

The Information & Consultation Directive – Are Unions Redundant?

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I INTRODUCTION

The Information and Consultation Directive-Council Directive 2002/14¹ establishes a general framework for informing and consulting employees which was to be implemented by March 2005. It is seen as a significant turning point in the development of European employment law and looks set to have major implications on Irish industrial relations. The Directive applies to undertakings employing at least fifty employees or establishments employing at least twenty employees. This is the first EU law generalising the obligation to inform and consult employees. Up to now, directives have identified specific situations where companies are obliged to exchange views with workers: collective dismissals, transfer of ownership of companies or where companies have a European works council.² The Directive was agreed in March 2002 and Member States will have three years from date of final adoption of Directive to comply with its provisions, with the exception of Ireland and UK where a phased transposition will take place, because “no general, permanent and statutory system of information and consultation or of employee representation at the workplace”³ exists.

For trade unions in Ireland, the Directive will have significant implications. On one hand, the widespread information and consultation committees could act as a powerful catalyst to unions as employees look for expertise and guidance, while on the other hand, employees may find no need for trade unions to give the information and consultation requirements.⁴ This essay proposes to examine the main features of the

¹ Directive 2002/14/EC of the European Parliament and Council, [2002] O.J. L80/29, (*hereinafter* referred to as the “Directive”).

² New Worker Information and Consultation Directive (“a modern business tool”), available at www.europa.eu.int/comm/employment_social/news/2002.

³ Article 10.

⁴ O’Mara, “Informing and Consulting with the Workforce - What the New Directive means for Ireland’s Voluntarist Tradition” (2003) 10(1) *Commercial Law Practitioner* 15 at 16; Wooldridge, “The

Directive and the impact of it on Ireland industrial relations system, with particular emphasis on the effect on trade unions, and proposes to argue that full implementation of the Directive, in tandem with legislative enforcement of the information and consultation structures contained therein, will minimise the position and the role of trade unions evident today because of the heightened personal interaction between employers and employees that will inevitably result..

The Directive was initially mooted in the European Commission's 1995 Medium Term Social Action Programme. It was proposed in November 1995 in the wake of the controversy over the Renault-Vilvorde plant closure in Belgium, when it was widely perceived that the workforce was not consulted properly.⁵ The progress of the Directive was delayed by a "blocking majority" consisting of Ireland, Germany, UK and Denmark who expressed "general reservations" about the Directive; however, this was withdrawn following drafting of a compromise text.⁶

II. AN OVERVIEW OF THE DIRECTIVE

Article 1(1) of the Directive provides that the purpose of the Directive is to establish a general framework setting out the minimum requirements for the right of information and consultation of employees in undertakings and establishments within the Community. The practical arrangements shall be implemented in accordance with national law and industrial relations practices in individual member states, in such a way that will ensure their effectiveness.⁷ Article 1(3) requires the employer and employee representatives to work in a spirit of cooperation and with due regard for those reciprocal

Framework Directive on Informing and Consulting Employees" (2003) 24(6) *Company Lawyer* 182.

⁵ "Implications of proposed EU Information and Consultation Directive in Ireland," available at www.eurofound.eu.int/2001/06/feature.

⁶ 11 June Council Meeting. Ireland, Germany and Denmark agreed, leaving UK isolated as the only opponent to the Directive and unable prevent its adoption as it was subject to qualified majority voting

⁷ Article 1(2)

rights and obligations. This is a somewhat vague obligation,⁸ however, Article 8(1) states that member states shall provide for appropriate measures in the event of non compliance with the Directive by employers or employees' representatives. In addition, the Directive⁹ requires the sanctions imposed on the employer or employers' representatives to be effective, proportionate and dissuasive in the event of infringement of the Directive.

Articles 2 and 3 of the Directive lay down important parameters of the Directive for its operation. An "undertaking" means a public or private undertaking carrying out an economic activity, whether or not operating for gain which is located within the territory of the member states.¹⁰ An undertaking is a long established community law concept, not a nationally defined principle.¹¹ It is used in Article 81 EC which prohibits anti-competitive behaviour, where any natural or legal person is carrying on an economic or commercial activity and also in the Acquired Rights Directive. In *Hofner and Eisner*,¹² the EC J considered that a public employment office in Germany was an undertaking for the purpose of Article 81 EC. In *Dr Sophie Redmond v Bartol*,¹³ a foundation set up to deal with drug problems was an undertaking, even though the foundation concerned was not profit making. O'Mara comments that the definition in the new Directive of "undertaking" is broader than that in the ARD.¹⁴ An undertaking under the new Directive need not be one with a specific retained identity or an organised grouping of resources. An "establishment" is defined in Article 2(b) to mean a unit of business defined in accordance

⁸ Wooldridge, "The Framework Directive on Informing and Consulting Employees" (2003) 24(6) *Company Lawyer* 182.

