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Recasting Worker Involvement?

Recent trends in information, consultation and co-determination of worker representatives in a Europeanized Arena

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In 'Recasting Worker Involvement?' a group of authors from especially Germany (Oldenburg) and the Netherlands (Groningen) analyses recent trends in worker involvement and the actual condition of Rhinelandic capitalism. In times of economic and financial crisis the role of the representatives of workers becomes a prominent topic. Worker involvement is related to consultation, information and co-determination rights of workers' representatives. The word recast has two meanings in this respect. In the first place it refers to the revision process of directive 94/45 on European Works Councils that is now concluded (directive 2009/38/EC) and the revision process of framework directive 2002/14/EC on information and consultation of workers, that has recently started. In the second place it refers to the consequences of these revision processes for worker involvement on the national, member-state, level. Relations between different representatives of workers will also be studied. What is for example the relationship between trade union representatives and works councils members? Two specific topics get most of the attention: restructuring of companies and data protection.

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Preface

Because of the international financial (and economic) crisis the role of the state and the role of other stakeholders in company law has got a renewed interest. Recently in May 2009, legislative activity of the European Community led to a new version of the directive on European Works Councils. This directive, 2009/38/EC, is called the re-cast directive. Directive 2002/14/EC concerning a general framework for informing and consulting employees in the EU is also under scrutiny. What is the impact of these discussions on national systems?

In June 2008 these European level developments and the situation of worker involvement in Germany and the Netherlands was the topic of an academic conference in Groningen. The contributions at this conference are at the basis of the articles collected in this volume. The idea for this conference in Groningen came about in the context of the Hanse Law School cooperation between the University of Groningen and the Carl von Ossietsky University in Oldenburg. The editors already cooperated in the so-called 'team-teaching' in national and international/European labour law. Filip Dorssemont from the Université Catholique de Louvain has had a large role in the idea of the conference and the preparation of the resulting book, recasting worker involvement.

It is with great pleasure that we present this volume in the series of the Institute for Company Law of the University of Groningen and the Erasmus University Rotterdam, the Netherlands. We have no doubt this book will be welcomed by legal professionals, academicians and administrators as a valuable recourse.

Groningen/Rotterdam, 2 July 2009,

Jan Berend Wezeman/Maarten Kroeze
Institute for Company Law

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Edgar Rose
Herman Voogsgeerd

Chapter 1
Introduction. Recent trends in worker involvement

Focus of the book

The purpose of this book is to study and analyse divergent national systems and recent developments of worker involvement in enterprises. The systems in place in several member states of the EU differ considerably. We will study some of the most eye-catching differences between systems of worker involvement in Europe. This concerns differences between so-called single channel (trade union as the only representative) and dual channel (trade union operating separately from relatively independent works councils) systems and differences within these systems.

Recent EU legislative activities are of the utmost importance here. The European Works Council Directive (94/45/EC) was modified in december 2008 and the new EWC directive 2009/38/EC is from the 6th of May 2009. The information and consultation paragraphs of this directive were changed substantially, although their impact is not yet clear. The Framework Directive 2002/14/EC concerning information and consultation in general is under review. The consequences of these two processes are dealt with in this book as well. Ales discusses the second directive and Dorssemont the first one.

The book is the result of a common Dutch and German conference that took place on June 19th, 2008 in Groningen. The organizers believe that in a world of accelerated economic globalization, social protection requires extra attention and proper development particularly in an international dimension. Labour law is, more than anything else, an important resource of social protection in times of rapid economic change. Among the branches of labour law, for several reasons the law of *worker involvement* plays an outstanding role as a subject of international research. Firstly, in crucial situations of economic change accompanied by e.g. mergers of large companies, processes of transnational restructuring, or, in the worst case, mass redundancies, the right of workers to be involved in decision-making is the centrepiece of social protection. Secondly, the differences between the legal institutions and the cultures of worker involvement in European countries are overwhelming. Any attempt to organize worker involvement on a transnational level therefore faces severe problems. Thirdly, the

European Union decided, nevertheless, to make cross-border harmonization of worker involvement the focal point of EU-labour law related to company restructuring. The two processes, mentioned above, are proof of this.

