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THE DUAL NATURE OF EMPLOYEE INVOLVEMENT

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ABSTRACT

Participation at workplaces encompasses different mechanisms used to involve the workforce in decisions at all levels of an organization – whether direct or indirect – conducted with employees or through their representatives. In its various pretexts, the issue of employee involvement has been a recurring theme in economic theories, industrial relations, and human right instruments.

Human dignity, freedom, equality, solidarity and justice are the core values inscribed in the European Charter of Human Rights. The Charter reiterates the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. But legal engineering cannot ensure high-intensity levels of democracy and distributive justice. The European Union faces many challenges that jeopardise the Welfare State model and increase inequalities and social exclusion. One narrative explains these issues by the inevitability and the consequent democratic deficit of the EU. One of the areas where democratic decision making is often overlooked is the workplace. This book aims to explain how employee participation is connected to democracy, human dignity and solidarity and provides examples that economic democracy can ease the negative effects of economic turmoil.

This book analyses employee involvement from a dual perspective: as an economic tool that enhances competition and as a human right that develops human dignity at workplaces. The introductory part deals with participation as an element of economic and industrial democracy. The second part of the analysis of participation forms a dual perspective and gives an overview of different economic theories dealing with participation and presents the relevant human rights instruments. This is followed by an overview of the European regulatory framework and its potential pitfalls. The possibility to expand employee involvement to reach global coverage is examined in a global context in the fourth part. The fifth part examines the effects of employee participation during the recent economic crisis in Europe. An extensive case study of Hungary demonstrates the regulatory gaps of the European participation model, and finally the sixth part concludes the overall findings related to workplace democracy.

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PART I. – INTRODUCTION

1. Economic and Industrial Democracy

The right to participate in decisions affecting one's life is a basic value in a democratic society. This principle should be present in all areas of civil society, encompassing political and economic spheres, and including workplaces (Kollonay-Lehoczky, 1990). Robert Dahl argues that people involved in certain kinds of human association possess an inalienable right to govern themselves in democratic process (Dahl, 1985). If democratic decision-making is required at the state level, then it is also justifiable at the workplace level (Mayer, 2001). Involvement in decision making that affects one's life is an essential part of human dignity (Sinzheimer, 1920). The voice of workers has traditionally been represented by trade unions through collective bargaining (Bogg & Novitz, 2014). Employees' right to be directly involved in issues related to the workplace gained recognition much later – the theory of economic democracy reaches back to the Weimar Republic.

Economic democracy, as a socio-economics theory, promotes a more equal distribution of wealth to reduce poverty, unemployment, and starvation. In that sense, it has three aspects: workers' participation, leading to production control; individual security, meaning fair access of everyone to common resources, such as water, land or raw materials; and the enhanced purchasing power of individuals.

Economic democracy constitutes a core element of Hugo Sinzheimer's work. The central point of his argument was that a subordinated worker must be recognized as a human being. Whereas employers' right to command workers at a workplace is inherent in the notion of capital, argues further Sinzheimer, it is important to identify the limits of the power arising from private property. In Sinzheimer's view, labour law could serve as a tool to free workers from the abuses of employers' power and thereby contribute to the democratization of the economy. Similarly to political democracy, economic democracy could contribute to the emancipation of individual workers *vis-à-vis* economic power (Sinzheimer, 1927). Participation could enable all economic actors to jointly form the economic conditions of the workplace and share responsibility related to the jointly made decisions. Therefore, employees would be freed from subordination, and equality would be brought to the economic sphere.

Political and social democracy could only exist if they are accompanied by economic democracy. Sinzheimer witnessed the reconstructualization of labour law: in the name of free competition the employers took advantage of the individualistic regulatory system, leaving trade unions vulnerable. Such managerial practices radically reduced the value of work, which had an undesirable effect on society. According to Sinzheimer, an economic constitution (*Wirtschaftsverfassung*) can put labour in equal power position to capital by enabling labour to make decisions together with property owners. Protecting labour has essential importance for a society, as the working power of man is not only an individual but also a social asset. The worker serves the employer directly, but the society indirectly; thus the society owes an equivalent return for his service, and this equivalent is the protection itself (Dukes, 2008).

The notion of the economic constitution focuses on the role a state plays or could play in ordering or constituting the economic institutions and actors by laws. Thus, the economic constitution encompassed laws that regulate (allow for, encourage, prohibit or constrain) worker participation in decision making (Dukes, 2014). Thus, the economic constitution is much broader than the law of the labour market and also than collective agreements. It encompasses all legal instruments concerning the economic sphere, which suggests a concern with democratic participation as a means of emancipating workers. Also, it goes much further than the conservative understanding of a constitution as a bill of rights, it is seen, rather, as an agent of social progress (Dukes, 2014). Through labour law the state recognizes the economic actors and empowers them to act, for example through legally binding norms concerning collective bargaining, and at the same time, sets limits to their power. The notion of economic constitution also clarifies the role of labour law. According to Sinzheimer, the overarching purpose of labour law was to free workers from subordination to employers by securing the freedom of meaningful participation in regulating the economy, while respecting the autonomy of economic actors. Sinzheimer, on a Kantian recognition of human dignity, argued that the democratization of the industrial sphere through the economic constitution might have brought equality and real freedom for workers – freedom which is not manifested in the way freedom of contract allowed exploitation, but freedom from subordination in employment relations (Sinzheimer, 1927).

The idea of economic democracy also gained significance as a criticism of formal democracy, because democracy cannot be divided from the economic structure in which it exists (Sen, 1999). The concept of economic democracy is often juxtaposed with industrial democracy, as it promotes workers' participation in corporate governance with a view of democratizing employment relations within the companies (Kahn-Freund, 1977).

To ensure economic empowerment, most proponents claim that basic necessities and sufficient purchasing power should be guaranteed to everybody and local control should be exercised over economic decisions. It is argued that modern property relations externalize costs, subordinate the general well-being to private profit and deny the justifiability of democratic voice in economic policy decisions (Smith, 2003). The classical liberal argument claims that ownership and control over the means of production should belong to private firms and can only be sustained by means of consumer choice, exercised daily in the marketplace (von Mises, 1951). In contrast, proponents of economic democracy generally argue that modern capitalism periodically results in economic crises characterized by deficiency of effective demand, as society is unable to earn enough income to purchase its output production. Thus, economic democracy could mitigate the gap between demand and supply and support access to political rights (Harvey, 2011). Both market and non-market theories of economic democracy have been proposed to encompass economic democracy.

Although they are related in many ways, industrial democracy and economic democracy convey different meanings. These differences are much related to diversity in industrial traditions. Historically, industrial democracy became an effective force within workers' movements primary as an idea of representative democracy (Müller-Jentsch, 1995). The principle of industrial democracy implies replacement of unilateral regulations with joint decisions on matters concerning workplaces or employment conditions. Citizenship rights in employment allow the workforce to partially or completely participate in the running of an

industrial or commercial organization (Arrigo & Cassale, 2010). Industrial democracy is a system that increases the extent and means of employees' involvement in their work environments. In a broad sense, it could include participation in setting agendas, implementation of various policies, or election of boards of directors. Industrial democracy has many benefits, such as improved communication, more effective policies and the better morale of employees. It fosters engagement; employees tend to implement policies better if they are not only in charge of execution but are also part of the decision-making process. Industrial democracy, therefore, reduces insubordination: employees feel that even though decisions and orders are imposed on them, they could make their own choices in ways that fit their personal interests the best.

Industrial democracy challenges both the authoritarian and the bureaucratic structures of a capitalist enterprise and the centralized regime in state socialist planned economies. In that sense, participation was also the dissolution of the Taylorist-Fordist model, which favoured flat hierarchies and direct orders, and it takes into account the fact that workers are not only bearers of labour power, but members of democratic societies from which they derive a set of civil, political and social rights (Marshall, 1950). The Hawthorne studies evidenced as early as the 1930s the ability of employees and employee groups to exercise informal control of productivity (Mayo, 1933). The recognition of legitimate power for employees paved the way for the development of the concept of industrial democracy. This paradigmatic transformation brought new production concepts and management techniques, which offered more leeway for self-regulation and responsibility to rank-and-files (Argyris, 1960). Such techniques also supported the legitimacy of management at workplaces. However, implementation of participative models has usually been made with an eye toward securing higher level of competitiveness.

It is argued that without participation, workers' alienation is inevitable at workplaces, which, in the long run, involves that they become indifferent to public affairs as citizens as well, which is a real danger to democracy as a whole (Kahn-Freund, 1960). Critics claim, however, that participation is often used by managements as a manipulative device to weaken trade unions and control workers' mood or morale (Rehnman, 1968). The sceptical arguments claim that even in extensive worker self-management regimes, employers retain control of power.

2. The Notion of Participation

Participation in decision-making processes could exist in many different ways, starting from the mere right to be informed, it could also include consultation, and the strongest influence could be provided by means of co-determination. Employee participation could be of a different nature, depending on the models of workers' representation, the public or private nature of the employment relationship, the organizational dimensions of enterprises and markets, as well as the relationship between legislative and contractual sources. Naturally, participation reflects the industrial relations systems within which it is applied. The increasing globalization of capital, product and labour markets has increased the need for effective and functioning models of participation. However, the co-existence of the different systems has led to paramount

difficulties in defining the meaning, and especially the boundaries of employee participation both in academia and in practice.

2.1. The International Labour Organisation's Approach to Participation

The subject of employee involvement at workplaces has been of interest to the International Labour Organisation (ILO) for many years in the production of regulatory provisions (International Labour Organisation, 2004). Based on the studies published on various national systems of employee participation, it is safe to conclude that the term *participation* does not have a single, unambiguous meaning. The actual definitions include diverse notions and disciplines concerning a non-unitary and diverse set of workers' rights originating in laws, agreements, or both. The notion of employee involvement – in a European context often used as synonym for participation nowadays – is based in most countries on a distinction of powers and roles between employers and employees (Blanpain, 1994). Through the different means of participation, workers seek to influence certain decisions made by the enterprise that employs them. Another interpretation considers participation as a means to modify or improve employment relationships and conditions and, in many cases, also the socio-economic conditions of a society (Walker, 1975). Focusing on the socio-economic aspects of participation, this approach focuses on employees' influence on decisions concerning employment and conditions of life and work (Arrigo & Cassale, 2010). This all-inclusive definition, including collective bargaining, does not coincide with the wide consensus of scholars.

The ILO defines the concept of participation as “any workplace processes or mechanisms that allows employees to exert some influence over their work and the conditions under which they work” (Arrigo & Cassale, 2010). A wide spectrum of practices is included in this definition from consultation of employees concerning aspects of the production process or workplace environment to co-determination in decision-making by employee representatives, or even the full control of workers in managements, such as the model of cooperatives or kibbutzim. Thus, this definition could be divided into four approaches which may co-exist in the same workplace: 1) indirect participation through employee representation; 2) direct participation, practiced face-to-face between employees and the (representative of) employers, like quality circles or autonomous work groups; 3) financial participation, meaning the different schemes through which employees are able to benefit from the enterprises financial performance;¹ 4) employee participation on boards of management.

The above definitions encompass great many aspects of participation; however, this book considers participation (interchangeably used with involvement) in a stricter meaning. I use the term participation/involvement in its meaning of direct participation and as a form of indirect representation through employee representation at enterprise level, which allows employees to influence decision-making processes at their workplace.

¹ An employee stock ownership plan (ESOP) is an employee-owner method that provides a company's workforce with a stock ownership interest in the company, usually as a part of the employees' remuneration package.

2.2. The European Dimension of Participation

The system of employee participation in companies' decision-making shows considerable differences across Europe. Neither the institutional structure nor the intensity of participation is on a similar level, arising from differences in the basic theory of industrial relations between the Member States of the European Union (EU). The most significant differences could probably be detected between the Anglo-Saxon, the German and the Scandinavian models. In the Anglo-Saxon system, institutionalised participation shows little compatibility with the traditional patterns of industrial relations, whereas in Germany and in the Scandinavian countries industrial relations could be characterised as cooperation-based. But even where institutionalised workers participation exists, for example in France, it often remains on the level of mere information and consultation. There are other models of employee involvement as well, most notably the southern European system – like the Mondragon cooperatives –, and the Eastern-European (post-soviet) model. Co-determination in its strict sense does not exist in the majority of the Member States. However, a lower level of institutionalisation concerning participation does not automatically mean less influence on management decisions, as the activity of trade unions or persuading the management by informal means could result in high levels of actual control in decision making (Biagi, 1995).

The different culture of industrial relations is the result of the different political, cultural and economic developments of the Member States. As Manfred Weiss points out, in view of the heterogeneous situation it would be largely unrealistic to shape the structure of participation identically throughout the EU, the most that could be achieved would be to approximate the systems in a functional sense (Weiss, 2000). However, approximation was indispensable, as the EU was no longer a mere market and economic community but was on its way to a social union.

The first approximation regarding workers' participation in the EU concerned specific matters, such as collective redundancies, the transfer of undertaking, and safety and health issues based on the initiations of the first Social Action Program of 1974. The Directive on collective redundancies was passed in 1975² followed by the Directive on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses two years later.³ Both Directives provide for information and consultation of workers' representatives according to the law and practice of the respective Member State. Thus, employers are only obliged to inform and consult employees' representatives in accordance with the rather vague term of participation as it exists in national law or practice.

Not only was approximation limited to the mere right to information and consultation in these Directives, but even that only succeeded to a very limited extent. (Weiss, 2000). Even though, by the amendments of the Directive on collective redundancies in 1992⁴ and of the Directive

² Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 48, 22.2.1975, p. 29–30.

³ Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61, 5.3.1977, p. 26–28.

⁴ Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, OJ L 245, 26.8.1992, p. 3–5.

on transfer of undertakings in 1998,⁵ the EU tackled the issue of transnationality, the importance of these Directives on the transnational level remained marginal compared to the effect of the establishment of a European Works Council (EWC). The adoption of Council Directive 94/45/EC was considered as a breakthrough in light of the long learning curve after the failure of the Vredling proposal. The Directive introduced European Works Councils or alternative procedures in order to ensure information and consultation for employees of multinational companies on the progress of the business and any significant decision at the European level that could affect their employment or working conditions. Council Directive 94/45/EC was repealed and replaced in 2009 by the Recast Directive 2009/38/EC.⁶

The EU used the stimulus of the positive experience with the Directive on European Works Councils to revitalise the project concerning workers' participation in the boards of the European Company, which was at a fatal deadlock by the 1990s. The EWC further encouraged the EU to another far-reaching step: instead of prescribing information and consultation only for certain specific issues, the national systems of information and consultation was approximated in a comprehensive way by Framework Directive 2002/14/EC on information and consultation.⁷ This Directive sets minimum principles, definitions and arrangements for information and consultation of employees at enterprise level within each country. Leveraging on the key success factor of the EWC Directive, Member States enjoy substantial flexibility in applying the Directive's key concepts (employees' representatives, employer, employees, etc) and in implementing the arrangements for information and consultation.

Employee participation constitutes a characteristic element of the European human rights instruments, such as the European Social Charter, the Charter on the Fundamental Social Rights of Workers, and the Charter of Fundamental Rights of the European Union. The common aim of these human rights instruments is to treat workers as *citizens* of enterprises. Hermann and Jacobi call the members of European Works Councils the “ambassadors of the European civil society” due to their remarkable potential to develop a strategic management structure, which represents the common interests of a multinational workforce and which formulates and represents common employment interests (Hermann & Jacobi, 2000, p. 95). Manfred Weiss argues that if democratisation of the economy is understood as a promoting and stabilising element for democracy in society. Workers throughout the EU should have a similar chance to influence decisions by which they are affected (Weiss, 2000). Therefore, in a globalised environment, the right to participate in decision making had to be extended beyond national borders, and it became necessary for the EU to address the transnational dimension of involvement. Hermann and Jacobi acknowledged its social importance, but emphasised the economic dimension of participation, while Weiss pinpointed its societal nature and its connection to democracy. I argue that both as an economic tool and as a human right,

⁵ Council Directive 98/50/EC of 29 June 1998 amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 201, 17.7.1998, p. 88–92.

⁶ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ L 122, 16.5.2009, p. 28–44.

⁷ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 80, 23.3.2002, p. 29–34.

participation should not remain a privilege of European citizens, but must be treated as a universal right of all workers employed by Europe-based multinational corporations.

2. Comparison of Participation with Other Forms of Representation

It is important to note the difference between direct and indirect forms of *representation* and the direct and indirect forms of *participation*. Workers could participate in decision-making either directly in person or indirectly through their representatives. Direct participation is based on a one-on-one, often face-to-face interaction between employees and their managerial counterparts, whereas indirect participation assumes that the views or concerns of employees are communicated by a representative of employees. Direct forms of participation (sometimes called consultative or deliberative participation) tend to be small-scale and decentralized, like quality circles or autonomous work groups, integrated usually into decisions about daily work. The traditional form of indirect participation in Europe occurs through works councils. Works councils are, in general, legally established representations, elected or appointed by all employees in an establishment, irrespective of their membership of trade unions.

Autonomous and semi-autonomous groups are teams that determine and carry out work tasks, quality control, decide on incentive payments and discipline members who do not meet performance standards. They serve to complement or partially replace the traditional manager-subordinate structure and have the greatest degree of independence (Arrigo & Cassale, 2010). Quality circles are small groups of employees, which meet regularly on company time, aiming to improve quality and productivity within their own work areas. Management may or may not implement their suggestions, which signifies a lesser degree of autonomy; however, it provides an opportunity to workers to influence the manner of manufacturing. Works councils are standing bodies providing for the information and consultation of employees at a workplace level. Members are elected by all the workforce of an establishment or an undertaking.⁸

2.1. Trade Union Representation and Participation

The institutionalized system of employee representation through works council is generally connected to the labour movements of the Weimar Republic. However, some rudimentary forms of representation could be found in an earlier stage of history. The Works Council Act was a part of the framework established by the Weimar Constitution.⁹ Article 165 of the Weimar Constitution provided for the cooperation on equal footing between workers and employees in order to look after their economic and social interests. The scheme provided for

⁸ Article 7 of the Additional Protocol of the Social Charter provided for that the requirements of Article 2 of the Additional Protocol are satisfied if great majority (80per cent) of the workers is protected under its provisions, however, workers excluded in accordance with paragraph 2 of Article 2 were not taken into account in establishing the threshold for workers concerned.

⁹ Adopted on August 11, 1919. Ceased de facto operation with the enactment of the Enabling Act on March 23, 1933.

a parliamentary form of governance, similar to and parallel with that of the political state. The detailed regulations of Factory Works Councils were promulgated in the Act on Works Council, but District Workers Councils and the National Economic Council had never been set up.

Industrial democracy can be divided into two categories: the direct and indirect forms of participation. A systematic differentiation between Trade Union representation and participation was first made by Csilla Kollonay Lehoczky (Kollonay-Lehoczky, 1997). She defines participation as a form of indirect representation, exercised through representatives directly elected by employees, in contrast to trade union representation, which is a form of representation through an organisation separate from employers or the community of employees. From this basic distinction other differentiating factors follow.

Trade Union representation could be traditionally described as a form of representation which protects employees' interest *against* those of the employers. The main function of a Trade Union is to secure the biggest possible benefit for employees from employers' profits in different ways, mostly through the machinery of collective bargaining or other forms of wage negotiations. In contrast, participation leverages on the common denominator of employers' and employees' interests: its goal is the prosperity of the workplace. Discovering and keeping employers' competitive advantage on the market is not only in the interest of employers, but also essential for employment security.

The differences in the field of interest also determine the available instruments. The integrative nature of participation assumes that instruments facilitating cooperation between parties will be used to achieve shared goals.¹⁰ The confrontational relationship between employers and trade unions anticipates, at least in principle, that bargaining between parties is adversarial or distributive (Arrigo & Cassale, 2010). Thus, trade unions' most frequently used legal tool is collective agreement, while participation is likely to be effectuated through information, consultation and sometimes co-determination procedures. However, a narrowing gap between the positions of the parties and the reconciliation of their interests could also be detected (Casale, 2000).¹¹

Access to information during decision-making is essential for employees. Following the definition provided by Directive 2002/14/EC¹², information is the "transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter [of the future decision] and to examine it."¹³ Compared to the mere transmission of information, consultation assumes a more complex, bilateral exchange

¹⁰ This integrative nature of participation could be detected in the wording of Art. 1 (3) of Directive 2002/14/EC: "*When defining or implementing practical arrangements for information and consultation, the employer and the employees' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.*"

¹¹ For a more detailed analysis see, G Casale, *Experiences of tripartite relations in Central and Eastern European Countries* (2000) 16/2 *The International Journal of Comparative Labour Law and Industrial Relations*.

¹² Directive 2002/14 established a framework for informing employees and consulting with them in the establishments in the European Community. It applies to all undertakings employing at least 50 employees or establishments employing at least 20 employees in the European Community, according to the choice made by the Member States.

¹³ Article 2 (f) of Directive 2002/14/EC.

of information. Consultation is defined by Directive 2002/14/EC as “the exchange of views and establishment of dialogue between the employee representative and the employer.”¹⁴

Co-determination creates an obligation to agree; therefore, it creates a single will in the decision-making process. With other words, co-determination is more than a consensus in a subject matter between the parties. Consensus of parties in individual cases is reached by two, albeit concordant declarations of an employee and an employer. Another important difference is that consensual decisions are only binding on the parties, whereas agreements concluded through co-determination could be binding on others as well. For example, a workplace agreement concluded by works councils and employers on safety and health related matters applies to all employees. Co-determination naturally requires information and consultation. It could appear in distinct levels, via works councils and, in some cases, as board-level participation. Co-determination exists in a limited scope both in terms of subject matter and in industrial relations traditions providing for such a right.

There are important differences in the organisation structure. Traditionally, trade unions have autonomous organization, separate and independent from that of employers. Employee participation, on the other hand, does not require a separate organisational structure. Representatives are executing their participatory rights in accordance with the structure of their respective employers. The differences in the organisation structures lead to the next differentiating factor: on the one hand, a trade union is a form of indirect representation: the representatives are delegated in accordance with the organisation’s internal structure and regulations, trade union officers represent the union’s interest. Participation, on the other hand, is based on direct representation, where representatives are elected directly by the employees and they are responsible directly to their elector, namely employees.

There are historical differences too. The origins of trade unionism go back to the 19th century and are related to the deterioration of working conditions in the era of industrial revolution. Participation took an autonomous legal and organizational form only in the years following the First World War in Europe. The idea was, by and large, associated with the principle of economic democratization in the Weimar Republic in the 1920s (Naphtali, 1968). However, some sort of participation was established in other European countries around that time: the Whitley Councils¹⁵ influenced the creation of works committees in the United Kingdom in 1918, laws on works councils were issued in Austria in 1919, in Czechoslovakia in 1920, and some forms of factory committees were recognized in Russia in 1917. However, the rise of the national socialist ideology set aside the participation movement until the end of the Second World War. Then, in the early post-war years the idea was revisited and widely debated in the then Federal German Republic. On an international level, participation became topical in the 1960s and made headway especially in America and in some countries of Asia.

¹⁴ The conditions are further articulated by Art. 4 (4) regarding the appropriate timing, method and content of the consultation.

¹⁵ Whitley Councils, also called Joint Industrial Council, were originally a series of councils made up of representatives of labour and management for the promotion of better industrial relations. The Councils were named for J. H. Whitley, chairman of the investigatory committee (1916–19) who recommended their formation, were first instituted as a means of remedying industrial unrest. Many of them later developed into wage negotiating bodies.

2.1.1. Single and Dual Channel Systems

Employee participation, irrespective of its degree of evolution or stability, is a part of a complex system of collective relations within an enterprise. National models of collective representation have an apparent influence on participation methods. On the one hand, in certain national systems, negotiating and participatory methods have developed on the basis of a single-channel model of union representation, as no *a priori* distinctions exist between the holders of the rights of information, consultation and the holders of the collective bargaining powers. Thus, the same actor can be at the same time representatives of workers at the workplace holding participatory rights and be a bargaining party. In single-channel models, enterprise-level employee representation is often carried out by external trade unions.

On the other hand, in other national systems, the dualism of the two concepts is apparent. In dual channel models the holders of involvement rights and the holders of bargaining powers are separate. In this model workers' general representation in the enterprise is entrusted in a single body elected by all workers, while unions are guaranteed autonomous forms of presence at the workplace, which allow them to protect the rights of their members. Legal provisions generally govern electorate procedures, and ensure that democratic principles are formally respected. A dual-channel model exists, for example, in Germany, which can be characterized by the autonomous sphere of the co-determination, consultation and information procedures of works councils, even though that these processes could, in some cases, lead to company-level agreements.

The relationship between participation and collective bargaining is very complex, in some national contexts the exact borders are not easy to detect. A theoretical distinction assumes that participation is rooted in and is operated through the concept of cooperation rising from the shared goals of employers and employees. Collective bargaining, in contrast, is assumed to be based on the conflicts of interest of the parties. Recent developments in national industrial relations, however, contradict this distinction, making the material boundaries between their respective areas of autonomy uncertain.¹⁶ Even the path followed by the European Union combines elements of two models. The EU lawmaker does not have a preferred model,¹⁷ a certain degree of interaction emerges in Directives between collective bargaining and employee involvement rights.¹⁸

Also, the contraposition of unions and workers' direct representation is tempered by the fact that works council representatives are often union members.¹⁹ A number of factors play part in this development, most notably unions' right to develop autonomous forms of workplace

¹⁶ See, for example, the recent changes in the Hungarian system, whereby works councils are allowed to conclude a collective agreement-like contract with the employer, covering all aspects of the employment relationship, except wages (Section 268 of the Hungarian Labour Code (Act No 1 of 2012)).

¹⁷ Art 153 of TFEU (ex-art 137 of TEC) does not give the Union specific competencies regarding the right of association, the EU lawmaker can only provide for the rights of employee representatives.

¹⁸ Under Directives 2001/86 and 2003/73 collective bargaining is intended to select and regulate the forms of and the arrangement for involvement, and in collective redundancy procedures, consultation with the workers in intended to reach an agreement (Directives 98/59 and 98/50).

¹⁹ See the former Hungarian Labour Code, which linked union representativeness to the results of the works council elections (Section 29 Para 2 of Act No 22 of 1992).

representation not solely to protect their members, but to create an effective communication channel to formulate a union's strategy.

Due to the different traditions of industrial relations among the Member States, there are many different forms of representative structures in the European Union. As a possible classification, the European Company Survey lists employee representation at company level as follows: single channel representation, where works councils are the sole eligible employee representation structure (examples are Austria, Germany, Luxembourg and the Netherlands); dual channel representation, where both types of representation can be found, but works councils have a stronger role (examples are Belgium, France, Italy and Spain). In some Member States, the union-based system is present together with works councils (examples are Poland, Romania, Slovakia, the UK, and to some lesser extent, Ireland); dual channel representation, with trade union shop stewards playing a prominent role (examples are Denmark, Finland, Portugal, Slovenia and Croatia); and single channel representation, where trade unions are the sole representative bodies (examples are Cyprus, Malta, Sweden and Turkey).²⁰

2.2. Direct Participation – Quality Circles

Quality Circles (QC) appear as the basic form of employee participation, a forum that unites shop-floor workers, first-line supervisors, section and middle managers and trade union officers who freely and informally discuss issues of production and possible development of work conditions. Operation and themes of activity of the QC is based on the workers spontaneous choice and surveys show that improvements of productivity and quality, working conditions, development of human relations are usually on the agenda.

QC is often associated with the Japanese production methods. In the 1960s labour productivity of Japanese manufacturing industries was the lowest of ten major OECD countries (OECD, 1970). Japanese companies attracted increased attention when, as a response to low efficiency, scientific quality control was introduced (Goldstein, 1985). The accumulated rise of quality circles could be explained as the companies' response to the mounting shortage of qualified labour (especially engineers and technicians) in the rapidly expanding economy. However, the low growth period after the oil shocks of 1970s triggered the real organizational changes at majority of the established companies (Tsuneki & Matsunaka, 2008).

