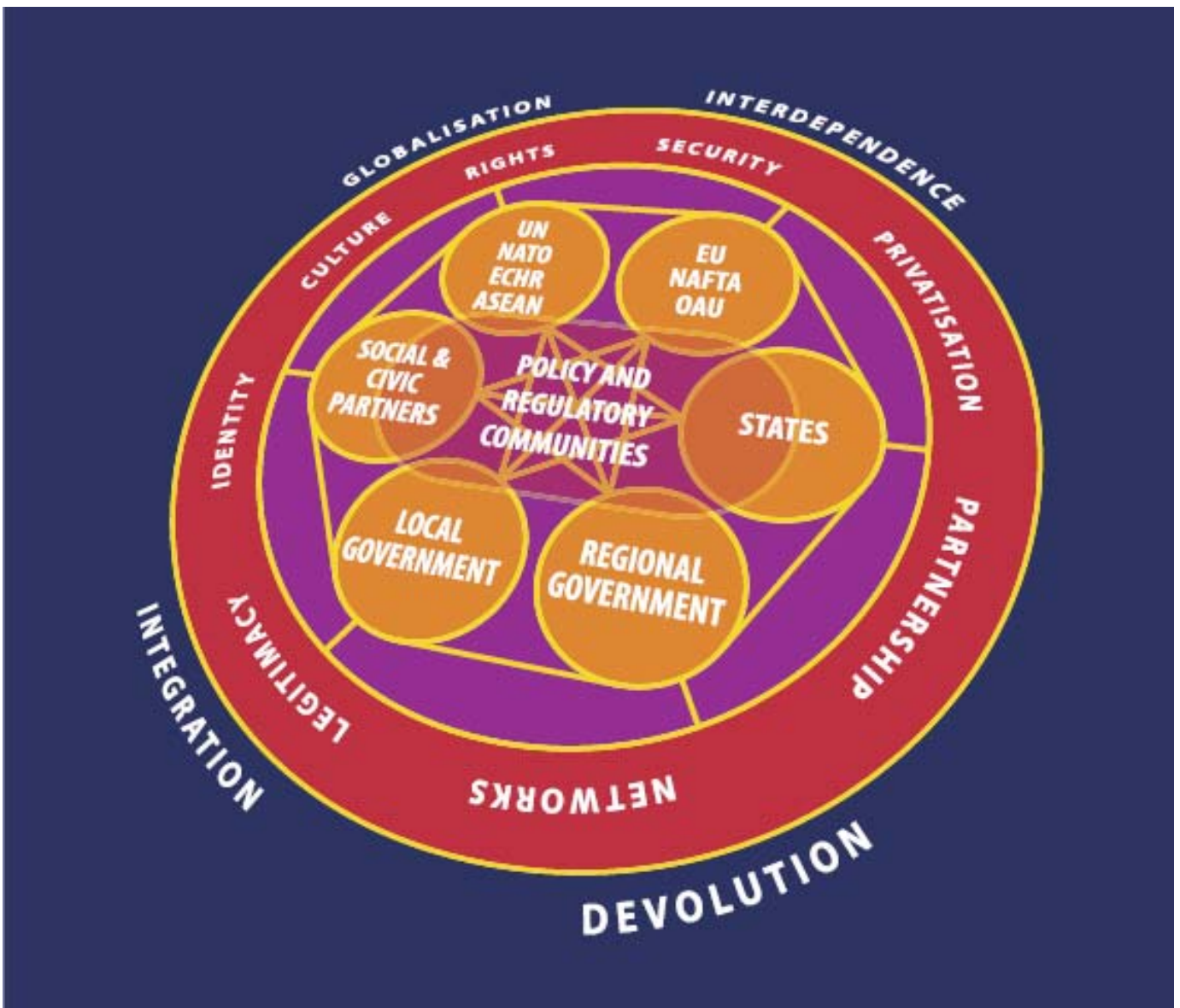


*The Information and Consultation Directives: Strategic
Choices and Experiences with EWCs*

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The Information and Consultation Directive

Strategic Choices and Experiences with EWCs

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Introduction

The new Information and Consultation Directive has the potential to be a major turning point in Irish employee relations. It offers all those involved, employers, employees and trade unions a further opportunity to construct a new framework for the management of employee relations based on co-operation and partnership. It offers a new route to applying the partnership approach that has been critical to the economic success of this country at enterprise level.

