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Hard law, soft edge? Information, consultation and partnership.

Abstract

The purpose of this paper is to assess whether the transposition of the EU directive on informing and consulting employees is likely to enhance voice and participation rights of Irish employees. The paper assesses the reasons for the "voice gaps" the evidence suggests exist in Irish workplaces and analysing the implications of the legal changes brought in by the information and consultation legislation. The paper argues that the transposition of the EU Directive provided a unique opportunity to bolster voice mechanisms in Irish workplaces and "plug" some of the gaps identified in the literature. However, the paper argues this opportunity has been largely squandered, as a result of the Irish Government's minimalist approach to "hard" regulation of information and consultation rights in the transposing legislation.

Keywords- Employment regulation, information and consultation, employee rights, partnership.

Introduction

In recent years, in the context of rapid industrial change and restructuring, a major focus of EU and Member State policy debate has been on increasing employee "voice" and participation at the workplace. From a business perspective, the Lisbon Strategy seeks to make Europe the most competitive and dynamic knowledge-based economy in the world by better utilising and exploiting the advantage of comparatively well-educated European workforces. At the same time, there have been significant EU legislative developments in relation to employee rights and the protection of employees' dignity, and opportunities for personal development, at work. Title III of the Charter of Fundamental Rights explicitly protects workers' rights to information and consultation within the undertaking (Article II-87), while the EU has also been keen to promote "social dialogue" (see Articles 137-139 EC). After all, the knowledge-based economy that the EU is so keen to establish is inconceivable without the active involvement of individual employees (Sisson, 2002). This has formed the backdrop to the passing, in 2002, of *Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community* (hereinafter "the Directive").

At Member State level, the vast majority of the "old" EU15 have long had in place mechanisms providing for information and consultation of employees at the workplace. These range from statutory works councils (for example, in Germany and France), to encompassing collective agreements which,

although backed by legislation, are the primary means of regulating information and consultation in countries like Denmark and Belgium, to the hybrid Italian model, where a statutory framework allows for sectoral agreements to flesh out the detailed operations of works councils (Broughton, 2005). Ireland and the UK are the odd ones out here as neither country has a general, permanent and statutory system of information and consultation or employee representation.

This paper examines why efforts in Ireland to address the crucial issue of establishing robust employee communication and participation channels at the enterprise have met with, at best, mixed results. The paper argues that the Irish transposition of the Directive (which is similar in most key respects to the approach of the UK) by means of the *Employees (Provision of Information and Consultation) Act 2006* (hereinafter "the Act"), is likely to be ineffective in significantly deepening the voice and representation rights of Irish employees. As we will see, the transposition of the Directive provides another example of the Irish State's Janus-like approach of embracing employee voice and representation at the national level (through the involvement of trade unions in the social partnership process) while failing to promote such rights at the level of the enterprise (Wallace, 2003).

Some caveats. The paper does not debate the benefits or otherwise of seeking to offer employees more voice at work. The starting point is that at both EU and national level (in the form of the national partnership agreements) the stated policy position is so to do (although, as will be outlined

below, there seems little consensus among the Irish social partners as to how this might be achieved). Furthermore, it is recognised that “voice” itself (like “participation”, “involvement” etc.) is a multi-faceted and complex concept (see Dundon *et al.*, 2004). The intention here, therefore, is not to seek to unpack precise voice and involvement arrangements and how they might, or might not, be supported [1]. The paper simply seeks to assess how the Directive might have been used to bolster voice and involvement mechanisms in Irish workplaces.

The paper is set out as follows. First, the “voluntarist” context within which employment regulation in Ireland takes place (including the role of social partnership in relation to employee voice and involvement) will be examined. Second, evidence of the failure of voluntarism to guarantee robust voice and involvement rights to Irish workers will be assessed. The manner in which the Directive has been transposed will be outlined briefly, before the paper goes on to identify precisely why the Act is unlikely to impact significantly on voice and involvement arrangements.

