# EU Information and Consultation Laws: The Coming Third Wave

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# THREE WAVES

- There has been two “waves” of EU laws on the collective information and consultation of employees through representatives.
- The first wave was in the 1970s and gave us the collective redundancies directive and the transfer of undertakings directive
- The second wave, which began with the single market act and continued after the Maastricht treaty , gave us health and safety committees, European Works Councils, the information and consultation directive, and employee involvement in European companies subject to the european company statute.
- We are now on the cusp of a third wave
- Where there are existing employees' representatives, unions or works councils, they will take on the new information and consultation rights.
- In the absence of existing representatives, representatives may have to be elected.

# Wave 1

- The 1970s was a time of significant, adverse economic change across Europe. 30 years of sustained economic growth was coming to and end, with oil prices rocketing as a result of the Arab-Israeli war.
- Europe began to experience large-scale industrial restructuring.
- The Collective Redundancies Directive and the Transfers of Undertakings Directive were part of the response to this. Both provide for the "information and consultation of employees' representatives with a view to reaching an agreement" when job cuts or outsourcing and under consideration.
- In 1994 in cases involving the UK government, the European Court said that in cases of collective redundancies or transfers where there were no existing employees' representatives, they should be elected.

# Wave 1 Recedes

- Also, in the 1970s, other information and consultation laws were on the agenda.
- The “Vredeling” Directive would have seen the establishment of what we now know as European Works Councils.
- Other measures, such as the 5th Directive on Company Law, would have seen European-wide board level representation.
- Economic pressures and disagreements between countries caused them to be postponed.
- Then, in 1979, the new UK Thatcher government said it would veto all future EU employment laws. At the time, all EU employment laws needed to be agreed unanimously.

# Comments on Wave 1

- The first wave, especially Collective Redundancies, was a response to job losses.
- It was focused, local, and national. It involved real issues involving real people.
- It has stuck and plays an important role in national industrial relations systems.
- The way it played out also made it clear that representation was not a union prerogative. Employees did not need to be in unions to be represented.
- However, where representatives were elected they were “ad hoc” and ceased when the consultation was finished.

# Wave 2

- From 1979 to 1987, the UK systematically blocked all EU information and consultation initiatives.
- What changed matters, was the Single European Act. As part of the package, the door was opened on some employment matters to qualified majority decision making. Through that door came Health and Safety Committees.
- The Maastricht Treaty in 1992 pushed things further. Information and consultation now became a majority vote issue. The British veto was gone. But the UK also opted out of the Social Chapter of the Maastricht Treaty. They were not even at the table.

# Did Wave 2 Deliver?

- As already mentioned, Wave 2 gave us Health and Safety Committees. Their impact has been long lasting. They could come to play an ever increasing role as mental health issues move up the agenda and the barriers between personal and business life dissolve as a result of remote working.
- We also got European Works Councils. A major breakthrough, the unions believed. In reality, they delivered little.
- Much the same with employee involvement in “European Companies” as there simply has been no rush to incorporate at European-level.
- The Framework Information and Consultation Directive, seen as an attempt to introduce works councils into those countries without them, has produced little.

# Comment on Wave 2

- Why did Wave 2 fail to move the dial in any meaningful way on employee information and consultation?
- Leaving aside Health and Safety Committees, the rest is just too divorced from day-to-day realities. There are no consequences.
- Where are the reports of employees waiting with bated breath for the return of their EWC representative?

# The Coming Wave - 3

- Wave 3 will be different. The British are no longer involved. Their concerns no longer matter. I think their absence is already evidenced.
- The issues that will require employee information and consultation in Wave 3, will be personal, local, and job focused.
- Representatives may need to be elected, if they do not already exist. But unlike Collective Redundancies, they will not be temporary and ad-hoc. They may develop stickability.

# The New Laws

- The Gender pay Transparency Directive (agreed)
- The Employment Status of Platform Workers (in process)
- The AI Act (in process)/AI Liability Directive (early stage)
- Corporate Due Diligence (in process)
- Revision of the EWC Directive (early stage)

# Brexit

- Ever since the UK became an EU Member State in 1973, it has acted as a brake on the development of EU employment law. This is true of Labour as much as of the Conservatives. Proposed laws were bent out of shape to accommodate its concerns.
- This no longer applies. The UK is gone. It will not be coming back anytime soon.
- The “liberal” reservations of the UK towards employment law are no longer holding the rest back. Which is one of the reasons we are seeing so many laws coming down the track.
- Brexit means a reinvigorated “Social Europe”.

# The Gender Pay Transparency Directive

- The heart of the matter is the joint pay assessment when data analysis shows a gap of more than 5% which cannot be justified.

Recital 29

- Joint pay assessments should trigger the review and revision of pay structures in organisations with at least 100 workers that show pay inequalities. The joint pay assessment should be carried out if employers and workers' representatives do not agree that the difference in average pay level between female and male workers of at least 5% can be justified by objective and gender-neutral criteria or if such a justification is not provided by the employer. The joint pay assessment should be carried out by employers in cooperation with workers' representatives; if there are no workers' representatives, they should be designated by workers for this purpose. Joint pay assessments should lead, within a reasonable time, to the elimination of gender discrimination in pay through the adoption of remedial measures. (Our underlining).

