

Linking information and consultation procedures at local and European level





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Executive summary

This report aims to analyse the differences in alignment, timing and content of workplace information and consultation at national and European level. It answers the question of articulation between European and national-level employee representation channels, comparing the legal situation in six countries: Belgium, France, Germany, Italy, the Netherlands and the UK. This comparative analytical report draws on questionnaire-based national contributions from these six countries.

The linking of European and workplace level information and consultation is supposed to be governed by the agreement establishing a European works council (EWC). Drafting provisions to cover such linking arrangements on a case-by-case basis is, however, difficult because national rules and practices regarding local level information and consultation have to be respected.

Where there is no provision in an EWC agreement to cover the linking of European and national-level processes, there are other possible ways to determine how the issue of timing might be determined. The recast EWC directive 2009/38/EC does stipulate that information and consultation should happen both at workplace and at European level, although the order or the way in which both processes are linked is not specified. Recital 37 of this directive is not legally binding, but it does provide guidance about the order of the processes by putting forward two main alternatives.

- either the EWC information and consultation comes first;
- or it comes at the same time as the workplace level information and consultation.

The default rule for linking information and consultation processes at workplace and at European level, as set out in the transpositions of the directive into national law for each of the the six countries considered in this study, can be summarised as falling into one of four categories:

- linked at both levels, without any indication about how or when (as in France);
- linked at both levels, within a reasonable time (as in the UK) or in a coordinated way (as in Italy) – the indication about how and when the processes should be linked is imprecise;
- the process should be simultaneous (as in Belgium) or ‘as far as possible’ simultaneous (as in the Netherlands);
- if not before, then simultaneously, suggesting that, ideally, one should happen before the other (Germany is the only country in this study where the suggestions made in Recital 37 are included in the national transposition).

Regarding the content of information and consultation processes, a distinction is made between regularly recurring information and consultation processes, and the information and consultation that takes place in unusual circumstances such as company restructuring. The scope of information and consultation at local level differs from that at the European level. The nature of local-level information and consultation also varies between countries. Furthermore, the existence of co-determination rights, injunction rights or more or less dissuasive sanctions to enforce local-level information and consultation rights may also influence the way Member States and social partners at each level perceive the issue of linking.

The issue of linking cannot be solved entirely by social partners’ arrangements because they do not have the power to deviate from the national provisions that apply in each of the Member States considered here. Here French case law might suggest possible ways forward. French court rulings suggest that the priority rule can only be invoked by some actors, and only for the sake of the effectiveness of workers’ information and consultation rights at a lower level. Such a pragmatic approach that encourages the seeking of a consensus between local and European workers’ representatives

could be sanctioned in different ways: for instance, by suspending the information and consultation procedures at local level when the EWC has not been properly informed and consulted – such a move being carried out, if possible, with the consent of local-level employee representatives.

Introduction

The project was launched in 2013, based on a stakeholder request from the chemical sector social partners from Germany: the German Federation of Chemical Employers' Associations (BAVC) and the Industrial Union – Mining, Chemical, Energy (IG BCE). Reports from their affiliates at the beginning of 2013 indicated that they had questions about the alignment of information and consultation mechanisms at European and national level in different countries.

In a letter addressed to Eurofound on 13 June 2013, Doris Meissner (IG BCE) and Lutz Mühl (BAVC) refer to the 2010 BAVC-IG BCE social partner agreement that forms the basis for regular meetings to support the work of European works councils in the chemical sector, to explore new developments and to discuss problems raised.

This letter outlines the challenge that arose from the January 2013 meeting about the timing of information and consultation of local workplace representatives and European works council members. With only one exception, all the companies and EWCs that take part in this social partner working party reported simultaneous local and European level information and consultation. The concern was raised that this synchronicity might diminish the relevance of consultation with the EWCs.

If, alternatively, an EWC was to be informed and consulted first, its position in the consultation process could result in plans initially proposed by management being changed. Only after this could the information and consultation process at local level start, since it would not be possible to clarify how the plans would be implemented at local level before the EWC consultation process had been finalised. From this perspective, synchronised information and consultation may involve potential conflicts of interest.

Since it appears that in some countries (for example, Belgium) the legal framework does not make it possible for local works councils to be informed after the EWC has considered the information, the social partners in the chemical sector in Germany put forward two research questions.

- In which countries is there a prescribed timing for local-level workplace information and consultation?
- How does this articulate with the information and consultation of the EWC; in other words, in which countries must the local works council be informed at the same time as the relevant EWC, if not before?

Because stakeholder enquiry projects are limited in terms of their resources and scope, it was agreed with the social partners requesting this study to focus on six countries. The legal framework that determines the order of local and European information and consultation and its different content in each of them was to be analysed and compared.

This report contains four sections. The first explores the boundaries and intersections of provisions about timing and linking of information and consultation processes, looking first to the agreements that govern the establishment of EWCs. If such provisions are lacking or imprecise, a default rule is identified. Section two presents a comparative analysis of these (implemented) default rules in the six countries, and section three presents an overview of case law and legal doctrine. The fourth and final section contains the conclusions of this report and suggests a number of alternative solutions to the research questions put forward in this requested research project.