According to the Japanese Industrial Standard (JIS), the term 'quality' is interpreted in the broadest sense to mean 'everything that can be improved'. Thus, quality is not only associated with products and services or the way how machines are operated, but also includes all aspects of human behaviour (Watanabe, 1991). Thus, participation in a QC is usually a part of workers' duties and the activities tends to extend beyond regular working hours and are usually unpaid. However, the unremunerated, voluntary participation of workers is based on economic motivation: an uncooperative attitude would result in a poor evaluation of the employee and endanger not only the chances of promotion or bonuses, but the individual's position within the group. In Japanese methods advice and guidance on establishment of a QC are provided by either a unit manager or a special person designated as QC promoter, then

²⁰ Employee representation at establishment level in Europe – European Company Survey 2009, the on-line report is available at http://eurofound.europa.eu/sites/default/files/ef_files/pubdocs/2011/43/en/1/EF1143EN.pdf.

workers select their circle leader among the participants, who are either chosen to become members or volunteer to do so, and as a result, 83 per cent of the total workforce is participating in QC activities.

The Japanese way of operating QCs is often compared to its Western counterparts, which tend to not achieve equally high results on productivity improvement. The difference in efficacy is often explained by the detached nature of the Western QC; it is argued that since the companies do not try to promote the movement as an integral part of corporate management, workers quickly become disillusioned and their enthusiasm gets quickly extinct (Cole, 1983-1984).

2.3. Financial and Board Level Participation

Financial participation is a term applied to the various forms of employee profit-sharing and share ownership schemes which give employees a financial stake in the company for which they work. Usually a part of the profit is paid to employees in addition to their wages. This form of participation can also be characterised by sharing property rights with employers and it gives employees a residual right to the company's profit. Neither profit-sharing nor shared-ownership schemes are necessarily associated with employee participation in corporate governance. In theory, stockownership may permit influence on decisions, but in practice it is a fairly limited option. Several studies confirmed that financial participation as a sole incentive has limited impact on business performance and employee involvement; but when it is combined with other policies (like professional trainings, job security or other forms of direct or indirect participation), the scheme may be positively linked with employee participation.²¹

Workers' representation on company boards is understood as one step further in changing the power structure in the economic field (Weiss, 2006). While in most Member States of the EU board-level participation is an important component of corporate governance, company law regulations on the relationship to the company of employee representatives in the highest enterprise organs reflect the broad spectrum of different national conceptions (Kluge & Wilke, 2007).

Employee participation is referred to in Council Directive 2001/86/EC (supplementing the European Company Statute) concerning the involvement of employees.²² Article 2(k) defines participation in particular terms as "the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of the right to elect or appoint some of the members of the company's supervisory or administrative organ; or the right to recommend and/or oppose the appointment of some or all the members of the company's supervisory or administrative organ". Council Directive 2003/72/EC

²¹ See for example, M. Festing, Y. Groening, R. Kabst and W. Weber (1998): Financial participation and performance in Europe, *15 Human Resource Management Journal*, 54–67; P. Kalmi, A. Pendleton, and E. Poutsma (2006): The Relationship between Financial Participation and Other Forms of Employee Participation: New Survey Evidence from Europe, *27 Economic and Industrial Democracy*, 637-667; A. Pendleton, E. Poutsma, C. Brewster and J. van Ommeren (2002): Employee share ownership and profit-sharing in the European Union: incidence, company characteristics, and union representation, *8 European Review of Labour and Research* 47-62.

²² Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22–32.

(supplementing the Statute for a European Cooperative Society) repeats this definition of participation.²³

²³ Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L 207, 18.8.2003, p. 25–36.

PART II. – THE DUAL NATURE OF EMPLOYEE INVOLVEMENT

1. Weimar Origins

The institutionalized system of works constitution and the form of employee representation through works councils are generally connected to the labour movements of the Weimar Republic. However, some rudimentary forms of such representation could be found in an earlier stage of history. At the beginning of the 19th century, to keep trade unions out of the plants and to provide more legitimacy to employers' policies, employers voluntarily established some forms of employee participation. Most of these shop committees were unsuccessful due to the limited power provided to them and the strict limitations of their functions to unimportant issues. However, in 1898, during a big strike in the mining industry, strikers sent a delegation to Kaiser Wilhelm II to seek his help in settling the industrial incident and to ask his support regarding the establishment of shop committees. The Emperor declared himself in favour of the shop committees and signed the 'Berlin Protocol', which granted the right to miners to set up shop committees (Stern, 1925).

The Works Council Act (*Betriebsratgesetz*) of February 4, 1920 was a part of the framework established by the Weimar Constitution far ahead of its age.²⁴ Article 165 of the Weimar Constitution provided that workers and employees, in order to look after their economic and social interests, have to cooperate with employers on an equal footing regarding the regulation of salaries, working conditions, as well as in the entire field of the economic development of the forces of production. The scheme provided for a parliamentary form of governance, similar to and parallel with that of the political state. The lowest unit, the Enterprise Workers Council, represented the interest of employees on a workplace level. The next unit in the industrial field was the economic district, represented by the District Works Council. The District Workers Councils were to be made up of an equal number of representatives of capital and labour. Finally, the highest unit was to be the nation itself, governed by the Reich Economic Council, also to be composed by the elected representatives of labour and capital in the same way as it was to be at the District Workers Council.²⁵ The detailed regulations of Factory Workers Councils were promulgated in the Act on Works Council, but District Workers Councils and the Reich Economic Council were never set up.

The Act on Works Council constituted the most extensive and most important piece of social legislation of the era. It covered almost every aspect of labour and social legislation, like collective agreements, labour exchanges, mediation and arbitration. Even though the final text of the law was compromised, its significance is unquestioned. (Stern, 1925)²⁶

²⁴ Adopted on August 11, 1919. The Act was abolished and replaced by the Act on the Order of National Labour on the 20th of January, 1934 that based the works constitution on the basis of the "Führerprinzip".

²⁵ Article 165 of the Constitution of the Republic of Weimar.

²⁶ The first draft of the Act was heavily contested by both employers and trade unions. The proposal was turned over to a special committee to balance the needs of various political parties. For example the works council co-

In the light of the provisions of the Weimar Constitution, the dual nature of employee involvement appears in a sprouting form in the Works Council Act. The human rights approach is apparent in the concept of 'collective economic interest' of the employees and the envisaged parliamentary form of interest representation through the District Workers Council and the Reich Economic Council. This decision making process mirrors the Sinzheimerian ideal of economic democracy. Sinzheimer argued that involvement in the formation of their economic conditions empowers employees with real freedom in their employment, which they otherwise cannot enjoy in the process of negotiating their individual contract due to the imbalance of power between the contracting parties (Sinzheimer, 1936). In Sinzheimer's views, the democratization of the economic sphere is necessary to free employees from subordination in employment relations, which is essential to safeguarding their human dignity (Dukes, 2011). The economic aspect shows that the improvement of the economic productivity of an establishment is as a common goal of both labour and capital, for which they have to strive in a cooperative manner.²⁷

However, works councils were never set up in the envisaged way. The ambiguity between the spirit of the law and its actual provisions could be detected in the repetitions and the unclear provisions used by the law. This vague language could largely be explained with the political unrest characterizing the post-war times.²⁸ Employers were frightened by the aggressiveness of extremist trade unions and soviets which spontaneously sprang up after the 1918 revolution and gathered increasing political and industrial powers. The amazingly rapid growth in membership of the socialist union was also an alarming sign of their increased power.²⁹ Thus, the establishment and the empowerment of works council represented the interest of capital to pacify the radical left at workplaces, but there was no genuine intention to share managerial prerogatives. Therefore, nominal rights were given to works councils to monitor the compliance of employers' practices with the employment regulations, but it was not accompanied by executive power.

The establishment of works councils was also an acceptable solution for trade unions, to keep extremists outside of their gates. Despite the successful incorporation of the system of works councils, there were fields where trade unions and works councils had to clash with each other. The friction resulted from the different objectives of the two organizations and from the fields of activity. The regulations concerning works councils interfered with the already existing schemes of trade union operation. According to the theory of economic constitution, works councils were supposed to be first and foremost representatives of workers at the establishment

determination right on hiring was eliminated, but on dismissal it was retained. The weakening of the power of works council was met with an outburst of opposition, delegations were continuously sent to the special committee to renegotiate the provisions, and during the second reading of the law, over 100,000 workers demonstrated at the Reichstag - the demonstration was ended by the police, shooting into the crowd, leaving 42 persons killed and 105 wounded (Stern, 1925).

²⁷ Section 66 Para 1 of the Works Council Act of February 4, 1920.

²⁸ It has to be also noted that the coming into force of the Act of Works Council coincided with the Kapp Putsch, which was a coup attempt in March 1920, aimed at undoing the results of the German Revolution of 1918–1919, overthrowing the Weimar Republic and establishing a right-wing autocratic government. It was supported by parts of the military and other conservative, nationalistic and monarchist forces.

²⁹ In October 1918 the socialist unions had a total of 1,648,313 members, while in 1920 the total membership was over 7,000,000. A possible explanation given by Stern to the phenomena is that the returning soldiers and the unorganized and untrained workers who joined the German soviets automatically became members of the local trade unions (Stern, 1925).

and they were in charge to protect all employees regardless of their union affiliation. Moreover, works councils were in charge to safeguard industrial peace within the establishment to ensure continuous, high level productivity. Thus, responsibilities of works council would have had to supersede those of the unions. Some of the unions, therefore, complained that the operation of works councils hampers the growth of trade unions within the establishment (Guillebaud, 1928).

A clash between trade unions and works councils was also apparent about the issue of strikes. As the keepers of industrial peace, the law obliged works councils to prevent strikes or any other action interfering with the continuation of production, and even in case a strike was called by a trade union, workers' representatives were not permitted to lead the action. Thus, admittedly, work councils successfully helped pacifying industrial conflicts, as they had an important role in preventing major wildcat strikes during the 1921-23 inflation, which caused the rapid devaluation of the mark and led to weekly changes of the Government food index, which was the basis of wage calculation (Stern, 1925). The limitations regarding strike activity have remained a distinguishing element of the rights and duties of works councils (Biagi, 1995).

The concept of an economic constitution and the idea of works councils have long survived the overthrow of the Weimar Republic (Fritzsche, 1996) (Mommsen, 1998). The economic democracy theory was much more than the transfer of parliamentary forms of democracy to workplaces, but more importantly it conveyed the principle of democracy and the resolving of industrial conflicts through dialogue. The Works Council Act incorporated the duty of an employer to consider not only the interests of shareholders, but also those of the employees. The contemplation of employees' interest improved the living and working conditions of workers and therefore largely contributed to better social development. Participation also introduced an important limitation on the misuse of economic power of employers. By establishing the long-term development of an establishment as a shared goal of labour and capital, the responsibility for the economic decision was also shared between the parties, but in a proportionate manner, which created a productive balance of interest. When seen this way, participation was an important factor in the stabilisation of the economic and social order. Finally, the Weimar model of participation chiefly influenced the current employee involvement system of Germany, which has had further impact on the European model of participation.

2. Employee Involvement as a Question of Economic Competitiveness

Employee involvement has been in the focus of economic researches for decades, and its importance is still extraordinary. Improvement of workers' influence on management decision making has utmost importance in the quest for competitiveness in the 21st century. However, it shall not be overlooked that even in times when efficiency has a major influence on labour regulations, the primary goal of labour law is to balance the power-inequality between labour and management, employers and employees.

The methods of decision-making naturally affect the dynamics of an enterprises and have been studied by many economic scientists related to corporate theories (Berle & Means, 1932). It is argued that the more participants are involved in decision making, the longer it takes to reach a conclusion, therefore the more expensive the process becomes (Freeman & Lazear, 1995). Costs include direct and indirect elements, such as the time spent by management preparing for the information and consultation processes. In a competitive environment only those firms are able to survive, which deliver their products demanded by customers at the lowest price while covering costs (Alchian, 1950) (Demsetz, 1967). Also, the time delay could easily eliminate profitable market options that require prompt responses from the economic players (Freeman & Lazear, 1995). Moreover, producing outputs at the lowest cost is in the utmost interest of the residual claimants of the company as it increases net cash flows (Fama & Jensen, 1983). Thus, employees' interest in involvement is contrary to that of the residual claimants.

Information asymmetries between workers and management can produce negative outcomes. First, the insufficient information flow between management and ownership leads to increased agency cost (Berle & Means, 1932). Second, the lack of exchange of information between labour and management could also create inefficient social outcomes: workers may fail to inform the management about ways to improve production efficiency, or if employees' needs for voice remain unheard, employees may choose to exit, thus creating more direct and indirect costs for an enterprise (Fama & Jensen, 1983).

Thus, the economic input of employee involvement could not be overseen. Many hypotheses exist on both sides, aiming to prove either the inefficiency or the efficiency of employee involvement. In the following section, examples of various economics theories dealing with participation will be introduced first, then empirical data from recent researches will be discussed. The following table gives a comprehensive overview on the presented economic theories related to employee involvement.

2.1. Efficiency Theories

Economic analysis of employee involvement started with the emblematic question raised by Jensen and Meckling, who asked if co-determination is so efficient, why do managers not choose it voluntarily (Jensen & Meckling, 1976). According to their theory, a firm is a black box operating in a way to maximize profit, and inside this black box there is a nexus of contracts that regulate the relationships between the individuals. Thus, the firm is a legal fiction where the conflicting objectives of individuals are balanced by the framework of contractual relations. Models denying the principle of profit-maximization are rejected by the market and employee participation is eventually abandoned for the traditional shareholder formation despite its inherent agency costs.

In their response to the Jensen-Meckling theory, Freeman and Lazear claim that forms of employee involvement could effectively improve productivity (Freeman & Lazear, 1995). They argue that employee involvement enlarges the total pie what owners and employees need to share, but eventually owners tend to end up with a smaller slice altogether. Thus, absent fiat, employee involvement is not encouraged at enterprises, and employers provide less power than

is socially optimal for institutions fostering employee involvement. Analogously, since the size of the pie gets larger by the greater power of the works councils, employees would prefer more power than is optimal. The optimum level of power sharing also depends on the bargaining system of a country where a firm operates. Their figures suggest that employee involvement fits better to the labour relation systems where pay and other elements of the compensation are determined through relatively centralized collective bargaining.

Social gains from employee involvement can only be maximized if the rules governing information and consultation processes are carefully bound the power of both labour and management, as well as fit the broader industrial relations system in which the representative bodies function. Even though many of the analysed firms voluntarily established employee involvement to avoid unionization, most abandoned them, as the power provided for workers proved to be insufficient, and the alienated workers stopped cooperating with the management. Without real power to affect decision many firms eventually introduced wages and employment conditions in a unilateral manner (Freeman & Lazear, 1995). This pattern highlighted the prisoner's dilemma, showcasing the cooperating-defecting solutions of works councils. When the gains from employee involvement, like any other cooperative arrangements, are based on long-term benefits, austerity measures discourage the operation of voluntarily established institutions.

The benefit of information sharing depends on economic certainty or uncertainty. Management often relies on employee representatives to transmit bad news, such as plant closure to workers, as their credibility is greater than that of the management. By contrast, in affluent times, information given to the employees through their representatives is at the expense of the management. Social gains of full information, including profit information, would be especially valuable regardless of the economic situation, as it could increase flexibility within the organization. Apart from information sharing, consultation also could create enterprise surplus, as new solutions to firm-specific problems that neither party would have revealed separately could be discovered as an outcome of teamwork. However, workers only provide information that management does not have if they are empowered with the right to propose solutions (Freeman & Lazear, 1995).

Employee involvement could not fulfil its role as a voluntary instrument. Moreover, sufficient rights must be allocated to employee representatives; otherwise additional economic surplus cannot be realized. Participatory rights of employees shall be safeguarded both in front of employers and other parties of industrial relations, notably trade unions.

2.2. Path Dependence Theories

The neo-classical approach to corporate governance applies the Darwinian notion of the survival of the fittest and envisages a process of natural selection within the market, which only allows the most efficient formation to survive. The heavily contested proposal of Hansmann and Kraakman in *The End of History for Corporate Law*, suggests that the shareholder-owned corporation has triumphed the contest for survival in the global market, and there is no need for

future research into any alternative models (Hansmann & Kraakman, 2001).³⁰ Hansmann and Kraakman argue that there is a normative consensus that corporate leaders should run the company in the best interest of their shareholders. Models designed to foster employee involvement are misguided experiments that force companies to remain with a less than efficient result.

The evolutionary theory of Hansmann and Kraakman was contested on the ground that evolution is not a unidirectional process, but an open-ended one, which can be reformed (Njoya, 2004). Deakin argues that the evolutionary theory proves nothing more than the ability of the winning model to adapt to a certain past environment the best (Deakin, 2002). It does not mean, however, that this model is the optimal one or that it would be the most suitable one for present or future markets. Deakin's argument emphasises the importance of adaptability: corporations adjust to specific market conditions without any quest for optimality. Adaptation is a long process which is shaped by historical conditions. Thus, institutional survival, or even supremacy, is not decisive.

Theories related to path dependency suggest that the predominance of suboptimal corporate governance systems that exclude employee involvement is unrelated to efficiency. Boyd and Richerson argue that market participants have a natural tendency to adopt the practices of the majority, if this is the optimal choice. This frequency dependent bias assumes that the preconception is based only on the frequency of the practice and not an efficiency evaluation (Boyd & Richerson, 1985). Correspondingly, Klausner implies that markets have a natural preference for the present state and oppose changes, regardless of the efficiency associated with the existing model. Such status quo is present due both to the blind imitation of other firms, and to the high costs of the implementation of an even superior form of governance (Klausner, 1996).

The different factors lying behind path dependence, such as culture, politics and legal systems make opting-out from the established system extremely difficult, even though more efficient alternatives may exist (Roe, 1996). Thus, the high transition costs of deviation may impede socially desirable innovations (Njoya, 2004). Roe and Bebchuk further argue that significant sources of path dependence can be detected in corporate ownership and corporate rules of the different countries, even though their economies might be quite similar to each other (Bebchuk & Roe, 1999). They identified two types of path dependence, one of which is efficiency based. They argue that even if a country's legal regulations were created solely for higher efficiency, the already existing patterns of ownership and governance influence the relative efficiency of the rules. The discussion illustrates that natural selection by itself will not eliminate inefficient structures if players see it as optimal for their own operations. They offer the example of Germany assuming that even if employee co-determination laws changes and make a dual corporate board optional rather than mandatory, as long as labour leaders and other players benefit from co-determination and they have the power to resist changes, the existing model will survive regardless of its efficiency. This demonstrates that not only value maximization and self-interest govern the choice of decision makers regarding corporate governance, but culture and ideology as well.

³⁰ For critics see: D. Kershaw (2002): No End in Sight for the History of Corporate Law: The Case of Employee Participation in Corporate Governance, 2 *Journal of Corporate Law Studies* 34; J. Michie and C. Oughton (2002): Employee Participation and Ownership Rights, 2 *Journal of Corporate Law Studies* 34.

Even though increasing global competition should discourage companies from following inefficient models, globalization so far has not resulted either in the obliteration of outdated models or in standardization. Another example of Bebchuk and Roe is the case of the European Company. Even though the European Commission has been promoting the idea of *Societas Europea*, arguments between the Member States over matters like employee involvement still continue. Even though central political will easily imposes standardised rules, countries remain to follow their already existing patterns. The extreme costs of escaping from an inefficient system by reincorporation have to be considered as well (Bebchuk & Roe, 1999). Further to the above arguments, it could be noted that the lack of effective employee involvement might not be due to the inefficiency of the instrument, but to the path-dependency of the national corporate governance systems. Thus, expecting corporations incorporated in national systems that do not traditionally encourage employee involvement to voluntarily adopt such a system would be futile.

2.3. Property and Human Capital Theories

Property rights theories in economy have addressed the problem of specification of individual rights that determine how costs and rewards are allocated among the participants of an organization. As it was explained above, firms have been seen as legal fictions, a nexus of contracts, whereas individual behaviour in organizations, like managers, employees or stock owners is greatly affected by these contracts. Specific attention has been given to contracts determining the relations between owners and managers, more precisely to those which are separating ownership and control (Jensen & Meckling, 1976).

The separation of ownership and control leads to an agency relationship, where the principal engages another person, the agent, to perform services on behalf of the principal which includes the delegation of decision-making authority to the agent. Delegation of authority to agents (managers) leads to agency cost, which occurs as the sum of the monitoring expenditures by the principal, the bonding expenditure of the agent and the residual loss. In public companies the agency cost is borne by the shareholders, as owners bear the residual risk in the firm. In this model employees are not owners, as they do not bear the residual risk, since they decided not to shoulder the residual risk and to remain at arm's length by contracting for a fixed sum by way of return (Njoya, 2004). Thus, it is efficient to vest ownership in shareholders and not in employees (Jensen & Meckling, 1976).

Property theories disregard two social and economic considerations. First, in years of economic constraints employers increasingly tend to share the residual risks arising from economic uncertainty with employees by lowering wages, deteriorating working conditions or reducing the level of health and safety protection. This forced participation in economic risks indeed leads to lower costs but it leaves the gate open to different forms of exploitation. Second, knowledge-intensive production greatly relies on highly skilled employees with significant firm-specific knowledge. Many economic theories suggest that specialized investments could gain a critical importance in determining the boundaries of firms and the allocation of risks, rewards, and control rights within firms.

The firm-specific human capital will only make employees more productive at their original employers. Becker explores the training investments employers and employees would make; according to his argument, in a competitive labour market employers are only willing to invest in firm-specific trainings and not in those that aim to improve the general skills of their employees, as they will not be able to collect the returns from the latter investment (Becker, 1993). Employees will be able to use the general knowledge at other companies if they choose to exit, whereby the specific knowledge will discourage them from leaving the employer (Lazear, 2009). Thus, it would bring an employer and an employee to be in a bilateral monopoly position (Kessler & Lülfsmann, 2006).

The firm-specific knowledge increases employees' bargaining power as replacing workers with special skills will impose high costs on the employer. In knowledge-intensive industries, like automotive companies, employees are typically paid on an hourly basis and several incentives are available to reduce turnover. By contrast, employees in the garment industry are often treated like subcontractors, and additional benefits are seldom offered to them (Holmstrom & Milgrom, 1994).

Human capital is not easily tradable and neither the firm nor any of its participants can own it. However, there are theories aiming to combine property and human capital concepts (Blair, 1999). If ownership involves the right to make decisions and an owner receives whatever remains after all payments specified by other contracts have been paid, all parties who invested in the firm, including shareholders and employees, should share the rights entangled in ownership. Where firm-specific human capital is important, property rights need to point toward employee control of the firm or at least participation in management. Otherwise employees, having the fear that the employer strips them off from the rents earned by the assets, will underinvest their human capital to the firm. Such action could negatively affect competitiveness, especially in knowledge-intensive production. Though the idea of risk-sharing has quickly (re)gained popularity, employees' right to involvement in decisions that significantly affect their daily living has not yet attracted that much recognition, not even as a means to retain skilled workforce.

2.4. Human Resource Management Theories

Human resource management deals with policy areas like selection, training, job design, compensation, performance appraisal, communication, and employee relations. Employee involvement, from a human resources management perspective, acknowledges that employees and employers have different but legitimate interests in the employment relationship. Managers are no longer seen as the sole custodians of authority, and employees can bring their workplace experience to the decision-making table, therefore decisions are better supported. Involvement in decision making provides employees with an opportunity to examine management's motives and the consequences of various options before settling on a binding decision. Thus, participation has long been in the scope of human resource management researches and has been studied from an organizational efficacy point of view (Dachler & Wilpert, 1978). Where employees had a greater amount of influence on decision making both the satisfaction level and the productivity of workers are higher. However, it has also been argued that the magnitude of

the positive effects of employee involvement is so small that it casts doubts on the overall practical benefits of the instrument (Locke, et al., 1986).

The usual critical standpoint of employee involvement from human resource management point of view is related to the effects of the traditional agency problem, which negatively influences the organizational outcomes. Delegation of decision-making rights to workers increases the agency problem as the more participants are involved, the more sluggish the decision-making process becomes. The increased costs, the time and the efforts to coordinate the decisions are likely to have negative effects on the overall performance of the firm (Kandel & Lazear, 1992).

Involvement increases the employees' commitment and trust, reduces alienation and resistance to change. These factors motivate employees to work harder, which leads to increased productivity (Leana, 1987). Participation programs could enhance organizational performance by providing information to managers that is not otherwise revealed to them with autocratic management methods (Leana & Florkowski, 1992). Information sharing and involvement in decision making successfully reduce organizational change cynicism (Brown & Cregan, 2008). However, it has been increasingly recognized that when the different techniques of information sharing and participation are not accompanied by the sincere intention of the management to involve workers in decision making, employees quickly lose interest in employee involvement. This voluntary withdrawal from participation could lead to the false impression that employees are not interested in involvement.

2.5. Behavioural Economic Theories

Behavioural economics is a method of economic analysis that applies psychological insights to human behaviour to explain economic decision-making (Simon, 1959). It first gained attention in the 1950s, as a new direction in microeconomics, and after the financial crisis in 2007 it excited even greater interest. Formerly, descriptive microeconomics was relatively uninterested in the behaviour of individual economic agents, unless if it was necessary to provide a foundation for macroeconomics. Normative microeconomics did not need a theory of human behaviour either, from its perspective the only relevant question was how people ought to behave, not how they actually behave. Thus, classical economic theories of markets with perfect competition and rational agents were considered as deductive theories that did not require contact with empirical data once their assumptions were accepted.

Combining psychology with economic models has brought a completely new perspective. Rather than correlating statistical data or interviewing and surveying people on their views, it uses psychological experiments to test how people react to particular changes to their environment. Behavioural economics tries to offer an answer to the question, why individual economic agents behave in seemingly unreasonable ways, e.g., acting against their self-interest.

Behavioural economists have influenced labour law in basically four major fields: the effect of fair pay on the motivation to work; the effect of security in pay on productivity; the relevance of participation rights and job satisfaction in the workplace; and the differences between opting in and opting out of workplace schemes, such as occupational pensions

(McGaughy, 2015). Labour rights that correct inequality of bargaining power, protect security in pay, and promote workplace participation are able to redress considerable market failures.

Probably the first experiment that had implications on workplace participation was the 'Howthorne experiment' conducted by Elton Mayo at the Howthorne Works of the Westerns Electric Company in 1924 (Mayo, 1933). Mayo's experiment competed with the scientific management theories of Taylor (Taylor, 1911). While Taylor wanted to prove that he could influence productivity by changing working patterns, break times and monetary incentives, treating workers as 'intelligent gorillas', Mayo's studies, by contrast, wanted to influence productivity by recording the reactions, opinions and thoughts of workers. The intended major aim of the Hawthorne experiment was to check the effect of lighting intensity on production. However, due to technical problems, the very research did not lead to any results, so they continued the experiments with work times and break times. The observers were instructed to consult workers when they would prefer breaks and what sort of meals they would want. Productivity went up significantly when meals were given and brakes were introduced, but even more curiously, productivity continued to improve even after these benefits were removed. Though Mayo did not get what he wanted from his experiment, later his data have been studied and have continued to be studied today.³¹

It was proven that the productivity of Hawthorne workers went up because they could genuinely participate in workplace decisions. This could serve as an explanation why workers continued to be productive even though the offered benefits were taken away. People whose work is ignored, disparaged, or discredited feel less motivated to keep working because they see that continued effort produces more harm than reward. There are many ways in which people at work could be acknowledged. Company managements can simply ensure that they foster a culture of recognition and ensure that people in the organisation are not left behind. Results have prescriptive implications for educating labourers about the goals of their work. This implies participation through work councils, representation on the company board and collective bargaining by trade unions (Ariely, et al., 2008). To maximize the protection of information and consultation rights of employees, it is a reoccurring idea to make it compulsory to set up and operate works councils at workplaces.

