# Employee Participation at European Union Level: Was it Worth the Wait? The Concept of 'Functional Equivalence' Revisited

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**Abstract**
This paper revisits the concept of 'functional equivalence' as a means of developing a framework for comparing worker representative functions across the member states of the European Union (EU). An evaluation of such functions may help in assessing the reality of the EU participation 'space' that has evolved following the adoption of a series of significant directives governing employee participation in recent years. Such an evaluation is all the more pressing because the ceding of hard law to soft law – particularly the development of 'reflexive regulation' in some of the directives in question – gives rise to a fragmentation of worker rights that make comparisons all the more complex. By highlighting what employee representatives actually *do*, and *how* and *where* they do it, the approach emphasizes what such representatives have in common rather than what divides them through institutional diversity. It should therefore help to reveal where and how the EU labour policy 'playing field' is not that level.

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There are now some fifteen directives that govern employee participation, in one form or another, across the member states of the European Union (EU). The most notable are the directives on European works councils (EWCs) and the information and consultation of employees (ICE), and the European Company Statute (ECS), but others cover redundancies, transfer of undertakings, health and safety, cross-border mergers, take-over bids and various revisions of these directives. The questions arise: is there now a genuine employee participation space at EU level and if not, why not? And to what extent are the rights embodied in that 'space' comparable across the member states?

Some controversy surrounds these questions, with certain commentators arguing that such a space does now exist, with others remaining more sceptical (for a review, see Cressey, 2009). A striking feature of the situation is that the fates of board level and sub-board level participation have diverged. Board-level participation has proved particularly difficult – the draft Fifth Directive was abandoned and the European Company Statute adopted in a diluted form that leaves open how far it can successfully prevent social dumping. Success has really centred on sub-board level, particularly on rights to information and consultation, though here too the effectiveness of these rights may be questioned.

The nature of a 'space' is problematic, and analysis requires first of all an overview of the ways in which the terms of a directive may fragment across the 27 member states of the EU. There are at least eight possible factors that affect fragmentation:

1) Negotiation of the directive itself requires a complex political process before its adoption, which may involve dilution of its terms to meet certain objections.
2) Exemptions may be permitted by the directive (e.g. Art.13 agreements in the EWC directive and the 'before and after principle' in the ECS).
3) The role of the ECJ in interpreting the directives also requires consideration in assessing their impact.

The first two factors affect the terms of the directive itself and therefore apply across all member states, while ECJ judgments too are binding across all member states, and therefore should not unduly affect fragmentation as such. The following factors, however, may have a greater 'centrifugal' effect.

4) Transposition of the directive into national settings is particularly fraught. Transposition may involve legislation or collective agreement, or both; new legislation or amendments to existing legislation; detailed questions regarding interpretation; tightness of the drafting process; and so on.
5) Once transposed, the terms of the directive may involve a process of negotiation through the special negotiating bodies (SNBs) to establish EWCs, European companies (SEs) and ICE arrangements, leading to structures tailor-made to the particular company. Some companies in certain sectors may find it easier to introduce EWCs than others because of the centralization of their structures. We know rather little about this stage of fragmentation because the overwhelming majority of EWCs have not been researched and there are still rather few 'normal' SEs.
6) The effectiveness of participatory arrangements, once in place, may vary in practice according to the strength of the union or employee representatives.
7) The role of national enforcement agencies may vary widely in securing compliance (compliance regimes).
8) The problems of language use, interpreting and translation may also affect the effectiveness of participation in obscuring the meaning and connotation of terms.

In terms of fragmentation, factors one/two/three involve the EU level and the nature of the directive itself; factor four involves national level (legislature, social partners); and factors five/six involve sector/company levels – for example, advice and support from sectoral unions, presence of advice and support at company level. Factor seven is also national, while eight underpins the rest. Generally, centrifugal forces may be observed throughout, which strongly suggests that a common space does not yet exist. Put another way, it has been argued that industrial relations in Europe today resemble an unfinished jigsaw puzzle whose pieces are all in hand but have not yet been fitted together to present a unified picture (Kluge, 2004).

Overall, the problem of fragmentation often centres on the 'match' of the directive with existing national industrial relations systems. Such systems differ widely across the EU member states and generally seem to be strong, stable and averse to change. Institutions governing interest representation and employee participation illustrate the point. They include systems with strong legal foundations, as in Germany; systems which are largely based on the trade unions as social partners, as in the Nordic countries; models built on voluntary agreements depending very much on company-based power structures, as in the UK; or models governed by politics and the state, as in France and other Southern European countries. EU enlargement into Central and Eastern Europe has sharpened these contrasts still further.

