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The Employee Involvement in the Decision-making Processes from the European and the U.S. Perspective

The article describes alternative forms of employee participation initiatives, such as information, consultation, negotiation, apart from deep-rooted trade union mechanisms. It provides an analysis of present legal regulations and tendencies in the EU countries, in the light of the implementation of 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. The second main part of the article refers to the worker involvement in company decision making procedures and management in the U.S. What is unique for the U.S., employee participation programmes were created as a result of bottom-up processes, with the initiative coming from employees and employers themselves. The article also focuses on contemporary public debate by explaining the added value of employee participation in the light of Corporate Social Responsibility policy.

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1. Introduction

Recently, in the time of a rapid economic growth and, subsequently, unexpected crisis, the issue of employee participation in the business, performed by their employers, became the topic of frequent discussions. Great number of lawyers and politicians have been pointing out that the worker involvement in the decision-making processes can result in a more efficient company management. It seems indisputable that workers might possess knowledge and experience in technical and social aspects, which may provide the employers with a different perspective on specific problems. Moreover, such pieces of information are unavailable to the CEOs and the boards.

In order to exploit and utilize the well-educated workforces, several legislative initiatives occurred. However, despite the fact that the aim of workers involvement is basically the same all around the world, the methods of legal regulation differ significantly. The differences refer not only to the relations between the legal systems in the United States and Europe, but also to the relation between the legal regulations in the Member Countries of the European Union (hereinafter referred to as "EU"). The prior is significantly meaningful given the fact that since the 1st July 2002 the EU members are obliged to implement in their domestic systems the provisions of Directive 2002/14 (hereinafter referred to as "Directive")[1].

The first main part of this work concerns the present legal regulations and the tendencies in the European countries. Therefore, special emphasis is put on the repercussions of the Directive's implementation. The second part of the article refers to the worker involvement in the decision making processes in the U.S. In the conclusion, we will briefly point out the advantages as well as the evident problems related to both legal systems regarding workers' participation issues. Particularly, we will try to assess whether the right "to be consulted and informed" really does provide the employees with an audible voice in the workplace.

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[1] 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, Official Journal of EU no. 80, p. 29.

At the beginning, we would like to emphasize that we are perfectly aware of the fact that trade unions regulations constitute an extremely important aspect of workers' participation. Nevertheless, the purpose of this article is to focus on alternative forms of employee participation initiatives, such as informing and consulting mechanisms of employees by the management.

2. The European Perspective on the Worker Involvement

Prior to the most important regulations accepted by the EU (which strictly referred to the worker involvement in the decision-making processes), the majority of its Member States did provide legal mechanisms regulating the workers' right to be informed and consulted. These regulations range from statutory work councils (France, Germany), through encompassing collective agreements, which constitute main measures to regulate information and consultation in Denmark and Belgium, and finally the hybrid models (i.a. Italy) where a statutory framework allows a sectoral agreement for the work councils[2].

Additionally, the EU law obliged its Members to implement several acts which touch upon the process of consultation with employees, i.a. the obligatory negotiations in case of collective redundancies.

However, the European Commission perceived these regulations as insufficient and inadequate for the challenges of modern business. Therefore, in 2001, the European Commission issued a communication which stated that one of the most relevant purposes was to make all employees appropriately informed and engaged in the development of enterprises and their professional lives[3].

The result of the difficult legislative process (to mention i.a. the initial strong opposition of the United Kingdom and Germany) resulted in the Directive, constituting a measure that provides the minimum framework, in which information and consultation takes place. Under the provisions

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2 M. Doherty, *Hard law, soft edge? Information, consultation and partnership* (in:) Employee Relations, Vol. 30 Iss. 6, p.609-610.

3 The Communication of the European Commission to the Council, the Economic and Social Committee and the Committee of the Regions, 2001/313.

of this Directive, the process of consultation does not possess a mandatory character – in order to perform the right to be informed and consulted, the employees need to file a request[4].

