



*Jan Hofkens*

## **SOCIAL ELECTIONS 2020: IT IS TIME TO WORK OUT YOUR STRATEGY**

The next social elections will be held between 11 and 24 May 2020. Even if this may seem a long way off, we recommend that you consider a number of essential strategic aspects today and, where necessary or useful, make further adjustments to your HR or corporate structure.

We will explain below why this is the case:

### **1. In which cases must a Works Council (WC) and/or a Health and Safety Committee (HSC) be established?**

An HSC has to be set up in companies with an average of 50 employees or more. A WC has to be set up in companies with 100 employees or more. The same applies in companies where a WC should have been established during the previous elections, insofar as the companies still have 50 workers or more.

The 2 questions that demand answers are the following:

- On which level must the threshold of employees be calculated?
- How does one calculate the threshold of habitually employed employees?

### **A. “Company” = “TBU”**

With regard to the social elections, the company is defined as a “technical business unit” (TBU). The company, or TBU, is thus not a synonym of legal entity (like an AG). In order to

determine the TBU, it is necessary to take into account economic and employment criteria. The employment criteria are predominant.

These employment and economic criteria are not set up by law, thus it is necessary to have a look at the relevant case law.

Indicating economic autonomy: different activities, separate management, separate services or own accountancy,... Social autonomy is characterized by: own personnel policy, different payroll provider, external prevention service, pension fund, separate work rules, own remuneration policy, use of different languages, own social activities (e.g. personnel parties, personnel newspaper), no social contacts between employees,...

Several possible situations can occur:

- The TBU is equal to the legal entity. This is the most common and simple situation.
- The legal entity contains several TBUs.
- Several legal entities form a single TBU.

It is the employer's task to decide which TBU will have to elect and establish a WC and/or HSC. The workforce and the trade unions can challenge the employer's decision. In order to prevent any disagreement, it is important to think the decision through carefully.

We therefore strongly advise you to take a current 'snapshot' of your company and to examine whether a number of different TBUs might exist. With regard to the social elections of 2020, it could indeed be useful to clarify a certain number of points in your company or to restructure the company (merger, demerger, etc.) in order to influence the determination of the TBU in the direction you wish.

## **B. Which workers are counted?**

The obligation to set up a WC or/and an HSC depends on the average number of workers habitually employed in the company.

In order to calculate this average number for the social elections of 2020, one should consider the number of employees usually employed by the company on average from 1 October 2018 to 30 September 2019. This is different from the previous social elections, where the year prior to the social elections was always taken into account.

We advise you to chart the current workforce numbers within your company. It is indeed possible that within your company, the threshold of 50 or 100 workers is only just reached. A focused personnel management in 2019 could therefore be worth considering.

It may also be important to determine which employees can currently be regarded as belonging to the category of executive and managerial staff.

In this respect, it is also important to know which employees will have to be taken into consideration.

- Long-term disabled employees must be taken into account, as well as employees whose employment contracts have been suspended.
- Temporary workers have a specific position. Temporary workers do not count for the calculation of the usually average employment at their own employer, the temporary employment agency. In some cases, temporary agency workers do count towards the user's usual average employment, except when they replace a permanent worker of the user. The user must keep a register for one quarter (the reference quarter) of the temporary agency workers working for him.

Here again, there is an important change compared to the previous social elections. Whereas previously only temporary agency workers employed by the company in the fourth quarter of the year prior to the social elections had to be registered and taken into account, this is now the second quarter of 2019 (between 1 April 2019 and 30 June 2019). Neither the number of temporary agency workers during the first quarter of 2019, nor that of the third and fourth quarters of 2019 influence whether or not the establishment of an HSC or a WC is mandatory. You do not need to keep a register of temporary workers if the WC establishes within 30 days after the entry into force of the new act, by unanimous statement in the minutes that the threshold of 100 employees has been exceeded.

There is another important change for temporary agency workers. Temporary agency workers will be able to vote at the user's social elections under certain conditions (e.g.. seniority of 3 months). However, they cannot be a candidate themselves.

- If your company is internationally active, it is important to know whether workers who are seconded abroad need to be counted. In principle, if they have employment contracts with the Belgian company and provided they do not work abroad on a regular basis, they should be counted. However, depending on the specific situations

of the workers who are working abroad, they could be considered as habitually working abroad, in which case it could be argued that they ought not to be counted.

## **2. A category of workers not to lose sight of: the executive and managerial staff**

During the social elections, executive and managerial staff are special categories. Indeed, the workers who belong to this category cannot be elected, are not entitled to vote, and are the staff from which the company chooses its own representatives on the WC and the HSC.

The notion of executive and managerial staff is strictly defined by law:

- They are people who are charged with the day-to-day management of the company, who have the power to represent the employer (level 1);
- As well as workers who are immediately subordinate to level 1 and insofar as they perform day-to-day management tasks (level 2);
- Workers at the third level in the company may in no circumstances be considered as managerial staff for the purposes of the social elections.

Whether a worker is managerial staff must be examined considering his/her actual function. Day-to-day management is not to be understood in the sense of corporate law, but must be seen as the actual, independent, continual, daily management of the company.

Strategically, the more workers you are able to define as managerial staff, the fewer protected workers you will have within your company. Furthermore, this could be relevant to the question of who you want to represent the employer within the WC or the HSC.

In this context, the company's organizational chart can play an important role. There is still time, during the year 2019, to draw up or reschedule this chart in tempore non suspectu by laying down clear job descriptions or creating a management team.

## **3. To do**

In order to better prepare yourself for the 2020 social elections, we advise you, as a first step, to draw up an organizational report, and to ask yourself the following questions:

- Are there TBUs?
- How many workers are employed in these TBUs?
- Who could be considered as managerial staff?

On the basis of this report, you will be able to determine whether the current structure is best maintained, or whether it is better to work out a different structure or to make adjustments, more specifically by:

- reorganizing or clarifying the structure of your organization (e.g. by dividing the TBU or, on the contrary, by merging several TBUs).
- orientating your workforce policy in 2019 (e.g. by employing fewer temporary workers during the 2<sup>nd</sup> quarter of 2019, or postpone hiring, in order to relate some workers to one TBU instead of another).
- setting up an organizational chart, adapting or drafting job descriptions, setting up a management committee, etc.

**You can contact Lydian's Task Force Social Elections 2020 for:**

- **Strategic guidance on the preparation for the social elections (audit and action plan),**
- **All your legal questions before or during the social elections,**
- **Representation in judicial proceedings,**
- **Day-to-day assistance during social elections and on-site assistance during election day, and**
- **Installation and operation of the WC/HSC (internal regulations, etc.).**

**Contact:**

- **Jan Hofkens +32 3 304 90 04 [jan.hofkens@lydian.be](mailto:jan.hofkens@lydian.be)**