Partnership, Voluntarism and Voice in the Irish Workplace

The Irish industrial relations (IR) system has traditionally been based on the adversarial, voluntarist Anglo-Saxon model of the UK, where there is a relative absence of state intervention in collective employment relations (there is no automatic *erga omnes* extension of collective agreements to non-union

workplaces, for example) and legally imposed structures (Hyman, 1995). Several commentators in the UK (see, for example, Ewing and Truter, 2005) and Ireland have recently commented that the voluntarist system of industrial relations is under threat. Teague (2005), for example, has argued that it is now inaccurate to describe the Irish employment relations system as voluntarist, due to the decline in trade union density and voluntary collective bargaining, and the parallel expansion in individual employment rights, which has resulted in a transition from a bargaining-based employment relations system to a rights-based system.

Others, like Roche (2005), however, feel that attributing major significance to all encompassing processes of change such as the "demise of voluntarism" is overly simplistic. He argues that one of the most significant developments of the past quarter century has been that employers and, to some extent employees and unions, have come to enjoy much greater latitude, within the law and the strictures of public policy, to choose *voluntarily* the employment relations models they wish to operate, including how they should *respond* to growing legal regulation itself. As Redmond (2004) points out, the social partnership agreement, *Sustaining Progress,* launched a proliferation of regulation for Ireland's labour law. However, she identifies three themes; first, the proposed laws almost exclusively concern *individual* employment rights, second the majority contain anti-discrimination measures, and finally, almost all are inspired (or required) by EU membership. Legal intervention in *collective* employment relations (especially in relation to advancing employee involvement rights) has been resisted by employers and successive

governments (due, in particular, to the perception it would damage the foreign direct investment on which Ireland, as a small, open economy, is so dependent; Teague, 2004). As a result, the relationships between employers and trade unions or other worker representative bodies, and the issue of employee voice and involvement at the enterprise have remained largely determined by the parties themselves (Redmond, 2004) [2].

Ireland has, however, diverged from the "pure" Anglo-Saxon model in relation to the historical inclination to deal with issues in a centralised manner; in the 1970s pay agreements were negotiated centrally, and even in periods of free collective bargaining like the early 1980s, local bargaining tended to follow central trends (Hardiman, 1988). The period since 1987 in Ireland has seen a return to centralised bargaining with the conclusion of a succession of national social pacts (seven at the time of writing) between the State, employers, trade unions and other civil society groups, and the advancement of arguments by all the social partners for an orientation towards moderation and partnership. Thus, regulation of various aspects of the employment relationship has been progressed through what has become known as the social partnership process; through the soft law mechanism of voluntary, non-binding social pacts. As Teague (2004) points out, the Irish process differs from traditional corporatist approaches, as agreements emerge from a high-level process of analysis and deliberation by the social partners, focusing on problem-solving more than traditional bargaining. However, the process does give labour a voice (though the Irish Congress of Trade Unions-ICTU) in relation to labour market, and socio-economic, policy formation and implementation.

Since the mid-nineties, amid concerns that the process was too focused on *national* public policy, increasing focus has been put on the dissemination of partnership to workplace level. With labour granted voice and involvement rights at national level (albeit through a voluntary process) the social partners outlined a voluntary framework promoting the diffusion of such rights to the level of the workplace. The national agreement *Partnership 2000* defined workplace partnership and identified nine areas in which the concept would be particularly apposite (including, *inter alia,* opportunities for employees to contribute to meeting the challenge of global competition, co-operation with change, including new forms of work organisation, and financial involvement; see paragraph 9.15 of *Partnership 2000*). Partnership is defined as:

> "an active relationship based on recognition of a common interest to secure the competitiveness, viability and prosperity of the enterprise. It involves a continuing commitment by employees to improvements in quality and efficiency; and the acceptance by employers of employees as stakeholders with rights and interests to be considered in the context of major decisions affecting their employment.
>
> Partnership involves common ownership of the resolution of challenges, involving the direct participation of employees/representatives and an investment in their training, development and working environment".

