

Letter of the Foundation

No. 50 – April 2010

Supplement to the «Cahiers de la Fondation» No. 75/76



IMPACT OF THE INFORMATION AND CONSULTATION DIRECTIVE ON SOCIAL DIALOGUE IN THE MEMBER STATES: RESULTS AND PERSPECTIVES

**Conference of 27 and 28 January 2010
Organised with the support of the European Commission**

IMPACT OF THE INFORMATION AND CONSULTATION DIRECTIVE ON SOCIAL DIALOGUE IN THE MEMBER STATES: RESULTS AND PERSPECTIVES

This Letter of the Foundation covers the main points of the presentations and debates of the conference held on 27 and 28 January 2010 on the “Impact of the Information and Consultation Directive on Social Dialogue in the Member States: Results and Perspectives”. This event is part of the ongoing reflection structure organised by Europe et Société on the role, the place and the importance of European social dialogue in its different dimensions.

The various presentations over these two days have clearly illustrated the lack of homogeneity in the different EU countries. The contributions of several different participants show that the adoption of a text at Community level does not necessarily mean that it will be coherently and rapidly transposed in the different countries. Despite the diverse situations, the same concern is obvious everywhere: the implementation of information and consultation procedures which enable the concerned players to take a more active role in influencing the course of

unforeseeable economic and social events, rather than simply being victim of such circumstances.

The debates have shown that for this to be possible, we must be able to anticipate such events. Our deliberation is part of the desire to construct a European system of industrial relations which lets the concerned players be active and find compromises which contribute to the construction of greater social cohesion in the European Union and in the Member States. In order to do this, the conference addressed the following questions:

- history and content of the information-consultation directive,
- examination and evaluation of the application of the directive,
- position of the European institutions in the context of the future of the directive,
- role of the directive in the instauration of a European model of industrial relations.

THE INFORMATION-CONSULTATION DIRECTIVE: HISTORY AND CONTENT

The information and consultation of employees in their workplace are a fundamental social right, integrated into the European social model.

The Community *acquis* in the area of information and consultation

The Charter of Fundamental Rights of the European Union makes up the general framework because it deals with information-consultation in article 27. This

Charter was proclaimed in Nice (France) in 2000. It was made obligatory and binding by the Treaty of Lisbon. There was already a previous Charter of fundamental social rights, accepted by all countries in 1989 (with the exception of Great Britain) which also provided for information and consultation; this is the basis, the reference of numerous later directives in this area.

The social-economic context

From the 1970s onwards, internationalisation has meant that the Internal Market had to be established and developed. Since then, internationalization has become globalization, and consequently the restructuring of companies and the race for competitiveness have become essential factors. All these restructurings mean that there is a pressing need to anticipate and manage change. So, employee involvement in the company is even more important. It must also be pointed out that there are notable differences between the national systems.

The initiatives of the Commission

The Commission has adopted a whole range of legal instruments from the 1970s onwards, notably directives in the area of information and consultation.

The first directive, which concerns collective redundancies, goes back to 1975 and was regularly amended, the last overhaul being in 1998. Then came the directive on the transfer of undertakings in 1977, and the 1989 directive on health and safety in the workplace. There then followed the 1994 directive on the creation of European Works Councils. This was a transnational directive which preceded the directive of 2002. Finally, there was the directive on the employee involvement in the European Company in 2001, and in 2002 the framework directive for information and consultation of workers in the companies.

What are the differences between these different texts? We should first examine whether they concern national or transnational level:

- Information-consultation at national level: specific situations or problems. In relation to information and consultation at national level, there are three relevant directives: collective redundancies (95/59/EC), transfer of undertakings (2001/23/EC) and health and safety (89/391/EC).

- Information-consultation at national level of general application: the directive in 2002 comes under national level, but is of general application. It gave rise to the creation of permanent bodies of employee representation.
- Information-consultation at transnational level: this is the directive establishing the European Works Councils.
- Information-consultation in particular types of organisation: these are the directives concerning specific types of organisations, those on the European Company and on the European Cooperative Society.

The framework directive 2002/14/EC

The aim of the 2002 framework directive was to establish a general binding framework for minimum information and consultation at company level.

