



GUIDE ON INFORMATION & CONSULTATION

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Introduction

If you are involved in information and consultation, the present guide aims to provide you with a handy support with information on your rights and tips to remind you what you have to pay attention to. The guide mainly (but not exclusively) deals with information and consultation at the national level.

The present guide is based on the findings of the survey undertaken in the framework of the DG Employment INVOLVE project, which undertook FAI CISL in Italy, FRATIA CNSLR in Romania, SMC_UGT in Spain and OBES in Greece, as well as on the experience gathered from many cases of information and consultation at company level. Survey has shown that the situation is far from ideal.

We intend that this guide is used transnationally. This means that we consciously omitted to include elements of national legislation or national trade union movement traditions, which nevertheless constitute a powerful constituent and tool and which you have never to forget, when conducting information and consultation.



Information and consultation. General concepts

Legislation

It has to be crystal clear that information and Consultation within the company does not substitute collective bargaining. It constitutes and is recognized as a separate right of workers/employees grounded on Article 27 of the European Charter of Fundamental Rights. Article 27 also recognizes that this right has to be exercised in good time.

European Commission has issued several Directives that invoke information and consultation.

EC Directive

Directive 75/129 on mass redundancies

Directive 92/56 on mass redundancies

Directive 98/59 on mass redundancies

Directive 98/50 on safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses

Directive 94/45/EC on the establishment of European Works Councils (EWCs)

Recast Directive 2009/38 on European Works Councils

Directive 2001/23 on transfers of undertakings

Directive 2001/86 on worker involvement in the European company SE

Directive 2002/14 on information and consultation

All these Directives have been transposed to member States' national Law. This is also true for countries that have joined the EU at a later stage. National Law is very important as far as application of Directives is concerned. There are differences between member States as far as the provisions of national Law are concerned. Main Directive for information and consultation at national level is Directive 2002/14.

Complementarity of Law

Directives mentioned above are valid independently and at the same time they are complementary to each other. If, for example there is a case of transfer of an undertaking, Directives 2001/23 and 2002/14 could apply. In the case the transfer refers to a company with European dimension, Directive 2009/38 on European Works Councils (EWCs) may also apply independently.

Directive 2002/14 also previews that if national Law in a member State has a better or higher level of protection of employees' rights, then national Law prevails. This is the case in countries with long tradition in information and consultation within the company as for example in Germany and in France.

Complementarity of action

Procedures of information and consultation are no obstacle neither do they draw back any other means of trade union action, such as collective bargaining, strikes, work stoppages, demonstrations, publicity to the problem, common action with local community etc.



Subjects of information and consultation

Information and consultation at national level includes:

- What the evolutions have been in the recent past and what they will be in the future as far as activities and economic situation of the company are concerned.
- The situation, structure and plans for development of employment in the company and if there is a threat to employment or if the management anticipates to take measures regarding employment.
- Decisions likely to lead to substantial changes in work organisation or in work contracts.

The employer is obliged to provide employees' representatives with real data, even with confidential one.

Timing

Time plays a major role in information and consultation. Directive 2002/14 recognises the importance of timely information and consultation as far as the success of the restructuring and adaptation of the company to the new conditions created by changes in the economy, and new forms of organisation of work are concerned.

The same Directive previews that information should be given at a time that allows employees' representatives to conduct an adequate study and, in the cases this is necessary, to prepare for consultation.

In other words this means that information should be given before decision is made, that there is reasonable time to ask for clarifications, to take answers for any clarifications employees' representatives ask or additional questions they pose, and to form their opinions on the basis of information received. Consultation should take enough time in order that employee representatives express their opinions, receive justified responses from the management about these opinions and analytically discuss the issue and possible solutions to it.

Information and Consultation (I&C) should be a win-win situation

Information and consultation aims at allowing employee representatives to know all parametres influencing a decision having implications on employment or work organization, to express their opinions and discuss with the company management to find a solution acceptable for both parties.

