Employee Voice Through EU Laws

By Tom Hayes

Introduction: *While it is unlikely that any initiatives by the European Union will result in a revival of trade union membership and/or collective bargaining coverage, a suite of new EU laws will add to employee voice in the workplace through enhanced powers for works councils or elected employee forums. Management must start thinking now about what this will mean for their future approach to employee relations, and what skill sets both they and employee representatives will need to navigate this new terrain.*

In my last Reflections piece, I wrote about the problems faced by the trade unions because of their declining representativity and their lack of leverage to push managements into negotiating with them to reach collective bargaining agreements.

I see no signs that this situation is going to change anytime in the near future. The hope, on the part of some unions, that the European Commission is going to force national governments into imposing collective bargaining arrangements because of Article 4 *Adequate Minimum Wage Directive* is ill-founded.

Article 4 of the Directive sets a "marker" that collective bargaining agreements should cover 80% of the workforce. Which is a tall order, seeing that union density across the EU hovers around 25% of the workforce, and only around 15% in the private sector. In a democratic, social market economy you cannot make employers negotiate, individually or sectorally, if they do not want to do so and if the unions don't have the leverage to force them to the table.

It is always possible for governments to legislate for "contract arbitration," where a court, or a tribunal, hands down a legally binding decision on pay and working conditions. Possible, but politically difficult to do because it assumes that a panel of judges know better than the bargaining parties what the outcome should be. Which is why it generally does not happen. But it is the logic of some union demands for "good faith engagement" by employers when talks end in stalemate and the union does not have enough members to call an effective strike.

Much of what the EU says and does about "collective bargaining" is what these days is called "performative." It looks good but means little. It is virtue signalling. Funds for "capacity building" is little more than money to keep the "dialoguearatti" happy, that happy cadre of advisors and consultants that make their money out of authoring reports and organising conferences whose added value is difficult to identify.

How relations between workers and employers are organised are too rooted in national cultures, histories, and traditions for the European Union to upend them, even if it was disposed to do so, which it is not, and national governments would let it, which they will not. Look at how the UK, when it was an EU member, always had difficulties in incorporating EU "collective" laws into its employee relations framework. We'll come back to this later. Ireland had the same issue, but Ireland's "social partnership" model disguised this fact, until now that is.

To put it bluntly. Nothing the EU can or will do is going to move the dial on union membership or collective bargaining coverage across Europe. But that does not mean that the EU does not have a major influence on

employee relations within individual undertakings. It does, and that influence is likely to expand in the years immediately ahead.

We all know that a 1994 Directive kickstarted the establishment of European Works Councils (EWCs). That Directive, however, only takes in about 2,000 undertakings, of which about half now have EWCs in place. But EWCs are for another day.

In this piece, I am more interested in the potential impact of European laws on employee relations in all those large, medium, and small undertakings that make up the European economic ecosystem.

It could be significant.

In the beginning

Best to start at the beginning… In the 1970s, there was much talk of the "Europeanisation" of industrial relations as a result of the growing importance of the then European Economic Community (EEC). It soon became clear that "Europeanising" employee relations was a lot more complex than people thought. They have largely stayed national till this day.

When unions and labour relations academics talk about the "Europeanisation" of labour relations what they really mean is that all EU Member States should adopt a blended model of Western European practices of sectoral collective bargaining, *erga omnes* extension mechanisms, in-company works councils, board-level codetermination, all overlaid with union-run European Works Councils. It turned out that was a labour relations model that could not be exported because countries like the UK and Ireland, and now countries in Central and Eastern Europe, were not prepared to import it.

At the same time, there was a growing demand for a "social dimension" as part of the drive towards European integration.1974 saw the EEC publish its first ever Social Action Program. Equal pay and equal treatment legislation came out of that program. For our purposes, it also proposed laws on collective redundancies and on the transfer of undertakings. Both of these laws required that management inform and consult with employees' representatives.

Keep in mind that the time the EEC only had nine members. The original six, France, Germany, Italy, the Netherlands, Luxembourg, and Belgium, along with the three new members, the UK, Ireland, and Denmark. Of the nine, seven had union/works council systems which would deal with the added information and consultation requirements. Ireland the UK did not.

During the 1980s, under the Thatcher Conservative governments, the UK took the view that the only employee representatives in the UK were trade union officials, and these were only present where an employer voluntarily recognised a union. If there was no union, there were no employee representatives with whom to inform and consult.