A 50-page extended Annex to this report, setting out the methodology, legal sources, scenarios for information and consultation, main findings of the national reports, and a comparison of the procedures involved in both local and EWC level in the six Member States, is available on request from Peter Kerckhofs at pke@eurofound.europa.eu

At a crossroads between local and European information and consultation 1

The first part of this section ('The default rule') proceeds from the view that the answer to how European and workplace level information and consultation is linked is to be found in the agreement establishing the relevant EWC or in protocol agreements annexed to it. The autonomy to define such linking arrangements on a case-by-case basis is however limited: the operation of EWCs must comply with national information and consultation arrangements, and on the other hand, for the sake of the effectiveness of the information and consultation process, the EWC should prevail. This supports the default rule that information and consultation needs to happen both at workplace and at European level, although it does not clarify the order or the way in which both processes are linked. Recital 37 of the recast EWC directive is not legally binding, but it does provide guidance on the order in which the EWC and local works committees should be consulted, putting forward two alternatives. Either the EWC information and consultation comes first, or it happens at the same time as the workplace-level information and consultation.

The second part of this section ('Defining the boundaries between local and European information and consultation') makes a distinction between regularly recurring information and consultation, and the information and consultation that takes place in unusual circumstances such as company restructuring. For both types of information and consultation, this second part considers their order and content, and identifies the junctions between the European and workplace level.

The third and final part focuses on the notion of transnationality and on the difference in content between information and consultation at the European and workplace level.

The default rule

The recast EWC directive urges the special negotiation body (SNB) and central management to agree on a solution to the question of linking. Article 6(2c) of the directive stipulates that 'the functions and the procedure for information and consultation of the European Works Council and the arrangements for linking information and consultation of the European Works Council and national employee representation bodies' are part of the mandatory content of the EWC agreement. This leads to the conclusion that, in practice, the answer to the issue of linking should be settled in the agreement establishing an EWC.

However, the recast directive suggests that the collective ability of the SNB and the central management to define 'linking arrangements' is in fact severely restricted, since EWC agreements are 'without prejudice to the provisions of national law and/or practice on the information and consultation of employee' (Article 12(2)). An agreement is likely to be silent on the issue of linking where it is at odds with national law and/or practices covering workers' involvement at local level.

The recast EWC directive also makes no mention of whether another type of agreed solution – a transnational agreement concluded by an EWC and central management to tackle issues of restructuring at group level – is acceptable.

For this reason, in the absence of (valid) linking arrangements the following shall be the default rule: 'the Member States shall ensure that the processes of informing and consulting are conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged' (Article 12(3)).

This default rule suggests that in a scenario of restructuring – where substantial changes in work organisation or contractual relations are indeed likely – information and consultation procedures need to be conducted at local as well as European level. However, the default rule does not clarify how these two procedures need to be linked, let alone which

level should be consulted first. The Recital 37 of the recast directive is not binding but does provide much more guidance, stating that ‘national legislation and/or practice may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national employee representation bodies’.

The recital suggests two possibilities: the EWC either needs to be informed earlier than the local level, or simultaneously. It does not provide guidance on the type or scope of the information, or on the start or closure of the consultation. The information can only relate, however, to the issues of substantial changes in work organisation or contractual relations. Furthermore, it needs to be repeated that the competence of the EWC is restricted to transnational issues rather than national issues (Article 1(3), recast EWC directive).

Defining the boundaries between local and European information and consultation

Information and consultation as described in Council Directive 2002/14 on information and consultation, and in the recast EWC directive, takes two forms (European Parliament and European Council, 2002; 2009). The process can be a regularly recurring event focusing on general issues, or it can have an occasional character when restructuring issues arise. When examined more closely, it is clear that the default rule does not deal with the issue of linking between local and European information and consultation procedures in a generic manner. Neither is information and consultation of EWCs restricted to ad hoc decisions which are likely to lead to substantial changes in work organisation or contractual relations. Under the subsidiary requirements (SR) to the original directive, EWCs need to be informed about a company’s ‘structure, economic and financial situation, probable development and production and sales of its Community-scale undertaking or group of undertakings’ while ‘information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments ...’. It can be argued that the ‘substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies’ to which the SR refer are equivalent to the aforesaid decisions. For the sake of this paper, these decisions will be qualified as restructuring decisions.

Though the default rule focuses on these restructuring decisions, the issue of linking cannot be reduced to the issue of restructuring. Indeed, Article 12(1) of the Recast EWC Directive establishes a generic provision that ‘information and consultation of the European Works Council shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Article 1(3).’ For this reason, it would be wrong to state that the issue of linking only arises for information and consultation in the case of restructuring. However, the sense of urgency at the heart of a restructuring process means that this type of information and consultation is quite different from the routine type. It is essential that workers are informed and consulted promptly when restructuring is underway, and essential that central management can make effective and timely decisions (Article 1, recast EWC directive). The chronology of local and European information and consultation processes in cases of restructuring is therefore of great importance. In short, it is necessary to distinguish between the different types of information and consultation processes at local and European level to gain a proper insight into the linking issue. Two axes are paramount – timing and purpose.

For more general and routine information, the issue is less about the timing of the information that needs to be provided at local or at European level. The subsidiary requirements only provide for an annual meeting of the EWC, whereas the national reports prepared for this paper show that local-level information and consultation takes place at regular intervals throughout the year.