I&C also gives the management of the company the opportunity to listen to what employees' representatives say and understand the real situation at the workplace, which they maybe ignore. It contributes to the creation of a common understanding, a positive business climate and/or attenuating negative effects of decisions to face economic problems of the company.

If both sides come to information and consultation having a positive and sincere attitude everybody has to gain from this procedure. I&C ideally is a win-win situation.

Group dynamics

Information and consultation is a form of social dialogue at company level. The social dialogue, however, is governed by the respective balance of powers and this should not be forgotten. The power of trade unions, depends on the number of their members, on their structure (if there is only one trade union in the company, the sector, the national level or several), their expertise, their ability to communicate both inwards (with their members and other company employees) and outwards (with other trade unions, public authorities, the society) and finally on the existing laws and regulations.

There are at least three levels of interaction when referring to information and consultation:

- Interaction between employee representatives and management representatives



- Interaction between employee representatives governed by groups dynamics between them
- Interaction between employee representatives and the rest of employees of the company, whom they have to inform about discussions with the management.

Additionally to these three levels of interaction, there is the interaction with company central management at EU level, when there is a EWC, and dynamics between employee representatives at European level and national or local levels.

Information and consultation at a local and European level

Information and consultation in companies of European dimension has to take place both at European level, specifically in the European Works Council and at national or local level. Talking about companies of European dimension as far as information and consultation is concerned, we have in mind companies having sites in at least 2 member-states, employing at least 1.000 persons in total, of which 150 employees in each of 2 member-States. These companies already have or have the right to establish a European Works Council, which undertakes information and consultation on transnational matters and the closure of establishments.

Although European Directives and national Laws concerning the European level and the national level are different with different definitions and having different provisions about processes, they are based on the same right, the right to information and consultation.

This observation is capital and as an employee representative you should make use of I&C at both levels exhausting all possibilities they offer.

We have to mention, though, that, following the findings of the survey of what is going on in practice in Italy, Romania, Spain and Greece, coordination between information and consultation at national and at European level, has a great room from improvement. This should be an objective employees' representatives at both levels should seek with persistence.

Information and consultation in practice

Information and consultation usually takes place in companies, where there is a company-based trade union or a works council (which one of them depending on the country, the structure of the labour movement in it, the labour Law and tradition). In most small and medium sized companies, although previewed for companies employing more than 50 employees and for establishments employing more than 20 employees, the right to information and consultation remains inactive and untapped.

Agreement

Both Directives 2009/38 and 2002/14 preview the signature of agreements, between employee representatives and the employer, that are the result of free negotiations between them. These agreements establish the detailed arrangements for implementing information and consultation of employees in a specific company or group of companies at the European and national level respectively. One of the great differences between the European and the national level is that Directive 2009/38 on EWCs specifies the synthesis and way of election of the special negotiating body and, in case of failure of negotiations, the subsidiary requirements for the agreement, while in Directive 2002/14 on information and consultation at the national level everything is open.

In all cases of EWCs there is a written Agreement, but this is not true at the national level, where written Agreements on information and consultation are much rarer, at least in member-States in which there is no Labour Code or labour Law further specifying arrangements for information and consultation.



Infringements of the right to information and consultation

Directive 2009/38 (on European Works Councils) explicitly says, in clause 3 of the Subsidiary Requirements, that information and consultation meetings do not affect the prerogative of the central management.

Yet, experience has proven that management in most cases is reluctant to inform in good time employees, to be questioned by them and to consult with them.

This attitude, negative to sharing information and accepting social dialogue within the company, directly leads to frequent infringements of Directive 2002/14 and the respective national transposition law or to trying to keep just the appearances of respecting the Law but in fact seldom to carrying substantial information and consultation.

Sanctions

No legal document is respected, if it does not preview sanctions for those infringing it. This is all the more so in the case of information and consultation, for which a-priori the management of many companies is not enthusiastic.

In the case of Directive 2002/14, the directive previews that sanctions should be effective, proportionate and dissuasive.

