

## *Some Thoughts on Information and Consultation in “Exceptional Circumstances” in the 2009 EWC Directive*

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*This paper examines the obligations placed on employers to inform and consult European Works Councils in “exceptional circumstances” for EWCs operating under the UK’s or Ireland’s Subsidiary Requirements. Matters may differ for EWCs working under other member states’ Subsidiary Requirements or the tailored terms of an EWC agreement. But, other than old “Article 13” agreements, all EWC agreements operate in the “shadow of the Directive”.*

The 2009 European Works Council Directive provides for the transnational information and consultation of employee’s representatives. However, nowhere in the Directive is either information or consultation clearly defined in any sort of granular detail.

The recasting of the old 1994 EWC Directive in 2009 involved the inclusion of new definitions of information and consultation as follows:

*‘information’ means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings;*

*‘consultation’ means the establishment of dialogue and exchange of views between employees’ representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees’ representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings;*

When read carefully, it becomes clear that these are not definitions of information and consultation, as such. They are descriptions of the processes of providing information to and, subsequently, consulting with the EWC. In fact, the oddity of prescribing that management do things in certain ways was the reason that the UK’s EWC legislation transposes these definitions not in its definitions section but by imposing stand-alone obligations. Language as malleable as “at such time”, “in such fashion” and “with such content” is also open to wide interpretation.

As, indeed, are the words "establishment of dialogue" and "exchange of views" when it comes to describing consultation. What objective test is there to prove that management has actually done or not done either of these things, even if it can prove that it met with the EWC?

In thinking this through, the words in the description of "information" which mandate the employees' representatives to conduct "... an in-depth assessment of the possible impact ..." of the "subject matter" seem to us to be of critical importance. Having completed their in-depth assessment, the employees' representatives are then entitled, as set out in the wording on "consultation", and after meeting with management, "to express an opinion on the basis of the information provided about the proposed measures...". (our underlining).

### What triggers EWC information and consultation?

But what constitutes a "subject matter"? This is not defined in the body of the 2009 EWC Directive but a clue to what the legislators had in mind can be gleaned from its Subsidiary Requirements when it comes to "exceptional circumstances". "Exceptional circumstances" are seen as "particularly" concerning "... relocations, the closure of establishments or undertakings or collective redundancies ...". Relocations, closures and collective redundancies (presumably, as defined in national legislation) are objective measures which, if under active consideration, potentially trigger an "exceptional circumstances" information and consultation process.

In *Junk v Kühnel*, the European Court of Justice held that when an employer is "contemplating" collective redundancies this should be understood as a "project to that end" and "corresponds to a situation in which no decision has yet been taken." The Cambridge Dictionary defines a project as "*a piece of planned work or an activity that is finished over a period of time and intended to achieve a particular purpose*".

As we see it, an "exceptional circumstances" information and consultation process is triggered by a potential decision which is under consideration that, if taken, would have a defined result within a set period of time. (Many EWC agreements reflect this understanding of "exceptional circumstances" in provisions which talk about information and consultation being triggered by X numbers of redundancies in Y period of time).

Further, "relocations, the closure of establishments or undertakings or collective redundancies" are only to be regarded as constituting "exceptional circumstances" if they also affect employees' interests "to a considerable extent".

Again, nothing in the 2009 EWC Directive helps us to understand what "considerable extent" means. However, in *Transdev* a French tribunal held that 2.5% of the total European workforce could not be regarded as constituting a "considerable extent". Metrics like this help to provide an objective basis for determining if "exceptional circumstances" exist. Otherwise, the matter becomes entirely subjective although management should always remember that it might need to defend its position in court.

## What is EWC information and consultation about?

As our underlining above shows, the Directive makes it clear that the "in-depth assessment" is limited to the "possible impact" of the "subject matter", not the "subject matter itself". When it comes to the "subject matter", the employees' representatives are simply to "acquaint themselves" with it and to "examine it". If the legislators had intended the employees' representatives to conduct an "in-depth assessment" of the "subject matter" itself, they would have said so.

Clearly, a distinction is to be drawn between examining the "subject matter" and conducting an "in-depth assessment" of its "possible impact".