The discourse of workplace partnership, therefore, is framed in terms of solidarity, inclusiveness, participation and workplace democracy. As Dietz *et al.* (2005, p. 290) have pointed out the assumption in the academic literature has largely been that any genuine partnership arrangements must involve an independent representative body acting on the workforce's behalf (i.e. a trade union) and that the "partnership" relationship is considered to be between the organisation's management team and the recognised trade union(s). However, the presence of a trade union clearly is not necessary for an arrangement to fall within the definition of partnership contained in *Partnership 2000.* Indeed, the national partnership agreements are quite explicit that no prescribed or unitary model of partnership is being promoted, that they merely set out a broad indicative agenda, and that partnership arrangements should be tailored to the specific organisation. In any case, decreasing trade union density, particularly in the private sector, means that in many organisations there are no unions with which employers can go into partnership!

Legally grounded employee rights to information and consultation or to input into organisational decision-making in Ireland, therefore, have been traditionally rather limited. Although certain specific rules relating to worker-directors have always applied to State-owned companies, the principal statutory obligations in Ireland to inform and consult with employees arise under legislation dealing with European Works Councils (EWCs), collective redundancies, health and safety, and transfer of undertakings.

This approach to informing and consulting employees represents what Gospel *et al*. (2003, p. 346) term an "event driven disclosure model". The features of such a model are that worker rights are triggered by a specific employer-initiated event (e.g. redundancy) and therefore information and consultation rights tend to be temporary and *ad hoc*. This model tends to focus on procedural justice in a specific context, is palliative rather than preventative, and rights granted under such a model have no continuous impact on the employment relationship. This contrasts with an "agenda driven disclosure model" whereby the trigger lies within a bargaining/consultation *agenda*, and where information and consultation rights cover a range of interlinked issues and involve an ongoing relationship between employers and employees.

Nevertheless, the principles of workplace partnership, as framed in the national agreements, and other State policy documents (like the *National Workplace Strategy*) seem to be premised on the need for a move away from the event driven model of informing and consulting employees to a more agenda driven model, which sees employees as important stakeholders with rights and responsibilities in respect of the organisation's performance and operation.

Voluntary Failure?

Recent evidence, however, consistently shows that significant gaps exist in relation to voice and involvement arrangements in Irish workplaces. Nationally representative data (O' Connell *et al*., 2004; Geary, 2006; Geary

and Roche, 2005; Gunnigle, 1997; Dundon *et al*., 2003), despite slight differences in approach, sampling and methodology, report a remarkably consistent picture. We will look here at just a few illustrative examples (see Geary and Roche, 2005 for a fuller review). O' Connell *et al.* (2004) reported that between 37% and 58% of private sector employees said that they hardly ever receive information on areas like the introduction of new products and services, changes in work practices and trends in sales and profits. Importantly the authors suggest that a wide gap exists between positive *employer* perceptions of information exchange and the (more negative) experience of significant numbers of *employees* (2004, p 38). Dundon *et al*. (2003) similarly found that employees were much more likely than mangers to express misgivings about the scope and depth of information and consultation at their workplaces; they found Irish organisations to be significantly better at informing rather than consulting employees.

It seems, too, that despite the promotion of workplace partnership, its significance in terms of prompting more robust voice and involvement arrangements appears quite limited. Again, we will take a few illustrative examples (see Geary and Roche, 2005 for a comprehensive review of the data). O' Connell *et al.* (2004) found that just 23% of employees reported even the *existence* of partnership structures at their workplace (18% in the private sector); only one quarter of these respondents were personally involved in such committees (*ibid*, p.100). While 39% of employees reported working in establishments in which there are no formal partnership institutions, no participation arrangements and low consultation, just 6%

reported that they work in “high involvement” establishments, where all three modes of involvement are present (*ibid.* p.110). Geary (2006) found that only around 15% of employees indicated that some form of Employee Consultative Committee was present in their workplace.

Even where partnership structures do exist, the penetration and depth of partnership in Ireland appears relatively limited. In unionised workplaces (and in the public service, where partnership arrangements are usually most prevalent) research indicates that unilateral management decision-making remains the most common approach to handling change (Roche, 2000; D’Art and Turner, 2003). Geary (2006, p. 145) succinctly sum up his evidence by concluding: “what do workers want? Well, they want more voice”.