Its application gives the Member States greater flexibility, notably on the designation of the employee representatives. The Member States are also authorized to define several other aspects:

- the choice whether to apply the directive either at undertaking or at establishment level,
- the choice whether to allow negotiated arrangements of information and consultation, which may differ from provisions of the directive,
- the choice of conditions according to which the management can choose not to divulge certain confidential information to employee representatives,
- finally, the mechanisms of implementation and possible sanctions in the case of non conformity to the directive.

Definition of information-consultation

The information should be provided in a timely manner, and its form and content should allow for adequate study and good preparation of the consultation. This implies an actual meeting, and the management must respond to the opinion formulated by the

employee representatives, in order to reach an agreement on the decisions which the employer has the right to make.

The information should cover the economic developments and the activities of the company, employment-related questions, and there is specific mention of anticipatory measures when jobs are threatened.

The information and consultation should also cover the decisions susceptible to give rise to substantial changes in the organisation of work or in the contractual relations. Here too, we see that the field covered by information-consultation is very precise.

The information-consultation directive as the basis of economic democracy in the company

Economic democracy seems to be a value in Europe, judging by existing directives and fundamental directions of the construction of the EU, but also judging by national models, from which the European model originates. This value of the participation of workers and of their representatives in the life of the company is directly expressed, right from the preamble of the directive. The involvement of the workers in the functioning of the company, and in decisions concerning them, is highlighted.

On the other hand, by transferring to the Member States the responsibility of organizing the practical arrangements of information-consultation, the directive introduces an uncertainty to be found in article 4, which describes the framework of practical arrangements of information-consultation, but also specifies that it is the Member States which determine the arrangements for exercising the right to information and consultation. This gave rise to a competitive approach, reflected in the debates which animated discussions of the Council and between social partners over several years. The adaptation of an “*a minima*” directive can also thus be explained by the absence of negotiations which often

refers back to this competitive attitude to industrial relations among the countries.

The consultation as an opening of information

What are the benefits and the limits of the directive? The actual aim of the directive is to define the terms of information and consultation. One important thing seems to be that the link between information and consultation remains to be constructed. In fact, information and consultation concern three main areas: the evolution of the company, employment and the organization of work, but consultation, envisaged as a high form of negotiation, held with the aim of making an agreement, only concerns the modification of the organization of work. In this crucial passage of the directive on the definition of information, there is no mention of how it is constructed, its regularity, or how it should interconnect with consultation.

A preference for a permanent and elected representation

Another point brought up by the directive is that of workers’ representation. Already in the preamble, the directive distinguishes workers’ representation from the direct dealings with workers.

The European jurisprudence displays a preference for elected representation, because it is universal, i.e. it covers all workers, not just those who are trade union members. This is the direction of the jurisprudence of the European Court of Justice. But however, the rulings and the directive do not exclude the possibility of the workers being represented by a trade union, as long as they are all trade union members, or covered by trade union agreements.

The directive also requires a protection for representatives in order to protect their independence from the employer. It also envisages different levels of representation. There is a distinction between the undertaking and the establishment, but these notions of undertaking and establishment

seem to be treated as an established fact, although national experiences have clearly shown that the definition of an undertaking or of an establishment was not established and could be open to debate.

The fate of the directive therefore appears very open

It would seem that the fate of the directive is very open in that it can give rise either to a

form of consultation of the “feedback” type, where the employees are consulted on a management project with the aim of improving mainly the management decision, or where (in the sense of consultation intended to result in an agreement) the aim is to form the framework of a high form of consultation or even deliberation.

THE DIRECTIVE, ITS TRANSPOSITION

The directive 2002/14 represents an action of unification. It unifies the previous fragmented information-consultation measures. This is important because this fragmentation was the source of some of the difficulties of various Member States, with respect to internal legal order and internal social dialogue practices.

A transposition which is part of strong national traditions

Overall, there are three types of situation in Europe:

- a first group of countries with co-decision rights at the different levels of the company (Germany, Sweden, France),
- a second group of countries with a certain experience of employee representation and of collective bargaining, but a collective bargaining which does not question the relevance of economic decisions, as the directive invites us to do (Belgium, Great Britain),
- a series of countries with little-structured social relations, notably the new Member States, which also have significant differences between them.