**EU STRATEGIES**

The EU institutions, in acknowledging the potential for fragmentation, have historically developed a number of strategies to deal with the problem.

The first strategy was 'big bang' or institutional transfer. It simply ignored or failed to acknowledge the problem. The first version of the Fifth directive and early versions of the ECS (governing employee board-level representation) dating from the 1970s were drawn up on the basis that institutions could transfer across boundaries. These drafts embodied the German model, though later the Dutch model was added, at a time when the German economy was highly successful and it was generally believed

that its system of corporate governance could be exported to the other member states. This view has been discredited – a voluminous literature on policy transfer reveals the difficulties involved in exporting institutions (Gold, 2005). However, the 'big bang' aimed at providing for similar outcomes (that is, employee board-level representation) and hence comparison between them was envisaged.

The second strategy focused on 'functional equivalence', and reflected growing concern in the Commission with the problem of institutional diversity. With successive waves of enlargement, it had become clear that a change in tactics was required. It is not entirely clear what the EU meant by 'functional equivalence', but it seems to involve a form of 'controlled fragmentation'. For example, the second version of the Fifth directive in 1983 allowed for a variety of (allegedly) equivalent options, including not only the German and Dutch models, but also the introduction of 'company councils' comprising employee representatives alongside boards, and further negotiated arrangements as well (Bulletin of the EC, 1983). At that stage, the strategy was to take into account diverse national institutions, and allow for the implementation of 'equivalent' arrangements around them. In the 1989 version of the ECS, the equivalents involved either the appointment of a certain number of employee representatives on to the SE's administrative or supervisory board; the creation of a 'separate body' to represent employees; or the creation of 'other models' following agreement between management and employee representatives (Bulletin of the EC, 1989).

However, it remains unclear as to how the Commission actually did evaluate the comparability of the arrangements (though this paper will propose a narrow concept of 'function' itself). But even the four 'functional equivalents' in the amended draft Fifth directive of 1983 proved unacceptable – the Fifth was much later dropped – while the 'before and after' principle was subsequently incorporated into ECS.

The third strategy centres on 'reflexive regulation' and the requirement for flexible, negotiated structures, tailor-made to the needs of individual companies, with standard 'fall-back' measures introduced principally in cases of failure to agree. Attention to such flexibility has accompanied the emergence of increasing interest in 'soft' law as a form of regulation over the1990s.

This is because the tension between 'harmonisation' on the one hand and 'flexibility' on the other has remained a central issue. The transposition of a directive into national settings, and its interpretation in line with domestic institutions and legal frameworks, has always raised issues of equivalence, but the process of widening the EU has reinforced trends towards even greater flexibility (for which some may read 'fragmentation'). The EWC directive exempted existing voluntary agreements from its provisions and prioritised 'tailor-made' EWCs through negotiations on the SNB, with statutory fall-back arrangements applicable only by default. Similar combinations of 'hard' and 'soft' law were embodied in the ECS and ICE directives.

But scepticism has been expressed over the nature of this approach, and the extent to which such flexible forms of regulation will lead to a *coherent* set of workers' rights across the EU and a restraint on market forces. However, some theorists view 'reflexive regulation' in a more positive light as it emphasises the value of combining regulation with social partner negotiations, on the grounds that this steers a course between harmonisation from the centre and regulatory competition between EU member states. It has been argued, for example, that 'harmonisation' viewed from this angle 'has been a force for the preservation of diversity' and 'an approach to regulatory interaction based on mutual learning between member states' (Deakin,

2006: 440). The questions – as to how effective such diversity is in ensuring equal rights and whether mutual learning actually takes place – remain open.

This suggests that whilst 'reflexive regulation' solves the input side, in that the approach has succeeded in leading to the adoption of the three principal directives in this area (EWCs, ECS and ICE), it does not solve the output side (that is, the *impact* of directives or their success in creating a genuine participation 'space'). Attention to legal inputs needs to be supplemented by attention to industrial relations outputs.

Centrifugal forces, then, include legal factors (particularly 4); compliance factors (7); linguistic factors (8, throughout); and institutional factors (5, 6).

