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# MANAGING transnational employee representation

How to effectively  
address the challenge  
of European  
Works Councils

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**M**anaging employee representation at European level is a complex and challenging process. The European Directive on the establishment of a European Works Council only gives broad principles but does not provide social partners at company level with sufficient backup on how to organise and involve the EWC efficiently on the important company topics.

This is especially true regarding three specific issues directly affecting the role of European Works Councils

- **What is a transnational topic?**
- **How to organise the information & consultation procedure effectively?**
- **How to manage confidentiality in the EWC?**

In this respect, with the support of the **European Commission (DG Employment, Social Affairs and Inclusion)**, **ASTREES** (France), **EWC Services SBI Training en Advies & FNV Formaat** (The Netherlands) and **IR Share** (France) carried out a project in 2015/2016 aiming at the promotion of good practises in managing European Works Councils.

**The European Centre of Employers and Enterprises providing Public Services (CEEP - Brussels)** and the Dutch Employers' Organisation (**AWVN**) supported this project and mandated the project partners to organise three workshops. Each workshop brought together HR managers in charge of running EWCs from different countries, sectors and groups. Each event was focused on a specific theme. Finally, a final event brought together HR managers and employee reps in different EWCs to share the lessons learnt from the previous workshops.

This handbook is the outcome of this exciting project. It aims at bringing light to these difficult issues to HR managers but also employee reps at different levels (European for sure, but also national or local). We hope it will be useful to any stakeholder involved in the functioning of European Works Councils.

The project partners share a strong belief in the added value of constructive dialogue on transnational topics in a multinational company. They believe that involving employees in an early stage will lead to a better decision-making – process and create financially stronger companies.

We would like to thank all managers, employee reps and organizations for their participation in this project as well as the CEEP, the AWVN and the European Commission for their contribution to this work. Without their participation and support, this book could not have been made.



We also wish to especially thank the Solvay group which welcomed us in Lisbon for our final event in March 2016.

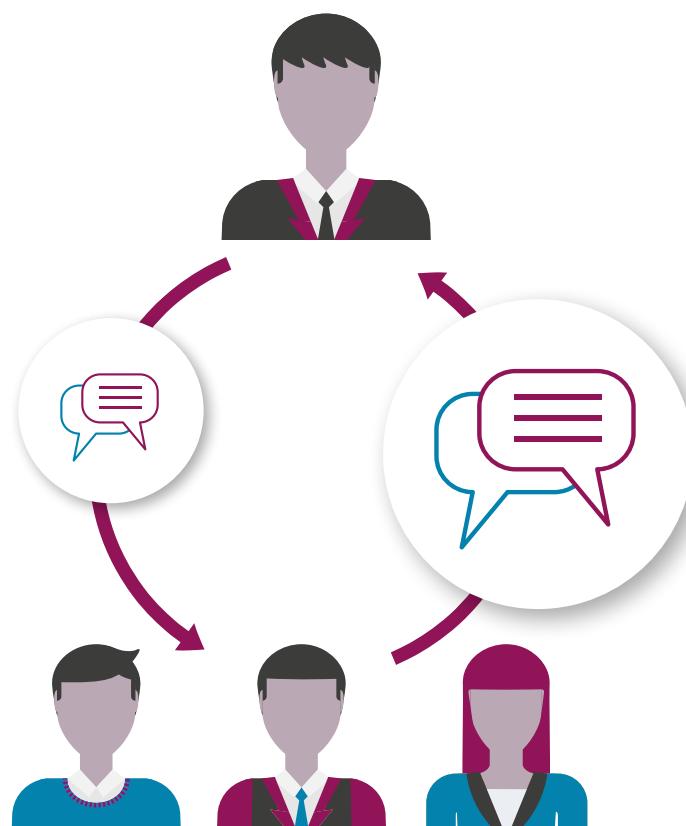
Finally, I'm personally grateful to Jacqueline Carlino and Laurence Danneaux (ASTREES), Petra Molenaar (SBI Formaat), Elza Novais (Solvay), Sebastian Schulze-Marmeling (ASTREES), Sjef Stoop (SBI Formaat), Frédéric Turlan (IR SHARE) and Marielle Van der Coelen (SBI Formaat) for their strong involvement in the implementation of this project.

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# Managing Transnational Issues in European Works Councils

F. Turlan (coord.)

**M**anaging transnational issues is the main role of an EWC. Even if the EC-Directive stipulates that transnationality concerns the company **as a whole**, or **at least two sites** situated in **two different Member States**, the matter of deeming a subject transnational is often a controversial issue. As the EC-Directive gives no detailed guidance on how to put it all into practice, social partners are required to come up with their own criteria.

This short handbook results from a seminar held on 9 and 10 April 2015, having brought together HR managers from different groups and sectors, with the aim of bringing light to this difficult issue.

# What is at stake?

## → From a legal perspective

### *Texts of the Directive*

The core of the directive contains two articles:

- Article 1 § 3: “Information and consultation of employees must occur at the **relevant level** of management and representation, according to the subject under discussion. The competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be **limited to transnational issues**. ”
- Article 1 § 4: “Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings **as a whole**, or **at least two undertakings** or establishments of the undertaking or group situated in **two different Member States**”.

These articles have to be read in the light of the whereas 16, which may be used by courts in case of litigation:

- Whereas 16: “the transnational character of a matter should be determined by taking account of both the scope of its **potential effects**, and the **level of management and representation** that it involves. For this purpose, matters which concern the **entire undertaking** or group or at least two Member States are considered to be transnational. These **include** matters which, **regardless of the number of Member States involved**, are of **importance** for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States”.

These provisions give some indication about the scope of a transnational issue. It is quite clear that an issue affecting two sites in two Member States has to be considered as transnational, as an issue with impact on the whole group (as an EU wide-restructuring or a reorganization of the company's structure).

However, social partners have to face many “grey areas” where it is unclear, from the text of the directive, if an issue has to be considered as transnational. A same situation can be considered as “of importance for the European workforce” and “transnational” by employees’ representatives and of less importance or not transnational for employers.

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The table below shows the different “grey areas”:

**Table 1: When a decision is considered to be in the scope of the EWC**

	Concerns the whole group or at least 2 sites in 2 Member States	Is of importance for the EU workforce because of potential effects	Group level management is the relevant level of management	Remarks
→ When a decision...	X	X	X	... it is in the scope of the EWC.
	0	X	X	... could be in the scope considering whereas 16 (“regardless of the number of Member States involved”)
	X	0	X	... not in the scope of the EWC if there is no important effect on the workforce.
	X	X	0	... it is in the scope even if the decision is not taken by central management (but a regional headquarter).
	0	0	X	Not in the scope.
	0	X	0	... could be in the scope if the project affects one Member State but has an impact on the EU workforce.
	0	0	0	Not in the scope

## → Practical elaboration of the legal background

The EC-Directive does not give detailed guidance on how to deal with each situation. And deliberately so. The Directive explicitly states: 'In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils (...) so as to suit their own particular circumstances.' (Whereas 19).

