

A decade beyond the Framework Directive on Information and Consultation (2002-2012)

Prof dr Filip Dorssemont
Université Catholique de Louvain



UCL

Université
catholique
de Louvain

Revisiting EU Directives on Information and Consultation in 2012

- A decade has gone by ever since **Framework Directive on Information and Consultation 2002/14**

- The fitness check on

Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States (**collective redundancies**)

Directive 2001/23/EC on **transfers of undertakings**

Directive 2002/14/EC establishing a general **framework relating to information and consultation of workers**

A bird's eye view on EU Directives

- D **98/59** : Collective Redundancy **(1975)**
- D **2001/23** Transfer of Undertaking **(1977)**
- D 2009/38 European Works Councils **(1994)**
- D **2001/86** *Societas Europea* **(2001)**
- D **2002/14** Framework on Information and Consultation **(2002)**
- D **2003/72** *Societas co-operativa europea* **(2003)**

A bird's eye view on EU Directives

- *Ratione loci* : establishments, undertakings and entities with a Community-scale dimension
- *Ratione materiae* : scenario's of restructuring (*ad hoc* information) and comprehensive information on a recurring basis (related to social, economic and financial situation), retrospective and prospective (including anticipatory measure to cope with the prospects)
- Worker involvement focuses on information and consultation procedures “not affecting the managerial prerogative” (no **offensive** approach to workers' participation neither any kind of co-decision rights (co-détermination or *Mitbestimmung*)

Towards a EU doctrine on worker's involvement?

Keys for systematization

- a) The legal basis as a key to a conceptual background?
- b) A common glossary for fundamental workers' rights?
- c) A new spectre haunting European Industrial relations ? (the spirit of co-operation)
- d) The egg of Columbus : horizontal subsidiarity
- e) **Better regulation through *codification***

Legal Basis and Conceptual Framework

- *(Market Integration): Articles 94 and 308 (old) TCE*
←-----→
- *A Social Policy perspective : Article 137 TCE- ASP) (old) : putting fundamental workers' rights at the heart of the matter*

MI: CR; TU, SE, SCE

SP: EWC, FIC

- *Caveat* : also references to CCFSRW in the recitals of TU and CR
- *Caveat* : a very economic and “business oriented” approach in the FIC and the EWC (Recast)

Legal Basis and Conceptual Framework

7) 'There is a need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs, increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness' **(FIC)**

Legal Basis and Conceptual Framework

- « without slowing down the decision-making process in undertakings » **(recital 22 EWC)**
- « without calling into question the ability of undertakings to adapt. Only dialogue at the level where directions are prepared and effective involvement of employees' representatives make it possible to anticipate and manage change ». **(recital 14 EWC)**

A common glossary

- Information, Consultation, Participation and Worker' Involvement
- **Definitions** are/have been absent, inconsistent, ambiguous
- **Definitions** do affect the hard core beyond contractual derogations

A common glossary(?)

“Workers’ involvement”

- “any mechanism, about the identity of the participating companies, concerned including information, consultation and participation, subsidiaries or establishments, and the number of their through which employees’ representatives may exercise employees, to start negotiations with the representatives of the an influence on **decisions** to be taken within the company (SE)

- *Generic expression*

- Mute on co-decision and exclusive of collective bargaining

(though QUID with “information and consultation on decisions likely to lead to substantial changes in work organisation or in **contractual relations** »

A common glossary

'Information'

- 'the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE' (SE)
- « means transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it » (FIC)
- Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation. (FIC)

A common Glossary

« *Consultation* »

« means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such **time**, in such **fashion** and with such **content** as enables employees' representatives to express an opinion on the basis of the information provided about the **proposed** measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings; (REWC)

A common glossary

- "consultation" means the exchange of views and establishment of dialogue between the employees' representatives and the employer » (FIC)
- « while ensuring that the timing, method and content thereof are appropriate » (FIC)

A common glossary (?)

- Consultation : “dialogue” or “exchange of views”
- *Consultation versus Bargaining*
- *Quid* with a view to reach an agreement
- Anteriority continues to be ambiguous
 1. The use of the word circumstances in SR
 2. “appropriate” in FIW

A common glossary

Participation :

- *" means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:*
 - *the right to elect or appoint some of the members of the company's supervisory or administrative organ, or*
 - *the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ (SE)*
- The Nice Charter is mute on the issue of participation
- Is information and consultation a **right or a duty?** /of **whom?**

The spirit of co-operation

- EWC, SE, FIC, SCE :
 - a) SNB and central management
 - b) EWC, body of workers representatives and the central management
- Co-operation, not collaboration ?
 - a) Ideological meaning?
 - b) Legal meaning : bargaining in Good faith or institutional good faith : -→ *boomerang* against employer (Cfr. *Bofrost*)

Horizontal Subsidiarity

- Historically subsidiarity refers to the relation of management and labour towards the State (cfr. *Quadragesimo Anno*)

‘cfr. subsidiary requirements’

- *Ratio* :
 1. Lack of consensus: no unique model
 2. Search of tailored solution
 3. Collective Laissez faire or Laissez passer

Horizontal subsidiarity

- *Critica* :
 1. Institutional Theory : there is a risk of discontinuity
 2. Can fundamental rights be alienated?

Better regulation through *codification*

- **Patch-work** without *articulation* and rules on *concordantia*
- Exception : EWC and SE
- Problems : Chronology Information and Consultation at local level and European level
- Quid decision to transfer, subject to IC?
- A more uniform glossary

Post-scriptum

- Fitness test, ché?
- Social Policy EU Directives take into account « the need to maintain the competitiveness of the Union economy » (article 151 TFEU) and « have avoided imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings » (article 152 TFEU)
- The right to information and consultation is a fundamental right
- Can we afford to respect or to disrespect human rights?