The directive offers the “potential” - but potential has to be realised. It does not happen automatically. Structures and procedures will have to be designed and implemented that embody a partnership approach. The transposing legislation will have to facilitate this.

The new directive is deeply rooted in the mainstream, continental European philosophy of employee relations. The original 6 members of the then EEC were all profoundly influenced in their approach to employee relations by both Catholic social teaching and by Social Democracy. These philosophies became embedded in the fabric of DG5 – the Directorate which deals with employment issues and so influenced the legislation that it proposed. They still do. This legislation is based on concepts of subsidiarity, social partnership and social dialogue, all of which assume a collectivist approach to social life and see social groups as having a responsibility to one another in the interest of the common good. In Ireland, on the other hand, industrial relations was, and still is despite a great deal of rhetoric to the contrary, primarily rooted in a philosophy of *laissez-faire* – whether of the individualist or collectivist strain. We have shaken off some, but not all, of our English inheritance in this regard. The behaviour of the ASTI over the past three years makes the point, behaviour that can only be characterised as obsessively self-interested with little or no regard for the common good.

The new Directive is clearly and explicitly built around partnership principles.

In thinking about the new Directive a useful approach is to look at the experience English-speaking companies have had with the European Works Council Directive, especially in terms of putting structures in place and getting them to work effectively. This presentation draws on this experience, especially the check-list to be found at the end of the paper.

It is worth noting that Irish trade unions and companies have been very slow to take up the opportunities that EWC offer (and EWCs do offer “value-added” to employee relations – see the ORC¹ study reported on in IRN on February 19th). According to the ETUC only 5 Irish companies out of the 40 covered by the EWC Directive have actually set up an EWC.

Country	No. of companies Covered by Directive	No. of companies with an EWC
Austria	39	14 (36%)
Belgium	57	28 (49%)
Denmark	53	19 (36%)
Finland	47	20 (43%)
France	185	65 (35%)
Germany	398	100 (25%)
Greece	0	0
Ireland	40	5 (13%)
Italy	57	20 (35%)
Luxembourg	2	2 (100%)
Netherlands	122	47 (39%)
Norway	19	14 (74%)
Portugal	7	0 (0%)
Spain	38	2 (5%)
Sweden	100	43 (43%)
UK	232	93 (40%)
Japan	49	21 (43%)
USA	286	101 (35%)
Total	1865	639 (34%)

The ETUC’s figures are slightly wrong, but the order of magnitude is roughly right. Only Spain and Portugal have a worse record than Ireland. Even US companies, who were among the most ideologically opposed to the EWC Directive, have a better record than Irish companies. Why have Irish trade unions been slow to push for the establishment of EWCs in Irish-based companies? Is this not a missed opportunity to develop partnership structures, albeit at a senior level? Many of the EWCs in US companies were set up as a result of management taking the initiative. Are Irish managers afraid of the challenge that EWCs present? Maybe these are questions that the National Centre for Partnership and Performance could look at.

Will the new Directive make companies perform better? I don’t know. But I do know that it will make them perform “less bad.” I see European employment regulation as a little bit like the

¹ One significant “unexpected business benefit” deriving from the EWC process, noted by several companies (in the ORC study), is that the “increased discipline” required of management in engaging with the EWC has exerted a “positive influence” on management preparation and coordination.

According to ORC, “engagement in trans-national information and consultation through their EWC has highlighted the need to have a clear, well thought-out and articulated explanation of corporate strategy. This need to explain strategic trans-national issues to their EWC has forced organisations to improve cross-business and country coordination among their management teams before they embark on consultation with their employee representatives”.

rules of the road – they don't make you a better driver but they do provide a common framework within which we all must operate and therefore make life a little bit safer for all. I have seen, at first hand, from experience with many EWCs, that they do force management to focus on otherwise neglected issues and that employee representatives, especially in non-confrontational settings, have much of value to offer.

Will the information and consultation Directive slow down decision making? Probably. But is that necessarily a bad thing? When you look at the quality of the decisions taken by some companies in recent years – and for which employees are now paying the price through redundancies – maybe a little less haste would have been beneficial. I don't have to name the companies – the *Financial Times* does it a lot better than I could do.