However, you should be cautious, because the Directive does not specify sanctions for each type of non-compliance or infringement of its provisions. It says that member-states should take appropriate measures as well as administrative and judicial procedures to enforce the obligations deriving from the directive and sanctions in case it is infringed. There are many EU member –States, where the Law previews such sanctions.

The problem with this is that transposition laws in some other member- States, e.g. Romania, Italy and Greece preview small fines, which are by no way dissuasive.

Judicial procedures may also not be effective, as in some cases they are too slow.

In the case of Spain, information and consultation are obligatory in the special dismissal procedure called ERE (Expediente de Regulacion de Empleo).

Confidentiality

Confidentiality can be a very tricky issue. The company management may sustain that a subject is of crucial importance for the company and deny you any information. In this case you even do not know there is such a subject pending. In other cases, the management may deliver information and call it confidential. This means that this information cannot pass on to other employees of the company, hence you have limited freedom of acting. There is a general tendency of employers to abuse the clause of the Directive referring to confidentiality and declare everything as confidential.

Each case is unique

No two companies and no two employee representatives entailed in the information and consultation process at the national level and no two EWCs are the same. Each one has its own agreement, specific composition, cultural background, relation with management, historical evolution and so on. Each case is unique and out of the many different ways of handling problems employees representatives choose for historical reasons and for reasons of balance of power a solution that seems feasible and good to them. No single solution is the best solution. However, years of information and consultation at the national level as well as of operation of European Works Councils at the European level can provide employee representatives with valuable case studies and conclusions they can learn from. In this perspective, learning is rather finding stimuli for generating ideas than mechanistically transferring practices that other employee representatives have lived to your own unique case.



Tips

The following are recommendations by trade unionists interviewed, deriving from answers by interviewees to the question “what would you suggest to other trade unionists engaging in information and consultation procedure?” with comments and clarifications by the authoring group.

Tackling in a serious manner the process of information and consultation

There is a set tradition, mainly in South European countries, that the main actions of trade unions are collective bargaining, strikes and manifestations.

In the recent years, though, changes in the labour Law have restrained the right to free negotiations between employers and employees and collective bargaining has been cut down at all levels.

On the other hand, information and consultation remains a serious and legally established way of sitting together with the employer and trying to find a mutually satisfactory solution to each problem. Although finding a solution is not guaranteed, it is necessary to come to information and consultation with a serious attitude if you wish to reach one.

In several cases examined in the survey, we have met employers trying to jeopardize information and consultation process or employee representatives addressing it in a suspicious and derogatory way, both minimizing their chances to gain from their participation to it.

Information and consultation culture

In countries like Germany, France, the Netherlands or the Scandinavian ones there is a long tradition of information and consultation, from which has derived a deeply rooted culture of information and consultation.

This gives employee representatives the opportunity to claim for information for any item even if it seems not being important, which creates a good in-company social climate to both sides (employer-employee). This may prove crucial in periods of economic and financial crisis, when issues to be discussed are infinitely more important.

In countries like Greece, Romania, Spain and Italy, where there is no established information and consultation culture you have to start engaging in the process, when the company gains profits, to learn how to sit around a table and discuss and how not to step back with the first objections of the management.

Agreement

Detailed arrangements for implementing information and consultation of employees are usually established following a negotiation between the two parties and written down on an Agreement between the employer and employee representatives. Agreements for information and negotiation are more common in the case of EWCs. You should pay attention especially to two points:

First, you should always have in mind that what is written in the Agreement prevails (it is stronger) than what is previewed in the Directive. For example if the special negotiating body and the employer have reached an agreement for the operation of the EWC not previewing the employer pays the cost of an expert assigned by the employee representatives to assist them or no cost for training of EWC members is previewed, then this is so (despite that minimum clauses previewed in the subsidiary requirements of Directive 2009/38 say the contrary). In the case you don't reach an agreement, which is better than the provisions of the subsidiary requirements, you should better reach no agreement at all, because in this case enter into force the subsidiary requirements.