National traditions also vary in relation to employee representation, with:

- a group of countries in which the information-consultation procedure involves a body of elected

representation, such as the *Betriebsrat* in Germany or the *Comité d'entreprise* in France or the *Conseil d'entreprise* in Belgium,

- countries in which the representation is only trade union, such as Great Britain, Sweden and certain new Member States,
- countries where the representation is mainly organised around the trade union channel, but can also be exercised through an elected body when there is no trade union representation. This is the case of Denmark, Italy and the Czech Republic.

The representation at the heart of debates on the transposition

The most noticeable aspect of the transposition at national level is that the representation was at the centre of the debates.

What we see is the necessity to introduce an elected representation as opposed to a trade union representation. The debate often concerns these questions in the new Member States, where the directive was the opportunity to introduce works councils, perceived as a means of competing with any already existing trade union organizations in the company. The impact was considerable in certain Member States, such as Great Britain or Ireland, where before there had only been purely voluntary measures of

information and consultation, although others had already very well developed systems, notably France, Germany and Austria.

Most countries transposed the directive through the legislative process, with the notable exception of Denmark, which, in keeping with its traditions, transposed it by means of agreements between social partners (or by law, but only where there had been no agreements of social partners).

In some countries, the transposition of the directive was a real source of controversy; because of transposition delays, it was only transposed in certain Member States in 2007, i.e. two years after the official deadline. One of the main questions in the debates was to know who the employee representatives would be. This is the famous debate between the single and double channel representation. The Member States were given free choice on this question. Seven countries resorted to the transitory provisions, i.e., the directive was only applied in companies of fifty employees after 2008.

THE APPLICATION OF THE DIRECTIVE: QUESTIONING, EXAMINATION, EVALUATION

Even if, from a European point of view, the only impact of the 2002 Directive is a national application, it is, in fact, of crucial importance in that it establishes the general and irrefutable principle in every country of this right to information and consultation. The example of Gilette, which wanted to close its factories in England, Germany and the Czech Republic in order to open a new factory in Lodz in Poland where there was no right to information, is a good illustration of this.

The traces are still evident today of the ideological battle against information and consultation in multinational companies, but also under ultra-liberal governments during almost twenty years.

Finally, of the 27 Member States, eight of them, i.e. just less than one third, carried out the transposition by a standard, a legal act. Most of these were new Member States. For the others, the transposition involved from two to seventeen legal acts. This would imply that the better organized the tissue of social dialogue in a country, the more complex the transposition. So the fact that a country is a “black sheep” does not mean that there is no social dialogue but that the harmonization dimension involves technical and political difficulties.

In the end, the demands of the transposition question the choices between voluntary social dialogue and social dialogue made legally obligatory – the choice between a monist and a dualist system of social dialogue, i.e., between freedom of worker representation and organization of worker representation through trade union organizations, and, of course, the choice between undertaking and establishment.

Whatever the weaknesses of the framework-directive, it still represents progress, because there are today over fifteen European directives which include employee rights to information-consultation, rights which were more or less transcribed at national level in countries where they had not previously existed.

In Bulgaria, there was no legal framework on information and consultation at company level. The employee representatives had no legal existence. The only social partners recognized by the labour law were the trade unions, so a real revolution took place. From that moment, a new social partner appeared, with its own responsibilities concerning employee representation, its role, etc... Thanks to progressive amendments to the

labour law, we can now identify six types of employee representation:

- the general assembly of employees,
- the assembly of employee representatives,
- the employee representatives on the company Board of Directors,
- the representatives for the general protection of employee interests,
- the representatives for information and consultation,
- the trade unions.

Elsewhere, in France, for example, the 2002 Directive did not bring any significant modifications. On the other hand, there are two questions which deserve to be addressed, from the point of view of French law, but also undoubtedly from the point of view of the social model of European relations. First of all, a very important point is that the directive involves the spirit of cooperation. It would have been preferable for the directive to refer to the notion of regulation, rather than that of cooperation, because in the systems of European industrial relations, conflict is expressed in a different way than in France. The second question is that the secondary intention of the directive, which is quite important, is that consultation should end in an agreement. In France, we are content with discordant viewpoints and we consider an opposing viewpoint as an agreement. Should the goal be a collective opinion, a favourable opinion? What is the agreement in question?

