EU INFORMATION AND CONSULTATION THE COMING 3RD WAVE

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Introduction

European countries and the European Union offer multiple structured channels for employee voice in the workplace. These structures include trade unions, works councils, European Works Councils, and, in some countries, board level worker participation. In the rest of the world, if you are not a trade union member then there is no channel for collective, workplace voice.

We say "structured" because, increasingly, employees can give voice to concerns and discontents through social media. But such "clicktivism" and social media activism is ad-hoc, emotionally driven, and devoid of lasting staying power because it lacks organisational discipline or a supporting legal framework. Like a storm, social media activism can blow savage while it lasts, but when a storm passes things can look much the same as before.

Leaving aside what happens in individual countries, over the past 50 years we have had two waves of European Union (EU) laws on employee information and consultation through designated representatives.

We are now on the cusp of a "third wave" and, we believe, this third wave will have a significant impact on workplace employee relations in ways that the two previous waves have not.

The first wave came in the 1970s and gave us Directives on Collective Redundancies and the Transfer of Undertakings.

The second wave began with the signing the of the Single European Act (SEA) in the late 1980s and then the Maastricht Treaty in 1992. From the SEA came health and safety committees, from Maastricht, first European Works Councils, then the Directive on employee information, consultation and participation in companies established under the European Company Statute Regulation, *Societas Europea,* (SE). Finally, the *General Framework on Informing and Consulting Employees* was also adopted. There are also references to employees' representatives' involvement in some company law statutes but, to date, these have not proved to be of much significance in practice.

The "third wave" will be driven by a host of new laws, written to respond to the need of today's workplace realities, such as the rapid emergence of Artificial Intelligence which is playing an increasingly important role in managerial decision making, as well as by growing public concerns over the need for social and environmental protections in all forms of employment, stretching throughout supply and value chains.

Emerging legislation that will drive the third wave in the near-term include:

- Directive on An Adequate Minimum Wage (agreed)

- 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)

Each of these take a broad view of the social responsibilities of companies with operations in Europe, and elsewhere. They continue to expand corporate obligations beyond their doorsteps and beyond their traditionally defined employees. And several seek to expand, establish, and/or require new forms of collective representation as a counterpart to what is perceived, at least by some legislators, as management's failure to manage with the interests of all stakeholders in mind, and employee stakeholders in particular.

A word of caution.

Too often, the laws in question are advanced in isolation, each pushed by its own "champions" without consideration of the cumulative impact on business when they are aggregated. Sometimes, it seems, that some legislators believe that the business of business is "due diligence" rather than the creation of goods or services that people want to buy, thereby creating jobs in the process. If you take all the legislation under consideration, along with existing legislation on anti-competitive behaviour and the General Data Protection Regulation (GDPR), European-based companies are at risk of fines that would come close to 30% of the global turnover for breaching such regulations. Now, it is unlikely that a company is unintentionally going to breach every piece of legislation, but the cumulative effect of such fines is to create an environment which appears hostile to business. They give the impression that business is "tolerated" rather than encouraged. At a minimum, the sum total of potential fines from this emerging range of non-traditional obligations is an indication of the growing and intrusive burden on management's ability to focus on the business of business.

While we were writing this paper this newspaper article caught our eye:

> Swiss pumpmaker Sulzer is moving some investments to the US because of the green-tech aid included in President Joe Biden's subsidy framework. *Bloomberg* says Sulzer joins other European companies who say that the benefits of the *Inflation Reduction Act* are impossible to ignore. Sulzer's executive chairwoman Suzanne Thoma said that although energy prices in Europe have dipped somewhat, they are still well above those in the US and add to high labour costs, stringent regulation and strikes. "I'm worried about Europe," Thoma said.

Now we know that Switzerland is not in the European Union, but it is very close to it and follows most EU laws. What Suzanne Thoma says is what many other companies are thinking.

You are sometimes left with the impression that the main purpose of the regulators who implement the GDPR is not so much to make sure that personal data is handled by businesses and public agencies in a safe and secure manner by working with them to develop proper procedures, but instead it is to constantly look for something they have done wrong so they can be hit with multi-million euro fines.

Will the proposed law on Corporate Due Diligence result in European-based multinational companies facing a barrage of court claims from unions, NGOs, and civil society organizations

over alleged violations? Even if, in the end, the allegations prove groundless, how much time, effort and cost will have been wasted in defending such actions?

While the "third wave" of legislation provides for extensive employee information, consultation, and involvement, such information and consultation is of little benefit if companies decide that European has become overregulated and that business is best done elsewhere. We flag this as a concern that should be taken into consideration as legislation is written.

Wave 1: The 1970s and the First Social Action Program

The 1970s was a time of significant, turbulent, adverse economic change across Europe. 30 years of sustained economic growth was coming to an end, with oil prices rocketing as a result of the Arab-Israeli war.

Europe began to experience large-scale industrial restructuring. Job losses and unemployment became the new reality. Inflation took hold.

The Community's first Social Action Program (SAP) of 1974 was written in response to a call from the Heads of States meeting in Paris at the Summit of October 1972. This was the last Summit of the original six members of the European Union, France, Germany, Italy, the Netherlands, Belgium and Luxembourg. January 1973 saw the UK, Ireland and Denmark join. The "6" became 9.