It was underlined in the Howthorne-experiment that genuine participation generated the better productivity. However, works councils may facilitate information and consultation at a workplace, it would not be guaranteed that employees could exercise their right to participate. Companies barely report to employees or to their representatives more than the legal minimum (McCahery & Vermeulen, 2008). Access to non-financial data has remained a managerial prerogative throughout the EU. In addition, it was found that workforce and workplace conditions are not seen as key parts of sustainability by the management. In the field of codetermination on working conditions, less than ten per cent of the companies provided even partial information. Items going beyond the workplace, including issues related to sustainability

³¹ See for example, Franke R. H. and Kaul J. D. (1978) The Hawthorne experiments: First statistical interpretation, *American Sociological Review*, 43(5), 623–643; Adair, J. G. (1984). The Hawthorne effect: A reconsideration of the methodological artifact. *Journal of Applied Psychology*, 69(2), 334–345; Stephen R. G. Jones (1992): Was There a Hawthorne Effect? *American Journal of Sociology* 98(3), 451-468; Wickström G, Bendix T. (2000): The "Hawthorne effect"--what did the original Hawthorne studies actually show? *Scandinavian Journal of Work, Environmental, Health*, 26(4), 363-7.

were not reported at all (Cremers, et al., 2013). At the companies examined, sustainability was clearly linked to corporate social responsibility (CSR) policies and non-financial reporting was often treated as a marketing tool to develop responsibility. However, even in this sense, these tools were mostly used to fulfil the needs of shareholders and less focused on those of the employees. Particularly in Greece and Bulgaria it was found that even those companies that have voluntarily put on international reporting obligations are reluctant to disclose information related to environmental issues, health and safety matters at work, business strategy and marketing.

The recent financial crisis has brought another aspect to non-financial reporting: European Companies tend to increasingly consider CSR and sustainability as luxuries in times when elements of traditional social dialogue are at stake. Parallel to this phenomenon, they show significantly less respect for human rights, labour standards and environmental consciousness (Cremers, et al., 2013).

These findings underline the importance of genuine employee participation over the role of compulsory workplace settings. The mere obligation to provide information on pre-set matters and consult employee representatives does not create a dialogue between employers and employees. By creating dummy institutions to put a rubber stamp on employers' decisions could simultaneously be a pretext for abolishing basic labour or human rights. But the obligation to protect the right of participation cannot be vested solely in the state actor or the employer. Genuine participation also requires the duty of understanding the importance of involvement and of activity on the employees' side.

3. Employee Involvement as a Human Right Issue in Europe

Robert Dahl argues that people possess an inalienable right to govern themselves in a democratic process (Dahl, 1985). If democratic decision making is required on a state level, then it is also justifiable on a workplace level. However, the right to be involved in issues related to a workplace gained recognition much later than unionism, and its gradual and partial acknowledgement is still very dependent on political regimes. Even though it was already realized after the First World War that economic prosperity and social democracy cannot be achieved without the protection of the dignity of workers (Sinzheimer, 1927), employee involvement was only incorporated in human rights instruments in the late 1980s, and notably, only in Europe. The controversy about the acknowledgement of labour rights as human rights is even more palpable regarding the right to be involved in decision making at the workplace. This chapter first analyses the paradox of labour rights as human rights in general, and then reviews the existing hard and soft law instruments concerning the right of employee involvement.

Features of the globalized economy have several adverse effects on working conditions, economic standards and collective rights. These new trends also highlighted that working conditions and patterns of economic and social conditions are highly interdependent. Thus, the need for the better protection of employees has emerged in the past decades. Even though

workers' rights are acknowledged as human rights and appear in all major human rights instruments, relatively little attention has been devoted to them compared to the forces of globalization (Alston, 2012).

Advocates of human rights and labour rights “run on tracks that are sometimes parallel and rarely meet (Bogg & Novitz, 2014, p. 323)”, and this paradox is rooted in the different purposes and personal scope of legal fields. While human rights are primarily oriented toward limiting the power of the state, labour rights predominantly aim to limit the power of private actors in the market. Regarding human rights, principal right-holders are individuals, while labour rights are more collectively orientated. As opposed to human rights, which are universal and possessed by all human beings by virtue of their humanity, the entitlement in case of labour rights can be defined as the set of rights that humans possess by their status as employees (Kolben, 2010). However, this status is rather fluid and the identity of the beneficiaries of labour rights is contested.

According to Alexy, normative questions can be divided into ethical and legal-doctrinal questions (Alexy, 2010). The former one addresses why individuals have rights and which right they have; the latter one deals with the question whether a legal subject has particular rights within a legal system. In the first case, the question is not whether the legal system acknowledges a certain right, but whether the norm that stipulates it is applicable to a given individual. In the second case, the existence of the right in question is also doubtful.

Regarding Alexy's first preoccupation, the personal scope of the right to involvement requires a closer inspection (Alexy, 2010). The beneficiaries of participatory rights are employees. Human rights instruments providing for the right to involvement also stipulate that the definition of employees lies in national legislations or practices of member states or contracting parties. This regulatory technique raises two questions: one is whether employee involvement is an individual or a collective right; and the other one is whether the vague personal scope affects the level of protection these international legal instruments can provide.

The scope of right-holders forms an essential element of collective right theories.³² Whereas the theories themselves vary greatly, it seems that a consensus is reached regarding the defining criteria for collective right: the ultimate interest that the right serves, and the nature of the right-holder (Miodrag, 2012). With other words, when a collective right is repelled, in any case it is the group, rather than any particular individual, who is wronged.

On the other hand, it is questionable whether a group of employees employed by an undertaking is the same in nature as other groups subject to collective rights, for example trade union members? Trade unions are legal entities with representatives, they usually have a solid internal structure and registered membership. Thus, both trade union and its members could easily be identified as right holders. The group of employees on the other hand is a part of an undertaking, it lacks internal structure as their position within an undertaking is defined by a unilateral decision of an employer; and the group has no influence on its membership either. Moreover, individuals could perform work in great many ways for an undertaking. Due to its

³² See for example Hart, H. L. A. (1982): *Legal Rights*, in his *Essays on Bentham*, Oxford: Clarendon Press, pp. 162–193.; McDonald, Leighton (1998): *Can Collective and Individual Rights Coexist?*, *Melbourne University Law Review*, 22 (2), 310–336.; Raz, Joseph (2010): *Human Rights without Foundations*, in *The Philosophy of International Law*, Samantha Besson and John Tasioulas (eds.), Oxford: Oxford University Press, pp. 321–338.

diverse nature, even in state socialist legal theories, the idea that the collective of employees has a special legal nature could not find solid support (Weltner, 1961).

Not all groups can be defined by regulated admissions or membership fees, such as ethnic minorities. On the other hand, a group of employees is different from these groups; as opposed to ethnic minorities, it is unlikely that membership plays a constitutive role in members' lives in terms of adopted values and life perspectives. Also, while social recognition is necessary for the membership of minorities (Alexy, 2010), it is not required for employees, as their 'membership card' is provided by a contract based on which they perform work for an employer. Another striking difference is that while the cessation of membership in groups depends on the decision of a right-holder, employment could be terminated by a unilateral (and sometimes arbitrary) decision of an employer.

The human right nature of employee involvement has long been questioned. The 'older brother' of participatory rights, the right to bargain collectively gained recognition in a much less contested way and now is acknowledged by major human rights instruments. On the contrary, employee involvement first appeared in 1988 in the Additional Protocol to the European Social Charter. A year later, the Community Charter of Fundamental Social Rights of Workers also incorporated it, and subsequently it appeared in the Charter of Fundamental Rights of European Union (CFREU). However, the right to involvement does not appear in human rights instruments outside of the aegis of Europe. The low recognition could raise concerns whether the right to involvement is a fully-fledged human right, even though, both the European Social Charter and the Charter of Fundamental Rights of the EU are indispensable human rights instruments of the European region and their importance is unquestioned.

The European Social Charter is a human rights convention of the Council of Europe, which established a wide range of economic and social rights that are crucial for human dignity. Due to its wide geographic coverage, its role is indispensable in promoting human rights across the European continent. The CFREU addresses issues which form the core of labour law and industrial relations in Europe: freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers' right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), non-discrimination (Article 21), equality between men and women (Article 23), protection in the event of unjustified dismissal (Article 30). Since its entry into force of the Lisbon Treaty in 2009, the CFREU has had the same legal value as the European Union treaties. Thus, inclusion of the right to information and consultation in this instrument signifies the stance of employee involvement as a fundamental human right.

The question whether participation is an individual or a collective right has to be addressed. Article 27 of CFREU states that workers or their representatives must be informed and consulted. Thus, if no representative can be found on an appropriate level, then workers, either individually or as a group, have to directly informed or consulted. Neither the right to be represented, nor the duty to establish a standing body can be found in Article 27. That means the right to information and consultation is vested in individuals, who, when the circumstances so require, can form a representative body for themselves. However, the possibility to elect a standing consultative body does not affect the individual nature of employee involvement as a human right.

Thus, the right to information and consultation should be unconditionally enjoyed by every employee, with a possibility to exercise it with the assistance of a competent and standing representative body. Even though information and consultation are rights which must be guaranteed to employees, they rather represent a duty for an employer to provide this right. Thus, as the very core of the right, it requires an employer to be active in delivering information and consultation (Ales, 2009).

3.1. The regulatory Framework of the ILO

The term workers' participation as used by the ILO means participation in decision-making at the enterprise level. The Philadelphia Declaration calls on the ILO to draw up programs to promote "the cooperation of management and labour in the continuous improvement of productive efficiency".³³ To implement this call, the ILO has created a series of general principles. However, no convention has been adopted on information-consultation; thus, the Organisation uses soft law instruments.

The normative framework of the ILO on information and consultation contains recommendations and declarations – measures, which do not have the binding force of the conventions and are not subject to state ratification. The recommendations list a whole series of themes to be included in information-consultation process at company level, and especially concerning working conditions (like hire, transfer or termination). The overall situation of a company and an explanation of decisions that directly or indirectly affect the situation of the personnel are also addressed by these documents. ILO's soft law instrument indicate the necessity of ensuring a climate of comprehension and reciprocal trust at company level, as well as the importance of timely communication and consultation.

Recommendation Number 94 (1952) on Cooperation at the Level of the Undertaking indicates that it is necessary to promote consultation and collaboration between employers and workers at company level for issues of common interest, which are not covered by collective bargaining or which are not normally subject of other procedures related to working conditions. *Recommendation Number 113 (1960) on Consultation on Industrial and National Levels* recommends appropriate measures for efficient consultation and collaboration to promote a mutual understanding and good relations, to develop the economy, to improve working conditions and to raise the standards of living. *Recommendation Number 143 (1971) on the Workers' Representatives* affirms the need of a consultation before a dismissal of a workers' representative becomes final.³⁴ *Recommendation Number 129 (1967) on the Communications within the Undertaking* is even more explicit about rights and obligations of social partners in times of restructuring, and about rules which are supposed to guide information-consultation processes.

³³ ILO Declaration of Philadelphia, Declaration concerning the aims and purposes of the International Labour Organisation, 1944. Article III. para e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.

³⁴ It is important to note that the duty of consultation is intended to coexist with collective bargaining, not to replace it.

Declarations are resolutions of the International Labour Conference used to make formal and authoritative statements. Although declarations are not subject to ratification, they are intended to have a wide application and contain symbolic and political undertakings by the member States. Adopted in 1998, the *ILO Declaration on Fundamental Principles and Rights at Work* is a commitment by governments, as well as employers' and workers' organizations to uphold basic human values. The Declaration covers four fundamental principles and rights at work, one of which is freedom of association and the effective recognition of the right to collective bargaining.³⁵ The Declaration and its Follow-up provides several ways to help countries, employers and workers achieve full realisation of the Declaration's objectives. There is an Annual Review composed of reports from countries that have not yet ratified one or more of the ILO Conventions that directly relate to the specific principles and rights stated in the Declaration. This reporting process provides governments with an opportunity to state what measures they have taken towards achieving respect for the Declaration. It also gives organizations of employers and workers a chance to express their views on the progress made. Each year a Global Report provides a dynamic and objective worldwide picture on the current situation of the principles and rights expressed in the Declaration. It serves as a basis for determining priorities for technical cooperation. Technical cooperation projects are designed to address identifiable needs in relation to the Declaration and to strengthen local capacities, thereby translating principles into practice. The *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (MNE Declaration) offers guidelines to MNEs, governments, as well as to employers' and workers' organizations in areas of employment, training, conditions of work and life, and industrial relations.³⁶ Its provisions are reinforced by certain ILO Conventions and Recommendations which the social partners are urged to bear in mind and apply to the greatest extent possible. The MNE Declaration provides for no specific ways of monitoring. Even though the ILO regularly collects data to monitor and analyse changes in actual working conditions and the laws which regulate them, such activity mostly contributes to identifying the gaps between law and the actual conditions. It is a tool used to assist the ILO in developing more effective policy responses. However, it does not aim to serve as an instrument to monitor the actual employers' activity or support workers or workers' groups with their individual complaints against an employer who fails to adhere to the instrument.

Even though ILO regulators are well respected supranational non-state actors, these soft law measures have no binding force, monitoring, or adjudication in the background, thus, these measures are not suitable to provide uniform protection to the right to information and consultation. The ILO did not adopt a binding convention on information and consultation within undertakings, the revision of such standard setting has been reoccurring. In 2011 the Governing Body of ILO stated on its 312th session that in order to meet the challenges of globalization and rapidly changing markets, businesses are increasingly seeking for adjustments at workplace which could accelerate their competitiveness. According to the Governing Body it would be essential to provide standards meeting the new needs regarding social dialogue,

³⁵ Other principles are: elimination of forced or compulsory work, abolition of child labour and elimination of discrimination in employment relations.

³⁶ Adopted by the Governing Body of ILO in 1977, amended on its 204th session in 2000 and on its 279th and 295th sessions in 2006.

thus, revisiting ILO related recommendations is advised, including *Recommendation No. 129 on Communication within the Undertaking*. It was suggested that in 2014 the ILO would be dealing with the matter; however, it was eventually not included in the agenda. The question of information-consultation is clarified in one of the chapters of *Convention Number 158 (1982) (accompanied by Recommendation No 166) on Redundancies*. This document deals specifically with the matter of economic, technological, structural or similar redundancies. In the event of such cases, the recommendation specifies that an employer should provide concerned workers' representatives with all relevant information, including the reasons behind an envisaged redundancies, the number and the categories of workers likely to be affected and the period over which these are expected to be implemented, in order to limit the negative effects of the action in good time.

3.2. The European Social Charter

The European Social Charter (ESC) is a human rights convention of the Council of Europe, which establishes a wide range of economic and social rights that are indispensable for human dignity. Due to the wide geographic coverage,³⁷ its role is indispensable in promoting human rights across the European continent. The Charter is, therefore, seen as the Social Constitution of Europe and represents an essential component of the continent's human rights architecture.

The ESC obliges Contracting Parties to adopt or encourage measures enabling workers to have access to the requisite information about their employer as well as to be consulted on matters related to their employment. Article 21 of the ESC provides for the right to information and consultation about the situation of the enterprise and about planned managerial decisions with a potential impact to the employment situation. In order to make involvement meaningful, employees or their representatives have to be consulted in a good time about the proposed decisions. Article 22 concerns working conditions and gives more specific entitlements: it provides for the right to take part in the determination and improvement of working conditions. Taking part in protection of health and safety, in organizing social and cultural services as well as in the supervision of all these is expressly mentioned. Participation in these activities evidently must mean more than mere information and consultation; however, co-determination is not required by the Charter. The notion suggests that under Article 22 a more active role should be given to employees' representatives with the aim of being engaged in a dialogue with the employer.

Article 22 has similar structure to Article 21. First it lists the areas in which participation has to take place, and then provides for the exclusion of certain undertakings. Contracting Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation or practices, to contribute to the determination and the improvement of the working conditions, work organization and working environment; to demand the protection of health and safety within an undertaking; to organize social and socio-cultural services and facilities, and supervise the observance of regulations on the above measures. For example, the Committee underlined in this context determination and

³⁷ The 1961 ESC or its 1996 revised version has been ratified by 43 (10+33) out of the 47 Member States of the Council of Europe.

improvement of the working conditions and working environment implies that workers may contribute, to a certain extent, to the employer's decision making process.³⁸ Appendix 3 clarifies the term social and socio-cultural services and facilities stating that it refers to facilities for workers provided by some undertakings such as welfare assistance, sports fields, rooms for nursing mothers, libraries, children's holiday camps and the like. Appendix 3 also sets it clear that Article 22 does not affect either the powers and obligations of the Contracting Parties regarding the adoption of health and safety regulations for workplaces, or powers and responsibilities of respective monitoring bodies.

A notable case concerning Article 22 was related to the complaint of General Federation of employees of the National Electric Power Corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) against Greece.³⁹ GENOP-DEI and ADEDY challenged that legal regulations in Greece are not in conformity with Article 22 on the grounds that Greek law⁴⁰ made it possible for a collective agreement at enterprise level to derogate from the provisions on remuneration and working conditions set out in a collective agreement concluded at branch level. It was argued that such regulation may encourage systematic deterioration of working conditions, which is in breach of Article 22. The Committee of Ministers in their Resolution⁴¹ concluded on non-application of Article 22. The conclusions on collective bargaining of the report on the high-level mission to Greece in 2011 of the International Labour Organization have been considered. However, it concluded that Article 22 does not concern the right to collective bargaining.

Articles 21 and 22 have common characteristics, such as the legal framework and the personal scope (Kollonay-Lehoczky, 2010). Contracting Parties undertake to promote the right to information and consultation by adopting or encouraging provisions that enable the involvement of workers or of their representatives in accordance with their national legislation and practice. The Explanatory Rules specify that these measures should be effective and adequate.⁴² Regarding personal scope, both Articles are applicable for undertakings operating for gain, therefore public servants and employees of public bodies are excluded from their scopes. The ESC enables Contracting Parties to further exclude employees working for spiritual or ideological undertakings and for small-sized employers, because the specific personal and material resources that are required to fulfil the provisions of information and consultation would mean a disproportionate burden on them.

The ESC and adhering documents provide for the definitions concerning Articles 21 and 22. The Appendix to the Charter defines the term workers representatives as persons who are recognized as such under national legislation or practice. National legislation or practice means that in addition to laws and regulations, collective agreements, other agreements between employers and workers' representatives, customs, as well as the relevant case law is covered by the term. An undertaking is defined as a set of tangible and intangible components, with or without legal personality, formed to produce or provide services for financial gain, and with

³⁸ Conclusions for Armenia, XIX-3.

³⁹ General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece; Complaint No. 65/2011.

⁴⁰ Section 13 of Act No. 3899 of 17 December 2010.

⁴¹ Resolution CM/ResChS(2013)2.

⁴² Council of Europe, Explanatory Report to the Additional Protocol, Para 35.

power to determine its own market policy. The Explanatory Report provides an explanation of the notion of workers or their representatives, applicable for both Articles 21 and 22. According to this specification, the right to information and consultation can be exercised either by trade union representatives or representatives freely elected or otherwise chosen by employees of a given enterprise. There is no restriction on overlapping functions of employee representatives; they could be at the same time trade union officers too. While respecting the importance of autonomous regulations, the ESC's supervisory body, the European Committee of Social Rights (the Committee) repeatedly emphasises that the right to information and consultation cannot be restricted only to workers who are covered by collective agreements.

Regarding confidential information, Article 21 Paragraph 1 also contains special restrictions, stating that certain information which could be prejudicial to the undertaking may not be disclosed or subject to confidentiality. Paragraph 2 of the Additional Protocol enabled Contracting Parties to exclude employers employing less than a certain number of employees from the scope of Paragraph 1 by national legislation or practice.⁴³

3.2.1. Personal Scope

The ESC ensures that information and consultation rights are provided for the great majority of the employees of an undertaking. These requirements are satisfied if 80 per cent of employees are protected under its provisions. The Committee stated that only employees in the public sector are, in principle, exempted from the provisions of Article 21, and in the public sector it is only applicable to workers, who are employed by publicly owned enterprises. Since 2007 the Committee, while deciding on the conformity with Article 21 of the Charter, has been referring to the minimum framework of Directive 2002/14/EC and to the seminal CGT judgment of the European Court of Justice.⁴⁴ Directive 2002/14/EC applies according to the choice made by Member States, to undertakings with at least 50 employees or establishments with at least 20 employees in any one EU Member State. Furthermore, when assessing compliance with Article 21, the Committee considers, in accordance with the CGT-case, that for all categories of employees, regardless of their status, length of service or workplace must be considered when calculating the number of employees covered by the right to information and consultation.

Regarding the case law of the Committee, non-conformity with Article 21 is seldom declared. The Committee decided that *Italy* fails to meet the great majority rule, as rules and procedures for appointing and electing trade union representatives are not applicable to employees with fixed-term contracts, if the contract is for less than nine months. The Committee also stated that the situation in *Croatia* is not in conformity with Article 21 on the ground that it has not been established that legal provisions governing the information and consultation of workers cover all categories of workers and all undertakings. About *Greece*, the Committee concluded that the works council's responsibilities regarding information and consultation of

⁴³ Art 21 Paragraph 1 was not incorporated into the body text of the Revised Charter; however, the Appendix upholds this possibility.

⁴⁴ Case C-385/05, *Confédération générale du travail (CGT) and Others v Premier ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement*, EU:C:2007:37.

workers are exercised only if there is no trade union functioning in the enterprise and these issues were not subject of a collective labour agreement. The Committee held that trade unions thus had a monopoly on representing workers for the purpose of information and consultation. According to the Committee, it had the possibility that a works council representing most non-unionised employees would be deprived of the right to be informed and consulted, while this right would be granted to a trade union representing only a minority of employees. The Committee further pointed out that despite the existence of legislation on works councils since 1988, very few works councils have been established in practice.⁴⁵

Norway's case is quite particular. In Norway the right to information and consultation is mainly governed by collective agreements. In the private sector this right is embodied, *inter alia*, in the national collective agreement between the confederation of Norwegian business and industry (NHO) and the Norwegian trade union confederation (LO). In firms, this right is primarily vested in locally elected trade union representatives (shop stewards) but also in bipartite works councils, which must be established in enterprises with more than 100 employees. Works councils may also be established in smaller enterprises. Besides that, there are several basic private sector agreements that were very similar to the one between the NHO and the LO. The 2005 amend of the Work Environment Act also includes provisions similar to the LO-NHO "basic agreement" regarding employees' right to information and consultation within the enterprise. Other branch legislation includes specific provisions on this subject, such as the Joint Stock Company Act, which applies to all companies with more than 30 employees. The 2005 act requires employers to inform and consult employee representatives in enterprises with more than 50 employees. In 2004, around 250 000 workers in total were officially covered by a collective agreement. There were also approximately 600 collective agreements in the private sector at the same period. All workers, even if they are non-union members, can be covered by a collective agreement. This applies to workers at enterprises bound by a collective agreement. Based on case-law and agreement practice these enterprises are obliged to apply the agreement on unorganized employees in the enterprise comprised by the scope of the agreement. In addition, in a survey conducted by Statistic Norway from 2004, 77 per cent of the participants stated that they are covered by a collective agreement, including the non-union workers. The current report states that during the reference period, approximately 52 per cent of all workers in the private sector who are not covered by the LO-NHO "basic agreement" are, however, covered by a collective agreement. In total, 70 per cent of all workers in Norway were officially covered by a collective agreement during the same period, which means that even though social dialogue is quite advanced in Norway, the coverage still does not meet the great majority requirement.

3.2.2. Enforceability of Information and Consultation Rights

The Committee examines the remedies workers or workers' representatives has if their right to information and consultation under Article 21 has been infringed, particularly with respect to

⁴⁵ Conclusions XIX-3; see, Document ID 2010/def/GRC.

information considered by employers to be confidential. Enforcement methods usually contain the right to apply, either to court or arbitration, imposition of fines. The amount of the penalty is rather diverse, ranging from EUR 6.5 in Estonia to EUR 50000 in Greece.

In rare cases national regulations provide for the nullity of an employer's decision violating the information and consultation processes. For example, in Croatia a decision rendered by an employer contrary to the provisions of the Croatian Labour Code on consultations with works council is null and void. In case of Greece, with a decision of the Minister of Employment and Social Insurance, it is possible, after a justified proposal of the competent Labour Inspector, to impose a temporary pause on an employer's operation for a time interval longer than three days or even a permanent pause of the operation of a particular department, or of an entire enterprise or undertaking.

It is necessary for Contracting Parties to set up a remedial system in their national legislations. In Moldova's case, the Committee found that the situation is not in conformity with Article 21 of the Revised Charter on the ground that it has not been established that sanctions are applicable in case employers fail to fulfil their obligation to inform and consult workers within the undertaking.

3.2.3. Specific Rights of Information and Consultation

While Articles 21 and 22 provide for information and consultation right in general, Article 29 of the Revised Charter guarantees the right for all employees to be informed and consulted in collective redundancy processes. In this regard, information and consultation need to cover ways and means of avoiding collective redundancies or limiting their occurrence and means of mitigating its negative effects. The Contracting Parties could introduce accompanying social measures aiming to redeployment or retraining redundant workers to meet the requirement set forth by Article 29.

However, according to the Explanatory Report, the relevant EU Directives were examined in the drafting process, the term of collective redundancy is not specified by the Charter.⁴⁶ The Committee during the first conclusion cycle concerning Article 29 interpreted collective redundancy as a layoff affecting several workers within a period set by the law and decided for reasons which have no relevance to the workers as individuals, but are related to a reduction or change in the operation of the undertaking.⁴⁷

The purpose of the consultation is provided for by Article 29 requires that sufficient dialogue should take place between employer and employees or their representatives regarding redundancy and the mitigation of its effects. Thus, it is necessary for an employer to provide adequate preliminary information, including the reasons for redundancy, planned social measures, the order in which the redundancies will be made, and the criteria for being made redundant. If such a process does not take place, the Committee concludes on the non-conformity.⁴⁸ This requirement also sheds light on the importance of the timing of the

⁴⁶ Council of Europe, Explanatory Report, 109.

⁴⁷ Conclusions 2003 and 2005, Statement of Interpretation on Article 29.

⁴⁸ For example Moldova (Conclusions 2010) or Sweden (Conclusions 2007).

consultation. However, what qualifies as a good time varies greatly among Contracting Parties from seven days to three months. Moreover, public authorities have to be involved in the procedures, however their role – whether it is the mere information on the redundancies or involvement in the negotiations – is undefined by the ESC or the Committee.

3.3. Human Rights Instruments of the European Union

The Europeanization of industrial relations plays an indispensable role in the strengthening and the further development of the social dimension of the European integration. As a part of the integration process, first the Community Charter of the Fundamental Social Rights of Workers (CCFSR) and subsequently the Charter of Fundamental Rights of the European Union (CFREU) recognized the rights of workers to information and consultation. The approach of Articles 17 and 18 of CCFSR demonstrates the early regulatory techniques of the EU in the social field. They specify the issues on which workers are entitled to be informed and consulted, such as major technological changes, restructuring, and collective redundancies.⁴⁹ CFREU demonstrates the shift away from this approach by referring to Community law and national laws and practices.⁵⁰ The new regulatory technique reflects the very different legal, social and labour relations backgrounds of the Member States better. Thus, the paradigm shifts indeed helped the EU to make a move and to push through long-standing proposals. The following section first provides an overview on the regulations of CCFSR, and then analyses the evolution of the right to information and consultation as a human right under the CFREU.

3.3.1. The Community Charter of the Fundamental Social Rights of Workers

The Community Charter of the Fundamental Social Rights of Workers (CCFSR) was adopted in 1989 by all Member States of the EU, except the United Kingdom. The CCFSR is a political instrument containing moral obligations aiming to guarantee certain social rights in the Member States concerned. The primary scope of the CCFSR concerned the labour market, vocational training, social protection, equal opportunities and health and safety at work. The CCFSR was followed up by action programmes and specific legislative proposals.

Two articles deal with participatory rights. Article 17 stipulated that information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. Article 17 underlined the transnational character of the involvement processes, stating that they had to apply especially in companies or groups of companies having establishments or companies in several Member States of the European Community. Article 18 prescribed that these processes must be implemented in due time, and listed specific cases which had to be treated with scrutiny, such as technological changes which, from the point of view of working conditions and work organisation; restructuring operations in undertakings or in cases of mergers having an impact

⁴⁹ Community Charter of Fundamental Social Rights of Workers (1989), Arts. 17-18.

⁵⁰ Charter of Fundamental Rights of the European Union, Art. 27.

on the employment of workers; collective redundancy procedures; and finally, again in connection with the transnational importance of information and consultation, in situations when trans-frontier workers in particular are affected by employment policies pursued by the undertaking where they are employed.

