

European Works Councils - 3

Information and Consultation

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The core concept

- The essence of the 2009 EWC Directive is the obligation it imposes on management to inform and consult the EWC:
 - *At least annually on the general state of the business*
 - *In “exceptional circumstances”, which generally mean potential decisions which could have adverse effects on employees, such as collective redundancies, closures or the transfer of production.*
- It is important to note that the obligation to inform is placed on management and in all circumstances it is management which initiates the process. There is nothing in the legislation to suggest that an EWC has a right of initiative, a right to demand meetings based on what it thinks might be happening.
- At the end of any information and consultation process the EWC may offer an opinion. Nothing more.

Information

‘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;

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What data?

- Note that the Directive just talks about **data**. There is no list of what data is to be provided, or to what extent. It simply has to have such “**content** as are **appropriate** to enable employees’ representatives to undertake an **in-depth assessment**.”
- Also, keep in mind that the data should be “transnational”, because that is the limit of the remit of the EWC. Granular, national data is not required.
- Not all data has to be provided. Just the data that is “appropriate” to allow for an in-depth assessment.
- Who is to decide on these matters? Who decides what is appropriate?

Opinion 1

- Let's jump a little to the Subsidiary Requirements.
- Here we find this about exceptional circumstances:

*This information and consultation meeting shall take place as soon as possible on the basis of a **report** drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or group of undertakings, **on which an opinion may be delivered** at the end of the meeting or within a reasonable time*

- So, in exceptional circumstances management has to prepare a report. What constitutes a “report”? The language on information simply talks about data being delivered in “**such fashion**” as will enable the EWC to carry out an in-depth assessment.
- When thinking about this, keep in mind that we are dealing with a multi-national, multi-lingual group. Language is an issue.

Opinion 2

- Look again at what the SRs say:

This information and consultation meeting shall take place as soon as possible on the basis of a **report** drawn up by the central management or any other appropriate level of management of the Community-scale undertaking or group of undertakings, **on which an opinion may be delivered** at the end of the meeting or within a reasonable time

- It seems clear to me that the **opinion** that may be delivered by the EWC relates to the **report** drawn up by management.
- Management must make a decision about the extent of the transnational information it includes in the report. The EWC may be unhappy with that decision and may believe it is entitled to further information. It can ask. But management is not obliged to answer all and every question from the EWC. These are judgement calls. And may well be disputed.

“In-depth assessment”

- Let’s go back to what the Directive says:
 - ‘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...**
- What is meant by an “in-depth assessment of the possible impact”?
- Note carefully the words ““in-depth assessment of the possible impact”. Not an “in-depth assessment” of the proposed decision but an “in-depth” assessment of the “possible impact” of the proposed decision.

“Explanation” v “justification”

- We work with the language of the Directive as we find it. Not what EWCs/EWC ‘*experts*’ would wish to be.
- So, the “in-depth assessment” relates to the “possible impact” of the proposed decision. Not the decision itself. The decision itself is a management prerogative. The EWC has no delaying or veto powers over the decision. In our view, the EWC does not need to be involved before the decision is taken.

“Explanation” v “justification 2”

- So, management does not have to “justify” the decision to the EWC. It simple has to “explain” it and outline the “possible impact” on employees so that the EWC can assess this “possible impact”.
- Management does not have to provide data to the EWC to show what reasoning led it to come to the conclusions it did. It is not the role of an EWC to “second-guess” management. EWCs are not a “shadow management”.
- The data to be provided should be such as to outline what may happen in the future after the decision is implemented.

Back to “in-depth assessment”

- Look again at the wording in the Directive:

*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**...*

- The reasonable interpretation of these words is that the EWC assesses the information provided by management. It may find this information inadequate and ask for additional information.
- But there is nothing in the wording to support the idea that the EWC is entitled to conduct independent information searches of its own, still less to commission “experts” to do so on its behalf.
- The information and consultation process takes place on the basis of the information provided by management. That is the inherent logic of the Directive.