The final communiqué from the October Summit said that the Member States "attached as much importance to vigorous action in the social field as to the achievement of economic union... (and considered) it essential to ensure the increasing involvement of labour and management in the economic and social decisions of the Community."

Accordingly, the Commission was instructed to draw up an SAP. By a Resolution adopted on 21 January 1974, the Council of Ministers approved the SAP involving more than 30 measures over an initial period of three to four years. The three main objectives were: the attainment of full and better employment in the Community, the improvement of living and working conditions, and the increased involvement of management and labour in the economic and social decisions of the Community and of workers in companies.

The Commissioner responsible for implementing the SAP was the first Irish Commissioner, Dr Paddy Hillery, later to become President of Ireland.

Laws on equality between women and men when it came to pay, working conditions, and social security coverage were key features of the first SAP.

The Collective Redundancies Directive and the Transfers of Undertakings Directive also came out of the first Social Action Program. Both provide for the "information and consultation of employees' representatives with a view to reaching an agreement" when job cuts or outsourcing were under consideration. The Collective Redundancies Directive continues to play an important role in European industrial relations to this day.

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. It was over-ambitious to begin with and ran into a wall of opposition

from employer groups concerned that it would impose German-style con-determination across Europe.

It was revised and "lightened" until it eventually ran into unremitting UK opposition when the Thatcher government took power in 1979 (*see later*). 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.

The first wave of EU information and consultation laws , especially Collective Redundancies, were a response to the threat of job losses as thirty years of continuing economic expansion came to an end. The Collective Redundancies law 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 their mandate ceased when the consultation was finished. As we will suggest later in this paper, the new "third wave" of EU employee information and consultation, because of the issues concerned, has potentially more long-term "stickability". Those elected will not have one-off mandates.

Wave One came to an end when, from 1979 to 1987, the UK systematically blocked all EU information and consultation initiatives because of the Thatcher government's ideological commitment to liberal and flexible labour markets.

Wave 2: Qualified Majority Voting Opens the Door

What changed matters, was the Single European Act (SEA). While the EU from its inception in 1958 had moved to eliminate customs barriers to trade between its Member States, such as tariffs on goods, the SEA sought to eliminate non-tariff barriers through, for example, the harmonisation of product standards and other regulations. If a product was approved to be placed on the market in one EU Member State, then it was approved for all Member States. Goods could move freely between Member States. However, the market for services still remained fragmented.

Such was the volume of legislation required to make the Single Market happen that Member States agreed that SEA legislation would be approved by qualified majority vote, a decisive move away from the unanimity principle that had previously held sway. When it came to the Single Market, no country had a veto.

It was agreed that workplace safety matters would be decided by qualified majority voting. This allowed for laws which mandated the establishment of workplace health and safety committees, a significant step forward for the information, consultation and involvement of workplace representatives.

However, employment laws were still subject to unanimity which meant that the UK still had a veto. This was to change with the Maastricht Treaty in 1992, the treaty that sets out the legal framework for the creation of the euro. Not only were most employment law matters moved to majority voting but is also contained a provision that the European-level social partners had to be consulted in the making of any employment laws and be offered the

opportunity of negotiating an agreement between themselves which could form the basis of a subsequent law.

The British government objected to both moves and famously "opted-out" of the social chapter of the Maastricht Treaty, as well as opting out of the euro. Looking back, the Maastricht Treaty gave renewed impetus to those in the UK who were always hostile to the European Union, believing it sapped UK sovereignty. Maastricht sowed the seeds of Brexit.

The social chapter of the Maastricht Treaty finally, in 1994, allowed for a law on the creation of European Works Councils to be adopted, some twenty years after the idea was first mooted in the 1970s. EWCs became a forum for information, dialogue and discussion. They were not decision-making bodies. They had no negotiating mandate. But they, nonetheless, opened up a new channel of communication between management and employees' representatives.

Unions thought that much had been achieved with the adoption of the Directive on employee information, consultation and participation in companies that could incorporate at European-level, so called SEs. But it came to little in practice as there simply has been no rush by European multinationals to opt for SE status.

The Framework Information and Consultation Directive, seen as an attempt to introduce works councils into those countries without them, has produced little. Why this Directive has had so little impact is difficult to explain. It seems to us that it offered little to employees beyond a forum for general discussions around the wellbeing of the company. Most US multinationals, for example, have plenty of other channels for such discussions. [NOTE: This confuses me. Other channels with employees? Is it unique to US multinationals?] I+C Fora would have added little. As we discuss later in this paper, this could now change and the I+C Framework Directive could come into its own. But, as an Irish politician once said, "All predictions are hard, but trying to predict the future is even harder, so best avoided."

2009 saw the "recasting" of the European Works Council Directive. While the unions saw it as the breakthrough they needed to make EWCs powerful industrial relations actors, the changes turned out to be relatively small-scale in practice and employers came to live with it fairly quickly.

Despite current attempts to yet again rewrite the EWC Directive (*see later*), it is unlikely that EWCs will ever become more than fora for transnational dialogue and discussion. There are simply too many structural obstacles in the way of them becoming anything more than that. EWCs would be best served by an acceptance that they are what they are and stop trying to make them something they will never become.