At European sectoral level, the 2002/14/EC directive has up to now been little taken into account as such.

However, the question of worker information and consultation was addressed in certain texts based on sectoral social dialogue. Thus, EuroCommerce and UNI Europa support social dialogue in the new Member States and candidate countries and encourage them to develop the social relations in their countries and to reinforce the role of social partners.

The directive therefore contributed to the implementation of bodies of information/consultation there where these were inexistent and/or little developed..., however, it is in the countries where the social partners already had an important role that this seems to have been most reinforced.

So there is a solid *acquis*, a legal *acquis* in the area of information-consultation at European level. The framework of information-consultation in the undertakings and establishments at national level is a very important complement to the entire European normative system. So the national level fills in the gaps, notably in the countries where there was no statutory legislation. However, on the base of national legislations, we can say that the contents given to the notions of information and consultation can seem vague, and we can ask ourselves whether information-consultation takes the unilateral form transferred by the employer to the representatives, or whether the information is used for consultation, allowing the workers to influence the direction of the company and to enrich their knowledge of the economic activity and of managerial decisions.

We therefore observe a range of practices depending on the collective capacities of information-consultation players:

- information-consultation envisaged as a management controlled feedback mechanism,
- information-consultation in view of a negotiation, but here again this consultation is mainly carried out *a posteriori*,
- information-consultation conceived as a deliberation on the company, on its future. So the issues of the project presented by management may not entirely correspond with the issues defined during the consultation with the employee representatives.

It remains to be decided how to create the link between the European and national levels of information-consultation. The

creation of this link involves the organization of a type of continuity of information-consultation, which requires a knowledge of how to co-ordinate between employer, trade union, national and European organizations.

Regarding the impact, this issue is a legal and automatic question on the law of Member States, on the organisation of social dialogue or the type of organisation of the social negotiation partners. We also need to reflect in terms of the impact on the capacity of players. Do the existing tools give them the capacity to act, the means to better master the work environment and the decisions which need to be taken when running a company in the present context?

Social dialogue is not possible without representatives in companies. If the aim and result of the information-consultation directive is to elect everywhere employee representatives without being sure about the role of the trade unions, this would seem to be problematical. This is the case at the moment in Central and Eastern Europe. It is shocking that workers representation through trade unions is still being questioned in the twenty-first century. The present conflicts on restructurings, relocations, collective redundancies in different sectors and companies have shown that bad practices can find areas to develop, even when the formal framework of directives or agreements concluded is respected. These are areas of uncertainty that should be reduced. We are no longer at the stage of the exchange of good practices, of learning. We know very well what does not work, what does not function in the 2002 Directive, the European Parliament pointed this out very well. So it needs to be revised, and neither the Commission, nor the employers, nor most Member States want to hear about this.

We can also identify other areas in which the directive is lacking. It seems that the representation frameworks and their interconnection at different levels are insufficient; between national and European levels, within a company composed of several establishments, but also with regard

to the interconnections between the temporality and the content of the information-consultation, and between the different directives related to information-consultation.

We have to admit however, that the only right given by the 2002/14 directive in a transversal manner is the right to information and consultation. Why highlight this? Because this is not just a contradiction, but the trace of a difficulty, effectively the binding legal content, which creates rights and obligations, is the material right. When we say the material right, for jurists, this is the content of the right, its actual subject, it is the right to information-consultation. But what is to inform and consult? It is a procedure. And obviously, when the material right is a procedural right, its transposition involves particular difficulties, because everything will depend on the know-how, both legal know-how and that of the social negotiation partners.

The long and difficult elaboration of the directive 2002/14/EC, as well as the transposition measures in national law, coupled with the *a minima* interpretation of the provisions by a large number of Member States show that the recognition and the respect of the participative democracy within the company in Europe cannot yet be said to be acquired. The right to information and consultation of workers, a European social value and a major trade union right, remains a fragile right in the European Union and requires a daily mobilization.

