It's Good to Talk … Isn't It? Legislating for Information and Consultation in the Irish Workplace

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Introduction

The Irish industrial relations (IR) system has traditionally been characterised as "voluntarist". This means there is a relative absence of legal intervention in collective employment relations. There is no obligation on employers to recognise a trade union for collective bargaining purposes, for example, and collective agreements are generally not legally binding.[1] Regardless of whether or not a trade union is present in a workplace, legally grounded employee rights to information and consultation, or to input into organisational decision-making, in Ireland have been traditionally rather limited. In this context, the passing, in 2002, of the Information and Consultation Directive[2] (hereinafter "the Directive"), opened up the possibility of considerable adjustment to the Irish model of IR. This article examines the transposition of the Directive by means of the Employees (Provision of Information and Consultation) Act 2006 (hereinafter "the Act") and assesses the extent to which the legislation is likely to be successful in securing robust information and consultation rights for Irish employees in both unionised and non-unionised workplaces. In the case of the former, the implications of the legislation for trade unions will also be considered. The article is set out as follows. First, the voluntarist model will be outlined in more detail. Second, the background and context of the Directive and its transposition (in terms of the key provisions of the 2006 Act) will be assessed. Finally, the implications of the Act for greater employee involvement and input at organisational level (and its potential to "plug" the voluntarist gaps identified) will be examined.

Voluntary Health?

Traditionally collective employment relations in Ireland have been considered in terms of the relationships between employers and trade unions. In this context, voluntarism refers to a situation whereby employees have a constitutional right to form and join trade unions, but employers are not obliged to recognise such unions as having the right to represent their members in negotiations over employment issues.[3] Unlike the situation in the UK, for example, there is no statutory recognition scheme under which employers can, in certain circumstances, be mandated to recognise trade unions for bargaining purposes.[4] Where trade unions are recognised for bargaining purposes, no Irish provision exists equivalent to section 181(2) of the UK's Trade Union and Labour Relations (Consolidation) Act 1992 under which employers are obliged to disclose "certain specified information without which a union would be materially impeded in collective bargaining and which it would be in accordance with good industrial relations practice to disclose".

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[1] Anthony Kerr and Gerry Whyte, *Irish Trade Union Law* (Professional Books Limited, 1985).
[2] Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community OJ L80/02.
[3] Kerr and Whyte, note 1, at 15.
[4] Under the UK's Employment Relations Act 1999, employers can be forced to recognise trade unions for bargaining purposes where the majority of employees, and 40% percent of all workers in the bargaining unit, vote for union recognition.

Where collective bargaining does take place, it is important to note that, under Irish law, collective agreements reached have generally been regarded as non-binding.[5]

Certain exceptions to this general rule exist, such as where collective agreements are registered with the Labour Court.[6] Also, Joint Labour Committees (JLCs) provide for the fixing of minimum rates of pay and the regulation of employment in certain sectors where there is little or no collective bargaining and where significant numbers of vulnerable workers are employed (e.g. the Hotels sector).[7] JLCs set legally binding minimum wages and conditions of employment for workers covered. Collective agreements made by Joint Industrial Councils (JICs; voluntary negotiating bodies for an industry or part of an industry, designed to facilitate collective bargaining at industry level in certain sectors) are also registered with the Labour Court and are legally binding. [8] They generally exist in sectors with a relatively high level of unionisation (e.g. the Construction sector).

The Industrial Relations (Amendment) Acts 2001-2004 represent a recent attempt to deal with disputes in workplaces where no collective bargaining mechanisms are present. Under this legislation, an employer may be compelled to grant trade union representatives the right to represent unionised employees on workplace issues relating to pay, and terms and conditions of employment. The Labour Court can make a binding determination with regard to these matters, and to dispute resolution and disciplinary procedures, in the employment concerned but cannot provide for arrangements for collective bargaining.[9]

A defining feature of these situations in which employers can be compelled to negotiate with employees through their trade union representatives is that they apply, for various reasons, to fewer and fewer workers. Primarily, this is because trade union density has dropped considerably in Ireland over the course of the last twenty years and now stands at approximately 35% (in the private sector, the figure is approximately 20%).[10] Many organisations (particularly in the service industries) do not engage in collective bargaining and do not recognise trade unions. Efforts by the trade union movement to pursuade the legislature to introduce a mandatory recognition scheme along the lines of that in the UK have failed. A High-Level group was set up to examine the issue (under the social partnership agreement, *Partnership 2000*) and its views were incorporated into the framing of the Industrial Relations (Amendment) Act 2001. Trade unions had hoped to use this legislation, which does not, as noted, provide for collective bargaining, as a "springboard" to greater recognition rights. However, the legislation has been regarded as largely neutered in this respect

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[5] *Goulding Chemicals Ltd. v Bolger* [1977] IR 211. But see also *O' Rourke v Talbot Ireland Ltd* [1984] ILRM 587, where a collective agreement was enforced at the level of the individual contract of employment.
[6] Part III, Industrial Relations Act 1946.
[7] Part IV, Industrial Relations Act 1946.
[8] Part V, Industrial Relations Act 1946.
[9] Industrial Relations (Amendment) Act 2001, section 6(2).
[10] Brian Sheehan, "Union Density Drops 10% in a Decade" (2005) 35 *IRN* 12.