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, European Works Councils and employee involvement in companies registered under the European Company Statute, are just too divorced from day-to-day realities. Outside of the Brussels industrial relations bubble, no one pays attention to them. Where are the reports of employees waiting with bated breath for the return of their EWC representative?

Until now, the Framework Directive on Information and Consultation has been too unfocused, too general to excite interest. Now, that may change.

Brexit: A Prelude to Wave 3

In a recent **article** in the *New Statesman,* Wolfgang Münchau says

> The UK had an opt-out from the euro and the Schengen passport-free travel zone. It also had opt-outs of sorts from the Charter of Fundamental Rights and the entire area of internal security and justice. The UK was not really a full member in the last 20 years of its membership.

I would argue that the UK, during its fifty years of membership, was never committed to "Social Europe", the idea that Europe could not just be a commercial market but also had to have a social dimension that looked after its citizens in their everyday lives.

In the 1970s, the then Labour governments were hostile to anything and any law that could be seen as undermining the dominant position of trade unions as the voice of employees in the British workplace.

It is well known that when Margaret Thatcher became prime minister in 1979, she was determined to rewrite the UK's "social contract" to severely limit the power of the unions and to usher in a liberal, lightly regulated labour market. She was insistent that what she was doing in the UK was not going to be undermined by the EU through the back door and instructed her ministers to systematically block any proposed EU employment law. For that reason, you will find little employment law on the EU statute books from the period 1979 to 1988. During those years, all laws had to be agreed unanimously. Thatcher had a veto.

What changed matters was the Single European Act, largely pushed by Thatcher and her EU Commissioner, Arthur Cockfield. In her 1988 speech opening the Single Market Campaign in the UK, Thatcher said:

> Just think for a moment what a prospect that is. A single market without barriers—visible or invisible—giving you direct and unhindered access to the purchasing power of over 300 million of the world's wealthiest and most prosperous people. Bigger than Japan. Bigger than the United States. On your doorstep. And with the Channel Tunnel to give you direct access to it. It's not a dream. It's not a vision. It's not some bureaucrat's plan. It's for real. And it's only five years away.

UK Brexiteers have given this up in the hope that new trade deal with far-flung countries can compensate for renewed barriers to trade between the UK and the EU. To date, there is little evidence to support this view.

To get the Single Market legislation through, EU Member State governments agreed to move to qualified majority voting for such legislation. The then EU Commission President, Jacques Delors successfully pushed to have workplace health and safety measures adopted by such voting as part of the Single Market package.

Through that door came laws on maternity leave, workplace health and safety, giving us health and safety committees, and, more controversially, the Working Time Directive.

Thatcher was livid over the Working Time Directive, even though the UK had managed to secure an opt-out from the 48-hour maximum working week limit. She saw it as an employment law requiring unanimity, rather than a health and safety matter needing only a qualified majority. The UK government went to the European Court of Justice to have the Directive struck down. The UK lost comprehensively.

Thatcher went and was replaced by John Major who negotiated a UK opt-out from the social chapter of the Maastricht Treaty. Social laws adopted under the social provisions of the treaty would not apply to the UK. So, for example, the European Works Council Directive, adopted in 1994, did not apply in the UK.

At around the same time, the EU Commission challenged the UK's transposition of the employee information and consultation provisions of the Collective Redundancies and the Transfer of Undertakings Directives. The UK government argued that in the UK employee voice in the workplace was the exclusive prerogative of trades unions, where they were recognised. But, in line with UK voluntarist principles, an employer was under no legal obligation to recognise a trade union if they choose not to. So, if there was no recognised trade union, there was no employees' representative and, hence, no need for an employer to inform and consult in the event of collective redundancies or the transfer of undertakings.

The matter went to the European Court which ruled that in the absence of employees' representatives, a provision would have to be made in national law for the election of such representatives on an ad-hoc basis to be informed and consulted in the event of redundancies or the transfer of undertakings.

As we will see later in this paper, the new laws coming through will require the election of employees' representatives where they do not currently exist. Any argument that because employees' representatives do not exist and, therefore, there is no need to inform and consult, has been undercut by the European Court rulings in the UK collective redundancies and transfer of undertaking cases.

The Blair Labour government came to office in 1997 and reversed the Maastricht Treaty UK social policy opt out. Nonetheless the UK tradition of hostility to EU employment laws continued unabated. Certainly, the Blair government legislated for European Works Councils, but it should be remembered that it fought the Framework Information and Consultation Directive and blocked the adoption of the Agency Workers Directive for as long as it could.

As this quick sketch shows, ever since the UK became an EU Member State in 1973, it had 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 British are gone. They will not be coming back any time soon. Their concerns no longer matter. Legislation no longer has to be drafted in such a way as to anticipate UK objections.

The "flexible labour market" objections of the UK towards EU employment law are no longer holding "Social Europe" back. Which is one of the reasons we are seeing so many new laws coming down the track so quickly. The major roadblock is gone.

