

# **Teaching Employee Involvement in Corporate Governance at the Transnational Level**

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## **A. Different Forms of Employee Involvement in Corporate Governance**

As the transactions of companies overrun the borders of countries, the roles of corporate constituencies increasingly gain cross-border nature. Employees as one of the corporate constituencies have been playing an increasingly important role at the transnational level. Nevertheless, employees' roles in the corporate governance differ among states since regulations of companies are quite different from one country to another even though the increasing number of companies now has activities beyond the national borders. For example, in cross-border mergers and acquisitions, as the form of growth and internationalization, the relations between the management and workers in the companies involved, may be subject to laws and regulations of more than one country, where there is great diversity. At one extreme, employee participation which provides participation for employees in corporate decision making, together with the two-tier board structure, is regulated. At other extreme, employees are only provided with information and consultation in major corporate decisions. The diversity between the employees' role in the governance of companies is one of impediments to major corporate transactions in the globalized world, which adversely affects the economic relations between countries and creates an obstacle to the development of the world economy.

There are efforts to approximate differences of employees' role in companies. For example, in the European Union (EU) it seems that major steps have been taken to harmonize different systems of employee involvement in the corporate governance. In 1994 the EU adopted European Works Council Directive<sup>1</sup> which requires member states to set up a general framework for employees' information and consultation rights in multinational companies. Under the Directive, consultation is defined as a two-way communication process; the

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<sup>1</sup> The Directive on the establishment of a European Works Council a procedure in Community –Scale undertaking and Community-Scale groups of undertakings for the purposes of informing and consulting employees. 94/45/EC [1994] OJ L254/64.

exchange of views and establishment of dialogue between employees and management.<sup>2</sup> The Directive imposes on member states the establishment of a Works Council in Community scale undertakings or groups of undertakings which have at least 1,000 or in companies which have at least 150 employees in each of two or more member states and where employees or their representatives request this.<sup>3</sup> Put simply, the Directive provides a collective voice through a central information and consultation forum.

The National Works Council Directive<sup>4</sup> also imposes on national companies of member states to set up minimum requirements for employees' information and consultation rights to complement the European Works Council Directive. Under the Directive employees are to be informed and consulted on a regular basis on major corporate decisions concerning employees' interests. Information and consultation are achieved through works councils, or in rare cases, through direct contact between management and employees or their representatives.

Further, employee involvement in Societas Europaea (SE) is regulated by the Directive<sup>5</sup> supplementing the Regulation for a European company (European Company Statute)<sup>6</sup> which introduced a new legal entity under EU law. The purpose of the Regulation for a European company is to offer a company with a European dimension free from the obstacles arising from the disparity and the limited territorial application of national company law.<sup>7</sup> The European company, which is primarily governed by the same rules, can therefore move freely from one country to another without legal restrictions imposed on national entities. The European company will permit cross-border mergers and the cross-border transfer of a company's registered office without the need for liquidation and for the formation of a new company. The Directive supplementing the Regulation for a European company then provides employee involvement in companies moving from one country to another to be subject same provisions.

The Directive<sup>8</sup> supplementing the Regulation for a European company, drawing on experiences and laws of member states, governs three forms of employee involvement in the

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<sup>2</sup> Articles 1, 2(1)(f).

<sup>3</sup> Article (2)(1)(c).

<sup>4</sup> Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80/29.

<sup>5</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

<sup>6</sup> Council Regulation (EC) No. 2157/2001 of 8 October on the Statute for a European Company (SE).

<sup>7</sup> Seventh Recital of the Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE).

<sup>8</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

corporate decision making: participation, consultation and information<sup>9</sup>. Employee participation should be clearly distinguished from other forms of employee involvement. This is because; of the three forms of employee involvement under the Directive only participation affects the structure of the company.