following the decision in *Ryanair v The Labour Court.*[11] There, the Supreme Court was critical of the procedures adopted by the Labour Court in hearing claims under the legislation; in particular, the Supreme Court felt that employees on behalf of whom claims were taken should ideally give oral evidence. The Supreme Court also ruled that the Labour Court had erred in law (due partially to its "mindset", which favoured the way particular expressions are used and particular activities are carried out by trade unions) in its interpretation of what was meant by "collective bargaining" and what constituted an "excepted body". The number of claims processed under the 2001-2004 Acts has fallen dramatically in the wake of the decision. In any case the legislation deals only with specific disputes, rather than ongoing employer-trade union/employee relationships. Finally, the JLC system came under threat in early 2008, as a result of a legal challenge by the Irish Hotels Federation (IHF) questioning, *inter alia,* the constitutionality of the Industrial Relations Act 1946, insofar as it empowers the Labour Court to issue Employment Regulation Orders (EROs) to set wages for sectors covered by JLCs.[12] The case was settled in relation to procedural flaws admitted by the Labour Court, and although constitutional arguments were advanced by the IHF, settlement was reached before they were responded to by counsel for the State. This, of course, leaves open the possibility of a further challenge in the future.

Given all of the above, some commentators have argued that it is now inaccurate to describe the Irish employment relations system as voluntarist, due to the decline in trade union density and voluntary collective bargaining, and the parallel expansion in individual employment rights, which has arguably resulted in a transition from a bargaining-based employment relations system to a rights-based system.[13] Redmond notes that the social partnership agreement, *Sustaining Progress,* launched a proliferation of regulation for Ireland's labour law.[14] However, she identifies three themes; first, the proposed laws almost exclusively concerned *individual* employment rights, second, the majority contained anti-discrimination measures, and finally, almost all were inspired (or required) by EU membership.[15] Thus, prior to the 2006 Act, employee rights to information, consultation and negotiation at work, outside of the floor of rights provided in certain areas like pay, remained largely determined by the parties themselves, with minimal legal intervention.

Given the trends in relation to union density, attention has recently shifted to obligations that exist on employers in *non-union* settings to inform and consult with their workers. Prior to the 2006 Act, the principal statutory

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[11] [2007] IESC 6. See Maura Connolly, "Industrial Relations (Miscellaneous Provisions) Act 2004—Implications for industrial relations law and practice of the Supreme Court decision in *Ryanair v Labour Court and IMPACT*" (2007) 4 *IELJ* 37; Michael Doherty, "Union Sundown? The Future of Collective Representation Rights in Irish Law" (2007) 4 *IELJ* 96.

[12] Any decision would most likely also have implications for the JIC system.

[13] Paul Teague, "New Developments in Employment Dispute Resolution" (2005) 4 *LRC Rev* 5.

[14] Mary Redmond, "The Future of Labour Law" (2004) 1 *IELJ* 3.

[15] And, as Hayes points out, much EU-inspired employment legislation itself relates to individual rights, such as equal pay, non-discrimination and so on; Brian Hayes, "Informing and Consulting Employees-Irish and EU Developments" (2005) 2 *IELJ* 89.

obligations arose in the context of the requirements of EU law. The Transnational Information and Consultation of Employees Act 1996 implements the European Works Councils Directive[16] and requires works councils to be set up for consultation purposes in specified large, transnational organisations. The Protection of Employment Act 1977 (as amended by the Protection of Employment Order 1996[17]) and the Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007[18] both oblige employers to consult with employee representatives with a view to reaching agreement on how collective redundancies should be effected. The European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003[19] give effect to the Transfer of Undertakings Directive,[20] which requires the appointment of employee representatives for information and consultation purposes in advance of the transfer, or sale as a going concern, of a business. The European Company Statute[21] provides for board-level employee involvement in certain, specified circumstances. Also, the Safety, Health and Welfare at Work Act 2005 requires consultation with employee representatives on various matters relating to health and safety in the workplace.[22]

Let's Get Talking: A Euro-vision

In virtually all of the situations outlined above, the worker rights are activated in the context of a specific employer-initiated event (e.g. redundancy, sale of a business) and therefore information and consultation rights tend to be temporary and *ad hoc*; what can be termed an "event driven disclosure model".[23] This model tends to focus on procedural justice in a specific context, is palliative rather than preventative, and rights granted under such a model have no continuous impact on the employment relationship. This contrasts with an "agenda driven disclosure model"[24] whereby the trigger lies within a bargaining/consultation *agenda*, and where information and

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[16] Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees OJ L254/64.
[17] SI No. 370 of 1996.
[18] Both of which take account of the Consolidated Collective Redundancies Directive, Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies OJ L225/98.
[19] SI No. 131 of 2003.
[20] Council Directive 2001/23/EC of 12 March 2001 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 OJ L82/01.
[21] Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees OJ L294/01.
[22] This Act further implements Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work OJ L183/89.
[23] Howard Gospel, Graeme Lockwood and Paul Willman "A British Dilemma: Disclosure of Information for Collective Bargaining and Joint Consultation" (2003) 22 *Comparative Labour Law and Policy Journal* 327, at 346.
[24] *Ibid.*

consultation rights cover a range of interlinked issues and involve an ongoing relationship between employers and employees.