⁹ Article 8(2)

¹⁰ Article 2(a)

¹¹ O'Mara, "Informing and Consulting with the Workforce - What the New Directive means for Ireland's Voluntarist Tradition" (2003) 10(1) *Commercial Law Practitioner* 15 at 18.

¹² Case C-41/91 [1991] E.C.R. I-1979.

¹³ Case C-29-91 [1992] E.C.R. I-3189.

¹⁴ ARD: An undertaking is an entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary

with national law and practice and located within the territory of a member state where an activity is carried on an ongoing basis with human and material resource. It has been suggested that the organisation that will have to comply with the Directive, including all limited and unlimited companies, partnerships, joint ventures, local authorities, government departments and offices, charities, sole traders, schools and hospitals.¹⁵ By Article 3(1), the Directive is applicable, according to the choice made by member states, to undertaking employing at least fifty employees in that state, and establishments employing at least twenty employees. Article 10 contains transitional provisions for Ireland and UK,¹⁶ which provides that states may limit the application of the national provisions implementing the Directive to undertakings employing at least 150 employees or establishments employing at least hundred employees, until March 23, 2007 and to undertakings employing at least hundred employees and establishments employing at least fifty employees during the following year.¹⁷

The right to information and consultation will cover¹⁸ information in the recent and probable developments of the undertaking or the establishment's activities and economic situation, information and consultation on the situation, structure and probable development of employment within the undertaking or the establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment and, also, information and consultation on decisions likely to lead to substantial changes in works organisation or in contractual relations. Article 4(3) states that the information must be given at such time and in such a manner as to enable an exchange of views and establishment of dialogue between employer and employee representatives and to enable

¹⁵ O' Mara, "Informing and Consulting with the Workforce - What the New Directive means for Ireland's Voluntary Tradition" (2003) 10(1) *Commercial Law Practitioner* 15 at 19.

¹⁶ There is no general, permanent and statutory system of information and consultation of employees or of employee representation in the workplace

¹⁷ Wooldridge, "The Framework Directive on Informing and Consulting Employees" (2003) 24(6) *Company Lawyer* 182 at 183.

them to conduct an adequate study and where necessary to prepare for consultation. Consultation must be carried out “with a view to reaching an agreement.”¹⁹ According to a CIPD report,²⁰ subjects that might be addressed under recent and probable developments include profit and loss, sales performance, productivity, structure, divestments, market developments and strategic plans. CIPD states that contractual relations likely to lead to substantial changes in organisation could cover working time and practices, training and development, equal opportunity, health and safety, merger and acquisition, transfer of undertaking, collective redundancies, restructuring, reorganisation, outsourcing and pay. The employees referred to in the Directive means all persons who, in the Member State concerned, are protected as employees under national employment law and in accordance with national practice.²¹ In Irish employment law, the employee is a worker operating under a contract of service, as held in numerous cases, including *Re Sunday Tribune*²² and *DPP v McLoughlin*.²³ The definition of employee representatives is also determined by national law. Ireland has no adequate definition in its laws and has used the ARD legislation. A clear definition is necessary.

As regards confidentiality, Article 6 states that member states must ensure that employee representatives and any experts who assist them should not disclose any expressly confidential information given to them. Furthermore, employers are permitted to withhold information and not consult where disclosure “would seriously harm the functioning of the undertaking or the establishment or would be prejudicial to it.”²⁴ In addition, Article 6 states that member states must provide for administrative or judicial review procedures where employers require confidentiality or withhold prejudicial

¹⁸ Article 4(2)

¹⁹ Article 4(e)

²⁰ CIPD (Chartered Institute of Personnel and Development) Report, *Information and Consultation of Employees*, available at www.cipd.co.uk.

²¹ Article 2(d)

²² [1984] I.R. 505.

information.