But the importance of the 2002/14 Directive goes well beyond the simple aspects of information and consultation. It has the potential to be the supporting pillar of the future evolution of employee participation rights, to become a real reference of good governance for the European companies. This directive has brought an essential contribution to the consolidation of the legal *acquis* and energy to the debate in view of an improved coherence of these texts.

The information, consultation and the participation of employees in the company as presented in all of these texts have become one of the fundamental parts of European economic democracy and this is a good thing. It has to be made permanent, even improved. We could say that if we want to specify the fundamental elements of the

European social model, it is this participation, legally attached to the life of the company and to the decisions of the employer, which constitutes in a normative way one of the central elements of the European social model and distinguishes it from other market economy models which exist in the world.

THE EUROPEAN INSTITUTIONS IN THE CONTEXT OF THE FUTURE OF THE DIRECTIVE

The European Commission has prepared several reports on the information and consultation directives.

The 2008 report deals with the evaluation and transposition of the 2002 framework directive. It concludes that it would not be justified at the present time to propose new amendments to the directive, with the exception of the inclusion of the international convention on seafaring people in its field of application. The report emphasizes a correct transposition and application of the directive.

The Parliament adopted a resolution on February 19 2009, inviting the Commission to:

- ensure a good follow up of the transposition of directive 2002/14. All the Member States have now transposed the directive, but there are still some delays and problems,
- evaluate the application of directive 2002/14 in view of preparing the future directive,
- examine the coherence between the different directives on information and consultation (in view of indispensable simplifications).

The Commission has also started a certain number of tasks:

- The first priority is to ensure the follow up and the correct transposition of the directives and particularly of the 2002

framework directive, and of the infractions and penalties if necessary. The Commission has already identified a certain number of problems or questions which could turn out to be problematical in the transposition of these directives at national level. It has to be said, however, that there have been no complaints on this subject: the employee representatives, the trade unions have not spoken up. We may wonder why, what is happening? A lot of studies have been carried out and there will be more, but it is still important to have feedback from the players themselves.

- The second priority is to review the implementation and examine the coherence between the different directives. Studies will be launched during 2010.
- The third priority is the cooperation with the experts of Member States in view of a correct transposition of the revised directive. A group of experts has been formed with this goal.
- Finally, we need to promote the awareness, the exchange of good practices and underline the importance of becoming acquainted with the use of all these instruments. The first directive showed that all this came from a long learning process. We can fix the main principles but this should take shape in practice. The players, both employers and employees and their representatives, should continue to learn make these principles and texts part of their daily life.

THE ROLE OF THE DIRECTIVE IN THE EUROPEAN MODEL OF INDUSTRIAL RELATIONS

We cannot discuss this directive and try to assess its impact without considering it as an integrated part of a system of relations, a Community *acquis*. So we have to judge the overall picture, a system which has progressed, even if not always in a coherent way.

So what is the range of this directive on the European social model? What did this seminar of January 2010 bring?

We often hear that this directive established an *a minima* right and is at the origin of a “top-down” process of Europeanization, whereby the weak practices of information-consultation will become increasingly important. This vision feeds notably the reflections on the range of the integration of new Member States in the European Union. A possible interpretation is that European unity is constructed less by the uniformity of practices than by the universality of values, which is applied differently depending on the contexts, notably at company level.

In fact, the directive which complements the existing European and national standards forms a basis of the democratisation of the representation which rests on a principle of universality.

So, does the directive contribute, does it favour a structuring process of a European model of industrial relations? A process at what level? Local? National? European? What should a European model be? A convergence of all the social models? Or the implementation of more or less identical structures? Or the creation of a European level?

There are two basic approaches to information and consultation and social relations. There is a system, with a more legal basis, where the rules of the game are defined by the law, and a system of negotiation, of conflict.

This duality results, for example, in a difference between the notion of the

obligation to create a Works Council, and the right of the employees to request the creation of such a Council.

Another difference concerns the collective approach and the right of the individual. In several countries, notably in Germany and Scandinavia, it is a collective right, but in Ireland and Great Britain the area is perceived as a right of the individual.