It should be emphasized that, unlike many other Directives (which are binding only in relation to their purpose, but simultaneously provide very detailed mechanisms to be implemented), this Directive leaves almost all legal details to the Member States or the national Social Partners. Namely, according to article 1 par. 2,the practical arrangements for information and consultation shall be defined and implemented in accordance with national law and practice of industrial relations in the different Member States in such a way as to ensure their effectiveness. Such a legal construction is perfectly understandable. While the EU constitutes blanket and across-the-board organization, its Members (and, consequently, the employers and employees) face completely different challenges, resulting from different conditions of their economy and cultural (legal) context. For instance, the employment problems which are of vital importance for workers in Bulgaria, most probably differ from those occurring in Germany or France. As it was adequately concluded by S. Estreicher: "Each country must examine its own labor and capital mix to determine where its competitive advantage lies, and must develop rules for labor-market competition within its borders that, while consistent with national values, will help it achieve success in the worldwide marketplace"[5].

However, despite the legal leeway granted to the particular Members by the Directive in article 1 par. 2, the Act in article 1 par. 3 sets a fundamental provision which applies to all countries (regardless of any circumstances) according to which, 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 of both the undertaking or the company and the employees.

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4 C. Barnard, *EU employment law*, Oxford 2012, p. 687.

5 S. Estreicher, *Think global, act local: Employee representation in a world of global labor and product market competition*, Virginia Law &Business Review, Vol. 4, Iss. 1, p. 91.

The Directive contains many vital provisions, which have significant potential to influence national legal system in a way, to provide the employees with a "real voice" in the context of the company performance. It seems unquestionable that the key to proper understanding of its provision lies in a clear explanation of the terms "transmission of information" and "consultation". The European legislator decided to include a legal definition of both terms in article 2 of the Directive.

According to article 2 p. f) "transmission of information" means transmission of data by the employer to the employees' representatives, in order to enable employees to acquaint themselves with the subject of the particular matter and to examine it. In reference to this term, we would like to strongly emphasize the importance of the adequate time which should be granted to the workers in order to provide them with an opportunity to analyze the received data (conduct a thorough examination) and to allow them to prepare for the consultation sufficiently. This stipulation is explicitly approved by the Directive in article 4 par. 3.

As far as term "consultation" is concerned, article 2 p. g) indicates that it means the exchange of views and establishment of dialogue between employees' representatives and the employer. Article 4 par. 4 additionally clarifies the circumstances under which the consultation shall take place. Namely, the consultation is performed: a) while ensuring that the timing, method and content thereof are appropriate; b) at the relevant level of management and representation, depending on the subject under discussion; c) on the basis of information supplied by the employer, in accordance with art. 2 p.f) and the opinion formulated by the employees' representatives; d) in such a way as to enable the employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they may formulate in a view to reach an agreement on decisions within the scope of the employer's powers referred to in par. 2 p.c).

By that means, the Directive constitutes two different kinds of consultation: the strong one, which is characterized by the fact that the consultation is performed "in a view to reach an agreement"[6] and the weak one, which is performed without any expected result. This conclusion is

[6] C. Barnard, *op.cit.,* p. 689.

(in our point of view) understandable, since the literal interpretation of art. 4 does not cast any doubt on whether all consultations shall be performed "in a view to reach an agreement". Simultaneously, such a conclusion does not mean that the "weak consultation" should be performed with no expectations of an agreement on the disputed issue. Particularly, having in mind the regulation of art. 1 par. 3which provides the demand to cooperate in "a spirit of cooperation".

Moreover, it should be emphasized that the requirement of company management to undertake consultation and to inform employees encompasses a broad range of topics defined in article 4 par. 2a) information on the recent and probable development of the undertaking or business activities and economic situation; b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment; c) information and consultation on decisions likely to lead to substantial changes in work organization or in contractual relations, including those covered by the Community law provisions referred to in art. 9 par. 1.