Member states are required by Article 7 to ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees in order to perform the duties assigned to them.

Article 11(1) states that member states are required to adopt the laws, regulations and administrative provisions necessary to comply with the Directive by March 23, 2005, or may, alternatively, ensure that management and labour introduce the required provisions by that date, by way of agreement, with member states being obliged to take all necessary steps enabling them to guarantee the requirements imposed by the Directive. As the Directive is a framework one, member states, as well as management and labour, when entrusted are free to determine such matters as the method of election, qualifications and period of office of the employees' representatives.²⁵ The regulations have been drafted to allow employers significant flexibility in establishing methods of informing and consulting that suit their particular organisation. Employers that have "pre-existing" information and consultation agreements that cover all employees and have been frequently approved by the workforce will only have to consider making changes if they receive a request supported by forty percent of employees to negotiate new arrangements. Organisations that do not formally have approved information and consultation agreements may be vulnerable to having the Directive's standard provisions imposed on them if just 10% of employees make a request for new arrangements. Employers in this position will be required to negotiate new arrangements, but, if agreement can't be reached, the standard provisions apply.²⁶

²³ [1986] I.L.R.M. 493.

²⁴ Article 6

²⁵ Wooldridge, "The Framework Directive on Informing and Consulting Employees" (2003) 24(6) *Company Lawyer* 182 at 184.

²⁶ CIPD (Chartered Institute of Personnel and Development) Report, *Information and Consultation of Employees*, available at www.cipd.co.uk.

It would seem that, in certain member states, implementation of the Directive may require only minor modifications to existing laws and industrial relations practices. However, more significant modifications will be made in the UK and Ireland, where there are no laws or general industrial relations practices requiring the establishment of work councils or comparable bodies.²⁷ Ireland has not been completely without the experience of statutory requirements to inform and consult employees in areas already covered by existing EU directives, including collective redundancies, transfer of undertakings, occupational pensions and health and safety under European Work Councils.

III. THE DIRECTIVE - AN IRISH VIEWPOINT

From an Irish viewpoint, the new Directive, together with the trade union provisions of the Industrial Relations (Amendment) Act 2001, creates a new legal framework on collective workplace representation and marks a significant move away from the traditional, voluntarist approach that has characterised industrial relations practice historically in this country.²⁸

In essence, industrial relations in Ireland have been characterised by legal abstention, whereby both employers and employees are free to enter into negotiations and to regulate their own respective rights and behaviour.²⁹ The Trade Union Act 1941 sets out the provision for the registration of trade unions in Ireland and the granting of licence which authorises negotiation on the terms and conditions of employment. An employee has a constitutional right to join a trade union;³⁰ however, court decisions have indicated that there is no mandatory system of negotiation.

²⁷ Wooldridge, "The Framework Directive on Informing and Consulting Employees" (2003) 24(6) *Company Lawyer* 182 at 183.

²⁸ O'Mara, "Informing and Consulting with the Workforce - What the New Directive means for Ireland's Voluntarist Tradition" (2003) 10(1) *Commercial Law Practitioner* 15.

²⁹ Meenan, *Working Within the Law* (Dublin, 2nd Ed., 1999) at p. 149

³⁰ Bunreacht na hEireann, Article 40.4.1.

McWilliam J. stated in *Abbott and Whelan v ITGWU and Others*³¹ that there is “no duty placed on an employer to negotiate with a trade union.” The voluntary basis of negotiation was reaffirmed by O’ Hanlon J. in *The Association of General Practitioners and Others v Minister for Health*.³² The framework for voluntarism was established in the Industrial Relations Act 1946, which set up the Labour Court to deal with a rush of wage claims following the price/wage freeze and the lifting of statutory orders following the Second World War.³³ The court’s primary function today is in the settlement of trade disputes, but it is not a court of law because its recommendations are not legally binding. In the Industrial Relations Act 1969, the office of the Rights Commissioner was established, which dealt with matters concerning personal grievances. The Industrial Relations Act 1990 set up new industrial framework under the Labour Relations Commission. The Commission deals primarily with conciliation and equality services.

