

Chapter 10

The current state of information and consultation rights in the European Union

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1. Introduction

One of the core elements of the Sustainable Company is the informing and consultation of workers on a wide range of strategic and operational issues. Although information and consultation rights are recognised as fundamental social rights for workers in the EU, actual practice falls far short of this ideal. First, information and consultation rights are quite fragmented, as they are defined for specific situations or in specific kinds of companies in more than 25 directives in the areas of labour and company law. Second, the actual implementation of many of these directives is weak or incomplete. Third, existing rights are often not recognised in practice. Thus, in reality, the European framework for information and consultation represents a long and tedious climb towards democracy in Europe (Schömann *et al.* 2006).

This chapter examines the current state of information and consultation rights in the EU. Section two of this chapter shows that these are recognised as fundamental social rights. However, the EU rights of information and consultation are in fact very fragmented (section three) and can be considered the ‘poor relation’ of EU social legislation. Although the long standing initiative of the European Commission towards better regulation is currently addressing the general issue of information and consultation of workers, both the initiative itself and the methodology used are to be criticised (section four). In this respect, the ETUC’s call in 2011 for European minimum standards for information, consultation and participation is a much more promising approach towards realising workers’ fundamental rights to information and consultation.

2. Information and consultation are fundamental social rights

The European directives on information and consultation are a clear expression of the willingness to make employees citizens in their places of work. The same intention is reflected in the European Charter of fundamental rights (referred to in the Lisbon Treaty) which gives information and consultation rights the status of a basic right of European citizens. Article 27 of the European Charter of fundamental rights stresses 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’. As the first article of chapter IV of the Charter entitled ‘solidarity’, this provision on workers’ right to information and consultation implies that the EU is based not only on traditional individual and liberal rights, but equally on social rights creating networks of solidarity among the citizens of the EU. The aim of information is to empower employees’ representatives, ensuring that they can obtain adequate facts on the issue at stake in order to prepare a substantive statement. This statement is an essential part of the following step: consultation. This process involves an exchange of views between management and representatives of labour in order to establish a continuous dialogue between them, so that they may reach an agreement on decisions falling within the scope of the employer’s discretion.

The employer has the obligation to inform and consult workers or their representatives on all matters, including those which concern them outside the undertaking. Information and consultation must take place ‘at the appropriate levels’, including the level of establishments, undertakings or group of undertaking regardless of their scope of operation. Article 27 of the EU Charter of fundamental rights thus creates a guarantee of information and consultation for workers at both national and transnational levels.

The employer has the obligation to inform and consult either the workers directly, or the worker representatives. However, information and consultation rights cannot be reduced to a right only for individual workers. Were employers to be permitted to ignore and undermine worker representatives, including trade unions, this would contradict the guarantee for freedom of association set out in Article 12 of the EU Charter of fundamental rights. Therefore, direct information and consultation

of individual workers could be an ‘appropriate level’ only in undertakings or establishments where no worker representatives have been elected. In the same vein, the view that the guarantee of information and consultation to ‘worker representatives’ applies only to works councils and not to trade union representatives is contested. Given that not all EU Member States operate a ‘dual-channel system’, the interpretation of ‘representatives’ as being either trade union representatives or these together with works councils appointed from the workforce as a whole within the undertaking is the more inclusive. Finally, Article 27 extends to the more general dimension of protecting human dignity (Article 1 of the EU Charter of Fundamental Rights) and is not restricted simply to traditional social rights and the objective of democratisation of the economy. As such, it expands the scope both of traditional social rights and of practices of democratisation to encompass threats to workers’ dignity in the many new forms these threats assume in a globalised economy, society and environment (Blanke 2006).