Brexit has given us a reinvigorated "Social Europe". Would the EU have been able to agree, as has done in the Adequate Minimum Wage Directive, a collective bargaining coverage target of 80% of the workforce if a UK Conservative government had have been sat around the Council table? The question almost answers itself.

Wave 3: Now Onwards

As referenced earlier, there are a number of new laws working their way through the EU's legislative procedures that provide for extensive employee representative information, consultation, and involvement. By involvement we do not mean co-determination, thought that is *de facto* if not *de jure* what the European Parliament would like to see happen with European Works Councils through their ability to seek injunctions and block management decisions until acceptable terms are agreed.

By involvement we mean that management will have to engage with employees' representatives in finding solutions to issues such as the elimination of gender pay differentials, human involvement in Artificial Intelligence decision making, or the effective implementation of due diligence in global supply chains. Simply asking for an opinion will not be sufficient. "Wave 3" information and consultation will be information and consultation with a good faith obligation to seek to reach an agreement.

Employees' representatives will need in-depth training if they are to be able to engage meaningfully in these processes. Otherwise, there is a risk of "capture" by outside, fee-oriented "experts" with their own commercial agenda but presenting themselves as "social justice crusaders". Management will need to insist that the dialogue is between them and the representatives of their employees. Where experts are involved, they should only be involved as advisors to the employees' representatives with no standing to engage directly with management.

Even though in many European countries legal frameworks exist for the election of workplace representatives, not every workplace has such representatives. Employees often do not avail themselves of the right to elect representatives. The legislation discussed below will require the presence of representatives. If employees want to be involved in the process, then they will have to make use of the processes already provided for by legislation. We may see works councils coming into existence where none currently exist. But this is by no means a given. Employees in many locations may simply decide to let these things pass they by.

There are also many EU Member States with low trade union membership and where alternative workplace representative structures are not widespread. Ireland is one such example, but this is also the situation in many Central and Eastern EU Member States.

As will be seen, many of the new pieces of legislation under discussion call for information and consultation with employees' representatives. The issue employers will face is this. Do you want one group of representatives to deal with gender pay, another to deal with the rights of digitally-employed workers, a third to be involved in supply chain issues, a fourth to deal with AI issues in general? Or do you want one group to take responsibility for all information and consultation processes?

If the answer is the latter, one overarching group, then there is already an answer in the 2002 General Information and Consultation Directive, as transposed into national law. We noted earlier that there was not any significant number of I+C Fora established under this legislation largely because, as we suggested, it was vague and unfocused. With the new legislation, there are focused, and specific issues employees' representatives can engage with. Trying to eliminate gender pay differentials will encourage many to get engaged.

Thinking ahead, we would recommend that employers look afresh at this legislation and see whether they could make use of it to meet the new information and consultation obligations coming down the road.

In the next part of this paper we look at the information and consultation obligations in the legislation under consideration. The texts of the Directive on An Adequate Minimum Wage and Gender Pay Transparency Directive are agreed. The others are still under consideration. Whatever changes may be agreed in the final texts on Platform Workers, AI/AI Liability, and Corporate Due Diligence we expect they all will include strong information and consultation obligations.

The New Legislation

Directive on An Adequate Minimum Wage

The primary purpose of this legislation is to ensure that Member States have frameworks in place to ensure that workers are entitled to an "adequate" minimum wage, whether provided for through law or collective agreements.

The Directive also calls on the governments of Member States to devise action plans to bring collective bargaining coverage up to 80% of the workforce where it falls below this threshold.

We have always been sceptical about how realistic the 80% objective is, especially as there is little evidence of any upsurge in union membership, which continues to decline across the European Union. Unions may argue that a return to sectoral bargaining is the answer, but where such bargaining does not already exist employers are unlikely to agree to it, preferring instead to manage pay and working conditions at the level of the individual enterprise. Further, younger workers, who use social media as their preferred mode of communication, would not take kindly to having their pay and working conditions determined for them by organisation of which they are not members and in which they have little interest.

Many younger workers just do not see the need for unions, and unions have failed to craft a value proposition that appeals to them. As long as unions continue to use language such as "worker power" and "confronting global capital", suggestive of a visceral hostility to the employers who create the jobs in the first place, so long will they continue to decline.

Further, economic leverage through strikes was what gave unions the power to bring employers to the bargaining table. But outside of the public sector, strikes are an increasingly ineffective weapon. Strikes work when economies are closed and business is done inside protective tariff walls and regulatory barriers. They are less effective when employers have an "exit" option, the ability to move production offshore to more cost-effective locations. Which faces unions with the dilemma: strike and there may be no job to go back to. Or, more likely, strike, and future investment will go elsewhere, and jobs will disappear over time.

For the unions, the answer to this dilemma is more legal powers, more obligations on employers to inform and consult across a range of issues before decisions are made. As the European Parliament recommendations for a further revision of the European Works Council Directive proposed, such legal powers should include a right for EWCs to be able to ask courts to stop employers implementing decisions if they think they have not been properly informed and consulted. (*See later in this paper*).