We might conclude that there is a significant difference between the process of information and consultation. The first concept refers to a kind of "one-sided" relation, since the representatives of employees are entitled merely to receive particular information, without the right to provide a response. On the other hand, the process of consultation requires an active performance not only from the employer, but also from the employees. In other words, consultation means the exchange of views and establishment of dialogue between the employees' representatives and the employer[7]. It is also indicated in the legal and academic doctrine that the Directive constitutes a proactive model of consultations, since article 4 par. 4 p. 3 imposes an obligation on the employers to provide the employees with a justified response to any opinion that they may provide. Thus, the workers are stimulated to proactively participate in the consultation[8]. It is worth mentioning that the recent examinations indicate that

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[7] J. Wratny, *Prawo pracowników do informacji i konsultacji – dyrektywa wspólnotowa a projekt polskiej ustaw*y, Monitor prawa pracy, Vol. 2/2005, SIP Legalis.

[8] D. Tarren, *Wzmacnianie przepisów dotyczących informowania i przeprowadzania konsultacji przez wymianę ponadnarodowej wiedzy i doświadczeń*, 2012, p. 9.

the frequently consulted issues are: changes in the legal form of the enterprise, the change of the size of the company's plant, the introduction of a new technology and the changes regarding the structure and quantity of workforces[9].

The Member States were left to choose whether the Directive system of information and consultation will be used in workplaces employing at least 20 employees or limited to the enterprises employing at least 50 employees. However, it is also possible to implement a more favorable system, in which the legal institutions incorporated in the Directive will also apply to the enterprises with lower workforces.

Eventually, in order to assure abiding of the rules by both employers and employees, article 8 par. 1 of the Directive obliges the Member States to provide for appropriate measures in case of non-compliance with the Directive by the employer or by the employees.

As it has been already pointed out, the Directive leaves plenty of space for the particular members of the EU, since (according to article 1 par. 2) all practical aspects of information and consultation are defined by the Member Countries with a due regard to the domestic practice and national law. Therefore, as far as these issues are concerned, the differences in the European Union are really significant. In that aspect, we would like to provide a detailed analysis of Polish implementation and a general analysis of the legal methods approved by other Member Countries.

As far as Poland is concerned, the implementation of the Directive resulted in the Act on information and consultation with workers[10]. This act, in article 1, provides a specific representative organ called "the works council". The legal doctrine emphasizes that, apart from the literal interpretation of the Act, the works council is "only" a medium between the employers and the employees – a specific transmission measure[11].

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9 See M. Carley, A. Baradel, C. Welz, *Work councils: Workplace representation and participation structures*, EIRO Thematic Features, 2005.

10 Ustawa o informowaniu pracowników i przeprowadzaniu z nimi konsultacji z 7 kwietnia 2006 r., Dz.U. Nr 79, poz. 550, z późn. zm. (The Act on Informing and Consulting Employees, 7 April 2006, Journal of Laws, No.79, item 550, as amended.)

11 J .Wratny, K. Walczak, *Komentarz do ustawy o informowaniu pracowników i przeprowadzaniu z nimi konsultacji*, (in:) Zbiorowe prawo pracy, ed. J. Wratny, K. Walczak, Warszawa 2009, SIP Legalis.

The works council is constituted in the enterprises that perform business activities and, concurrently, employ at least 50 workers. What is important, the members of the works council are elected only by the employees of a particular company (article 4). The Act explicitly decides that it is the employer to bear all the expenses related to the existence of the works council (article 6).

Apart from the complex regulation regarding the election of the members of the works council, the most relevant provisions are included in article 13 (in reference to the obligation of information transmission) and in article 14 (regarding consultation processes). Both provisions were formulated almost similarly to those covered by the European legislator in the Directive. However, it should be noted that the Polish Act demands that the employer and the employees consult "in a view to reach an agreement". Thus, the Polish Act, as far as this issue is concerned, is more favorable for the employees than the Directive, which provides such a demand only to the decisions which may result in significant changes in the work organization or in the contractual relations in the company – article 4 par. 4 p. e) of the Directive.

