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EMPLOYEE INVOLVEMENT AS A TOOL TO PROMOTE SOCIAL JUSTICE

This paper will argue for the positive effects of employee involvement, not only in connecting economic growth to human development as one of the key goals of social justice, but also in enhancing democracy through the empowerment of workers by involving them in decisions made on matters affecting the main areas of their working lives.

The importance of the employees' voice, once seen as a shared value in the European Union, has now become one of the major targets of deregulation. Employee representation has increasingly been seen as ineffective instrument to increase competitiveness, despite the fact that the obligation of involvement follows from the Charter of Fundamental Rights of the European Union and the Revised European Social Charter, making employee involvement a part of the legal framework of European democracy.[1] Based on the current trends in economic policy, it is clear that social justice cannot be vested solely in the good will of governments, but shall be seen as a mutual interest of both state and economic actors, particularly employers and employees.

I also take the liberty to argue that the right to be involved in decisions affecting one's employment should not be seen as a privilege of European citizens, especially in companies operating on a transnational scale who largely benefit from the cheap labor and low influential power of employees of their offshore plants. This paper will also examine whether the extension of the personal scope of EU Directives concerning participation could serve as a tool to involve employees in decision-making processes at multinational corporations.

I Democracy, Freedom and Participation

In this section I try to summarise the common elements in the theories of Hugo Sinzheimer and Amartya Sen related to human dignity, democracy and participation. Human dignity for Sinzheimer and human capabilities for Sen are special values which allow individuals freedom from subordination or deprivation and to live meaningful lives. To achieve such freedom both theorists emphasise the role of participation; in other words, involvement in decision-making on matters affecting one's life. Participation is only possible in democratic surroundings and the state has an

[1] EESC Opinion, 2013

indispensable role to safeguard democratic settings. In Sinzheimer's views, economic democracy has two complementary pillars: the autonomous regulation of the industrial actors (employers' associations, trade unions, works councils) and the rights of workers to participate in the management of the economy.[2]

In the workplace, this participation is crucial for employees to be freed from the unilateral and often exploitative will of employers. 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.[3] On a Kantian recognition of human dignity[4], Sinzheimer argues that the democratization of the economic sphere is necessary for freeing employees from subordination in employment relations. [5]

Sen, challenging the "Lee Thesis",[6] asks the question of what should be more urgent for policy makers: to eradicate poverty, or to guarantee democratic rights (for which poor people have little use anyway)? Sen's answer to this question is very straightforward: economic development and liberty are interconnected. Separating them or prioritizing one over the other is entirely the wrong approach. Without freedom, including the opportunity to participate in decision-making on matters affecting the main areas of an individual's life there is no economic development. Likewise, economic development fosters individual and social freedom.

II The Importance of Employee Involvement during the Economic Crisis in the European Union

Regarding economic theories, the positive effect of employee involvement has been heavily contested.[7] 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. Despite the fact that the crisis was described as an

[2] Hugo SINZHEIMER *1936.*, see also COUTU 2012-2013. 608.

[3] DUKES 2008), 3.

[4] Kant has phrased the principle of human dignity in the archetypal maxim that what possesses dignity must not be treated purely as a mean but also as an end in itself; for more on Kant's approach to human dignity see, HÖFFE 2010. 71 ff.

[5] DUKES 2011. 345.

[6] Sen argues against the 'Lee Thesis', named for President Lee Kuan Yew of Singapore, which states that denying political and civil rights is acceptable if it promotes economic development and the general wealth of the population (Sen, 1999:15). He rightly insists that we should approach political freedoms and civil rights not through the means of eventually achieving them (GDP growth) but as a direct good in their own right. Freedom is also good because it creates growth. See, O'Hearn (2009) 9-15.

[7] The economic analysis of employee involvement started with the emblematic question of Jensen and Meckling asking 'if co-determination is so efficient, why do managers not choose it voluntarily?', and generated ongoing discussions on the issue (see, Jensen and Meckling (1976); E. F. Fama and M. C. Jensen, (1983) R. B. Freeman and E. P. Lazear)

[7] Alchian, Uncertainty (1950)

'omnipresent phantom in the autonomous European inter-professional social dialogue',[8] the various forms of social dialogue at national, sectoral and company level have been proven to be effective instruments in mitigating the negative social and economic impacts of the crisis.[9]

Continued deregulation not only constitutes a backward step in workers' protection, but "undermines any remaining hopes of European social integration."[10] Social dialogue has been able to function and forge adequate responses to the crisis through national social pacts and collective agreements at various levels.