3. The fragmented rights to information and consultation in the European Union

Information and consultation rights in EU law are currently some of the most fragmented rights in the entire EU legislative corpus. In total, more than 25 directives deal with information and consultation either in a general or specific sense. The first steps to set up procedures of information and consultation of workers and their representatives in specific circumstances of the development of undertakings were taken with the adoption of Directive 75/129/EEC on collective redundancies (codified in Directive 98/59/EC)¹ and Directive 77/187/EEC on safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (codified in Directive 2001/23/EC).² The first systematic step towards a general right of information and consultation of workers within the undertaking was taken by Directive 94/45/EC on the establishment of European Works Councils (recast

1. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, p. 16.

2. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82, 22.3.2001, p. 16.

by Directive 2009/38/EC).³ The general system has been strengthened and complemented by Directive 2001/86/EC on employee involvement within the European company (*Societas Europea - SE*)⁴ and the general framework Directive 2002/14/EC of on information and consultation at national level.⁵

Additionally, a large number of directives in the field of health and safety guarantee information and consultation rights of the workforce. Framework Directive 89/391/EEC introduced measures to encourage improvements in the safety and health of workers at work.⁶ This general framework has been complemented by a range of directives targeting (1) particularly sensitive risk groups, for example, Directive 91/383/EEC on the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship,⁷ or indirectly, for example, by way of Directive 2003/88/EC concerning certain aspects of the organisation of working time,⁸ as well as (2) specific sectors, for example, Directive 92/91/EEC concerning the minimum requirements for improving the safety and health protection of workers in the mineral- extracting industries through drilling⁹ or Directive 93/103/EC concerning the minimum safety and health requirements for work on board fishing vessels,¹⁰ or (3) specific aspects of the working environment, for example, Directive 2000/54/EC on the protection of workers from risks related to exposure to biological agents

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3. Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ L 122, 12.5.2009, p. 28.
 4. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees, OJ L 294, 10.11.2001, p. 22.
 5. 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, OJ L 80, 23.3.2002, p. 29.
 6. Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, OJ L 183, 29.6.1989, p. 1.
 7. Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed- duration employment relationship or a temporary employment relationship, OJ L 206, 29.7.1991, p. 19.
 8. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9.
 9. Council Directive 92/91/EEC of 3 November 1992 concerning the minimum requirements for improving the safety and health protection of workers in the mineral- extracting industries through drilling, OJ L 348, 28.11.1992, p. 9.
 10. Council Directive 93/103/EC of 23 November 1993 concerning the minimum safety and health requirements for work on board fishing vessels, OJ L 307, 13.12.1993, p. 1.

at work.¹¹ All those directives required national legislation on information and consultation of worker representatives in these specific areas.

However, only Directive 2002/14/EC establishes a general framework from 2005 onwards (the deadline for its transposition in the Member States) in relation to the information and consultation of workers in the European Union. This piece of legislation thus represents a substantial contribution to the consolidation of European Union social law in the area of information and consultation of workers. Indeed, it is the first EU directive to impose a general obligation to inform and consult workers in the European Union and thus represents an indispensable complement to the existing but fragmented measures on workers' rights to information and consultation in specific types of company situation. The general directive on information and consultation (Directive 2002/14/EC) lays down for the first time a European standard of information and consultation rights in national companies. This is in contrast to other directives which aim at improving employee involvement rights in Community-scale companies. This approach is particularly relevant for countries (such as the UK, Ireland, and Malta) where no such rules existed previously. This minimum standard is complemented by specific rights of information and consultation.

To sum up, the architecture of information and consultation rights in the European Union has been shaped progressively to a considerable extent by the need to secure workers' involvement and social democracy within undertakings when issues of working conditions and the working environment are at stake, with special provision in the case of difficult business situations and in relation to sensitive risk groups. Clearly, such fragmentation creates confusion and legal insecurity both for workers and their representatives as well as for management, a situation that is compounded by the fact that most directives are poorly implemented. Furthermore, this architecture has been strongly inspired by the national labour law of those continental European countries which traditionally have made provision for information and consultation rights. Other shaping features include the influence of European business law and rulings of the Court of Justice of the European Union (CJEU). However,

11. Directive 2000/54/EC of the European Parliament and of the Council of 18 September 2000 on the protection of workers from risks related to exposure to biological agents at work, OJ L 262, 17.10.2000, p. 21.

information and consultation rights appear, none the less, to be the ‘poor relation’ of EU social legislation.