It should be emphasized that Polish Act foresees a system of guarantee for the employees who are the members of the works council. Namely, an employer may not, without the consent of the works council, terminate the employment agreement when the employee is a member of the works council (article 17 par. 1). Additionally, an employer may not, without the consent of the works council, unilaterally change the employment conditions or wages of a worker during their membership, except when permitted by other laws (article 17 par. 2). Therefore, we shall conclude that the position of the works council members is similar to the position of the trade union members, who are particularly protected by the labor law.

In order to make both parties (the workers and the employers) obey the provisions of the mentioned Act, article 18 provides that, generally, the infringement of the Act constitutes an offence that shall result in a fine or limitation of liberty.

Eventually, it is also worth mentioning that according to article 15, while performing the legal tasks, the works council may be assisted with

persons with specialist knowledge (experts). In this context, we unreservedly accept the Polish contention of legal doctrine, which contents that in the absence of an agreement on this issue, the costs of the expert's work are suffered only by the employers (on the ground of article 6)[12].

As far as other EU Members are concerned, we would like to briefly point out the most important differences in particular legal systems.

One of the most important dilemmas which has to be solved is whether the works councils should be the sole "transmission measure" or whether the entrepreneurs shall cooperate simultaneously with trade unions. For instance, the Austrian law provides that the representatives of employees are the sole organ responsible for the transmission of information and for the performance in consultation process. On the other hand, the legal mechanism in Czech Republic creates a system of two independent transmission measures – trade unions and works council which exist simultaneously[13].

The further issue, which differs among the EU Members legal systems, refers to the minimum number of workers who, if employed in a particular company, impose an obligation on the employer to perform the process of information and consultation. In the majority of the EU countries, this number amounts to 50 (e.g. France, Greece, Hungary, Spain). However, many states decided to make this number lower (more favorable for the employees) – for instance, in Austria this obligation refers to the entrepreneurs who employ at least 5 workers (in Lithuania this number amounts to 20)[14].

Another curious issue concerns the experts' participation in the works councils activity. On this legal field, many EU Members provide that works councils are entitled to the professional experts help only in the framework ensured by the trade union (for instance in Portugal, Hungary, Ireland). As it has been already mentioned, in Poland (and additionally in Norway) all the expenses are suffered by the employers. In other countries, the experts' help (the expenses of such help) may be covered by the employer (but subject to their consent – in Germany) or may be suffered

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12 J .Wratny, K. Walczak, *op. cit.*
13 D. Tarren, *op.cit.*, p. 11.
14 *Ibidem*, p. 24.

according to the provisions of the special agreement on this issue (Estonia)[15].

Finally, we would like to indicate that the European countries adopted two methods of information (consultation) commencement. In the first group, the inception depends on the specified percentage of employees who possess legal initiative (for instance in Italy, Germany and Greece). In other countries, the mechanisms of information and consultation are introduced "automatically" – when the number of workers reaches the quantity provided by the law (i.a. in Austria and Belgium)[16].

3. The U.S. Perspective on Employee Participation

Being the world's leading economic power and a positive example concerning most of the contemporary social and public policy issues, the U.S. democracy is often pictured as a role model in the global environment. However, nowadays it is the European Union which sets a tone for the employee participation and meaningful industrial democracy strategies.

The justice shall be given to the U.S. by stressing its long-lasting and deeply-rooted tradition of worker participation, mostly by their unionization. There are two quotes that might pertinently illustrate the development of the relevant sphere. In 1947 Senator Robert Wagner stressed that "We must have democracy in industry as well as in government. Democracy in industry means fair participation by those who work in the decisions vitally affecting their lives and livelihood; and the workers in our great industries can enjoy this participation only if allowed to organize and bargain collectively through representatives of their own choosing"[17]. Fifty years later, the reality brought commentators to the very hard

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15 *Ibidem*, p. 24, 25.

16 *Ibidem*, p. 24, 25.