The 2009 EWC Directive imposes an obligation on management to inform and consult. To inform means to tell someone about something. It does not mean to explain, much less to justify. For example, if I tell you that I bought a new house, I am informing you. It does not involve me explaining to you why I bought the particular house I did, much less justifying to you why I needed to buy it.

It seems to us that all the 2009 EWC Directive does is to impose on management the narrow obligation to inform employees' representatives about a proposed decision and why management is considering taking that decision. Management is not required to explain in detail the rationale behind it, much less to justify it.

It could well be argued, and with reason, that good employee relations practice would suggest that, at the very least, management should explain to employees' representatives the thinking behind proposed decisions. We would not quarrel with that. But that is different from saying that the law requires them to do so. In our opinion, it does not.

At least at EWC level. What may be required as regards national/local information and consultation is a different matter and varies from country to country. EWC information and consultation takes place with a pan-European, higher-level perspective than national information and consultation. Arguing that EWC information and consultation should be more robust than it is all well and good but does not change the facts of the law as it stands. Wishing that something was different from what it is does not make it so.

That the obligation on management is narrow is confirmed by the fact that at the end of the process all the EWC can do is to offer an "opinion" on the "proposed measures". There is no suggestion anywhere in the 2009 Directive that EWC consultation is "with a view to reaching an agreement", as is found in the 2002 Framework Directive on Information and Consultation (the "National Works Council Directive"). Such a requirement is also found in the Collective Redundancy and Acquired Rights Directives.

By contrast, the EWC can simply offer an "opinion" or a statement of views. Nothing more, nothing less.

Further, as the CAC pointed out in *Oracle*, there is no obligation on the EWC to offer an opinion. It can decide not to do so if it chooses. The right to voluntarily offer an opinion, or not, is quite some distance from consultation "with a view to reaching an agreement".

Under the Subsidiary Requirements, management is required to respond to any opinion offered by the EWC and that brings the information and consultation process to a close. The response

should set out the “reasons” for the response but there is no suggestion that the EWC can then “respond” to management’s response. Management’s response to the EWC’s opinion closes the process. It does not open “phase 2”.

Putting all of this together leads to the conclusions that what an EWC is entitled to is to be informed about proposed decisions concerning relocations, the closure of establishments or undertakings or collective redundancies so it can undertake an in-depth assessment of the possible impact of the proposed measures, or other similar “exceptional” events, but only if they affect employees’ interests to a considerable extent. Thereafter, the EWC can engage in a “dialogue and an exchange of views” with management at “an” exceptional meeting (noting that the legislation uses the singular, implying that there is not a series of meetings), at the end of which it can offer an opinion on the proposed measures.

### Information and experts

In “exceptional circumstances” the meeting between management and the EWC takes place on the basis of a report drawn up by management. The information that management is required to provide in this report to the EWC is, in our opinion, limited to such information as will enable the EWC to undertake an in-depth assessment of the “possible impact” of the proposed decision.

The information that should be provided is proportionate to the scope of the opinion that can be offered, which, to repeat, is limited to the “possible impact” of the “proposed measures”. This also suggests that the information to be provided should be forward-looking, covering what could happen as a result of the “proposed measures?”. It seems to us difficult to make a case that detailed, historical data can assist the EWC in any way in this regard.

In *Oracle* the CAC commented:

The Regulations are clear that it is not the role of the EWC to seek to reverse management decision or any action taken. Certain of the “procedural questions” raised by the EWC imply that this might have been the purpose behind some information requests ...

Some of the information requests we have seen from EWCs in exceptional circumstances situations can best be understood as an attempt to gather data which would allow the EWC to say that what was under consideration by management was not justified and that management should look at alternative courses of action.

The CAC in *Oracle* went on to say:

What appears to us to have been lost in the exchanges between the parties is a distinction between, on the one hand, seeking financial detail of the business case for reorganisation in order to challenge or seek to reverse managerial decision and, on the other hand, seeking information necessary to understand the rationale or thinking behind a proposed action in order to represent the interests of those employees affected by it and provide an opinion which “will be useful in the decision-making process” (Recital 23).

A distinction is to be drawn between asking for information in order to "second guess" management or to enable the EWC to cast itself in the role of a "shadow management" and asking for information to simply understand management's proposed decision. Demands for information that explains or justifies the decision is beyond the scope of what is required by the 2009 EWC Directive.