It is therefore more likely that local representatives will receive information before the EWC. While it is easy to identify a situation which is at the crossroads of European and local information and consultation procedures in the case of the aforesaid decisions, it is difficult to imagine that the local and the European level would receive the same kind of recurring information. Indeed, where the competence of the EWC is limited to transnational issues, the recurring information given to local representatives is also usually limited to issues about the enterprise or establishment concerned.¹

The line of demarcation is therefore much clearer for recurring and routine information. Recurring and general information which has to be submitted to European works councils concerns 'transnational issues'. They are defined in Article 1(4) of the recast EWC directive as issues that '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'.

In the case of a restructuring operation, a debate might arise (and an instance of this is described later in this report) about whether its nature is national or transnational, but this is a less ambiguous issue for recurring and routine information.² What kind of routine information needs to be given to local workers' representatives and to European workers' representatives is clearer.

Where a restructuring operation could be defined as transnational, it is relevant to make a distinction between the purpose of information needed at local and European level. At the European level, the focus will have to be on the global picture and context, whereas at the level of the local works council it could be restricted to information relevant locally. However, information about the more comprehensive level might also be of interest at the local level. If a group of undertakings functions in a rather vertical way, a restructuring decision may be adopted by the central management but the local management may have some leeway in how the decision is implemented. (The transnationality aspect of a restructuring operation is explored in the subsequent section.)

The issue of linking of recurring information at both levels is more related to the issue of transmitting information provided by the central management to the EWC towards the more 'local' level. Article 10(2) of the recast directive provides that

... members of the European Works Council shall inform the representatives of the employees of the establishments 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.

This obligation was already set out in the subsidiary requirements of the previous directive (1994/45) and the recast directive has reinforced it by transferring it into the body of the directive.

¹ Here it is relevant to mention the object of information described by Article 4(2) of Council Directive 2002/14: '(a) information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;(b) information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment'.

² See, for example, the British Airways case 'Tribunal de Travail Bruxelles', 6 December 2006, *Chroniques de droit social* 2008, 146-147.

The concept of transnationality

The recast EWC directive indicates in the body of directive that the ‘competence of the European Works Councils and the scope of the information and consultation procedures for employees governed by this Directive shall be limited to transnational issues’. It moves the restrictive definition of ‘transnational matters’ from the old subsidiary requirements into the heart of the directive. Article 1(4) now reads: ‘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’.

The approach of the recast directive constitutes a restriction to the autonomy of the contracting parties which is at odds with the recognition of autonomy referred to in Article 6.³ This raises the risk of it being used as an argument to preclude an EWC from covering parts of a transnational undertaking that fall outside the Community. It may also lead to legal disputes about the transnational character of information given by central management, since the directive’s definition of what constitutes ‘transnational’ information remains somewhat ambiguous.

Recital 16 of the recast directive states:

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.

The final part of the recital is a meaningful addition to the original version and precludes a too narrow approach to the concept of transnationality. According to this approach, workers in at least two Member States ought to be adversely affected in a direct ‘here and now’ way. Thus, a transfer of activities between Member States will be considered to be a transnational matter. The recital does not require that the transfer take place between the establishments or undertakings of the Community-scale undertaking or group. It is the authors’ view that such a condition is indeed not relevant. Any such restructuring will potentially affect the workers of more than one Member State.

In practice, a restructuring operation will involve choices about which establishment or undertaking is to be adversely affected by or indeed profit from such an operation. A decision to close one establishment may be:

- construed as a decision to save an establishment in another Member State;
- construed as a redistribution of production quota across the Community-scale undertaking or group;
- avoided by means of a decision that affects other establishments in a less dramatic way.

In sum, the final part of Recital 16 allows for a more qualitative assessment of the importance that some matters might have for the European workforce concerned. It disregards the number of Member States directly ‘involved’ as such. However, this line of reasoning means that it is not possible to say that when a restructuring decision is taken in one Member State and this directly affects workers in another, such a decision is a transnational decision. This remains a matter of dispute among academics.⁴

³ See also the observation of the EESC: ‘The definition of the EWC’s competence as transnational restricts its remit rather than making it more precise as intended’, European Economic and Social Committee (2008).

⁴ See, for example, Verburg, 2007 and Dorsssemont, 2008.

However, from Recital 16 it is possible to construct an argument in favour of the thesis that if a managerial decision to restructure is taken in a country other than the one where the affected workers (and the workers' representatives) are, this would be sufficient to make such a decision a transnational matter. Recital 16 suggests that both the level of management and representation that it involves need to be taken into account. If management refers to 'central management', and if 'representation' refers to workers' representation, then two levels in two different Member States are involved if central management is not in the same country as the affected workers' representative body. It is clear from the German *Travaux préparatoires* of the implementation of the Recast Directive that the German government has taken the view that restructuring decisions adopted in one country and affecting workers in another have a transnational character (Hohenstatt et al, 2011).

The essence of transnationality is that information does not just affect two establishments or undertakings. Instead, it is essential that it affects the interests of workers situated in more than one Member State. Such an approach is reminiscent of a passage in the ruling of the Brussels Labour Court of 6 December 2006 in the case of British Airways.⁵ In its judgement, the Labour Court said the very fact that a decision taken in the UK might adversely affect an undertaking in another country (Austria) could mean that such a decision had a transnational character. However, the Labour Court did not state that such a conclusion was warranted in every case. The facts of the case show that the outsourcing operation initiated by British Airways and affecting Austrian establishments was part of a more global operation, and it had affected other establishments in other countries. This pan-European operation had been coordinated by the UK central management. The case does illustrate the importance of considering a wide time span to assess the transnational character of a single operation, looking at both earlier and potential future operations.

