

# Worker involvement in EU law

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Institutional issues

Catalogue raisonné of EU Directives

Legal basis and paradigm?

A glossary

Some principles

The object of information and consultation

# Institutional Issues

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- Information and Consultation has been an *explicit* EU competence ever since Maastricht Treaty (1993) : *qualified majority*
- BUT : Representation and collective defence, Dismissal protection require *unanimity*
- How to dissociate INFO § Consultation and Representation and Dismissal protection

# Focus : How to dissociate?

- A number of EU Directives adopted under different legal bases already deal(t) with the issue of **representation**

*Directives related to information and consultation favour the exercise of this right in an indirect way, id est through representation (CR, Transfer of Undertaking, Framework Directive INFO/CONS)*

- b) The intervention of the EU legislator is often based upon a *renvoi* (reference) to the MS or to management and labour in order to identify workers' representatives
- c) The CJEU has elucidated that EU Directives presuppose an obligation to provide a system of workers' **representation**
  - CJEU, 8 June 1994, Commission v UK, C-382/92 and CJEU, 8 June 1994, Commission v UK, C – 383/92
- d) *(Recast) EWC Directive institutes bodies of representation for the sake of negotiation (SNB) or for the sake of INFO/CONS (EWC)*

# Focus : How to dissociate?

- INFO and Consultation entails Corollary rights (often linked to unanimity)
  - a) The EU legislator tends to impose a system of protection against unfair dismissal of workers' representatives
  - b) The EU legislator tends to capacitate trade unions\reps to have access to justice for the defence of workers' rights
  - c) The EU legislator has provided right to training in EWC Recast Directive (prefigured by the H&S Framework Directive )
  - d) The EU legislator tends to facilitate communication between reps and their constituency (Recast EWC Directive)

# Institutional Issues

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- *Article 27 (CFREU)*

## **Workers' right to information and consultation within the undertaking**

“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 Union law and national laws and practices”

# Impact of Article 27 CFREU

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-Article 27 has major flaws

The object is not indicated

The reference to « in the cases and under the conditions provided for by Union law and national laws and practices”

The CJEU ignores Article 27 (*Mono Car Styling*) or denies it to have a direct effect (*Association de médiation sociale*)

# Institutional Issues

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- The **diversity of systems of industrial relations** constitutes a potential limit to EU intervention

-Article 151 :

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations

-Article 152:

The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.

-The principle of subsidiarity corroborates this approach

# Institutional Issues

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- Workers representation in the field of INFO and CONSULTATION needs to respect the freedom of association

According to standing ILO conventions and recommendations recourse to « elected » workers' representatives (*id est* reps not elected by all workers, or designated by the trade unions) cannot undermine the position of trade unions

ILO Workers' representatives Convention Nr 135

## **Article 5**

Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures shall be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.

***Recommendation 94 concerning Consultation and Co-operation between Employers and Workers at the Level of the Undertaking***



# Focus : Workers' representatives *versus* trade unions in EWC's

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- An institutional framework for EWC's has been established prior to any framework for trade union recognition at the level of Community-scale level
- The EWC is *not per se* composed of elected representative distinct from trade union reps, but ..... It might be composed of elected representatives
- The involvement of European representative organisations of workers is cosmetic :

Article 5 2) c) : The central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations.

# Focus : Workers' representatives *versus* trade unions in EWC's

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- Article 5 4) Recast Directive :

For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body

- De facto the EWC have impeded upon a prerogative which has always been reserved for trade unions outside any kind of empowerment : CB

# Catalogue raisonné : at all levels

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- *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 *Mittbestimmung* : unanimity)

# Catalogue raisonné : Overview

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- D **98/59** : Licenciements collectifs- Collective Redundancy **(1975)**
- D **2001/23** : Transfert d'entreprise-Transfer of Undertaking (maintien des droits-acquired rights) **(1977)**
- [D **2008/94** : Insolvabilité des travailleurs –Insolvency **(1980)**]
- D **2009/38** : Comités d'entreprises européens- European Works Councils **(1994)**
- D **2001/86** *Societas Europaea* **(2001)**
- D **2002/14** : Directive Cadre Info Consultations- Framework on Information and Consultation **(2002)**
- D **2003/72** *Societas co-operativa europaea* **(2003)**

A body of directives which has been updated, consolidated, made coherent, recasted : NO formal codification of the directives (but rather of the case law)

# Focus : Legal basis , a key to the understanding ?

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- *(Market Integration): Articles 94 (115) and 308 (352 TFEU) TCE* ←-----→
- *A Social Policy perspective : Article 137 (TCE- ASP) (153 TFEU) : 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) (cf Employment policy )

# Legal basis and paradigm

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- *Article 27 (CFREU)*

## **Workers' right to information and consultation within the undertaking**

“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 Union law and national laws and practices”