The Directive – an Overview

The purpose of the Directive is "to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the European Community". The practical arrangements for information and consultation are to be defined and implemented by Member States in accordance with national law and industrial relations practice. (Article 1)

Unlike other EU Directives (for example, the Working Time Directive) there is very little structural detail in this Directive. In essence, it sets out a set of objectives, the information and consultation of employees on a range of issues, and then leaves it to Member States, within certain limits, to determine how these objectives are to be achieved. As a result, the transposition process becomes extremely critical in determining what impact the Directive will have.

Its requirements will apply, according to the choice made by Member States, to:

- undertakings employing at least 50 employees in any one Member State; or
- establishments employing at least 20 employees in any one Member State. (Article 3)

Reports suggest that neither the UK nor the Irish government will use the "establishment" option.

Article 2 says an "undertaking" means a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States. An establishment is a sub-unit of an undertaking. Employers and employees are as defined in national law and/or practice. Employee representatives means the employees' representatives provided for by national laws and/or practices. Given law does not

currently have a general definition of employee representatives this will be a critical issue for the transposition legislation.

The right to information covers:

- information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
- information and consultation on the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment; and
- information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations.
- The information should be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives (as provided for by national laws and/or practices) to conduct an adequate study and, where necessary, prepare for consultation. (Article 4)

Consultation shall take place:

- while ensuring that the timing, method and content are appropriate;
- at the relevant level of management and representation;
- on the basis of relevant information to be supplied by the employer and the opinion which the employees' representatives are entitled to formulate; and
- in such a way as to enable employees' representatives to meet with the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; and
- with a view to reaching an agreement on decisions within the scope of the employer's powers likely to lead to substantial changes in work organisation or in contractual relations. (Article 4)

It is my opinion the above obligations can only be met through the establishment of information and consultation committees. I do not believe that attempts to inform and consult by, for example, e-mail will be found to be compliant with the Directive.

Where decisions are likely to lead to substantial changes in work organisation and contractual relations, management has to consult with "a view to reaching agreement", wording which implies a good faith dialogue that goes beyond merely exchanging views. There is likely to be scope for legal challenge where employee representatives feel that they have been presented with a *fait accompli* rather than a meaningful discussion - as the CBI said in a comment on the Directive in June of last year.

Member States can also entrust management and labour with defining such arrangements freely and at any time through negotiated agreements, including at undertaking or establishment level. These may differ from those set out by the Directive. (Article 5)

Article 5 is a key article. It reads in its entirety:

Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. These agreements, and agreements existing on the date laid down in Article 11, as well as any subsequent renewals of such agreements, may establish, while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4.

It must be remembered that Article 5 agreements are precisely that – agreements and agreements assume a process of dialogue and discussion between two parties before conclusions are reached. Unilaterally designed management initiatives that are put to a ballot vote of employees will not, in the longer term at any rate, meet the requirements of the directive and are likely to be subject to challenge in the European Court of Justice. However, this is not to say that management cannot take the initiative in designing and putting structures in place, work with them over a period of time and then seek to formalise them subsequently in an agreement with nominated or elected employees' representatives.

As regards confidentiality, Member States must ensure that employee representatives and any experts who assist them should not disclose any expressly confidential information provided to them, though Member States may authorise its disclosure to employees and third parties bound by an obligation of confidentiality. Member States must also ensure, in specific cases and within the limits laid down by national legislation, that employers are not obliged to communicate any information or undertake any consultation which would seriously harm the functioning of the undertaking or would be prejudicial to it. Member States must provide for administrative or judicial review procedures where employers require confidentiality or withhold prejudicial information. (Article 6)

The reference to "experts" in this section is the only such reference in the Directive, unlike the EWC Directive which specifically says that EWC members may be assisted by experts of their choice. The Commission has made it clear, however, in its reactions to the Parliament's first report on the Directive, that it believes it is implicit throughout the Directive that employee representatives on information and consultation committees may call on expert assistance, presumably funded by the employer.

Article 7 guarantees that employees' representatives shall have adequate protection when carrying out the duties they have been elected to perform.