So Why Can’t the Partners Get it On?

As noted earlier, employee “voice” and “participation” are complex and multifaceted concepts. Thus, investigating the causes of why employees feel they lack input or say into their work and organisation’s affairs is fraught with difficulty. This section briefly summarises some of the main factors that have been identified in the literature to explain the “voice gaps” (and the consequent employee discontent) referred to above and that seem to inhibit the establishment of more robust employee voice and involvement arrangements (be they under the banner of “partnership” or otherwise).

One of the main reasons the Directive is likely to have such an impact in Ireland and the UK, in particular, is because the voluntarist environment in both counties mean that no general, permanent and statutory system of information and consultation or employee representation exists. Traditionally, trade unions have fulfilled the role of representing employees, but declining union density has meant that "union only voice" is now the position in only a minority of organisations. Thus, it may be argued that where organisations have few, or no, voice and involvement arrangements in place, and where trade union membership is not an option, employees are in a weak position to advance their case in the absence of any *legal* rights. Equally, employers may be less willing to involve employees in the absence of any statutory promptings to do so (Teague, 2004).

Given this lack of institutional support, a major factor influencing the success or otherwise of voice and involvement arrangements is the stance of management and, where present, trade unions. Information, of course, is power and in the inherently unequal employment relationship, management may be unwilling to cede such power to employees, much less have employees encroaching onto managerial decision-making, through granting consultation rights. Thus, the positive effects of voice and involvement arrangements tend to be mediated by the level of, in particular, senior management support (Dundon *et al.*, 2003). Similarly, the partnership literature has frequently emphasised the importance of partnership "champions" on the management side (Geary and Roche, 2003; NCPP, 2002). In both cases, senior management support tends to set the tone for

those further down the managerial chain. A similar argument can be made in terms of trade union support for such arrangements. Unions, and especially workplace union representatives, can fear voice mechanisms they perceive to be a threat to the union's representative status (Kessler, 2005). Furthermore, Oxenbridge and Brown (2004) have shown that it can be difficult for unions to sustain workplace partnerships. Where partnership arrangements are robust, workplace representatives privy to commercially sensitive information can feel isolated from members, as they may be unable (for reasons of confidentiality) to justify a particular union stance. In other cases, especially where arrangements are shallow, members can become suspicious that workplace representatives have "sold out" to management. Thus, "buy-in" on all sides is key (NCPP, 2002).

Management and/or trade union opposition or apathy towards voice and involvement arrangements is identified in the literature as having important knock-on effects. The failure to promote such arrangements can mean employees have low levels of awareness or knowledge of their existence or potential (Hall, 2006). This can lead to an under utilisation of such arrangements where they do exist, and a lack of employee enthusiasm or know-how on whether, or how, to introduce them where they do not. In the latter case, employees may, in particular, fear putting their heads "above the parapet". This can lead to further problems in terms of representation. Collective mechanisms for informing and consulting employees obviously require employee representatives. However, it may be difficult (particularly in non-union organisations) to find employees willing and/or able to serve in

such a capacity without strong management support for encouraging fair and transparent selection procedures and, especially, providing proper training (NCPP, 2004). The *quality* of employee representatives is obviously crucial for effective voice arrangements, particularly where they are expected to deal with issues to do with economic performance, technological change and so on (Gollan, 2006).

Where voice and involvement or partnership arrangements are in place, a lack of effective employee representation and management or trade union commitment can quickly lead to a lack of faith in the arrangements. In such cases, employees may perceive that management seek involvement only on “their terms” and only on specific management-driven agendas (Dundon *et al.*, 2003). In terms of partnership structures, a criticism commonly levelled is that partnership fora become mere “talking shops”, with a resulting lack of tangible and visible outcomes (Tailby *et al.*, 2004). In many cases, the complaint is that what happens in these fora is not effectively communicated to the workforce at large, either because they are management-dominated or because of failures of articulation on the employee/union side (Oxenbridge and Brown, 2004).