In recent years, a key focus of EU policy debate has been the need to improve economic performance while maintaining and protecting labour standards and delivering "better jobs". The Lisbon Strategy seeks to make Europe the most competitive and dynamic knowledge-based economy in the world, and there is a view that increasingly what will differentiate European economies from low-cost competitors is the focus on "knowledge" and on exploiting the comparative advantage of better-educated European workforces (human capital). After all, the knowledge-based economy that the EU (and Ireland) is so keen to establish is inconceivable without the active involvement of individual employees.[25] The debate on worker participation is not just a recent one. As Barnard points out, the European Commission has had an agenda on worker information, consultation and participation, which stretches back some 30 years to the early 1970s.[26] Such a view is explicit in Title III of the Charter of Fundamental Rights, which specifically protects workers' rights to information and consultation within the undertaking[27] and Articles 137-139 EC, which promote "social dialogue". At Member State level, too, the vast majority of the "old" EU15 have long had in place mechanisms providing for information and consultation of employees at the workplace (for example, the statutory works councils that exist in Germany and France[28]). Ireland and the UK are the odd ones out here as neither country has a general, permanent and statutory system of information and consultation or employee representation. Nevertheless, the Irish social partnership process since 1987 (with its emphasis on encouraging partnership at the level of the enterprise[29]) has also been framed in terms of inclusiveness, participation and workplace democracy.

It is in this context that the Information and Consultation Directive was passed and transposed in Ireland by means of the 2006 Act. The primary purpose of the Act is to provide for the establishment of a general framework setting out minimum requirements for the right to information and consultation of qualifying employees, and to provide a general right to information and consultation for employees from their employer on matters that directly affect them. The article will go on to assess how robust these rights are likely to be in the context of the provisions of the Act. The likely impact of the legislation for trade unions (who may have hoped to use it as a platform to seek recognition and negotiation rights[30]) in qualifying organisations will also be considered.

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[25] Keith Sissen, *The Information and Consultation Directive: Unnecessary "Regulation" or an Opportunity to Promote "Partnership"?* (2002) Warwick Papers in Industrial Relations Number 67.

[26] Catherine Barnard, *EC Employment Law* (3rd ed, Oxford, 2006), at chapter 15.

[27] Article II-87.

[28] Andrea Broughton, "European Comparative Practice in Information and Consultation", in John Storey ed, *Adding Value Through Information and Consultation* (Palgrave, 2005). The practices of the "new" Member States are also outlined in the chapter cited.

[29] See section 9.15 of *Partnership 2000*; Framework V of the *Programme for Prosperity and Fairness*; Part 2, section 5 of *Sustaining Progress*; and Part 2, section 6 of *Towards 2016*.

[30] Maura Connolly, "Consultation With Employees" (2004) 1 *IELJ* 36.

The 2006 Act: Talking About a Revolution?

The Directive contains a general framework setting out minimum requirements for employee rights to information and consultation. Article 4 requires that employees have rights to *information* on the recent and probable development of the undertaking or establishment's activities and economic situation; rights to be *informed and consulted* on the situation, structure, and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment; and rights to be *informed and consulted* on decisions likely to lead to substantial changes in work organisation or in contractual relations, *with a view to reaching agreement*. The Directive was to be implemented by the Member States by March 2005 but for countries with no "general, permanent and statutory" system of information and consultation or employee representation (essentially Ireland and the UK) a phased introduction was permitted, with full application by March 2008.

The Irish legislation was passed in 2006 and came into force for undertakings[31] with at least 150 employees from 4 September 2006, for undertakings with at least 100 employees from 23 March 2007 and for undertakings with at least 50 employees from 23 March 2008.[32] The legislation, therefore, only applies to employees working in organisations with at least 50 employees. Some concern has been expressed in the UK about the exclusion of businesses with as many as, for example, 40 or 45 employees,[33] and this is especially relevant for Ireland, where there are well in excess of 200,000 small and medium enterprises, which typically each employ 27 people (and about half the national workforce in total).[34] An "employee" is defined in section 2 as someone "who has entered into or works under a contract of employment" and so, despite lobbying from the trade union movement, does not explicitly cover agency workers or others engaged in "atypical work".

Trigger Happy?

The Act provides for three types of information and consultation agreements, but significantly, rights under the Act must be "triggered". Section 7 provides that the employer may initiate negotiations or employees may request negotiations with the employer to establish information and consultation arrangements. The employer is only obliged to set up information and consultation structures where requested to do so by 10% of the workforce, subject to a minimum of 15 employees and a maximum of 100

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[31] The Directive offered a choice to Member States of applying its requirements to "undertakings" employing at least 50 employees or "establishments" employing at least 20 employees. An "undertaking" is defined as a public or private undertaking carrying out an economic activity, whether or not operating for gain (section 2).