Second, concerning the timing of negotiation for the Agreement, it is always better to negotiate, when the company faces no economic or market problems and the trade union is more powerful. Remember that you will use the provisions and modalities of the agreement as well when problems may arise.

Virtues of a good employee representative

During information and consultation employees express themselves through their representatives. Solutions reached or failures to find a solution depend to a great extent on the virtues and skills of representatives.

Trade unionists from all countries participating in the survey have underlined as most important that as employees' representatives you have to:

- Believe in unity, responsibility and solidarity.
- Communicate to workers information you have received and inform them about your involvement in the search for all possible solutions.
- Never give illusions or false hopes to the workers; inform them properly.

Scope

As an employees' representative, as a trade unionist or as an expert, you have always to have in mind that you participate in the information and consultation process to negotiate on better conditions or arrangements for information and consultation in order to be in a better position to improve the conditions of employees.

Limits

The limit of information and consultation is not to lose job positions, or, in the case this proves to be impossible, to minimise the impact on employees affected.

Unity

In a company there may be more than one trade unions, belonging to trade union federations with different ideologies. Unity and coordination of action between trade unions is necessary if you wish to improve your positions. On the opposite, the company management often uses conflict or failed coordination between trade unions to neutralize trade union pressure (e.g. trade union is on strike in one factory and another trade union in another factory of the same company doesn't take any action, so workers in the second factory work overtime to counterbalance the loss of the employer from the first one).

Solidarity

Solidarity is closely related to unity but has a broader sense. Solidarity may be interpreted as a common action with colleagues working in the same company but in another plant or another country and facing a serious problem.

Solidarity may seem natural and self-understood, but is not always so. Think for example that the company management wants to close a factory. If not the one they propose, would it be yours? Experience has shown that if there is no solidarity the most likely result is that both factories will close in the mid-term.

Things are even more complicated in the case of multinational companies, where supporting employees of a plant of a specific country, which is in risk to be closed, may have negative consequences on employees of several other countries.



In practice, you may confront dilemma such as: will you envisage supporting colleagues of another plant with local conflicts? If you are a member of a EWC, how would you face a problem of closure of a plant in a non-EU country (which is not represented in the EWC)?

Last but not least, impulsive solidarity is not enough. You should look for coordination with other trade unions demonstrating solidarity to you, in order to tune and maximize impact.

Communication of Information to employees

As an employee representative, a trade unionist or a works council member, you base your power exactly on the fact that you represent employees and you are elected to this aim. This link is not exhausted in the act of participating in the elections, it is a living bond and it has to be kept as such. It is most of all an act of confidence in you. To this end, you have to pass to your colleagues information you receive from the management of the company and keep them updated about what is going on and what are the results (if any) of consultation. Frequent communication establishes transparency. To be transparent and true to your colleagues is the main virtue they ask from you.

To do this many of your colleagues, who participated in the survey have used the General Assembly, some have used the announcements board or the company newspaper. Whichever way you choose to use (you may also use e-mails or other new technology applications), the whole exercise of reporting to your colleagues, may give you the opportunity to listen to ideas, information, documentation that may be extremely useful to you and, anyway, you will keep your colleagues ready for any action you may need to take (e.g. stoppage, strike, manifestation etc.).

Even in the case of closure of a plant of a multinational company, which is very difficult to tackle as when multinationals decide to close it is very difficult to stop the decision from being implemented, there should be maximum transparency for the workers in order that they make their own decisions based on facts not on rumors and an effort to find alternative solutions.

Setting –up an effective internal information system

Effective communication demands to set-up and use an effective internal information system. This system may be used in a double-way. First, you may use it to diffuse information to your colleagues and second, you may use it to collect primary information or to check information provided by the employer.

If you use e-mails it is preferable to use personal e-mails of your colleagues and not the company mails or the company intranet, in order to keep communication between employees out of the control of the company.

