

SDC CGA 12 June 2014: agenda item 4 Rights to information and consultation

Discussion paper

This note attempts at framing the discussion on *how* to move forward the following objective in the SDC CGA workprogramme 2014-2015, i.e. “*to examine information and consultation rights with a view to improving the social dialogue, in particular in situation of restructuring*”.

As a first step, it was agreed to do a mapping exercise of the national rules governing information and consultation of workers and their trade union representatives – topics covered, legal nature of joint outcomes, timing i.e. before or after the changes, relevance of EU standards and definitions in this area. To this effect a questionnaire was sent out.

The discussion should also seek to build upon the common ground already identified regarding social dialogue and restructuring, albeit in a general fashion, in our joint documents such as the **response to the EC Green Paper on restructuring** (2012), the **Framework Agreement on quality administrations**, and the **policy guidelines on HRM to better anticipate and manage change** (2014) and during three exchanges of views with the European Commission.

This common ground can be summed up as follows:

- ✓ an effective social dialogue at national level is a matter of fundamental human rights¹, is central to high quality working conditions and a high quality central administration and to an effective anticipation and management of change (Framework Agreement, Policy Guidelines, Response to EC Green Paper);
- ✓ Complementarity of both the social dialogue at national and EU levels. This is all the more relevant in view of the new EU economic governance, via the European semester and country specific recommendations, that puts public administration reforms centre-stage.
- ✓ The *Europeanisation* of public administration reforms is not supported by the EU legal framework on information and consultation rights which has been devised, to a large extent, for companies (discussions with EC), see annex;
- ✓ Public debt crisis-related restructuring has taken place with little or no information and consultation of the trade union representatives, the social dialogue in the public sector has been sidelined (EC). Yet, the best long-term, proactive approach to restructuring and change should integrate social dialogue based on trust between employers and trade unions, and respect for trade union rights (Response to EC Green Paper, Policy guidelines);
- ✓ The trend towards aligning working conditions and employment status in the public sector towards those of the private sector has accelerated and intensified (e.g. job security). This makes it both legitimate and necessary to ensure that public sector employees have, at least, the same rights as in the private sector (EC).

It is also reminded that the HRM guidelines invite social partners at national level “*to define a social dialogue framework with trade union organisations to step up timely social dialogue with respect to any change in the organisation of work, employment and contractual relationships before, during and after the implementation of these changes*”.

On top of the above, last December the Commission adopted a **Quality Framework on Restructuring and anticipation of change** (QFR) that, for the first time, applies to both the public and private sectors; which is no doubt thanks to the visibility of the SDC CGA work. The

¹ Inter alia, Article 27 of the EU Charter of Fundamental Rights; articles 21 and 29 of the revised European Social Charter (Council of Europe); articles 17 and 18 of the 1989 Community Charter of fundamental social rights;

QFR invites social partners to draw up and negotiate at the relevant level frameworks of action on anticipation of change and restructuring. A review of the application of the QFR is foreseen for 2016 that might lead to a legal act, as called for by Parliament (2013).

Importantly, the QFR also confirms the Commission will consult social partners on the **consolidation of three directives** dealing specifically with workers' rights to information and consultation (please see annex) and that it envisages to cover public administration via sectoral social dialogue, i.e. the SDC CGA as well as in local and regional government.

The Consultation is due to be published later this year, as announced by the Commission at the 24 March SDC CGA meeting. At that meeting, the Commission also underlined that voluntary initiatives to improve the anticipation and management restructuring have led to little results. Most of the time good practices in companies are triggered by law or collective agreements.

At the 12 June meeting, we propose to discuss the following:

- ✓ The legal framework at national level governing information and consultation rights and changes that have accompanied austerity measures on the basis of the replies to the questionnaire;
- ✓ why despite binding legislation or collective agreements, and EU or European standards on workers' rights to information and consultation, there has been little or no social dialogue on recent major restructuring such as pay cuts, job cuts, merging of services (shared services), outsourcing, decentralization, internal flexibility (increased working time)? How can we redress the situation? On the basis that these reforms have both deepened and accelerated as a result of EC intervention, how can we anticipate and manage them?
- ✓ To try and identify a common ground to improve information and consultation rights that in the main would aim at:
 - better anticipating and managing change
 - preserving jobs (redundancies as a last resort measure), develop employability (reinforcing training and educational measures)
 - improving social cohesion and trust between employees and employers
 - increasing gender and generational diversity
 - Better managing psycho-social risks including health risks
 - Reinforcing fairness and offsetting consequences of restructuring
 - Developing a more comprehensive, modern approach to restructuring (scope) and to an effective social dialogue
 - Aligning or going beyond arrangements for the private sector
 - Others?