Experts

- Under the SRs, an EWC is entitled to be assisted by an expert of its choice.
- Unlike experts assisting SNB, experts assisting EWCs are given no right to attend meetings between management and the EWC.
- In our view, their role is restricted to assisting the EWC to assess the information provided by management. As already said, the EWC has no right to commission experts to undertake any sort of independent analysis or audit.
- The experts assist the EWC. They have no right to engage with management directly or to request information from management.

Who are “experts”?

- In the early 1990s, when the original Directive was being crafted, it was always understood that “expert” = trade union official. There to coordinate on behalf of the European trade union federations.
- With the additions of the words “in-depth assessment” in the 2009 revisions, experts *à la français* saw a business opportunity. They would offer to “audit” the company on behalf of the EWC. To verify the information provided by management.
- Now, it is being suggested that the role of experts is to help the EWC develop a counter-strategy to that proposed by management.
- But the Directive makes it clear that the EWC works off the information provided by management. As we have already said, the EWC is not a “shadow management”, not there to second-guess management.
- Be careful of mission creep by experts.

Timing

- Back to the wording:

*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***

- When should the EWC be given the information?
- We need to keep two things in mind:
 1. The decision of the UK's CAC in *Oracle*, and
 2. The way we manage business communications in the internet age

Oracle

- *Oracle* is a seminal decision for “exceptional circumstances” information and consultation under the Subsidiary Requirements.
- In *Oracle* the CAC held:
 - When management believe that “exceptional circumstances” may arise it informs the select committee
 - The select committee may then request an information and consultation meeting (note: the SRs refer to 1 meeting, not multiple meetings)
 - Management then provides appropriate information to the select committee /EWC to allow for the “in-depth assessment”
 - The information and consultation meeting then takes place
 - At the end of the meeting, or shortly thereafter, the EWC may offer an opinion.
 - Management responds to the opinion and that response closes the information and consultation process.

Communicating the information

- There is nothing in the Directive to specify exactly how and when information is to be given to the EWC.
- Remember the Directive was written in the “pre-internet age” when documents had to be sent physically through the post. Or by fax. Which took time.
- So, instead of sending information before a meeting, it was often presented at a meeting, allowing it to be put in context and interpreted into necessary languages.
- We have moved on since the Directive was written.
- Now, information is normally sent to the EWC electronically.
- And, for the foreseeable future, we will be meeting electronically.

In practice...

- It seems to us that a reasonable way of working in today's circumstances would look something like this:
 - Once a meeting is requested and a date fixed, management prepares and sends a report to the select committee (or full EWC) X days in advance of the meeting
 - The EWC "assesses" the report, with the help of an expert if needed.
 - The EWC may come back to management with supplementary questions in advance of the meeting.
 - Management responds to these questions either in advance or at the meeting.
 - We are assuming here that the EWC is meeting virtually.

Consultation 1...

- Which brings us to the meeting itself...
- Consultation is described in the Directive itself as follows:

‘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;

Consultation 2...

‘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;

Understanding “consultation”

- Consultation is the **establishment of dialogue** and **exchange of views** leading to the EWC being able to express an **opinion** on the basis of the **information provided** about the **proposed measure**.
- It is not *“consultation with a view to reaching an agreement”*, as is found, for example, in the Collective Redundancies Directive. It is simply the offering of an opinion.
- The Cambridge Dictionary defines opinion as *“a thought or belief about something or someone”*
- So, “consultation” as provided for in the Directive consists of a **conversation** between management and the EWC on the basis of the information provided.

Furthermore...

- There is no obligation on the EWC to offer an opinion.
- That being the case, as the CAC pointed out in *Oracle*, there cannot be any obligation on management to await the EWC's opinion before opening, conducting and closing national-level information and consultation.
- The two processes run in parallel, but independently of each other.
- If the EWC wants to offer an opinion that can be taken in account by management then it needs to do so in a timely manner.

Wrappings things up...

- If and when the EWC does offer an opinion then management responds to that opinion and that concludes the process.
- The response should be in writing. There is no need for a further meeting.
- Nor is there any need to come back to the EWC as the proposed decision is being implemented, following national information and consultation, though it will probably come up in any event at the next annual meeting with the EWC.