Coordination with other trade unions and trade unions structures (Federations, country organisations)

Solidarity may also be expressed between workers or trade unions from different companies. This includes trade unions at all levels (including the Confederation level).

Organizing a strong trade- union action demands to communicate your problems, decisions and actions to other trade unions and trade union structures, ask for their solidarity and co-ordinate with them. Coordination with national and (in the case of EWCs) European confederations is therefore essential, as well as continuous training and strengthening the network of European workers' representatives.



Social action, solidarity, support of social institutions

To maximize pressure on your employer you require the support of social institutions, and institutions at all levels (local government, local authorities, ministry and ministry departments). This may contribute to the general climate towards your case but it may also have practical application (tripartite meetings etc.).

Another important component of solidarity is mobilisation of the local community and employees of other sectors. To do this, you have to use communication and publicity measures to make your problem known and gain support. Use of social media may also prove to be useful to achieve penetration of your message to big numbers of persons.

For example, in the case of VIOME, a bankrupt chemical industry in Thessaloniki, Greece, the company-based trade union took over the operation of the factory. A huge solidarity movement has been built and products of the company are promoted and sold through movements (not only the labour movement but also ecologists, movements for combatting poverty, cooperatives etc.) all through Greece and abroad.

Written minutes, written documentation

Information should be given in written and not be limited to ppt presentations of general interest or publicity spots.

In many cases reported, employers deny to keep written minutes of information and consultation meetings. The reason for this is in order that they are easily able to reformulate or even deny what they have said in the meeting in the future.

You have to insist to keep minutes or record the meetings. In case this proves to be not feasible, a suggestion proposed by a trade unionist is to keep minutes with your own initiative and then ask the company to protocol the document.

Experts

Your employer in general disposes of more resources and technical expertise than you do. Companies participating in information and consultation (taking into consideration that, following the findings of the survey they are at least medium sized) have a technical department, a financial and an accounting department, a lawyer etc., which contribute to formulate the position of the company and to support the management before, during and after the I&C meetings.

Information includes pieces of information of technical nature (e.g. analysis of financial data and balance sheets, production data etc.), which you are not obliged as a trade unionist to master. In order to understand them, make the proper questions and prepare your position in view of participating in consultation, you need the assistance of an expert. The expert may not be the same all the times. In fact, it depends on the nature of the information to look for the expert having the most appropriate knowledge, experience and skills.

Directive 2009/38 and most EWC Agreements preview at least one expert, assigned by employees' representatives the cost of which is paid by the company. In case though, the agreement on information and consultation either at national or at European level has not any provisions for an expert then he/she has to be paid by the employees (trade union). In most cases experts are provided by trade unions or trade union federations.

Experts most likely are lawyers but it is very common that they have to be accountants or economists or engineers.

Before starting providing services as experts, they have to sign a statement that they are bound under the same confidentiality obligations as the employees' representatives.



To know well the procedure of information and consultation

You, as an employees' representative, have to know well the provisions of Directives concerning information and consultation related to your case and the respective national laws applied. For example, if the management of your company intends to make mass redundancies you have to know the provisions of Directive 98/59 and of the law transposing it into your national legislation.

Of course, nobody expects from you to have the knowledge even lawyers, if not specialised on the topic, do not have. You must know the basic provisions. Participating in training sessions organized by trade unions, or in meetings for exchange of experience with other employees' representatives or asking the Inspectorate of Labour or, of course, having the support of a lawyer may prove beneficial and save you a lot of trouble.

To study legislation

The same applies to other pieces of legislation (e.g. about bankruptcy law). Spanish trade unionists have especially mentioned that employee representatives have to know the provisions and concrete proceedings of the special dismissal procedure called ERE (Expediente de Regulacion de Empleo). Trade unionists have to have the basic knowledge on this kind of legislation as well as on fiscal and marketing issues (as proposed by Italian trade unionists) in order to be in a position to effectively participate in information and consultation.