Finally, organisations in all sectors today operate in an environment of rapid and often disorienting change. It is dealing with the challenges of managing change that has to a large extent driven the contemporary focus on employee involvement and partnership. However, the literature consistently shows that existing voice and participation arrangements, be they under the rubric of

partnership (NCPP, 2004) or otherwise seem to be considerably more effective in dealing with *incremental* as opposed to *transformative* change (Dundon *et al.*, 2003). It seems the more fundamental in nature the change facing the organisation, the less “say” workers are granted; in such situations, information tends to significantly predominate over consultation (*ibid*, p. 54).

Thus, the evidence suggests important voice gaps in Irish workplaces. It seems that information is prioritised over consultation, that a “perception gap” exists between employees and employers, and that worker voice expectations in most cases are not being met. These gaps have not been addressed by the promotion of workplace partnership (through the framework outlined in the national agreements or the proselytising of the State-backed National Centre for Partnership and Performance-the NCPP). It is this context that the Irish Government transposed the Information and Consultation Directive. A possibility presented itself, given the thrust of the Directive itself, the promotion of employee voice at EU level, and the Irish partnership approach at national level, as well as the continued commitment by the social partners to promote workplace partnership [3], that the legislation would have been transposed in a manner that sought to address the issues identified above. In particular, the legislation held out the prospect, at least, of providing a stronger institutional framework, in turn “legislatively prompting” (Hall, 2005) employers and unions to be more willing to “buy-in” to robust voice or partnership arrangements. This, in turn, may have led to greater employee awareness of, and faith in, such arrangements and encouraged a “process-

driven" approach to informing and consulting employees that would support a more inclusive approach to managing transformational organisational change.

The Transposition

The Directive sets out a general framework outlining minimum requirements for employee rights to information and consultation. Article 4 requires that workers have rights to information on the recent and probable development of the undertaking's activities and economic situation; rights to be informed and consulted on the probable development of employment within the undertaking (in particular where there is a threat to employment); and rights to be informed and consulted on decisions likely to lead to substantial changes in work organisation or in contractual relations (with a view to reaching agreement).

The 2006 Act provides for three types of information and consultation agreement but, significantly, rights under the Act must be "triggered". Section 7 provides that the employer may initiate negotiations or employees may request negotiations with the employer to establish information and consultation arrangements. The Act (section 9) provides for pre-existing agreements (the retention of existing arrangements or the establishment of new arrangements prior to Act's date of commencement) and new negotiated agreements under section 8. Section 7 contains the "Standard Rules", the fallback position for setting up information and consultation arrangements where the employer refuses to enter into negotiations or where the parties have entered into negotiations but cannot reach agreement within the

specified time limit. The key element in the Standard Rules is the establishment of an Information and Consultation Forum. This forum (detailed procedural rules for which are laid out in Schedule 3 to the Act) would meet at least twice a year, would be resourced by the employer, and, as such, would approximate in many ways a works council-type arrangement.

Section 11 has proved one of the more controversial elements of the legislation. It provides that, for both negotiated and pre-existing agreements, employees may receive information and consultation either through representatives *or* directly. Employees can request a change from a system of direct involvement to one involving representatives; such a request would be put to a vote. Direct involvement systems are not a feature of the Standard Rules.

Section 6 defines employees' representatives as employees of the undertaking elected or appointed for the purposes of the Act (where the employer bargains with a trade union that represents 10% or more of the employees in the undertaking, that union will have pro-rata representation rights). Section 13 prohibits an employer from penalising an employees' representative for performing his or her functions in accordance with the Act.

As with the transposing legislation in the UK (see Hall, 2005; Ewing and Truter, 2005) the Act has been the subject of quite critical commentary (see Hayes, 2005 on the Bill which became the 2006 Act) and its impact at the time of writing has been minimal (Dobbins, 2007). The aim here is not to undertake

a detailed legal analysis of the legislation's strengths and weaknesses, but to look at specific areas where the legislation has failed to address the problems identified in preceding sections. As a result, the Act also falls someway short of advancing the broader EU objectives and social partnership aspirations outlined above.

