Improving employee consultation or a fig leaf for partnership?

2006 saw the coming into force of a piece of legislation with the potential seismic shift in Irish industrial relations and radically change the face of enterprise level communications. Following much consultation with the Social Partners, the Government last year finally enacted the Employees (Provision of Information and Consultation) Act 2006 (the Act) thus bringing into Irish law an EU Directive on the same topic. The Act sets out a detailed framework within which employers must consult with their employees on all matters that impact upon their employment. While far reaching in principle, only time will tell, however, whether the Act has such an impact in reality or whether it is merely a fig leaf for partnership.

Background

The Act is based on an EU Directive (EU Directive 2002/14/) aimed at increasing the level of communications between employers and employees at the level of the organisation. The method that the Directive sets out to achieve this aim is enterprise level information and consultation (I&C) councils or forums. Historically, given the tradition of voluntarism that exits in Industrial Relations in Ireland, consultation has taken place at national level; the passing of the Act coincided with the Social Partners completing negotiations on the seventh National Partnership agreement, Towards 2016. The Directive, however, is a product of the view that more enterprise level partnership was needed and worked towards establishing "a general framework for improving information and consultation rights of employees in the European Community".

The impetus for the Directive was primarily driven by:

- increased globalisation whereby decisions are taken internationally that often impact at a local level
- a desire to strengthen dialogue at local level to a European Standard – this pressure has come from countries where consultative systems already exist including the Scandinavian countries
- a belief that existing measures have failed or are ineffective. In recent years, the spotlight has been on a number of high profile cases that have shown companies willingness to act for business reasons without considering local employment issues.

As is often the case with such legislation, the original Directive was, thus, in part, a reaction to several high profile cases. These involved multinationals making cross border decisions that impacted upon employment in a manner that was perceived to be purely driven by a financial perspective without any regard for the impact of the decision on employees. One often cited case occurred in 1997 when Renault announced at a press conference the decision to close its Belgian factory at the same time as informing the company's 3,000 Belgian employees of the decision. While there was a negative political reaction to the decision, which was seen as a nationalistic move to save French jobs, the Paris stock market reacted almost euphorically to the decision and Renault shares gained 13% in one day!

A similar situation occurred in 2001 when Marks & Spenser pulled out of France after years of losses at its 38 stores. In this case, a French court ruled that Marks & Spencer had violated French employment law by failing to consult its workers. The company was forced under French law to engage in dialogue with its employees. Ultimately, the dialogue had little impact on the decision as18 stores were sold to a French supermarket chain with the remaining stores closing.

There is a parallel between these cases and the recent reaction to several high profile companies in Ireland – Irish Ferries and Gamma Construction among them – which have been perceived in recent years as being in the vanguard of the 'race to the bottom' by importing 'cheap' employees to displace Irish jobs. It is interesting to note that this issue was tackled within the national process. In fact it was of such importance to the trade union movement that it was a precondition for their entering the negotiations for the latest Social Partnership Agreement. As part of the overall agreement, an improved labour inspectorate and a body to oversee compliance with employment rights – the National Employment Rights Authority – were agreed.

What companies are impacted?

The legislation states that all "public or private undertakings carrying out an economic activity, whether or not operating for gain" (Employees (Provision of Information and Consultation) Act 2006) are covered by the Act. As such, it applies to all companies as well as charities, trade unions and public bodies. This is an important point for employers to note, as not for profit operations such as charities tend not to have sophisticated HR departments but will still be impacted by the legislation.

Not all undertakings are impacted and, of those that are, not all are impacted immediately. The Act is being introduced on a phased basis with large organisations (150 employees or greater) already subject to the legislation. From 23rd March 2007, undertakings with at least 100 employees will be subject to the legislative requirements. Finally, undertakings with at least 50 employees will come under the legislation from 23rd March 2008. As of now, undertakings with less than 50 employees are not impacted.

How does an I&C forum come about?

The principle Directive allowed national governments to determine locally the method by which companies would be required to establish an I&C forum. The trade unions pressed for the 'opt out' option whereby employers would automatically be required to initiate discussion with staff unless the workforce declined to enter into negotiations. The Government, however, endorsed the 'opt in' option whereby employees have to request, or 'opt in', in order to bring about an I&C forum. This was the option favoured by IBEC as well by a number high profile multi-nationals who feared the Act would be a Trojan Horse for trade union recognition.