If the remit if an EWC is limited to asking for "information necessary to understand the rationale or thinking behind a proposed action in order to represent the interests of those employees affected by it" then this also limits the role of experts to assisting the EWC work through the information provided by management.

In our view, there is nothing in the 2009 EWC Directive which allows EWCs to instruct experts to conduct research in order to produce reports proposing "alternative strategies" to that being followed by management. The EWC Directive is based on the concept of management "informing" the EWC, because management is the party in possession of the relevant transnational information. Nowhere in the Directive is there any suggestion that the EWC is entitled to conduct independent research, or have experts conduct such research on its behalf.

"Exceptional circumstances" meetings are conducted on the basis of a report "drawn up by management". The Subsidiary Requirements say nothing about the EWC having the right to put forward an alternative report of its own. To argue that this can be justified under the "means required" as provided for in Article 10.1 is, in our view, interpretive overreach.

Support for this view is to be found in the Irish legislation which states that the obligation on management when it comes to the funding of experts "shall be limited to funding the equivalent of one expert per meeting." We understand "meeting" to mean an actual physical or virtual meeting with management's representatives, together with the employee pre-meeting. In many cases, the involvement of the expert is limited to attendance at the pre-meeting of employees' representatives, without them sitting in on the meeting with management.

Appropriate preparation time should also be allowed for. In the case of "exceptional circumstances", preparation time means the studying of the report provided by management but not the conducting of independent research.

As an example of the information we believe should be given to the EWC in "exceptional circumstances" take the case of a company that announces it is to close a plant in country A and transfer production to country B. The transfer makes it transnational and management accepts that the decision will impact employees to a "considerable extent". It seems to us that if management informs the EWC that detailed studies clearly demonstrate that it is more cost-effective to manufacture in country B than in country A, that meets the CAC test of allowing the EWC to understand the rationale behind the decision.

Demands that management give the EWC the detailed studies would, we believe, stray into the "seeking financial detail of the business case for reorganisation in order to challenge or seek to reverse managerial decision" category and could be properly refused. Management simply has to inform the EWC that the reason for moving is cost-effectiveness. It does not have to provide information to prove that this is actually the case.

Management provides the EWC with a report on the possible impact of the proposed measures resulting from the plant closure/transfer. This report should set out what is being proposed, the numbers impacted, the timescale involved and any other relevant information.

As we see it, the EWC is then given the opportunity to carry out an “in-depth assessment” of this report with the assistance of an expert, if one is requested. As the CAC notes in *Oracle*, the purpose of the consultation is to allow the EWC to represent the interests of the employees who will be affected and not to seek to reverse the decision of management. Of course, the EWC will challenge the decision and seek to reverse it but a refusal by management to enter into a dialogue on the decision or to consider alternatives does not constitute a failure to engage in European-level consultation. As we have already noted, what happens at national level may well be a different matter.

In conclusion, at the end of an information and consultation process all an EWC is entitled to do is to offer an opinion, which draws a reasoned response from management, on the “possible impact” of “proposed measures” and not on the rationale of the “proposed measures” itself. The information management is required to provide is limited to enabling that opinion to be delivered after consultation, if the EWC so chooses.

### A final thought

Let me leave you with this final thought. The European Union consists of both social market and liberal market economies which have one thing in common. They are founded on respect for the rights of private property. That translates into companies being owned by their shareholders and run on their behalf by managers appointed by the shareholders. The overarching objective of any company is, through the sale of goods or services, to maximise the financial return on shareholders’ funds.

Our societies recognise that it is the right of shareholders to make use of, and dispose of, their property, their companies, as they see fit, provided they do not engage in criminal behaviour. If shareholders decide to restructure an operation or close it, even if it is profitable, that is their right, regrettable as that may be for the workers concerned. In our societies, shareholders cannot be forced to keep a company open, to structure it in any particular way or to employ workers they do not wish to employ.

What our laws do can do is to insist that if a company is to be closed, or jobs cut, that these things are done in a proper manner and that financial compensation and other measures are put in place to assist the workers adversely impacted by the decisions in question.

At the end of it all, the only thing that information and consultation processes can do, whether at European or national levels, is to ensure that proper procedures are followed when jobs are lost. EWC information and consultation will never stop jobs being lost if that is what management has decided.

That is the nature of economic life in market societies.

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