The CCFSR had declaratory status only; however, it is claimed that it had three effects, which were expected to emerge for the CFREU (Bercusson, 2006). First, the Member States' stronger attachment to fundamental social rights as defined in the 1989 Community Charter, which appears in Article 151 of the TFEU (ex Article 136 of the TEC). Secondly, the Commission's Social Action Programme was directly linked to the declarations of the Community Charter. Finally, CFREU was expected to be used by the European Court of Justice as an interpretative guide in litigation concerning social rights.

Despite the high hopes attached to the CCFRS, the social policy dimension had not become a priority for the reform agenda, which, as it was argued, endangered the enlargement of the EU and undermined institutional reforms. Therefore, the adoption of the CFREU had great importance regarding the social dimension of the EU, as fundamental labour and social standards are determined by the economic and political context which forms their content. Social and labour rights could be developed only when they find a place on the Community's integration agenda. Thus, the inclusion of social and economic rights related to working life into the CFREU confirms that these are to be considered fundamental to the EU social model, what it means to be an EU citizen (Bercusson, 2006).

3.3.2. The Charter of Fundamental Rights of the European Union

The Community Charter of the Fundamental Social Rights of Workers had already stipulated that information, consultation and participation for workers must be developed alongside appropriate lines, considering the various national industrial relations in the Member States. These provisions can be considered precursors of Article 27 of the Charter of Fundamental Rights of the Charter of the European Union (CFREU) The continuing significance of the institution is illustrated by the structure of CFREU: workers' right to information and consultation appears in the Solidarity chapter, preceding Article 28 which contains the traditional right of collective bargaining and collective action. The implication of the Solidarity chapter is that the traditional individual and liberal rights and the social rights, which create networks of solidarity among the citizens of the EU have a fundamental importance for the European Union. Thus, the right to information and consultation is a fundamental right in the context of the EU and Article 27's reference to national laws and practices implies that the Member States are obliged to maintain at least the mandatory standards of information and consultation provided by statutory law or by collective agreements. This provision is rooted in already existing sources in EC law, such as the directives concerning collective redundancies,⁵¹

⁵¹ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16–21.

transfers of undertakings,⁵² and European works councils.⁵³ It is noteworthy that this approach of induction used by the EU was just the opposite that of the Council of Europe's deductive method, whereas the general obligations of information and consultation appeared first, followed by specificities of collective redundancies.

The notion of a workers' representative is contested. Article 27 provides that workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices. On one hand, it is apparent from the phrasing of Article 27 that the employer has the obligation to inform and consult either workers directly, or workers' representatives. Providing direct information and consultation to individual workers could be considered an 'appropriate level' only in very small companies or establishments. Since participation is a collective right and its exercise cannot be restricted to individuals, this practice would contradict the guarantee of the freedom of association provided for in Article 12 of the CFREU. On the other hand, the guarantee of information and consultation to workers' representatives cannot apply only to works councils excluding trade union representatives, as not all Member States of the EU operate a so-called dual-channel system, which distinguishes between representatives elected by the workforce in the establishment and trade union representatives. Thus, workers' representatives shall include trade union representatives together with works councils.

The aim of Article 27 is to protect the interests of the individual worker against the dominant position of an employer in case workers' interests are substantially affected. Apart from the need to protect workers in extraordinary situations, such as collective redundancies and transfers of undertakings, Article 27 also reflects the difficulties associated with globalization of the economy and the increased importance of transnational companies. Large scale international mergers and acquisitions of undertakings could effectively weaken national traditions of workers' involvement in decision-making processes.

National traditions of industrial relations created a huge obstacle during the regulatory process. The previous wordings of Article 27 reveal the quest for the common denominator during the negotiations. The scope of information and consultation is confined to "matters which concern them within the undertaking" was deleted in the final text, thus potentially increased the scope of information and consultation to include matters beyond the undertaking (Blanke, 2006). The reference to "workers or their representatives" was a regression from the earlier formulation of "workers *and* their representatives". This wording contradicts the Community *acquis* in other directives. Earlier references of Article 27 to "all levels" were replaced by the requirement to apply "at the appropriate levels" which could also be considered as step back compared to the initial intention of the legislator. On the other hand, the phrasing

⁵² Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20.

⁵³ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254, 30.9.1994, p. 64–72; the EWC directive as repealed by Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast), OJ L 122, 16.5.2009, p. 28–44.

“information and consultation in good time” was inserted at a later stage, suggesting that the information must be given, and the consultation procedure must occur prior to the final decision of the management.

Even though employee involvement signifies a very narrow part of human rights, and its recognition is rather low, its importance must not be overlooked. The significance of employee involvement in the development of democratic institutions is enormous. The estrangement of people from the handling of their own affairs at a workplace will in the long run lead to the withdrawal of not only the employees but the citizens from participation which is a real danger to democracy. Thus, employee involvement is essential to issues of social justice, human rights and democracy and must be promoted as such. Article 27 has as much or more to do with the protection of human dignity specified in Article 1 of the CFREU than with traditional social rights and the objective of the democratisation of the economy. It expands the scope both of traditional social rights and of practices of democratisation to protect workers' dignity in a globalised economy, society and environment (Bercusson, 2006).

Human rights are primarily oriented toward limiting the power of a state, while labour rights predominantly aim to limit the power of private actors in the market. Regarding human rights, principal right-holders are individuals, while labour rights are more collectively orientated. As opposed to human rights, which are universal and possessed by all human beings by virtue of their humanity, the entitlement in case of labour rights can be defined as the set of rights that humans possess by virtue of their status as workers (Kolben, 2010). However, this status is rather fluid and the identity of the beneficiaries of labour rights is contested. A group of employees is a part of an undertaking; it lacks internal structure as they position within the undertaking is defined by the unilateral decision of an employer; and the group has no influence on its membership either. Moreover, individuals could perform work in great many ways for an undertaking.

PART III. – REGULATORY FRAMEWORK OF EMPLOYEE INVOLVEMENT

1. Information and Consultation

The Directive on informing and consulting the employees was the pioneer legal instrument in which the EU made it obligatory to all Member States to provide adequate measures for employees to obtain regular information and consultation on their employing undertakings. In that sense, the Directive indeed signified a vital complement to the higher degree of harmonization of social laws in Europe and has had major impact in countries with voluntarist tradition (like the UK or Ireland) or in those (mostly new) Member States where employee involvement had not become a genuine part of industrial relations (Kun, 2009).

Directive 2002/14/EC⁵⁴ has had a great significance in national level information and consultation issues in the Member States. The adoption of the Directive was not overly smooth due conflicts of the different national industrial relation systems (Barnard, 2012). The Renault case⁵⁵ gave new impetus to the proposals and the Directive was eventually adopted in 2002. The Directive provides for minimum requirements applicable throughout the Community and leaves the practical arrangements to be defined and implemented in accordance with national laws and industrial practices.

The objective of the Directive is to establish a general framework for informing and consulting employees in the European Union. The Directive provides for a right to be informed and consulted, thus it is not mandatory: if employees do not request it, employers are not obliged to provide information or consult employees (Barnard, 2012). Information is defined as transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it. Employees' representatives are those who are defined as such by national laws and/or practices. Thus, Member States can provide this right either to standing bodies or to individual representatives. Consultation means the exchange of views and establishment of dialogue between employees' representatives and an employer.

An employer is obliged to provide sufficient information in good time and at an appropriate level about the undertaking generally, and to conduct timely information and consultation sessions on specific issues in particular, like where there is a threat to employment, or in situations that could lead to substantial changes in the organisation. The Framework Directive specifies that consultation has to take place: (a) while ensuring that the timing, method and content thereof are appropriate; (b) at the relevant level of management and representation,

⁵⁴ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 80, 23.3.2002, p. 29–34.

⁵⁵ The French car manufacturer, Renault closed its plant in Vilvoorde, Belgium without prior information and consultation of the employees. As the Commission pointed out, the existing legal regulations were not protective enough, if they did not guarantee the right to information and consultation *prior to* the decision of the employer.

depending on the subject under discussion; (c) on the basis of information supplied by the employer in accordance with the notion of information and of the opinion which the employees' representatives are entitled to formulate; (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; (e) with a view to reaching an agreement on decisions within the scope of the employer's powers concerns information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations"⁵⁶ It is also provided for that the representatives of employers and employees shall work in a spirit of cooperation.⁵⁷

The importance of social dialogue and mutual trust between employers and their employees in improving risk anticipation and flexibility is emphasised, because the promotion of employee involvement facilitates the undertakings' competitiveness. Recitals of the Directive further stress the significance of timely information and consultation for companies to compete better in a global environment and declare that the existing legal frameworks for employee involvement both at Community and national level pursued an excessively *a posteriori* approach to the process of change.

2. European Works Council

Directive 94/45/EC⁵⁸ introduced European Works Councils or alternative procedures in order to ensure information and consultation for employees of multinational companies on the progress of the business and any significant decision at a European level that could affect their employment or working conditions. This Directive was repealed and replaced in 2009 by recast Directive 2009/38/EC.⁵⁹ To overcome some of the shortcomings arising from the insufficient measures of the relevant legal instruments,⁶⁰ especially of those related to the unequal treatment of employees concerning procedures for informing and consulting on a transnational scale, the recast Directive adopted measures to enhance dialogue to make it possible to employees to anticipate and manage changes related to the undertakings.⁶¹

The recast Directive pursues a two-stage approach for transnational information and consultation process for community scale undertakings or group of undertakings. The first step is based on the voluntary agreement of labour and management, while the second step, when no agreement could be reached, is the application of the mandatory provisions provided for by Article 7 and elaborated by the Annex of the Directive. The EWC Directive provides for the

⁵⁶ Article 4. of Directive 2002/14/EC.

⁵⁷ Art. 1 Para 3. of Directive 2002/14/EC.

⁵⁸ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 254, 30.9.1994, p. 64–72.

⁵⁹ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 OJ L 16.5.2009 28–44.

⁶⁰ Apart from Directive 2002/14 as referred above, see Directive on Collective Redundancies (Council dir. 75/129/EEC (OJ [1975] L48/29) amended by Council Dir. 92/56/EEC (OJ [1992] L245/13) and Directive on the Transfer of Undertakings (Council Dir. 77/187/EEC (OJ [1977] L61/26, amended by Directive 98/50 (OJ [1998] L201/88) and consolidated in Directive 2001/23 (OJ [2001] L82/16).

⁶¹ Recitals (10)-(15) of Directive 2009/38/EC.

establishment of a European Works Council or an Employee Information and Consultation procedure. Negotiations are put in focus with the aim to activate central management or employees.⁶² The parties could either decide to set up a European Works Council by concluding an agreement on the scope, composition, function and term of service of an EWC; or they could agree to implement an Information and Consultation Process (ICP) instead, a less formalized form of employee involvement.⁶³ Whether a EWC or an ICP is established, the minimum requirements provided for by the Directive do not need to be incorporated into the agreement.⁶⁴

In the spirit of autonomy, the parties are entitled to determining the nature, the composition, the function, the mode of operation, the procedures and the financial resources of an EWC.⁶⁵ If an agreement is reached, it means that the parties are almost free to set the content on the information provided to employees as long as it meets the requirements of the Directive. In case the parties agree to set up an EWC, the agreement shall include the details of the undertakings covered by the agreement; the composition of the EWC; the number of members; the allocation of seats and the term of office; the function and procedure for informing and consulting the EWC, the venue, frequency, and duration of meeting of the EWC; financial and material resources to be allocated to the EWC; the duration of the agreement; and the procedure for its renegotiation.⁶⁶

In case the parties decide to set up an ICP instead, they ought to specify the methods by which employees' representatives have the right to meet and discuss the information transmitted to them. Data must contain information on transnational matters considerably affecting the employees' interest.

Regarding confidential information, the EWC Directive allows Member States to adopt national regulations to ensure that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence.⁶⁷ The same could be applied to employees' representatives in the framework of an information and consultation procedure. A Member State could provide, in specific cases and under the conditions and the limits laid down by national legislation, that central management is not obliged to transmit information when, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or be prejudicial to them.

The concept of confidentiality is not well addressed. While Article 8.1 provides for that confidential information must not be revealed to third parties, it does not specify either what type of information can be considered as confidential for the purpose of this Article or who these third parties are. Thus, it is the national legislator who has the opportunity to define the notion of confidentiality. This provision must be read strictly in the light of the principles of transparency and mutual trust. Otherwise the objective of the EWC Directive would be inverted and EWC would become a "secret club whose members were sworn to secrecy" (Picard, 2010, p. 110).

⁶² Art. 5.1. of Directive 2009/38/EC.

⁶³ Art 4.1. of Directive 2009/38/EC.

⁶⁴ Art. 6.4. of Directive 2009/38/EC.

⁶⁵ Recital (19) of Directive 2009/38/EC.

⁶⁶ Art. 6. of Directive 2009/38/EC.

⁶⁷ Art. 8. of Directive 2009/38/EC.

Another aspect of confidentiality was highlighted in the Grøngaard case.⁶⁸ The Court ruled that the Directive on Insider Dealing⁶⁹ precludes the employees' representative from disclosing confidential information to any third party, unless such disclosure is made in the normal course of his employment, profession or duties, unless there is a close link between the disclosure and the exercise of his employment, profession or duties and that disclosure is strictly necessary for the exercise of that employment, profession or duties. However, due to the lack of related cases, it has not been addressed whether informing employees would be in a scope the exercise of duties of the employees' representative.

The two stage process of the EWC Directive was designed with an aim to encourage employers to be open to employees' initiatives (Barnard, 2012). By reaching an agreement an employer can avoid applying mandatory provisions that are formulated with a penalizing nature. However, these minimum requirements do not create the impression that the procedure provided for by the Annex is equal to a worst-case scenario. The subsidiary requirements provide for one information and consultation meeting per year, based on the written report drawn up by the central management.⁷⁰ Information shall cover structure, economic and financial situation of business; probable business development, production and sales; employment situation and future trends; investments and substantial changes concerning the organization of business; introduction of new working methods or production processes; transfers of production; and mergers and cutbacks or closure of undertakings or collective redundancies.⁷¹ Even though this list is lengthy, the data is combined for many compulsory and voluntary reports transnational undertakings are otherwise bounded by, therefore neither the quality nor the quantity of information put an excessive burden on employers.⁷²

3. Participation as an Evolving Scenario

Reflecting to the recent financial crisis and its effect to businesses, the Opinion of the European Economic and Social Committee (EESC) states, that adopting a multi-stakeholder approach involving the investors, employers and employees and a positive approach towards efficient social dialogue is necessary to mitigate the negative effects of the crisis. The EESC opinion recalls that business sustainability also strongly relies on the different forms of employee involvement, such as information, consultation and, where applicable, co-determination too. To achieve a good business management concept, the voice of employees has to be respected in business decisions. This obligation also follows from Article 27 of the EU's charter of

⁶⁸ Case C-384/02, *Criminal proceedings against Knud Grøngaard and Allan Bang*, EU:C:2005:708.

⁶⁹ Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing, OJ L 334, 18.11.1989, p. 30–32, replaced by Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), OJ L 96, 12.4.2003, p. 16–25.

⁷⁰ See Annex 2. In addition to this, a select committee comprised of no more than five members of the EWC shall be set up. This committee can be informed of important decisions matters significantly affecting the employees' interest, like collective redundancies, factory closures and so forth. Upon its request, the select committee has the right to meet the management as soon as possible.

⁷¹ Annex 1. to Directive 2009/38/EC.

⁷²For example the Global Reporting Initiative on sustainability.

Fundamental Rights, making employee involvement a part of the legal framework of European democracy (European Economic and Social Committee, 2013).

The EESC urges the European policymakers to create appropriate incentives and improve the requisite legal framework, without interfering with the national competences, however. Further, the EESC implies that European company law shall cater for more employee involvement. The role what employee involvement could play in regaining economic competitiveness underlines the need for corrective actions against the short-term of corporate values and for increased corporate transparency. It is suggested that a sustainable company is centred on the principle of 'fair relationship', which is a part of the multi-stakeholder management approach.

The Opinion outlines possible new directions to improve employee involvement rights on a transnational level. The standpoint of the opinion is to safeguard national diversity to keep European businesses competitive while standardizing of divergent definitions to ensure consolidation and provide for more legal certainty. Making employee participation in company boards obligatory and creating binding minimum standards for restructuring are also key elements of the proposal.

Although the Opinion envisages an innovative approach to mitigating the negative effects of economic turmoil by strengthening the role of employee involvement in business management, it only focuses on business activities located in the territory of the European Union. Such limited personal scope overlooks that transnational companies often operate subsidiaries outside of the Member States. The activity of these undertakings significantly contributes to the overall performance of a group. To mention but one aspect, transnational companies often benefit from cheap labour force and low influential power of employees working in non-Member States. While acknowledging that the different, albeit generally lower, standards of the non-EU countries constitute a competitive edge for most European multinationals, consolidation of business practices cannot be complete if it does not reach out to branches situated outside of the European Union.

While the theoretical discussion has been going on for many decades, the economic crisis has provided a solid reference point for researchers to study the interrelatedness of firms' performance and the different forms of social dialogue from 2007 onwards. Although the negative consequences of an economic turmoil typically reach the labour market with delay, this time the effects were almost immediately visible, forcing social partners to act quickly. Even though the crisis was described as an "omnipresent phantom in the autonomous European inter-professional social dialogue" (Clauwaert & Schömann, 2011, p. 75), the various forms of social dialogue at national, sectoral and company levels have been proven to be effective instruments in mitigating the negative social and economic impacts of the crisis.

Differences in methodology and scope make it impossible to fully compare researchers' findings, it seems unquestioned that social dialogue in general and enterprise level dialogue in particular has had measurable positive effect in combating the detrimental impacts of the crisis and it was positively associated with better social performance by companies. A sustainability analysis of large European companies listed on the stock market in 2012 demonstrated that in almost all cases companies with employee representation performed better than those without. Companies' performances related to environmental protection was also much more positive where any forms of employee involvement existed. Thus, the strengthening of employee

involvement may also contribute to companies' sustainability (European Trade Union Institute, 2014).

The plant-level is relatively free from the often politicized negotiations between trade unions and employers' associations or governments (Galgóczy & Glassner, 2009). European Works Councils (EWC) also played an important role in mitigating the adverse effects of the economic crisis (Guyet, et al., 2012). EWCs are important elements of transnational social dialogue at a company level and while in some cases stimulating results have been delivered by them, there are important limitations on the scope of their actions which need to be highlighted (Guyet, et al., 2012). EWC instruments are claimed to be ineffective in forcing employers to provide information in a timely manner, and to be slow in providing prompt responses for decision-making (Cremers, et al., 2013). Therefore, the information and consultation rights of EWCs are often not respected. Moreover, the situation has worsened as the recent labour law reforms triggered by the crisis undermine workers' rights across Europe to information and consultation, especially during collective redundancy and transfer procedures. Continued deregulation not only constitutes a backward step in workers' protection, but "undermines any remaining hopes of European social integration" (European Trade Union Institute, 2014, p. 68).

Social dialogue has been able to function and forge adequate responses to the crisis through national social pacts and collective agreements at various levels, except in cases where these forums have been prevalently overridden by governmental unilateralism, as happened in those Western and Eastern European countries most affected by the economic, debt and political crises (such as Ireland, Greece, Spain, Hungary and Romania). However, there are major differences between the factors hindering the institutional, political and legal framework of social dialogue in the old and the new Member States. Most new Member States experienced severe external pressures to restructure their public finances, as the Council of the European Union issued several Excessive Deficit Procedures⁷³ and the pressure on the governments' side to meet austerity plans often overrode the demands of organized labour. Hence, Central-Eastern European (CEE) countries not only experienced political instability like their Western counterparts, but also abrupt changes in social partnership that coincided with the fiscal consolidation measures in the region. Despite the unconstructive circumstances, social dialogue was still used as a debate forum by all the countries under examination, with the exception of the atypical cases of Romania and Hungary where social dialogue technically broke down.

The growing inequalities in incomes and the rising shares of populations at risk of poverty or social exclusion demonstrate that austerity measures signify a roll-back of national social protection. Deregulation – rooted in the European Union's liberal approach to social legislation and becoming a part of the European governance process – affected individual and collective labour law in all member states. Despite the restricted rights in the arena of collective labour law and strategies pursued by multinational companies to challenge employee

⁷³ The excessive deficit procedure is governed by Article 126 of the Treaty on the Functioning of the European Union, under which the Member States are obliged to avoid excessive deficits in national budgets. When the Council decides that an excessive deficit exists in a Member State, it firstly makes recommendations to the State concerned, with a view to rectifying the situation within a given period. If the Member State fails to comply with these recommendations, the Council may instruct it to take appropriate measures for reducing the deficit. If necessary, the Council has the option of imposing penalties or fines and of inviting the European Investment Bank (EIB) to reconsider its lending policy towards the Member State concerned.

representatives to coordinate their activities across borders, the different forms of employee involvement have demonstrated significant contributions in mitigating the negative effects of the crisis.

4. Problems related to the European Participation Model

The main purpose of Directive 2002/14/EC is to set up a framework for an effective information and consultation procedure.⁷⁴ In accordance with the ECJ's case law on '*effet utile*', during the process it ought to be ensured that the employees are entitled to formulate their opinions, to have response together with the related reasoning from management, to raise their ideas and to participate in decision-making processes related to employment.⁷⁵ Having considered the advantages of social dialogue, Article 5 of the Framework Directive provides the opportunity for Member States to entrust management and labour at an appropriate level, including the level of the undertaking or establishment with the right to define freely the practical arrangement of the information and consultation procedure. Effectiveness is further guaranteed by the timely and adequate ways – meaning the appropriate level and the fashion – of the information and consultation process.⁷⁶ However, due to a wide margin of appreciation Member States' national solutions often tone down the effect of the Directive (Clauwaert & Schömann, 2011).

The most problematic area where inequality could seriously harm the principles of participation is the protection of employees' representatives. The Directive provides for adequate protection for employees' representatives to perform their roles properly. However, the vague wording of the Directive does not provide distinct criteria whether the protection shall include favourable working conditions, paid working time or prohibition of dismissal. Some of the Member States apparently used this room to reduce the level of protection where possible. For example in Poland employees' representative supposed to carry out their tasks outside working hours, in Ireland it is unclear whether employees' representatives are entitled to any earnings for the time spent for exercising their role, in Bulgaria only trade union members enjoy protection, while in the Czech Republic no protection is provided at all (Clauwaert & Schömann, 2011).

Ambiguity in domestic laws leads to great inequality. The Framework Directive indicates that effective, dissuasive and proportionate administrative and judicial procedures and sanctions ought to take place in case of the infringement of the obligations.⁷⁷ In other words, Member States are free to choose between civil and (or) criminal sanctions. Due to the lax wording of the Directive, domestic courts struggle to judge the threshold where the action of the employer impedes the right of information and consultation. Especially at times of economic constrain, labour courts tend to adopt restrictive interpretation.

⁷⁴ Arts. 1. 1-2. of Directive 2002/14/EC.

⁷⁵ Art. 4.4. of Directive 2002/14/EC.

⁷⁶ Arts. 4.1 and 4.3. of Directive 2002/14/EC.

⁷⁷ Arts. 8.1-2 and Recital 28.

Sanctions imposed on employers in case of violation of the right to information and consultation of employees is another sensitive area. National legislations provide for various sanctions. In some Member States a fine can be imposed on the employer who violates the right to information and consultation, both the process and the fine's amount vary greatly.

Differentiation for the same unlawful action of employers is hardly justifiable. In Croatia a decision rendered by an employer contrary to the law's provisions on consultations with the works council is null and void. In case of a violation of information and consultation obligations a fine of HRK 31,000 to 60,000 (EUR 4,217 to EUR 8,163) can be imposed on an employer as a legal person. In case of Denmark, employers who fail to inform and consult workers in accordance with the applicable rules may be fined as well. In Greece a failure to comply with the obligations emanating from the provisions of the decree results in the enforcement of administrative penalties. On an employer who violates the provisions of the Labour Law a fine for each violation, from EUR 500 up to EUR 50,000 is imposed. Temporary and even permanent pause of the operation is possible too. With regard to Bulgaria, a recent amendment of the Labour Code has increased the fines applied in case of violation of the labour legislation with penalties from 10,000 to 15,000 BGN (EUR 5,113 to EUR 7,669) and in case of a repeated violation, the penalties applied are from 20,000 to 30,000 BGN (EUR 10,226 to EUR 15,339). In Estonia employers who violate this right may be sanctioned with administrative fines ranging from 100 to 6000 Estonian Kroons (EUR 6.5 to EUR 385). In the case of Italy the provincial labour directorates, which are part of the ministry of labour and social protection, are responsible for enforcing employees' right to information and consultation. Employers who fail to respect this right are liable to fines ranging from EUR 3,000 to EUR 18,000. Regarding Romania, employers who fail to meet the obligation to inform and consult their employees are liable to a fine of RON 1,000 to 20,000 (about EUR 245 to EUR 4,907), while offenders who have failed to meet the requirement to establish consultation procedures with workers' representatives are liable to a fine of RON 2,500 to 25,000 (about EUR 613 to EUR 6,133). Lastly, if the information provided by employers is incomplete or incorrect and hence prevents workers' representatives from adopting an informed opinion with a view to future consultation, the statutory fines range from RON 5,000 to 50,000 (about EUR 1227 to EUR 12,267).

In some other Member States fines cannot be imposed, but employees or their representatives could seek judicial and/or administrative remedies. For example, in Belgium any body that represents employees, or any individual employee may take a case to the courts alleging failure to respect the obligations imposed by the relevant legislation. In Bulgaria each representative of workers or employees elected, whether a representative of a trade union organization or not, is entitled to lodge a claim in the court.

Even though Directive 2002/14/EC was crafted with the best intentions and manoeuvred rather well between the fairly different interests and traditions of industrial relations of the Member States, the sometimes vague wording and the ample room for national transpositions resulted in a variety of domestic systems with very different level of actual rights and obligations. Practically, such a flexible framework is not suitable to provide equal level of information and communication for workers of the European Union.

As a part of the 2010 work Programme an evidence-based survey was conducted by the European Union on the effectiveness of information and consultation rights of employees in the

European Union.⁷⁸ In particular, Directives 98/59/EC on collective redundancies, 2001/23/EC on transfer of undertakings and 2002/14/EC on a general framework of information and consultation were examined. The general findings of the survey suggest that the mentioned directives address stakeholders' needs, as stakeholders are suitable to increase trust between management and labour, to involve workers in decisions affecting them, to protect workers, to contribute to increased adaptability, and to improve staff and company performance. It was also underlined that especially Directive 2002/14/EC was found capable to effectively promote workplace performance and to improve management and anticipation of change. It was also pointed out that the actual efficacy of the Directive 2002/14/EC depends on several factors, especially on the industrial relations system and social dialogue traditions of a Member State, on the size of an establishment and on the attitudes of labour and management. The EU seems to be satisfied with the results, conferring the information and consultation system to be relevant, effective, coherent and mutually reinforcing.

The opinion of the European Economic Social Committee's opinion referred to by the Fitness Check points out the urgent need of a more effective formulation of information and consultation rights in EU and suggested the serious reconsideration of the various definitions of information and consultation rights for greater standardisation.⁷⁹

The assessment also suggests that consultation is less likely to take place and tends to cover operational issues, like working time or work organisation, rather than business strategies. Evidence was also found that the arrangements concerning the working time, benefits and resources concerning employee representatives vary greatly among Member States.

⁷⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Commission Work Programme 2010 COM (2010) 135 final, Commission Staff Working Document, Fitness Check on EU Law in the area of Information and Consultation of Workers, SWD (2013) 293 final.

⁷⁹ Employee involvement and participation as a pillar of sound business management and balanced approaches to overcoming the crisis. Opinion of the EESC. SOC/470. Brussels, 20 March 2013.

PART IV. – GLOBAL EXTENSION OF DEMOCRATIC PARTICIPATION

Globalization has brought many new challenges to business management. Competition has become fiercer, and the quest for profit maximization has made large concerns spur on social dumping to continuously fight for yet lower production costs. Such practices often lead to human rights violations at workplaces (Kolben, 2010). The frequency and the severity of these malpractices tend to be higher in premises where national laws are less protective, and the influential power of workers is low. If the right to participate is a human right with substantial effect on economic competitiveness, it has to be extended to employees working outside of the European Union.