17 Senator Robert Wagner, New York Times, 13th April 1947, quoted in Ch. B. Craver, *Mandatory worker participation is required in a declining union environment to provide employees with meaningful industrial democracy*, The George Washington University Law School Public Law and Legal Theory working paper no. 305, p. 1.

landing as “Approaching the twenty-first century, the United States effectively stands alone among the developed nations, on the verge of having no effective system of worker representation and consultation. Survey data indicate that some 30 to 40 million American workers without union representation desire such representation, and some 80 million workers, many of whom do not approve of unions, desire some independent collective voice in their workplace”[18].

Although the theme of this article does not cover the collective labor law, nevertheless, in order to give the comprehensive overview of the U.S. perspective on employee participation, the National Labor Relations Act ("NLRA") should be mentioned. NLRA was enacted in 1935 by the Congress, with an aim to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy[19].

At the outset, the NLRA seemed to be very promising, resulting in formation of the Congress of Industrial Organizations and rapid union growth, especially in heavy industries (such as steel, automobile, electrical manufacturing). By 1954, labor membership exceeded 17 million with unions representing 35% of nonagricultural employees. By the early 1960s, organized labor began to experience relative decline in membership, as union ranks grew more slowly than the overall labor force[20]. The serious breakdown came during the 1980s – 1990s, resulting in private sector union membership on the level of 10.4% of nonagricultural workers represented[21].

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18 Joel Rogers & Wolfgang Streeck, *Workplace Representation Overseas: The Works Councils Story*, 1997, quoted in Ch. B. Craver, *opt. cit.*, p. 1

19 Title 29, Chapter 7, Subchapter II, United States Code; the full text of the National Labour Relations Act of 1935.

20 For more details see: M. Goldfield, *The Decline of Organized Labor in the United States*, The University of Chicago Press, London 1987, Table 1 National Union Membership, selected years 1930-1978, p. 10.

21 Source: Bloomberg Daily Reports, Daily Labor Report No. 28, 12th Feb 1996, quoted in: Ch. B. Craver, *op.cit.*, p. 3.

3.1. Searching for a Golden Mean

Those statistics were introduced in order to provide a factual background that accelerated the external efforts, undertaken by both legislative and judicial authorities, to strengthen the position of non-unionized workers.[22] As the U.S. is the common law domain, the courts' intervention played a crucial role in discovering the areas of employers' abuses, where dissatisfied workers could seek for redress. In that aspect, the courts mostly focused on termination proceedings, by both minimizing the negative effects of the common law employment-at-will doctrine (historical approach that employment is for an indefinite period of time and may be terminated either by an employer or an employee), and by creating exceptions rooted in public policy prerequisites that bar an employer from terminating employees in violation of well-established public policy of the state[23].

However, shortly it transpired that it was hard to find a proverbial golden mean. Increasing legislative and judicial regulation of employee-employer relations resulted in increasing employer's dissatisfaction. They were voicing a negative impact of collective responsibility and punishment that had been imposed on whole employers' sphere, resulting from individual and isolated acts of aberrational companies[24].

This was the starting point for a broad public debate concerning the need for enhancing more individualized, bilateral employer-employee relations. Many employee involvement programmes were created, as a result of the bottom-up processes, with the initiative coming straight from management and company directors. These arrangements, called "quality circles", "production teams" or "quality of work life programs", "discussion groups", "total quality management", "self-directed work

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22 The most profound examples being: The Equal Pay Act of 1963, The Age Discrimination in Employment Act of 1967, The Pregnancy Discrimination Amendment of 1978, The Occupational Safety and Health Act of 1970, The Family and Medical Leave Act of 1993.

23 As an example, in many states an employee may not be terminated for filing a workers' compensation claim after an on-the-job injury. Criteria for what violates public policy in particular states, varies from state to state. For more information see: Legal Information Institute, Cornell University Law School.

24 Ch. B. Craver, *op.cit.*, p. 8-10.

teams", and "safety committees", were designed to facilitate communication between managers and employees in the first place, to improve product or service quality, and to increase worker productivity in the longer distance[25]. The added value of worker participation programs is undeniable, not only does it increase worker management communication, enhance employee quality and productivity, but also by strengthening worker commitment to firm objectives, it improves company's competitive positions in global markets.