4. Shortcomings in national implementation of information and consultation rights

In general, the financial and economic crisis did not reveal previously ‘hidden problems’ in respect of the implementation of the transfer of undertakings, collective redundancies and general information and consultation directives (European Labour Law Network 2010, confirming Schömann *et al.* 2006). Rather it shed additional light on already existing and well-known problems (Barnard 2010). Four main issues are identified in relation to the three directives at stake: (1) incorrect implementation, (2) avoidance of the provisions of the directives, (3) uncertainty about key definitions and concepts, and (4) enforcement difficulties. Mainstreamed issues addressed in the collective redundancies and transfers of undertakings directives include domestic dismissals protection law, insolvency and bankruptcy, collective agreements, enforcement mechanisms, employees’ benefits and pensions. Thus, the definition of the concept at stake in those directives remains a major source of legal uncertainty. Implementation of the general information and consultation directive is still not optimal as regards the timing and content of the information provided and the nature of the consultation carried out. Practical arrangements as well as the protection afforded to worker representatives in the exercise of their rights reveal loopholes in domestic implementation provisions.

In relation to Directive 98/59/EC on collective redundancies, the definition of ‘collective redundancies’ remains a contested issue, leading to legal uncertainty in various respects. Problems arise, for example, as a result of different definitions depending of the status of the workers concerned, non-application of the directive to certain categories of workers (executive staff – air transport staff – temporary agency workers), the staggering of dismissals so as to avoid triggering the threshold for information and consultation, and recourse to ‘termination agreements’ that do not automatically fall within the scope of the directive. Furthermore, the issue of enforcement in respect of the consultation of worker representatives lacks explicit domestic provisions in respect of the content and timing of the consultation, on the (choice of) worker representatives to be consulted. In addition, the legal consequences (sanctions) in case

of infringement of the obligation to inform and consult the workforce and/or in relation to the timing and content of the notification to the public authorities are anything but clear and efficient. The issue of the priority list for dismissal reveals a large degree of employer autonomy in some countries, leading to lack of equity.

Dismissal protection in groups of undertakings raises concerns in relation to the liability of the group and not simply the undertaking carrying out the dismissals, whether there is an obligation requiring further employment within the group and the issue of continuity of service (and the rights attached thereto) in the case of such further employment. An additional issue, rarely addressed by domestic legislation or the courts, is the recourse had to external workers (temporary agency workers or subcontractors) when dismissing permanent staff. Finally, the lack of control/enforcement by the administrative authorities ensuring respect for the procedure has been noted as a particular problem.

In relation to Directive 2001/23/EC on transfers of undertakings, the scope and definition of a ‘transfer of an undertaking’ remain unclear, leading to legal uncertainty. Furthermore, practice with regard to the application of the directive to civil servants and state-owned companies remains highly heterogeneous, revealing a lack of consistency in this respect.

As far as the scope and definition are concerned, case-law of the CJEU has not provided an unambiguous definition of a ‘transfer of an undertaking’, leading to difficulties in interpreting the concept at national level, in particular in relation to issues such as outsourcing, transfers within groups of undertakings and public services (whether or not recourse may be had to the exception for administrative reorganisation of public authorities and transfer of administrative functions between public administrative authorities). Terms and conditions of employment and the relationship with trade unions following the transfer are other major areas of judicial conflict. Further issues arise also in relation to (1) the liability of the transferor (for severance payments and contributions to company pension schemes) before and/or after the transfer; (2) the transfer of undertaking as a ground for dismissal; (3) the distinction between transfers and situations of bankruptcy and insolvency and the recourse to the latter to avoid employee protection; (4) the difficult harmonisation of collective agreements within the company after a transfer, leading to inequality of treatment in relation to remuneration; (5) the

failure to respect the obligation to inform and consult; (6) reemployment/dismissal after the transfer took place; (7) the lack of sanctions.