**CROSS-NATIONAL RESEARCH**

Given this fragmentation, the question as to how comparisons may be made across the member states of employee participation arrangements as transposed through EU directives becomes extremely pressing. The issue of cross-national research is known to be a minefield, and comparing institutions has been dubbed 'comparing the incomparable':

> Actors thus ruin our beautiful point of departure. This happens all the time: we have tried to compare institutions as being 'functionally equivalent' with regard to some purpose or goal but find time and again that their meanings are different. When the specific meanings attached are different, which on closer scrutiny they invariably are, then we are comparing the incomparable (Sorge, 2005: 151-2).

So much has been written on this subject – how to compare institutions across countries – that there are now numerous reviews of the issues (see, for example, Elder, 1976; Maurice, 1989; Hyman, 2001; O'Reilly, 1996) as well as those based on linguistic analysis (Lallement, 2005). No consensus on conclusions emerges, only that considerable care is required in making comparisons internationally across institutions, functions or issues. Indeed, one commentator notes that the discussion around comparability and what is to be compared is 'itself an essential stage of the interpretative endeavour' (Hege, 1998: 11 [author's translation]).

**FOCUS ON FUNCTIONS/PROCESSES**

Yet the comparison of the functioning or operation of directives on employee participation across the EU member states remains an important issue. It is difficult to review the operation of these directives without some *comparative framework* in which to do so. By the 1950s, national institutional structures and regulations had become 'the dominant paradigm for comparative industrial relations research' (Locke, 1990: 349), but this paper argues that the concept of functional equivalence may yield more fruitful results, within the context of 'reflexive regulation' of employee participation.

The term 'functional equivalence' stems from the work of Robert Merton in his critique of functional unity:

> Once we abandon the gratuitous assumption of the functional indispensability of particular social structures, we immediately require some concept of functional alternatives, equivalents, or substitutes (Merton, 1957: 52).

Because the concept of 'functional equivalence' focuses attention on 'a range of possible variation' in the case under examination, it 'unfreezes the identity of the existent and the inevitable' (ibid.). The concept was used by the Commission in the

1970s and 1980s specifically in relation to its attempts to introduce employee board-level representation across the EC member states through the draft Fifth directive and the ECS. As noted above, in the 1983 draft of the former and the 1989 draft of the latter, the Commission proposed that member states could legislate to introduce one of several forms of board-level representation in line with what was most appropriate for their institutional and legal frameworks. A specific institutional model, based on the German or Dutch system, was – to use Merton's terminology – no longer regarded as 'functionally indispensable' and was hence abandoned. Each new option was deemed to be 'functionally equivalent'; in other words, its establishment was to attain the same end, objective or *function*, namely employee board-level representation involving influence over corporate strategy. Functional equivalence, as the term implies, therefore suggests a move in Commission thinking away from transfer of institutions as such, towards an analysis of the functions of those institutions within varying and contrasting national contexts. Once the function has been established – employee board-level representation – then the means appropriate to those contexts may be proposed.

In a review of the literature, Hyman (2001) examines a number of pieces of research which make function the basis for international comparison. Summarising the approach adopted by Hege (1996), Hyman notes that national institutions are inappropriate objects for international comparison as 'they are differently constituted, differently experienced and differently set in motion according to specific national context' (2001: 6). To make assumptions about their role is to act ethnocentrically and to fail to acknowledge the possible diversity of their functions.

This is a significant criticism but it may be countered, first, by admitting the charge of European ethnocentricity and focusing explicitly on the member states of the EU and, second, by restricting the definitions of 'function' to very specific areas of analysis. The concept may prove viable if a narrow function is considered, and placed in spatial and temporal context. For example, the functions of a German works council – though not, of course, the works council itself – may be at least partly identified in certain circumscribed UK contexts. When attempting to examine the nature of the EU-level employee participation space created by the directives in question, the functions created by the directives may be characterised quite specifically and then compared across member states.

The employee participation directives, after all, attempt to establish similar objectives across the member states, for example, the notification and consultation of employee representatives in the case of redundancies; rights to information and consultation over employment matters through EWCs; rights to participation through the ECS. Rather than comparing the nature of works councils and EWCs across the member states, which has been attempted many times (Jenkins and Blyton, 2008), a series of questions may be raised regarding the *processes* of representation and function.