The definition of what constitutes a transnational matter is related to the articulation between levels of information and consultation.⁶ In its Explanatory Memorandum to the original Proposal, the Commission relates the issue of limiting the competence of the EWC to the issue of the delimitation of competences between levels of information and consultation.⁷

⁵ Brussels Labour Court 6 December 2006, *Chroniques de droit social* 2008, 146. For a commentary, see Dorssemont, 2008 and Verburg, 2007. The authors do not consider that Recital 12 of the EWC Recast Directive warrants an opposite view.

⁶ (15) Workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be differentiated from that of national representative bodies and must be limited to transnational matters. (Directive 2009/38).

⁷ COM (2008) 419 final.

Legal framework in six EU Member States 2

A comparative analysis of the legal framework in the six countries included in this study reveals insights about the order of the information and consultation mechanisms. They show how the default rule becomes applicable if the agreement establishing an EWC does not deal with the issue of timing at all, or does not clarify the issue in a way that conforms with the law of individual Member States. In some systems, this default rule leads to a situation where the European level is informed before the local level, whereas in other systems information and consultation are supposed to take place either simultaneously, or are required to take place at both levels in a ‘coordinated’ way or ‘within a reasonable time’.

The varying nature of workplace level information and consultation mechanisms also has an impact on linking, as does the degree of detail with which the competences are defined and the effectiveness of any sanctions for failure to observe the information or consultation process.

International law matter

Prior to an analysis of the implementation of the main rule and the default rule in the six Member States concerned, there is a private international law issue which emerges. Indeed, the question arises as to which law is applicable to the issue of the linking of the prerogatives of the European works councils and the information and procedure at local level. Since the issue has inevitably a transnational character, the law applicable to the undertaking conducted by the central management will deal with the issue of linking, rather than the laws of the Member States where subsidiaries of the group might be situated. If the central management of a group of undertakings with a Community-scale dimension is situated, for example, in Germany, the law implementing the recast directive will be applicable to the linking issue. However, the latter does not mean at all that the law of other Member States ceases to be relevant. The German law implementing the main rule will have to make a reference to the necessity to respect the provisions of national law and/or practice on the information and consultation of employee (at local level). Hence, it will be necessary to assess the validity of the clauses in the agreement in the light of the law and practices of those member States.

Insofar as these clauses cannot be upheld, the German law will come into play as the applicable law defining the default rule. From a formal point of view, the national law of the other Member States is irrelevant here. There is no reference made in the default rule to the law of those Member States. However, the principle of territoriality logically would preclude the German legislator from extending the primacy in time (anteriority) of the EWC to the detriment of local works councils beyond the will of the European legislator. In other words, only the European legislator can empower the German legislator to adopt laws which have such extraterritorial implications.

Order of information and consultation

In terms of the order of the local and European information and consultation mechanisms, there are roughly four different types of arrangements:

- at both levels, without any linking indication (as in France);
- at both levels, within a reasonable time (as in the UK) or in a coordinated way (as in Italy) – how the processes should be linked is imprecisely defined;
- simultaneously (as in Belgium) or as far as possible simultaneously (as in the Netherlands).
- at the latest, simultaneously, suggesting that, ideally, one should happen before the other (Germany is the only country in this study where the provision of Recital 37 of the recast directive is included in the national transposition).

The French legislation reproduces the lack of legal precision which is inherent in the provisions of the recast directive. This will stimulate the French judiciary to continue to clarify the picture in the future.

In Italy and the UK, information and consultation needs to take place at both levels but an indication is given of chronological order even though this is somewhat ambiguous. In Italy, it needs to be done in a ‘coordinated’ way. In the UK, the legislator has prescribed that both procedures need to be linked ‘so as to begin within a reasonable time of each other.’

In the Netherlands, the legislator has stated that information and consultation needs to take place ‘simultaneously as much as possible’. In Belgium, the situation is less ambiguous. In the absence of specific arrangements in an EWC agreement, the default rule is that information and consultation should take place simultaneously at both levels. The consultation process within the EWC should not hinder information and consultation procedures at local level. The overall protection of the employees and their information and consultation rights should not be reduced.

The ambiguity of the directive’s provisions make it difficult to identify a clear-cut choice between simultaneity or anteriority.

In Germany, the rule combines previous approaches, stipulating that EWCs should be informed and consulted either simultaneously or before the local level. By stipulating that EWCs must, at the latest, be informed and consulted simultaneously with the local level, there is no leeway for the local level to be consulted first.

Default rules

Table 1 summarises the default rules for Belgium, France, Germany, Italy, the Netherlands and the UK that are to be followed if an EWC agreement makes no specific arrangement for the timing of information and consultation.