Building on the Weimar traditions, the European Union has developed an outstanding framework for employee involvement, which is at the same time capable of protecting employees' rights and is suitable to meet business needs. Due to the lack of extraterritorial regulatory power of the EU, non-Europe based multinational companies (MNC) are not obliged to respect these protective rules of the EU. MNCs tend to draw up internal codes of conducts (COC) to promulgate minimal standards to be applied by their subsidiaries and subcontractors. However, these internal rules often prove to be non-efficient in most of the fields they are intended to regulate, and are not capable to halt human rights violations, to improve working standards, or to enhance the voice of workers. Moreover, these company statutes do not form a ground for liability when workers' rights are violated.

While the EU considers employee involvement as a prerequisite for the success of the restructuring and adaptation of undertakings to new conditions created by globalisation,⁸⁰ it explicitly reserves this right to employees working within the territory of the European Union. Since human rights are indivisible and universal, it is necessary to examine the possible extension of the personal scope of the respective EU Directives to cover subsidiaries of Europe-based MNCs located outside of the territory of the European Union.

1. OECD Standards for Employee Involvement

Formation of regulations is no longer an exclusive domain of states and governmental authorities, and the role of non-state actors in standard setting is increasingly diverse (Peters, et al., 2009). In this norm setting method the process is not unilateral but often international and the formation of regulations is at least partially taken over by private sector actors, particularly in areas where governmental efforts failed, or where stakeholders are concerned that international treaties do not adequately took their interest into account.

The OECD Guidelines aim to ensure that operations of multinational enterprises are in harmony with government policies, to strengthen the basis of mutual confidence between enterprises and societies in which they operate, to help improve foreign investment climate, and

⁸⁰ Directive 2002/14/EC, Recital (9).

to enhance contribution to sustainable development made by multinational enterprises. The Guidelines are comprehensive catalogues of social and economic norms, and multinational enterprises and their subsidiary companies are expected to carry out their business activities in line with these principles. They are supposed to be applied not only within the territory of OECD but world-wide, especially in developing countries (OECD, 2011). Thus, the Guidelines have an important role in promoting the observance of these standards and principles among multinational enterprises.

The Guidelines were established in 2000 and reviewed in 2011. They are recommendations jointly addressed by governments to multinational enterprises, they provide principles and standards of good practice consistent with applicable laws and internationally recognised standards. The 2011 updates enhanced the binding nature of the Guidelines by adding that the countries adhering to the Guidelines make a binding commitment to implement them in accordance with the Decision of the OECD Council on the OECD Guidelines for Multinational Enterprises. Furthermore, matters covered by the Guidelines may also be the subject of national laws and international commitments. The updates in 2011 extended the reporting obligations of the multinational enterprises. The aim was to encourage improved understanding of the operations of multinational enterprises. The revision underlines the importance of clear and complete information on enterprises to a variety of users, including shareholders, workers, local communities, special interest groups, governments and society at large. The updates make further suggestions and encourage the corporations to communicate additional information that could include a value statements or statements of business conduct intended for public disclosure including information on the enterprise's policies relating to matters covered by the Guidelines; policies and other codes of conducts to which the enterprise subscribes; information on internal audit, risk management and legal compliance systems; and information on relationships with workers and other stakeholders.

The Guidelines deal with employment and industrial relations. According to its provisions, enterprises should, within the framework of applicable law, regulations and prevailing labour relations and employment practices; and within the framework of applicable international labour standards provide information to workers' representatives. Such information is needed for meaningful negotiations on conditions of employment, as it enables employees to obtain a true and fair view of the performance of the entity, or where appropriate, the enterprise as a whole. The revised text adds that enterprises shall also promote consultation and co-operation between employers and workers and their representatives on matters of mutual concern.

The Guidelines set important standards by providing that employment and industrial relations must not be less favourable than those observed by comparable employers in the host country. The Guidelines also aim to provide directions for cases when multinational enterprises operate in developing countries. It obliges the enterprises to provide the best possible wages, benefits and conditions of work, within the framework of government policies. These standards are subject to the economic position of an MNC but should be at least adequate to satisfying the basic needs of the workers and their families.

The Guidelines provide for a similar process for collective redundancies to the one described in the respective EU Directives, stating that reasonable information has to be given to representatives of workers about their employment and their organisations, and, where

appropriate, to relevant governmental authorities, and co-operate with workers' representatives and with appropriate governmental authorities to mitigate to the maximum extent practicable adverse effects, preferably prior to the final decision being taken.

The OECD Guidelines are often compared with the ILO MNE Declaration. Distinctions between the function and aim of the two instruments are made in the Commentary of the Guidelines. The Commentary specifies that while the ILO MNE Declaration sets principles in the fields of employment, training, working conditions, and industrial relations, the OECD Guidelines cover all major aspects of corporate behaviour. The OECD Guidelines and the ILO MNE Declaration refer to the behaviour expected from enterprises and are intended to be parallel and not to conflict with each other. The ILO MNE Declaration can, therefore, be of use in understanding the Guidelines to the extent that it is of a greater degree of elaboration. However, the responsibilities for the follow-up procedures under the ILO MNE Declaration and the Guidelines are institutionally separate.

1.1. National Contact Points

The Guidelines are supported by a unique implementation mechanism of National Contact Points (NCPs), agencies established by adhering governments to promote and implement the Guidelines. NCPs assist enterprises and their stakeholders to take appropriate measures to further the observance of the Guidelines. They provide a mediation and conciliation platform for resolving practical issues that may arise with the implementation of the Guidelines. However, the NCP's action does not always satisfy its clients. The activity of the Swiss NCP was widely criticised in the Triumph International case, questioning the efficiency and the unbiased nature of OECD monitoring capacity. The below case also demonstrates that European companies, trusted with promoting human rights and safeguarding labour rights – like Triumph International – use double standards for their employees working at overseas subsidiaries regarding participation.

One of the key features of the textile industry – one of the principal industries of the global economy – is that labour-intensive production is increasingly allocated to countries with cheap wages and lax labour standards, especially to countries in South Asia. Triumph International, headquartered in Germany is present in 120 countries, employing over 44,500 people worldwide; its turnover exceeds EUR 1.9 billion. The company set up an EWC for its European branches in 1996. Triumph International owns about 60 per cent of the production sites in its supply chain, which is considered as a very high ratio in the garment industry. In December 2009 a coalition of labour unions, NGOs and labour support groups filed a complaint against Triumph International for carrying out massive layoffs without consulting unions in the Philippines and Thailand. Most of the workers who were laid off were union members, including union leaders.

Triumph International's subsidiaries in the Philippines (TIPI) decided to close its local factory in July 2005, resulting in 1663 workers losing their jobs. TIPI had a collective agreement effective with the local union, however, the 'separation money' offered to the workers was not in line with the provisions of the collective agreement. TIPI warned the union that if they had planned any organized action against the decision, they would have withdrawn

their offer on the separation money and would sue individually all the workers involved. The trade union refused to accept the offer, claiming that no information had been given to them on the closure. The factory was eventually closed down and severance payment was paid to the workers.

Few years later in August 2009, nearly 2,000 workers were suddenly dismissed from Triumph's Thai factory (BFT), including 13 out of 19 union representatives, cutting the factory's workforce by half. BFT paid severance payment to the workers, but not according to the Thai Labour Relations Law and the effective collective agreement concluded with the workers' representative trade union.

The union and its affiliates filed inquiries to many international organizations, including the Delegation of the European Commission in the Philippines, but received no acceptance. In December 2009 the Unions turned the case to OECD and asked the Swiss NCP to set a concrete timeline for handling this case, as well as to facilitate communication and exchange between the parties in an impartial, transparent and objective manner. Although Triumph initially appeared to be open to the NCP process, the company subsequently refused to enter any mediation meetings in which the issue at the core of the complaint would be discussed. The NCP refused to hold meetings in Thailand or the Philippines and was also not willing to provide funding to help bring the victims to Switzerland or for translation of key documents. According to one of the complainants, the NCP performed the bare minimum of forwarding the letters between Triumph and the unions, but never made a constructive proposal to facilitate a mediation meeting or to investigate independently the case (OECD Watch, 2010).

In its final statement, the NCP did not make any determination as to whether the OECD Guidelines have been breached by Triumph, nor does it make recommendations to enhance the implementation of the Guidelines. As a summary of the proceeding, the NCP stated that '[the] parties concerned had a different understanding on the objectives of the proceeding and it was therefore not possible to reach such an agreement. In view of this situation, the NCP sees no possibility to further contribute to the solution of the conflict (National Contact Point of Switzerland, 14 January, 2011). The end of the procedure was indeed abrupt and questioned the ability of the Swiss NCPs to perform its role as an unbiased mediator.

The lesson learnt from the Triumph case is that the impact of OECD Guidelines on economic and social sustainability is relatively low. It is welcomed that the OECD takes part in the discussion of employee involvement and that the revised Guidelines refer to ILO norms. On the other hand, the Guidelines are merely recommendations, which make the effective application of the provisions rather questionable. It is even more uncertain how the Guidelines could be enforced in the non-Member Countries of the OECD. On the other hand, it is apparent that even European MNCs are bypassing its regulations due to the lack of effective enforceability.

2. World Works Council

Adopting the transnational approach of the international instruments facilitating employee involvement, management and labour have tried to initiate different methods to enhance

cooperation. There are four major forms of transnational structure for employee representation on an undertaking level: World Company or Group Councils; World Works Councils; extended EWCs; and global information committees (Rüb, 2002).

World Works Councils (WWC) are standing bodies operating on bilateral terms. Their operation is based on the agreement of employee representatives and central management. Probably the best-known example for WWC is that of Volkswagen's. At Volkswagen (VW) efforts to include employees on a global scale date back to the 1970s. The EWC agreement concluded in 1992 (two years before the Directive was adopted) served as a blueprint for WWC set up in 1999, consisting representative from all companies in which VW has the predominant stake. The guiding principles of the agreement between the central management and trade unions reflect well the approach of management towards employee participation (Rüb, 2002). The structure and mode of operation allows both sides to see a contribution towards global cooperation and joint resolution of the possible conflicts by constructive dialogue and cooperative resolution of economic, social and ecological challenges.⁸¹ Unlike most WWCs, the one at VW is still quite active.

The extension of the EWCs, including to non-European participants, contains two models: one is based on agreement, where the central management agrees to hold plenary EWC meetings and the other on the independent decision of the employee side, which is solely for internal meetings. An example could be Danone's case: the international union of the food sector managed to conclude an agreement with the central management in 1996, agreeing that a consultative committee representing Danone workers from all European countries would be informed about the strategic decision of the company.⁸² Even though the agreement was concluded before the substantive enlargement of the EU, it is striking that a clear distinction was drawn between European and non-European countries, the latter are simply represented by the trade union, and are not members of the committee.

Information committees offer the most limited form for global employee representation, mostly dealing with ad-hoc specific issues. However, they could be important signs from the management side, marking the initial acceptance of global employee representation as a part of management.

Unfortunately, both the historical development and the current status of global employee representation forms are poorly documented. As far as it could be tracked, some of the forums rarely meet after their establishment, sometimes only once in five years or even less often (Rüb, 2002). The limited financial resources, management opposition, language barriers and poorly defined powers were the most frequently reported obstacles of global cooperation.

Global structures for employee representation in transnational undertakings are still in their infancy. One of the major impediments resulting in poor stability and lack of continuity is the absence of solid regulatory background. Soft law regulations are unable to ease dependency on the willingness of management to play an active role in participation, to disclose information

⁸¹ Agreement for Cooperation between Volkswagen Group Management and the Volkswagen Group Global Works Council from 20 May 1999.

⁸² Information concerning the economic and financial situation, technological projects, major investment decisions, organizational issues, training, health and safety, environmental issues, equal opportunities, trade union rights and others mutually agreed upon. See: Agreement on the Constitution of an Information and Consultation Committee for Danone, 11 March 1996, in: Rüb, 2002, 51.

or to finance the activity of global representative bodies. Representative bodies at companies with solid traditions in participation and pre-existing patterns of employee participation could carry on a significantly better performance (Rüb, 2002).

While the different soft law mechanisms could successfully facilitate cooperation on a global scale and could also contribute to lowering the resistance of management concerning employee involvement, without an enforceable legal framework these mechanisms could not provide sufficient guarantees for participation. It is the state's responsibility to create hard legal norms. However, the Sinzheimerian principle of economic democracy ought to be respected: legal norms are to protect labour, yet at the same time it has to respect the autonomy of economic actors.

2.1. World Works Council in Practice – The Chattanooga Experiment

A research based on interviews with 2400 American workers showed that there is a large representation and participation gap at American workplaces. The majority of the interviewed people claimed that they prefer more influence over their employers to have a greater say in issues affecting them at workplaces and they imagined this involvement to take the form of an elected committee. On one hand, employee participation is a bridge between employees and management, it allows employees to take part in decision-making and at the same time it serves as a tool to achieve a more inclusive economy through the democratization of workplaces. On the other hand, regulatory differences create a large gap in participation rights of employees of transnational corporations. The establishment of World Works Councils could be a solution to approximate the protection level of employees working in the EU and in the US for the same employer. However, due to the very different industrial relations rules, implementing such institution to American workplaces is rather challenging.

Industrial democracy challenges the authoritarian and bureaucratic structures of a capitalist enterprise. However, participation is not fundamentally alien to the American industrial relations system. Participation challenged the Taylorist-Fordist model, which favoured flat hierarchies and direct orders (Marshall, 1950). The paradigmatic transformation brought new production concepts and management techniques, which offered more leeway for self-regulation and responsibility to rank-and-files. The Hawthorne studies evidenced in the early 20th century the ability of employees to exercise informal control over productivity (Mayo, 1933). The recognition of legitimate power for employees paved the way for the development of industrial democracy (Argyris, 1960). However, implementation of participative models was usually made with an eye to securing a higher level of competitiveness.

Therefore, a fresh approach is needed in American industrial relations to provide a voice at work that improves the economic conditions of employees and that enhances efficiency and equity in economy and society. Since unionization is declining even among those workers who belong to a bargaining unit and the proportion of those who are not benefiting from union services has been growing. There have been many attempts to introduce alternative forms of representation and participation especially concerning transnational corporations. Most of these methods are originally connected to fair investment policies to developing countries and are in various forms of soft law measures, but the traditional dichotomy of unionized and non-

unionized workplaces does not enhance new forms of representation, which could correct the information asymmetry between individual employees and management (Mironi, 2010). Moreover, there are hard law obstacles in the United States, which prevent the implementation of new ways of participation.

At American workplaces employees are represented through traditional labour unions organized and operated independently from employers. Section 8(a)(2) of the National Labor Relations Act (NLRA) does not allow employers to “dominate or interfere” with labour organizations. Instruments of employee participation like works councils form a part of employers’ organization as their core purpose is to involve employees in the employers’ decision-making process. This section has been interpreted in a rather restrictive manner to suppress non-union, employer-sponsored representation models. However, this strict understanding of the regulation may lead – especially read together with Section 302 of the Labor-Management Relations Act – to a complete ban of any non-union labour organization, including works councils. Even though works council is by no means a ‘sham union’ and constitutes no threat to fair labour-management relations envisaged by the drafters of NLRA in 1935.

The National Labor Relations Board (NLRB) interpreted Section 8(a)(2) of the NLRA and concluded that any organization is a labour organization, if (1) employees participate, (2) the organization exists, at least in part, for the purpose of ‘dealing with’ employers, and (3) these dealings concerns ‘conditions of work’ or concern other statutory subjects such as grievances, labour disputes, wages, rates of pay, or hours of employment (Drutchas, 2016). Therefore, works councils are labour organizations and deal with the employer under section 8(a)(2). To examine works councils’ conformity with NLRA, it is necessary to check whether employers dominate, interfere with or influence their operation in the meaning of Section 8(a)(2).

Judges often rely on implicit factor tests to decide whether an employer dominates a labour organization. The most often cited issue is when an employer sets the agenda of a meeting for a labour organization. Since works councils have to be informed regularly on certain topics, it is indispensable for an employer to provide an outline for each. This duty however does not hinder works councils to initiate a meeting whenever an issue affecting the majority of employees occurs (Drutchas, 2016).

Financing or supporting of a labour organization constitutes unfair labour practice under NLRA section 8; moreover, Section 302 of the Labor-Management Relations Act of 1947 prohibits an employer from engaging in any “payment or lending” to any employee representative or labour organization representing its employees. This provision was created to prevent employers from bribing unions and labour representatives. It is the employer’s duty to facilitate employees’ participation, therefore it is the employers’ duty to cover the operational costs of a works council. This means that a European type works council would not pass the assessment of the National Labor Relations Board. An interesting ‘experiment’ is happening in Chattanooga, Tennessee to test how the European works council model could survive in the US.

In August 2013 United Automobile Workers (UAW) International Union and Volkswagen Group (VW) decided to set up an employee representation in Volkswagen’s Chattanooga, Tennessee plant. UAW introduced a new collaboration model involving both

blue-collar and white-collar workers to work together with VW management on various issues concerning working conditions by providing information and consultation rights. After the union lost a closely contested election open to all the plant's 1,500 workers in February 2014, a unit called 'Local 42' was created. Besides, a group of VW Chattanooga workers formed the American Council of Employees (ACE), which was – according to their press release – “an independent employee council created to ensure that VW-Chattanooga employees have a voice on the Volkswagen Global Works Council” (Ramsey, 2015).

The Chattanooga works council is not subject to German law, however a contract concluded between VW management and VW Group's European and Global Works Councils is binding. VW's Charter on Labor Relations is effective since 2009 and it established participation rights of democratically elected employee representatives. Accordingly, VW promised that the Chattanooga works council would be represented on the Global Council. UAW Local 42 initially was not established as a bargaining unit for any VW-Chattanooga worker. In 2015, members of UAW Local 42 asked Volkswagen to recognize the local union as the bargaining representative of skilled-trades employees at the Chattanooga plant, although VW rejected the claim. Later that year the NLRB ruled in favour of Local 42 and ordered an election for 160 skilled trades employees, which resulted in an overwhelming success of Local 42. However, VW refused to enter into collective bargaining with Local 42, but after UAW filed a charge against the employer stipulating that VW unlawfully refused to bargain in February 2016, the NLRB denied Volkswagen's request for a review of the December election, and upheld the election and its results.

Even though there was a heated debate over UAW Local 42 and eventually it was recognized as a collective bargaining unit, there is no clarifying answer from the NLRB whether a works council is a lawful alternative of employee representation under US law. Since the debate is not yet over, insecurity continues. During the most recent election round, in 2019, of the roughly 1,600 workers who voted, 833 opposed the unionization effort. The union's defeat appeared in media as a loss that highlighted the difficulty of organizing private-sector workers in a political environment that is overtly hostile to labour unions (Scheiber, 2019). Even though Volkswagen was also officially neutral during the 2019 election, its posture was much more resistant. The company's election website informed workers that “we prefer to continue our direct relationship with you, working together as one team”, and it was interpreted as a language that oppresses unionisation (Scheiber, 2019). Moreover, it was argued that state representatives said a decision to unionize could threaten tens of millions of dollars in future state incentives for the company. From the union's response it is clear that World Works Council did not get accepted by labour representatives and it is seen as a tool to prevent collective bargaining.

3. Extension of the Personal Scope of the EU Directives

The significance of employee involvement has been gradually growing in the European Union. The learning curve from the 1980s has been very long indeed, and during these decades many of the initial problems have been addressed in the amends of the Directives addressing the right

to be informed and consulted.⁸³ The change in the regulatory technique allowing more room for Member States for transposition with regard to the different traditions in industrial relations caters better for employee involvement and the strengthened legal status of the CFREU symbolizes its importance as a human right.

However, enjoyment of the right has not been guaranteed to all; in absence of enforceable regulations, employee involvement has not penetrated to subsidiaries of European multinationals located outside of the territory of the EU. To mitigate the regulatory gap, both international organizations and multinational enterprises have developed regulatory solutions. What legitimizes the norm-setting exercises of non-state actors are more transparent decision-making processes and the possibility of representing a broad range of views. Indeed, soft law, voluntary codes of conduct, and other non-binding instruments have an important role in facilitating employee involvement. However, voluntary actions have proven to be insufficient, and thus cannot be substitutes of enforceable legal instruments.

The EWC Directive is not only applicable to undertakings or groups of undertakings that are located within the territory of the EU, but also addresses non-European businesses by stating that the mechanisms for informing and consulting employees in undertakings (or groups of undertakings) operating in two or more member states shall encompass all establishments, regardless of whether its central management is located inside or outside of the territory of the Member States. The aim of this extension is the protection of the European workforce, and it does not constitute extraterritorial legislation as it refers to business activities that take place within the EU.

The key element in the scope of the Directive is the transnational character of business issues. According to Article 1 Para 4, those matters have a transnational character that concern the entire undertaking or group, or at least two Member States. These include matters that are of importance to the European workforce in terms of the scope of their potential effects or that involve transfers of activities within the Member States.

To ensure that the right of information and consultation is effectively realized at subsidiaries of the Europe-based multinational companies located outside of the territory of the EU, the personal scope of Directives 2002/14/EC and 2009/38/EC should be expanded in a way that encompasses all branches under the control of the controlling undertaking domiciled in the EU.⁸⁴ The notion of a controlling undertaking in its current form could create a link to

⁸³ Apart from Directives 2002/14 and 2009/38 as referred above, see Directive on Collective Redundancies (Council dir. 75/129/EEC (OJ [1975] L48/29) amended by Council Dir. 92/56/EEC (OJ [1992] L245/13) and Directive on the Transfer of Undertakings (Council Dir. 77/187/EEC (OJ [1977] L61/26, amended by Directive 98/50 (OJ [1998] L201/88) and consolidated in Directive 2001/23 (OJ [2001] L82/16)

⁸⁴ Directive 2009/38/EC on European Works Council defines community-scale undertaking as any undertaking with at least 1,000 employees within the Member States, and at least 150 employees in each of at least two Member States; a 'group of undertakings' means a controlling undertaking and its controlled undertakings; and a 'community-scale group of undertakings' means a group of undertakings with the following characteristics: at least 1,000 employees within the Member States, at least two group undertakings in different Member States, and at least one group undertaking with at least 150 employees in one Member State, and at least one other group undertaking with at least 150 employees in another Member State. The Directive also provides for the definition of a controlling undertaking: for the purposes of the Directive, a 'controlling undertaking' means an undertaking which can exercise a dominant influence over another undertaking (the controlled undertaking) by virtue, for example, of ownership, financial participation, or the rules which govern it. The ability to exercise a dominant influence has to be presumed, without prejudice to proof to the contrary, when an undertaking, in relation to another undertaking directly or indirectly: (a) holds a majority of that undertaking's subscribed capital; (b) controls a

subsidiaries located outside of the EU territory. It is indeed necessary, as the impact of these ‘third country subsidiaries’ are very important resources for European MNCs. Therefore, issues related to their activity increased importance for the entirety of the workforce. All branches should be included in the concept of the transnational character of a matter.

It may be argued that the enlarged territorial scope would constitute a competitive disadvantage to European multinational companies and therefore would encourage businesses to move their seats outside of the Member States. Since participation enhances competitiveness, the expansion of the material scope of the respective Directives would further improve European MNCs’ competitive advantage, as globalisation pushes industrial relations toward convergence. (Weiss, 2007). All-encompassing participation would support the idea of cooperation, participation and joint responsibility. If the democratisation of the economy is understood as an element that promotes and stabilises democracy in society, workers should have a similar chance to influence decisions by which they are affected.

3.1. The Doctrine of Implied Power

The competences of the European Union have been expanded by a doctrine of the implied powers, developed by the Court of the European Union, which has the last word on competence issues.⁸⁵ The doctrine of implied powers indicates that the EU can either originates its powers expressly promulgated in the Treaties, or its competences can be implied (Delereux, 2009). For example, Article 352 (1) TFEU states that ‘[if] action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures.’

Such an expansion of competences, especially in the field of employment and industrial relations, would not be free from controversy. However, the international scope of the activity of the EU has to be guided by principles which have inspired its own creation, development, and enlargement, and which seek to advance in the wider world: democracy, rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, principles of equality and solidarity, and respect for principles of the United Nations Charter and international law.⁸⁶

Implied powers exist where internal power has already been used in order to adopt measures which come within the attainment of common policies,⁸⁷ yet are not limited to common policies, but cover all Treaty objectives.⁸⁸ The importance of employee involvement both as a human right and as a tool to enhance economic competitiveness is significant for

majority of the votes attached to that undertaking’s issued share capital; or (c) can appoint more than half of the members of that undertaking’s administrative, management, or supervisory body.

⁸⁵ Case C-104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A.*, EU:C:1982:362, paragraph 17, and Case C149/96 *Portuguese Republic v Council of the European Union*, EU:C:1999:574, paragraph 34.

⁸⁶ Art 205 of TFEU and Art 21 of TEU.

⁸⁷ Joined Cases 3,4 and 6/76 *Cornelis Kramer and others* EU:C:1976:114.

⁸⁸ Opinion given pursuant to the second subparagraph of Article 228(1) of the EEC Treaty - International Agreement on Natural Rubber. Opinion 1/78, EU:C:1979:224.

democracy.⁸⁹ Moreover, back in 2001, the European Commission proclaimed that a more coherent and consistent approach to human rights in its internal and external policies, with a view to promoting human rights and democratisation commitments in external relations consistent with the EU Charter on Fundamental Rights is needed.⁹⁰ Thus, a possible action to enlarge the scope of Directives 2002/14/EC and 2009/38/EC would fulfil the above requirements and therefore could justify extraterritorial jurisdiction.

3.2. Territorial Expansion of EU Law

It is generally accepted that a state can exercise territorial jurisdiction over conducts that occur within a state and persons who are present within the territory of a state (Staker, 2018). States can also provide access to their territory, or the enjoyment of a given status within their territory, given that a person or a corporation complies with their laws. In the context of participation this is the case with third country businesses who set up subsidiaries in two or more Member States and who have to be in line with the rules set forth in Directive 2009/38/EC. It also means that if the presence of a natural or legal person within a state can constitute a basis for the exercise of territorial jurisdiction, then territorial jurisdiction may be exercised over persons who are present but their conduct in question takes place abroad. States or actors can also make access to their territory, or the enjoyment of a given status within their territory, given that a person or a corporation complies with their laws. In the context of participation this is the case with third country businesses who set up subsidiaries in two or more Member States and they have to be in line with the rules set forth in Directive 2009/38/EC. It also means that if the presence of a natural or legal person within a state can constitute a basis for the exercise of territorial jurisdiction, then territorial jurisdiction may be exercised over persons who are present but their conduct in question takes place abroad (Scott, 2014).

The EU relies on this legislative technique to gain regulatory power over activities that take place abroad, if a foreign conduct generates effects for the EU. This happens in areas like competition law, environmental protection,⁹¹ financial services,⁹² air transportation⁹³ and ship

⁸⁹ Art 205 of TFEU and Art 21 of TEU.

⁹⁰ European Commission, Communication from the Commission to the Council and the European Parliament – The European Union’s role in promoting human rights and democratisation in third countries, COM/2001/0252 final.

⁹¹ Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC; Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market; Directive 2012/19/EU of the European Parliament and of the Council of 4 July 2012 on waste electrical and electronic equipment (WEEE).

⁹² Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies; Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

⁹³ Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community; Regulation (EC) No 2111/2005 of the European Parliament and of the Council of 14 December 2005 on the establishment of a Community list of air carriers subject to an operating ban within the Community and on informing air transport passengers of the identity of the operating air carrier, and repealing Article 9 of Directive 2004/36/EC.

inspection.⁹⁴ This technique allows the EU to govern transactions that do not take place in its territory and enables the EU to influence the nature and content of third country and international law. The EU's global regulatory power is exercised to effectuate a specific legislative instrument adopted by the EU.

Another example for extraterritoriality is when the EU aims to adopt international agreements and to encourage states to sign up to and comply with existing international norms. This was the case with climate change and air security, even though in this case there is no EU legislation.