The growing inequalities in incomes and the rising shares of populations at risk of poverty or social exclusion[11] 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 labor law in all member states.

III The Dual Nature of Employee Involvement in the European Union

In the European Community employee involvement was on the agenda for many years before its regulation could have been completed. In compliance with the nature of the Community it was not an issue of human rights, rather a matter of economic competitiveness. Its regulation had to overcome the difficulties deriving from the diversity of the industrial relations of the Member States. It went through different stages, from the stage of regulating involvement in specific subjects (collective redundancy, transfer, health and safety), followed by the hard victory of regulating the European Works Councils and involvement in transnational companies in general, completing the process with the regulation of shop-floor level involvement. The progressing criticism due to the "democratic deficit" of the EU governance as well as the growing need for a "Bill of Rights" for the EU put a stronger emphasis on the democratization and human rights effect of employee involvement, yet maintained its economic role.

A) Employee Involvement as a Human Right

i) The European Social Charter

[8] Cluwaert, Schömann and Warneck (2010), 75.
[9] Cluwaert and Schömann (2011).
[10] Segol (2014) 68.
[11] Eurostat 2014.

The European Social Charter 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, its role is indispensable in promoting human rights across the European continent.

Reflecting the substantive as well as the time-phase difference between the freedom to bargain collectively (guaranteed by Article 6) on the one hand and the fundamental right to be involved in managerial decisions on the other, the latter was added later and now is regulated by Articles 21, 22 and 29 of the Revised Charter. Article 21 and 22 are in general on involvement while article 29 guarantees the right to information and consultation in the specific situation of collective redundancies.

ii) The Charter of Fundamental Rights of the European Union

The Community Charter of the Fundamental Social Rights of Workers (CCFSR) had already 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, these provisions can be considered a precursor of Article 27 of the Charter of Fundamental Rights of the Charter of the European Union (CFREU).[12]

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." It is apparent from the phrasing of Article 27 that the employer has the obligation to inform and consult either the worker directly, or the worker's representatives.

B) Employee Involvement as a Tool to Enhance Economic Competitiveness

The basic instrument with regard to the general rights regarding information and consultation of employees is Directive 2002/14, and the (Recast) Directive on the European Works Council provides for a procedure which effectuates such rights. Therefore, Directive 2002/14 will be analysed first, followed by the Directive on the European Works Council.

i) Directive 2002/14/EC on Informing and Consulting Employees

The Directive on the general rights of informing and consulting the employees was the pioneering legal instrument in which the EU made it obligatory for all Member States to

[12] Commentary of the Charter of Fundamental Rights of the European Union (EU Network of Independent Experts on Fundamental Rights, 2006) 233 ff.

provide adequate measures for employees to obtain regular information and consultation.

The main purpose of the Directive is to set up a framework for an effective information and consultation procedure. Recital (7) of Directive 2002/14/EC emphasizes the importance of social dialogue and mutual trust between the employers and their employees in improving risk anticipation and flexibility and states that the promotion of employee involvement facilitates the undertakings' competitiveness. Recital (9) further stresses the significance of timely information and consultation for companies to compete better in a global environment. Recital (13) declares that the existing legal frameworks for employee involvement at both the Community and national levels pursued an excessively *a posteriori* approach to the process of change. However, neglecting the economic aspects of decisions taken did not contribute to risk prevention.

ii) Recast Directive 2009/38/EC on the European Works Council

Council Directive 94/45/EC 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. This Directive was repealed and replaced in 2009 by the Recast Directive 2009/38/EC.

The Recast Directive's preliminary aim – following the objectives of the 94/45/EC Directive – is to enhance dialogue to make it possible for employees to anticipate and manage changes related to the undertakings.[13] The harmonious functioning of the internal market requires the employees affected by business decisions to be informed and to be consulted through their representatives, and that information provided at an appropriate level enables employees to anticipate and manage changes. The transnational structure of the enterprises requires new methods to realize this goal.

