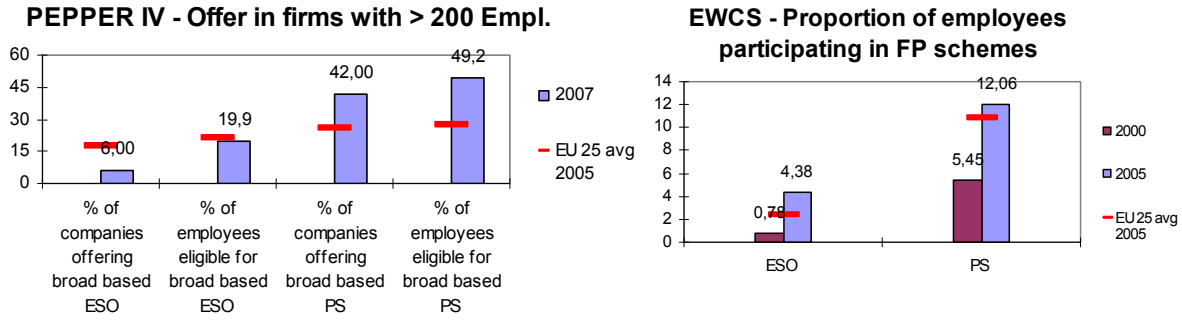
XXIII. Romania

Employee financial participation in Romania is a relatively new idea, as distinguished from various pseudo schemes attempted under the communist regime. PEPPER schemes emerged during early stage privatisation; at that time voucher privatisation and insider privatisation via an ESOP-like scheme were the two main privatisation methods. The most prevalent form is employee share ownership, mainly through ESOP-like schemes. It is estimated that by the end of 1998, over a third of all industrial firms in the State Ownership Fund had undergone ESOP privatisation, with an average employee ownership of 65 per cent and a median of 71 per cent; in addition, ESOP participants made up the largest owner group in one-fourth of Romanian privatised firms, making this method the country's most important tool for state ownership divestment (Earle and Telegdy, 2002; World Bank, 2004; compare also to Lowitzsch, 2006, pp. 251, Tables 1-3). Nevertheless, after more than ten years of transition, only 40 per cent of large enterprises and about two-thirds of medium-size enterprises have been privatised. The number of state-owned or state-controlled firms in Romania remains larger than that total in the other Central and Eastern European countries combined.[171]

Since 2001 cash-based profit-sharing, known as 'The Fund of Employee Profit Participation', has been compulsory in companies and in autonomous bodies where the state is the sole or majority owner. At a national level, net profits directly paid to employees in 2003 was about 2.2 per cent on average, while 70.3 per cent was distributed from salary funds, including premiums and benefits.[172] Although the number of profit-sharing firms is still limited, their number is gradually increasing.



171 World Bank data from 2004, at the end of 2003 there were about 1,300 state-owned enterprises and another 600 enterprises de facto under state control.

172 Although compulsory, interview evidence reported, that in practice it is seldom applied and, if applied, concerns a rather small number of employees.

1. General Attitude

While employees are represented by a considerable number of large trade union confederations, employers' associations – eleven of them registered – are even more fragmented. In privatisation of utilities and the oil and gas industry, employees often have purchased shares through trade unions, since the unions, being very strong in these sectors, have substantial influence, including the right to appoint at least one member to the boards of administration. In some cases (for example, the sale of 8 per cent of the social capital of the PETROM Company, representing a total value of about Euro 200 million) the trade unions tried to have the relevant law amended to make employees' associations controlled by the trade unions become the purchasers of the offered shares rather than individual employees. Such cases illustrate that the interests of trade unions and their legal representatives are not necessarily in line with the interests of individual employees, and that sometimes trade unions try to achieve their goals at the expense of employees' rights. Trade unions have a very strong position in the tripartite council (National Social and Economic Council), which also includes the government and the employers' associations. Employers' associations have not yet addressed the issue of financial participation of employees. However, according to Article 104 of the Collective Labour Contract concluded at the national level for the years 2007-2010, employers and trade unions committed to mutual information concerning changes in the property form of their companies and to sustain the participation of employees' associations in their privatisation. Well known examples of ESOP associations founded in 2008, are that of SC Oltchim MBO gathering 2000 employees from OLTCHIM SA – more than half of the number of whole employees – and that in Electrica SA acquiring 10 per cent of the employer company.