Despite that, concerns are being expressed as to specific law provisions that are likely to endanger those valuable trends in companies. Section 8 [§ 158] (a)(2) of NLRA, dealing with unfair labor practices by employers, states that it shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. In our opinion, the idea behind it deserves to be supported, since it prohibits employer domination of unions. However, Section 2 [§152] (5) of NLRA, defines the term "labor organization" as any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Such a broad definition of labor organization goes far beyond the traditional understanding of trade unions, hence the existence and legality of any worker - management common ground might be successfully contested.

The National Labor Relations Board[26] decisions from 1992 (and onwards) jeopardized the legality of employee involvement programs. In *Electromation Inc.*, the prominent case on employee participation organizations, the National Labor Relations Board held invalid worker participation programmes that are significantly controlled by management officials. The decision was further upheld by the United States Court of

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[25] P. Linzer, *Who Owns the Company?: Rethinking Capitalism for the Twenty-First Century*, Research in Law and Policy Studies 217, 1995; quoted in: Ch. B. Craver, *op.cit.*, p. 8.

[26] Established in 1993 by The National Industrial Recovery Act, is an independent government agency of the U.S., quasi-judicial body, charged with conducting elections for labor union representation and with investigating and remedying unfair labor practices.

Appeals, Seventh Circuit. In the conclusion, the Supreme Court explained that domination of a labor organization existed where the employer controls the form and structure of a labor organization so that the employees were deprived of complete freedom and independence of action as guaranteed to them by Section 7 of the NLRA, and that the principal distinction between an independent labor organization and an employer-dominated organization lay in the unfettered power of the independent organization to determine its own actions. The Electromation action committees, which were wholly created by the employer, whose continued existence depended upon the employer, and whose functions were essentially determined by the employer, lacked the independence of action and free choice guaranteed by Section 7 of the NLRA. The Supreme Court further explained that it was not to suggest that the management representatives were anti-union or had devious intentions in proposing the creation of the committees. But, even assuming they acted from good intentions, their procedure in establishing the committees, their control of the subject matters to be considered, their membership and participation on the committees, and their financial support of the committees all combined to make the committees labor organizations dominated by the employer in violation of the NLRA[27].

3.2. Outline of the Contemporary Debate

Taking into consideration the above mentioned deliberations, and the path how the U.S. case law has developed, the remark of the lack of industrial democracy for significant group of the U.S. employees, remains legitimate. Especially, bearing in mind the decline in union representation over the past decades, resulting in merely 10% of private sector workers being able to influence management decisions through the collective bargaining process. Once again the reality and employment state of affairs, were a spark for a public discussion. It was stressed that the NLRA had recently become an irrelevant statute for the vast majority of

[27] 35 F. 3d 1148 - *Electromation Incorporated v. National Labor Relations Board*, the United States Court of Appeals, Seventh Circuit, 15th September 1994; the full text of the judgment available at: < http://openjurist.org/35/f3d/1148/electromation-incorporated-v-national-labor-relations-board>

private sector employees. Even if unorganized (non-unionized), workers should still be able to have a say in their employment conditions, and for that reason they should be provided with a new statutory rights guaranteeing them that privilege[28]. Moreover, similarly to European countries, the discussion drifted on Corporate Social Responsibility waters, as the arguments were raised that corporate success was dependent upon three vital fundaments: the first one being the investors who provide the necessary capital; secondly, the managers who provide the leadership; and last but not least, the employees who perform the basic job functions.