Therefore, social partners have tried to negotiate different kind of provisions in their agreements to work out how they want to deal with transnational issues. Such provisions provide:

- to set up some thresholds to consider what is of importance for the EU workforce: an issue is raised to the EWC if at least 3% of the EU workforce is affected, or at least 1,300 employees, or if the concerned business represents about 5% of the total turn-over of the group. However, the combination of the concept of 'significant' in one clause with the definition of transnationality, is not in line with the directive as transnationality is defined in the Directive without reference to 'significant' or 'considerable extent'. Furthermore, participants in our workshop didn't consider such a provision as a good practice as it still maintains rigidity. Especially when it focuses only on the threshold of affected workers to measure the "substantial impact" as this concept can't be only defined in terms of redundancies. E.g. the impact may be an increase in workload for those that stay behind; or an increased business risk; or risks of process disturbances.
- to adapt the whereas 16, with the aim to agree that some issues affecting a single country may be raised to the EWC if they are of importance (depending on the number of employees affected).

### ***Example of Transnational in an EWC agreement, taking into account whereas 16:***

*A matter is considered transnational when it affects the employees in at least two countries covered by this Agreement, or when it concerns the transfer of activities between countries covered by this Agreement.*

*Decisions made in one Member State which affect the employees in another Member State will also be considered transnational when they, regardless of the number of countries involved, are of importance for the European workforce in scope of their potential effects.*

- to explicitly exclude from the scope of the EWC an issue concerning one single Member State.

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The use of legal ways to solve conflicts is tricky for both sides. If the EWC agreement has no provision: the judge will take into account the national implementation regulation and if there is no provision there, the text of the directive in the light of whereas 16. For both parties, the result is highly uncertain. If the EWC agreement has a provision: the judge will take into account the provision. It must be a serious incentive to negotiate such provision but the result may be uncertain too.

## Practical issues and possible solutions

*What are, in short, the difficulties reported by companies and employee reps with respect to transnationality?*

### A. Can an important issue affecting one site in one single Member State be considered as a transnational issue?

This question is very controversial, according the results of the workshop held in Paris in May 2015. If managers agree that an important event happening in one Member State may be an issue of information of the EWC, and for some of them an issue of consultation, they are absolutely against considering that an issue affecting one establishment in the same country as the headquarter is, could be raised to the EWC, as there is a lack of transnational link (see box on Transdev below). Their fear is that the EWC considers every decision as transnational (especially in organisation with transnational support services or where production is constantly transferred from a country to another). Therefore, they highlight that in such a situation there must be an evidence of an important impact on the workforce.

#### **Transdev**

*The EWC criticised the management for failing to consult it following Transdev's decision to ask one of its subsidiaries, the shipping company SNCM, which only operates in France, to repay a loan, thus causing SNCM to be put into receivership. The court underscores that «matters which require the prior consultation of the European works council must [...] incorporate an international or European dimension, by their purpose or by their effect. In the absence of any international element, the consultation of the EWC is not mandatory». Since the court did not find any international element in this case, it examined whether Transdev's decision had a significant impact on the European workforce.*

*In the eyes of the court, this was not the case. Therefore, the EWC did not need to be consulted. But it was mentioned by Rachid Brihi, lawyer (Brihi & Koskas associates) who defended the European works council of Transdev: The court maintains that the decision taken by the management of Transdev, which led to its subsidiary SNCM being placed in receivership, could have «significant economic and social consequences eventually for the entire group and therefore for the European employees». Therefore, the possible winding-up or sale of this «small» French subsidiary, which represents only 2.5% of the group's workforce, could be a subject for consultation with the European works council.*

However, in the case of Heineken, a different approach was reported later in the Information and Consultation workshop, when the affected establishment is the headquarters of the group. When the company planned a restructuring that only led to job losses in the headquarters in the Netherlands, management found it still very obvious to inform and consult the EWC on this: The change in the structure of the company would impact the Heineken global governance and as such have an effect on all subsidiaries in Europe.

### **B. Must a transnational issue involve employees in two different Member States?**

Companies mainly consider that only transnational issues have to be raised to the EWC. This is for example the case of the French tyre manufacturer Michelin (65,000 employees). However, this group, before the 2000's had no EWC and tried to avoid an information and consultation body. Meanwhile, the company launched reorganisations in one country after the other without any explicit European plan. Michelin has finally set up an EWC in 1999, and the management has changed radically its position as from 2005. It introduced new practices aiming at improving co-operation and exchanges between the EWC members and management. For example, the group has announced, in November 2015, a European wide reorganisation and a consultation of its EWC (see box).

#### ***European-wide reorganisation at Michelin***

*The Select Committee of the EWC met on 19 November 2015, following the management announcement on 3 November of restructuring affecting 1,600 jobs in Europe. Michelin launched a reorganisation plan of its activities in the UK and in Italy. This would be accompanied by an investment of 265 million Euros to modernise production facilities and the logistics network in these countries. The Oranienburg Pneu Laurent site in Germany would cease operations. The group announced investments and site closures primarily affecting its business with new and retread truck tyres. An extraordinary Select Committee meeting was therefore held with extended representation, including members of the EWC representing the affected countries. In a statement, the members of the Select Committee took «an adverse view of the planned site closures». As far as the accompanying social measures are concerned, the Select Committee pointed out that it was unable to intervene in local negotiations, but called for the European framework agreement to be observed and for a progress update to be provided at each meeting of the committee on the «establishment of negotiated social measures».*

However, in March 2016, Michelin has announced a reorganisation of its activities in Clermont-Ferrand, where it has its headquarter, that will affect also a retread truck tyre activity (with 330 internal replacements), its engineering activities with 164 job cuts (on a total of 970) that will receive replacement proposals within the group. For this important restructuring, the EWC has not been consulted as it was not considering as a transnational issue (as provided for by the EWC agreement that considers a transnational issue when at least two Member States are affected).

This case highlights the importance for companies of a proof of "transnational" issues that is needed to justify a consultation of the EWC.

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### C. What is meant with “effects”? Employment, organisational, other?

Issues have to be of importance for the EU workforce, that does not necessary mean employment effects. A change of in the remuneration system, or a change of software to deal with HR management or accountancy may produce effects on the whole workforce. The transfer of production to different countries also, even it has no impact of the number of employees but on the working organisation or the workload. As mentioned by participants, a transnational company deals with many transnational issues. Then some rules have to be followed to avoid that any issue is raised to the EWC. The key points is that the issue has to be significant (of importance for the EU workforce) and that the information and consultation process of the EWC has an added-value in the decision making process.