IV The Problem of the Limited Application of the EU Directives

Though the Recitals of the mentioned Directives envisage an important role for employee involvement in mitigating the negative effects of economic turmoil, they only focus on business activities located in the territory of the European Union. Such limited territorial scope overlooks 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 the group, and the different (generally lower) standards of the non-EU countries constitute a competitive edge for

[13] Dorssemont (2009) 32 ff.

most European multinationals. To mention one aspect, transnational companies often benefit from the cheap labor force and low influential power of the employees working in non-Member States.

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 States. The exercise of extraterritorial jurisdiction faces both legal and political obstacles. So far the enactment of extraterritorial legislation by the EU is extremely rare, yet not free from controversy. The political impacts of extraterritorial law-making ought not be overlooked. The EU is very cautious in using unilateral measures, and is often critical of the extraterritoriality of the Unites States. The European Commission's standpoint on extraterritoriality was made clear by President Barroso, answering a parliamentary question regarding the amicus curiae sent to the United States Supreme Court in the case of *Kiobel v Royal Dutch Petroleum*. Barroso said that the amicus brief reflects the broad consensus on the relative importance of state sovereignty and fundamental human rights, namely to preserve harmonious international relations respecting the substantive and procedural limits imposed by international law concerning extraterritoriality in general, and in particular by the exhaustion requirement.

On the other hand, the EU is not afraid of using the mechanisms of territorial extension to address global or trans-boundary problems when international agreement on the importance of the matter has been reached. This dynamic dimension is explored by the EU, not to export its standards, but to launch an interactive process, aiming to meet shared regulatory objectives.

A) The Competency of the EU for Extraterritorial Jurisdiction

The scope of competences of the European Union has been expanded by a doctrine of the implied powers, developed by the CJEU, which has the last word on competence issues.[14] The doctrine of implied powers indicates that the EU can either rely on the powers expressly promulgated in the Treaties, or its competences can be implied.[15] 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 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

[14] Case 104/81 *Kupferberg* [1982] ECR 3641, paragraph 17, and Case C149/96 *Portugal* v *Council* [1999] ECR I8395, paragraph 34, also referred to in the ATA case (para 34).

[15] Delereux, (2006) 234.

inspired its own creation, development, and enlargement, and which seek to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[16] Implied powers exist where "internal power has already been used in order to adopt measures which come within the attainment of common policies,"[17] yet are not limited to common policies, but cover all Treaty objectives.[18] The importance of employee involvement either (or both) as a human right or (and) as a tool to enhance economic competitiveness is significant regarding democracy.[19] Moreover, in 2001, the European Commission proclaimed that a "the crosscutting nature of human rights and democratisation requires considerable effort to ensure consistency and coherence" consistent with the EU Charter on Fundamental Rights is needed.[20] Thus, in my opinion, a possible action to enlarge the scope of Directives 2002/14 and 2009/38 would fulfil the above requirements and therefore could justify extraterritorial jurisdiction.

B) The Personal Scope and the Transnational Character of the Respective Directives

In terms of personal scope, three important points have to be considered to investigate further the possibility of extension. The EWC Directive is not only applicable to undertakings or groups of undertakings which 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 which take place within the EU. According to the Directive, those matters which have a transnational character concern the entire undertaking or group, or at least two Member States. These include matters which are of importance to the *European* workforce in terms of the scope of their potential effects or which involve transfers of activities within the *Member States*.

[16] Art 205 of TFEU and Art 21 of TEU.

[17] Joined Cases 3,4 and 6/76 Kramer, Cornelius, and others [1976] ECR 1279

[18] Opinion 1/78 (Re Natural Rubber Agreement) [1979] ECR 2871.

Sinzheimer believed that political and social democracy could only exist if accompanied by economic democracy. In his view, economic democracy has two complementary pillars: the self-regulation of the industrial actors (employers' associations, trade unions, works councils) and the rights of workers to participate in the management of the economy. See, Dukes, (2008) and Dukes (2012-2013). 605-7;

[19] Art 205 of TFEU and Art 21 of TEU.

[20] 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, EU Doc; COM/2001/0252 final.