Hard Law, Soft Edge?

Reactions of the social partners

Despite the existing lack of legal support for voice and involvement arrangements in Ireland and the State's strong commitment to social partnership, it came as little surprise to many that the Irish government initially opposed the Directive. Once it became clear its passing was inevitable, Ireland and the UK, in particular, pushed for maximum "flexibility" in terms of its requirements (Geary, 2006). Therefore, a wide scope was given to the social partners in each Member State to negotiate terms different to the Standard Rules, and sanctions for non-compliance that meant decisions in breach of the Directive would be suspended were omitted. Surprisingly, after almost 20 years of social partnership Irish trade unions and employers were unable to agree a national framework agreement. There is also no mention whatsoever of the Directive in the latest national agreement, *Towards 2016.* I will discuss some of the other key "flexible" provisions below, but what is clear from the Irish Government's approach is that statutory measures to enhance employee voice and involvement and promote workplace partnership must always be introduced without prejudice to managerial prerogative and without

threatening the voluntarist system of collective IR. Therefore, any hopes of greater institutional support for voice and involvement arrangements through a robust form of "legislatively prompted voluntarism" (Hall, 2006) were largely dashed.

Much as senior management and union officials set the tone for those at middle and lower-levels, it seems likely the State's minimalist and somewhat begrudging response to the Directive will influence employers' views of the 2006 Act. As Dundon *et al.* (2006, p. 508) point out, employers can choose a "high road" approach to information and consultation (with a mix of direct and representative mechanisms tailored to the organisation and a broad agenda allowing for employee co-operation and participation) or a "low road" approach (with disjointed processes that minimise employee input into decision-making and consolidate management control). Prior to the passing of the Act, the available evidence (e.g. NCPP, 2004) suggested that employers' responses to the Directive would very much depend on the detail of the legislation. Very few "pre-emptive" information and consultation agreements were signed (notable exceptions were the agreements signed at Tesco and Hewlett Packard; Dobbins, 2007a) and in the early months since the legislation has been in place very little activity has been reported (Dobbins, 2007). It seems that most employers have adopted a strategy of risk assessment rather than active compliance (Hall, 2005). Neither has the union movement shown much enthusiasm to promote the Act. The unions seem to be uncertain as to whether to view the legislation as an opportunity or a threat and have also seemed to adopt a "wait and see" approach.

The reaction of the social partners is perhaps the most disappointing, if not entirely surprising, aspect of this tale. The success (or, at least, longevity) of the process at national level is time and time again attributed in large part (not least by the partners themselves) to the relationships of trust that have been built by the main players (Hastings *et al.*, 2007). What seems to be important is the ”socialisation” aspect of the partnership process; the positive feedback loops associated with repeated interactions. The idea is that actors alter pre-existing preferences, expectations and behaviour, and forge interdependence. Case studies of information and consultation processes in organisations, too, emphasise that *informal* dialogue is a crucial element of effective employee voice, yet extremely difficult to regulate or legislate for (Dundon *et al.*, 2006; Marlow and Gray, 2005). It might have been expected, however, that a more robust legislative framework (mandating, for example, some form of regularised interaction between employers and employee representatives) and a more positive response from employer and trade union leaders might have stimulated greater management, employee and employee representative interaction, and might have led to increased trust on all sides [4]. After all, evidence suggests (NCPP, 2004) that a hard and fast distinction between “informing” and “consulting” is not easily maintained in reality. Ongoing voice and participation arrangements need to evolve and this evolution is dependent to a large extent on the development of personal relations between actors. The transposition of the directive, then, represents another example of Ireland’s “truncated” model of partnership (what Boucher and Collins, 2003, refer to as “neo-liberal corporatism”), where national

agreements rely heavily on social partner cooperation and interaction, but no mechanisms exist to guarantee social partner engagement at the enterprise level (O' Hagan, 2002).