However, the problem for the unions is that if employees' representative bodies, such as works councils or elected fora, are increasingly given legally based information, consultation, and involvement rights (*see later on Gender Pay Transparency)* why would they need unions? The unions can argue that they bring expertise to the table, but so do consultancy cabinets and independent experts. Consultants and experts do not have political agendas, as unions tend to have. Increasingly educated workforces to not need unions to tell them what to think about their relations with their employers. They are more than capable of working it out for themselves.

What do union officials know about Artificial Intelligence and the use of algorithms in human resource decision making, or the sociological reasons for gender pay differences, or the complexity of relationships in global value chains beyond simple, formulaic slogans? Collective bargaining is not and cannot be the answer to very problem.

Could the truth be that the days of private sector collective bargaining are over? That unions and collective bargaining were primarily rooted in mass, male-dominated manufacturing industries, the docks, coalmining, transport and other such occupations which offered stable, lifetime employment, and which also facilitated stable, lifetime union membership? And which were deeply rooted in local communities? Men lived, worked, drank, and played sports together.

Could it also be the case that human resources managers have become adept at "managing discontent", identifying problems at source, and dealing with them become they can become acute. Artificial Intelligence systems will only make the ability to do this all the easier.

The Adequate Minimum Wage Directive does not mandate any new information and consultation obligation at enterprise level *per se*. What it does do it to suggest a direction of travel on the part of the European institutions, a desire to rebuild the labour relations collectivism of yesterday in which trade unions were dominant.

We are all creatures of habit. Where unions and collective bargaining exist, they will continue to exist because the actors have learned their lines and they all know their parts in the play. But where unions and collective bargaining do not exist, they are unlikely to make an appearance. At best, small walk-on parts but the days of taking centre stage are gone.

Collective bargaining was rooted in time, place, and structures which have passed. For now, no one has found the answer to the riddle of how to rebuild long-term union collectivism in private sector workplaces when the circumstances in which such collectivism first appeared seem to have passed. Flogging dead horses and hoping they will magically come back to life is not the answer.

Gender Pay Transparency Directive

According to the European Commission, the gender pay gap across Europe is 13% despite legislation having been in place for many years mandating equal pay between men and women for work of equal value.

The Directive gives employees the right to receive information on pay, and to challenge any discriminatory practices they may encounter. They may ask for such information through representatives.

Such data will also have to be made available to job applicants. Job applicants may not be asked about their pay history.

The Directive requires companies with over 250 employees to disclose pay information by gender and grade on an annual basis. Companies with fewer than 250 employees will have to do so every three years.

Where the annual report shows a gender pay gap of more than 5%, and if the gap cannot be justified on a gender-neutral basis, or closed within 6 months of having been identified, the management will have to engage in a joint assessment with employees' representatives to determine the reasons for the gap and to develop an action plan to close it.

As the Directive says:

> 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 pay assessment is to 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:

- an analysis of the proportion of female and male workers in each category of workers;
- information on average female and male workers' pay levels and complementary or variable components for each category of workers;
- identification of any differences in average pay levels between female and male workers in each category of workers;
- 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;
- 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;

- measures to address such differences if they are not justified on the basis of objective and gender-neutral criteria;
- an evaluation of the effectiveness of measures from previous joint pay assessments.

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 human resource decision making.

The final bullet point quoted above "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 seems to us that, given the complexity of the joint pay assessment, employees representatives are going to need in-depth training if they are to contribute to the process. We would caution against "outsourcing" this work to outside consultants. Where gender pay gaps exist then finding ways to close the gap should be "owned" by management and employees' representatives and not seen as some technical exercise that can be handed off to experts.

The Employment Status of Platform Workers

The EU estimates that there are about 24 million workers in the gig economy or working through digital platforms. This will reach 40 million in the next few years.

This Directive seeks to give legal certainty to the employment status of such workers, whether they are employees or self-employed. Irrespective of their status, it also seeks to ensure that they are provided with appropriate job protections, health coverage, and social security entitlements.

As the time of writing, the Directive is still very much under discussion. The European Parliament has signed off on its version of the Directive, which we use for the purpose of this discussion. The Council of Ministers has yet to reach agreement on its version. Once it does so, the Parliament, Council, and the Commission will open negotiations with a view to arriving at a common position.

The most contentious issue is whether there should be a presumption of an employment relationship between platforms and those that work through them, unless the platforms, with the burden of proof falling squarely on the platforms, can prove otherwise, and sustain the position that those who work for them are self-employed.

The Parliament leans heavily towards a presumption of employment, even if everyone in the Parliament is not happy with this position. The Council of Ministers seems more divided on the matter. As noted above, the European Commission estimated that there are around 24 million workers earning income through the platform economy. Many of these are from marginalised communities, often shut out from the regular labour market. Gig work is seen by many governments as a pathway into the workforce for them, and they are concerned that giving way to demands that employment status should be the default position could be damaging. At the same time, governments are also concerned that gig economy work should not be part of the informal economy work, depriving tax and social security authorities of revenue.

Whatever the outcome of the debate between the European institutions on the question of employment status, it seems to us that there will not be any great difference of opinion between them on the need to inform and consult representatives of platform workers, whether employed or self-employed. The European Commission has already said that it no longer sees European competition law as a barrier to solo self-employed workers organising and bargaining collectively. If such workers can bargain collectively, then there can hardly be objections to their representatives being informed and consulted. The question remains, however, whether an independent contractor can be obliged to accept terms and conditions to which they do not agree as indivdiduals. How can employers bargain with “representatives” if the represented are not bound to the deal?