Current events add to the need for more research in this field. Recent developments in very diverse areas have consequences for the effectiveness of worker involvement. In the Netherlands discussions on the increasing dominance of shareholders in corporations started especially after the break-up of the Dutch bank ABN-AMRO, this dominance may make systems of worker involvement vulnerable. If boards of companies are increasingly under pressure from shareholders the influence of workers' representatives on these boards may weaken correspondingly. Trade unions in the Netherlands have demanded that trade unions and works councils be given more legal influence on the exercise of the managerial prerogative or on corporate governance. In Germany, comparable although not equal developments are taking place. Here, additionally, the declining influence of formerly powerful trade unions evokes significant change in the structures of worker involvement. The membership of trade unions and the coverage of collective agreements is constantly shrinking year by year. To stabilize their power German trade unions engage more and more in the important field of company restructuring that was traditionally under the responsibility of works councils. Social plans which in the past were, almost exclusively the domain of the works councils now not infrequently become a matter of collective agreements negotiated by trade unions.

In view of these different aspects, several academic approaches to the topic of worker involvement had to be combined in the conference of June 19th, 2008. The EU-perspective on harmonization of worker involvement was addressed by the conference contributions of Eduardo Ales, Andrea Ritschel/Katja Nebe, Werner Altmeyer, Filip Dorssemont and Hanny Schutte-Veenstra. Recent developments such as the adoption by the Council of Ministers of the European Works Councils Recast Directive are covered. From a comparative perspective Herman Voogsgeerd and Edgar Rose explored different dual and single channel systems of worker involvement in Europe. Finally, a comparison between the Dutch and the German system of worker involvement concerning two specific topics was started focusing on the fields of restructuring and privacy. Zef Even, Rainer Weinert, Catharina Jakimowitz and Britta Mester contributed to this part of the conference.

The conference contributions are collected in this book as the first documentation of new efforts to intensify the scientific exchange in legal research between Groningen and Oldenburg. The editors plan to continue this exchange with further conferences and publications in the area of labour law and social security law, especially regarding comparative research related to the Netherlands and Germany.

Worker involvement

In our view the notion of *worker involvement* particularly relates to information and consultation of workers' representatives. Information is defined in article 2, sub f of the directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community as the "transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it". Consultation on the other hand is related to the "exchange of views and establishment of dialogue between the employees' representatives and the employer" (article 2, sub g). It adds a truly interactive element. Apart from information and consultation rights, some countries have co-determination rights; these are not mentioned in the framework directive. In some national systems, such as the Netherlands and similarly in Germany, a right to consent exists. Workers' representatives such as works councils have the right to approve a limitative list of measures to be taken by the entrepreneur. We bring this kind of co-determination rights under the definition of worker involvement. This is a different kind of co-determination in comparison with the right to nominate workers' representatives in the boards of large corporations. This right will not be qualified as worker involvement, but as *worker participation* (in the decision-making process of the company). A fourth element of worker involvement is the right to monitor developments in the company. This right is easily forgotten. It nevertheless exists in a number of countries. For example, in the Netherlands the works councils have a legal duty to monitor the enforcement of the applicable collective labour agreements in the company. Also in other countries specific duties of monitoring exist.

Worker involvement, therefore, consists of information, consultation, the right to consent and the duty to monitor. The election of workers' representatives in the boards of large companies will be qualified as worker participation. Both will be covered in this book, but the focus will lie on worker involvement.

Who are *workers' representatives*? Mostly two actors are relevant here, trade unions and works councils. In countries, with a so-called dual channel system, conflicts between the two may come to the fore. In single channel systems it is a matter of internal decision for the trade unions how the information and consultation functions are separated from the bargaining functions. In dual channel systems works councils are not allowed to call a strike or participate at collective bargaining negotiations. Both are the prerogative of the trade unions. Works councils do have, however, independent rights protected by law in dual channel systems.