In practice, it only requires 10% of employees (or at least 15 and no more than 100) to make such a request to require the employer to engage with staff on the introduction of a forum or council as defined by the Act. Alternatively, companies can choose to introduce such a forum on their own initiative, thus controlling the timing and, within the limits of the legislation, the makeup of the forum. Either way, once the company begins the process, it will then have six months to come to a consensus with staff or will have to implement the

forum as set out under the standard rules imposed by the Act, thereby removing any degree of flexibility.

Key elements for any agreement to be deemed valid are that it must cover all relevant employees and must also be approved by those employees. Approval by employees is the critical issue. There are several methods whereby employee approval can be achieved. These include majority secret ballot but also majority approval of the elected employee representatives. Staff must be aware that these representatives will have the authority to approve, with the management representatives, the details by which such an I&C forum will be governed. The decision to allow the representatives approve the constitution of the I&C forum should, therefore, be part of the nomination or appointment process when the representatives are put in place. These representatives can also be the nominated staff voice on the forum avoiding either a second vote or an all-employee vote on the whole process.

An outline constitution can be brought forward by the company for discussion at the first meeting. Once employee representative views are incorporated, agreement can then be easily reached. Afterwards, the company can focus on the operation of the forum.

Operation of the forum

The right to information and consultation can cover a wide range of areas. It does not preclude the company from providing information directly to staff or through other existing channels if it so chooses. However, where no such channel exists, it can become a powerful method of getting staff bought into company plans and informing them of changes in the industry and new directions for the company.

The decisions surrounding which issues are to be included for discussion will always be contentious. The legislation splits the topics under information – business plans, marketing strategies, financial performance – and consultation - acquisitions, disposals, restructurings, re-organisations, that is anything that is likely to affect employment or substantial changes in contractual relations.

The first area, i.e. information, is likely to be relatively non-contentious, especially as companies can decide not to release information that is likely to be too sensitive to the business to be released to the forum, so long as this approach is not being used to withhold non-sensitive information.

It is within the area of consultation that problems for companies are likely to arise. The legislation requires that the information should be given a time, in a manner and of a content as is appropriate to enable the respective employees' representatives to study and to prepare for consultation. The Act places emphasis on the establishment of a dialogue on those issues that will impact on staff employment or conditions and favours agreement as the outcome of such dialogue. However, the company is under no obligation to act upon the outcome of any such consultation once it has been entered into in good faith. How good faith is defined is, unfortunately, vague and probably awaits a Labour Court determination for clarification.

Employee representatives
The issue of how to define the employee representative was one of concern for both union and employer bodies in the period of consultation prior to the publishing of the legislation. Many non-union employers feared that the legislation would allow union representation through the back door, especially in the wake of the Industrial Relations (Amendment) Act 2001 and the Industrial Relations (Miscellaneous Provisions) Act 2004. These acts have been used by the union movement to press for changes in terms and conditions of employment where they have claimed companies have refused to enter into collective bargaining. Meanwhile, unions feared that the forum could be used as a way of sidelining their role in unionised employments or as an argument from employers in battles for recognition.

In the end the employee representative is a compromise, defined as any employee who is elected or appointed by staff for the purpose of representing them on such a consultation forum. While the Act allows the appointment (as opposed to election) of such representatives, this may give rise to into practical difficulties in getting an agreement approved where staff have not been allowed appoint their own representatives. However, should any company have, or enter into, a collective bargaining agreement with a trade union, and that union represents at least 10% of the workforce, union members will be entitled to at least one representative on the forum.

Experts to assist the employee representative
A further area of contention is likely to be around the use of 'expert assistance' to assist employee representatives. A typical scenario would be where both parties are involved in consultation over the financial implications of a change programme in the organisation. Employee representatives may seek external financial assistance to evaluate company information and, possibly, to assist in the drafting of employee representations.

While the Act is silent on the nature and scope of such experts, they cannot be engaged or access information without the approval of the company; equally, they are bound by the same confidentiality requirements as employee representatives. It is generally a good idea to include a company veto on the appointment of such experts as part of the forum agreement.