### D. Does “transnational” cover decisions taken at central level concerning or impacting only a single Member State?

On a legal basis, looking at the EWC directive, the answer is no. It was provided for by the SE directive, but refused by the social partners in the framework of the revision of the EWC directive in 2009. However, as mentioned in A, social partners at company level may decide on such provision in their agreement, or may agree to raise such issue to the EWC if they think the decision is significant and of importance for EU workforce. But, when decision from the headquarters has an impact on the Member State where the headquarters are located, participants in our workshop refused with unanimity to estimate it could be a matter of information or consultation of the EWC. However, an important starting point for the EWC is that the employees have the right to be informed and consulted when decision that affect them are taken in another Member State (whereas 12 of the 2009 directive). Where participants in the workshop thought that the EWC cannot be informed and consulted on all headquarter decisions that only have an impact in one country, one could think of bringing one-country issues to the table of the EWC in case the national employees' representatives reach their limits. This can be done by inserting in the agreement a text like:

**Information on one-country matters provided by Central Management will not constitute an initiation of a consultation process, unless the decision making level of the issue impedes the national employees' representatives to be engaged in a meaningful Information and Consultation process.**

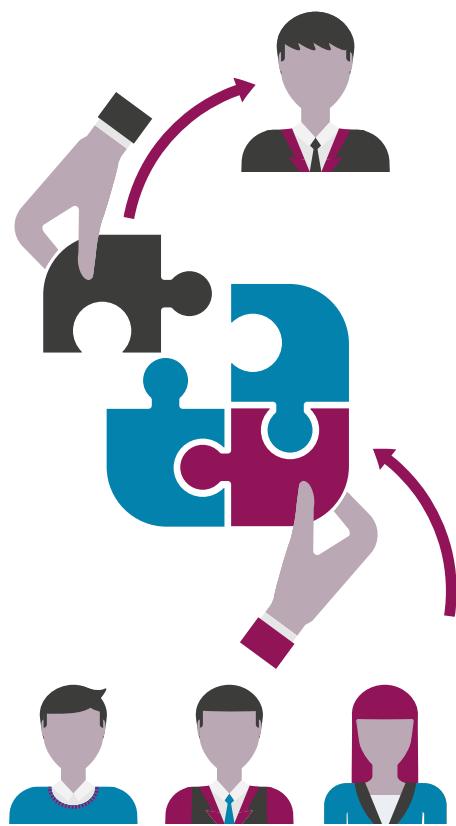
# Going further to better manage the “transnationality” issue? Some guidelines for HR managers

- **Managing transnationality without hindering the role of EWC representatives is a matter of trust**
- **In light of this statement, we present here a set of possible guidelines by making a distinction between three different levels**
- **Level 1: social partners are invited to include a provision on transnationality in the EWC agreement**
  - **The aim** – to agree on basic rules adapted to the company rather than just copy and paste the definition of the directive.
  - **Implementation** – to launch a collective bargaining with the EWC to amend the agreement. However, social partners have to avoid a provision with a catalogue of issues considering as “important” or “transnational”. The aim is more likely to give key of interpretation of what is of importance for employees’ representatives. According to the participants of the seminars, issues that have to be raised to the EWC have to be significant and the process of information and consultation must provide added value for the EU employees. It could be useful to explain in which circumstances an issue affecting only one single country could be considered as relevant or as a subject that has not to be submitted to the EWC..
  - **Added value** – Making clear for all that the EWC has to deal with issues on which it can have an added value. Facilitate the decision for managers to decide or not if an issue has to be submitted to the EWC. Avoiding repeated discussions on the concept of transnationality.

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- **Level 2: to launch a workshop with the Select Committee and management to discuss about issues of the “grey areas”**
  - **The aim** – to build a better understanding on issues that have to be raised to the EWC (or only to its Select Committee) and to build trust between managers and employees’ representatives.
  - **Implementation** – to launch a dialogue, based on different fictive case studies, between managers and employees’ representatives, to facilitate for the future the decision to raise or not to raise an issue to the EWC. The participants will decide when consultation of the EWC has an added value in the decision making process and what kind of issues are to be considered as significant by managers and employees’ representatives.
  - **Added value** – to speed up the necessary building of trust between social partners to facilitate the information and consultation process and to create a common understanding of the concept of transnationality.
- **Level 3: to give the Select Committee a role in filtering whether an issue is matter of information or consultation**
  - **The aim** – to set up a continuous channel of information between the management and the Select Committee to build trust and to decide in common whether an issue is transnational and important or not, and furthermore to decide if the issue has to be raised to the whole EWC or to the Select Committee only.
  - **Implementation** – to launch a collective bargaining with the EWC to amend the agreement. The provision has to set up the process of information and consultation between the Select Committee and the management. Such provision may ensure the legitimacy and the representativeness of the Select Committee, so that its members may be consulted on some issues in the name of the EWC. This is important as the Select Committee will then take two decisions for any information given by management: it will decide if it is transnational or not and if the EWC has to give its opinion through a consultation process or not. This not only requires trust between management and the Select Committee, but also a high level of trust between the Select Committee and the European Works Council.
  - **Added value** – to ensure a permanent information and consultation process based on trust between management and employees’ representatives, that is facilitated through interaction between managers and a small group (the select Committee) of employees’ representatives.



# Managing I&C in European Works Councils

**S. Stoop (coord.)**

Information and Consultation are the core business of a EWC. The management of this process often turns out to be a complicated and sometimes controversial issue. The EC-Directive is a very well-constructed piece of legislation in which a lot of complicated issues have been solved, but it does not give detailed guidance on how to put it all into practice.

This short handbook, resulting from a seminar held in June 2015 and having brought together HR managers from different groups and sectors, aims at contributing to enlighten this difficult issue.

# What is at stake?

## → From a legal perspective

DIRECTIVE 2009/38/EC on the establishment of a European Works Council (Recast) provides detailed definitions of Information and Consultation. These definitions, as transposed into the national legislation that governs the EWC Agreement, are binding. Deviations are legally void.

### **Article 2**

- (f) 'information' means transmission of data by the employer to the employee 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 employee 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;
- (g) 'consultation' means the establishment of dialogue and exchange of views between employee representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as to enable employee representatives to express an opinion on the basis of the information provided about the proposed measures in relation to the consultation, 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;

These definitions have to be applied in combination; especially when it comes to the timing of the process. The part 'an opinion (...), which may be taken into account within the Community-scale undertaking' would mean that management has to count back from the moment when the company wants to take the first irreversible steps toward executing the proposed measures, to agree on a date on which information and consultation can be done in a timely manner. As the Directive states, this should allow employees' representatives to:

- to undertake an in-depth assessment of potential impacts
- to prepare for consultations
- to have a dialogue and exchange of views between employee representatives and central management
- to express an opinion on the basis of the information provided.

The subsidiary requirements add a final step that many companies have copied into their EWC Agreement too:

- The consultation shall be conducted in such a way that employees' representatives can meet with central management and obtain a response, with the reasons for that response, to any opinion they might express

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The Directive also makes it mandatory for the EWC to provide this opinion within a reasonable time frame. The opinion is without prejudice to the responsibilities of management, so at the end of the day, management is free to decide after the procedure has been properly followed.

### → Practical elaboration of the legal background

The management of this process can be quite challenging. Especially the question of what is a reasonable time to deliver the opinion, which often turns out to be a difficult one to solve.

The EC-Directive does not give detailed guidance on how to put it all into practice. And deliberately so. The Directive explicitly states: 'In accordance with the principle of autonomy of the parties, it is for the representatives of employees and the management of the undertaking or the group's controlling undertaking to determine by agreement the nature, composition, the function, mode of operation, procedures and financial resources of European Works Councils (...) so as to suit their own particular circumstances.' (Whereas 19).

So it is up to the social partners to work out how they want to make the I&C process work!

## Practical issues and possible solutions

What are, in short, the difficulties reported by companies and employees' representatives with respect to I&C?