Table 1: Default rules for the order of information and consultation

Belgium	In Belgium, the provisions of the directive have been implemented in a literal way into the collective agreement. The provisions of Recital 37 have not at all been integrated in a literal way into the official commentary of the social partners to Article 101. Whereas the recital suggests EWCs should be informed and consulted before the local level, the commentary of the social partners refers to simultaneity.
France	The French implementation is a literal implementation of the provisions of the directive and does not give any indication at all about how the processes should be linked at both levels if there is no provision to cover this in the EWC agreement. The 37th recital was not integrated into national law at all.
Germany	In Germany, Article 1(7) of the national EWC law prescribes that information and consultation of EWCs should take place, at the latest, simultaneously with information and consultation procedures for national employee representatives. Germany is the only country of the six considered in this report that has incorporated the Recital 37 into the body of its national legislation on EWCs, set out in a subparagraph of Article 1.
Italy	The Italian legislative decree includes a nearly literal implementation of Article 12 of the recast EWC directive. There is a small adjustment: Article 13(3) of the legislative decree states that information and consultation needs to take place in a ‘coordinated way’.
Netherlands	Article 12(3) of the recast directive has been implemented into Dutch law in a more or less pragmatic way. The default rule provides for simultaneous information at local and European level ‘as much as possible’.
United Kingdom	In the UK, the legislator has implemented an interpretation of Article 12(3) of the recast directive. The UK’s Transnational Information and Consultation of Employees Regulations (TICE) provide that, where EWC agreements do not include specific linking arrangements, companies must ensure that the procedures for informing and consulting the EWC and national employee representation bodies about substantial changes in work organisation or contractual relations ‘are linked so as to begin within a reasonable time of each other’.

Source: *National reports, Network of European Correspondents*

For a proper understanding of the importance of the linking of information and consultation mechanisms from a comparative perspective, it is important to consider the differences in the type and focus of the competences concerned and the potential sanctions for non-compliance. In some Member States, local works councils have prerogatives or competences that, generally speaking, EWCs do not have.

Information and consultation rights do not affect the managerial prerogative in Belgium, Italy and the UK. In France, Germany and the Netherlands, the prerogatives of local works councils do affect the managerial prerogative. In practice, this means that it is possible to suspend a managerial decision for a period of time so that additional information can be requested and an opinion expressed. In France, there is also a right to commission a financial analysis of the information provided. In Germany and the Netherlands, worker involvement also involves co-determination rights, but this is not the case in any of the other countries considered in this study.

The object of the information and consultation procedures can also differ. For EWCs this is determined by the context of the agreement that establishes them. As a fallback rule, the subsidiary requirements of the directive lists subjects for which each EWC should be entitled to obtain information unless the EWC agreement specifies otherwise.

In principle, the competence of EWCs is limited to transnational matters. In Belgium, France, Germany and the Netherlands, the subjects that local works councils are entitled to have information about and be consulted on are regulated in much more minute detail than was set out in the former subsidiary requirements.

Last but not least, sanctions for failing to respect information and consultation rights need to be taken into account. Sanctions are seldom set out in European directives and practices vary among Member States. They range from administrative or penal sanctions to the possibility of works councils being able to halt management decisions using legal instruments such as injunctions. However, if such sanctions apply only to local-level procedures, or if the sanctions for breaches of EWC rights are less robust, this might explain why managers might be less inclined to consult the EWC before consulting local works councils. It might also explain why workers' representatives would prefer that local works councils be informed and consulted before EWCs.

Case law and legal doctrine 3

The issue of linking has only given rise to case law in three of the countries discussed here: one case in Germany, two in Belgium, and in France a body of case law has been developed.

Germany: Forbo

This case concerned a dispute between international company Forbo and its general works council (GBR). The EWC was not party to this case. Following a rumour that production units were to be relocated from Germany to Slovakia, which at the time of the dispute was not yet a member of the EU, the GBR asked for installation of an ‘arbitration committee’ (*Einigungsstelle*).

The court ruled that the simple existence of the EWC could not alter any of the prerogatives of the GBR. The judges did not rule on whether the EWC had to be informed or consulted before the local level was told about the proposed restructuring.

Belgium: Renault and British Airways

After the closure of the Renault plant at Vilvoorde was announced in 1997, Belgian judges ordered the local Renault management to immediately begin local-level information and consultation procedures.

This ruling conflicted with rulings by French judges intended to preserve the effectiveness of EWC rights, and obliging the central management and its subsidiaries to inform the EWC first, and to suspend local information and consultation until the EWC had issued its opinion.

A ruling by Belgian judges in 2006 on British Airways’ attempts to restructure its operations in the EU and elsewhere in the world shed light on their view of transnational issues falling within the scope of the EWC. Belgium’s Labour Court said the very fact that a decision taken in the UK might adversely affect an undertaking in another country (Austria) could mean that such a decision had a transnational character. However, the Labour Court did not state that such a conclusion was warranted in every case.

French case law

A distinction in French case law can be made between two types of case, depending on which parties are involved in the litigation. The first type involves EWCs and central management, and the second involves local works councils or trade unions and local management.

At first sight, rulings in French case law on this subject seem inconsistent. A coherent approach can however be elicited from these rulings, leading to the conclusion that the priority rule is not challenged. However, the rulings do restrict the type of actor that can invoke this priority rule, and suggest this can only be done to preserve the effectiveness of workers’ information and consultation rights.

Cases between EWCs and central management

In two French court cases, EWCs sought to exercise the prerogative to be consulted and informed before the local works councils. The result was that local-level information and consultation mechanisms were suspended. The juridical problem with both court rulings is that they had extra-territorial implications beyond the competences of the French courts that delivered the rulings.