In relation to Directive 2002/14/CE on information and consultation, the limited coverage of the collective agreements transposing the directive leads in some countries to the non-application of the provisions to employers which are not bound by a collective agreement. In the same vein, the question arises whether freedom of association is respected when employees fall under the provisions although they are not trade union members. Deviations from the statutory provisions by way of collective agreement to the detriment of workers have also been reported. Moreover, issues arise concerning the threshold triggering information and consultation rights (for example, excluding categories of workers such as fixed-term workers or artificially splitting an undertaking to ensure that the threshold for application of the legal and/or collectively bargained provisions is not triggered). As far as practical arrangements are concerned, the lack of an appropriate institutional framework and an inadequate 'culture' of social dialogue highlight the fact that there are difficulties in defining – in particular in countries with a dual channel of representation – whether the right to information and consultation should be accorded to trade unions or worker representatives. Not in every Member State is the right to information and consultation automatic. In some cases, it needs to be requested by a certain percentage of the workforce. The timing and content of the information and consultation remain issues of conflict. In addition, there are doubts whether domestic provisions on confidentiality are in conformity with the directive. Enforcement remains an issue, as the right to information and consultation is sometimes perceived an individual right and enforcement mechanisms appear not to properly protect workers.

5. The European Commission's fitness check of information and consultation rights

At the beginning of 2000, the European Commission launched a reflection on the methods to achieve better regulation under the heading of 'better law-making', putting the focus on the quality and effectiveness of European legislation and on ensuring legal certainty. Renamed 'better regulation', the 2005 programme of the European Commission has been shifted to competitiveness, investment, economic growth and the right incentives for businesses, leaving aside the issue of legal certainty. The

aim of this exercise is to fight red tape under the assumption that less red tape will automatically lead to more growth insofar as it could lead to considerable savings for businesses. However, no direct link between the level of regulation and EU competitiveness has been shown. A range of methodological tools have been created to achieve better regulation, such as (1) the impact assessment, although the European Commission places an emphasis on the economic and not the social and environmental impact (European Commission 2005), (2) the screening of pending legislative proposals and withdrawal of obsolete or irrelevant proposals and (3) the simplification of European legislation by means of repeal, codification and recast, as well as by co-regulation and self-regulation.

In its rolling programme 2005-2008, the European Commission envisaged the codification of five social policy directives including those on collective redundancies (Directive 98/59/EC), on the transfer of undertakings (Directive 2001/23/EC) and on general information and consultation (Directive 2002/14/EC) (European Commission 2006). However, on the basis of an expert report (Ales 2007) and following two European Parliament resolutions of 2007 and 2009, the European Commission has undertaken, as part of its 2010 Work Programme, a review of the body of EU legislation in selected policy fields. The methodology proposed is a 'fitness check' to keep current regulation fit for purpose, thus identifying excessive burdens, overlaps, gaps, inconsistencies and obsolete measures. The European Commission is looking for (1) concrete findings on the effectiveness, efficiency, relevance and added value of the *acquis* in the areas under scrutiny that will serve (2) for drawing policy conclusions. As a result of this exercise, legislation could be withdrawn or amended, and new instruments and/or tools proposed to complement existing legislation. The overall results obtained by DG Employment during the fitness check exercise will be presented in a Commission communication in 2012 outlining the key conclusions and next steps. This communication will be accompanied by a staff working paper setting out in detail the evidence by Member State and the positions of stakeholders.

The 2010 fitness check is a pilot exercise taking place in four areas: employment and social policy, environment, transport and industrial policy. DG Employment has decided to carry out its fitness check in the area of information and consultation and in particular on three directives: Directive 98/59/EC on collective redundancies, Directive 2001/23/EC on transfers of undertakings and Directive 2002/14/EC on information and consultation. The review of the three directives will rely on an evi-

dence-based approach and integrate legal, economic and social effects of the existing legislation. In addition, ‘stakeholders’ (representatives of the labour ministries of the Member States and EU social partners) have been invited to become involved in this process and participate in regular European Commission working groups to assist in gathering relevant information, to discuss the different studies on information and consultation of workers, to highlight different national experiences regarding the implementation of the directives and to express views on actions that the Commission may undertake in this area.