For the purposes of this paper we are working off the European Parliament’s draft. We will update the paper when a Directive is agreed between the institutions.

The European Parliament says that a digital labour platform includes any "*internet-based companies that organise the work provided by workers or self-employed people to third-party clients and serve as intermediaries between the workers and the clients*".

For the Parliament, a "digital labour platform" now includes any commercial service which:

- is provided, at least in part, at a distance through electronic means, such as a website or mobile application;
- is provided at the request of a recipient or involves the allocation of work through an open call; and
- involves the organisation of work performed by individuals irrespective of the location or contractual designation of the relationship.

This pushes the definition of platform workers well beyond the Ubers and Deliveroos. It would appear to include any solo self-employed worker engaged directly by a platform or by a business through a platform or even potentially through an employment agency.

The Parliament's text defines workers "representatives' as 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, depending on how national laws deal with the issue. This has already happened in France where "social dialogue" structures between platforms and elected workers' representatives have been established.

The Parliament wants to see platform workers, however defined, have full collective bargaining rights. Further, it wants to see union officials have both physical and digital access to such workers with a view to organising them. In many EU countries, such a right does not currently exist for unions to access non-platform workers. Were such a right to be included in the Platform Directive it would set a precedent.

> 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' representatives have the right to access platform workers, including through digital access, for the purpose of organising their representation.

The Parliament's draft also seems to bring EWCs into the picture (our underlining below). The language goes beyond what is found in the 2009 EWC Directive. Further, it should be noted that Directive 2002/14/EC, the Framework Information and Consultation Directive, defines consultation as "with a view to reaching an agreement on decisions within the scope of the employer's powers." Referencing the two Directives, the EWC Directive and the Framework Information and Consultation Directive, in the way it does could easily lead to the conclusion that agreement is required with the EWC on the subject matters referred to. This would be all the more the case if the Parliament's proposals for a revision to the EWC Directive, based on the Radtke Report, were to be adopted (*see later).*

> Without prejudice to the rights and obligations under Directives 89/391/EEC, 2002/14/EC and <u>2009/38/EC</u>, 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.

Information and consultation with the representatives of platform workers must cover

> 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.

Further, all AI decisions must be subject to human oversight and the final decision must be taken by a human decision maker.

> 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.

As noted earlier, the definition of platform worker is extensive and stretches way beyond the "Ubers" of this world to include many solo self-employed workers.

The language used in the Parliament's draft is sufficiently malleable to extend the remit of existing information and consultation bodies, such as EWCs. While it can be argued that the courts would shut down any attempted "mission creep" on the part of EWCs, that would only hold if the EWC Directive stays the way it is. Were "Radtke" inspired reforms to be enacted, then the dividing line between European and national information and consultation processes would be significantly eroded. It is, of course, entirely proper for European legislators to make such decisions, but they should be fully aware of what they are deciding, rather than later being blindsided by unintended consequences.

The AI Act

The Act, which will be a Regulation applying across the whole of the EU without the need for transposition into national laws, defines "artificial intelligence" as a system that can, with human oversight, perform tasks that would normally require human abilities such as learning, reasoning, perception, and self-correction. The Act prohibits certain AI practices, such as creating or deploying AI systems intended to cause harm or that have a significant impact on fundamental rights, such as freedom of expression or privacy.

The Act adopts a risk-based approach to AI regulation, requiring more stringent measures for high-risk AI applications, such as biometric identification systems and critical infrastructure control systems. Human resource decisions are regarded as high risk.

The Act requires human oversight for AI systems, meaning that a person must always be able to understand, intervene and correct the AI system's decision-making. The Act requires AI systems to be transparent and explainable, meaning that the decisions made by AI must be able to be understood and traced by human users.

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.*

Consent comes from negotiation. It is a far cry from considering an opinion or even informing and consulting with a view to agreement. The legislative intent is again clear.

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 **here**.

It is unlikely that there will be a separate AI Workplace Directive. But we 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 proposed AI Liability Directive simplifies the legal process for victims when proving that a certain fault led to damage by alleviating the existing burden of proof. The AI Liability Directive will provide that where victims can show that someone was at fault for not complying with an obligation relevant to the harm caused and a causal link to the AI performance seems "reasonably likely", national courts can presume that the non-compliance caused the damage. This allows victims to benefit from the 'presumption of causality'. This does not preclude the liable person from rebutting the presumption, for example, by asserting that the harm was caused by another factor.

The Act will provide for means of redress for persons who believed they have been harmed by AI-based decisions.

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.

Employees' representatives' observer status appears to place them firmly within the definition of claimant. This puts them in a strong position to profit personally from the exercise of their representative duties.

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

The Directive will impose an obligation for companies to identify and address adverse impacts on human rights and the environment caused by their activities or by those of their business partners. Companies will be under a duty of care to take the necessary measures to prevent or mitigate such adverse impacts.

