



« VOLUNTARY WAY - GOING FURTHER »

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VOLUNTARY WAY-GOING FURTHER)*

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- The Objective -

This booklet aims to present a simplified analysis of the Directive.

As a first approach we would like to stress that the manifest objective of this Directive is, essentially, to define the delimitation of the minimum to apply on the rights of information and consultation to all the EU members.

This Directive seeks to create a relative minimum frame regarding rights and procedures on:

Workers' Information & Consultation

Note: Regarding the relation employers / workers' representatives, within the companies located in the different member states, this directive does not establish any restriction unless the one concerning the number of workers of a company so that it has to be subjected to the application of the rules of this community instrument, but it has to be analysed jointly with other dispositions relative to the rights of information and consultation consecrated already at EU level.

-Matters -

This Directive, in what concerns to the extent of application of the rights there consecrated, it embraces subjects that concern and involve companies with headquarters within the national space of each member state, in one of three views:

- ⇒ Information on the recent evolution and the probable evolution of the activities of the company or the establishment and its economic situation.
- ⇒ Information and consultation on the situation, the structure and the probable evolution of employment in the company or establishment and on the eventual anticipation measures foreseen, namely in case of threaten for the employment.
- ⇒ Information and consultation on the decisions susceptible of developing substantial changes at level of the work organisation or the labour agreements, including the ones foreseen by the community dispositions referred in the no. 1 of the article 9.

Note: There is, however, the need to make a correction here, because and according with the extent of Directive are not susceptible, in a first analysis, to be covered by it issues that are framed to be debated within the workers' representative body EWC - European Works Councils or of any information and consultation procedure (both instituted according the laws that transposed the Directive 94/45/EC into the different internal legislation and now this the new European Works Councils Directive «Recast» - 2009/38/EC).

This way, the privileged place for debate, and consequent information and consultation, of European matters of transnational nature, are the referred EWC. Nevertheless, it is not completely out of line, and having in mind the involved entities and the intervenors in the process of information and consultation, that the information and consultation foreseen in

Directive 2002/14/EC include matters also to debate within the European works council. This because in spite of the creation of special mechanisms for the effect (EWCs) the issues can implicate, also, consequences at national level, within each member state.

- Who has the right to information and consultation? -

- The workers' Representatives!

- Who has the duty to inform and consult? -

- The companies' representatives, so that they can answer for the acts!

- Legitimacy -

After the definition of what are the cases that can be involved, or susceptible to be a Directive's objective, it has to be analysed who has **legitimacy to intervene** in the procedure of information and consultation. Such situation is left for the national legislation.

Note: This is one of the matters that raises the largest divergence, because at European level, and according with some legislation, the workers' representatives are the trade unions, through their shopstewards, or the workers' committees, and to this respect, and in what concerns its constitution, there are differences from country to country.

There are situations that, and because of the systems already instituted in the national legislation, where nothing new is created, this because there are already bodies instituted with such rights, to what is added what is foreseen by the Directive 2002/14/EC; on the other hand, systems exist where the rights foreseen in the directive will be granted to bodies that didn't have such rights yet, as it is the Portuguese case. In Portugal it was privileged, at the time of the transposition for the internal law of the directive 2002/14/EC, the shopstewards.

In what it concerns the employers, in principle and having in mind the matters in analysis, in our opinion, should not be the intermediate leaderships the active subjects in the transmission of information and in the workers' consultation procedure. It seems us far too much evident that should intervene, on the part of the companies, who has responsibility for the acts.

- Time of the Acts? -

This is exactly one of the aspects where it is necessary a clearer planning. It has to be stressed out that there are **two times** and **two actions** that should be initiated by the employers and by the workers. We have a first moment that seeks the information and a second moment seeking the consultation. It will be, without a doubt, necessary a space of time to allow to develop these two stages of the same process, allowing both the analysis of the information and the data gathered, the search of solutions, as well as the accomplishment of the consultation phase, without allowing the process to be prolonged for too much time, that can implicate disastrous consequences for sure, for both intervening subjects, due to the delay, by «dragging» the process.

These are two phases of the process that cannot be mixed. Any of them has to be carried out before the facts take place in order to allow it to have a useful effect.

While that, and regarding the concept of information, such was never object of great controversy, the same did not happen with what is designated by consultation.

The phase of consultation and the concept itself were, and mainly in what concerns the EWC's Directive, target of a major debate, being, inclusive, motif for some legal actions. Nowadays, such has been improved having in mind the new European Works Councils' Directive («Recast»).

So, there are:

- Two moments / Two rights:

➡ Information & Consultation

Note: these rights do not emerge as acquired rights, once to be exercised is essential they were requested.