In 1997, car manufacturer Renault suddenly announced the closure of the Vilvoorde plant in Belgium before any information had been given to either the EWC or the local works council. In a first ruling, the French judges ordered central management to suspend the closure through its Belgian subsidiary until the information and consultation rights of the EWC had been fully respected. On appeal, this ruling was reiterated, though the right of the EWC to have prior information and consultation was made subject to some conditions. If central management intended to carry out the announced closure, it first had to convene the EWC for information purposes. No explicit reference was made to the consultation rights of the EWC in this final ruling. However, this ruling conflicted with the ruling of the Belgian courts that had ordered Renault's Belgian subsidiary to immediately begin local-level information and consultation procedures for collective dismissals.

Telecom equipment company Alcatel announced a worldwide restructuring that would lead to the loss of 12,500 jobs around the world, 900 of them in France. The EWC was not satisfied with the information provided by the central management about these changes. It wanted the courts to order the disclosure of additional information and grant an injunction suspending both the restructuring process and the local-level information and consultation procedures. The court upheld only part of the EWC's argument. Central management was ordered to give the EWC more information and more detail about the planned restructuring. However, the judge refused to suspend local information and consultation procedures because neither the specific agreement for this EWC nor the EU directive stipulate that the EWC had a right to priority of information and consultation.

Cases between local works councils and local management

There are five examples of cases of this type between local works councils and local managements. At first sight, the rulings in these five cases appear to be inconsistent. On closer examination, however, it is possible to detect a more or less consistent approach by the French judiciary to the linking issue.

In the Marks & Spencer case (from 2001), a French trade union defended the prerogatives of the Comité de Groupe and of the local works councils. French local management wanted to postpone local-level information and consultation until the EWC had expressed its opinion. The Court ruled that local management could not invoke priority of the EWC if the intention was to postpone local-level information and consultation.

In the Alstom case (2003), local management did want to start information and consultation at the local level but the secretary of the local works council argued that the EWC procedure was still pending. The court did not uphold the preference of local management to begin consultation at the local level, ruling that there is no pre-established order for information and consultation at both levels. However, for the sake of effectiveness of the procedures at both levels, the court decided that the European procedure should come first, as this was necessary for the effectiveness of both the European and the local procedures.

In the Seita case (2003), central management was very cooperative in informing and consulting with the EWC first. However, when local management wanted to start local information and consultation procedures almost immediately after this, the courts ruled that these local procedures were being started at too short notice.

The Dunlop case (2010) began with the discontent of the French central works council and some trade unions about unsatisfactory information and consultation at both European and local level. In its first ruling, the court agreed that the *comité central* had not been properly informed and consulted, but refused to suspend national procedures until the EWC had been fully informed and consulted. On appeal, the court ruled that information and consultation rights had been violated at both European and at local level but, again, without granting an injunction.

The GDF Suez case (2011) concerned the merger of research departments in France and Belgium.⁸ Since Belgian employees would not be relocated, central management did not consider this to be a transnational matter on which the EWC had to be informed or consulted. However, the French works council argued that local information and consultation procedures should be suspended until the EWC had been informed and consulted. The court agreed that this matter was transnational and hence that it fell within the competence of the EWC to be informed and consulted on it. The argument in this ruling was that, even without a formal linking arrangement under French law, the effectiveness of procedures at both levels depended on the principle that the EWC should be informed and consulted before the local level. Even so, the court did not order suspension of the local information and consultation procedures because French workers had already accepted the working conditions under the new structure. However, the French works council was granted €15,000 compensation.

Finding consistency in French case law

We can conclude that the Renault and the Alstom case support the priority rule. In the cases involving Marks & Spencer, Alcatel, Dunlop and GdF Suez, the priority rule is not upheld in the same unambiguous way.

However, it is also possible to see that the priority rule is not rejected either. The French courts have restricted who can invoke it and why, focusing more on the rights of employee representatives to information and consultation and less on the obligation of management to provide this.

- Local management is not entitled to invoke priority for the EWC as a justification to suspend the local-level information and consultation mechanisms to which local works councils are entitled.
- The EWC and the local works council could – on a consensual basis – invoke ‘priority for the EWC’ for the sake of the effectiveness of information and consultation at both levels.

Legal doctrine

As neither legislative solutions nor case law help to resolve legal uncertainty on this point, legal experts have tried to put forward solutions in the form of legal doctrine.

Dorssemont (2006), Teyssié (2012) and Holtzer (2014) argue that priority should be given to the EWC so that local works councils can make use of the information provided at that level. Central management is best placed to provide complete and comprehensive information about planned measures. Access to this kind of general overview before the local procedure starts can benefit local works councils.

An exchange of views (or consultation) is only effective if it takes place at the level where the decisions are taken. Decisions about an overall plan are likely to be taken at the level of central management, while the detail of its local implementation is likely to be decided by local management.

⁸ In 2015, GDF Suez became Engie.

Peeters (2012) and a numbers of authors writing about French legal doctrine both question the priority rule because it presupposes hierarchical decision-making. They argue that this is not always the case in multinational companies: central management does not always centralise all transnational and strategic decisions at headquarters, overruling local management decisions.

Conclusions and possible ways forward 4

The issue of linking has additional territorial implications. For this reason, the European legislator would have been the most appropriate institution in which to resolve this issue. The solution offered in Article 12(2) in the recast EWC directive is, however, to delegate the problem to the signatory parties of an EWC agreement. Since these actors also have to take into account the legislation of the Member States concerned, it is reasonable to conclude that the (collective) autonomy of the social partners is hampered to an extent that makes it nearly impossible to find a solution that respects the various legal requirements of 28 Member States.