Member States will have to provide for appropriate measures in the event of non-compliance by employers or employees' representatives with the provisions of the Directive, and ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from the Directive to be enforced. Member States must also provide for adequate penalties to be applicable in the event of infringement of the Directive. These must be "effective, proportionate and dissuasive". (Article 8)

I believe that this implies that governments will have to make disputes resolution institutions available to which employee representatives can refer complaints of non-compliance. For many companies this will be the first time employees can have had recourse to outside agencies, even if the range of issues they can refer to such agencies is limited.

Penalties for non-compliance will be confined to financial fines. Both the Parliament and the Commission had wanted decisions taken in breach of information and consultation obligations to be suspended.

Article 9 makes it clear that the new Directive is to be without prejudice to the obligations already conferred by other Directives such as the Collective Redundancies, the Transfer of Undertakings and the European Works Council Directives.

In practice it is likely that national law will provide that standing information and consultation committees will fulfil the information and consultation role required by the Collective Redundancy and the Transfer of Undertakings Directives. It can also be assumed that such committees will also become the nominating body to European Works Councils – as currently happens, for instance, in Germany and the Netherlands.

Member States will have three years from the date of final adoption of the Directive to comply with its provisions (Article 9). Under the transitional provisions introduced to accommodate the UK and Ireland, Member States in which there is, at the date of adoption of the Directive, no "general, permanent and statutory system" of information and consultation nor of employee representation at the workplace, will be able to apply the Directive in three phases:

- undertakings with at least 150 employees (or establishments with at least 100 employees) would be covered as from the three-year implementation deadline;
- undertakings with at least 100 employees (or establishments with at least 50 employees) would be covered two years later; and
- full application of the Directive (i.e. to undertakings with at least 50 employees or establishments with at least 20 employees) would become obligatory three years after the normal implementation deadline.

Article 11 provides for the Directive to be transposed three years after its adoption while Article 12 provides for a review by the Commission five years after its adoption. Article 13 says that the Directive comes into force on the day its is published in the EU's Official Journal.

As part of the final agreement on the Directive the European Parliament, the Council and the Commission also appended a "joint declaration" on employee representation to the Directive which reads:

"With regard to employee representation, the European Parliament, the Council and the Commission recall the judgements of the European Court of Justice of 8 June 1994 in Cases C-382/92 (Safeguarding of employees rights in the event of transfers of undertakings) and C-383/92 (Collective Redundancies)"

In its list of proposed amendments to the Directive, the Parliament had sought to add a new recital to make it clear that Member States should take measures to guarantee that employees' representatives were elected by employees or designated by employees' organisations, i.e., trade unions. The Parliament was anxious to prevent a situation arising where employee representatives were either handpicked by management or selected through a management-dominated procedure.

The joint declaration is an attempt to meet these concerns. The European Court cases referred to in the declaration arose from proceedings brought against the UK governments over what the Commission regarded as the faulty transposition of the Acquired Rights and the Collective Redundancies Directives.

Both Directives require employers, when contemplating either the transfer of an undertaking or collective redundancies, to meet with employee representatives, as provided for by national law and practice, for the purpose of informing and consulting them about the proposed developments. In both cases consultation should be with a view to reaching agreement on the matters under discussion.

When both Directives were originally transposed into UK law employee representatives were defined as representatives of trade unions recognised by the employer. This definition meant that employers who did not recognise trade unions did not have to inform and consult employee representatives as UK law made no provision for any employee representatives other than those nominated by trade unions.

The original purpose of framing UK law in this way was to strengthen trade unions and to ensure that they were the only channel of employee representation. However, the change of political climate in the UK after 1979 with the election of the Thatcher government meant that instead of strengthening trade unions the law was interpreted in such a way as to relieve employers, to a great extent, of any information and consultation responsibilities. The European Commission found this unacceptable and eventually referred the matter to the European Court.

The ECJ took the view that the ability of employers which did not recognise unions to frustrate the protection provided for employees by the Directives must be regarded as contrary to EU law. To comply with the ECJ rulings, it was necessary for the UK Government to make provision for the designation of employee representatives for the specific purposes of information and consultation under the two Directives in situations where there are no recognised unions.