- Rights -

Consecrated rights: Information & Consultation

The Directive it self presents us with a definition of both concepts. However, it won't just from that definition that it will be obtained a materialisation of the content of the rights there consecrated.

Let us begin, then, for the concept of **information**:

This concept has never raised great problems and it has always been understood as the mere transmission of knowledge. Though, this Directive adds something more. It adds that the information is given in a moment, in way and with content susceptible to allow the workers' representatives to analyse the subjects and to prepare, if it the case, an appropriate exam.

It will be, essentially, on the basis of the composition of the procedure that we will proceed to the analysis of the whole potential of this concept.

The determination of the information is essential. Not only in what concerns to the transmitted data, but also when it happens. The information will have to be transmitted in a way to be analysed and to allow the intervenors to be consulted, if such is required.

Here, and in the sense of what was already expressed, emerge the issue of the moment when information happens. From a merely legislative point of view, we are able to understand the construction present at the Directive, not quantifying the necessary time, letting it open to the member states to concretise such.

Not forgetting, however, that it will be necessary to have the adequate time in order to allow an analysis, and consequent consultation, appropriate of the rendered information.

When such period of time doesn't exist, it has to be defined according objective principles: the time strictly necessary to analyse the documents, to formulate and to present an opinion on the it and, if decided, to develop a consultation process.

The **consultation's concept**. The Directive 2002/14/EC is scanty in the presented concept, but extremely elucidating in what respects to the presented process. For that reason in this phase of the process it is expected the intervenors to act in representation of the company should be the people having an effective power to decide. We underlined, at once, the alert in the sense that arguments as "the decision is not up with us and as such it is not valid" are not sufficient because it is demanded, on the part of the companies, not the presence of the intermediate leadership but directly the responsible directors for the acts and with power to decide.

- ⊙ The purpose of consultation: it should cover the matter's subject of information. However, this situation may lead to a new configuration, because if during what it is understood as consultation new matters or new subjects are presented, on which there is any information, it will lead to the need of repetition of whole the process.

We underline, therefore, and aiming at a quick process, the need of the transmission, immediately, all of the information and complementary data in a way to cover all of the views and points of the raised issue.

In the phase of the consultation are possible two acts consubstantiated in the formulation of opinions, on the part of the workers' representatives and in the accomplishment of a meeting. That is the reason why it is important a prepared and well-grounded analysis. An opinion, a simplistic analysis, is not enough. It becomes necessary to make available the appropriate means to the accomplishment of those activities.

We cannot forget that the workers' representatives can be accompanied by experts, being both subject to the same confidentiality rules.

It is up to the employer to present a well-founded answer. Just some paragraphs or simplistic arguments, on the part of the employers, are not, also, enough under the condition of the developed acts are not considered as a true consultation.

That answer should be based in a formal document, not being enough the mere transmission of it during a meeting.

A final remark: despite the fact of consultation is not binding, which definitely is not, it should aim an agreement point.

In summary: the workers' representatives are entitled to be informed, that is, to be given information and data concerning the set of foreseen matters. After which, a period of time should be followed to allow them to analyse carefully the information received. If they intend, the workers' representatives will be able to give an opinion, that should be analysed having in mind the principle of a join action and which rejection has to be well grounded.

- The exercise of the rights of information and consultation should include:

- a) the information about the recent evolution and the probable evolution of the activities of the company or establishment and its economic situation.
- b) the information and the consultation about the situation, the structure and the probable evolution of the employment in the company or establishment and on the eventual anticipation measures foreseen, namely in case of threaten for employment.
- c) the information and the consultation on the decisions susceptible to cause substantial changes at level of the organisation of the work or of the labour agreements, including the ones covered by the community dispositions referred in the no. 1 of the article 9.

There are, in this aspect, three groups of matters that are susceptible to be covered:

- ✓ Matters of the economic area on which can be requested information (on this group of matters is not possible consultation);
- ✓ Matters on employment (where it is possible information and consultation);
- ✓ Matters on work's organisation and labour agreements (where it is possible information and consultation).

Note: it is not excluded, in a clear way, the possibility of, in these groups of matters to include information and consultation on the intention to carry through a collective redundancy, Lay Off, mergers.

Despite the procedures of information and consultation, of its own, the present Directive doesn't exclude the possibility of such matters be subject of information and consultation (Directive 2002/14/EC), because such emerges in a previous phase to the decision taken.

Once again we reiterate what has been already stated in due time: EWCs deal with matters of transnational extent, that is, matters, subjects or measures with origin in certain member state and have repercussion in another member state of the E.U. Once assumed the transnational character of an issue such will be debated within the EWC; all the remaining ones can be included by the Directive 2002/14/EC.

- Who can ask for it?

The entities with competence to intervene, concerning information and consultation, are different from member state to member state.

- Who has the Initiative?