- **The right timing is a big issue. Management is concerned about delays if the implementation of measures cannot be started in time, employee representatives want enough time for the I&C process.**
- **The 'Linkage clause'. The art. 12 of the Directive calls for a clause to link European and national I&C in certain cases.**
- **How and when does consultation begin after information?**
- **How to deal with the difference between 'normal' consultation and consultation in case of extraordinary circumstances?**
- **What should the proper content of the information consist of; what is necessary information, which level of detail is necessary, should this contain local detail?**

- **How to deal with dynamics? Within multinational companies, one can see more and more central decision-making, leading to more and more transnational matters to consult with the EWC. How can a company comply when you have only one/two meetings per year with the EWC?**
- **If headquarters are located outside of Europe, or if the company is managed by global business lines, managers responsible for the I&C with the EWC are sometimes not informed in time themselves.**
- **How to define 'significant'?**

The seminar discussions provide useful input to deal with the above mentioned issues:

→ **Timing**

What is the right moment to inform the EWC? It is clear that the Directive requires enough time for the information and consultation process to enable the EWC to come up, within a reasonable time, with an opinion based on an in-depth assessment of the possible impact. The opinion of the EWC may be taken into account by the company. This should at least mean that the company should calculate back from the moment it wants to take the first irreversible measures towards implementation of the proposal, asserting how much time the EWC might reasonably claim for the I&C and start the I&C at that time at the latest.

The I&C process as prescribed in the Directive does not always fit with the decision-making process of companies. In a strict interpretation of the Directive, the company first has to give all necessary information to the EWC; the EWC will study it and then express an opinion. Until this opinion has been received by management, no irreversible measures towards implementation of the proposal may be taken. In practice, decisions that are initially of a general nature are made more concrete in a step-by-step process and by the time all information is there, the decision is more or less fixed.

The TNT and Heineken examples point a way out of this dilemma. Consultation becomes more of a continuous dialogue, a work in progress. As early as the plan development phase, the EWC gives input. This is better suited to a dynamic environment. The probability that the feedback from the SC/EWC affects the final plans is much higher in this approach. However, it requires a high level of trust. At this point, efforts made in the past from both sides to come to a constructive and pragmatic way of working will pay-off, especially in situations and circumstances that require more speed.

Although fixed timeframes for all kinds of foreseeable situations may be hard to agree on, an I&C Protocol might be helpful to manage this process (see next chapter).

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### **Example of a Consultation process on a complex change of the Company**

One manager presented an interesting case where a complex change of the Company structure only had people impact in one EU country. For management, there was no doubt that this was an EWC issue. Although the job losses only took place in the Netherlands, the structural change was important enough and would have an impact on other countries.

Two Select Committee members were informed before the formal I&C started. They had to sign a non-disclosure agreement. The formal consultation of the EWC and the Groups Work Council (GWC) in the Netherlands started on the same day, with the submission of the Request for Advice (RfA) for the GWC and a Consultation Document for the EWC. The full EWC information document was sent the same day the company made the proposal public because of the stock exchange rules. This also was the start of the formal Information and Consultation. The EWC and GWC had a meeting in which a fair amount of sensitive information was shared. This shows the high level of mutual trust that exists.

The manager mentioned several consultation challenges during the process.

- Difference in role and level of understanding between the GWC and the EWC.
- People impact only applies to one EU country and, therefore, only GWC is formally involved in the people impact process. The EWC is dealing with the overall strategy change.
- Complexity of the restructuring and therefore of the EWC consultation documents (nearly 40 pages of information). The EWC can share this document at local level.
- How and on what to focus EWC opinion. In this case: the GWC will be the first to give their advice, because they have a far greater role to play, are better informed and have stronger rights. The EWC can use the output of the GWC advice and see where they can help.
- Most EWC members are focused on local impact and less on global and regional impact.
- How to adequately consult the individual EWC members and how EWC members can consult their respective local constituents.
- Internal dialogue of EWC mainly depends on the physical meetings and translations.
- Much depends during the I&C process on the Select Committee. Therefore, its role and leadership is crucial.
- The timeline is difficult to organise because people are impacted. Labour unions are notified about collective dismissal. There are many meetings, and the earlier the better, because the process has to be finalised before the implementation. If the EWC reacts quickly, the opinion might have a real impact on the final decisions.

### → **Linkage**

I&C at local level and in the EWC must be linked. According to Mrs. Pichot, from the European Commission, "40% of all EWC Agreements have a clause on this topic". The basic principle should be that the rights of both levels have to be respected. This question arises: is there a set priority? Where do you first start? Experts state that there are no set rules, since existing case law goes in different directions. Here, we can only conclude that it depends on the issue at stake.

This leads to the question: What should be discussed on each level? One should try to avoid a duplication of work. Can you clearly distinguish the local and European levels to avoid double work? This is not always possible, but double work can sometimes be reduced by splitting strategic decisions, which should be consulted with the EWC, and the employment consequences that call for local consultation or negotiation. However, a EWC might argue that to allow the undertaking of an ‘in-depth assessment of the possible impact’ (as the Directive calls for) of a strategic decision it also needs to be informed about the employment consequences.

The case law on Fujitsu Siemens (C-44/08) can help, although this ruling was not in the context of the EWC Directive but in the context of the Collective Redundancies Directive 98/59/EC. It was ruled that there is no duty for local consultation as long as strategic plans do not contain an identification of local subsidiaries to be affected by the restructuring that may lead to Collective Redundancies. But as soon as a subsidiary is identified in a Member State, there is a duty under Directive 98/59/EC for local consultation.

It seems inadvisable to agree a fixed set of rules or any pre-set priority. Instead, a more open clause could be used, like the Linkage clause in the TNT Agreement:

“Information and consultation in the EWC will not replace any information and consultation rights at local or national level. Where there are transnational issues that also call for information and consultation at national or local level in any country within the scope of this agreement, European-level and any national-level information and consultation process shall begin in a coordinated manner. Where ever possible, all levels will be informed at the earliest stage, allowing enough time for consultation to have a meaningful effect. A more detailed time schedule allowing the coordination of information and consultation processes will - if necessary - be agreed between the Management Representatives and the SC, with the additional participation of all countries directly involved, whereby at least:

- The European-level information and consultation will follow the procedures set out in this agreement.
- National-level information and consultation will follow the processes required by national law and/or practice”

Within Heineken, the issue of European and local/national I&C linkage is dealt with in the most pragmatic way. Each level has its own role to play; “when possible, we combine it”.

How to deal with I&C in the EWC and the information to local management? Sometimes the EWC knows more than local management. One suggestion was to send the presentations directly after the EWC meeting to local HR, with the assumption that they would spread this information.

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### → How and when do we start consultation?

Information is defined as an obligation of management, consultation as a right that the EWC can exert. This implies that the dynamics and practical organisation is different. The Directive contains no direct obligation for management to ask for the EWC's opinion. Management must inform the EWC in such a way as to enable the EWC 'where appropriate, to prepare for consultations'. The EWC therefore should indicate after having been informed if it thinks that consultation should take place. However, management would be well advised to after having informed the EWC, to ask the EWC whether or not it thinks consultation should follow. This may avoid later surprises and delays. Therefore, the Dutch EWC practice which consists in submitting a Request for Advice / Opinion to the EWC can be recommended. The EWC is always free to indicate that it might refrain from the right to give an opinion on the issue at stake, e.g. because of other priorities.

Some EWCs often have a long list of questions instead of a genuine dialogue. It is not always clear what this really brings. This seems to be a general tendency of EWCs; to continue asking questions. At a certain point, you need to come up with an opinion. Here, the advisor plays a role in helping the EWC to take the questions phase to actually giving their opinion. Often, between the lines, questions already contain an outline of the opinion to be expressed.