In drawing attention to the Court's rulings in these cases, the joint declaration makes it clear that national transposition legislation must provide mechanisms for the selection/election of employee representatives to allow the protection and benefits provided by the Directive for employees to be availed of. As noted earlier in this report, this raises difficult questions about the nature of such processes, how they are to be triggered and by whom. It further underlines the importance of the issue raised earlier as to whether such processes are to be mandatory or optional – do employers have to provide for the election of employees representatives in all and every circumstances or only when requested to do so by employees? These are key questions that will have to be addressed when national laws transposing the Directive are being drafted.

Choices

Faced with the new Information and Consultation Directive organisations have three options:

- Utilise Article 5 and begin the process of putting structures in place now
- Negotiate an agreement after the directive is transposed into national law – again in accordance with Article 5
- Wait and simply do what will be required by law - if anything.

The three options are similar to the options that were available under the EWC Directive (negotiate before it became law, negotiate after it became law or just follow the terms of the Directive/national law) with two major difference. The EWC Directive set out clearly the negotiating mechanism to be used – the Special Negotiating Body – after the Directive became national law. It also, in the annex, set out the model that was to be applied in the event of failure to agree an alternative. As a result, undertakings had a fairly good idea beforehand as

to what the future held and so could make an informed choice whether to negotiate an Article 13 agreement or wait until the Directive was transposed.

This is not the case with the information and consultation Directive. Such issues as negotiating mechanisms, how such mechanisms are to be triggered, what is to happen in the event of a failure to agree, a “default model” (i.e. a model information and consultation structure) the use of experts, costs and training are among the issues that fall to be resolved by national governments. At the time of writing, it is impossible to say with any degree of certainty how any of these issues will be dealt with.

As against waiting for an uncertain future, developing structures now gives organisations maximum flexibility to put in place a process that best suits their own employee relations philosophy. While there will still be freedom to negotiate after the directive becomes national law that freedom will obviously be circumscribed by what is set out in the legislation. By then, in any event, as happened with the EWC Directive, “models” will have begun to emerge from companies which take the initiative early and these models will inform, and restrict, the choices of negotiators. Maximum flexibility comes with “first mover” advantage.

In any event taking advantage of Article 5 is the only option currently available.

As Article 5 states:

Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. These agreements, and agreements existing on the date laid down in Article 11, as well as any subsequent renewals of such agreements, may establish, while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4.

Article 5 offers management and labour maximum flexibility now, but uncertainty as to whether any agreement they reach will conform with such “conditions and limitations” as may be laid down in legislation. At this time we have no knowledge whatsoever as to what such “conditions and limitations” might be. For example, might it have to be shown that Article 5 agreements had been accepted by a ballot vote of employees? Might such agreements have to have dispute resolution mechanisms? Might they have to demonstrate, in some form or other, that the employee side is independent of management?

The key questions in deciding on information and consultation structures should be: how good are our current employee relations, what are our goals and objectives in this regard and how will what we are proposing help us reach those goals and objectives? New structures should “add value” to existing processes.

A pragmatic, gradual approach to Article 5 makes sense. The new Directive brings us into unknown employee relations territory. Management and trade unions will want to tread warily and to make sure that they get it right. A failure to do so could prove disastrous in the long term. Might it not make sense for organisations (and trade unions) to set up structures now without concluding a formal agreement at this time? All parties could then, over the next two years, get use to the new arrangements, experiment with them and make adjustments where necessary. Then, in early 2005, when the shape of national legislation should be known, management and employees' representatives can formalize such arrangements through an agreement? Management and employees' representatives who conclude agreements in this way will have the benefit of two years experience behind them as well as being certain as to the "conditions and limitations" laid down in national law.

This observation is based on my experiences with negotiating EWC agreements. I saw too many situations where employees' representatives from across Europe were brought together and asked to negotiate an agreement. Most had never met one another before. Many had little experience of acting as representatives and none had experience of acting as European-level representatives. This made negotiations very difficult. However, we had no other choice as it is impossible to run European meetings without an agreed framework. We often ended up with "lowest common dominator" agreements. What I now find is that the "second generation" agreements – the re-negotiation of the original agreement after some 4/5 years – are of much better quality because we now have a core of experience to build on. If only we had had that experience in the first place....so why, in putting the new Directive in place don't we get the experience first before we formalise agreements?

The following check list summarizes some of the areas that need to be examined. There are no "right" answers to these questions as every organisation is different as to its structure, ways of working, management philosophy, employee relations climate and so on. What suits one organisation may not suit another. The list also draws on experience with putting EWCs in place, in particular with the "nuts and bolts" logistics that can mean the difference between an EWC that works well and one that becomes a problem for all parties.