The Act ensures that employee representatives and any experts who assist them should not disclose any expressly confidential and sensitive commercial information provided to them. Equally, as outlined above, the company will not be obliged to communicate any information that would seriously harm the functioning of the business. This would generally cover financially sensitive information but cannot be used as a means to avoid consultation generally.

What is the reality?
It is important that employers decide now what their stance is in relation to the Act. Employers should retain control of the process, even if a decision is taken to wait for staff to request the establishment of an I&C forum. They should consider how they will react should the necessary minimum number of staff request its introduction. In this way, they will be prepared and will not merely be reacting to events.

Management must at the earliest possible stage begin to manage staff expectations as to the purpose and scope of the I&C forum. Staff will have certain expectations as to what will come under the scope of the forum. These must be managed as otherwise staff will become frustrated with the forum and may even seek alternative methods of representation. This may also happen if staff believe that the company is engaging in a token manner only. The issues that are most likely to cause misaligned expectations are in relation to the negotiation of salary and other benefits. While it is up to an individual employer to allow pay negotiations to be included within the scope of the forum, negotiations are specifically excluded by the legislation. Unless this is clearly understood by staff from the outset, it will lead to problems at a later stage.

Other issues that impact upon the reality of establishing an I&C forum include the difficulty of getting staff to become and remain employee representatives, deciding how to engage on contentious issues, agreeing on what information can be seen by experts and finally how to manage where an existing partnership forum is in place in the company. Unless these issues are tackled up front, they will impact on the successful operation of the forum.

An improvement or a fig-leaf?

There is no doubt that the Act is a potentially significant advancement towards improving enterprise level communications. The benefits of effective communications have become clearer in recent years. Research from international consultants Watson Wyatt has shown that shareholder returns for companies with the most effective communication were over 57 percent higher over the last five years (2000-2004) than were returns for firms with less effective communication (Watson Wyatt, Effective Communication: A Leading Indicator of Financial Performance - 2005/2006 Communication ROI Study). Engaging with the workforce and giving them a sense of involvement in the decision-making process are some of the critical elements in effective communication.

However, while the threshold for the 'opt in' is low, at 10% of staff, the fact that employees have to request that a forum be set up will limit its take up. This requirement for employees to mobilise themselves has proved to be a distinct disincentive for employees in the UK.

Companies that are positive about employee engagement are more likely to have channels in place already or will be proactive about setting up an information and consultation forum. Many companies, however, will play a wait and see game, waiting to see if their employees first approach management. That is not to say that these companies will not then fully engage with staff to put a forum in place. However, the mere fact that they will wait will ensure that the take up will be lower than if employees have to opt out. Undoubtedly also there will also always be companies that will strongly resist the notion of employees being involved in any part of the business.

Conclusion

The jury is out as to whether the Act will be 'an asteroid or a damp squib' (page 2, research paper from conference on Employee Information & Consultation; Regulation, Reform or Revolution, LSE, London Metropolitan University and CIPD (UK), 18 March 2005). Will the Act lead to a revolution in enterprise level communications? Will it be merely a fig-leaf that the Social Partners will conveniently point to? Will it be a 'nail in the coffin' for collective bargaining (page 2, LSE et al). Will employers use the requirements of the Act as

a method of union avoidance? This is most certainly a concern for the trade union movement who unsuccessfully pushed for a definition of employee representative that would be more in line with that of a shop steward.

Equally, will the existence of an information and consultation forum have any impact on the decision-making of a multi-national that has an operation in Ireland? Decisions on investment and location tend to be made by far off head office and are unlikely to influenced by local consultation requirements. If a multi-national has taken the decision to relocate its Irish operations to a low cost alternative, it is unlikely that the local I&C forum will have any influence on the decision other than to be consulted on the closing down timetable and the redundancy payments. There have been many examples in recent years – from Digital and Seagate in the 1990s to the more recent examples of Motorola, Pfizer and Vodafone – where it was the global decision making process that counted.

There is no doubt that the Act has the potential to improve the flow of information between employers and their staff. In an era of mass and rapid communication, this can only be a good thing. Whether there will be a real shift to meaningful consultation in a manner that will mirror the successful national consultation process has yet to be seen. For the Act to make a real difference, there will have to be consultation where it counts, that is where jobs are being impacted. While perhaps not merely a fig-leaf, there is some way to go before we can decide whether the Act will lead to the sea change in enterprise level communication that was envisaged by the original Directive.

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