[32] Section 4.

[33] Keith Ewing and G.M. Truter, "The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy" (2005) 68 *MLR* 626.

[34] See http://www.skillsireland.ie/press/reports/pdf/egfsn060512_sme_report_webopt.pdf (visited 18 January 2008). Note that the obligation to negotiate with employee representatives under the collective redundancies legislation applies to companies with 20 or more employees; section 6(a) Protection of Employment Act 1977 (as amended).

employees.[35] The unions have been particularly critical of this provision, arguing (in reference to the 10% of employees required to trigger a request) that there cannot be "a plebiscite on a right".[36] Hayes has argued that the Directive itself does not support the introduction of this "trigger mechanism".[37] The requirement for workers to trigger their rights under the Act is unusual, in the sense that it has never previously been a feature of Irish labour law.[38] However, where employers do not initiate the process it seems employees may have to fight to secure rights under the Act. In non-union workplaces (or, indeed, where unions do not promote the legislation) it seems unlikely many employees will be aware of their rights, and, even if they are, may be unwilling or unable to force their employer's hand. While the legislation contains protection against victimisation for employee representatives,[39] it is silent on protection for those seeking to establish arrangements. The situation may have been more favourable (at least in unionised workplaces) had trade unions been allowed to make applications on behalf of employees, but there is no provision for such an application. Speculation that employers are unlikely to take a proactive stance on information and consultation rights, as there is little expectation of employees requesting such rights, is supported by the (admittedly early) evidence.[40] Furthermore, for those employees who do attempt to access their rights and ask for information and consultation arrangements to be put in place, if the 10% threshold is not met (that is, where an insufficient number of employees support the request) 2 years must pass before a further request can be made.[41]

As noted, provision is made for three types of information and consultation agreements. Pre-existing agreements allow employers and employees and/or their representatives to customise information and consultation arrangements, either through the retention of existing arrangements or the establishment of new arrangements, prior to the date the Act comes into force for the relevant undertaking.[42] Such agreements must be in writing and available for inspection by employees.[43] The agreement must be approved by a majority of voting employees, (or through some other agreed mechanism[44]) but, again, only where rights under the Act are

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[35] Section 7(2).
[36] John Geary and William Roche, "The Future of Information and Consultation in Ireland" in Storey ed, note 28, at 186.
[37] Hayes, note 15.
[38] The Collective Redundancies legislation, for example, imposes an *obligation* on employers to inform and consult (Protection of Employment Act 1977, section 9). As Hayes points out, it seems odd that employees must trigger rights under the 2006 Act in relation to decisions likely to lead to substantial changes in work organisation or in contractual relations, whilst, in a situation where redundancy becomes a possibility, employers at some point in the consultation process would become *obliged* to inform and consult under the 1977 Act.
[39] Section 13.
[40] Tony Dobbins "Apathy Reigns on Information & Consultation, Despite Minister's Move" (2007) 12 *IRN* 1. See also Mark Hall, "A Cool Response to the ICE Regulations? Employer and Trade Union Approaches to the New Legal Framework for Information and Consultation" (2006) 37 *IRJ* 456.
[41] Section 7(8).
[42] Section 9.
[43] Section 9(2).
[44] Section 9(3).

"triggered", and may be for a specified term or open-ended.[45] The agreement must make reference to duration and procedures for renegotiation (if applicable), the subjects for information and consultation, the method and timeframe by which information is to be provided and by which consultation is to be conducted (including, in both cases, whether this is to be directly or through representatives, see below), and the procedure for dealing with confidential information.[46]

Section 8 provides for negotiated agreements (following an employee request or an employer's initiative), providing the employer and the employees and/or their representatives with the opportunity to devise their own tailor-made information and consultation agreement through negotiations. The agreement must be approved by a majority of voting employees or their representatives elected or appointed under the Act, or through some other agreed mechanism.[47] The agreements must make reference to the same issues as those outlined above in respect of pre-existing agreements.[48]

Both of these agreements fall some way short of the "Standard Rules" provisions of section 7, which, arguably, embody more accurately the spirit of the Directive.[49] This is a fallback position for setting up an information and consultation arrangement where the employer refuses to enter into negotiations or where the parties have entered into negotiations but cannot reach agreement within the specified time limit.[50] The key element in the Standard Rules is the establishment of an Information and Consultation Forum. Ballots for election to the Forum are to be organised by the employer,[51] or, in the absence of elections, representatives are to be appointed by employees by means of a procedure agreed with the employer.[52] This forum (detailed procedural rules for which are laid out in Schedule 1 to the Act) would meet at least twice a year, would be resourced by the employer, and, as such, would approximate in many ways a works council-type arrangement. Information must be supplied by the employer at the time, in the fashion, and with the content appropriate to enable the Forum to prepare for consultation. Unlike agreements under sections 8 and 9, the subjects for information and consultation are specified as including:

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[45] Section 9(5).
[46] Section 9(7). A view had been expressed (see Connolly, note 30) that the publication of the draft legislation would lead to many employers commencing the process of preparing a consultation agreement applicable to the needs of the local enterprise. This has not happened to any appreciable extent, (see Tony Dobbins, "Unions Hold Workshops on Consultation Law" (2007) 25 *Industrial Relations News* 20) possibly due to the fact that employers feel it is unlikely, for reasons outlined above, that employees will actually access their rights under the legislation. Two notable exceptions were agreements signed by Tesco (with the retail workers' union Mandate) and Hewlett Packard (with the Irish Bank Officials' Organisation-the IBOA).
[47] Section 8(3).
[48] Section 8(5).
[49] Mark Hall, "Assessing the Information and Consultation of Employees Regulations" (2005) 34 *ILJ* 103.
[50] 6 months, which can be extended by agreement between the parties; sections 7(6) and 7(7).
[51] Schedule 2.
[52] Schedule 1.

> (*a*) information on the recent and probable development of the undertaking's activities and economic situation;
> (*b*) information and consultation on the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment;
> (*c*) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations…

Furthermore, the Standard Rules explicitly require the engagement by the employer with employee representatives and rule out the "direct involvement" systems provided for in section 11. The latter has proved one of the more controversial provisions in the legislation. It provides that, for both negotiated and pre-existing agreements, employees may receive information and consultation either through representatives *or* directly.[53] To make a change from a system of direct involvement to one involving representatives, at least 10% of employees who operate under the direct involvement system in the undertaking are required to make a written request to the employer or to the Labour Court.[54] Any change must then be approved by a majority of the employees who operate under the direct involvement system.[55] This has become known as the "Intel clause" as it is rumoured to have been furiously lobbied for by the American Chamber of Commerce Ireland on behalf of US multinationals based in the country. In fact, the legislation, in practice, arguably privileges direct voice mechanisms as, if employers have the opportunity to comply with the *letter* of the law by using only direct arrangements, there seems little incentive to try and comply with the *spirit* of the Directive, which seems to promote a more process-driven, trust-based and representative model. Practically speaking, it is also difficult to see how a meaningful exchange of views and dialogue (the essence of consultation) can take place, or agreement be reached, *directly* in a medium-, or large-sized-organisation.[56] It is questionable, too, whether direct arrangements would satisfy the interpretation given to "consultation" by the ECJ in the *Junk* case.[57] There, in the context of the collective redundancies legislation, the ECJ held that consultation "imposes an obligation to negotiate"[58] and emphasised that consultation "with a view to reaching agreement" involves the possibility of compromise and change.[59] The Court stressed that it would be "much more difficult for workers' representatives to achieve the withdrawal of a decision that has been taken than to secure the abandonment of a decision that is being contemplated".[60] The direct involvement provision has been a big factor behind the trade union ambivalence to the legislation, as it explicitly allows a non-collectivist approach. Its inclusion ensured that unions were always going

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[53] For example, by way of email or through face-to-face meetings with individual employees.
[54] Section 11(2).
[55] Section 11(4).
[56] See also Hayes, note 15.
[57] Case C–188/03 *Wolfgang Kühnel v Junk* [2005] ECR I-885; 1 CMLR 42.
[58] Case C–188/03 [2005] ECR I-885; 1 CMLR 42, at [43].
[59] Ciarán O' Mara, "Calling Time on Collective Dismissals-the Junk Case" (2005) 2 IELJ 68.
[60] Case C–188/03 [2005] ECR I-885; 1 CMLR 42, at [44].

to be sceptical of State (and employer) motives and somewhat suspicious of promoting the legislation.

Representative Challenge

Section 6 defines employees' representatives as employees of the undertaking, elected or appointed for the purposes of the Act. The employer is obliged to arrange for the election or appointment of representatives.[61] Where it is the practice of the employer to conduct collective bargaining negotiations with a trade union or excepted body that represents 10% or more of the employees in the undertaking, the Act provides that employees who are members of that trade union or excepted body are entitled to elect or appoint from amongst their members one or more than one employees' representative(s).[62] The parties themselves can determine the overall number of representatives, except in relation to the Standard Rules, which prescribe the number of representatives allowed in relation to the Information and Consultation Forum.[63] This is one area where the Irish trade unions have fared better than their UK counterparts as, unlike in the UK, the Irish legislation does grant a privileged position to workplace representatives of recognised trade unions. However, the definition of employee representatives does not seem to allow any role for external union officials (as is provided for by the legislation on European Works Councils[64]) nor does it seem to allow for external expert assistance when the original information and consultation arrangements are negotiated. The latter point is perhaps even more acute in non-union organisations. It may be the case that employee representatives will not be experienced or skilled enough to effectively negotiate around the complex issues of subjects for discussion, confidentiality and so on, especially if faced with a phalanx of company human resources and legal specialists. Denying employee representatives access to external, independent advice, undoubtedly runs the risk that negotiated arrangements will be management-driven, and thus unlikely to address employee concerns about real involvement in decision-making. There is also a risk that, once arrangements are in place, employee representatives (who after all work for the organisation) will be less able to be open and critical in their views, and less able to prevent a management-dominated agenda without external, independent assistance.[65] Furthermore, although employee representatives

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[61] Section 6(2).