This kind of knowledge may also be gained through training, exchange of expertise and support by experts. Many agreements on information and consultation (mainly for EWCs as there is such a provision in Directive 2009/38) preview training sessions paid by the company for employee representatives participating in information and consultation.

To use all legal means available

Trade unionists participating to the survey from Greece, Romania, Italy and Spain agreed that to protect effectively employees' rights and interests, you have to be persistent and to use each and every means previewed by the law and the juridical procedures available.

Alternatives

You should always have in mind that if you have your own positions and propositions for solution to put on the table, then it will be easier to bring the management to discuss on the basis of your positions. It will be even better, if you are ready to present not just a solution but several alternative solutions as well, because this widens the range of options and may provide answers to objections from the part of the management.

Even in the case it seems there is an impasse and the company will be closed, employees may find another solution, such as to form a cooperative taking over the activity, as Italian trade unionists suggest.



Issues to pay attention to when you participate in information and consultation and questions to ask yourself

Forms of employee representation

Generally, there are various systems of employee representation in Europe (e.g. the German and the French ones). The problem we deal with now is, who may represent employees and workers as far as information and consultation is concerned?

As a rule, depending on national labour legislation and tradition, employee representation may be through works councils (e.g. Spain) or company-based trade unions (e.g. Romania and Greece) and more seldom representatives may be directly elected by employees to this end.

Trade unions having as members employees working in more than one company (at local or sector level) are not entitled to participate in company level information and consultation processes. This is because information and consultation is considered as a “family affair” between parties, equally interested in the well-being of the company (employees and the management) and information may not be delivered to persons not directly involved in the company and directly interested in its future (e.g. trade unionists working in the competition).

It is common, though, that trade unions provide with experts and assist works councils and company-based trade unions.

Information

Before you start discussions with the management, are you sure you have all necessary information?

Have you double checked information before you react or have you just assumed that the information that you got is correct? This is especially important if information comes from a single source or from press articles or from rumors.

Have you used all resources available to verify information you got? The most important aspect of information and consultation at national/local level is input from your colleagues. At European level for a EWC the most important is not the legal framework, but the network of workers’ representatives that you can create and how you use it to exchange information and to verify what management tells you.

Always look for evidence of what the company offers.

Try to have the information as soon as possible so that you can analyse it well and study it to have the framework of the problem or of the impact of crisis and that you find the highest protection for workers.

Assess whether the company's plans are really aimed at the development of the company.

Disagreement

There will, inevitably, be issues on which the union and the employer will fail to agree. When this happens, the union might try and resolve matters by recourse to:

- An appeal to more senior management
- Taking out a collective grievance
- Going to arbitration
- Bringing the problem to the Court of Justice.



If there is still no agreement the union might consider industrial action. This is, and should always be, the last resort. Local union branches would need to involve senior union representatives and officials before any decision to invoke industrial action could be taken. Union members would also have to be convinced that negotiations had broken down leaving no alternative but to go on strike.

Problems you introduce, with your own initiative, for consultation

To start consultation about a subject you introduce with your own initiative, the first stage is to identify the problem, and to do this adequately you will need to talk to employee(s) concerned. Make sure that the facts of the case are correct and that all complaints with which you progress are justified.

- Is the problem a personal one? You should be aware that some 'personal problems' can cross over the boundary and become enmeshed with work and vice-versa; e.g. illness and time off might be triggered by stress or by breaches in health & safety regulations
- Is the problem an individual or a collective one? What at first appears to be an individual problem may also affect other members, e.g. change in pay, job content or working conditions for one member might reveal a change in management policy towards the whole workforce.
- If an employee has a problem there will probably be an underlying reason.

Time

Take your time! When management comes to you with a restructuring project, they will ask you to express an opinion the soonest possible, whereas they have been preparing that project for months, paying whole teams of experts.