It is putted, now, the question to know on whom the duty relapses to develop the process of information and consultation. Will such duty belong to the employer or to the workers' representatives?

It is general understanding, and even based in the compared law, that it should be, in first place, the employer to start the process, once the employer is in better position to have a good knowledge of the situation and of its own intentions, with the possibility of the workers, whenever they understand is opportune, to request near the employer information regarding matters susceptible to information and consultation.

Such it is what the authors of the present document designated for mitigated competence:

It is, in principle, up to the employer to develop and to supply information;

It is up to the workers, whenever they think is necessary, to request information;

It is up to the workers' representatives to request the consultation, through a petition;

It is up to the employer to present its opinion on what has been presented by the workers' representatives.

This process represents the rights of information and consultation, but no participation!

☞ **Where can be asked for?**

Everything that has been here presented will be applicable to small, medium and big companies and establishments, however such will not be applicable, to very small companies and small companies and the establishment with less than 20 workers.

☞ **Will exist the possibility of such matter to be regulated through an agreement?**

This is, in our understanding, one of the possibilities that, without a doubt, should be taken into consideration, since it is assured the establishment and transposition of the basic principles within this frame.

In fact, the Directive 2002/14/EC allows the social partners, at different levels, to agree on how it will be implemented on workers' information and consultation.

The Directive promotes, and recognises, the agreements at the most different levels, as regards to information and consultation, as well as the promotion of these agreements by collective bargaining, so much at company level as branch level. Such needs to be articulated with what is regulated at the different national legislation on this matter.

Reiterating what has been previously stated, this directive consecrates minimum requirements that, and according with the spirit and framing of this instrument, cannot be excluded, but can be developed and extended.

☞ **Is there the possibility of experts to intervene?**

Both parts can be accompanied by experts.

Note: it is not foreseen that the expenses resulting from the experts' intervention are supported by the companies.

- Confidentiality -

In what concerns the confidentiality of the information received by the workers, the Directive consigns its regulation, to the member states, being these, however, forced to respect the defined limits by this instrument. It only can be classified as confidential the information that fills in the following requirements:

- To respect the limits stipulated by the national legislation, as well as
- To respect a legitimate interest of the company
- &
- The information will have to be transmitted with the express mention of its confidentiality.

It will be the conjugation of these assumptions that will allow the characterisation of an information as confidential, and the classification of certain confidential information cannot be subject to the free will of the one who transmits it.

☞ **To whom is applied?**

This confidentiality is also applied to the workers' representatives, experts and third persons. Being able to, however, and once authorised by the workers' representatives, to publish such information to the remaining workers that will be, also, subject to identical confidentiality.

It has to be added the limitation imposed in the sense that any information and consultation will not be carried out since it can be able to, and having in mind objective criteria, affect seriously or to harm the operation of the company or of the establishment.

The Directive establishes, still, that the member states must provide means, judicial or administrative, in order to allow control forms in the cases that the employer classifies certain information as confidential or if he doesn't supply information. This subject, in particular, raises some difficulties, because also in this matter, great differences exist within the E.U.

The confidentiality reservation is a safeguard hypothesis, on the part of the employers, in the development of the process of workers' information and consultation, that is why it is important the establishment of ways of control, in order to avoid situations as those where the employer uses such a granted ability to hide certain acts, classifying the matters as confidential.

- Sanctions - Processes -

This Directive leaves margin for the member states to exercise the sanctioning power, in order to adopt measures to allow to guarantee the effectiveness of the Directive.

- Relation Inter - norms -

This Directive establishes, in a clear way, that the process here instituted doesn't prejudice:

The process of Information and Consultation in the scope of the Directives 94/45/EC that institute the European Works Councils and now in the scope of the Directive «Recast» 2009/38/EC.

The process of Information and Consultation instituted by the Directive 98/59/EC, on collective redundancies. It seems very clear that, and in what concerns the figure of collective redundancies, it exists with the Directive 2002/14/EC the compulsoriness that, and even before a process of collective redundancy be instructed, this has to be preceded by a process of information and consultation created and developed in the scope of the information and consultation rights instituted by this Directive.

There are two clear and different moments: it appears a process of information and consultation (in a previous moment to the development of a process of collective redundancy) and another process of information and consultation developed already in a subsequent phase, that is, when the intention to proceed with a collective redundancy is rendered (this process developed within the Directive 98/59/EC. We have two different moments, two phases also different and which, in anyway, do not exclude mutually.

This directive still doesn't get confused with the process of information and consultation that is developed in a process of transfer of companies, acting in a previous moment to the decision taken. In other words, the arguments presented for the processes of collective redundancy are appropriately invoked, also, for the processes of transfer of companies. In both cases we have to act in prior moment to the decision taken.