In one company they decided that, instead of sending around lists of question, they rather invite the manager to the meeting to have a real discussion.

### → How to deal with the difference between 'normal' consultation and consultation in case of extraordinary circumstances?

Many companies have used in their agreement the example of Subsidiary Requirements, where extensive lists are suggested for issues of I&C, with a much more limited definition given for extraordinary circumstances. Only these last issues call for additional extraordinary meetings. However, also for these 'normal' issues, the definition of the Directive concerning timely consultation applies. But it yet remains unclear how timely consultation can be arranged on these issues of 'normal' consultation, when there is no regular meeting on the short term and when it does not fulfil extra-ordinary meeting criteria.

Some companies therefore no longer make a difference between issues of 'normal' consultation and extraordinary circumstances in their agreement. Others include a clause that for 'non-extraordinary' items that might come up in-between regular meetings, ad-hoc procedures have to be agreed on. A solution can also to plan regular meetings with the SC; this may often, in practice, be enough to deal with these 'non-extraordinary' items if they require consultation.

→ **Content of the information, what is necessary information, level of detail, local detail?**

Discussions may arise if the EWC feels it does not have enough information to make an in-depth assessment. EWC representatives may claim that they need to get local details to assess the potential impact for the employees. To avoid having to discuss this time and again, especially in cases when time is limited anyway, some EWCs and companies have agreed on a standard format for the information to be provided.

***Example of information to be provided in the event of extra-ordinary circumstances, as part of an I&C Protocol:***

*If ever the Company formulates proposals as detailed above, the Company will submit information to the SC in a report ("Special Report"). The Special Report shall contain:*

- 1) a general description of the planned measure;*
- 2) the main arguments/reasons why central management deems the measure necessary;*
- 3) details of other proposals that may have been considered as an alternative to the planned measure;*
- 4) the impacted countries;*
- 5) the number of employees potentially impacted by country;*
- 6) the timing of the planned implementation of the measure.*
- 7) proposed business benefits*
- 8) risk analysis*
- 9) decision makers and/or project team involved*

*The EWC representatives and Company recognise that at the time of providing the Special Report, the Company may not always be able to provide all information that is needed to assess the impact of the proposals. However, such further information as is necessary will be provided as soon as available.*

Sometimes arguments may arise as to whether the information has been sent in time. EWC representatives may claim more time to go through the report than management would have expected. Language issues may also be at stake.

→ **How to deal with dynamics?**

Within multinational companies, one can see more and more central decision-making, leading to more and more transnational matters for which to consult the EWC. How can a company comply when you have only one/two meetings with the EWC?

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A possible solution could be to channel the consultation through the Select Committee. To be able to do this, management should have an intense contact with the Select Committee, for instance by using teleconferences for short messages and updates. Consultation becomes more of a continuous dialogue.

Exceptional circumstances pose a special challenge: how to organise the I&C process quickly? As one manager said: "*Business managers sometimes tell me that they are going to make a decision within one month, and it made me wonder how I could organise that is in such a short period.*" Some practical solutions mentioned:

- Make use of the Select Committee (and countries directly affected) instead of the full EWC if the SC is trusted enough by the EWC. It helps to speed up the writing of an opinion on behalf of the EWC. Make arrangements to enlarge the SC when the information is important.
- Modern means of communication, like conference calls and tele-conferencing might be applied although, this can only work if everyone is able to speak English.
- One participant suggested: "We have a SC meeting every month. The plenary meeting is once a year. When I&C on a specific topic is needed we create a working group. We also have a permanent health and safety working group meeting twice a year. We try to develop a charter with the SC to better coordinate I&C in the EWC and at local level. "
- Sometimes the finalisation of a decision may be postponed so that I&C can take place during an already planned meeting.

### → **What if headquarters are situated outside Europe or if the company is managed by global business lines?**

Managers responsible for the I&C with the EWC are sometimes not informed in time themselves. This poses a special challenge that cannot always be avoided in real life. Some suggestions that might help here:

- Get the explicit support of the CEO for the I&C of the EWC
- Make sure the EWC is discussed in European HR meetings and/or bring up this topic in the regular contacts with the international HR contacts at business level.
- Create an internal document for the business leaders to explain them how the EWC must be involved.
- Include the need to inform the EWC on intended decisions that might require consultation with the EWC in the description of the responsibilities of the business managers.
- The EWC should make itself visible as an important force in the company

## → How to define “significant”?

The word significant in relation to the I&C of an EWC is to be found only in one part of the Directive, Whereas 43: “Certain decisions having a significant effect on the interests of employees must be the subject of information and consultation of the appointed employee representatives as soon as possible.”

In the Annex Subsidiary Requirements we find another related term, ‘considerable extent’: “Where there are exceptional circumstances or decisions affecting the employees’ interests to a considerable extent”.

These concepts, ‘significant’ or ‘considerable extent’ have found their way into many EWC Agreements, especially when dealing with extra meetings in exceptional circumstances. For the EWC to have the right to be consulted, these agreements often stipulate that the issue must be transnational and significant. Sometimes the concept of ‘significant’ is combined in one clause with the definition of transnationality. This, however, is incorrect. Transnationality is defined in the Directive without reference to ‘significant’ or ‘considerable extent’. These are two distinct definitions, and to blur them into one clause is neither in line with the law as far as the definition of transnationality is concerned, nor is it understandable.

Still, in companies where many transnational issues are at stake, the need may arise to limit the I&C to ‘significant’ cases, if only to keep things manageable. This is not easy. Among others, the size of a company will have to be taken into account.

### **Quantitative criteria in the collective redundancies Directive 98/59/EC**

#### *Article 1.1.*

- (a) ‘*collective redundancies*’ means dismissals where, according to the choice of the Member States, the number of redundancies is:
- (i) either, over a period of 30 days:
- at least 10 in establishments normally employing more than 20 and less than 100 workers,
  - at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,
  - at least 30 in establishments normally employing 300 workers or more,
- (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question;

However, we should bear in mind that a substantial impact is not only defined in terms of redundancies. E.g. the impact may be an increase in workload for those who stay behind; or an increased business risk; or risks of process disturbances. Also, a substantial impact is not only considered in terms of negative consequences.<sup>1</sup> Items like the introduction of new working methods, major changes in strategy or company structures or new HR policies may be significant, even without any job losses.

<sup>1</sup> See European Commission: Report Group of Experts Implementation of Recast Directive 2009/38/EC on European Works Councils December 2010, p.19

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But a definition of 'significant' could have a quantitative element, as part of the definition. If a proposed measure implies a potential job impact to a certain quantitative extent, the measure is significant by definition. If it does not meet that criterion it might still qualify as significant on other grounds.

### ***Example: Quantitative criteria as an element of the definition of significant***

*A potential job impact of:*

- *At least 150 individuals within the European Economic Area*
- ***Or:***
- *At least 2 countries are involved where*
  - *At least 15 jobs may be lost in countries with less than 100 employees*
  - *At least 25 jobs may be lost in countries with 100 – 250 employees*
  - *At least 40 jobs may be lost in countries with over 250 employees*
- ***Or:***
- *In one location at least 30% of the jobs may be lost*

## Going further to better manage the I&C process? Some guidelines for HR

The above mentioned issues can often be best managed in an integrated way by agreeing on an I&C Protocol or Flowchart. Doing this in a separate document instead of in the formal EWC Agreement may lead to a more pragmatic and flexible approach that is not too hampered by legalistic issues. Furthermore, it is very much a case of 'learning-by-doing' that can only work if there is a certain basis of mutual trust between the different parties involved.