Pulling the trigger

A significant weakness in the legislation relates to the fact that employees must "trigger" their rights by requesting employers to enter into negotiations to establish information and consultation arrangements. The unions have been particularly critical of this provision, arguing (in reference to the 10% of employees required to trigger a request) that there cannot be "a plebiscite on a right" (Geary and Roche, 2005, p. 186). The requirement for workers to trigger their rights under the Act is unusual, in the sense that it has never previously been a feature of Irish labour law (see the collective redundancies legislation, for example). However, where employers do not initiate the process it seems employees may have to fight to secure rights under the Act. In non-union workplaces (or, indeed, where unions do not promote the legislation) it seems unlikely many employees will be aware of their rights, and, even if they are, may be unwilling or unable to force their employer's hand. While the legislation contains protection against victimisation for employee representatives (section 13) it is silent on protection for those seeking to *establish* arrangements. Speculation that employers are unlikely to take a proactive stance on information and consultation rights, as there is little expectation of employees requesting these (Hall, 2006) is supported by the (admittedly early) evidence. Furthermore, for those employees who do

attempt to access their rights, in a case where the 10% threshold is not met, two years must pass before a further request can be made (section 7).

By not obligating employers to, at least, begin negotiations, the legislation does little to more strongly institutionalise voice and involvement arrangements, does nothing to promote employee awareness of their rights, makes accessing rights largely dependent on managerial attitudes and gives little or no incentive to management to take a proactive approach.

Employee representatives

A related issue is that of employee representatives. As we have seen (unlike in the UK) the legislation does grant a privileged position to workplace representatives of recognised trade unions. However, the definition of employee representative does not seem to allow any role for external union officials (as does the legislation on EWCs) nor does it seem to allow for external expert assistance when the original information and consultation arrangements are negotiated. It may be the case that employee representatives (or union workplace representatives) will not be experienced or skilled enough to effectively negotiate the complex issues of subjects for discussion, confidentiality and so on, especially if faced with a phalanx of company human resources and legal specialists. Denying employee representatives access to external, independent advice undoubtedly runs the risk that negotiated arrangements will be management-driven, and thus unlikely to address employee concerns about real involvement in decision-making. There is also a risk that, once arrangements are in place, employee

representatives (who after all work for the organisation) will be less able to be open and critical in their views, and less able to prevent a management-dominated agenda without external, independent assistance.

Furthermore, although employee representatives are entitled to "reasonable facilities, including time off" (section 13) to fulfil their functions, the extent of time and training that they get will be dependent on managerial whim. No provision exists, for example, obliging management to facilitate representatives to meet periodically with all the other employees they represent. If management do not take a progressive approach to the arrangements, it is likely that employee representation will be weak and that employee apathy or hostility towards the arrangements will increase.

Direct Involvement

One of the most contentious elements of the legislation is section 11, which allows for *direct* information and consultation arrangements. This has become known in Ireland as the "Intel clause" as it is believed to have been furiously lobbied for by the American Chamber of Commerce Ireland on behalf of US multinationals based in Ireland. While the evidence consistently shows that the most successful voice and involvement arrangements are those that *combine* direct and indirect mechanisms (Marchington *et al*, 2001; Dundon *et al.*, 2006; 2003), the legislation again fails to encourage any moves by organisational stakeholders towards such a dual approach and in practice, arguably, privileges direct voice mechanisms. If employers have the opportunity to comply with the *letter* of the law by using only direct

arrangements, there is no incentive to try and comply with the *spirit* of the Directive, which seems to promote a more process-driven, trust-based and representative model. The latter would equally seem to better deal with the issue of managing more effectively the types of transformational organisational changes referred to above.

Practically speaking, it is also difficult to see how a meaningful exchange of views and dialogue (the essence of consultation) can take place, or agreement be reached, *directly* in a medium-, or large-sized organisation. This provision has also, of course, been a big factor behind the trade union ambivalence to the legislation, as it explicitly allows a non-collectivist approach. Its inclusion ensured that unions were always going to be sceptical of State (and employer) motives and somewhat suspicious of promoting the legislation. In any case, the provision might well be the subject of a future legal challenge (see Ewing and Truter, 2005 on the UK version of section 11).