6. An alternative approach to strengthening information and consultation rights

In May 2011, Bernadette Ségol, General Secretary of the European Trade Union Confederation (ETUC), reiterated that the ETUC supports genuine efforts to improve EU regulation, but doubted whether fitness checks could actually contribute to improving legislation, querying whether those checks did not simply represent another step towards deregulation. Indeed, the European Commission fitness check falls under the smart regulation agenda already much criticised for its intention to cut red tape for business without considering the social implications. The ETUC is therefore concerned about the ‘fitness checks’ which aim to identify ‘excessive burdens’. It is of major importance for the ETUC to ensure, in addition to proper consultation of the social partners, that any measures to improve legislation do not undermine the objective of the legal act in question, for example by lowering standards.

Furthermore, questions arise when scrutinising the fitness check exercise. The choice of a general directive on information and consultation of workers (Directive 2002/14/EC) and two specific directives (on transfers and collective redundancies) is not clear. Other directives deal with worker information and consultation, such as the recast European Works Council Directive or the SE Directive, but they are deliberately excluded. If, as the Commission states, the exercise is to promote coherence between all directives on information and consultation in order to ensure the quality of legislation, the question arises why other directives on information and consultation are excluded from the exercise.

The ‘better regulation’ agenda pursued during the first Barroso Commission aimed at simplifying the Community *acquis*, i.e. the body of EU law

and regulation, and achieving better quality legislation. Evaluation of the actions taken points to mixed results whether in terms of methodological issues, the lack of a conclusive outcome in practice, the proliferation of intermediate bodies to reduce administrative burdens, the lack of simplification of procedures and processes, or a lack of evidence that the actions led to savings. Renamed 'smart regulation' under the second Barroso Commission, the Commission fitness check exercise applies a cost benefit analysis to all the issues at stake (employment and social policy, environment, transport and industrial policy). Serious concerns have already been expressed about the impact of such initiatives on workers' rights in terms of lowering core labour standards with regard to health and safety at the workplace (Vogel 2009). In particular, the methodology puts the emphasis on how to minimise costs to business, thus measuring more costs than the benefits of legislation. However, assessment of social legislation must take into account the purpose of each law, without disregarding the social, environmental and indirect costs but also the cost of non-regulation or costs that are useful to the quality of regulation (Van den Abeele 2009). The methodology proposed and used by the European Commission does not allow it to check whether the balance between the competitiveness, productivity and efficiency of legislation, on the one hand, and security, sustainable development and social cohesion, on the other, is respected. The ETUC is therefore sceptical about measuring the costs of the directives on information and consultation for workers. Furthermore, the benefits of the information and consultation directives can be measured less in financial terms than in social terms (democratic participation of the workforce in management issues). Thus, it is difficult to measure the social (and economic) benefits and costs when the directives are not implemented correctly.

In its resolution 'Strengthening worker involvement: minimum standards for information, consultation and participation in Europe' adopted on 28 April 2011, the ETUC Executive Committee stressed that the current economic crisis creates an important momentum to be used to re-establish and strengthen worker involvement in different forms: information, consultation and participation in the company. Information and consultation of workers is a long-standing fundamental right of workers and a crucial component of social dialogue at company level. Worker involvement strengthens democracy at the enterprise level and research shows that worker participation impacts positively on productivity and the well-being of workers and that a well-functioning participation system can create a win-win situation.

The ETUC's call for the definition and implementation of European minimum standards for information, consultation and participation would thus be a much more promising approach towards realising workers' fundamental rights than the Commission's current 'better regulation' approach. In this regard, the call by Aline Conchon in this volume (chapter 3) for a holistic approach to company and labour law is also relevant in the 'long climb' to achieve industrial democracy in the EU.

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