Do you waste time on details, do you analyse what is going on and focus on what is really important? Perhaps dealing with these details that you are more familiar with (or they are simpler and you can handle without having to ask an expert) makes you feel better, but do you dedicate enough time to what is really essential (e.g. drop of productivity, reduction in investment, problems with the banks or with paying suppliers)?

Does management waste time presenting trivial information, which you already have or do not really need?

Experts

Have you used experts? Have you used the right experts? Don't forget, if you are a EWC member you have the right to use experts and that legislation provides that at least one expert is paid by the company management and the same stands if you have an agreement on information and consultation at the national level, which previews experts.

A point that should be stressed here is that you are not obliged to use one and the same expert all the time. On the contrary, it would be wise on your part to choose your expert according to the problem you have to examine. A good example would be that you use a lawyer to clarify legal uncertainties or to advice you on your rights and the provisions of the Law. On the other hand, if you wish assistance to analyse the balance sheet or the financial situation you may make recourse to an accountant and when you need to analyse production data the management presents to you, you make ask the support of an engineer.

Good practice example in a multinational company was that employees' representatives used as expert the retired ex HR manager of the company and the ex-Financial manager.

Alternatives

Have you found alternatives to the positions and solutions proposed by the management?



Just saying “no” to what the management proposes is too easy and will not get you any respect as a social partner. Trying to find alternatives is more constructive. In many cases, as a matter of fact, management raises re-organisation or profitability or efficiency reasons to centralise some activities, closing departments functioning in some plants. In that case, the best strategy is not to try to cancel this decision but to try and develop alternatives that have less negative consequences for staff.

If you reject a project without arguments or alternatives, management will simply ignore your opinion and continue with their plans. If you can advance some well -argued alternatives, it will be a lot more difficult for management to just ignore them.

An example of the importance of elaborating alternatives, presented by the ETUC, is the case of centralisation of securities activities in the Benelux which was advanced by Fortis Bank. It was stopped by the EWC in Fortis Bank, which proposed organising specialised “competence centres”, namely handling of shares in the Netherlands, investment funds in Luxemburg and coupons in Belgium. In this way some jobs were lost in each country, but activities were maintained everywhere.

Confidentiality

Have you ever asked yourself if information, which management labels as confidential is really confidential? Has it ever passed through your mind that if management has information, which is really confidential, the employer will simply not tell you, so you wouldn't even suspect there is such a problem?

Both Directives 2002/14 (on information and consultation at national level) and 2009/38 (on information and consultation at European level) contain a confidentiality article. By no means can management interpret this fact as that it has the freedom to make decisions autonomously, without information and consultation, whenever it applies this article. In any case you are not obliged to accept it.

If you have accepted the label of confidentiality for a piece of information, have you agreed with the management for how long you are obliged to keep confidentiality?

Have you thought and is it clear who is covered by confidentiality, if and with what standard procedure (signature of a statement accepting to keep confidential information etc.) you may share information with your experts in order to formulate your position and suggestions for the specific issue? Does confidentiality cover employee representatives absent in the meeting the confidential issue was raised?



Answers to remember

1. What is information?

Directives usually start by giving the definitions of the basic terms they use. It is interesting that different directives use different definitions for the same term. As a rule, definitions become much more elaborated with the time.

Specifically, following Directive 2002/14 "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.

On the other hand, following Directive 2009/38 "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.

2. What is consultation?

Following Directive 2002/14 "consultation" means the exchange of views and establishment of dialogue between the employees' representatives and the employer.

In Directive 2009/38 "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.

You may observe that the latter definition is more refined and includes prerequisites for considering a dialogue as a consultation (e.g. need for reasonable time).

3. What are the differences with collective bargaining?

Information and consultation is based on Article 27 of the European Charter of Fundamental Rights, whereas collective bargaining is based on Article 28 of the same Charter. The International Labour Organisation (ILO) defines collective bargaining as the "voluntary negotiation between employer or employers' organisations and workers' organisations, with a view to the regulations of terms and conditions of employment by mean of collective agreement".