# The Joint Assessment

The joint pay assessment shall be carried out in order to identify, remedy and prevent differences in pay between female and male workers which cannot be justified by objective and gender-neutral factors and shall include the following:

a) an analysis of the proportion of female and male workers in each category of workers;

b) information on average female and male workers' pay levels and complementary or variable components for each category of workers;

c) identification of any differences in average pay levels between female and male workers in each category of workers;

d) the reasons for such differences in average pay levels and objective, gender-neutral justifications, if any, as established jointly by the workers' representatives and the employer;

e) the proportion of female and male workers who benefited from any improvement in pay following their return from maternity or paternity leave, parental leave, and carers leave, if such improvement occurred in the category of workers during the period that the leave was taken;

f) measures to address such differences if they are not justified on the basis of objective and gender-neutral criteria;

g) an evaluation of the effectiveness of measures from previous joint pay assessments.

# Comments

- When you look at the list of what needs to be covered in the joint pay analysis, it is clear that any methodologies used in determining pay will have to be put on the table, especially the use of algorithms and AI in decision making.
- (e) “an evaluation of the effectiveness of measures from previous joint pay assessments” makes it clear that this is not a one-off exercise, but a continuous process, stretching over years.
- It is local, focused, and of material interest. “Gender discrimination, pay, fairness” in the one sentence will ensure that.

# Platform Workers: Definition of Employees' Representatives

- We will work off the EU Parliament's draft, recognizing that the final text will be a compromise between the Commission's original text, that of the Parliament, and that of the Council of Ministers.
  - Representatives' means the workers' organisations or representatives provided for by national law or practices, or both;
  - 'workers' representatives' means representatives of recognised trade unions in accordance with national law and practice or other persons who are freely elected or who are designated by the workers in an organisation to represent them in accordance with national law or practices, or both;
  - 'representatives of persons performing platform work' means the representatives of recognised trade unions in accordance with national law and practice or other persons who are freely elected or who are designated by the workers or by the self-employed performing platform work in an organisation to represent them in accordance with national law or practices, or both
- Clearly, representation is not limited to trade unions. New forms of representation could emerge.

# Information and Consultation

- Without prejudice to the full respect of the autonomy of social partners, Member States shall promote collective bargaining in platform work and ensure that workers' representative shave the right to access platform workers, including through digital access, for the purpose of organising their representation (15a)
- Without prejudice to the rights and obligations under Directives 89/391/EEC, 2002/14/EC and 2009/38/EC, Member States shall ensure timely information and effective consultation of platform workers and workers' representatives on decisions likely to lead to the introduction of or substantial changes affecting working conditions and health and safety in the use of automated monitoring and decision-making systems referred to in Article 6(1), in accordance with this Article. When defining or implementing practical arrangements for information and consultation, the digital labour platform and the workers' representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the digital labour platform and of the workers.

# The Substance of Information and Consultation

- automated decision-making systems which are used to take or support decisions that significantly affect those platform workers' working conditions, in particular their access to work assignments and organization of their work, their earnings, their occupational safety and health, their working time or are used to support decisions affecting, their promotion and their contractual status, including the restriction, suspension or termination of their account.
- the grounds for decisions to restrict, suspend or terminate the platform worker's account, to refuse the remuneration for work performed by the platform worker, on the platform worker's contractual status or any decision with similar effects, the grounds for promotion and, where decision-making is supported or based on monitoring and evaluating performance, the criteria used for behaviour evaluation.

# Human Oversight

- Member States shall require digital labour platforms to ensure sufficient human resources for monitoring the impact of individual decisions taken or supported by automated monitoring and decision-making systems in accordance with this Article. The persons charged by the digital labour platform with the function of monitoring, decision-making assisted by automated monitoring or automated decision-making systems or review of decisions shall have the necessary competence, training and authority to exercise that function. They shall enjoy protection from dismissal, disciplinary measures or other adverse treatment for overriding automated decisions or suggestions for decisions.

# Comments

- As noted in a previous presentation, the definition of platform worker is extensive and stretches way beyond “Uber” to include many solo self-employed workers.
- The EU Commission has already made stated that EU competition law does not preclude such workers organising and bargaining collectively.
- It is clear from the Parliamentary draft that digital employers will have an obligation to inform and consult about the use of AI and algorithms in human resource decision making.
- It seems to us, in line with Collective Redundancies, that where employees’ representatives do not exist, Member States will have to provide for their election.

# The AI Act

- For now, the AI Act has little to say about collective employee information and consultation.
- There was nothing about it in the original Commission proposal, nor did the Council pick up on it.
- However, the EU Parliament has. An amendment before the Parliament reads:
  - ***Prior to putting into service or use a high-risk AI system at the workplace, users shall consult workers representatives, inform the affected employees that they will be subject to the system and obtain their consent.***

# Unions

- The European Trade Union Confederation is extremely unhappy with the Council/Commission Position.
- It is calling for a separate Directive on AI in the Workplace https://www.etuc.org/en/document/etuc-resolution-calling-eu-directive-algorithmic-systems-work
- I do not think there will be a separate Directive. But I do think, in line with Platform Workers and Gender Pay, we will see employee representative information and consultation written into the Directive. Whether it will go as far as “consent” as the Parliament may ask for is uncertain.