### → Towards a formalised procedure? An example: TNT

TNT uses a formalised Request for Opinion procedure in three phases.

- **Phase 1: Pre-information**

- There is a bi-weekly meeting between the Select Committee and Central Management, in which the Select Committee is informed on any possible changes in the company.
- The pre-information is key to the process. It really helps if you pre-inform the SC and already discuss the process. In this way you can also make sure that the opinion is there on time. It also solves some of the issues of informing the EWC before local bodies.

- **Phase 2: Information**

- Management drafts a formal Request for Opinion (RfO) for the European Works Council. This request contains the relevant information for the EWC and the exact matter that management seeks the opinion of the EWC for. Before the final RfO will be send out the EWC, it will be discussed with the Select Committee.
- In general, the information to the EWC comes first, before the country-specific processes are implemented. European HR makes sure to stay close to all HR Directors, so they know what is happening at that level too.

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- **Phase 3: Consultation**

In phase 3 the EWC comes up with an opinion.

- After a meeting with Central Management and after having received input from the EWC members, the SC drafts an opinion. The document is sent out to all EWC members, who may discuss it with their local constituencies. The Select Committee also informally shares the draft opinion with management. After consent of the EWC, the SC gives the final opinion to management. Management can now take its final decision. Central Management will inform the EWC on the taken decision and will react to the opinion of the EWC.
- In principle, the consultation process takes 6 – 8 week after issuing the formal Request for Opinion. The time taken for pre-discussions and working with drafts first (RfO, opinion) actually speeds up the process as a whole.
- Not only does the opinion have influence, but the pre-discussions can also be useful to management. Therefore, it is important to always have the business leader to discuss the issue with the EWC, and not only with HR. For this, an internal document for business leaders has been created to explain them how the EWC is involved.



# Managing confidentiality in European Works Councils

C. Teissier (coord.)

**A**s EWC members are supposed to take part in the decision making process at central level at an early stage through information and consultation rights, they are often likely to receive strategic information. The question is then to know what the EWC members can do with the information received without endangering the company interests.

This short handbook results from a seminar held on 1 and 2 October 2015, having brought together HR managers from different groups and sectors, with the aim of bringing light to this difficult issue.

# What is at stake?

## → From a legal perspective

- Confidentiality is regulated through the European Works Council Directive 2009/38/EC. Confidentiality in the EWC has two aspects: EWC members can be put under confidentiality and Central Management has the right to not inform the EWC when specific conditions are met.

### ***Confidential information (article 8 - Directive 2009/38/EC of 6 May 2009)***

- Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been disclosed to them in confidence. That obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office.*
- Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the central management situated in its territory not be obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them. A Member State may make such dispensation subject to prior administrative or judicial authorisation.*

- As a result, a distinction is to be made in between “**Secrecy**” and “**Confidentiality**”



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- In parallel, **employee reps in EWCs** have the obligation under the directive/national transposition laws to:
  - **Inform the employee representatives within the company or, in the absence of employee representatives, the workforce as a whole**
  - **Of the contents and outcome of the information and consultation procedure**
  - **And without prejudice to any obligation on them to maintain confidentiality**

### ***Role of employee representatives (art. 10. 2 Directive 2009/38/EC of 6 May 2009)***

*Without prejudice to Article 8, the members of the European Works Council shall inform the representatives of the establishment employees or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Directive.*

- National legislation may provide a clause that allows or even obliges EWC reps to inform local employee reps. (e.g. Germany, Sweden, Austria, Luxembourg).
- In this general framework, European regulation does not precisely define the list of topics or the kind of measures to be considered as secret by nature (secrecy) or as confidential by nature but some indications may be found in different national laws.
  - As for **secrecy**, it may for instance relate to the right for the employer not to inform the EWC prior to a takeover bid (**see article L. 2341-11 of the French Labour Code**).
  - As for **confidentiality**, in some national laws, some information is by nature deemed confidential but, in many situations, only general guidelines similar to the ones provided by the EU directive exist: it is confidential information expressly provided in confidence by the employer.
  - Some national legislation however appears to be more demanding. **In France, for instance**, a twofold condition is required: to be considered as confidential, information is to be objectively confidential and to be expressly provided, as such, by the employer.

### **What is confidential information? The French example**

*Article L.2325-5 of the Labour code, applicable to all employee reps including the EWCs members, requires that the information be objectively confidential AND expressly provided, as such, by the employer. In some specific situations, the labour code directly assumes some information as being confidential. This is for instance the case of financial information delivered to the Works council, according to the article L. 2323-10 of the Labour Code.*

- In the **Dutch EWC act**, we find a clause on confidentiality which is a bit more problematic because it can easily lead to different interpretations. Dutch EWC members must keep information confidential “whose confidential nature they ought to understand”:

### **Dutch European Works Council Act of 23 January 1997, Article 4.4:**

*(Dutch EWC members) must maintain confidentiality on all business and company secrets which come to their knowledge in their capacity as representatives, as well as on all matters designated confidential or whose confidential nature they ought to understand in the light of the imposed confidentiality requirement.*

- All in all, there is still some room for interpretation, paving the way for potential disagreement between employee reps and management and even conflicts (see below).
- Influence of stock exchange rules or insider dealing regulations

General stock exchange rules or laws on insider dealing may be grounds for confidentiality but not for secrecy

These rules do not have the goal to limit the rights of worker representatives, but to prevent distortions on stock markets by unequal access to information.

As a matter of principle, confidentiality which is required by financial regulations is therefore not absolute and is not likely to limit the rights of employee reps to communicate in all situations.

### **European Court of Justice Case C-384-02 6 Judgment of 22 November 2005**

*“Article 3(a) of Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing precludes a person, who receives inside information in his capacity as an employees’ representative on a company’s board of directors or in his capacity as a member of the liaison committee of a group of undertakings, from disclosing such information to the general secretary of the professional organisation which organises those employees and which appointed that person as a member of the liaison committee, unless: — there is a close link between the disclosure and the exercise of his employment, profession or duties, and — that disclosure is strictly necessary for the exercise of that employment, profession or duties”.*

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### → From a practical perspective

What are, in short, the difficulties reported by companies and employee reps with respect to confidentiality of information?

Company concerns	Employee rep feelings
Avoid giving competitors a chance to react quickly on the announced changes or figures	Why does management want to inform you if you cannot act in your role as representative?
Manage customer relations	Are you sometimes supposed to "leak"?
Avoid unnecessary or untimely unrest amongst employees	Are you made the messenger boy?
Loyalty of suppliers	Why is already public information deemed to be confidential?
Political sensitivity	If management says "100", it will be much more...
Incidence of stock exchange rules	Is all of this a game?

### → So what? Main lessons learnt

- An overview of legal provisions regulating confidentiality shows some gaps:
  - What is deemed to be confidential is not clearly defined by European regulations, leaving some room for interpretation
  - National legislations vary from one country to another, blurring even more the situation and making it difficult to know what is to be deemed confidential case by case
- In addition, the showdown of the views and concerns of companies on one hand and employee reps on the other hand may lead:
  - **Companies** to define (too) extensively their right in this field
  - And at the same time, **employee reps** to consider confidentiality as a game and not as a serious duty

## What about conflicts?

In this context, conflicts between companies and employee reps are likely to occur.