At present, employee financial participation of is of little interest to either the government or political parties. The last significant commitment by policy makers was in 2001 when the aforementioned compulsory cash-based profit-sharing scheme, 'The Fund of Employee Profit Participation', was introduced. Only one aspect of financial participation of employees is currently being addressed by the government, namely the sale of minority shares to employees in public enterprises now in the process of privatisation; these include utilities (or the so-called *Régies autonomes*), oil and gas, banks, as well as state companies. However, since economic privatisation policy was recently changed to favour sales to strategic outside investors, including foreign investors, government support is expected to be on the decline. In some of these privatisation cases, trade unionists and representatives of political parties are suspected of engaging in insider deals and corrupt practices at the expense of employees; therefore the general public has little confidence in government support of employee financial participation.

2. Legal and Fiscal Framework

Romanian law lacks a systematic legal framework for regulating employee financial participation. However, several laws passed in conjunction with the privatisation process influenced the extent to which the concept of employee financial participation has spread,

with mass privatisation and an ESOP scheme being the major forms. The only legal regulations of profit-sharing concern a compulsory scheme in (majority) state owned companies to which National Labour Collective Agreements apply.

a) Share Ownership

Privatisation (1991, 1995, 1999) – The Romanian Privatisation Law 58/1991 decreed that 30 per cent of shares be free shares transferred under alternate privatisation methods, mainly through vouchers and contained regulations on preferential treatment for employees and management in the sale of shares through the national Privatisation Agency. According to Art. 48 of Law 58/1991, employees (including management) of the relevant enterprise had a pre-emptive right to purchase the offered shares on preferential terms. In a fixed price sale, the 'insider share price' had to be 10 per cent lower than the public price; in the case of a sale by competitive bidding, the insider offer had to be accepted by the Privatisation Agency as long as the offered price was not lower than 90 per cent of the highest public bid. This preferential treatment was extended to the direct sale procedure, where the insider offer had to be accepted by the Privatisation Agency in the event of an equal negotiation offer from other interested parties. The 30 per cent quota was reaffirmed by Law 55/1995 on the Acceleration of the Privatisation Process; the privatisation agency compiling a list of suitable enterprises issued the so called 'nominal value vouchers for privatisation' to be distributed amongst the resident population that had not made full use of their property vouchers received according to Law 58/1991. This new law contained the first real incentive for employee financial participation in voucher privatisation. While members of the general public who owned the nominal value vouchers could exchange their vouchers only for shares of companies chosen from the privatisation agency's list of suitable enterprises, Art. 5 offered employees, former employees (pensioners or the unemployed) and managers the same opportunity to acquire shares of non-listed companies.

Employee Stock Ownership Plans (1992, 1994, 1997, 2002) – ESOP associations stem from Rule 1/1992 on the Standard Procedure for the Privatisation of Small Enterprises by the Sale of Shares in force as of January 1993. Although focused on the privatisation of so-called 'small enterprises' with not more than 50 employees, this regulation defines insider privatisation via an ESOP-like scheme implemented by means of direct negotiations with interested employees and managers as the standard privatisation procedure. However, the shares were not acquired directly by participating employees but by an incorporated association of share owners ruled by Law 77/1994 allowing employees and the management of partly or fully state-owned enterprises earmarked for full or partial privatisation to establish ESOP associations.[173] Until 2002, only one ESOP association could be established in each enterprise to be privatised, eliminating the possibility of competition between associations over the purchase of one specific enterprise. Membership in the

[173] Law on Associations of Employees and Members of the Management in Companies in the Privatisation Process, establishing so-called management and employee associations ('asociaţiă salariatilor şi membrilor conducerii'). When voucher privatisation came to an end Emergency Ordinance 88/1997 defined a rough legal framework for the employee shareholder associations and referring for the details to the general legal provisions governing associations and foundations; the Ordinance was subsequently changed by Law No. 137/2002 concerning some measures to forward privatisation.

ESOP association, while voluntary, was a precondition for making use of the advantages and rights. The law prescribes that a minimum of 30 per cent of the total number of employees and management staff must participate in establishing the ESOP association. The employing enterprise is obliged to disclose all relevant commercial and financial information to the association's founding committee; it must also bear the costs of a preliminary feasibility study. The ESOP association buys and administers the shares for its members. Membership is open to employees with open-ended labour contracts for at least half-time employment (since 2002 also to fixed-term employees and to pensioners), to members of the management of the employer company and former employees, both unemployed and pensioners.