The most recent structural analyses of employee participation initiatives show the lingering scheme of their diversity in scope and longevity. It is crucial to stress that in most cases such initiatives are of operational and one-off nature, constituted *ad hoc* to deal with specific issues. On the other hand, strategic and wide-ranging programmes, addressing basic business issues of enterprise direction such as financing, investment, choice of product lines, production methods or marketing, are much less frequent. The main forms of employee participation can be divided into: Quality of Work Life intended to make work more satisfying and meaningful; Quality Circles – delegating to workers the responsibility to solve quality and production problems; Participation Groups – joint-labor-management groups that discuss a wide range of production and quality problems and working conditions; Task Forces – groups established to deal with a single question such a new product launch; gain sharing – providing bonuses to employees when productivity increases; and, finally, worker representation on the board of directors[29].

As in the 1990s, the concerns about efficiency of the new involvement programmes are raised. Two of the arguments seem to be especially adequate. Firstly, most of the existing employee participation initiatives give the workers no real say. In other words, the management retains unanimous decision-making control. Hence, these programmes offer in fact "old wine in new bottles." Secondly, it is more common nowadays

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[28] Ch. B. Craver, *op.cit.*, p. 11-13.

[29] Typology presented by J. Schwartz, *Voice Without Say: Why More Capitalist Firms Are Not (Genuinely) Participatory*, Fordham Journal Of Corporate & Financial Law, 2013, vol. XVIII, p. 975-977.

that employee participation programmes are top-down initiatives, imposed by management as a "new way" of corporate management technique, where managers tend to motivate and organize workers[30]. Moreover, regarding wine-bottle metaphor, it is also explained that the existing programmes offer workers no real say, because of the employers' fear that the "new wine" of real employee participation might break the "old bottles" of capitalist, managerial power, traditionally organized as authoritarian hierarchy[31].

4. Conclusion

As was shown in the article, both the EU and the U.S. adopted various forms of employee participation programmes. In concluding remarks, it is worth stressing basic differences between the two systems. The process of "building in" employee representation mechanisms into the domestic legal system of the EU countries was far more thorough and systematic. The initiative to regulate came from the EU institutions, in order to harmonize and guarantee the same standard of employee-employer relations among all the Member States. However, the Directive is based strongly upon the pre-existing institutions and ideas implemented in the Member States, with Germany being the most positive example. While in the U.S., the initiative to regulate workers representation and participation arrangements came from the employees and employers. With the lack of any legal pattern, they were looking for possible creative solutions on their own. As a result, many enterprises have adopted various forms of employee participation plans. Such diversity, on one hand, allows for flexibility in adopting the most suitable employee participation programme. However, on the other hand, it depends solely on a good will of the particular employer and the management, which does not guarantee consistency and the same standard to all employees. Moreover, in the absence of employee participation programmes rooted in legal system, it is impossible to enforce them.

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30 Both arguments presented by J. Schwartz, *op. cit.*, p. 979-98.

31 S.M. Bainbridge, *Participatory Management within a Theory of the Firm*, 1996, quoted in J. Schwartz, *op. cit.*, p. 979.

It is also worth noting that both in the EU and the U.S. the discussion of the contemporary labor law shows the growing interdependence between different branches of law. In the context of company's obligations towards the employee and employee rights, the labor law regulations shall stay in line with corporate governance and corporate social responsibility issues. What is more, the discussion also involves the standards of democratic society and public policy requisites.

Last but not least, we would like to bring attention to the reality that might turn out to be a very hard landing. As it was described in the article, academic scholars, professionals, and practitioners emphasize the added value of the employee participation – the increase in productivity, workers commencement to company objectives, positive influence on workers morale and loyalty, and the feeling of being listened to. However, the real question is whether the initiatives do embody the genuine participation mechanisms. In other words, since universally most companies are organized as top-down, hierarchical structures, is there still any space to cede some real authority to the workers or give them "voice" (as opposed to "say")? In our opinion, the law (legal system) "acting" on its own cannot guarantee any success in this aspect. The fact that most often the worker participation is imposed by the management as a "new way" of corporate management technique is a real threat to the whole idea. In order to give employees the "voice", and make their participation programmes effective, it shall involve cooperation and positive attitude from all the engaged parties, employees, employers, management, boards of directors, and, finally, the legislators and the courts.