Meenan claims that, in recent years, voluntarism has become more and more of a misnomer³⁴ because individual employment rights are increasingly protected by statute and with centralised bargaining that have produced the Programme for National Recovery (PWR), the Programme for Competiveness and Work (PCW) and the Programme for Economic and Social Progress (PESP) and Partnership 2000. However, given the history of voluntarism in Ireland and the court’s decisions in *Abbott and Whelan* and *General Practitioners*, it would appear that the new European Directive will pose enormous challenges for the industrial relations practice in Ireland.

IV. IMPACT OF DIRECTIVE ON IRISH TRADE UNIONS

O’Mara comments that the new Directive could turn out to be a “double-edged

³¹ [1982] 1 J.I.S.L.L. 56 at 59.

³² [1995] 1 I.R. 382.

³³ Meenan, *Working Within the Law* (Dublin, 2nd Ed., 1999) at p. 152.

³⁴ *Ibid.* at p.151.

sword” for trade unions.”³⁵ On one hand, it would provide a second channel of employee representation. The widespread information and consultation would result in more employees seeking expertise and guidance from their trade unions and may encourage more employees to join trade unions. Alternatively, a negative fallout may result where companies set up information and consultation structures under the Directive – employees may draw the conclusion that they have no need for a trade union. If employees find that the new structures under the Directive solve their problems, they will not be inclined to look to unions, especially as unions cost whereas the new structures will not. Trade unionists may also view the new work “council-type” forums that may emerge as competition, if it means that fewer workers seek trade union recognition.”³⁶ The new Directive applies to all workers whether they are unionised or not. This raises the question as to whether unionised and non-unionised employees are to be involved in the same structures of information and consultation or whether they are to be consulted separately?³⁷ There may be conflict between competing channels of employee representation as any new representative bodies will have to be consulted on issues that up to now would have been dealt through collective bargaining.³⁸

The March 2005 deadline surpassed the Irish government, however on the 19th of July 2005, the Irish government published the Employees (Provision of Information and Consultation) Bill 2005,³⁹ implementing the Directive. The Bill was announced by Labour Affairs Minister Tony Killeen, who hailed it as heralding “A new era of effective, two way information and consultation practices.”⁴⁰

³⁵ O’Mara, “Informing and Consulting with the Workforce - What the New Directive means for Ireland’s Voluntarist Tradition” (2003) 10(1) *Commercial Law Practitioner* 15 at 16.

³⁶ *Implications of proposed EU Information and Consultation Directive in Ireland*, available at www.eiro.eurofound.eu.int/2001/06/feature.

³⁷ O’Mara, “Informing and Consulting with the Workforce - What the New Directive means for Ireland’s Voluntarist Tradition” (2003) 10(1) *Commercial Law Practitioner* 15 at 17.

³⁸ *Ibid.*

³⁹ www.oireachtas.ie/viewdoc.

⁴⁰ Ed., “Draft Law on Information and Consultation” (2005) *European Industrial Relations Law Review* 22-26.

The Bill proposes an “opt-in” trigger mechanism. To initiate the information and consultation structures of the Directive, it is necessary that 10% of employees request the establishment of information and consultation arrangements, subject to a minimum of 15 and a maximum of 100 employees.

There has been mixed reaction to the Bill by the Irish social partners. The Irish Congress of Trade Unions⁴¹ were originally strongly in favour of the Directive, believing that it could play a vital role in improving worker access to information and consultation rights relating to workplace change and that the Directive could potentially facilitate an increase in the diffusion of enterprise-level partnership between employers and employee representatives. In contrast, the Congress had reservations regarding the Bill proposed by the government, arguing that it does not give workers an automatic right to information and consultation, allowing them only to trigger negotiations to set up such structures and that, consequently, employees will face hurdles raising issues.⁴²

Alternatively, employer groups in Ireland have opposed the Directive because they view it as a potential burden and restriction on business activity. The Irish Business and Employers Confederation (IBEC) is opposed to the introduction of the statutory based mandatory employee representation structure such as work councils, instead preferring a voluntarist system and direct communication between management and employees, rather than collective representation.⁴³ Their reaction to the Bill is somewhat different; they believe that the Bill would set limits on the extent to which the Directive would impinge on traditional management prerogatives. The US Chamber of Commerce has been a vocal opponent of the Directive and is opposed to any form of collective representation. Given the large presence of US based multinationals in Ireland, it is significant that they

⁴¹ www.ictu.ie/htm/services/consultation.

⁴² www.ictu.ie/htm/services/consultation.