There is also the question of the added-value of keeping the upper hand on this dossier so that the specific interests and concerns of our sector can be best dealt with rather than being left to the Commission only (i.e. consolidation of the information and consultation directives and possible extension to public sector; application of the QFR)

Next steps:

Following the meeting on 12 June, it is proposed to start elaborating a mandate also in view of the upcoming EC consultation on the consolidation of the information and consultation directives and application of the Quality Framework on Restructuring . The mandate will be discussed next on 30 September.

Annex

Below is a short summary of the 3 directives dealing with information and consultation rights that will be subject to the abovementioned Consolidation. The meaning of consolidation is itself open to interpretation, in theory it should not entail substantial changes whereby the directives would be merged into a single one, in practice it might well entail changes in content as the scope and definitions differ from one directive to another. To note that other directives deal with information and consultation rights such as the European Works Council directive or directives regarding health and safety and gender equality that do have provision on social dialogue but these are not in the radar of the Commission.

Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community

<http://eur-lex.europa.eu/legal-content/EN/ALL/?jsessionid=phk4TPtGT5HK4SCZfLsQyLFbLjxgxYcBtyWhqvj9JbLKRYyGy8LG!2043381171?uri=CELEX:32002L0014>

The directive provides for minimum standards of information and consultation rights on recent and probable change in relation to the economic activity and employment, in particular where there is a threat to employment, and substantial changes in work organisation or in contractual relations.

Its application to public administrations has been controversial and subject to court cases. What the text of the directive says:

The directive applies to "undertaking" i.e. a public or private undertaking (of at least 50 employees) carrying out an economic activity, whether or not operating for gain, and establishments (of at least 20 employees). In theory, providing that administrations can be deemed an undertaking, there is no exclusion of public administrations. Only a handful of governments have however implemented the directive in their administrations (mainly Nordic countries).

Preamble 20 states that the directive takes into account and is without prejudice to other national measures and practices aimed at fostering social dialogue within companies not covered by this Directive and within public administrations.

The only sector explicitly excluded is vessel crew plying the high seas. This loophole is being closed via a draft amending directive that extends the scope of the 2002 directive to vessel crews (fed into by the relevant sectoral social committee).

Information is defined as: 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 means the exchange of views and establishment of dialogue between the employees' representatives and the employer.

Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

Consultation shall take place also at such time, in such fashion and with such content as are appropriate, at the relevant level of management and representation, depending on the subject under discussion; and in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c).

Council Directive 98/59/EC on the approximation of the laws of the Member States relating to collective redundancies (recast of 1975 directive)

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31998L0059>

Here, it is clearly stated that the Directive shall not apply to: (b) workers employed by public administrative bodies or by establishments governed by public law (or by equivalent bodies); (c) the crews of seagoing vessels.

Information and consultation

Article 2

1. Where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.
2. These consultations shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant.

Member States may provide that the workers' representatives may call on the services of experts in accordance with national legislation and/or practice.

3. To enable workers' representatives to make constructive proposals, the employers shall in good time during the course of the consultations:

Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (recast of 1977 directive)

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0023>

The aim of this Directive is to protect employees in the event of a change of employer following a transfer of undertaking. It specifies the rights and obligations of employers affected by the transfer.

The Directive applies to all undertakings, public or private, which are engaged in economic activities whether or not they are operating for gain. An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive. In other words internal transfers within public administrations are not covered.

The transfer of an undertaking or an establishment may be the result of a legal transfer or merger. Following a transfer, the transferee of the undertaking becomes an employee of the undertaking transferred by the transferor.

In these circumstances, the rights and duties of the employment contracts of the employees from the transferred undertaking will be recognised. This Directive applies to all types of employment relationships, without distinction in relation to:

- the number of working hours, performed or to be performed;
- the type of employment contract (undetermined, fixed-duration, or temporary).