It also has to be noted that multinational corporations are not traditional subjects of international law and it is controversial which national law is able to impose direct duties on them; thus, they often "fall through the cracks of the international regulatory system" (Zerk, 2006, p. 104). The picture becomes even more complicated by adding that multinational corporations are increasingly reliant on their supply chains, which are only connected to them through civil law contracts. Therefore, enforcement of any corporate norms binding to the parent company in its supply chain is next to impossible.

Expanding the personal scope of Directives 2002/14/EC and 2009/38/EC would contribute to the recognition of the right to be informed and consulted both as a human right and as a tool for enhancing the economic competitiveness of European multinational companies. As a human right, it would be just and fair to provide the same rights (and duties) to every employee of a given corporation regardless of their location, as human rights are universal. Employee involvement can be seen as a tool for democratization (Dukes, 2014); thus, it would also support the democratization of industrial relations in the host countries. The expansion would create stronger ties between the headquarters and their third-country subsidiaries and could serve as a tool for combating human rights violations caused by multinationals (Zerk, 2006). As an economic tool, the employer would benefit from the feedback and innovative ideas of its employees more extensively than before. By improving the employment conditions for workers worldwide, European companies could be better trusted and evaluated by consumers and therefore their market positions would be stronger.

3.3. Implementation Difficulties

Taking the Chattanooga example, it is very difficult to implement European participatory instruments to a different industrial relations system. Any unfavourable interpretation of section 8(a)(2) of NLRA would jeopardize the setting-up and operation of non-union employee representation instruments. Some commentators suggest that a genuine works council would not violate NLRA requirements, especially if they demonstrate good will towards the Board and towards public opinion to avoid being viewed as illegally sponsored company unions. It is also recommended to UAW and ACE to gain financial independence and to enter into various agreements emphasizing independence from the employer or to gain national presence to be more powerful in case a more aggressive action is needed against the employer.

⁹⁴Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (recast); Regulation (EC) No 391/2009 of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations (Recast).

These kinds of strategies miss the point of a cooperation-based instrument, which is designed to allow employees to participate in managerial decision by being informed and consulted before such decisions are made. Other solutions offered by authors include the complete or partial repeal of section 8(a)(2) (Kaufman, 2001). Those arguing for the complete repeal argue that section 8(a)(2) has failed to achieve its intended purpose: which was the collective bargaining model that enables collaboration, mostly because of the rigid interpretation. Due to the high level of workers' dissatisfaction a fundamentally new system has to be built to allow employees and employers to freely experiment with new models of representation. Moreover, a full repeal of section 8(a)(2) would convey a message that the US is hospitable to labour innovations. A full repeal would go too far in claiming that complete deregulation would allow employers to suppress unions even more by establishing management-dominated organizations (Estreicher, 1994). The idea of reforming the US labour system implies that employers and unions have to be put on a more equal footing and the objective of NLRA to protect employee rights of self-organization and collective bargaining has to be accomplished. The suggested solution would be to expand the range of lawful participation devices while guarding against the use of such devices for anti-union purposes (Befort, 2004).

Any comparison between the American and European industrial relations systems must be taken with caution. However, the benefits employee involvement has on employees are equal regardless of the legal system. However, enjoyment of the right has not been guaranteed to all; without hard law obligations employee involvement has not penetrated to subsidiaries of European multinationals located outside of the territory of the EU.

To mitigate the regulatory gap, international organizations and multinational enterprises have developed regulatory solutions. What legitimizes the norm-setting exercises of non-state actors is the more transparent decision-making processes and the possibility of representing a broad range of views. Indeed, soft law, voluntary codes of conduct and other non-binding instruments have played an important role in facilitating employee involvement. However, voluntary actions have proven to be insufficient, and thus cannot be substitutes of enforceable legal instruments. One solution could be the expansion of the scope of the relevant EU Directives. Another step towards filling the regulatory gap would be to reform the US industrial system and abolish the threat of an unfavourable interpretation of NLRA regarding section 8 (a)(2) by allowing alternative forms of genuine employee representation.

The right to employee involvement must be protected both as a fundamental right and a tool to enhance economic competitiveness. Moreover, this protection cannot be limited to the territory of the European Union in the context of globalization. The recognition of the humanity of workers through involvement is a shared responsibility of global economic actors

PART V. – EMPLOYEE INVOLVEMENT DURING THE ECONOMIC CRISIS IN THE EUROPEAN UNION

1. The European Social Model and Social Dialogue

The European welfare and employment regimes and the European Social Model are experiencing a convergence towards neoliberalism. Neoliberalism is defined as “a political project that is justified on philosophical grounds and seeks to extend competitive market forces, consolidate a market-friendly constitution, and promote individual freedom” (Jessop, 2013, p. 70). Social and labour policies in the EU have been under stress since the 1980s and this issue was associated with the fiscal and legitimacy crisis of the Keynesian welfare state in the 1970s. The new consensus considered social policies and labour rights as an impediment for the new growth model that created rigidity in the labour market and welfare dependency (OECD, 1981).

The overarching objective of Social Europe is to create a more equal society: ending poverty and poverty wages, guaranteeing fundamental human rights, essential services and an income that enables every individual to live in dignity. The Commission’s 1994 White Paper on social policy (European Commission 1994) described a ‘European social model’ in terms of values that include democracy and individual rights, free collective bargaining, the market economy, equal opportunities for all, social protection and solidarity. The model is based on the conviction that economic progress and social progress are inseparable. A defining feature of the European social model, when contrasted with that of the US, is the important role attributed to organisations of workers and employers in Europe. Neoliberal employment however fails to provide security under the pressure of the global and local trends affecting employees (Standing, 2011). Social and economic rights are increasingly dependent of the market which may jeopardize the foundational values of Europe. Since the Treaty of Amsterdam, the EU reinforced the capacity to influence social and employment policy in the Member States and overcome the difficulties of coordination, especially in the areas of welfare and work which remained in the Member States domain.⁹⁵

Social dialogue is one of the main pillars of the European Social Model, a unifying and protective umbrella in which social justice and good economic performance are compatible goals. Social dialogue has a long democratic tradition of decision reaching processes in many Member States of the EU, even though it was already under pressure before the financial crisis occurred. Researches clearly show, that the contexts presenting stronger social models, based on trust between social partners, were better equipped to come up with solutions to protect workers and national economies (Araújo & Meneses, 2018).

⁹⁵ The Treaty of Amsterdam was signed on 2 October 1997.

Arguably, the European Social Model has been declining in the past two decades (F. Scharpf 2009) (F. W. Scharpf 2002) (Sapir 2006) (Ferrera, Anton Hemerijck and Rhodes 2007). The existing constitutional asymmetry between policies designed to promote market efficiency and social protection is striking (Schiek 2017). The answer of the European institutions to the international financial crisis and economic recession started in 2008 combined aggressive austerity, privatization, internal devaluation, labour market deregulation, fragmentation of labour relations and erosion of the welfare state. Structural reforms adopted during the crisis had many similarities across Europe (Hermann, 2017). The cuts in social benefits and pensions, the promotion of atypical employment and the erosion of employment protection, as well as the decentralization of collective bargaining and the weakening of workers' interest representation were all common features of the national reform agendas. Social dialogue was allegedly a harmful constraint of fast economic recovery.

1.1. The Austerity Paradigm

Even though social dialogue is mainly seen as a national level tripartite dialogue between the government and the representatives of employers and employees or a bipartite collective bargaining on sectoral or on workplace levels, participation as a direct form of employee representation could play an important role in mitigating the negative effect of the crisis.

The European Social Model is not only about labour or social justice, but also about economic efficiency. Before the crisis and as expressed in the Lisbon Agenda, Europe wanted to stand out in the globalized world as an economy able to combine competitiveness and social cohesion.⁹⁶ However, when the EU starts failing economically it has a detrimental effect on the promotion of the social model and the principles of justice (Vaughan-Whitehead, 2015). Vaughan-Whitehead argues that austerity packages on social dialogue had severe impact in three major areas. First, tripartite mechanisms were weakened or stopped. Most legislative changes in Europe aimed at relaxing employment protection legislation were introduced with only limited social dialogue. Second, in the public sector there was an unprecedented wave of adjustments introduced in a context of rare negotiations and consultations with social partners. Third, collective bargaining came under attack, which led to a profound decentralization and erosion of collective bargaining systems.

The absence of alternatives and lack of democratic dialogue combined with the threat of future uncertainty had major consequences for citizenship (Araújo & Meneses, 2018). On one hand, it evoked fear and resignation, but, on the other hand, it increased the perception of injustice. A wave of protests spread throughout Europe, including movements like Occupy and Indignados, claiming that democracy cannot be subject to rules dictated by financial markets. These movements wanted to promote a new model of democracy that is open to the voices of citizens and takes seriously the values inscribed in European treaties and national constitutions (Araújo & Meneses, 2018). For trade unions, industrial action (strikes, street protests and the like) was often the only way to have a say in decision-making processes. Forms of social

⁹⁶ "The Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion" Lisbon European Council 23 and 24 March 2000, Presidency Conclusions.

dialogue that are based on cooperation, like works councils, could not voice employees' needs as much as the more confrontational alternatives.

In countries where social dialogue is embedded in a democratic tradition of reaching decisions, like Austria and the Netherlands, social dialogue had a stabilising function in times of crises and helped to overcome the economic crisis. For example, the social partnership structure in Austria is defined by cooperation, concertation and the accordance of interests between different actors, and the relationship between negotiation partners is based on mutual trust. Consultations are frequent, including voluntary and informal ways of cooperation (Meier & Tiefenbacher, 2018). The Netherlands also has a strong tradition of social dialogue within the context of labour law developments and it is historically known for its well-functioning social dialogue system. The process of social dialogue is a consensus-based decision making process, aimed to avoid severe public confrontations both on the governmental side as well as on the side of the social partners (Vries & Safradin, 2018). Cooperation-based models have resulted in fewer strikes, improved protection of employees and employee satisfaction and increased employment and higher labour productivity (Araújo & Meneses, 2018).

The former Soviet Bloc went through neoliberal system transformations with a radical shift from the previous communist regimes even before their accession to the EU. Central and Eastern European welfare regimes, however, are still shaped by their past as planned economies and they combine current neoliberal trend with socialist traditions of welfare states. Social dialogue is usually very centralized by the State; however, it is existent and more alive on the workplace level as there is larger space left for trade unions' manoeuvring.

In Hungary national level social dialogue has a weak impact on policy formation or on regulatory issues, while sectoral level social dialogue has never been well developed. Social dialogue is the most effective at the workplace level; however, bipartite negotiations became increasingly difficult due to the changes in trade unions' rights after 2012 when the new Labour Code came into effect. In Croatia social dialogue was not satisfactory. However, bipartite negotiations were much more successful because both parties were interested in setting terms and conditions for labour to restart economic growth. Tripartite negotiations were formal and social partners' opinion are overlooked during the decision making. Social dialogue was not valued by the government and in addition to this matter officers representing the government during the negotiations lacked the required professional knowledge on labour and social law issues. In Slovenia social dialogue was ineffective until a new regulation concerning the Economic and Social Council were negotiated and adopted between social partners and the government in December 2016. After that negotiations became more operative. While sectoral level collective bargaining remained an important element of social dialogue, workplace level negotiations lost their importance. The challenges related to social dialogue were arguably due to the lack of trust between social partners and the fact that in many cases terms and conditions of already concluded agreements were not respected by either party (Horváth, et al., 2019).

Even though reasons vary in Central-Eastern European countries why detrimental changes were introduced to social dialogue, it could be observed that governments tend not to involve social partners when implementing austerity measures. This might be explained by the fact that social dialogue is perceived as sluggish and governments wanted to be quick in implementing measures during the crisis to mitigate its negative effect. Another explanation might be that

governments are more pragmatic, and, indeed, even autocratic about crisis management in this region.

2. A Case Study of Hungary

Policy reforms in Hungary have been heavily influenced by the economic crises, as in many European countries. However, in Hungary the recent economic downturn was accompanied by the landslide victory of the current governing party, the conservative Fidesz and its politically subordinated ally, KDNP (Christian Democratic People's Party). The two-third majority allowed the coalition to practically re-codify major policy areas with no opposition, while triggering substantial attention from national and European institutions due to the removal of democratic guarantees from the political processes.⁹⁷ Major legislative bills were adopted in the social and labour fields catering for more flexibility while removing substantial elements of security and even the Constitution was replaced.⁹⁸

The character of reforms in employment policy is rather mixed, neo-liberal and state-socialist elements could equally be detected in legislation (Kollonay-Lehoczky, 2013). Fundamental elements of democratic control, like participation or trade union rights, were largely eliminated to cement the executive power of the coalition, whereas centralisation was made in almost all areas from education to health care. Social rights were largely curtailed, increasing vulnerability and poverty in a disproportionate manner. The democratic gap was further widened when the Basic Law abolished the right of the Constitutional Court to ex-post review laws related to budgetary issues, such as legislation on taxation and social insurance, both unquestionably central to social policy (Halmai & Scheppele, 2012).⁹⁹ So-called 'cardinal laws' were introduced to regulate issues related to social policies. Cardinal laws are subject to amendments with two-third majority, making it unfeasible for any future government to initiate substantial changes in social legislation with simple majority.

Since 2011 the government has made great efforts to narrow down the influence of social partners. The National Council of Interest Reconciliation, which had been the forum of the national tripartite social dialogue functioning since the 1989-90 political regime change – was terminated. One of its main functions was that social partners agreed on wage policy and statutory minimum wage on a tripartite basis. By its termination tripartitism was also abolished. The legislative objective was to replace the existing social dialogue with a centralised system which ensures only consultation rights. A National Economic and Social Council (NESC) established in 2012 was set up to replace the National Council of Interest Reconciliation.

⁹⁷ Some examples are: European Commission for Democracy through Law (Venice Commission), *Opinion on three legal questions arising in the process of drafting the new constitution of Hungary* (No 614/2011, 28 March 2011) (Venice Commission Op 614/2011); *Opinion on the new Constitution of Hungary*, (No. 618/2011, Venice). 17-18 June 2011) (Venice Commission Op 618/2011); European Parliament resolution on the Revised Hungarian Constitution [2011].

⁹⁸ Basic Law of Hungary (2011).

⁹⁹ The removal of fiscal laws from the jurisdiction of the Hungarian Constitutional Court, originally meant as a temporary measure, was later made into a firm part of the new Fundamental Law, with the consequence that the Parliament can now enact fiscal laws that violate the constitution and individual rights, and the Constitutional Court is not just temporarily but permanently barred from reviewing them.

However, this newly established body has no substantive rights to make decisions, it is a mere consultative and advisory body, which is independent from the Parliament and the Government. It is not a tripartite forum, since it consists of six different interest groups,¹⁰⁰ and at the same time the Government is not a member of the NESCS, and its ministers are only permanent guests with consultation rights. Even social partners do not consider NESCS to be suitable for discussing the merits of the national reform programmes. Furthermore, in 2012 an informal tripartite forum was established, the Permanent Consultation Forum (PCF) of the Private Sector and the Government. The Government invited only selected trade unions and employers' associations to PCF. Interviewees agreed that the reason the government established the PCF was that negotiations in NESCS about wages, including minimum wages, would not be possible.

The case of Hungary represents very well that the ambiguity of provisions could lead to serious harm in national legislations. The vague wording of Directive 2002/14/EC allowed the Hungarian lawmaker to adopt a new employee involvement system, which by and large meets the formal requirements of the Directive but bypasses its objectives.

2.1. Overview of National Legislation

Political changes were rather rapid in Hungary, between 1988 and 1992 key legislative movements laid down a completely new system of industrial relations. The third Labour Code¹⁰¹ was based on the principle of freedom of association and strived to create a genuinely democratic form of participation. Works councils were institutionalised, despite the lack of genuine historical origins or theoretical foundations (Kiss, 2005). New works councils followed the German dual-channel system; however, eventually it became a significantly weaker institution than the original model.¹⁰² Works councils and trade unions were provided with similar, sometimes competing, rights at a workplace level, creating a horizontal dual-channel system (Tóth, et al., 2004).

The formulation of the third Labour Code was naturally subject to political debates and the implementation of a dualistic model of participation indeed was a result of a political compromise. During the crisis of industrial relations the role of trade unions was significantly weakened, but due to the provisions of the third Labour Code on participation trade unions could, to some extent, keep their former positions at a workplace-level.¹⁰³

Decisions of the Constitutional Court concerning trade unions shaped the reforms of industrial relations and had an important impact on the bargaining position of trade unions (Kollonay-Lehoczky & Ladó, 1996).¹⁰⁴ Trade unions could represent employees in issues

¹⁰⁰ The representatives of the economy (e.g. employers' representative organisations), trade unions, civil societies, the representatives of the sciences, the arts and the registered (historical) churches. Act XCIII of 2011 on National Economic and Social Councils, Subsection (1) Section 4

¹⁰¹ Act No XXII of 1992.

¹⁰² In Germany works councils possess strong co-determination rights at a workplace level, thus employers have to take them as relevant negotiation partners; works councils' activities successfully complement sectoral-level social dialogue.

¹⁰³ Reforms concerning the National Council of Trade Unions (*Szakszervezetek Országos Tanácsa*, SZOT) the national level umbrella organization of trade unions set up by the stalinist Hungarian Socialist Workers' Party started in 1988, and were focusing on two major areas: separation from Party politics and decentralisation.

¹⁰⁴ The relevant decision concerning trade union rights were 8/1990 (IV.23.) ABH and 42/1991 (VI. 23.) ABH (Constitutional Court decision).

related to their living and working conditions, in the name of and on behalf of employees even in the absence of a special authorization. The Constitutional Court decided that the right of the trade unions to represent employees without authorization violated the Constitution. The Constitutional Court argued that the socio-economic environment where the representation of employees fell within the exclusive competence of trade union has radically changed as part of the political transformation process, and the representation of the employees' interests has now been placed upon a pluralistic basis.¹⁰⁵ The Constitutional Court did not find the disputed provision unconstitutional in violating the freedom of association, but rendered its decision considering the provisions on the right of personal disposal. The right of disposal is an integral part of the right to human dignity, it is a natural right of which no one may be deprived. The Constitutional Court stated that the right of disposal is a general right to personhood, which encompasses various aspects, such as the right to free personal development, the right to free self-determination, the general freedom of action or the right to privacy. On the basis of the disputed provision, it may not be ruled out that the trade union may choose to exercise its right of representation in spite of an employee's explicit request to the contrary. The risk of infringing an employee's interest is at its greatest when the non-trade-unionist employee's personal matters are concerned. Thus, the provision in question was annulled by the Constitutional Court. Even though the Constitutional Court was based on a stereotypical image of socialist-style, paternalistic trade unions alienated from workers, rather than a recognition of genuine trade union functions, this decision was as an important step in acknowledging the personal freedom of workers.

The rights of trade unions and works councils regarding information and consultation were not clearly formulated resulting in a rather controversial dual channel model by creating different stances for works councils and trade unions at workplaces (Tóth, 1997). The former Labour Code tied the right of concluding a collective agreement to the results the trade union achieved on works council election. Act No XX of 1992 stipulated that those trade unions were entitled to conclude a collective agreement with the employer, whose candidates had received more than half the votes in the works council election.¹⁰⁶ Since trade union representativeness was tied to the results of the works council election, the two institutions horizontal interdependence was further enhanced and their and trade unions got works councils under their influence (Neumann, 1997).

This mixed system, where the trade unions' right to conclude a collective agreement was tied to the results of the works council election, was a result of an unfortunate trade-off

¹⁰⁵ Pursuant to Article 70/C (1) of the Constitution (Act No XX of 1949) everybody shall have the right to form an organization with others with the aim to protect their economic and social interests or to join such an organization.

¹⁰⁶ Major changes concerning the rules of the election were introduced by Act No LV of 1995. If more than one trade union maintained a local branch at a given employer, a collective agreement could only have been concluded jointly by all the trade unions, provided that the candidates of such trade unions had jointly received more than half the votes in the works council election. If the above conditions for having the trade unions jointly conclude a collective agreement were not fulfilled, the so called representative trade unions had the right to conclude a collective agreement together, provided the candidates of such trade unions have jointly received more than half the votes in the works council election. If the conditions for having the representative trade unions jointly conclude a collective agreement were not fulfilled either, the trade union whose candidates jointly had received more than sixty-five per cent of the votes in the works council election became entitled to conclude a collective agreement. In that respect, representatives were those trade unions, whose candidates received at least ten per cent of the votes in the works council election.

(Prugberger, 2004).¹⁰⁷ This regulation blurred the line between collective bargaining and consultation and gave employers an opportunity to avoid bargaining with trade unions (Tóth & Frege, 1997). Employers did not have prevailing counterparts at the bargaining table, and they were not interested in providing higher standards in employment relationships than the minimum requirements of the Labour Code. Thus, collective agreements could not become genuine sources of labour law, and the anti-union inclination of employers was generally high. Notwithstanding, researches had controversial findings on the relationship between works councils and trade unions (Ladó & Tóth, 1994).

Since the boundaries of collective bargaining and participation were blurry, a nationwide study showed that at workplaces where both trade union and works council operated, the majority of the trade union officers believed that works councils swindled trade unions from the participatory rights, which traditionally belonged to them (Benyó, 2003). Due to these regulations, trade unions were only interested in the election, but not in the effective operation of works councils (Kisgyörgy, et al., 2003). However, in this way, collective agreements concluded at workplaces by trade union could genuinely represent the interest of employees at a given establishment (Kollonay-Lehoczky, 2013). The new Labour Code abolished the mixed system of trade union representation. Dissenting opinions still exist.

The dual channel system was widely criticised. After a heated academic debate some labour law scholars concluded that previous regulatory regime of employee involvement clearly failed (Berke, et al., 2009). This failure could be explained by the wrong initial concept regarding the dual channel model: the numerous overlaps in trade union and works council rights, which completely lacked solid dogmatic foundations, did not serve the purposes of employee involvement. These problems had a significant impact on the new Hungarian Labour Code, which came into effect on July 1, 2012 (Kun, 2009).¹⁰⁸

The new Labour Code of Hungary while generally maintaining the democratic principles of its predecessor concerning works councils, has brought substantive changes to industrial relations. The structure of the Labour Code suggests that the lawmaker intended to emphasise the importance of works councils, even to the detriment of trade unions: many of the former rights of trade unions are now allocated to works councils. While the confusion regarding trade unions' and works councils' rights was mostly cleared away, the novelties of the re-codification are not uncontested. Even though trade union's former information and consultation rights are now delegated to works councils, works councils are not empowered by the necessary powers to effectively exercise these rights.

The economic plans drawn up by the government after the landslide victory of the current conservative governing party Fidesz and its politically subordinated ally, KDNP (Christian Democrats) emphasise the role of collective labour law in particular in economic development and the importance of autonomous regulations in the world of work.¹⁰⁹ However,

¹⁰⁷ T Prugberger, A kollektív munkajog intézményei, a munkavállalói érdekképviselő és participációs jogok tartalma, mechanizmusa és érvényesülése a jogharmonizációs jogalkotási követelmények tükrében, in, I Horváth and R Rác (eds), *Tanulmányok a munkajog jövőjéről* (Budapest, 2004, Denzoprint),75; Kisgyörgy-Pataky-Vámos: Helyzetkép az üzemi tanácsokról (Budapest, 2003, FES); B Benyó, '*Tekintetjük-e jelentéktelennek a munkavállalók részvételét Magyarországon*' (2003) 47 Munkaügyi Szemle 1-2.

¹⁰⁸ Act No I of 2012.

¹⁰⁹ Hungarian Economic Reform program (Széll Kálmán Plan) http://ec.europa.eu/europe2020/pdf/nrp/nrp_hungary_en.pdf, Hungarian Labour Plan

these sources refer to both individual and collective autonomy as new and forward-looking ideas to reform Hungarian labour law. This undistinguished point of reference disregards the historical fact that the strengthening of individual autonomy would rather was a step backwards. It is by and large unquestioned that the origins of labour law dates back to times when state actor started controlling the autonomy of parties entering to an employment relationship to protect the weaker party, the employee. Collective autonomy – as opposed to individual autonomy – is an effective tool to control the unilateral regulating power of employers.

The economic plans aimed to encourage social partners to enter into collective agreements; however, the new Labour Code does not provide employees' representatives with strong, enforceable rights to achieve this goal. Most notably, the 2012 Labour Code allows individual labour contracts to alter from the Code to the detriment of workers, providing enough flexibility for employers to govern labour relations without concluding collective agreements. Moreover, standards stipulated by the Labour Code are already providing for minimum requirements, therefore trade unions are usually not willing to enter into negotiations to further lower these standards and effectively jeopardize living standards and dignity of employees (Kollonay-Lehoczky, 2013).

2.1.1. Establishment of Works Councils

An employee representative or a works council has to be elected if, during half-year prior to the date when an election committee was established, the average number of employees at the employer or at the employer's independent establishment or division is higher than fifteen or fifty, respectively. The number of works council members is proportionate to the size of the division represented by the works council.¹¹⁰ A unit of an employer has to be considered independent if the head of the establishment is vested with competence which concerns the works council's rights of participation.¹¹¹ This notion does not require physical (geographical) separation: divisions located at several places could belong to one works council. If there are more than one independent units, multiple works councils could be elected at the same employer. Works councils are elected for terms of five years.¹¹² The justified expenses incurred in connection with the election of the works council is borne by the employer.¹¹³

Concerning active election rights, all workers employed by the employer and working at the given fixed establishment have to be entitled to participate in the election of works council members. Members of the works council have to be elected by secret ballot and popular vote.

http://brdsz54.hu/index.php?option=com_content&view=article&id=249:nemzeti-munkaterv-szell-kalman-terv&catid=84&Itemid=476.

¹¹⁰ Three, if the number of employees does not exceed one hundred; five, if the number of employees does not exceed three hundred; seven, if the number of employees does not exceed five hundred; nine, if the number of employees does not exceed one thousand; eleven, if the number of employees does not exceed two thousand; thirteen, if the number of employees is more than two thousand. A new works council member shall be elected if the number of employees and the number of works council members are not consistent with the above provisions for at least six months due to an increase in the number of employees.

¹¹¹ Section 236 Para 2 of Act No I of 2012.

¹¹² Section 236 Para 3 of Act No I of 2012.

¹¹³ Section 236 Para 4 of Act No I of 2012.

All eligible employees have to have one vote.¹¹⁴ Regarding passive election rights, employees nominated as works council members have to have legal competency¹¹⁵ and must have been employed by the employer for a period of at least six months, and have to work at a given fixed establishment.¹¹⁶ Persons exercising employers' rights, those who are relatives of the employer's executive officers or are members of the election committee cannot be elected.¹¹⁷

A candidate may be nominated by at least ten per cent of the employees eligible to vote or by at least fifty employees eligible to vote, or by the local trade union branch represented at the employer. An election has to be declared valid if more than half of those eligible to vote have participated. To this end, an employee eligible to vote cannot be counted – provided that she/he did not participate in the election – who, at the time of the election, was incapacitated to work due to illness or was on leave of absence without pay.¹¹⁸

Nomination of candidates has to be construed valid if the number of candidates reaches the number of members that can be elected to the works council.¹¹⁹ The persons receiving the highest number of votes, or at least thirty per cent of the valid votes are construed as having been elected members of the workers' council.¹²⁰ In the event of equality of votes, the length of the employment relationship with the employer has to be taken into consideration. Persons receiving at least twenty per cent of the valid votes are regarded as substitute members of the works council.¹²¹ If there are not enough candidates who received thirty per cent of the valid votes, the works council cannot be established. It means that establishments with overly active employees have lesser chances to elect works council members, as if there are too many candidates running for the office, it could easily happen that the votes are fractured as much that not enough candidates could meet the threshold.

Employees could be represented by an employee representative, a works council, a central works council, or by a corporate-level works council.¹²² The new Labour Code maintained the option of works councils forming a central works council in case more than one

¹¹⁴ Section 243 of Act No I of 2012.

¹¹⁵ See, Section 2:8 of Act No V of 2013. Regarding the requirement of having legal competency, at an establishment where only employees with either no or limited legal competency are employed (which is theoretically possible due to Section 212 of the Labour Code), employees would be deprived to exercise their right to information and consultation. Neither the European Social Charter, nor Directive 2002/14 contains any provisions regarding the legal competency of employee representatives.