# The AI Liability Directive

- The Act will provide for means of redress for persons who believed they have been harmed by AI-based decision.
- It defines “claimants” as follows:

  > claimant’ means a person bringing a claim for damages that:
  > (a) has been injured by an output of an AI system or by the failure of such a
  > system to produce an output where such an output should have been produced;
  > (b) has succeeded to or has been subrogated to the right of an injured person by virtue of law or contract; or
  > (c) is acting on behalf of one or more injured persons, in accordance with Union or national law.

- The more entrenched AI-based human resource decisions become in the workplace, the more will individual employees and employees’ representatives look to use this Directive to claim compensation for alleged damage or, at least, to use it as leverage in negotiations.

# Corporate Due Diligence

- ‘stakeholders’ means the company’s employees, the employees of its subsidiaries, trade unions and workers’ representatives, consumers, and other individuals, groups, communities or entities whose rights or interests are or could be affected by the products, services and operations of that company, its subsidiaries and its business partners, including civil society organisations, national human rights and environmental institutions, and human rights and environmental defenders;

# Complaints

- Member States shall ensure that companies provide the possibility for persons and organisations listed in paragraph 2 to submit complaints to them where they have legitimate concerns regarding actual or potential adverse impacts with respect to their own operations, the operations of their subsidiaries and the operations of their business partners in the companies' chains of activities.
  2. Member States shall ensure that the complaints may be submitted by:
  (a) persons who are affected or have reasonable grounds to believe that they might be affected by an adverse impact;
  (b) trade unions and other workers' representatives representing individuals working in the chain of activities concerned; and
  (c) civil society organisations active in the areas related to the human rights or environmental adverse impact that is the subject matter of the complaint.

# Directive 2022/2464 on Corporate Sustainability Reporting

- Member States should ensure that sustainability reporting is carried out in compliance with workers' rights to information and consultation. The management of the undertaking should therefore inform workers' representatives at the appropriate level and discuss with them relevant information and the means of obtaining and verifying sustainability information. This implies for the purpose of this amending Directive the establishment of dialogue and exchange of views between workers' representatives and central management or any other level of management that could be more appropriate, at such times, in such fashion and with such content as would enable workers' representatives to express their opinion. Their opinion should be communicated, where applicable, to the relevant administrative, management or supervisory bodies
- The management of the undertaking shall inform the workers' representatives at the appropriate level and discuss with them the relevant information and the means of obtaining and verifying sustainability information. The workers' representatives' opinion shall be communicated, where applicable, to the relevant administrative, management or supervisory bodies.

# Radtke and a Revised EWC Directive

- If adopted, Radtke would elide the difference between national and European information and consultation. This can clearly be seen in the proposed definition of transnational
  - Matters shall be considered to be transnational where their **potential effects** concern, directly or indirectly, a Union-scale undertaking or a Union-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States.
  - 4a. In order to determine the transnational character of a matter, the scope of its possible effects and the level of management and representation involved shall be taken into account. This includes matters which, irrespective of the number of Member States involved, are of concern to workers in terms of the scope of **their potential impact**, as well as matters which involve the transfer of activities between two or more Member States. Undertakings or establishments situated in different Member States are deemed to be concerned where it can be **reasonably expected** that a matter affecting one undertaking or establishment entails, or may entail in the foreseeable future, effects on undertakings or establishments in other Member States, including where decisions envisaged by an undertaking or a group of undertakings are taken in a Member State other than that in which those effects are produced.";

# Some Conclusions

- The Gender Pay Transparency Directive is the only new legislation for which we have the text. We can see how extensive employees' representatives involvement will be through joint pay assessments.
- The Employment Status of Platform Workers, whatever its final shape, will provide for extensive information and consultation around the use of AI and algorithms when it comes to human resource decision making concerning widely-defined workers employed through digital channels.
- As the ETUC notes, there is no provision in the AI Act for information and consultation. The Parliament wants to fill that gap. I suspect it will be filled. We also see the complaints mechanisms available through the AI Liability Directive.
- The Corporate Due Diligence Directive will provide further channels of complaint. Unions will define "labour rights" as including "digital rights" and will look at the use of AI through global supply chains.
- Radtke has the potential for bring all of the above within the scope of EWCs through defining everything as "potentially" transnational.

# New Forms of Representation

- As we have seen, all of the emerging legislation provides for employee representation other than through unions or existing works councils.
- Will national legislation insist that representation must be through existing channels. We know that there are multiple workplaces without representation as of now.
- What about countries such as Ireland and those in Central and Eastern Europe which have no tradition of workplace representation other than through unions?
- Whatever may be the final shape of the various pieces of legislation, companies would be wise to map now “what they have” workplace by workplace. Surprises are never helpful.

# Questions?