The "depth" of the due diligence obligation remains an open question for now. Will it extend to just first line suppliers or beyond that? How far down the global supply chain will the duty extend? Will it also extend to the "value chain" – what happens with a business's goods or services after they are sold? For example, is a company responsible for the use to which facial recognition technology might be put by the end user? If a bank lends money for a dam project, does it have a responsibility for the environmental consequences of the dam?

Who will have legal standing to bring complaints either through internal procedures or through the courts? What fines and penalties will companies be subject to for breaches of due diligence obligations?

The Council's current draft defines "stakeholders" as meaning

> 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;

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.

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.

It should be noted that *Directive 2022/2464 on Corporate Sustainability Reporting* already provides that:

> 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. Beyond the penalties, as with the other pending directives, the potential for employees' representatives to weaponize the complaint procedure has the potential to change the nature of representative-employer relationships significantly.

A Revised EWC Directive?

Introduction

On April 11, 2023, the European Commission opened a consultation process with the social partners, primarily BusinessEurope on the employer side and ETUC on the employee side, on a possible revision of the European Works Council Directive **here**.

The consultation was initiated in response to a set of recommendations from the European Parliament based on a report by the German MEP Denis Radtke, an ex-trade union official.

For added impact and in an effort to establish a case for change, the Commission emphasizes the urgency for substantive consultation in the context of the "twin transitions" driving "changes in the world of work" and "mitigation of the social and economic impacts of inflation and high energy prices." The "twin transitions" refers to the transition to a "digital" economy" and to a "green" economy.

The consultation process is undertaken in two stages. In the first stage the Commission identifies the issues that have been raised and asks the social partners if they think legislative action is needed. Once the social partners' responses are received the Commission will decide if action is needed and will put forward proposals for possible legislative changes. It will again consult the social partners and ask if they wish to negotiate an agreement between themselves on the matter in preference to the Commission bringing forward legislation. If the social partners were to negotiate and reach an agreement it could be given the force of law across the European Union.

However, the Social Affairs Commissioner Nicolas Schmit seems to think that such negotiations will not happen and has said that he plans to bring forward legislation before the end of 2023.

Numbers

The consultation document gives us some interesting numbers.

It estimates that there are around 1,000 EWCs in existence, meaning there is an EWC in about half of the companies in scope. Which begs the question: why not focus on encouraging the creation of EWCs in companies which do not have one as a priority rather than upending existing agreements through legislative changes?

Germany has 281 active EWCs, followed by companies with central management in the United States and France, with 184 and 134 EWCs respectively. At the same time, more than ten EU Member States have either none or only one established EWC body. Since the entry into force of the recast Directive, the creation of new EWCs has been rather stable, with slightly more than 20 new EWCs created each year. By sector of activity, the large majority of EWCs are concentrated in metal, services, or chemical companies. 22 companies have EWCs that work under the Subsidiary Requirements.

The consultation document notes that infringements procedures relating to the EWC Directive have only been opened against one country – Ireland – over its inadequate dispute resolution procedure. This could easily be fixed, but the Irish Department of Enterprise and Employment refuses to admit that there is a problem.

The Issues

The Commission says in the consultation paper that the following issues may need attention.

- the notion of 'transnational matter'.
- the definition of 'consultation'.
- 'confidentiality' restrictions.
- the framework for setting up EWCs (SNB timelines)
- enforcement (redress and sanctions, with reference to the possibility for injunctions and GDPR-size fines); and
- exemptions from the scope of the recast Directive

The last bullet point refers to a proposal from Radtke, based on trade union demands, that all "Article 13 agreements" be ended. EWCs are not trade union bodies. They result from agreements between employees' representatives selected/elected in accordance with national laws and management. If Article 13 agreements continue to work for them, why should they be ended at the demand of unions which are external to them?

What EWCs are Not

The consultation paper says that EWCs are different from national information and consultation bodies as they do not have a negotiating mandate:

> EWCs are not a negotiating body, and so have a different objective than information and consultation processes at national or local level which aim to reach an agreement between employees' representatives and management.

Further, it makes it clear that as the law stands EWCs do not take precedence over local information and consultation process and that the two can run in parallel.

> For reasons of effectiveness, consistency and legal certainty, there is an established link between European and national levels of information and consultation. This link may be specified in agreements establishing the EWCs themselves, with due respect of the provisions of national law and/or practice on information and consultation of workers. If the agreement does not cover this interaction, the process must be conducted both at national and European level in such a way that it respects the competences and area of action of the employee representation bodies. In any case, the EWC process shall be without prejudice to national information and consultation procedures set out in EU law. The European information and consultation process through the EWC is to take place either before or at the same time as the national information and consultation process.

In our view, the recommendations from the European Parliament run the risk of conflating European and national industrial relations processes to the detriment of both. This could be even more the case if trade union officials are given an automatic seat on EWCs as the Parliament recommends. As European trade unions represent, at most about 15% of workers in the European private sector, it is difficult to see why they should be automatically entitled to sit on every EWC, irrespective of the level of their membership in a company.

The distinction between the European and national level of employee representation needs to be strictly maintained.

Wrongheaded

Elsewhere we have written in detail about why the European Parliament's recommendations, based on the Radtke Report, are wrongheaded, damaging to European competitiveness, and designed to ensure that companies that do not have an EWC would not want to have one.