The association's main decision-making body is the general meeting in which each member has one vote. The general meeting adopts the ESOP association's Articles of Association which must contain strict rules on the distribution of shares purchased. With the share not being acquired directly by employees and management, but the intermediary ESOP association, with an autonomous legal personality, participation in decision-making therefore depends upon the decision-making procedure within the association and how members' decisions are transmitted to the shareholders' meeting. The ESOP association may also purchase shares on behalf of individual members. In this case the shares are distributed directly to and administered by the members themselves once they fully pay for the shares either with cash or privatisation vouchers. The main advantage of buying shares through the ESOP association is the use of the credit offered either by the Privatisation Agency itself or by external banks. Shares bought under the name of the association are not vested directly to individual members, but retained by the association until they are entirely paid for, serving as credit securities during this period. ESOP associations' members have pre-emptive rights to the unvested shares, on the basis of length of employment, company position and salary. If the members do not exercise their pre-emptive rights, these shares may be distributed to new employees. When all shares are distributed to its members, the association must be dissolved. Law 77/1994 additionally offers preferential instalment options[174] for shares purchased by ESOP associations. This involves a low advance payment, complemented by a minimum repayment period of five years and a maximum interest rate of 10 per cent per year. Given the high inflation rate that obtained during the 1990s, this interest rate limit turned out to be remarkably advantageous.

Private Companies – The legal framework established by Romanian company law is defined by Law 31/1990 on companies, republished in 2004. Romania has only made partial use of the tools/exceptions offered by the Second Council Directive 77/91/EEC of 13 December 1976 to promote employee financial participation by means of corporate legislation. Regarding permission to acquire the companies' own shares for its employees Art. 103 Law on Companies offers an exception to the restrictive general rule for such transfer which requires a decision of the shareholders' meeting in the case of the acquisition of shares for the employees of the company. The second exception is Art. 106 para. 2 Law on Companies, that is, the encouragement of share acquisitions by employees by permission to advance funds and to make or secure loans for this purpose.

174 Regarding Art. 52 of Law 77/1994 the Privatisation Agency is bound by these conditions. Furthermore, the Agency has to accept a certain amount of privatisation vouchers (property vouchers) in exchange for the shares to be transferred.

b) Profit-Sharing

In 2001 the government passed Ordinance 64/2001[175] covering state or municipal enterprises whose legal form is prescribed by Law 31/1990 on Trading Companies, with the state as single or majority owner, or in a specific legal structure which is still widely used by public utilities ('regiă autonoma', governed by specific regulations). The ordinance regulates the details of profit distribution, such as reserve funds, payouts to owners and the coverage of losses from previous years. In Art. 1 lit. e), the ordinance also contains a provision which sets the maximum payout rate for employee profit-sharing at 10 per cent of the overall profit of the enterprise (10 per cent in the case of companies, or 5 per cent in the case of autonomous bodies, depending upon employees' performance and contribution to the financial results).[176] There is no current provision regarding a minimum rate; it should be noted that the number of state firms actually making a profit is still low. Nevertheless, Ordinance 64/2001 is one of the few laws expressly dealing with the issue of employee profit-sharing. Against the background of the pronounced encouragement of ESOP privatisation schemes, profit-sharing in companies privatised through this method should be widespread, as a side effect of share ownership. Since ESOP privatisation policy particularly favoured the sale of smaller enterprises to employees and management, profit-sharing schemes should be over-represented in the sector of small and medium sized firms.

c) Participation in Decision-Making

While legislation before 1990 emphasised employee participation in decision-making excessively way, the privatisation laws passed since 1990 contain no special regulations on this issue. The notion of employees' co-determination, as in German law, was not introduced. The Company Law does not provide any legal means for the privileged participation of employees in decision-making. However, it does contain various provisions protecting the interests of minority shareholders. The new Labour Code of 2003, as well as the nation-wide collective agreement with trade unions for the period 2007-2010, contain regulations for some compulsory consultation procedures if management is planning any changes in labour conditions.

175 On the Repartition of Profits Obtained by State and Municipal Companies with the State as Single or Majority Owner (M. Of. No. 536/2001 as amended) abrogating earlier regulations, for example, Ordinance 23/1996 on the same issue.

176 Supplemented by Governmental Disposition No. 29 of 25 February 2002 for the approval of the explanatory note regarding the establishing of the amounts making the object of the profit repartition conforming to the Governmental Ordinance No. 64/2001 and their reflection in bookkeeping (M. Of. No. 157/2002).