For example, in each member state, who is responsible for handling information and consultation over redundancies? (It might be the works council, but it might also be the trade unions, including shop stewards and full-time officers.) Who is responsible for ensuring the company complies with its obligations to inform and consult? At what levels? Or, if a company announces a European-wide restructuring programme, who exactly in each member state does it inform/consult over closures, redundancies, moving production and similar issues? How do the various EWC members pursue the issues raised in their own countries? But rather than comparing EWCs *as such* – without in any way denying the centrality of such bodies in focusing our attention on the achievement of critical employment objectives – it may prove more fruitful to examine in detail the functions of the varying actors involved at the various different

levels, particularly if it proves possible to extract them from their agency or institutional setting. In such a way it may be possible to understand a 'function' independently of the complex webs of meanings that envelop our understanding of institutions across cultures. Indeed, terms like the English 'shop steward', which are notoriously difficult to understand across industrial relations cultures, become much clearer once they are broken down by functions, which include handling collective bargaining, grievances and communications with management (European Foundation, 1991: para.635). Trade unionists from other countries may then locate these roles within their own domestic settings and identify who, in their own systems, would be likely to carry them out (maybe a combination of works councillor and union representative at different levels).

However, the problem with international comparisons of industrial relations may be compounded, not only because some actors may have no experience of 'works councils', 'shop stewards', 'worker directors' and so on, but also because the terms themselves may be ambiguous in at least two ways. First, the differences between works councils across the EU may not be self-evident and the fact that German works councils are chaired by an employee but French works councils are chaired by a manager may prove highly significant. But even a modified translation does not prevent the fact that a *Betriebsrat* is not a *comité d'entreprise*, nor a *consiglio di fabbica*, nor a *comité de empresa*, and so on. Second, these terms may also vary by connotation: a works council may be regarded generally positively in, say, Germany, but negatively in some quarters in Poland or the UK.

A focus on functions may help to remove some of these ambiguities by creating more room for common understanding amongst trade unionists, who after all share common responsibilities in representing their members. Functions may then be analysed narrowly both within the context of national settings and also international settings, such as EWCs, and comparisons made easier to handle. Gaps and discrepancies are then also easier to identify, and outcomes easier to evaluate. The issue here, then, is not analysis of legal rights as such, for example, the well-known fact that rights to information and consultation vary greatly across the member states. Rather, the issue is how effectively actors are able to *exercise* those rights given the variation of functions and how they interrelate within national levels and between European and national levels (for example, the ability of employee representatives to carry out their functions as European works councillors or board members of SEs). The intention here is only to propose a framework within which comparisons can be made – the evaluation of those comparisons is a separate task.

**CONCLUSIONS**

Much research has established the contrasts between industrial relations systems across the EU, and particularly forms of employee participation and representation. However, in order to compare the *effectiveness* of employee participation across the member states, as introduced by some fifteen directives, it is necessary to go beyond mere institutional comparison. An attempt to fit the pieces of the EU participation jigsaw together – to form an overall picture, the prerequisite for an analysis of the practice of participation and to identify where the parts remain missing – requires a means of comparing and contrasting the processes whereby certain challenges, common across borders, are met.

The approach adopted in this paper attempts to revisit the concept of 'functional equivalence' as a means of developing a framework for comparing worker representative functions across the member states. An evaluation of such functions may help in assessing the reality of the EU participation 'space' that has evolved following the adoption of a series of directives in recent years. This task is all the

more pressing because the ceding of hard law to soft law – particularly the development of 'reflexive regulation' – gives rise to centrifugal pressures on worker rights that make comparisons all the more complex.

This approach bypasses comparability or otherwise of institutions and the rather repetitious and sterile debates about them. By focusing closely on functions, it allows a greater chance to compare 'like with like', identify gaps and issues, and devise policy recommendations accordingly. By highlighting what employee representatives actually *do*, and *how* and *where* they do it, the approach emphasizes what such representatives have in common rather than what divides them through institutional diversity. What matters is that representational functions are performed and performed efficiently – in an attempt to restrain market forces, if that is the criterion for success – rather than that they are performed by works councillors rather than by shop stewards or *délégués du personnel*. The approach stresses equality or otherwise of outcomes and helps reveal compliance issues. It should also illustrate the limitations of 'reflexive regulation' as embodied in recent directives and demonstrate the importance of hard law (Pochet, 2008). It should reveal where and how the EU social playing field is not that level.

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