→ **Legal possibilities for employers: sanctions for employee representatives planned at national level**

- National legislation (criminal law or labour law) provides the procedures, the sanctions (e.g. suspension from EWC, dismissal from company) and/or punishment (jail, fine) for any employee breaching the duty of confidentiality

### **National examples**

#### **Germany: EWCA 2011 § 43 Penalties:**

- (1) *A term of imprisonment of up to two years or a fine shall be imposed on anyone who makes use of a business or operating secret in breach of § 35 (2) [...].*
- (2) *Offences shall be prosecuted only upon request.*

#### **Belgium: Penal Code Art. 458. PROFESSIONAL SECRETS**

*"Medical practitioners, surgeons, health officers, pharmacists, midwives and all other persons who, by virtue of their status or profession, have knowledge of secrets entrusted to them and publish them [...], be punished with imprisonment from eight days to six months and receive a fine of one hundred to five hundred Euros".*

→ **Legal possibilities for employees: amending or suspending confidentiality requirements**

- However, misuse of confidentiality requirements by the employer may also give way to control and sanctions upon request of employee representatives, according to national legislation in force
- In some countries, legislations plan some “appeal procedures” in case of discussion about the categorization of specific information, on request of the EWC members

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**According to the Dutch EWC Act: 5.2, members of the EWC can ask the court to lift the confidentiality and/or oblige management to give information.**

**And in the UK transposition (Statutory Instrument 1999 No. 3323, the Transnational Information and Consultation Regulations) and the amendment by Statutory Instrument 2010 No.88 of the United Kingdom. (Transnational Information and Consultation Regulation (TICE) of 2010) we can find the following:**

"TICE (6) A recipient whom the central management has entrusted with any information or document on terms requiring it to be held in confidence may apply to the CAC for a declaration as to whether it was reasonable for the central management to impose such a requirement.

- (7) If the CAC considers that the disclosure of the information or document by the recipient would not, or would not be likely to, prejudice or cause serious harm to the undertaking, it shall make a declaration that it was not reasonable for the CM to require the recipient to hold the information or document in confidence". (similar for secrecy)

### **UK Guidance – Transnational information and consultation of employees regulations 2010**

"The Regulations do not define what confidential information is, but if any EWC member thinks that a piece of important information is incorrectly categorised as confidential, then, in GB, he can apply to the CAC who will decide whether or not that information should be treated as confidential".

- In other countries, such as France, it is possible for employee representatives to appeal to the courts to cancel confidentiality requirements.

### **Cour de Cassation (French Supreme Court) Decision 11/5/2014 – N° 13-17270**

This decision relates to the rights of local works council members but can be transposed to EWC members. It states that, on the basis of the Labour Code, the information given to members of the works councils must not only be declared confidential by the employer, but also be confidential considering the legitimate interests of the company, a fact which has to be proved by the employer. In that case, the fact that all documents provided to the Central Works Council were presented as confidential without precise justification is an abuse of confidentiality duty.

See full decision [in French] : <http://bit.ly/1pkOZKJ>

### → Lessons learnt?

- In case of conflicts about the confidentiality duty, both employers and EWC reps may appeal to legal tools which may vary from one Member State to another<sup>2</sup>

2 For a detailed description of the implementation of confidentiality provisions at national level, see R. Jagodzinski [ed.], Variations on a theme? The implementation of the EWC Recast Directive, ETUI, 2015, p. 48-55

- When possible, the use of legal ways to solve conflicts is however tricky, and possibly costly, for both sides: the employer may be requested to show what are the precise reasons justifying the needs for confidentiality and may experience sanctions in case he's not able to do so. The employee reps may also experience individual punishments but **collectively, for the EWC as such, the most significant sanction is the breach of mutual confidence that is necessary for the information/consultation process, with the risk that the information flow breaks down.**
- As a result, it would be better if employer and EWC reps have a common interest in sharing common views about confidentiality requirements, in terms of definition as well as process.
- For companies, it's especially important that recipients understand why information is confidential and that there is a common interest that information does not leak.

## Managing confidentiality in practice

- Beyond the legal framework in force, confidentiality is ruled by EWC agreements when they exist and also by day to day practices implemented by HR managers.

### → Diversity of EWC agreements

- It's common that EWC agreements only copy and paste the provisions of the EU Directive. In that situation, all of the gaps and potential problems previously mentioned remain.
- However, one may note this is not always the case. Some EWC agreements, and especially recent ones, try to regulate both the definition and process of confidentiality in more details.

Some agreements aim to clarify **the definition of what is confidential.**

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### **UP EWC agreement (French only -2014) – article 15**

« Les membres du Comité d'Entreprise Européen ont une obligation de discréction à l'égard des informations qui revêtent un caractère confidentiel et que l'employeur qualifie expressément comme tel ». « Une information ne peut être considérée comme confidentielle si elle est déjà largement connue du public et des salariés de l'entreprise. Une information est confidentielle si sa divulgation est de nature à nuire à l'intérêt de l'entreprise ».

### **Mc Bride EWC agreement (2016) – article 5.2**

*"For clarity, all information is regarded as not confidential unless designated as such by the Company in meetings. Where information is regarded as confidential the Company must explain why to EWC delegates. The management should not withhold information without justification"*

### **PerkinElmer EC agreement (2014) – article 16**

*"The dialogue between Central Management and the EWC / Select Committee will be as open as possible. Central Management and the Chairman of the EWC may decide that a particular topic under discussion within the EC is confidential. The Chairman will provide an explanation why such information must remain confidential and the duration of this confidentiality"*

- Sometimes the process of confidentiality (who receives the information, how and what can be done with it) is planned.

### **PerkinElmer EC agreement (2014) – article 16**

*The duration of the confidentiality requirement should be mentioned by Central Management*

*"This confidentiality is not mandatory within EWC and in communication with national employee representation bodies who are, according to national laws, bound to secrecy as well"*

### **UP''EWC agreement (French only – 2014) – article 15**

*« Lors de la remise des informations, l'employeur indique le caractère confidentiel de l'information ainsi que **la durée de cette confidentialité aux membres de l'instance** ».*

**Some EWC Agreements find their inspiration for their confidentiality clause in art.11.7 of the Subsidiary Requirements of the Dutch EWC Act,** which gives some conditions to the company before it gives confidential information to the EWC:

*"With respect to the provision of information, the central management may impose a requirement of confidentiality if there are reasonable grounds to do so; a statement shall be issued as early as possible prior to the matter in question being dealt with, indicating the grounds for imposing the requirement, what written or oral information is covered, for how long it applies and whether there are any persons with regard to whom such confidentiality doesn't need to be maintained".*

- Last but not least, some procedures are sometimes defined in case of disagreement between the company and the EWC about what is to be regarded as confidential.

#### **UP EWC agreement (French only – 2014) – article 15**

«En cas de contestation par le Comité Européen de la nature confidentielle d'une information, une discussion sera entamée avec les représentants de la Direction avant toute démarche légale. Les membres de l'instance pourront, s'ils l'estiment nécessaire, obtenir au préalable les conseils d'un juriste sur le bien-fondé de la confidentialité requise par la Direction».