# Legal basis and paradigm

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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 paradigm

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- « without slowing down the decision-making process in undertakings » **(recital 22 EWC Recast)**
- “To that end, informing and consulting the European Works Council should make it possible for it to give an opinion to the undertaking in a timely fashion, 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 Recast)**



# A glossary

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- Information, Consultation, Participation and Worker' Involvement
- **Definitions** do affect the *hard core* beyond contractualisation

# A glossary

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## *“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** » (FIC)

# A glossary

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## *'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 glossary

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- “information” means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings (RecastEWC)

# A glossary

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## « *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 glossary

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- "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 glossary

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- 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 (“and decisions” EWC)
  2. “appropriate” in FIW

# A glossary

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## *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



# Some principles

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- Is information and consultation a right or a duty? /of whom?
  - **Doesn't touch the "prérogative entrepreneuriale" - managerial prerogative**
  - 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 ?
- Ideological meaning?
- Legal meaning : bargaining in Good faith or institutional good faith :  
-→ *boomerang* against employer (Cfr. *Bofrost*)

# Some principles

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- Horizontal subsidiarity:

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

- ‘cfr.subsidiary requirements”

- Ratio* :

- Lack of consensus: no unique model

- Search of tailored solution

- 3. *Collective Laissez faire or Laissez passer*

# Some principles

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*-Critique :*

Institutional Theory : there is a risk of discontinuity

Can fundamental rights be alienated?

# Focus : The problem of the contract- institution : you will build the Church on solid rock

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## **Contract**

- No genuine common interest (*res publica*)
- Subject to expiration, termination

## **Institution**

- Based upon an idea (une idée)
- Aimed to be lasting, sustainable

# Focus : Article 13 Recast Directive

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- Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States. At least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body, in addition to the members elected or appointed pursuant to Article 5(2). During the negotiations, the existing European Works Council(s) shall continue to operate in accordance with any arrangements adapted by agreement between the members of the European Works Council(s) and the central man

# Focus : Inalienability of fundamental rights

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- Fundamental rights are considered to be « inalienable »
  - waivering by employees constitutes a problem
- “individuals applying for employment often find themselves in a vulnerable situation and are only too eager to comply with the terms of employment offered.” (*Sorensen and Rasmussen v Danmark*, 2006)
- “that, where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate”. (*Eweida and others v UK*, 2013)
- waivering by representatives of employees is MORE problematic

# Focus : Article 5. 5) Recast Directive

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- 5. The special negotiating body may decide, by at least two thirds of the votes, not to open negotiations in accordance with paragraph 4, or to terminate the negotiations already opened.
- A new request to convene the special negotiating body may be made at the earliest two years after the abovementioned decision unless the parties concerned lay down a shorter period.

# Object of Information and Consultation

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- The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of **employment**, investments, and **substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings**, establishments or important parts thereof, and collective redundancies. (SR Recast EWC Directive)



# Substantive issues

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- Where there are **exceptional circumstances or decisions affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies**, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed. It shall have the right to meet, at its request, the central management, or any other more appropriate level of management within the Community-scale undertaking or group of undertakings having its own powers of decision, so as to be informed and consulted. (SR Recast Directive)

# Substantive Issues

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Article 4 D 2002/14

Practical arrangements for information and consultation

1. In accordance with the principles set out in Article 1 and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation at the appropriate level in accordance with this Article.

2. Information and consultation shall cover:

(a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;

(b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;

(c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).

3. 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.

# Substantive Issues

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4. Consultation shall take place:

(a) while ensuring that the timing, method and content thereof are appropriate;

(b) at the relevant level of management and representation, depending on the subject under discussion;

(c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate;

(d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;

(e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c). (EU Directive 2002/14)

# The object of information and consultation

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(b) Without prejudice to meetings held pursuant to paragraph (c), the representative body shall have the right to be informed and consulted and, for that purpose, to meet with the competent organ of the SCE at least once a year, on the basis of regular reports drawn up by the competent organ, on the progress of the business of the SCE and its prospects. The local managements shall be informed accordingly.

The competent organ of the SCE shall provide the representative body with the agenda for meetings of the administrative, or, where appropriate, the management and supervisory organ, and with copies of all documents submitted to the general meeting of its members.

The meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, initiatives with regard to corporate social responsibility, the situation and probable trend of employment, investments, **and substantial changes concerning organisation, the introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.**

(c) Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, transfers, the closure of establishments or undertakings or collective redundancies, the representative body shall have the right to be informed. The representative body or, where it so decides, in particular for reasons of urgency, the select committee, shall have the right to meet at its request, the competent organ of the SCE or any more appropriate level of management within the SCE having its own powers of decision, so as to be informed and consulted on measures significantly affecting employees' interests.

(SR Directive 2003/72)