In the book the following questions will be answered:
Are the systems of worker involvement in Germany and the Netherlands still effective? What may be the influence of the EU (especially directive 2002/14/EC) in this respect? Is there a tendency towards convergence of the worker involvement systems thanks to EU directives and measures? What is in this

respect the role of the European Works Councils (EWC's) and workers' influence in the SE (Societas Europea)? Do countries in the EU learn from each other in this respect? These questions will be answered at the end of the book by Thomas Blanke and Wijnand Zondag.

Part I

WHO? ACTORS AND FUNCTIONS

Edoardo Ales

Chapter 2. Information and Consultation within the Undertaking: Employees' Right or Employer's Duty? Looking for effectiveness.

I. Information and consultation as a fundamental social right: looking for its meaning

As generally known, article 27 of the EU Charter of Fundamental Rights[1] (hereafter article 27) proclaimed at Nice on December 2000[2], provides for a "workers' right to information and consultation within the undertaking". Therefore, any investigation into the meaning and the effectiveness of this right at European level refers to article 27 as a conceptual framework for Community Law that has both preceded and succeeded it.[3]

Thus article 27 should in turn be conceptualised.

First of all, we must emphasise that the content of article 27 EUCFR is not consistent with its headline, the latter advocating a right to be informed and consulted, the former stating that information and consultation "must be guaranteed", although only "in the cases and under the conditions provided for by Community law and national laws and practices". Therefore, according to article 27, the fundamental right to information and consultation in fact represents a duty for the employer to provide this right. This is an extremely relevant conclusion since it requires, as the very core of the 'right', the employer to be active in delivering information and consultation, where Community Law and national legislations and practice so provide, whatever the attitude of workers towards them.

For this reason, one may argue, article 27 proposes, as an alternative that, "workers or their representatives" be informed and consulted: where no representatives can be found (at the appropriate level, in our case, the undertaking) then workers (as individuals or as a group) have to be directly informed and consulted. Which reveals the fact that article 27 does not seem to require workers'

1. On the EU Charter of Fundamental Rights see, among the others, T. Hervey, J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*, Hart Publishing 2003.
2. "Which shall have the same legal value as the Treaties": confront article 6 TEU as amended by the Lisbon Treaty 2007.
3. On the origin and on the essence of article 27 see T. Blanke, "Art. 27 of the European Charter: Information and Consultation at Enterprise level as a European Fundamental Social Right", in: *Diritti Lavori Mercati* 2003, 25-52.

representation at all the relevant levels in order to (inform and) consult the workforce. Neither a right to be represented nor a duty to establish a standing consultative body (within the undertaking) can be found in article 27.

Nevertheless, one may wonder whether workers' representation is truly not required to effectively guarantee the 'right/duty' to information and consultation laid down by article 27. Indeed, there is a case for some kind of workers' representation particularly where consultation is concerned, since it is difficult to figure out how workers as individuals and even as a group (huge as it may be) can effectively influence management decisions without relying on somebody competently committed to that task on an ongoing basis.

On the other hand, one has to be extremely cautious in emphasising the relevance of workers' representatives as far as the exercise of the 'right/duty' to information and consultation is concerned, since this might, as an unintended consequence, result in the separation of information and consultation; the former being in any case provided to the workers as individuals or group, the latter being delivered only if representatives are there. This has already happened with article 7 par. 6 of Council Directive 2001/23/EC which reads: "Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance (...).". Therefore, no consultation without representation.[4]

Alternatively inserting "workers and their representatives" as far as the entitlement to the 'right/duty' is concerned, would result in article 27 being likely to jeopardise the idea of information and consultation as a continuum.