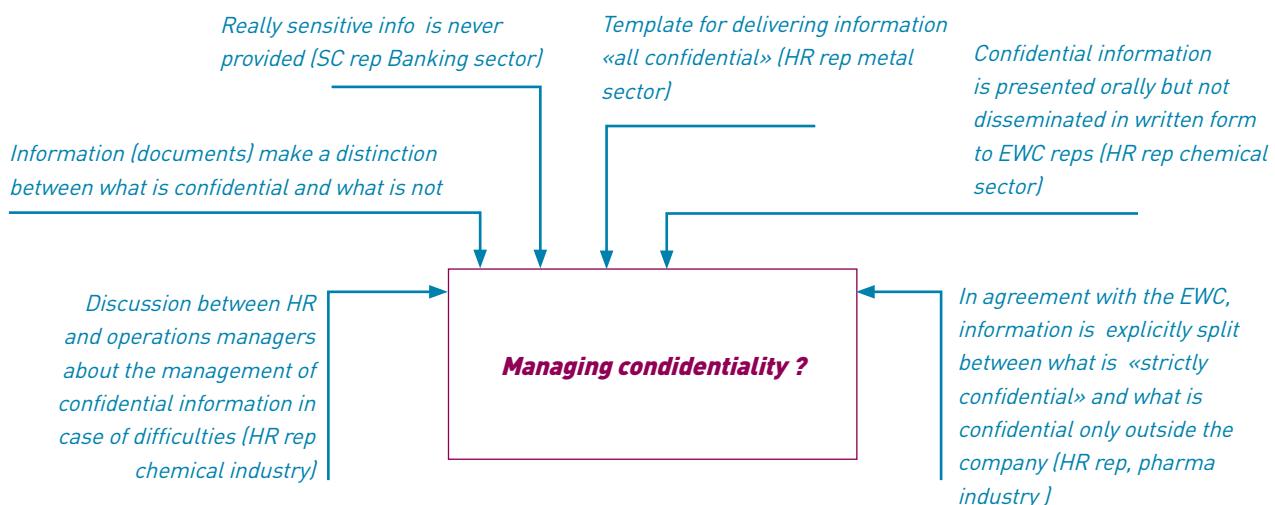
#### **PerkinElmer EC agreement (2014) – article 16**

"The select committee may challenge management decisions in respect of confidential information through the procedures provided for in English Law"

- Of course, the above mentioned examples do not reflect all situations that one may find on the field. They however show that it is sometimes possible to "regulate" confidentiality issues through social dialogue.

#### **→ Diversity of practices beyond the agreements**

- Without any surprise and apart from the provisions of EWC agreements, different attitudes and practices in respect to the management of confidentiality may be reported<sup>3</sup>



<sup>3</sup> We refer here to the practices expressly mentioned during our Brussels Seminar held on 1 and 2 March 2016

## Going further to better manage confidentiality issues? Some guidelines

- **Managing confidentiality without hindering the role of EWC reps is a matter of confidence**
  - **In light of this statement, we present here a set of possible guidelines by making a distinction between three different levels (from the minimum to the max/most desirable)**
- 
- **Level 1 : Checking the need for secrecy and/ or confidentiality of information prior to any communication with the EWC**
    - **The aim** – Avoiding “all confidential” approach / culture
    - **Implementation** - Developing a dialogue on a case by case basis between HR, Central Management and Operation managers in order to categorize information as confidential
      - avoiding marking information as confidential when the latter is available through other channels (investor relations, etc.)
    - **Added value** - Making clear for all that choice for confidentiality is not just a company prerogative but also has impacts on the role and duties of EWC as an information channel
  - **Level 2 : Unilaterally limiting the use of confidentiality to what is necessary in respect to company' needs in the communication with the EWC**
    - **The aim** - Making sure that EWC reps understand why an information is confidential / preventing the breach of confidentiality duties by EWC reps
    - **Implementation** - Management should unilaterally:
      - specify exactly what is confidential<sup>4</sup> ;
      - explain why this is the case
      - for how long

4 Taking into account whether the company is listed or not and the kind of information to be deemed as confidential: for instance, information about the company strategy may be limited while information about employment impacts of restructuring projects could be more openly delivered and disclosed as this is already the case in some groups like Air France

- indicate the persons to whom the information may be disclosed (other EWC members / other employee reps / experts / supervisory board members...)<sup>5</sup>
- **Added value** - Creating the basis for more mutual understanding and confidence between CM and EWC reps

- **Level 3: Negotiating the management of confidentiality with the EWC reps**

- **The aim** - Ensuring that EWC reps understand the need for confidentiality and the common interest that information does not leak
- **Implementation** -
  - Management should discuss with the EWC Select Committee: the criteria information to be deemed as confidential should meet, the duration for confidentiality requirements, the people to whom the information may be disclosed
  - Regarding the definition of people to whom a specific information may or may not be disclosed, the discussion should aim at identifying circles of confidentiality: need for confidentiality will change over time during a project – step by step, the need for confidentiality will decrease and more elements of the information may be shared with more people – third parties who should never access confidential information before it is made public should be precisely defined, as thoroughly as possible
  - The discussion with the SC should be organised on a case by case (project) basis
  - This overall process should be enshrined in a working document planning the above mentioned process and co-signed by management and all EWC members
  - In parallel, EWC internal rules should formalise the commitment of EWC members to stick to the above mentioned process: it especially means that EWC reps commit themselves to maintaining confidentiality in line with decisions made on a case by case basis. EWC internal rules should also plan that the dissemination of information, when becoming possible in line with the already mentioned process, be collectively decided by the SC at the individual request of an EWC rep
- **Added Value** - Fostering confidence between CM and EWC reps and therefore limiting the risks of damaging leaking

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<sup>5</sup> Taking into account the countries represented in the EWC, as the scope of confidentiality duties of employee reps differs from one MS to another

## ***Example of a good practice from the Heineken protocol on information and consultation: Confidentiality***

*As a rule, information given to the European Works Council by management is not confidential and can be shared with the employee representatives and the employees that the EWC represents.*

*As a rule, information given to the Select Committee by management is not confidential and can be shared with members of the EWC. Members of the EWC can share Information with the employee representatives and employees in their countries.*

*The Select Committee is, in principle, the smallest circle within which information can be confidentially shared. Any exception to this principle needs to be agreed with the Select Committee of the EWC.*

*As an exception, Central Management can require a confidentiality guarantee from the Select Committee or the European Works Council under the conditions set in article 12 of the Heineken EWC Agreement.*

*If the information is in writing or in a PowerPoint presentation, the level of confidentiality will be indicated on the paper or the presentation.*

### ***Levels of confidentiality***

- A. Select Committee
- B. European Works Council
- C. National Employee Representatives
- D. Company Employees

*It is recognised by the EWC and Central Management that the EWC cannot issue an opinion when the Select Committee is (still) put under a confidentiality guarantee vis-a-vis the EWC.*

*It is also recognised by the EWC and the Central Management that the EWC cannot issue an opinion when the EWC members, because of a confidentiality guarantee, cannot seek consultation with their national employee representatives. Under very specific circumstances, it may be acceptable that the entire information be shared with national employee representatives or that there be certain time constrictions.*

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