¹¹⁶ Section 238 Para 1 of Act No I of 2012.

¹¹⁷ Section 238 Para 2 of Act No I of 2012.

¹¹⁸ In the event of an invalid ballot, the election shall be repeated within a period of ninety days. The new election may not be held within a period of thirty days. The second election shall be declared valid if more than one-third of those eligible to vote have participated. The nominee receiving the highest number of votes, or at least thirty per cent of the valid votes shall be declared an elected member of the works council. If the repeated election is declared invalid, a new works council ballot shall be held after one year at the earliest.

¹¹⁹ Section 242 of Act No I of 2012.

¹²⁰ An election shall be declared invalid if the required number of candidates did not receive thirty per cent of the votes cast. The nominees having received thirty per cent of the votes shall be declared elected members of the works council. A new election shall be held within a period of thirty days to fill the remaining positions. For the new election, new candidates may also be nominated up to the fifteenth day prior to the election. The second election shall be declared valid if more than one-third of those eligible to vote have participated. The nominees receiving the highest number of votes, or at least thirty per cent of the valid votes shall be declared elected members of the works council. Persons receiving at least fifteen per cent of the valid votes shall be regarded as substitute members of the works council. If the repeated election is declared invalid, a new works council ballot shall be held after one year at the earliest.

¹²¹ Section 246 of Act No I of 2012.

¹²² Section 236 Para 1 of Act No I of 2012.

works councils operate at an employer.¹²³ Members of the central works council have to be delegated by the works councils from among their members. A central works council may not have more than fifteen members.¹²⁴

A novelty of the new Labour Code is the introduction of corporate-level works councils.¹²⁵ Central works councils or, in their absence, works councils may set up a corporate-level works council at a recognized¹²⁶ or *de facto* group of companies.¹²⁷ Members to such works councils have to be delegated by the central works councils or the works councils from among their members. The number of members of the corporate-level works council is limited in fifteen.¹²⁸ General provisions pertaining on works councils apply to a central works council and to a corporate-level works council.¹²⁹

Procedures for informing and consulting employees in a European Works Council were introduced by Act No XXI of 2003¹³⁰ to satisfy the obligation concerning the transposition of Directive 94/45/EC. The Act sets forth a regulation regarding the applicability of the Hungarian rules for the election of a works council. The Hungarian rules have to be applied when the central management of a Community-scale undertaking, or group of undertaking is located in Hungary. The Hungarian regulations also have to be applied regarding the protection of employee representatives, if the registered office of the controlling company is not situated in a Member State, but the management of a fixed establishment or company operating in a Member State and controlled by the central management is situated in Hungary, or a Community-scale undertaking or a group of undertaking has a representative agent in Hungary; or if the Community-scale undertaking or controlled undertaking employing the greatest number of employees in Hungary.¹³¹

¹²³ Section 250 Para 1 of Act No I of 2012.

¹²⁴ Section 250 Para 2 of Act No I of 2012.

¹²⁵ Section 251 Para 1 of Act No I of 2012. The regulations concerning corporate-level works councils are aligned with those of the group of companies stipulated by the Civil Code. The rules of cooperation have to be laid down within the group of companies by the works council having the right to adopt decisions relating to employees and by the corporate-level works council. Section 3:50 Paragraph 3 of the Civil Code stipulates that the autonomy of the controlled companies of the group may be restricted in the manner and to the extent specified in the control contract with a view to achieving the common business objective. The control contract has to provide for the protection of the rights of the controlled members, and for the protection of creditors' interests. That provides for that decisions regarding participation are made on the level of the controlling company.

¹²⁶ Section 3:49 of the Civil Code (Act No V of 2013) defines the notion of recognized group of corporation as a form of cooperation featuring a common business strategy between at least one dominant member that is required to draw up consolidated annual accounts and at least three members controlled by the dominant member under a control contract. A group of corporations may consist of limited companies, private limited-liability companies, groupings and cooperative societies. If a group of corporations is led jointly by several legal persons, they shall enter into an agreement to determine the one enabled to exercise the rights of the dominant member in accordance with the control contract.

¹²⁷ If the conditions for the control contract prevail for at least three consecutive years, at the request of either of the parties with legal interest the court may order the *de facto* dominant member and the controlled companies to conclude the control contract and to apply to the court of registry for the registration of the group of corporations. If a group of corporations *de facto* operates for at least three consecutive years, the court - at the request of either of the parties with legal interest - shall have authority to apply the regulations governing the relations between the managements of the dominant member and the controlled member even in the absence of a control contract and without being registered as a group of corporations. See, Section 3:62 of Act No V of 2013.

¹²⁸ Section 251 Para 2 of Act No I of 2012.

¹²⁹ Section 250 Para 3 and Section 251 Para 4 of Act No I of 2012.

¹³⁰ Amended by Act No CV of 2011.

¹³¹ Para 4 of Section 1 of Act No XXI of 2003.

2.1.1. Competencies and Responsibilities of Works Councils

Substantive changes were introduced concerning the role of works councils. Works councils aim to promote cooperation between employers and employees and to facilitate participation in decision making.¹³² The role of works councils is to monitor compliance with the employment regulations. The ministerial reasoning further explains that this change in the new Labour Code is justified by “international standards.”¹³³ It is regrettable, however, that the ministerial reasoning does not specify which international standards are being referred to, as works councils are traditionally the instruments of participation (Barnard, 2012) and their rights generally do not enable them to effectively control employers’ practices, which would require powers dissuasive enough to prevent employers from malpractice.

Moreover, the protection of works council members was narrowed down and it is only the chairperson of a works council who is protected against unfair dismissal. This regulation is suitable to effectively withhold regular works council members to stand up for workers’ rights.

As it was pointed out, the compromised solution of the Labour Code of 1992 was unnecessarily blurred the lines between the powers and responsibilities of trade unions and works councils by providing rights of information and consultation to both. Now these rights are solely vested in the works councils. However, it ought to be noted that trade unions are traditionally in a better position to monitor employers’ practices and working conditions, as works councils are instruments of mutual cooperation and participation in decision making.

Works councils are entitled to request information and to initiate negotiations, with the reason indicated, which the employer may not refuse. Notification means transmission of information specified by law as related to industrial relations or employment relationships in order to enable the recipients to acquaint themselves with the subject matter and to examine it, and to formulate an opinion to prepare for consultations, and ‘consultation’ means the establishment of dialogue and exchange of views between the employer and the works council or trade union.¹³⁴ These definitions are the same as provided for by Directive 2002/14/EC.¹³⁵

To the extent required for their responsibilities, works councils are entitled to request information and to initiate negotiations, with an indication on its reason. The employer must not refuse the initiative of the works council. Moreover, an employer has to provide information to the works council in every six month on matters affecting employers economic standing; changes in wages, liquidity related to the payment of wages, characteristic features of employment, utilization of working time, characteristics of working conditions; number of workers in employment and the description of the jobs they perform.

Consultation has to take place with a view to seeking an agreement, in such a fashion as consistent with the objective thereof and ensuring *a)* that the parties are properly represented; *b)* the direct exchange of views and establishment of dialogue; *c)* substantive discussions.” Regarding the issue of timing, employers have to consult the works council at least 15 days prior to passing a decision in respect of any plans for actions and adopting regulations affecting

¹³² Section 235 Para 1 of Act No I of 2012; ministerial reasoning concerning Sections 235-37 of the Labour Code.

¹³³ Ministerial reasoning concerning Section 262 of the Labour Code.

¹³⁴ Section 233 Para 1 Points a) and b).

¹³⁵ Article 2 Points (f) and (g) of Directive 2002/14/EC.

a large number of employees. The quality of the dialogue is supposed to be further protected as an employer must not carry out the proposed action during the time of consultation, or for up to seven days from the first day of consultation, unless a longer time limit is agreed upon. In the absence of an agreement an employer has to terminate consultation when the said time limit expires.

The scope of plans or actions that require consultation especially covers the following matters: proposals for the employer's reorganization, transformation, the conversion of a strategic business unit into an independent organization; introducing production and investment programs, new technologies, or upgrading existing ones; processing and protection of the personal data of employees; implementation of technical means for the surveillance of workers; measures for compliance with occupational safety and health requirements, and for the prevention of accidents at work and occupational diseases; introduction and/or amendment of new work organization methods and performance requirements; plans relating to training and education; appropriation of job assistance related subsidies; drawing up proposals for the rehabilitation of workers with health impairment and persons with reduced ability to work; laying down working arrangements; setting principles for remuneration of work; measures for the protection of the environment relating to the employer's operations; measures implemented with a view to enforcing principle of equal treatment and to promote equal opportunities and work-life balance.¹³⁶

Both the ministerial reasoning and the Commentary of the Labour Code emphasise the importance of confidential information (Kardkovács, 2012). An employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation covers facts, information, know-how or data that, if disclosed, would harm an employer's legitimate economic interest or its functioning.¹³⁷ Employers' prerogatives are mirrored as obligation of employees' representatives, as representatives acting in the name and on behalf of works councils or trade unions are not authorized to disclose any facts, information, know-how or data which, in the legitimate economic interest of an employer or in the protection of its functioning, has expressly been provided to them in confidence or to be treated as business secrets, in any way or form, and they are not authorized to use information in any other way in connection with any activity in which this person is involved for reasons other than the objectives specified in the Labour Code.¹³⁸ Any person who is acting in the name or on behalf of a works council or a trade union has to be authorized to disclose any information or data acquired in the course of their activities solely in a manner which does not jeopardize employer's legitimate economic interest and without violating rights relating to personality.¹³⁹

The notion of 'business secret' – or in the wording of the new Civil Code, 'trade secret' – includes any fact, information and other data, or a compilation thereof, connected to economic activities, which are not publicly known or which are not easily accessible to other operators pursuing the same economic activities, and which, if obtained and/or used by unauthorized persons, or if published or disclosed to others are likely to imperil or jeopardize the rightful

¹³⁶ Section 264 of Act No I of 2012.

¹³⁷ Section 234 Para 1 of Act No I of 2012.

¹³⁸ Section 234b Paras 2 and 3 of Act No I of 2012.

¹³⁹ Amended by Point e) of Para 34 of Section 175 of Act No CCLII of 2013 in accordance with the new Civil Code.

financial, economic or commercial interest of the owner of such secrets, provided the lawful owner is not subject to actionability in terms of keeping such information confidential.¹⁴⁰ Commercial secrecy also has to apply to technical, economic and other practical knowledge of value held in a form enabling identification, including accumulated skills and experience and any combination thereof, if acquired, used, disclosed or published in violation of the principle of good faith and fair dealing. It is noteworthy that the breach of commercial secrecy must not be relied on as against a person who has obtained trade secrets or know-how from third parties in good faith, in the course of trade for consideration.¹⁴¹ These regulations are in line with the provisions of Article 6 of Directive 2002/14/EC, Article 8 of Directive 2009/38/EC as well as Article 21a of the Revised European Social Charter, which allow employers to withhold certain information which could be prejudicial to the undertaking or which are confidential.

2.1.2. Co-determination Right of Works Councils

The new Labour Code brought detrimental changes related to works councils' co-determination rights. Most importantly the subject matter of co-determination was curtailed, the previous Labour Code provided co-determination right to works council related to the appropriation of welfare funds, and *the appropriation of welfare institutions and real estate property of such nature*, as specified in the collective agreements, now it is limited to the appropriation of welfare funds.¹⁴² Thus, the new Labour Code eliminated the co-determination right concerning the appropriation of welfare institutions and real estate property, and it ceased to link these rights to the provisions of the collective agreement effective on a workplace. Although the limitation of the subject matter is not explained by the ministerial reasoning, it has positive aspects too.

Ceasing the linkage with the provisions clears the boundaries between trade unions and participation. Moreover, Section 65 of the previous Labour Code led to controversial interpretations. The question referred to the Supreme Court of Hungary was whether the works council had the right of co-determination related to the utilization of welfare-related real estate property in the absence of a specific provision of a collective agreement.¹⁴³ The Court's decision was in the affirmative. However, when this section was amended in 2007, it became clear that the lawmaker interpreted this question in a manner contrary to the quoted ruling of the Supreme Court.¹⁴⁴ Act No XIX of 2007 did not amend the text itself, but edited the existing sentence that changed the interpretation in a way that the works council *shall not* have the right

¹⁴⁰ Section 2:47 of the Civil Code (Act No V of 2013).

¹⁴¹ Section 2:47 Para 3 of the Civil Code.

¹⁴² Section 65 Para 1 of Act No XXII of 1992, amended by Section 1 of Act No XIX of 2007. In 1992 the Labour Code originally provided co-determination right to works councils to the adaption of the health and safety regulations, however, the related provisions were incorporated in Act No XCIII of 1993 on Employment Safety and Health. This amendment was controversial, as the provisions of Act No CXIII of 1993 did not make the election of a health and safety committee compulsory; thus, in case the employer did not agree with the election of such committee, the works council would have no right of co-determination on safety and health issues.

¹⁴³ Case EBH 2004.1148 of the Supreme Court.

¹⁴⁴ Act No XIX of 2007.

to co-determination in the absence of specific provisions on the subject matter laid down by a collective agreement.

Formerly, the content of the co-determination was heavily debated in other cases too, and it was questioned whether the works council had co-determination rights with regard to the sales of a welfare property. The law stipulated that the works council had co-determination rights concerning the *utilization* of welfare-related real estate property.¹⁴⁵ However, the right to sell in its nature is a different, yet superior, right compared to the right to utilize, thus, the co-determination right of works councils did not cover this area (Prugberger, et al., 1994). Critics of the decision argued that the income resulted from sales is a specific form of utilization, thus it was involved in the scope of co-determination (Prugberger, 2004).

The legal consequences of the breach of the works council's right on co-determination were also changed in 2012. While the previous Labour Code deemed any action taken by an employer violating the co-determination rights void, the new Labour Code does not stipulate so.¹⁴⁶ As no explanation is given by the ministerial reasoning for such a change, a possible explanation lies in the decision of the Labour Court in the Budapest Airport case, which delayed its privatization process.¹⁴⁷ The former Labour Code stipulated that employers' measures which violated the co-determination or consultation rights of the works council were void. In the Budapest Airport case, the Labour Court had to decide whether the transaction related to the privatisation of Budapest Airport was lawful and ruled the transaction void because the management had failed to consult the works council and therefore violated the Labour Code.

The decision was highly politicized because major government and opposition parties clashed on the high-value transaction, as the repeated tender was won by BAA International Ltd, the value of the bid was HUF 464.5 billion (around EUR 1.5 billion). (Neumann & Fodor, 2005). The privatisation process in Hungary started in the late 1980s; however, companies of a certain strategic importance remained owned by the Hungarian state, for example those being vital for public transportation, like the Budapest Airport Rt. The Privatisation Act required that at least 25 per cent plus one share of Budapest Airport must remain in state ownership. Nevertheless, the Hungarian Privatisation and State Holding Company (*Állami Privatizációs és Vagyonkezelő Rt, ÁPV Rt.*) decided to sell the shares of Budapest Airport over this limit, issued a call for tenders in June 2005 and shortlisted the potential buyers. The works council of Budapest Airport challenged the privatisation at the labour court on grounds that – among other complaints – the works council had not been informed or consulted appropriately on the privatisation tender; therefore, the transaction had been void. The court upheld the works council's claim. In its ruling, the court referred to Section 65 of the Labour Code of 1992, which required employers to consult the works council prior to taking a decision in respect of plans affecting a large group of employees, including the employer's privatisation.

The ruling triggered controversial comments in both business and academia. Those who disagreed with the Court's decision argued that the Labour Code did not specify any obligations for the employer's owner regarding the duty of consultation, even if the decision or the action influences the working conditions of the employees. The Labour Code stated that the power to inform and consult the works council was vested in the employer, not in the owner, regardless

¹⁴⁵ Section 65 Para 1 of Act No XX of 1992.

¹⁴⁶ Section 67 of Act No XXII of 1992.

¹⁴⁷ Ruling of the Municipal Labour Court No 2.Mpk. 50.329/2005/9-I.

of the entity of the decision maker, therefore an action of the owner of the employer (in this case, ÁPV Rt.) could not be deemed void under Sections 65 and 67 of the Labour Code of 1992. Another argument was that the Labour Court did not have the competence to decide on civil law issues, such as the validity of a privatisation tender (Gyulavári & Kun, 2012).

Although widely criticised, the Budapest Airport case was a landmark decision, reinforcing the strongest power of works council, the right for co-determination. Arguments in favour of the labour court's ruling emphasised that participatory rights must be enforceable in all cases, including commercial transactions. Nonetheless, those sections of the Labour Code having transposed the EU Directive on transfers of undertaking refer clearly to the superior organisations' decision making and maintains the information and consultation duty of the management. Moreover, the Privatisation Act also stipulated detailed procedural rules for information and consultation.¹⁴⁸ Previous court rulings related to selling companies' social welfare facilities were also cited, as examples for the co-determination right of works councils in civil law matters. Having regard to the changes introduced by the 2012 Labour Code the works council could only file a claim to state that the employer's action violated the right of co-determination and without an enforceable sanction stipulated by the Labour Code, the Court most probably would not deem the action void.

The importance of the legal consequences of the breach of the works council's right on co-determination is striking. Without dissuasive sanctions and proper remedies, participation rights are not safeguarded. The European Social Charter therefore stresses that enforcement methods are crucial; administrative fine and nullity of the employer's decision violating the rights of information and consultation are the most common sanctions in the pan-European area.

The former Labour Code of Hungary stood on the ground that employers action violating works councils' rights are null and void. However, as the relevant case law demonstrates, Courts' interpretations on this matter were heavily contested. Undoubtedly, the meaning of nullity is hard to understand in many cases. For example, what would be the decision in a theoretic case when the employer makes unilateral decision over the welfare fund – say, purchases music concert tickets for the employees? In case of nullity, what would be the consequences of infringing the co-determination right of the works council? Should the employer take back the tickets? What would happen if, by the time the court rules the case, the music concert is already over? Should the money spent on the tickets be paid back, even though the employees enjoyed the concert, despite they had wished to listen to different genre of music or to have meal vouchers instead?

Even though nullity is a sanction difficult to apply in most of the cases, it would have been advisable to revisit other possible sanctions when the new Labour Code was drafted, for example an administrative fine would have been introduced. Even though monetising a violation could easily lead to malicious employment practices, as it would be easier to treat a potential fine as an additional cost item during the decision-making process. It is also argued, that the most severe punishment for a business is when the decision-making process needs to be repeated in a relatively short timeframe, therefore it is more dissuasive than fines. This is well demonstrated by the Budapest Airport case. Regarding the nature of the subject matter of consultation rights, I believe that a system which contains both elements, nullity and an

¹⁴⁸ Act No XXXIX of 1995.

administrative fine would serve the interest of employees the best. Labour courts could be entitled to decide which sanction to be imposed based on the nature of the violation.

2.1.3. Collective Redundancies and Transfer of Undertaking

The new Labour Code designates information and consultation rights to works councils, however, there are two areas when this solution raises concerns regarding the effectuality of information and consultation rights. During collective redundancy and transfer procedures employees are deprived of their information and consultation rights in the absence of a works council.

Regarding collective redundancies, the Labour Code stipulates that in case the employer is planning to carry out collective redundancies, it has to initiate consultation with the works council.¹⁴⁹ The negotiation may lead to an agreement;¹⁵⁰ however the employer's duty of consultation does only due up to 15 days from the initiation of the consultation. The Labour Code only refers to the content of the agreement in one aspect, namely that it may contain the scope of workers affected by the termination of employment relationships,¹⁵¹ and it does not refer to any sanction or remedies may due upon the infringement of the agreement, e.g., a termination of an employee against the rules accepted by the parties.¹⁵² However, this agreement has to be considered as a workplace agreement, and its violation has to have the legal consequence of unlawful termination.¹⁵³ However, this assumption is rather weak as a possible remedy.

Concerns arise about cases when there is no works council operating at an establishment in question. Since the Labour Code only refers to the duty of consultation with the works council, a strict interpretation of the text suggests that in the absence of works council there is no such obligation on the employer's side, not even in the case when a trade union is present at the establishment.

Directive 98/59/EC states that workers' representatives means the workers' representatives provided for by the laws or practices of the Member States.¹⁵⁴ This notion is rather vague, allowing Member States to interpret it in line with their national industrial relations' traditions. At the first glance, EU law does not inspire Member States to create new forms of representation system, but the case law of the Court of Justice of the European Union specifically made mandatory for the United Kingdom to establish adequate representation for workers where it had not existed with regard to collective redundancies.¹⁵⁵ The Court set forth that "[the

¹⁴⁹ Section 72 Paragraph 1 of the Labour Code.

¹⁵⁰ See Article 2.1 of Directive Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies (Official Journal L 225, 12/08/1998 P. 0016 – 0021).

¹⁵¹ Section 76 Para 1 of Act No I of 2012.

¹⁵² Act No XXII of 1992 specifically invoked the consequences of unlawful termination in such cases; see, Section 94/F Para 1 of Act No XXII of 1992.

¹⁵³ On a similar opinion T Gyulavári (ed) *Munkajog [Labour Law]* (Budapest, 2013, Eötvös Kiadó), 228-229.

¹⁵⁴ Article 1b of Directive 98/59/EC.

¹⁵⁵ Case C-382/92 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, EU:C:1994:233; and Case C-383/92, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, EU:C:1994:234.

Directive 77/187/EEC on transfers of undertaking] require[s] Member States to take all measures necessary to ensure that workers are informed, consulted and in a position to intervene through their representatives in the event of collective redundancies [or the transfer of undertaking].”¹⁵⁶

Member States’ laws and practices for the designation of workers’ representatives must ensure that they are able to sufficiently protect employees’ interests under circumstances like collective redundancies or transfers (Bercusson, 2009). Thus, the aim of the regulation is to provide adequate voice for workers during these procedures. The Hungarian Labour Code clearly fails to achieve this goal. As argued above, the right to information and consultation is an individual right and employee representatives are to facilitate the process. Even in the absence of a standing body, individual employees shall not be deprived of their basic right to gain information concerning a workplace, especially regarding issues severely and disadvantageously affecting their employment, such as collective redundancies. A possible solution to overcome this shortcome would be that trade union officers or, in the absence of a trade union at the establishment, ad-hoc representatives elected by all employees employed at a given establishment could take up the task to negotiate with the employer.

A similar gap concerning information and consultation rights could be detected regarding regulations of transfer of undertaking. In case of a transfer of undertaking, an employer needs to inform employees in writing about the date or proposed date of the transfer, the reason of the transfer, the legal, economic and social implications of the transfer to employees, and any measures envisaged in relation to the employees.¹⁵⁷ An employer is required to consult the works council 15 days prior to the decision making regarding any plans for actions and adopting regulations affecting a large number of employees; specifically in case of transformation and business reorganisation.¹⁵⁸ Again, this regulation means that in the absence of works council, employees are not consulted, only informed, about the employer’s decision. However, Directive 2001/23/EC provides for that "representatives of employees" and related expressions shall mean the representatives of the employees provided for by the laws or practices of the Member States.¹⁵⁹

Thus, the Hungarian Labour Code violates Directive 2001/23/EC because it does not provide for adequate protection of workers during the transfer if there is no standing body elected. Also, trade unions are not referred by the law with regard to the procedure of transfer as possible representatives of employees. Thus, a revision of the regulation would be necessary, providing that trade union officers or, in the absence of a trade union at the establishment, ad-hoc representatives elected by all employees employed at a given establishment have to be consulted by the employer with regard to the issues related to the transfer of undertaking.

¹⁵⁶ Case C-382/92 paragraph 23; and Case C-383/92, paragraph 26.

¹⁵⁷ Section 38 Paragraph 2 of the Lasbour Code

¹⁵⁸ Section 264 Para 1 of the Labour Code.

¹⁵⁹ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16–20; Article 2c.

2.2. Workplace Agreement

One of the most contested regulations of the new Labour Code concerns workplace agreements. Works councils are now enabled to conclude a workplace agreement in subject matters designated to collective agreements, except the issue of wages. Such workplace agreements may be concluded on condition that the employer has not concluded a collective agreement covering a given workplace, or there is no representative trade union at the employer which is entitled to conclude a collective agreement.

This regulation signifies a severe misconception on the nature of employee participation and works councils. Even though works councils represent employees' interests, they are not a part of the collective bargaining process but are instruments of employee involvement in decision making. Collective bargaining transforms decision making processes and the collective agreement, as a result of the bargaining, merges the will of the two contracting parties. In contrast, through participation the decision-making process becomes more democratic, yet the decision itself will remain a unilateral act of the employer (Kollonay-Lehoczky, 2013). It is especially true in the case of the Hungarian works councils, which do not possess as strong competences as their counterparts in Germany or in Austria. Moreover, works councils have a nature of a public law, rather than a private law instrument (Kiss, et al., 2010).¹⁶⁰ Thus, works councils could never become the contractual partners of employers.

This is not the first time that this misconception appears in the Hungarian Labour Codes. Originally workplace agreement was introduced by an amendment of the Labour Code in 1995, which allowed works councils and employers to conclude an operative agreement on issues pertaining to the rights of a works council and its relations with the employer.¹⁶¹ This scope was largely extended by the radical changes in 1999.¹⁶² The amend allowed employers and works council to regulate issues, which were subject matters of a collective agreement. Both the general and the specific parts of the ministerial reasoning remained silent on the reasons why such a drastic amendment was necessary. The Hungarian trade unions did not find the matter justifiable either, even though concluding such normative workplace was only possible if there were no trade union representation at a workplace. They argued that works councils were not meant to be protecting employees' interest against employers, and they were defenceless at the bargaining table. Works councils do not possess any rights which would help them to put pressure on employers, most importantly, works councils were (and still are) not allowed to organize a strike.¹⁶³

Therefore, Act No LVI of 1999 introduced an instrument fundamentally alien to the newly established Hungarian works councils. This measure revoked the state-socialist mechanism, which forced trade unions to represent employees' interests against that of the

¹⁶⁰ The ministerial reasoning of the new Laboru Code for example states that the provisions of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) cannot be applied in case of employee participation, as these regulations are not based on private law.

¹⁶¹ Section 64/A of Act No XX of 1992.

¹⁶² Act No LVI of 1999.

¹⁶³ Works councils had to remain unbiased in relation to a strike organized against employers. Consequently, they could neither organize a strike, nor could support or impede a strike. The term of works council members participating in a strike were suspended for the duration of the strike. See, Section 70 of Act No XX of 1992.

employer's and at the same time, to exercise their participatory rights. The 1999 amendment restricted the scope of unilateral decisions of employers in issues like working time banking, the order of work, matters pertaining the employees' health, culture or welfare, and improvement of their living conditions.¹⁶⁴ In the absence of a collective agreement, these areas were subject to internal rules, unilaterally drawn up by an employer. Thus, workplace agreement might have been able to increase employee control over these issues. However, due to the continued contest of trade unions, concerned regulations were taken out from the Labour Code – as silently as they were introduced – in 2002.¹⁶⁵

To distinguish between the right to bargain collectively and the right to participate, the principal differences between Article 6 and Article 22 of the Revised Social Charter ought to be also mentioned. Despite of the overlap of their material scope, there are substantial differences in their stances. Consultation process set forth by Article 6.1 of the Charter with relation to the right to bargain collectively does not establish any rights or duties; it refers to an exchange of views of parties on an equal footing in a situation where the conflicting interest of the bargaining parties are to be confronted. In contrast, Article 22 of the Charter grants an enforceable right to consultation to workers in a vertical, unequal situation, where the managerial prerogatives of an employer are recognized (Kollonay-Lehoczky, 2010).

Thus, the new Labour Code did not increase the terrain of collective autonomy, the right of works councils to conclude such workplace agreements is nothing more than a rubber stamp on the unilateral action of employers to draw up working conditions (Kollonay-Lehoczky, 2013). Not to mention, the model of vesting participatory and bargaining rights in such way solely to one party has already failed twice in the history of Hungarian labour law.