Conclusion

The information and consultation legislation has been described as an example of ”reflexive” employment law whereby “the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment” by the parties to the employment relationship ”rather than to intervene by imposing particular distributive outcomes” (Barnard and Deakin, 2000, p. 341). The social partnership process, with its emphasis on promoting workplace partnership, has its origins in the similar (corporatist) idea of the

partners "bargaining in the shadow of the law". The problem with the 2006 Act is that the shadow is very faint indeed. The Act also seems to be insufficiently encouraging of actors to produce the "second-order effects" intended by reflexive law (*ibid.*). The State and the social partners have not, for example, provided as of yet a code of practice or a list of possible topics for information and consultation (like those listed for workplace partnership in *Partnership 2000*) and, as noted, the most recent national agreement does not mention the legislation at all.

It is necessary to stress the fact that while structures and content of laws are important, processes (how actors actually behave) are also critical; legislation will inevitably be mediated by employer strategies, union power, existing structures, enforcement and so on. Nevertheless, legal supports do affect information and consultation outcomes and can, at least, promote or inhibit a particular culture (see Gospel and Willman, 2005 on different information and consultation outcomes in Germany, France, and the UK). The Irish transposition of the EWC directive ten years ago, for example, has had an extremely limited impact. That legislation also had a "trigger" mechanism and did not even obligate employers to inform the Department of Enterprise, Trade and Employment as to whether they had established a European Employees' Forum (as it is termed in the legislation). Research has shown that, as of June 2005, 43 Irish-owned companies headquartered in Ireland were covered by the EWC Directive, of which 6 had established EWCs – a "compliance rate" of just 14% (Dobbins, 2006). It would be a pity were the 2006 Act to have a similarly limited impact.

While the framework for workplace partnership in the national agreements seems to have had limited effect as a means of promoting more robust voice and involvement arrangements, the 2006 Act could have been framed in a manner to encourage greater interaction between workplace actors in a more process-driven approach. Using legislation to promote a shift in workplace culture is clearly desirable in an era where numbers of collective disputes are at an all time low, but where third party dispute resolution is increasing exponentially (LRC, 2007) using an individualistic approach to issues that often might better be the subject of collective negotiation.

It seems unlikely, given the manner of the transposition, that EU level ambitions, as set out in the preamble to the Directive, will be met in the Irish case [5]. Similarly, the transposition does little to suggest that the nature of Irish social partnership will become a little less "truncated"; while successive national agreements have argued the need for practical approaches and activities to further develop employee voice and involvement arrangements (in particular through workplace partnership) it seems such approaches and activities will not be achieved by legislatively grounded promptings (even of the "reflexive" nature).

Notes

1. For the purposes of this paper, I am going to use the catch-all term "voice and involvement arrangements" as shorthand for the various voice and participation mechanism identified in the literature cited.
2. One obvious exception relates to legislation dealing with trade union representation in organisations where trade unions are not recognised for bargaining purposes (the *Industrial Relations Acts 2001-2004*).
3. See Part Two, section 6.4 of *Towards 2016:* "The Forum on the Workplace of the Future concluded that there is a continued need for advocacy of partnership at workplace level, in accordance with previous social partnership agreements. The NCPP will develop a detailed project plan in 2006, in consultation with ICTU, IBEC (Irish Business and Employers Confederation) and relevant Government Departments and agencies, outlining a series of practical approaches and activities to further develop workplace partnership."
4. Of course, just as repeated interaction can increase trust and create positive "spillover" effects, there is a chance that such interactions could have the opposite effect and create negative "spillback" effects (Teague and Donaghey, 2004). Nevertheless, where a stated policy aim is to increase communication between parties, having them meet and talk on a regular basis must have a role.
5. The directive set out to "to reform the existing legal frameworks for employee information and consultation at Community and national level, which tend to adopt an excessively *a posteriori* approach to the

process of change… 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”.

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