[62] Section 6(3). This is to be done on a pro-rata basis with other elected or appointed representatives; section 6(4). Note that, in *Ryanair* [2007] IESC 6, the Supreme Court ruled that where an employer has an internal, non-union collective bargaining unit in place, which has a degree of permanency and is not *ad hoc*, this unit could constitute an "excepted body". Therefore its members could have rights to sit in any alternate information and consultation forum. Were an employer to set up such an internal bargaining unit, the employer could presumably decide on issues such as how employees would be elected or chosen to be members, the remit of the Council, and the terms of office of its members; see Doherty, note 11.

[63] The Forum shall have at least 3 but not more than 30 members; Schedule 1.

[64] Transnational Information and Consultation of Employees Act 1996, section 3.

[65] However, as Hayes, note 15, points out, it is true that information and consultation processes are different from collective bargaining processes and the exclusion of full-time officials could be justified on the basis that involvement in both could result in a conflict of interest.

are entitled to "reasonable facilities, including time off"[66] to fulfil their functions, the extent of time and training that they get will be totally dependent on managerial whim. No provision exists, for example, for representatives to meet periodically with all the other employees they represent.

Section 14 imposes an obligation of confidence on employee representatives and participants in information and consultation arrangements in relation to the disclosure of confidential information. The employer is not required to disclose information or undertake consultation where to do so would seriously harm the functioning of the undertaking, or be prejudicial to the undertaking.[67] Disputes as to how information is classified are to be referred to the Labour Court and in coming to a decision the Court may be assisted by a panel of experts.[68] The interpretation of what is to be classed as confidential is likely to be crucial in determining the parameters of the legislation and its practical impact in terms of employee involvement in the enterprise.

Policing Standards

The legislation is to be policed by inspectors with wide-ranging powers of entry and examination, and failure to comply with the requests or direction of such an inspector is an offence.[69] As many inspectors as the Minister for Enterprise, Trade and Employment deems appropriate are to be appointed.[70] Although the National Employment Rights Authority (NERA) was established in February 2007 (initially on an interim basis) as a result of an agreement reached in the social partnership agreement *Towards 2016*, and there is a commitment under that agreement to increase the number of Labour Inspectors by 200% to 90,[71] recent evidence suggests that general compliance with employment standards remains a matter of some concern.[72] In its preliminary summary of investigations in 2007, the NERA revealed that 56% of more than 400 inspections of the construction sector and 61% of some 200 inspections of the catering sector detected breaches of legislation.[73] With inspectors struggling to enforce standards in areas like the minimum wage, protecting young workers and protecting migrant workers, it seems unlikely that information and consultation rights will be an area of priority, and it seems more likely that monitoring by employees themselves (and trade unions where present) will be more important in securing compliance with the 2006 Act.

Disputes concerning negotiations for an information and consultation agreement under sections 8 or 10, the interpretation or operation of agreements under sections 8, 9, and 10, or the interpretation or operation of a

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[66] Section 13.
[67] Section 14(4).
[68] Section 15(8).
[69] Section 18.
[70] Section 18(2).
[71] The Employment Law Compliance Bill is being drafted at the time of writing.
[72] The issue almost collapsed the social partnership process in the wake of the Irish Ferries controversy and accounted for a significant portion of the *Towards 2016* agreement (see Part 2, section VII).
[73] Concern about compliance with employment standards was not limited to the aforementioned sectors; see "Job to Enforce Law" *Irish Times*, 18 January 2008.

direct involvement system under section 11 are to be referred to the Labour Court.[74] Such referrals are to be made only once internal dispute resolution procedures have failed to resolve the dispute and the matter has been referred to the Labour Relations Commission.[75] Disputes relating to matters of confidentiality under section 14 are also to be referred to the Labour Court[76] and any determination can be enforced through the Circuit Court.[77] In terms of criminal sanctions for those in breach of the legislation,[78] the Act provides for a fine of up to €3,000 and/or a prison sentence of up to 6 months for a summary conviction, and a fine of up to €30,000 and/or a prison sentence of up to 36 months for a conviction on indictment. There has been some concern as to the extent to which the penalties provided for can be said to be "effective, proportionate and dissuasive", as required by the Directive.[79] The first draft of the Directive provided for injunctive relief where employers proceeded with decisions in breach of their obligations, stating that:

> Member States should provide that in case of serious breach by the employer of its obligations to consult in relation to decisions likely to lead to substantial changes in work organisation or in contractual relations, any decisions having direct and immediate consequences would have no legal effect on the employment contracts or employment relationships affected.[80]