For cases where no linking arrangements are provided for in the EWC agreement, Article 12(3) of the EWC directive provides a default rule that states that there should be information and consultation at both levels. However, it gives no precise detail about how information and consultation procedures at both levels should be linked.

This report has considered how national legislators in the six Member States included in the study have implemented this default rule. In each case, the relevant national transposition will be the one for the country where a company is headquartered (or, in the terminology of Article 3 of the Directive, where the controlling undertaking is situated). This report has raised the question of whether one national transposition can introduce a solution that has implications beyond its borders, affecting the local information and consultation rights of employee representatives in other countries.

A comparative overview of how the default rule is transposed into national law in the six Member States considered shows the variety of ways in which the directive's provisions on this point can be interpreted. Some Member States have not provided clarification on the issue of linking, echoing the legal uncertainty created by the recast EWC directive, while others have given poor guidance on the issue or put forward divergent approaches.

Finally, this report has analysed case law in France, Belgium and Germany, with a view to answering the questions posed by the research, as the study offers a coherent view of how courts have interpreted the directive's provisions on the order and content of the information and consultation rights of EWCs and local works councils. The diversity of court rulings in France suggests the possibility of more legal uncertainty. These cases also show how court rulings in one country on the rights of EWCs to prior consultation and information might directly affect local information and consultation processes in other countries, even though this is beyond the territorial competence of the court that supports the EWC right to priority.

The information provided in this report and the reasoning developed throughout the analyses indicate possible ways forward, inspired by both the varying outcomes of French case law and the divergence in national implementations of the default rule.

French case law argues for a priority of information and consultation at European level where the local works councils would not object. A local manager, however, was not allowed to use this reasoning to postpone local level social dialogue by invoking the priority of information and consultation at European level. This does not challenge the priority rule, but only restricts who may invoke it. This is based on the French courts' perception that the purpose of the priority rule of information and consultation at European level is to protect a workers' right to information and consultation at local level. The focus is more on the right of the worker to the information, and less on the obligation of management to provide it.

A pragmatic way forward would be to seek the consent of the local works councils for the EWCs to get priority in the information and consultation process on a case-by-case basis. This suggested approach deviates slightly from the 'solution' offered by the recast EWC directive, which opts to invite social partners to include a linking arrangement in agreements that establish an EWC. This disregards the fact that local works councils are not directly involved in the agreement bargaining process. At best, the Special Negotiation Body might take their wishes into account. The pragmatic

solution applied by the French courts is often based upon a consensus between workers' representatives at local and European level. To avoid litigation, best practice would be to make EWC agreements more comprehensive or to reach consensus between all the actors involved, both management and workers and at all levels.

Making the consent of local works councils a condition for granting priority to the EWC would also eliminate the problem of court rulings in one country affecting priority decisions to the detriment of a works council in another country. The pragmatic approach would mitigate against the unintended consequences of a blind application of the priority rule. However, such a solution presupposes that consent can be obtained in good time from all the works councils concerned. The larger the group, the more insurmountable the conflicts of interests and the more difficult this solution would be to implement.

The EWC receipt of (broader) information before the local works council does not necessarily weaken the position of the local works council. However, if the European consultation procedure ends before consultation happens at local level, and if the EWC has not raised any objections to a proposed transnational restructuring, it may be more difficult for the local works council to communicate its criticism or objections to central management level, not to mention have them taken into account (Holtzer, 2014).

Finally, this study offers for consideration a number of ways in which the pragmatic approach might be taken forward.

Limit prerogatives of local works councils: A first possible way forward is to limit the prerogatives of local works councils. Indeed, some judges have ordered suspension of information and consultation procedures at local level.

Suspension of restructuring decisions: Another way forward could be to request that all restructuring decisions be suspended until European and local works councils have been properly informed and consulted. This approach does not specify which level should be consulted first, but this might be less important if it renders the linking question less acute. Consideration would have to be given to the need to allow managements to make effective decisions, including making sure that information and consultation procedures were concluded at all levels within a reasonable time frame.

Separating the processes of information and consultation: It might be worthwhile to separate the processes of information and consultation. The EWC priority rule mentions giving precedence to consultation at European level, but says nothing about the issue of information. There is no reason why the local works council should not receive information immediately after the European works council has been informed, or even simultaneously, while the consultation procedure at local level is suspended.

Judicial guidance from the ECJ: The European Court of Justice (ECJ) could provide judicial guidance on two issues: the question of how linking arrangements resulting from court rulings might hamper the principle of effective decision-making; and to what extent an employer could invoke this principle in a situation where lack of respect for the information and consultation rights of local and/or European works councils is part of the problem.

Incorporating Recital 37 into Article 12: As for a possible legislative way forward, the findings from this study would suggest that Recital 37 should be incorporated into Article 12 to replace the existing and deficient default rule. The implementation of such a default rule needs to be operated by amending both the national law on EWCs (of which only the one of the country where the company is headquartered is applicable) and the laws relating to information and consultation at local level (only those of the countries where the company has operations being applicable).