Nevertheless, there are still major divergencies between the laws of member states concerning employee involvement in corporate governance. This stems from the fact that the employees' role in corporate governance is related to not only laws and regulations of corporate governance of countries, but also the underlying philosophy of corporate governance. The shareholder primacy prevails in the Anglo-American countries where the company is considered a profit making organization. This philosophy encourages corporate directors to maximize corporate profit. The directors are elected by the shareholder, which ensures the responsibility of the directors only to shareholders.<sup>10</sup> The directors act, as agents of shareholders, in the best interests of shareholders. The shareholders are the owners of the company carry the risk of investment. They, in turn, should be the one who decides in the company.<sup>11</sup>

The Anglo-American corporate governance system has therefore mainly drawn on contractual theory. This leads to the relationship between corporate constituencies and the company to be treated as contract.<sup>12</sup> Therefore, employees as one of corporate constituencies are regarded as outsiders. Their contractual rights are supplemented by certain statutory protections for the individual worker, and by collective rights of bargaining and consultation.<sup>13</sup>

The stakeholding approach, on the other hand, prevails on the Continent. The company is regarded as the institution in which the interests of different corporate constituencies, such as employees, suppliers, certain long-term customers, environment and society are reconciled. Employees, as one of corporate constituencies, or of stakeholders are protected within the company through mainly two tier board structure. The members of supervisory board are elected by shareholders and employees, and those of the management board are elected by the

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<sup>9</sup> *Ibid.* Article 2.

<sup>10</sup> See Hacimahmutoglu, Sibel, "The System of Corporate Governance: A Turkish Perspective " (1999), 1 International and Comparative Corporate Law Journal, (Number 3), p. 311.

<sup>11</sup> See Villiers, Charlotte, European Company Law- Towards Democracy? , European Business Law Library, 1998, p. 193-195, 200-201.

<sup>12</sup> See Villiers, Charlotte, p. 193-195, 198-199.

<sup>13</sup> See Deakin, Simon and Hughes, Alan "Comparative Corporate Governance An Interdisciplinary Agenda" (1997), 24 Journal of Law and Society, (Number 1),p. 2.

supervisory board. This structure of the company makes it possible for employees to participate in the decision making of companies<sup>14</sup>.

Therefore, employee voice is related to corporate culture, historical, political and sociological development of countries that shape legal rules of employee involvement in the decision-making of companies.

## **B. Teaching Employee Involvement in Corporate Governance from a Comparative Perspective**

The laws and regulations relating to employee involvement in corporate governance which have evolved in different cultural, sociological, historical and economic development of countries can be thought from a comparative perspective.

Different roles of employees can be illustrated by explaining laws of UK, Germany and the Netherlands concerning employee involvement in corporate governance. Examining law of the UK about shareholder primacy together with employee involvement will show that employees can only have information and consultation rights in major corporate decisions. On the other hand, an explanation of laws of Germany and the Netherlands relating to employee participation can make a fuller understanding how the corporate structure enables the interest of company to include the interests of shareholders, creditors, employees and society. Information and consultation rights in UK law stem from the implementation of Directives<sup>15</sup> which impose on member states to regulate, at least, the lowest level of employee involvement. Employees' information and consultation rights are not likely to provide influence upon decisions or corporate policies whereas participation must at least have the capacity to influence decisions and policies. Information and consultation, on the other hand, can be deemed as the essential step in the process of participation<sup>16</sup>

Two-tier board system, as the corporate structure, comprising the supervisory board and the management board is the major characteristic of laws of Germany and Netherlands providing for employee participation. However, while employee involvement in these two countries can be referred to as employee participation, there are differences in these two

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<sup>14</sup> See Hacimahmutoglu, Sibel, p. 314-315.

<sup>15</sup> See Directive on the establishment of a European Works Council a procedure in Community –Scale undertaking and Community-Scale groups of undertakings for the purposes of informing and consulting employees. 94/45/EC [1994] OJ L254/64 and Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, [2002] OJ L 80/29.

<sup>16</sup> See Villiers, Charlotte, p. 191.

countries' laws concerning employee involvement. Explanation of the laws of Germany and the Netherlands about employees' role, in a comparative way, will help the students to understand different types of employee participation, which is also reflected in the Directive<sup>17</sup> supplementing the Regulation for a European Company.

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<sup>17</sup> See Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, annex standard rules part 3. See also Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European Company (SE), article 40