This leads us back to the consideration that in order to effectively guarantee the 'right/duty' to information and consultation, some kind of workers' representation is needed and that the alternative referred to above may only apply in cases where the (extra)small size of the undertaking allows direct involvement to work in practice.[5]

Therefore, in my view, 'no consultation without representation' means that the 'right/duty' to information and consultation has to be seen as a continuum (workers' involvement in management decision making) that, in order to be effective ("has to be guaranteed"), must necessarily be supported by some kind of employees' representation, although all this is not explicitly affirmed by article 27. Consequently, when article 27 states that information and consultation has to be provided "at the appropriate levels", it also entails the requirement that employees' representatives are present at all levels at which managerial decisions are taken.

The fact that some kind of representation is needed is however confirmed in article 27 by the requirement that information and consultation be provided "in good time". In fact, preventive worker involvement clearly entails the presence of

4. For the ECJ creative interpretation of article 7 par. 6 see in the below II.
5. For instance 5 workers as it happens in Germany.

somebody who is acquainted with the subject matter on an ongoing basis, as, for instance, a standing consultative body could be.

II. Models for information and consultation provided for by Community Law before Directive 2002/14/EC came into force

II.1 Collective redundancies and transfer of undertaking directives as interpreted by the ECJ

The fact that the right to information and consultation has to be declined as a duty was absolutely clear to the legislature of the collective redundancies and the transfer of undertaking directives (now, respectively, 98/59/EC and 2001/23/EC).[6] Indeed, article 2 par. 1 of the former reads: "Where an employer is contemplating collective redundancies, he *shall*[7] begin consultations with the workers' representatives in good time with a view to reaching an agreement"; article 7 par. 1 of the latter states that: "The transferor and transferee *shall be required* to inform the representatives of their respective employees affected by the transfer (...)"; finally, article 7 par. 2 adds: "Where the transferor or the transferee envisages measures in relation to his employees, *he shall* consult the representatives of his employees in good time on such measures with a view to reaching an agreement.".

Moreover, it was also apparent, at least to the legislature of the collective redundancies directive, that information and consultation shall be considered as parts of a whole[8], thus enhancing workers' (representatives) involvement in such a critical phase of the employment relationship. On the other hand, this was not the case in Directive 2001/23/EC, advocating, as we have seen before, that consultation be restricted to employees' representatives, workers as individuals or as a group being entitled to information only.[9]

However, in its landmark decision[10] of 1992, the ECJ "refocused" the meaning of art. 7 par. 6 of Directive 2001/23/EC, by rejecting the opinion of the United Kingdom according to which: "the directive is limited to a partial harmonization of the rules relating to employee protection at the time of the transfer of an undertaking, that it does not require Member States to provide for specific representation of employees in order to comply with the obligations which it lays down and that the Community legislature itself envisaged the possibility that

6. See, C. Sachs-Durand (ed.), *The Situation of Workers in Restructuring in the European Union*, Presses Universitaires de Strasbourg 2004.
7. Emphasis always added.
8. According to article 2 par. 3: "To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations: (a) supply them with all relevant information and (b) in any event notify them in writing of (...)".
9. See art. 7 par. 6 quoted in the above at par. I.
10. ECJ 8 June 1992, C-382/92, *Commission* vs *United Kingdom*.

national law might not require employee representation within a transferred undertaking, as is clear from Article 6(5) (now article 7) of the directive." (points 13-14).

It did so on the grounds that: "The interpretation proposed by the United Kingdom would allow Member States to determine the cases in which employee representatives can be informed and consulted, since they can be informed and consulted only in undertakings where national law provides for the designation of employee representatives. It would thus allow Member States to deprive Article 6 (now article 7) of the directive of its full effect." (point 19). In fact, according to the Court: "The intention of the Community legislature was not therefore to allow the different national legal systems to accept a situation in which no employee representatives are designated since such designation is necessary to ensure compliance with the obligations laid down in Article 6 of the directive." (point 24).

Consequently, the idea that the right to information and consultation has to be interpreted as an employer's duty to involve workers in at least two critical phases of the employment relationship (collective redundancies and the transfer of undertaking) has been brought to its extreme consequences by the ECJ by deriving from it a duty for Member States to provide some kind of employees' representation, even though *ad hoc*, in order to guarantee the enjoyment of the aforementioned right.