Did the directive 2002/14 create a process directly or was it rather the expression of an existing process? Two major changes in the social practices, through Europeanization and globalization, have been underway in companies since the 1990s: the directive on the European works councils may have generated more changes, even at local level, than the 2002 Directive which was, in a way, an expression of these changes.

To privilege negotiation by introducing simply the obligation to negotiate is an approach completely adapted to European level and to the social traditions of Member States. In the same way, the respect of pre-existing agreements is an expression of autonomy of the social partners at company level: as long as there is an agreement between the two parties, no-one can question the validity of the agreements.

So there is a dialectic connection between the European directives and the evolution of practices. If we can speak of a structuring process of the European model, this was not only sparked off by the directives, but also by the negotiation of method agreements, which is compatible with the growing complexity experienced in the companies, in the European structures, and which also introduces a harmonisation of legislative and negotiated systems.

Overall, while the information-consultation procedure does not make social Europe, we can however see it, with some reflection, as a triangle composed of three, objectively speaking, honourable elements:

- the first point of the triangle is information-consultation. The fact that this directive favours and encourages this in the company, the fact that it is intended to be a standard to be applied everywhere and not left up to the discretion of the manager is decisive. It is also useful to bring everyone in the same direction, even if behind the words there are somewhat different practices. Simply these parallel paths do not necessarily meet, and everyone carries out information-consultation on his own. This is useful, but it is an approximate and distant convergence.
- the second point of the triangle is the European Works Councils. The aim of these bodies is to have information-consultation at the same time for all of the involved parties: the European Council is important, it forces the people to react together and to get over their misunderstandings. But this is a long-term process; some say that we need to regard it in a perspective of over ten years.
- the third point of the triangle is the European agreements. Social Europe is

not only constructed by information-consultation or even by European (Works) Councils, it is also made in the same way as social history is made in each of these countries, by conflicts and agreements. And we cannot ignore the existence of the European agreements. Every one has to accept his responsibilities as he stands, and history will tell whether the main role was played by the cross-industrial area, the branches or the companies! In any case the common language of social Europe is negotiation and the possibility to make agreements.

When we look at this triangle, i.e. information-consultation, European Works Councils, and European agreements, we notice that things often do advance faster than we think. But if there is today a point which should be emphasized, it is the European agreements, and Europe has not yet done the necessary work for the European agreements. Our countries do not have a text which provides a sufficiently solid base for these European agreements, and this must be a priority.

SOME RESULTS DESPITE THE PARTICULAR NATIONAL SITUATIONS

To sum up, the various speakers highlighted the fact that despite its insufficiencies, the information-consultation directive has allowed us to achieve results, despite the particular national situations. That said, there is a series of still unanswered questions and problems, which can give rise to different interpretations and responses. This also applies to the problem of representation which is approached and perceived differently in some of the Member States. The history and traditions of the Member States have a considerable influence on this aspect. One of the major difficulties encountered in the interpretation of the directive consists in the conception that you can have of information, and especially of

consultation. Despite the difficulties, things are being harmonized and procedures unified. This progress is still limited and the question to know what the result of consultation should be, still often goes unanswered. This is an essential issue for the players. According to the response provided, employee representation will be perceived as more or less legitimate and essential to negotiation and to the conclusion of equal representation agreements.

This conference represents a stage in this effort to give ourselves instruments capable of impacting on the economic and social areas, and the instauration of an authentic European social dialogue.

FORTHCOMING ACTIVITIES

4-5 May 2010

***Conference organised by Europe et
Société with the support of the European
Commission on the theme “Social
dialogue and restructurings in Europe in
the face of the crisis: consequences and
results”***

During the first half of 2011

***Conference organised during the year of
the 25th anniversary of the founding of
Europe et Société***

May 2010

***Publication of the
“Cahiers de la Fondation” No. 75/76
Impact of the information-consultation
Directive on social dialogue in the Member
States: results and perspectives***

Publication director:
Jacques Moreau

Europe et Société
29 rue Cardinet
75017 Paris

Tel: 01.55.65.19.19
europetsociete@wanadoo.fr
www.europetsociete.com

ISSN 1021 – 0008