2.3. Remedies

The protection of workers' representatives is safeguarded by ILO Convention No 135. According to its provisions, workers' representatives in the undertaking have to enjoy effective protection against any act prejudicial to them, including dismissal, based on their status or activities as a workers' representative or on union membership or participation in union activities, in so far as they act in conformity with existing laws or collective agreements or other jointly agreed arrangements.¹⁶⁶ The Convention further specifies the term workers' representatives, it means “persons who are recognised as such under national law or practice, whether they are (...) elected representatives, namely, representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.”¹⁶⁷ This notion was adapted by the European Social Charter: “[w]ith a view to ensuring the effective exercise of the right of workers' representatives to carry out their functions, the Parties undertake to ensure that in the undertaking: they enjoy effective protection against acts prejudicial to them, including dismissal, based on their status or activities as workers' representatives within the undertaking.”

¹⁶⁴ Section 119 of Act No XX of 1992.

¹⁶⁵ 14 Para 4 of Act No XIX of 2002, effective of 2 July, 2002.

¹⁶⁶ C135 - Workers' Representatives Convention, 1971 (No. 135).

¹⁶⁷ Articles 1 and 3b of C135 - Workers' Representatives Convention.

¹⁶⁸ The same requirement also appears in Directive 2002/14/EC: “Member States shall ensure that employees’ representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly re duties which have been assigned to them.”¹⁶⁹

All the above-mentioned instruments state that protection serves the effective exercise of the right of workers’ representative to carry out their function. This notion has utmost importance regarding the new Hungarian Labour Code. The former Labour Code provided protection against unfair dismissal of all trade union officers and works council members without prejudice to their positions within the trade union organization or the works council respectively. The new Labour Code unnecessarily narrows down the scope of protection to a specified number of trade union officers and to the chairperson of the works council. Works council’s consent is required for terminating the employment relationship of the chairperson of the works council by notice, or for temporary reassignment.¹⁷⁰ If the works council does not agree with the proposed action, the statement shall include the reasons. Failure by the works council to convey its opinion to the employer within the above specified time limit has to be construed as agreement with the proposed action.

The new provisions of the Labour Code do not satisfy the requirements set forth by the ILO, the European Social Charter and the EU Directive, because all members of the works councils are actual employee representatives, not only the chairperson of the works council, therefore, they would deserve the same level of protection.

2.4. Social Dialogue During the Economic Crisis

Prior to the outbreak of the global financial crisis in September 2008, Hungary managed to achieve substantial fiscal consolidation gains and the general government deficit shrank, from 9.4% in 2006 to 3.7% of gross domestic product (GDP) in 2008. However, following the outbreak of the crisis Hungary faced one of the most severe recessions among OECD countries (and among other transition countries) with a steep fall in real gross domestic product in 2009 being double the OECD average. Despite financial assistance from international organisations, the recession hit hard on the labour market. (Horváth, et al., 2019)

The Hungarian labour market could be characterised by a moderate unemployment rate, a relatively low labour market participation rate and highly flexible labour market institutions (Köllő 2011). Union coverage has been radically declining, and the unions have little power (Gyulavári and Kártyás 2016). Employment protection is lower than the EU average, while the adjustment of wages is also relatively easy (Eurofund 2019). According to some research, the former Labour Code of Hungary was one of the most liberal in Europe, but after the introduction of the new Labour Code in 2012 it got even more flexible (Kun 2014).

After the abolition of the tripartite nation interest reconciliation forum in 2010 a two-tier social dialogue model emerged in Hungary. On one hand there is an official body which involves representatives from many different areas of the society, but it operates without any

¹⁶⁸ Article 28 of the Revised European Social Charter.

¹⁶⁹ Art 7 of Directive 2002/14.

¹⁷⁰ Section 53 of Act No I of 2012.

government agents. On the other hand, there is an informal council established by the government by a civil law contract and only selected organisations are part of it. The common denominator for these forums is that neither of them meet the requirements for national level tripartite social dialogue set forth by ILO Convention No 144.¹⁷¹

The disfunctional character of the social dialogue on the national level has, unsurprisingly, negative consequences on the lower levels of social dialogue too. The consequences are manifold, effecting the general support and smooth functioning of the unions on local level. By stigmatizing the representatives of alternative opinions and turning them into political scapegoats, a general sense of fear and insecurity is created among existing union members and supporters. These processes lead to further deterioration of union support by its members, and it serves a major obstacle to further unionization. Another symptom the Hungarian unionism has been struggling with since 1989 is related to the internal struggles and tensions between various confederations and the related unions, leading to general fragmentation of the entire union system (Neumann 2018). In the fight for union members, some of the confederations close to the political power-center have “poached” members on a large-scale, going after entire unions with a full membership (Neumann, 2018, p. 330). Since the return of the Orbán government to power in 2010, it has actively contributed to this fragmentation, further enhancing and stimulating the weakening of the unions (Neumann, 2018, p. 331). Furthermore, the emptied out and thus meaningless national level mechanisms of SD create disillusionment and lack of interest among the representatives and likewise among those being represented.

The 2012 Labour Code pursued a new regulatory concept, and now allows collective agreements to depart from the provisions of the law without restriction, that is, even to the employee’s detriment. The new concept allows social partners to have much more influence on shaping working conditions through agreements. The new Labour Code significantly curtailed trade union rights at the workplace; and trade unions which had not been overly strong in the past either are in an increasingly difficult position to protect employees’ interest (Kollonay-Lehoczky, 2013). Against this background it would have been necessary to reinforce the positions of works councils, as trade unions have lost most of their influencing power.

Law on paper suggests that the new Labour Code clearly favours the instruments of employee participation over collective bargaining. However, the preference of the lawmaker is by and large exhausted in declarations and, in fact, works councils do not possess stronger rights than before. The preferential treatment of works councils does not empower works councils as much as trade unions’ rights. Works councils remains the diluted version of the German model, having no considerable power. Even though the scope of consultation was enlarged compare to that of the previous Labour Code, the right of co-determination was curtailed.

There is a fundamental misconception of works council to state that the function of works council is to monitor the compliance of employers’ practices with employment

¹⁷¹ The Convention on Tripartite Consultation (International Labour Standards), 1976 (No. 144). The Conventions provides that Contracting Parties undertake the duty to operate procedures which ensure effective consultations, with respect to the matters concerning the activities of the International Labour Organisation between representatives of the government, of employers and of workers, while employers and workers are represented on an equal footing on all bodies through which consultations are undertaken. Hungary ratified Convention C-144 in 1994.

regulations. Currently, the rights of works council are not enough to provide effective control over employers and the protection of employee representatives is not sufficient either.

The available remedies are not as effective as they were before. The new Labour Code introduced substantial changes to the system of remedies in case an employer violates the right of consultation or the right of co-determination of works councils. The sanctions related to the unlawful practices of employers, e.g., the violation of information, consultation and co-determination rights are not dissuasive enough to prevent malpractice of employers. Sanctions and remedies are indispensable instruments and create the core of the information and consultation rights as genuine and enforceable human rights (Kollonay-Lehoczky, 2010). Without dissuasive sanctions and proper remedies, the right to conclude a workplace agreement covering subject matters of a collective agreement is not a sign of empowerment of works councils, but a rubber stamp on workplace rules unilaterally drawn up by employers

Legislative changes lead to segmentation of the workforce, alienation, a feeling of being threatened, and weakening voices of labour self-representation without the mass support of workers. In this situation, the government is directly interested to silence any ambitious collective claims, its interest is to preserve alienation and the sense of fear. For this, political tools are being used just like on the national level of social dialogue, by creating political enemies out of dissident voices.

Employee participation is not in the limelight of political debates, however, the detrimental changes in works councils' rights show that even on workplace level cooperation and social dialogue is not supported. Despite the severe and long-lasting social injustices and increasing precarity of workers in different sectors of the Hungarian labour-market, the workers' support for trade unions and works councils has not increased, which means that employee representation could not really capitalize on the situation. However, this is not necessarily their "fault", it is more part of the "game", of the nature of the increasingly authoritarian or, as it likes calling itself, illiberal political regime developed in Hungary by the ruling party by the end of 2010s. This is a political regime built on the fragmentation of the society, on individual fears, where existential anxieties overrule the possibility of a strong collective voice (Árendás & Hungler, 2019).

The economic crisis helped the government to severely turn down social dialogue to the point that it does not fulfil its role neither on national, and sectoral, nor on workplace level. Institutions of social dialogue are in place and operate, meeting the formal criteria of democratic provisions. However, some of the legal solutions do not meet international standards, especially that of the ILO on tripartite social dialogue, and some of them bypasses democratic legislative process, like the establishment of the PCF by a civil law contract. Social dialogue as a democratic process is dysfunctional since these institutions and mechanisms are not implemented in a democratic way, and no real dialogue or no actual debates take places. Instead, these mechanisms work in a top-down manner, the illiberal state and its central governing bodies expect certain solutions and answers, leaving no scope for a transparent democratic dialogue with the relevant social partners. The government uses institutions of social dialogue to preserve the image and impression of a democratically functioning state of the EU, however, not surprisingly, it is unable, and it seems unwilling, to preserve the values and achievements of the European social model.

PART VI. – SUMMARY AND CONCLUSIONS

Participation at workplaces encompasses different mechanisms used to involve the workforce in decisions at all levels of an organization – whether direct or indirect – conducted with employees or through their representatives. In its various pretexts, the issue of employee involvement has been a recurring theme in economic theories, industrial relations, and human right instruments. Employee involvement as a direct form of participation was analysed from a dual perspective: as an economic tool, which enhances competition and as a human right, which develops human dignity at workplaces.

The right to participate in decisions affecting one's life is a basic value in a democratic society. This principle should be present in all areas of civil society, encompassing political and economic spheres, including workplaces (Kollonay-Lehoczky, 1990). Democratic decision-making is required at a state level, and it is argued to be also justifiable at workplace level (Mayer, 2001). Involvement in decision-making which affects one's life – such as issues concerning employment – is an essential part of human dignity (Sinzheimer, 1920).

Without participation, workers' alienation is inevitable at workplaces, which, on a long run, involves that workers also become indifferent towards public affairs, which is a real danger to democracy as a whole (Kahn-Freund, 1960). Critics claim, however, that participation is often used as a manipulative device of management to weaken trade unions and control workers' mood or morals (Rhenman, 1968).

According to Sinzheimer, participation could enable all economic actors to jointly form economic conditions of a workplace and share related responsibility). Therefore, employees would be freed from subordination, and equality would be brought to the economic sphere. Like political democracy, economic democracy could contribute to the emancipation of individual workers *vis-à-vis* economic power (Sinzheimer, 1976). Sinzheimer believed that political and social democracy could only exist if they are accompanied by economic democracy. Protection of employees has essential importance to society, as the working power of man is not only an individual but also a social asset (Dukes, 2014). Workers serve the employer directly, but also serve society indirectly, argues Sinzheimer further, and thus society owes the worker an equivalent return for his service, and this equivalent return is the protection itself. On a Kantian recognition of human dignity Sinzheimer argued that the democratization of the industrial sphere through the economic constitution can bring equality and real freedom for workers—freedom which is not manifested in the way that freedom of contract allowed exploitation, but freedom from subordination in employment relations (Dukes, 2011).

Although they are related in many ways, industrial democracy and economic democracy convey different meanings. These differences are strongly related to diversity in industrial traditions. Historically, industrial democracy became an effective force within workers' movements primary as an idea of representative democracy (Müller-Jentsch, 1995). The principle of industrial democracy implies the replacement of unilateral regulations with joint decisions on matters concerning the workplace or the employment conditions. Industrial democracy challenges both the authoritarian and bureaucratic structures of a capitalist enterprise and the centralized regime in state socialist planned economies. Participation also implied a criticism of the Taylorist-Fordist model, which favoured flat hierarchies and direct

orders. Participation considers that workers are not only bearers of labour power, but members of democratic societies from which they derive a set of civil, political and social rights (Marshall, 1950).

Participation in decision-making processes could exist in many ways, starting from the mere right to be informed, it could also include consultation, and, the strongest influence could be provided by means of co-determination. Employee participation could be of a different nature, depending on the models of workers representation, public or private nature of employment relationship (Casale & Tenkorang, 2008), organizational dimensions of the enterprises and markets, as well as relationship between legislative and contractual sources of regulations (Bronstein, 1999). Naturally, participation reflects the industrial relations systems within which it is applied (Schregle, 1970). Globalization of capital, product and labour markets has increased the need for effective and functioning models of participation (Chaykowski & Giles, 1998).

Definitions of participation include diverse notions and disciplines concerning a non-unitary and diverse set of workers' rights originating in laws or in agreements, or in both (Arrigo & Cassale, 2010). The notion of participation (nowadays often used as a synonym for involvement) is in most countries based on a distinction of powers and roles between employers and employees (Blanpain, 1994). Through the different means of participation, workers seek to influence certain decisions made by the enterprise employing them and may also share some the economic and financial consequences of these decisions. Another interpretation considers participation as a means to modify or improve employment relationships and conditions, together with socio-economic conditions of a society (Carby-Hall, 2017).

Workers' participation in company's decision-making shows considerable differences across Europe. Neither the institutional structure nor the intensity of participation is on a similar level, and these differences originate from the different systems of industrial relations between the Member States of the European Union. As Manfred Weiss points it out, in view of the heterogeneous situation it would be largely unrealistic to shape the structure of workers' participation identically throughout the EU, however, approximation of the systems in a functional sense would help employees to have better influence on decision making (Weiss, 2000). If democratisation of the economy is understood as a tool to promote and stabilise democracy in society as a whole, workers throughout the EU should have a similar chance to influence decisions by which they are affected. Therefore, in a globalised environment the right to participate in decision making had to be extended beyond national borders the EU should address the transnational dimension of involvement. Both as an economic tool and as a human right, participation should not remain a privilege of European citizens, but have to be treated as a universal right of all workers.

The institutionalized system of employee representation through works councils is generally connected to the labour movements of the Weimar Republic. However, some rudimentary forms of representation could be found in an earlier stage of history. The Works Council Act was a part of the framework established by the Weimar Constitution.¹⁷² Article 165 of the Weimar Constitution provided that workers and employees, in order to look after

¹⁷² Adopted on August 11, 1919. Ceased de facto operation with the enactment of the Enabling Act on March 23, 1933.

their economic and social interests, ought to cooperate with employers on an equal footing regarding the regulation of salaries, working conditions, as well as in the entire field of the economic development of the forces of production. The scheme provided for a parliamentary form of governance, similar to and parallel with that of the political state. The detailed regulations of Factory Works Councils were promulgated in the Act on Works Council, but District Workers Councils and the National Economic Council had never been set up. The Act on Works Council constituted the most extensive and most important piece of social legislation of its times. It covered every phase of labour and social legislation, such as the Code of Industrial Regulations, agreements, labour exchanges, mediation and arbitration. Even though the final text of the law was compromised, its significance is unquestioned.

In the light of the provisions of the Weimar Constitution, the dual nature of employee involvement appears in a germinal form in the Works Council Act. First, the concept of 'collective economic interest' of the employees and the envisaged parliamentary form of interest representation through District Works Councils and the National Economic Council projects the Sinzheimerian ideal of economic democracy. Sinzheimer argued that employees are empowered with real freedom in their employment if they are involved in the formation of business conditions. Employees cannot take part in this process individually due to the power imbalance between contracting parties, so the state has to ensure this as a collective right (Sinzheimer, 1936). In Sinzheimer's views, the democratization of the economic sphere is necessary for freeing employees from subordination in employment relations, which is essential to their human dignity. Second, the furthering of the 'economic aims' of the establishment appears as a common goal of both labour and capital, for which they ought to strive in a cooperative manner. Cooperation is not manageable if the economic aims of the establishment only contain profit-maximalisation, business owners have to strive for efficiency and high productivity (Fritzsche, 1996). The concept of an economic constitution and the idea of works councils have long survived the overthrow of the Weimar Republic (Mommson, 1998). The economic democracy theory meant much more than the transfer of parliamentary forms of democracy to workplaces, but more importantly it conveyed the principle of democracy and the resolving of industrial conflicts through social dialogue. The Works Council Act incorporated the duty of an employer to consider not only the interests of shareholders, but also those of the employees. The contemplation of employees' interests improved the living and working conditions of workers, thus largely contributed to better social development.

Participation also introduced an important limitation on the misuse of the economic power of employers. By establishing the long-term development of an establishment as a shared goal of labour and capital, the responsibility for the economic decision was also shared between the parties, but in a proportionate manner, which created a productive balance of interest. When seen this way, participation was an important factor in the stabilisation of economic and social order. Finally, the Weimar model of participation chiefly influenced the current employee involvement system of Germany, which has had further impact on the European model of participation.

The economic input of employee involvement has been researched for decades, many hypotheses exist on both sides, aiming to prove either the inefficiency or the efficiency of employee involvement. Proponents of the efficiency theory, Freeman and Lazear examined the voluntary or mandatory nature of works councils and suggested that to maximise social gains

the rules governing information and consultation processes should carefully balance the power of labour and management, and fit the broader industrial relations system in which the representative bodies function (Freeman & Lazear, 1995). Path dependency theories argue that there is a normative consensus according to which corporate leaders should run a company in the best interest of their shareholders (Kershaw, 2002). In contrast, Roe argues that opting-out of the established system of corporate law is extremely difficult due to the different factors lying behind path dependence, such as culture, politics and legal systems; therefore, even if more efficient alternatives exist, business owners stick with the existing models, like forms of the limited liability company. Thus, high transition costs of deviation may prevent socially desirable innovations (Roe, 1996) (Roe, 2002).

Property rights theories in economy have addressed the problem of specification of individual rights that determines how costs and rewards are allocated among the participants of the organization (Alchian, 1950) (Demsetz, 1967). Human Resource Management theories approach employee involvement from an organisational efficiency point of view, acknowledging that managers are no longer seen as the sole custodians of authority and employees are able to bring their workplace experiences to the decision-making table (Blair, 1999). Findings suggest that employees' satisfaction levels correlate with the degree of their influence in decision making, and the higher level of employees' satisfaction level raises productivity and reduces organizational change cynicism (Brown & Cregan, 2008).

The human right nature of employee involvement has long been questioned. The 'older brother' of participatory rights, the right to bargain collectively gained recognition in a much less contested way and now is acknowledged by most major human rights instruments.¹⁷³ However, it has been long argued that the Europeanization of industrial relations plays an indispensable role in the strengthening and the further development of the social dimension of the European integration. In the contrary, employee involvement first appeared in 1988 in the Additional Protocol to the European Social Charter. A year later, the Community Charter of Fundamental Social Rights of Workers also incorporated it,¹⁷⁴ and subsequently it appeared in the Charter of Fundamental Rights of European Union. However, the right to involvement does not appear in human rights instruments outside of the aegis of Europe. The low recognition could raise concerns whether the right to involvement is a fully-fledged human right. The regulatory technique of the European Union used for labour rights in the above-mentioned human rights instruments could also be seen as an area of concern. These instruments require certain level of adjustability to national characteristics of the Member States. Therefore, these instruments do not define the notion of employee. However, the delegation of the the scope of the right-holders to national laws could lead to highly diverse practices. The uneven level of protection could therefore result in significant inequality both on national and international level. Thus, vague personal scope could dilute the intended protection of employees and further alleviates the recognition of employee involvement as a human right.

The inclusion of social and economic rights related to working life into the CFREU confirms that these are to be considered fundamental to the EU social model, what it means to be an EU citizen (Bercusson, 2006). Thus, the right to information and consultation is a

¹⁷³ For example, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

¹⁷⁴ Community Charter of Fundamental Social Rights of Workers (1989), Arts 17-18.

fundamental right in the context of the EU, and the reference in Article 27 of CFREU to national laws and practices implies that the Member States are obliged to maintain at least the mandatory standards of information and consultation provided by statutory law or by collective agreements. The aim of Article 27 is to protect the interests of the individual worker against the dominant position of the employer in situations in which those interests could be substantially affected. Apart from the need to protect workers in extraordinary situations, such as collective redundancies and transfers of undertakings, Article 27 also reflects the difficulties associated with globalization of the economy and the increased importance of transnational companies and mergers of undertakings. Article 27 has as much or more to do with the protection of human dignity specified in Article 1 of the CFREU as with traditional social rights and the objective of democratisation of the economy. As such, it promises to greatly expand the scope of both traditional social rights and of practices of democratisation, to encompass threats to workers' dignity in the many new forms these threats assume in a globalised economy, society and environment (Blanke, 2006).

Even though employee involvement signifies a very narrow part of human rights and its recognition is rather low, its importance should not be overlooked. Inclusion of the right to information and consultation in this instrument signifies the stance of employee involvement as a fundamental human right. The significance of employee involvement in the development of democratic institutions is enormous. The estrangement of people from the handling of their own affairs at a workplace in a long run will lead to the abdication of not only employees but citizens towards participation which is a real danger to democracy. Thus, employee involvement shall be seen as essential to issues of social justice, human rights and democracy and must be promoted as such.

The European Union addressed employee involvement in three major directives, the European framework directive on information and consultation (2002/14/EC), the (recast) directive on European works councils (2009/38/EC) and the directive on employee involvement in the European Company (2001/86/EC).¹⁷⁵ The learning curve from the 1980s has been indeed very long and many of the initial problems have been addressed in the amends of the respective Directives. The change in the regulatory technique allowing more room for Member States to implement a method which fits their traditions of industrial relations.

The Framework Directive provides for minimum requirements applicable throughout the Community¹⁷⁶ and leaves the practical arrangements to be defined and be implemented in accordance with national laws and industrial practices.¹⁷⁷ This ambiguity provides considerable room for Member States to manoeuvre when they decide on their own domestic system, which could lead to uneven level of workers' protection in different countries. This shortcoming is especially visible in the national measures concerning the definitions of an undertaking and an establishment, the practical procedures, the notion of confidentiality, the protection of the

¹⁷⁵ Besides this general frame, a range of directives secure the right of information and consultation of workers in specific situations, such as in case of collective redundancies (98/59/EC), transfer of undertaking (2001/23/EC). The directive on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EC) also contains important regulations on participation. In total, more than 15 directives deal with information and consultation in some kind of a general or specific sense and thus form part of the social *acquis* in this regard.

¹⁷⁶ Art. 1.1. of Directive 2002/14/EC.

¹⁷⁷ Art 1.2. of Directive 2002/14/EC.

employees' representative, and the issue of sanctions (Clauwaert & Schömann, 2011). Though Directive 2002/14/EC was crafted with the best intention and managed to harmonise not only the fairly different interests of Member States but the various traditions of industrial relations as well, the sometimes vague wording and the ample room for national transpositions resulted in a variety of domestic systems of rights and obligations. This flexible framework is not suitable to provide an equal level protection of employees' information and consultation rights.

Council Directive 94/45/EC introduced European Works Councils or alternative procedures in order to ensure information and consultation for employees of multinational companies about significant transnational business matters significant decision at European level that could affect their employment or working conditions. This Directive was repealed and replaced in 2009 by the recast Directive 2009/38/EC.¹⁷⁸ The EWC Directive provides for the establishment of a European Works Council or an Employee Information and Consultation procedure. Parties either could decide to set up a European Works Council by concluding an agreement on scope, composition, function and term of service of an EWC; or could agree to implement an Information and Consultation Process (ICP) instead, a less formalized form of employee involvement.¹⁷⁹ Whether an EWC or an ICP is established, the minimum requirements provided for by the Directive do not need to be incorporated into the agreement.¹⁸⁰

Globalization has brought many new challenges to business management. Competition has become fiercer, due to profit maximization, and companies' efforts to keep production costs low have made employees prone to social dumping. Frequency and the severity of human rights violation tend to be higher in premises where national laws are less protective, and workers' influential power is low. Due to the lack of regulatory power of the EU, European based multinational companies are not obliged to respect the protective rules of the EU. MNCs tend to draw up internal codes of conducts (COC) to promulgate minimal standards to be applied by their subsidiaries and subcontractors. These internal rules however are often proved to be non-efficient in most of the fields they intend to regulate, to be unable to halt human rights violations, to improve working standards, or to enhance worker's voice. Moreover, these company statutes do not form a ground for liability when workers' rights are violated.

While the EU considers employee involvement as a competitive advantage in the global economy,¹⁸¹ it explicitly reserves this right to employees working within the territory of the European Union. Since human rights are indivisible and universal, it raises the issue of how the existing level of protection provided by the EU could be transferred to subsidiaries of Europe-based MNCs located outside of the territory of the European Union. The limited personal scope of legal instruments (European Social Charter, CFREU, various EU Directives) concerning employee involvement overlook the fact that transnational companies often operate subsidiaries outside of the Member States. The activity of these undertakings significantly contributes to the overall performance of a group, and the different and often lower standards of the non-EU countries constitute a competitive edge for most European multinationals.

The personal scope of Directive 2002/14/EC on Information and Consultation, together with Directive 2009/38/EC on the European Works Council, has to be enlarged to ensure that

¹⁷⁸ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 OJ L 16.5.2009 28-44.

¹⁷⁹ Art 4.1. of Directive 2009/38/EC.

¹⁸⁰ Art. 6.4. of Directive 2009/38/EC.

¹⁸¹ Directive 2002/14/EC Recital (9)

all employees employed by a European multinational company have sufficient access to information and are consulted on matters relevant to their employment. Both directives are equally important in that sense, as Directive 2009/38/EC is the ‘agent’ that enables employees to have access to information and serves as a forum for consultation.¹⁸²

Of course, one of the biggest challenges to controlling the activities of European corporations operating outside of the territory of the EU is the territorial sovereignty of the States. The exercise of extraterritorial jurisdiction faces both legal and political obstacles. A general rule of international law affirms that one state cannot take measures on the territory of another state by means of the enforcement of national laws without the consent of the latter. Such an expansion of the competences, especially in the field of employment and industrial relations, is not free from controversy. On the other hand, the international scope of the activity of the European Union has to be guided by principles which have inspired its own creation, development, and enlargement, and which seek to advance in the wider world: democracy, rule of law, universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.¹⁸³ The importance of employee involvement, both as a human right and as a tool to enhance economic competitiveness, is significant regarding democracy.

The right to employee involvement has to be protected both as a fundamental right and a tool to enhance economic competitiveness. Moreover, this protection cannot be limited to the territory of the European Union in the context of globalization. The recognition of workers’ human dignity through involvement has to be seen as a shared responsibility of global economic actors.

The importance of the dual nature of employee involvement can be demonstrated with the Hungarian case. Political changes were rather rapid in Hungary, between 1988 and 1992 key legislative movements laid down a completely new system, including industrial relations. As a part of the reforms, works councils were institutionalised, although it is argued that the introduction of works councils was lacking genuine historical origins or theoretical foundations (Kiss, 2005). Due to the recent re-codification of Labour Law although the democratic principles related to works councils are maintained, works councils lost their importance. Protection of works councils’ members is abolished and there are no dissuasive sanctions to prevent employers from violation of participation rights. This practice goes against the requirements set forth by Directive 2002/14/EC and violates Article 22 of the European Social Charter as well as the provisions of ILO Convention No 135.

The success of the European model of participation lies in two interconnected factors: first, the notion of participation that encompasses employee involvement as a human right and as a tool for economic efficiency; and second that participation has a solid foundation based on principles of democracy. Acknowledging participation as a human right is a guarantee that a person is not treated as subject or serf but a person with human dignity who has a say in decisions made on matters affecting her life. Participation at workplace helps to fight commodification and objectification of human beings. More specifically, employee

¹⁸² Art 1. 2 of Directive 2009/38/EC.

¹⁸³ Art 205 of TFEU and Art 21 of TEU.

involvement at workplaces is an important tool in employees' hand to balance the superior economic power of employers. Through the democratization of decision making at the workplace freedom could be brought to employees and therefore they could be eased from subordination in employment relations. While businesses are required to respect their employees' right to get involved in decision-making processes and employees need to learn how to leverage their participatory rights, it is the state's responsibility to create enforceable legal norms and promote economic democracy.

Only democracy can create an environment that fosters the substantive freedom of people to lead lives which they have reason to value, that enhances the real choices they have, and that, thereby, promotes social justice. The protection of the human dignity of employees has essential importance to society, as human working power is not only an individual but also a social asset. The right to employee involvement has to remain protected and be promoted not only as a tool to enhance economic competitiveness but also as a fundamental right.

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