Needless to say, any kind of representation, in order to effectively guarantee the 'right/duty' to information and consultation, shall be established at the appropriate level, this being in our view, within the undertaking affected by the collective redundancies or by the transfer.[11]

Information shall be provided and consultations shall begin in good time ("when an employer is contemplating collective redundancies", "before the transfer is carried out" and, as for the transferee, "in any event before his employees are directly affected by the transfer as regards their conditions of work and employment"), as now recalled by article 27.

Furthermore, what on the contrary, is not recalled by article 27, in both directives[12] consultation is provided for "with a view to reaching an agreement", thus confirming that the main aim of the Community legislature, as refocused by the ECJ[13], is to enhance the involvement of employees' representatives within the collective redundancies and the transfer of undertaking procedures from their very beginning and to try to find an agreement which will minimise the social impact of these procedures.

One may conclude that, taking into account the specific domains governed by

11. It is a matter of discussion whether national legislations, such as the Italian one, allowing trade unions representatives at national level to be informed and consulted if no representation is provided for within the undertaking meet directives' requirement.
12. Article 2 par. 1 dir. 98/59/EC; article 7 par. 2 dir. 2001/23/EC.
13. ECJ 8 June 1992, C-382/92, *Commission* vs *United Kingdom*; ECJ 27 January 2005, C-188/03, Junk with annotation by F. Dorssemont in *CMLR* 2006, 225-241.

Directive 98/59/EC and 2001/23/EC, Community law was already in line with the 'right/duty' to inform and consult as provided for by article 27, even going beyond it (a) by supporting worker involvement based on information and consultation seen as a continuum, (b) by considering the presence of some kind of employees' representation as being indispensible for realising worker involvement, and (c) by stating that consultation should result in an agreement.

II.2 The EWC Directive: one step back; one step forward?

The same conclusion cannot be reached when considering further developments in Community Law with a view to improving the right to information and to consultation of employees in a more general (and transnational) perspective. Even though article 1 par. 1 of Dir. 94/45/EC[14] reads that "a European Works Council or a procedure for informing and consulting employees *shall be established* in every Community-scale undertaking and every Community-scale group of undertakings", it also adds that this may only happen "where requested in the manner laid down in Article 5 (1)". That is "the central management *shall initiate* negotiations for the establishment of a European Works Council or an information and consultation procedure *on its own initiative or at the written request of at least 100 employees or their representatives* in at least two undertakings or establishments in at least two different Member States.".

Therefore, we have here an explicit reference to what is vividly named the "trigger" mechanism[15], strictly connected to a right to information and consultation (not a duty to inform and consult) which, in order to be effective, needs employee activation as far as the establishment of a standing representative body (EWC, in this case) or an information and consultation procedure is concerned. Once again, we are back to 'no information and consultation without representation'.

This is even more surprising since, as we have already emphasised, article 1 par. 1 of Dir. 94/45/EC clearly states "a European Works Council or a procedure for informing and consulting employees *shall be established* in every Community-scale undertaking and every Community-scale group of undertakings". Still, the same alternative provided by article 1 par. 1 and 6 par. 3 of establishing one (or more) procedure(s) for informing and consulting employees, does not seem to be of any help, since, according to article 6 par. 3, it shall however involve *employees' representatives* coming from the different Member States where the Group/Company is based.

If one compares this model to the one adopted by the Community legislature in the domain of collective redundancies and transfer of undertaking, one can easily draw the conclusion that a step back has been made from a 'right/duty' to

14. See on it M. Rigaux, F. Dorssemont (eds.), *European Works Councils. A legal analysis*, Antwerp – Groningen: Intersentia 1999.
15. See, for all, K. Sisson, The information and consultation Directive: "unnecessary" regulation or an opportunity to promote "partnership", *Warwick Papers in Industrial Relations* 2002 n. 67.