⁴³ www.ibec.ie/informationcentre.

oppose the Directive.⁴⁴

V. THE OPPOSING VIEWS - WHO'S RIGHT?

At present, the future of the Bill remains uncertain and it remains to be seen how it will affect the trade unions and industrial relations practice in Ireland. What is certain is that there is no escape from the new Information and Consultation Directive and that it has the potential to be a major turning point in the conduct of industrial relations in Ireland. O'Mara states that, after years of resistance, the defensive walls of Ireland's voluntarist model of industrial relations have finally been breached.⁴⁵ Employers will not be able merely to pay lip service to the idea of consultation, but will need to demonstrate a real dialogue with employees and their representatives. Employees will no longer feel that they are privileged to be informed about what is going in the workplace.

Anna Diamantopoulou, European Commissioner for employment and social affairs, stated that "the Directive provides a fail safe protection for employees and, used intelligently, can be a modern business tool."⁴⁶ The extent of its implication is dependent on the government approach in implementing the Bill. If a minimalist approach is taken, the impact on the organisation will be insignificant and effectively the reasoning behind the Directive will be lost. If the necessary requirements of information and consultation are available to employees, it will allow them to become an integral part of the organisation and it is a possibility that they may no longer be concerned with becoming members of a trade union as the Directive allows employees to have a voice within the organisation. This is not always available through the trade union structure and is clearly of benefit to the employer-employee relationship.

⁴⁴ *Implications of proposed EU Information and Consultation Directive in Ireland*, available at www.eiro.eurofound.eu.int/2001/06/feature.

⁴⁵ O'Mara, "Informing and Consulting with the Workforce - What the New Directive means for Ireland's Voluntarist Tradition" (2003) 10(1) *Commercial Law Practitioner* 15 at 25.

⁴⁶ New Worker Information and Consultation Directive ("a modern business tool"), available at www.europa.eu.int/comm/employment_social/news/2002.

The future role of trade unions will be a minimalist one if the aims set out in the Directive are to be fulfilled. The information and consultation structures set out in the Directive are of such nature as to allow the employee to personally interact with the employer in order to obtain information regarding the organisation, possibly cutting out the necessity of the “middle-man,” the trade union. This practice may lead to fears of the trade union movement being marginalised and a perception of unions as being outdated. However, the decline of trade unions will depend on the implementation of the Directive, both at a government level and on individual organisations themselves. If the role of trade unions is diminished and is replaced by direct employer-employee interaction, a more productive and open work atmosphere will be created, which will benefit the organisation with increased interaction and open discussion between the parties, namely the employees’ representatives and management. The issue of the definition of “employees’ representatives” is a key issue. The Congress argues that this should be redefined as “union representatives” in congruity with other legislation, but this raises the issue of how to deal with non-unionised workplaces or members.

Given the historical position and presence of trade unions in the Irish industrial relations system, diminution of their role has the potential to drastically affect the system and it is unclear how the traditional industrial relations structure would operate in such a vacuum. Trade unions have traditionally been the representative of employees in disputes, negotiations, and other work place issues and, in many cases, have been a loud voice in such areas, becoming the intermediary between employers and employees. Trade unions must recognise the importance of the Directive to maximise the benefit to employees. The new Directive may not offer such a strong voice campaigning on behalf of the employee. The legislation provides a robust right for information and consultation and this exchange of information should be advised through the trade union intermediary. Looked at in one

sense, it provides a platform for the spread of trade union recognition. If the future of trade unions is to be maintained with this Directive, the legislation should enshrine the principle that information and consultation should be through trade union representation.

VI. CONCLUSION - ARE UNIONS REDUNDANT?

The Department of Enterprise, Trade and Employment began consultations with employers and employees bodies in late 2002 and following the publication of the Bill in 2005, these are still continuous. The effect of the Directive is still undetermined and there is little systematic evidence on how employees and trade unions have been represented by the new legislation and on what patterns of implementation are emerging in jurisdictions where it has already been implemented. It deserves a public and open debate to determine the effect of its transposition into Irish law. If the Directive is to be implemented by government within a reasonable time-frame and if the procedures outlined in Directive are followed within the organisations, there will be open and efficient information and consultation exchange between employer and employees and a resulting lessening in the role of unions in industrial relations. Only the future will tell if their overall standing and relevance will diminish concomitantly.