The EU Commission disagreed and began infringement proceedings against the UK. In 1994 the then European Court of Justice (ECJ) held that where there were no employee representatives – no unions – then the law had to provide for the election of such representatives to be informed and consulted about the proposed collective redundancies of the transfer on undertakings. Once the collective redundancies or the transfer of an undertakings were completed, there was no further role for the elected representatives, and they were stood down.

I simplify a little, but the essential point is that the ECJ said that where EU law requires information and consultation then that cannot be avoided because there are no existing employee representatives. But it would seem that not everyone got this memo from the ECJ.

As I understand it, but I am open to correction, in Germany, for example, if redundancies are being contemplated and there is no works council in existence, there is no information and consultation. While at the time, that judgement was really only relevant to the UK and Ireland, now it has a much greater reach because of the greatly expanded EU membership.

The General Framework

During the 1990s, the European Commission brought forward a proposal for a general framework for the information and consultation of employees. The Blair Labour government strongly opposed the measure, as did Ireland. However, the then Irish Taoiseach, (prime minister), Bertie Ahern, decided that opposing the measure was not in keeping with Ireland's consensual approach to labour relations, and instructed his ministers to support it, leaving the UK isolated.

Directive 2002/14 establishing a general framework for informing and consulting employees applies to any undertaking with more than 50 workers. It requires that management consult with representatives of the workers on a broad range of business and economic topics. How this is to be done should be set out in an agreement between management and employee representatives. Representatives may need to be elected to negotiate the agreement.

Here is where things get a little cloudy. The transposing legislation in the UK and Ireland require the process of setting up an "Information and Consultation Forum" to be "triggered" either by the management, or by a written request from a certain percentage of the workers. The same applies in most Central and Eastern European countries. With the result that there are very , very few I+C Forums under Directive 2002/14 in existence.

A counterview is that Directive 2002/14 is "mandatory" and not "voluntary". While Member State governments can decide how the obligation should be met, through trade unions, works councils, or elected representatives, it has to be met one way or another. There can be no vacuum.

This is where the rubber hits the road. EU law makers may say "you must have an information and consultation process" but what happens when workers say, "we don't want one"? Is there any research on why workers opt not to want representative structures in their workplace? Not that I am aware of, though there is plenty of research from unions and academics who know what workers should want, if only workers knew what was in their own best interest.

As far as I know, this issue of whether 2002/14 is mandatory or voluntary has never been before the courts, so the correct interpretation of the Directive remains legally uncertain.

New Times

Until now, I think it is fair to say that Directive 2002/14 has been a sleeping dog. What has brought the issue into focus is the wave of new EU laws coming into force that provide for employee information and consultation. These laws include:

- *The Corporate Sustainability Reporting Directive*
- *The Pay Transparency Directive*
- *The Status of Platform Workers Directive*
- *The Corporate Sustainability Due Diligence Directive*
- *A Directive on Remote Working and the Right to Disconnect (under discussion)*
- *A specific Directive on the use of AI in the Workplace (likely to be proposed by the European Parliament)*

Unlike collective redundancies or the transfer of undertakings, the requirement to inform and consult with representatives under these new laws will be ongoing. Once employee representatives are elected, they will remain in place. A question that managements within the scope of these laws will need to answer is this: Should we have a separate set of representatives for each law, or just one set covering them all?

For example, the Irish regulations transposing the *Corporate Sustainability Reporting Directive (CSRD)* refers to the Irish 2006 Act which transposes Directive 2002/14 into Irish law. Presumably, the law transposing the *Pay Transparency Directive* will do the same. But once a set of representatives are elected under the 2006 Act, *Employees (Provision of Information and Consultation) Act,* for *CSRD* then will they not assume responsibility for all information and consultation requirements that may arise?

It seems to me that if representatives are elected under the 2002/14 Directive, in whatever EU Member States, for *CSRD* information and consultation then their remit cannot be limited just to that Directive. The first companies with the scope of *CSRD* need to report in 2025, while *Pay Transparency* comes into force in 2026.

So, while EU initiatives to promote collective bargaining may turn out to be, as suggested above, largely performative, laws to provide for employee voice in the workplace through elected employee representatives will have much more bite. Do management have the skill sets to engage with these new forms of employees' representatives? You can call it "information and consultation" but if representatives have the right to go to court in the event of a dispute, then it is not too far from negotiations.

Will elected employee representatives also have the skill set to engage constructively with management? Providing training to assist them in understanding their roles and responsibilities will be critical. All employee relations actors need to starting thinking ahead now about how to manage what is fast coming down the road.

But there is another way for employees to make their voice heard. Social Media. In the third paper in this little series, we will look at the intersection between social media and employee/labour relations.

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