As soon as the Commission consultation paper was published the ETUC was quick to publish a comment https://www.socialeurope.eu/strengthening-democracy-at-work.

But private sector workplaces are not democracies in any meaningful sense of that word. Decisions are not made by majority rule or through a ballot box. They are entrepreneurial organisations which aim to make a financial return through the manufacture and sale of goods or the provision of services. Even in the few countries with board-level codetermination, the shareholders still have the final vote. Elsewhere there are consultation processes of various strengths, but the final decision always rests with management. EWCs are not co-decision makers with management.

EWCs can offer an opinion on decisions under consideration. But there has to be a proposed decision on which an opinion can be offered. Discussions never take place in a vacuum. The idea that management can talk with the EWC before a course of action has been mapped out simply does not reflect reality. This is particularly the case where central management is located outside the European Union.

No matter how much the Parliament/Radtke would wish it to be so, management, in a market economy, cannot be forced to act on the EWC's opinion. As things stand, neither European nor national politicians have any electoral mandates to fundamentally alter decision making structures in private sector companies.

"Consideration" of an opinion cannot be turned into an obligation to accept an opinion. Management cannot be obliged to change a proposed decision to accommodate the EWC. No tinkering with procedures can change outcomes which will always be dictated by economic and commercial realities.

Certainly, management should provide a written response to the EWC's opinion but having to do so is not going to change or frustrate the decision if the decision makes business sense, no matter how detailed the response. It would be irresponsible of management to prioritise the interest of one stakeholder – employees – over those of all other stakeholders.

Injunctions and Fines

The Parliament wants EWCs to have the right to ask courts to issue injunctions to prevent management implementing decisions when they believe that their information and consultation rights have been infringed. They also want fines equal to those imposed under the General Data Protection Regulation of either €20m or 4% of global turnover, whichever is the greater.

On what basis would courts grant injunctions? How are EWCs to show that their rights have been infringed? "Believing" that their rights have been infringed upon cannot be a sufficient basis. The real purpose of building injunctions into the Directive is to give EWCs negotiating leverage to demand agreements with management. Which assumes that an EWC can come to a common position itself on the decision under consideration. This is seldom the case as representatives from different countries may have different, even competing, interests. As the Commission rightly notes, negotiations with employees' representatives are restricted to

national level information and consultation processes where the issues in question are precise and focused.

There is also the legal complexity of commercial injunctions issued in one country being enforced in another. Just as European trade union federations cannot instruct national unions, in many multinational companies there are complex legal structures with "central management" not always being in a position to directly instruct local managements on how they should act. Local legal circumstances also need to be taken into account. The European Union still consists of 27 sovereign Member States, each with its own business and legal traditions, even if the EU provides a basic framework of commonality.

If injunctions were handed down, what criteria would have to be met to have them lifted? Could EWCs secure an injunction because they "believe" they have not been given enough information to form an opinion? How is a judge to decide what constitutes "sufficient information"? could an EWC get an injunction because they "believe" that their "expert" has not been given sufficient time to study the information provided? Could they get an injunction because they "believe" that management's detailed response to their opinion was not detailed enough?

What the Parliament/Radtke seeks to do is to turn what are "conflicts of interest" into "conflicts of rights" when in, fact, there are no rights at stake, just conflicting interests over contested decisions that management proposes to take. You cannot legislate away such conflicts.

Nor should management be obliged to pay for legal actions that EWCs decide to take, no matter how frivolous. When a dispute arises, EWCs should be able to access national mediation services and have access to labour courts. The use of such services should be free. Maybe consideration could be given to providing EWCs with a limited budget to pay for legal services. But the idea of an "open chequebook" at management's expense must be considered unacceptable. Create perverse incentives and they will be made use of.

Injunctions and GDPR-size fines should have no place in the EWC process when all that is at stake is a non-binding "opinion".

Precision

The consultation paper notes that the Parliament wants "precise and comprehensive" definitions of "transnational" and "consultation" introduced into the Directive. Yet all the Parliament can offer is to add more nebulous wording into what is already nebulous wording. Making nebulous wording longer does not make it more precise. There is a danger that disputes about "transnational" and "consultation" become theological.

If precise and comprehensive language is what is needed, there are many examples already to be found in EU employment law. The *Collective Redundancies Directive* establishes clear metrics and timelines to determine what constitutes a collective redundancy. Many negotiated agreements contain such metrics, defining in clear, numerical terms what constitutes "exceptional transnational circumstances", which is what is really in play when these matters are discussed.

Conclusion

It is not the purpose of this note to comment in detail on the consultation paper. Rather its purpose is to make the "philosophical" point that EWCs are not co-decision makers with management. All they can do is to offer a non-binding opinion, and no amount of procedural

tinkering will change that. As such, injunction and GDPR-size fines are inappropriate. The proposed changes are an attempt to use internal and external procedures to change outcomes that EWCs do not like. It is an attempt to turn conflicts of interests into conflicts of rights.

EWCs should be fora for dialogue, not confrontation.

Some of the provisions in the Directive could be more precisely defined, but such precision should be metric based. Just adding additional words creates more ambiguity and greater uncertainty.