Bibliography

- Blanke, T. and Rose, E. (2010), 'Who is the first? The correct timing of information and consultation of European Works Councils in relation to national rights of worker involvement', in Dorssemont, F. and Blanke, T. (eds), *The recast of the European works council directive*, Intersentia, Antwerp, pp. 327–356.
- Dorssemont, F. (2008), 'Transnationaliteit als bevoegdheids criterium voor de Europese ondernemingsraad' [Transnationality as a criterion of jurisdiction for the European Works Council], *Chroniques de Droit social 2008*, Brussels, pp. 131–137.
- Dorssemont, F. (2006), 'The Renault saga (revisited)', *European Company Law*, Vol. 3, No. 1, pp. 5–10.
- Eurofound (1998), *Negotiating European works councils: An analysis of agreements under Article 13*, Publications Office of the European Union, Luxembourg.
- Eurofound (2006), *European works councils and transnational restructuring*, Publications Office of the European Union, Luxembourg.
- Eurofound (2008), *European works councils in practice: Key research findings*, Eurofound, Dublin.
- European Economic and Social Committee (2008), *Opinion of the European Economic and Social Committee on the Proposal for a European Parliament and Council Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employee*, COM(2008) 419 final - 2008/0141 (COD).
- European Parliament and European Council (2009), Directive 2002/14/EC of the European parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, *Official Journal of the European Union*, L 80/29, 23 March.
- European Parliament and European Council (2009), 'Directive 2009/38/EC of the EUROPEAN Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)', *Official Journal of the European Union*, L 122/28, 16 May.
- Fitzgerald, I. and Stirling, J. (eds) (2004), *European works councils: Pessimism of the intellect, optimism of the will?*, Routledge, London.
- Hohenstatt K.S., Kröpelin A. and Bertke A.-K. (2011), 'Die Novellerung des Gesetzes über Europäische Betriebsräte', *Neuze Zeitschrift für Arbeitsrecht* 2011/23, p. 1314.
- Holtzer, M. (2014), *De invloed van werknemers op de strategie van de vennootschap* [The influence of employees on company strategy], Wolters Kluwer, Alphen aan den Rijn.
- Kerckhofs, P. (2006), *European works councils – Facts and figures 2006*, European Trade Union Institute, Brussels.
- Kerckhofs, P. (2010) 'Can the new EWC directive bring more and more effective EWCs?', in Dorssemont, F. and Blanke, T. (eds), *The recast of the European works council directive*, Intersentia, Antwerp, Vol. 22.

Lamers, J. (1998), *The added value of European works councils*, AWWN, Haarlem.

Lecher, W. (1999), 'Resources of the European works council – Empirical knowledge and prospects', *Transfer*, Vol. 5, No. 3, pp. 278–301.

Lecher, W., Nagel, B. and Platzer, H.-W. (1998), *Die Konstituierung Europäischer Betriebsräte - vom Informationsforum zum Akteur? Eine Vergleichende Studie von Acht Konzernen in Deutschland, Frankreich, Großbritannien und Italien* [The constitution of European works councils - the information forum for actors? A comparative study of eight groups in Germany, France, UK and Italy], Nomos, Baden-Baden.

Lecher, W., Nagel, B. and Platzer, H.-W. (1999), *The establishment of European works councils – From information committee to social actor*, Ashgate, Aldershot.

Marginson, P., Hall, M., Hoffmann, A. and Müller, T. (2004), 'The impact of European works councils on management decision-making in UK and US based multinationals', *British Journal of Industrial Relations*, Vol. 42, No. 2, pp. 209–233.

Müller, T. and Hoffmann, A. (2001), *EWC research: A review of the literature*, IRRU, University of Warwick.

Nakano, S. (1999), 'Management views of European works councils: A preliminary survey of Japanese multinationals', *European Journal of Industrial Relations*, Vol. 5, No. 3, pp. 307–326.

Peeters, J. (2012), 'Articulatie en concordantie tussen de Europese en de nationale ondernemingsraad' [Articulation and concordance between the European and the national council], in Dorsemont, F. and Kerckhofs, P. (eds), *De omzetting van de Herschikkingsrichtlijn 2009/38 Europese ondernemingsraden naar Belgisch recht* [Transposition of Recast Directive 2009/38 on European Works Councils into Belgian law], Die Keure, Brugge, pp. 64–83.

Teyssié, B. (2012), *Droit et pratique du CE européen*, LexisNexis, Paris.

Verburg, L. (2007), 'De Europese ondernemingsraad: driemaal in de rechtszaal gesignaleerd!' [European Works Councils: spotted three times in the courtroom!], *Arbeidsrechtelijke annotaties*, Vol. 3, pp. 94–96.

Waddington, J. (2011), *European works councils – A transnational industrial relations institution in the making*, Routledge, New York.

Zimmer, R. (2005), 'Die Forbo Entscheidung' [The Forbo decision], *Arbeitsrecht im Betrieb*, Vol. 4, pp. 207–208.

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This report examines the differences in alignment, timing and content of workplace information and consultation processes at national and European level. It compares the legal situation at national and European level in six EU Member States: Belgium, France, Germany, Italy, the Netherlands and the UK. It finds that the provisions of the EU directive governing the operation of European Works Councils are ambiguous about the order in which information and consultation processes should happen at each level. It also highlights the fact that EU Member States have interpreted the directive in different ways when transposing it into national law. The report concludes with a number of pragmatic guidelines as to how this issue might be resolved.

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