However, this was removed from the final version. It is questionable whether a fine of €30,000 would be "dissuasive" to a medium- or large sized-organisation (it stretches credibility to think it might be so in the case of a large multinational, for example) and such a fine, in any case, would only apply in respect of the most serious of breaches. The first case in which a penalty was imposed under the UK legislation[81] involved a failure by Macmillan Publishers Ltd to hold a ballot for the election of employee representatives as required.[82] The UK Employment Appeals Tribunal stated that, although the company's actions did not constitute the most serious breach of the regulations that could be envisaged, they were nonetheless a very grave breach affecting many employees and fixed the penalty at £55,000 (someway short of the £75,000 maximum penalty[83]). Although the penalty imposed here was significantly greater than the maximum that could be applied by the Irish courts, the Assistant General Secretary of the union involved questioned whether the level of the fine would act as a sufficient

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[74] Section 15(1).
[75] Section 15(2).
[76] Section 15(4).
[77] Section 17.
[78] Primarily employers, but also those who breach confidentiality requirements.
[79] See also Case C-382-92 *Commission v United Kingdom* [1994] ECR I-2435; ICR 664, where the ECJ found the existing UK regime for consultation of employees in the case of collective redundancies to be inadequate.
[80] Ewing and Truter, note 33, at 634.
[81] The Information and Consultation of Employees Regulations 2004, SI No. 2346 of 2004.
[82] *Amicus v Macmillan Publishers Limited* UKEAT/0185/07/RN.
[83] The Information and Consultation of Employees Regulations 2004, Regulation 23.

deterrent for a large, global company like Macmillan in the future.[84] It is important to remember, too, that there is no provision in the Irish Act for the compensation of *employees* affected by an employer's breach of the legislation.

The first recommendation by the Labour Court under the 2006 Act was issued in February 2008.[85] The Labour Court concluded that a complaint by health unions that the Health Services Executive (HSE) did not consult them about a recruitment freeze and cutbacks was "well-founded" and that the HSE contravened an information and consultation agreement between the parties (concluded under section 9 of the 2006 Act), and by extension the Act itself, by "its failure to inform and consult with the unions in advance of its breakeven initiative". The Court recommended that the HSE should assure the unions that should the need for a similar initiative arise in the future full and adequate consultation will take place, but did not consider it appropriate to make any further recommendations in the case. Thus, no sanction was imposed for the breach of the Act in the instant case.

Conclusion

Section 12 of the 2006 Act provides that when defining or implementing practical arrangements for information and consultation, the employer, employees and/or their representatives must work in a spirit of cooperation. One of the defining features of this legislation, however, has been the distinct lack of cooperation on view between employers and labour throughout its gestation. Despite the existing lack of legal support for consultation and involvement arrangements in Ireland and the government's strong commitment to social partnership,[86] it came as little surprise to many that the Irish government (following extensive lobbying from the Irish Business and Employers Confederation-IBEC-and the American Chamber of Commerce in Ireland) initially opposed the Directive. Once it became clear its passing was inevitable, Ireland and the UK, in particular, pushed for maximum "flexibility" in terms of its requirements.[87] Surprisingly, after almost 20 years of social partnership, Irish trade unions and employers were unable to agree a national framework agreement to assist employers, employees and their representatives in meeting obligations under the Act.[88] There is also no mention whatsoever of the Directive in the latest national agreement, *Towards 2016.*

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[84] http://www.eurofound.europa.eu/eiro/2007/08/articles/uk0708039i.htm (visited 18 January 2008).
[85] Recommendation No. RIC081 *Health Service Executive v Health Service Staff Panel*
[86] And, in particular, partnership at the level of the enterprise, see note 29.
[87] John Geary, "Employee Voice in the Irish Workplace: Status and Prospect" in Peter Boxall, Paul Haynes and Robert Freeman eds, *Employee Voice in the Anglo-American World* (Cornell University Press, 2006).
[88] A Code of Practice on Information and Consultation was issued by the Labour Relations Commission (LRC) in March 2008 (in accordance with section 42 of the Industrial Relations Act 1990). The LRC drew on a number of sources in preparing the Code, including "consultation with the social partners" (section 2).

Given the various problems highlighted above (the need to trigger rights, the exclusion from the scope of the law of many organisations and certain categories of employee, the lack of protection given to those seeking to establish information and consultation arrangements, the provision for direct involvement systems, the difficulties in enforcement and the question mark over the adequacy of penalty provisions) it seems unlikely that the Act will plug the "voluntarist gaps" in the Irish IR system and grant robust collective involvement and participation rights to Irish employees.[89] In the early months since the legislation has been in place very little activity has been reported.[90] It seems that most employers have adopted a strategy of "risk assessment" rather than active compliance.[91] As noted above, in the one recommendation made by the Labour Court under the Act to date, no sanction was imposed on an employer in breach of an information and consultation agreement. Moreover, the factual background upon which the health unions referred their claim under the 2006 Act also grounded a claim that the HSE's failure to consult them on its cost-cutting plans was a breach of several provisions of the *Towards 2016* social partnership agreement (especially 28.13 and 30.2). The Labour Court upheld this claim also and issued an identical recommendation to that issued under the 2006 Act; that the HSE should assure the unions that should the need for a similar initiative arise in the future full and adequate consultation will take place, but that it was not appropriate to make any further recommendations in the case.[92] In other words, the unions' claim could have been processed through the social partnership process irrespective of whether the 2006 Act was in place or not.[93]