Checklist

Nature of the undertaking

- How is your organisation structured?
- Do you have one location or many? Are you organized on a functional or geographic basis?
- How autonomous are individual businesses/sites?
- What is the nature of the relationship between sites/business units?
- At what level are key management decisions taken?

Employee relations

- How many unions, if any, do you have?
- What is your union density/spread?
- Do you have collective bargaining arrangements in place? If so, are they constructive/destructive?
- Do non-union employees have any form of existing representative structures?
- Do you have any existing information and consultation structures in place?

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- What are your current employee communication processes?

Designing structures

- What mix of structures do you want to develop - national, local, divisional or a mix? At what level(s) do you want to inform and consult? The answer to this question should flow, in large measure, from the structure of the business. The Directive talks about "consultation" at the relevant level of management which suggests a multi-layered approach.
- What topics will the new structures deal with? The Directive mentions such issues as the recent and probable development of the undertaking's activities and economic situation; the situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular where there is a threat to employment; and decisions likely to lead to substantial changes in work organisation or in contractual relations.
- What is to be the relationship between the new information and consultation structures and existing collective bargaining processes? How are overlaps and conflicts to be avoided?
- Will the new structures take over the information and consultation rights currently provided for by the Collective Redundancies and Transfer of Undertakings Directives?
- How is the agreement setting up the new structures to be concluded and ratified? Where trade unions are involved the negotiating and ratification mechanisms will be well established. In the case of non-union groups the process will be less clear cut. As with the European Works Council Directive should there be elections of representatives, as with the Special Negotiating Body, to negotiate an agreement, followed by a fresh set of elections for representatives to serve on the new committees? Or will one set of elections do? Will those elected have a mandate to reach a final agreement or will it have to be approved by a workforce ballot?
- How is the decision to put information and consultation structures in place to be communicated to both management and the workforce to ensure "buy-in"?

Employee representatives

- What is the appropriate size of an information and consultation committee? How many employee representatives should it have? How many members of management?
- How are the employee representatives to be elected/selected?
- Will there be one constituency consisting of the whole undertaking or will it be divided to ensure that all groups and categories are represented?
- Where unions are recognised will they have the right to nominate their representatives without going through an election?
- What should be the length of the representatives mandate? Too short and the process can fail to gather momentum, too long and it can become stale. Three years may be about right.

Process operations

- How often should management and employee representatives meet?
- How is the agenda to be agreed?
- What provisions are to be made for employee-side only meetings – both before and after the meetings with management?
- What is to be the structure of the management/representatives meetings?
- Who is to chair the meetings?
- How are the minutes to be agreed?
- Is there to be some form of employee representatives co-coordinating committee?
- How are the outcomes of meetings to be publicized – how is the wider workforce to be kept informed of developments?
- Can the employee representatives be assisted by "experts"?
- How is the information and consultation process to be linked to the undertakings' European Works Council? Existing legislation provides that employees should be elected directly onto EWCs except, in the case of the UK, where there is already a body in place representative of the entire workforce. Such a body can nominate directly to an EWC. It is likely that this will now become standard practice. More importantly, the scheduling of national and European meetings needs to be synchronized.

Disagreements

- What happens if management and employee representatives fail to agree on an issue? While information and consultation committees are not negotiating bodies many of the issues with which they will deal have the potential to lead to serious disagreements – especially if work reorganization and redundancies are involved. How are such disputes to be resolved – by recourse to outside agencies (ACAS or the Labour Court in the UK and Ireland, for example) or will it be open to undertakings to develop their own disputes resolution mechanisms?

Between meetings

- Will employee representatives be given facilities – office space, computers, e-mail access etc.
- How are representatives to meet with those they represent to be informed of concerns and to report back?
- What time will they have to act as representatives?

Training

- Many of those who will be elected on to the new bodies will have little previous experience of acting in a representative capacity. If the structures are to be effective representatives will need to be provided with training in such areas as: understanding the relevant employment legislation; managing meetings; preparing and presenting cases; communications skills; group dynamics and decision making processes. Some of this training should be undertaken immediately after the new representatives are in place so as to assist them in concluding an agreement.