To ensure that the right of information and consultation is effectively realized at subsidiaries of the Europe-based multinational companies which are located outside of the territory of the EU, the personal scope of Directives 2002/14 and 2009/38 should be expanded in a way that encompass all branches which are under the control of the controlling undertaking domiciled in the EU. The notion of a controlling undertaking in its current form could create a link to subsidiaries located outside of the EU territory. Regarding trans-nationality, as argued above, in reality the impact of these 'third country subsidiaries' is of great significance for the multinationals. Therefore issues related to their activity, or which involve transfers of activities between the operations, have an increased importance for the entirety of the workforce in terms of the scope of their potential effects. All branches then should be included in the concept of the transnational character.

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. However, if the statements of the Recitals of the Directives and the EESC Opinion are true, then that would, on the contrary, ensure even higher level of competitiveness for European undertakings.

C) Problems Related to Extraterritorial Jurisdiction

The competence of extraterritorial jurisdiction may be exercised by way of prescription, adjudication, or enforcement. The extension of the personal scope would not be an ultimate weapon, a solution for all problems. The difficulties would be twofold: one would arise from the 'inherited' weak points of the EU regulations; the other would come from the structure of the multinational corporations.

Regarding the first point, Directives 2002/14 and 2009/38 have considerable weaknesses.[21] Concerning the definitions, firstly the notion of confidential information is not well addressed. According to the Directive, confidential information must not be revealed to third parties; however, it does not specify either what type of information can be considered as confidential nor who these third parties are.[22] Thus, it is the national legislator who has the opportunity to define the notion of confidentiality. Specification of the quality and quantity of the data provided for employees' representatives would be necessary to create a comprehensive regime. Further to that point, the limitations regarding the disclosure of the information which has been provided to the employee representatives and liability for the violation of the provision shall be centrally regulated. Such measures would give assurance for management that the information exchanged will not harm the functioning of the undertaking.

Second, the level of protection that employee representatives enjoy ought to be unified. Domestic laws sometimes allow quite arbitrary actions against employee

[21] For a detailed analysis of Directive 2002/14, see Ales (2009).
[22] Art 8.1 of Dir 2009/38, Art 6.2 of Directive 2002/14.

representatives.[23] Inequality in protection does not facilitate discussion on a transnational level, if employee representatives could face serious disadvantages as a result of their activities already in their homelands. According to Article 7 of Directive 2002/14, employee representatives shall enjoy adequate protection in order to properly perform their roles. Thus the position of employee representatives needs to be consolidated regarding pay and working time allowances.

Lastly, Directive 2002/14 indicates that effective, dissuasive, and proportionate administrative and judicial procedures and sanctions shall take place in case of the infringement of the obligations.[24] In other words, Member States are free to choose between civil and (or) criminal sanctions.[25] However, the regrettable lack of precision of the Directive makes it difficult for domestic courts to judge the threshold where the action of the employer impedes the right of information and consultation. Especially in times of economic constraint, labor courts tend to adopt a restrictive interpretation.[26] Thus, sanctions imposed on employers for not complying with the information and consultation provisions ought also to be unified for better predictability for both employers and employees.

V Summary and Conclusions

Based on the theories of Hugo Sinzheimer and Amartya Sen I argued that participation in decision-making processes on issues affecting one's life is essential in democratic societies. More specifically, employee involvement at workplaces is an important tool in the employee's 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.

Expanding the personal scope of Directives 2002/14 and 2009/38 would, in my view, 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. Employee involvement can be seen as a tool for democratization, thus it would 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.[27] As an economic tool, the employer would benefit from the feedback and innovative ideas of its employees in a larger pool than before. By

[23] See the Conclusions the Committee has concluded related to Art 28 of the European Social Charter; in its 2010 Conclusions the Committee found that (among other State Parties) Bulgaria is not in conformity with the Charter.

[24] Arts 8.1-2 and Recital 28.

[25] In Poland the sanction is said to be not overly dissuasive, while in the Czech Republic there are no sanctions imposed at all, for more details see Schömann (2006) 32.

[26] Schömann (2006) 32.

[27] Zerk, (2006) 104 ff.

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.

Observations Sinzheimer and Sen made on the importance of democracy have to be remembered here. Protection of the human dignity of employees has essential importance to society, as the working power of man 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 tool to enhance economic competitiveness but also as a fundamental right. 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 ought to be seen as a shared responsibility of global economic actors.

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