Nor is the legislation likely to provide much of a platform for trade unions to expand their representation rights. Where unions do not first have some sort of presence at a workplace, it is unlikely (given that unions cannot make applications on behalf of their members to establish information and consultation arrangements) that the Act will grant an "in" for them. Even where the problems above are negotiated and rights in a workplace are triggered no role exists for the external union, and we have seen that concerns exist about how adequately employee representatives, in the absence of external advice, will be able to establish and utilise any structures that are set up. The unions have been somewhat muted in their reaction to

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[89] Nor does the transposition seem to live up to the lofty ideals of the Commission's worker involvement agenda, see discussion above and Barnard, note 26, at 701 *et seq.* The directive itself claims in the Recitals to seek "to reform the existing legal frameworks for employee information and consultation at Community and national level, which tend to adopt an excessively *a posteriori* approach to the process of change… strengthen dialogue and promote mutual trust within undertakings… promote employee involvement in the operation and future of the undertaking and increase its competitiveness".

[90] Dobbins, note 40.

[91] Hall, note 49.

[92] Recommendation No. LCR19152 *Health Service Executive v Psychiatric Nurses Association, Irish Hospital Consultants Association and Health Service Staff Panel*

[93] Of course, this point is relevant only to situations where employers and unions have signed up to the partnership agreement; the 2006 Act would provide the only possible route for employees or their representatives to challenge any breach of consultation obligations by the employer in situations where the latter has not signed up to partnership process.

the Act[94] fearing tensions might arise in unionised workplaces regarding the overlap between the roles of any information and consultation body and established collective bargaining arrangements, as well as between union and non-union employee representatives.

The information and consultation legislation has been described as an example of ”reflexive” employment law whereby “the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment” by the parties to the employment relationship ”rather than to intervene by imposing particular distributive outcomes”.[95] The social partnership process, with its emphasis on promoting workplace partnership, has its origins in the similar (corporatist) idea of the partners “bargaining in the shadow of the law”. The problem with the 2006 Act is that the shadow is very faint indeed.[96] The Act also seems to be insufficiently encouraging of actors to produce the “second-order effects” intended by reflexive law.[97] The State and the social partners have not, for example, provided a list of possible topics for information and consultation[98] and, as noted, the most recent national agreement does not mention the legislation at all. In this sense the legislation perhaps marks a move away from the *principle* of voluntarism, but not the *practice*.

Are there any reasons for optimism that the legislation may have a greater impact than is predicted here? It may be that the legislation will become more important in the context of the commitments in *Towards 2016* to step up employment rights compliance and the setting up of a new Office of the Director for Employment Rights Compliance.[99] However, this will only be useful in the event that employees have already triggered the provisions (or have been prevented from so doing). It may also be that the neutering of the Industrial Relations Acts 2001-2004 in the *Ryanair* case may mean trade unions refocus efforts on using the legislation as a platform for gaining increased influence and/or recognition rights.[100]

It may also be in employers’ interests to become more proactive in relation to the legislation. This may be because more employers become convinced of the merits of the “business case” for robust information and consultation rights.[101] Alternatively, and more cynically perhaps, employers may attempt to exploit the utility of the legislation as a defensive mechanism. First, as Gollan points out, in the context of union density decline, many issues that in the past would have been the subject of collective bargaining in *unionised* workplaces may now fall under the rubric of information and

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[94] Dobbins, note 46.
[95] Catherine Barnard and Simon Deakin, “In Search of Coherence: Social Policy, the Single Market and Fundamental Rights” (2000) 31 *IRJ* 331, at 341.
[96] This, unfortunately, appears also to be the case in relation to the European Works Council legislation. Recent data suggests that in June 2005, just 43 Irish-owned companies headquartered in Ireland were covered by the EWC Directive, of which 6 had established EWCs; a “compliance rate” of 14%, compared with an overall EU average of 35% for companies headquartered in respective member states; Tony Dobbins, “Irish Multinationals have 14% European Works Council Compliance Rate” (2006) 37 *IRN* 5.
[97] Barnard and Deakin, note 95
[98] Like those listed for workplace partnership in *Partnership 2000*, for example.
[99] See chapter 7 of *Towards 2016.*
[100] Doherty, note 11.
[101] Sissen, note 25.

consultation in *non-union* settings.[102] A more expansive approach by management to granting effective employee *consultation* rights could ward off any incipient demands for *collective bargaining* in such workplaces. Second, it may be the case that anti-union employers can use the legislation to de-recognise unions (or resist union recognition drives) in favour of the alternative of an information and consultation forum or arrangement which ostensibly represents all employees.

[102] Paul Gollan, "Editorial: Consultation and Non-union Employee Representation" (2006) 37 *IRJ* 428.