stock option plans) which could be used to this end.

9. The advantages granted in the framework of the participation mechanism can be in cash or in shares. The shares awarded must give their holders the normal voting rights. The fiscal and quasi-fiscal processing of the participation in the capital will be more attractive than that which is applicable to advantages awarded in cash. The working group proposes the following fiscal and quasi-fiscal processing – (see Appendix 3 for a full explanation):

• The participative advantage constitutes part of the company's after-tax profit. Half of the corporation tax which is paid on the share of the profit assigned to the participation mechanism is allocated to social security.
• If the participative advantage is allocated in cash to the worker, the worker's personal share to social security is payable. The balance is subject to a levy of 25%.
• If the participative advantage is allocated in shares, it is subject to a levy of 15%.

Companies' needs in terms of participation mechanisms may vary radically. That is why there is a need to offer the greatest possible freedom in the choice of the participation formula. In some companies, there may be a preference for forms of direct cash allocation, while in others, the preference will be for the allocation of shares (participation in capital). Companies may also wish to apply both forms of participation.
The working group is of the opinion that the specific fiscal and quasi-fiscal scheme must be more advantageous vis-à-vis a participative advantage in shares rather than in cash. The reason is that in the framework of a participation in capital, workers are more closely involved in the company and run more risks. In addition, the shares are blocked for a set period (see condition 10 below).

10. Where the participative advantage is allocated in the form of shares, the specific company collective labour agreement sets the period for which the shares are blocked. The law will determine a minimum period.

The point is that it is necessary, in the case of an allocation in the form of shares, to avoid the latter being immediately resold by the worker. In fact, in such a case, there would no longer be any difference between this scheme and an allocation in cash. That is why a period of blockage is indispensable. This period must, however, not be too long, at the risk of making the link between the results of the company and the advantage deriving from them for the wage-earner too fleeting. The minimum duration of blockage proposed is 2 years.

Nevertheless, the company collective labour agreement may provide for a longer period of blockage.

11. The specific company collective labour agreement likewise lays down whether the allocation of the participative advantage is to be made via an intermediary structure (for example: participation fund, co-operative society) or not. If an intermediary structure is set up, the specific company collective labour agreement may also stipulate that the workers may opt for the allocation of the participative advantage via the intermediary structure or for direct allocation. The right to vote within this intermediary structure will follow the principle of 1 person/1 vote.

The idea underpinning this condition is that for certain companies (for example SMEs, but not necessarily all SMEs), an intermediary structure is indicated for the management of the workers' participative advantages in capital. For other companies, this is not necessarily the case. The company needs to be able to position itself freely depending on its own needs.

The fiscal and quasi-fiscal processing of these two forms of participation in capital must be neutral, in other words it must not favour one form over the other.

12. The participation mechanisms may not be set up to the detriment of employment. Neither must they have the effect of modifying the company's employment policy. That is why the consultation which must take place within the company ahead of the setting up of a participation mechanism must likewise include a discussion on the employment policy. The conclusions of that discussion must appear in the specific company collective labour agreement. At the macro-economic level, the social partners will regularly evaluate the impact of the participation mechanisms on employment.

There is a legitimate fear in some quarters that participation may be used to force the readier acceptance by workers of employment and restructuring measures. The company's profits after restructuring may in fact increase and therefore serve to the benefit of those who remain. That is why it is necessary to establish clearly, within the framework of the collective consultation procedure, the extent to which the participation mechanisms will have an influence on employment within the company.

Appendix 1: The problem of Groups

I. Perimeter to be taken into consideration

1. Subsidiaries under Belgian law in which at least 50% of the voting rights in the ordinary general assembly are directly or indirectly owned by a Belgian or foreign parent company.

Commentaries:

• *Proposal not to include subsidiaries in which under 50% is owned, because de facto control is an idea which is difficult to define.*

• *Proposal to include 50/50 joint ventures but on condition that they choose the programme of one of their 2 parent companies. No combining.*

2. Belgian branches of foreign companies.

II. Social consultation and specific collective agreement

Same principles as for an isolated company, but

1. The Group's proposal must include all its Belgian entities as defined under 1.

2. The social negotiation will be common. In other words, the consultation bodies of all the entities concerned will be gathered to reach a collective company agreement that is the same for all.

III. Notion of 'Group Ceilings'

1. The ceiling of 10% of the wage bill will be calculated by adding up the wage bills of all the entities falling within the perimeter under I.

2. The ceiling of 20% of profits will be calculated on the basis of the net consolidated result of the accounting period taken after audit at the level of the parent company (the 'Nr'). Then the following formula might be adopted:

Ceiling = 20% Nr (Staff in Belgium/Total staff of Group).

Appendix 2: The ceilings on remuneration and on profit

The table below contains data on the wage bill and the net profit in a certain number of Belgian sectors (1997) and in the whole of the private sector. We can see that on average in 1997, the wage bill was twice as high as the profit. However, we also see a wide sectoral variation in this average.

Sector	Year	Currency	Wage bill	Net profit	Ratio Remuneration/ Profit
Chemical industry	1997	million BEF	163,523	71,258	2.29
Motor industry	1997	million BEF	67,145	12,932	5.19
Food	1997	million BEF	100,123	21,779	4.60
Transport and telecoms	1997	million BEF	356,251	46,845	7.60
Construction	1997	million BEF	184,475	17,428	10.58
Financial sector	1997	million BEF	51,143	400,162	0.13
All sectors (excluding financial sector)	1997	million BEF	2,439,583	840,153	2.90
All sectors (including financial sector)	1997	million BEF	2,490,726	1,240,315	2.01

Source: Banque Nationale, Centrale des Bilans

From the information in the table above, we may draw the following conclusions:

• On the assumption that the ceiling on remuneration and the ceiling on profit are at the same level, we would then, on average, reach the limit of the ceiling on profit twice as fast as the limit of the ceiling on remuneration. This may be illustrated by an example. Let us assume that these two ceilings reach 10%. When this limit of 10% is reached for the ceiling on profit, the ratio between the allocation of profit and the wage bill is at only 5%.
This is an argument in favour of raising the ceiling on profit in comparison to the ceiling on remuneration; otherwise, there is a risk, in fact, that the share of the allocation of the profit in the wage bill will be particularly reduced. If the ceiling on profit is twice as high as the ceiling on remuneration, then on average we reach the limits of these 2 ceilings at the same time.

• The effect of the significant sectoral differences is that in certain sectors, the ceiling on remuneration will often be the limit that imposes itself. This is the case in the financial sector. In other sectors, the opposite rule will apply.

Appendix 3: The proposed fiscal and quasi-fiscal processing of the participative advantages

In this appendix, we have illustrated by means of an example the mechanism for the fiscal and quasi-fiscal processing of participative advantages. We have also calculated the total charges as well as the charges for the employer and the worker.

Participative advantage allocated to the worker =		**100**
Corporation tax (40%) =	66.7	
Half is paid to the ONSS =	33.3	
Total cost to the company =		166.7
Worker's income =		100

Scenario 1: Worker opting for advantage in cash

Worker's contribution (13.07%) =	13.07	
Worker's taxable income =		86.93
Levy (25%) =	21.7	
Worker's net income =		65.2

Scenario 2: Worker opting for advantage in shares

Worker's taxable income =		100
Levy (15%) =	15	
Worker's net income =		85

	Total charges (*) (employer + worker)	Charges(*)	
		Employer	Worker
Shares	49.9%	40.0%	9.0%
Cash	60.9%	40.0%	20.9%

(*) As a % of the total cost to the company.