The main differences of information and consultation on one hand and collective bargaining on the other are:

- Collective bargaining has as sole aim the signature of a collective agreement, whereas information and consultation may deal with specific decisions of the management or examine the perspectives of the company.
- Collective bargaining may cover a company, a plant of the company, a sector or to be nationwide. Instead, information and consultation is always company based.
- Collective bargaining takes place periodically, in most cases once a year. Information and consultation may take place at any time.
- In collective bargaining employee representatives participating are always trade unions. In information and consultation other forms of employee representation (such as works councils) may participate as well.

4. Why information and consultation is useful?

Information and consultation is useful when it is effective, this meaning when it concludes to the adoption by the management of concrete solutions



improving both the positive perspectives of the company and the work conditions of employees or, in the case the management decision has a negative impact on employees, to attenuate that. To achieve this, both parties, the management and employees' representatives, have to act seriously, sincerely and in a win-win mood.

You have not to forget that information and consultation is a legal obligation. Failure of the management to comply with this obligation gives the right to the trade union to proceed to Court or take any other juridical measures. This may have as result postponing or even declare void the decisions of the management. This development may be useful as well.

5. In which type of companies employees are entitled to information and consultation?

Directive 2002/14 for information and consultation at national level applies to companies employing at least 50 employees and establishments of companies employing more than 20 employees. In practice, it may apply in companies where there is a company-based trade union or works council. In most cases small and medium sized companies, sometimes even big companies fail to comply with the obligation for information and consultation.

It is sometimes the legal form of the company for which information and consultation is mandatory. For the European company (SE), for example, it is previewed in Directive 2001/86, which deals precisely with rights of participation and information/consultation of employees in this legal form of company as well as the way these rights are applied.

6. Is there a difference if the company belongs to a European-scale grouping?

Under specific conditions, namely if the grouping employs more than 1000 employees in the EU, of which at least 150 employees in a member-State and 150 employees in another member-State, then additionally to information and consultation at national level, employees have the right to ask and establish a

European Works Council (EWC) and proceed with information and consultation at European level.

This means that in European-scale groupings, information and consultation have to take place at both levels (national/European) and none of them substitutes the other.

7. Who represents employees?

Depending on the national legislation of the member-State, in information and consultation sessions employees are represented by company-based trade unions or works councils or representatives on purpose elected by the whole work-force of the company.

The notion of representation is reciprocal, this meaning that if you are an employee representative you have to keep employees you represent informed.

8. Who represents the management/employer?

Employer has to be represented in the highest level possible (employer, general manager), because else employer representatives may play games, e.g. by conducting consultation and then saying "I am not authorized ..." taking back whichever concessions up to that moment.

You should also be cautious that you are not outnumbered by management representatives, lawyers, etc. because if this happens it will be most difficult to counterbalance them and have a dialogue on an equal basis.

9. If there are more than one companies in the grouping is there any difference?

Works councils and/or company-based trade unions will be wise to inform the respective works councils and/or company-based trade unions in the other companies of the grouping and coordinate their action with them.

10. In which cases Information and Consultation should take place?

Cases preview in the Directives include everything that influences the development of employment in the



company, all the more if the employers' decisions may threaten employment, the possible anticipatory measures envisaged, in particular as far as employee training and skill development is concerned in order to attenuate negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected. Information and consultation in occasions of transfer of companies is also mandatory.

In the case of EWCs, information and consultation refers to transnational matters, this meaning matters that concern companies in two at least member States.

11. In which cases is it good to have information and consultation?

There are two facets of the usefulness of information and consultation.

The first, the positive one is to strengthen dialogue and promote mutual trust between employers and employees within a company. This is meant to have a positive impact on work organization, access of employees to training, risk anticipation, improving security, employability, employee involvement, awareness about adaptation needs and competitiveness of the company.

The second is to find ways of reducing negative impact of decisions threatening employment or producing damage to employment, work organization or work conditions.

12. What if the employer refuses to give information?

You may report this to the Labour Inspectorate or take juridical measures.