Information and consultation in the European Community

Implementation report of Directive 2002/14/EC

Report 97
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Implementation report of Directive 2002/14/EC

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Brussels, 2006
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Foreword


Directive 2002/14/EC is a substantial contribution towards the consolidation of European Community social law. It is the first EU directive to establish a general obligation to inform and consult employees and it represents a vital complement to the existing fragmented Community system providing for the right of employees to be informed and consulted in special situations in the life of their undertaking. In this manner, four years after the Renault Vilvorde affair, directive 2004/14/EC offers a general framework for the information and consultation of employees in the European Union, bringing democracy to undertakings in Europe and thereby the continental model of employee representation.

The main purpose of this comparative report is to analyse the domestic implementation provisions of directive 2002/14/EC in the EU Members States and some of the acceding countries. It focuses on the stumbling blocks for national transposition. It appears already that many Member States adopt a minimal interpretation in their transposition measures. Additionally, the second purpose of the report is to relate the hard and difficult climb to democracy in the undertaking in Europe. It shows, that the right to information and consultation, a European social value and a major and fundamental trade union right, remains a fragile ‘acquis’ in the European Union, calling for a mobilisation of all the bodies concerned.

The ETUI-REHS report of the Research Department is based on the replies to the questionnaire elaborated within the frame of the NETLEX and circulated to ETUC affiliates. We warmly thank all our colleagues for their cooperation to this project. The information provided on domestic legal and conventional provisions have been completed where necessary and where possible by research material. The information provided dates of February 2005.

We hope that this comparative report will not only provide a valuable analysis of the information and consultation in Europe but will also serve as an incentive for discussions and debate in order to secure the respect of the fundamental right to democracy in the undertaking at national and European level.

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Introduction

The European Union learns from its setbacks: exploitation of the loopholes in Community law, together with the deliberate misconceptions of national law on worker information and consultation on the part of companies such as Renault and Alsthom, have helped to persuade even those most reluctant to support the Community project of providing general protection for the fundamental right of workers to be informed and consulted. European directive 2002/14/EC, dubbed the “Renault Vilvorde” directive, is the first in which the EU has extended to every Member State the obligation to provide a procedure for effective, ongoing and regular information and consultation for workers on recent and probable developments in the undertaking’s activities, financial and economic situation, the evolution of employment and in particular of decisions that might lead to major changes in the organisation of labour.

Directive 2002/14/EC of the European Parliament and the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community came into force in the domestic laws of European Union Member States not later than 23 March 2005. After more than three and a half years’ discussion and heated debate, the European Commission succeeded in winning all the protagonists over to a compromise text: to gain the support of all the Member States for the Council, the initial proposal of 11 November 1998 underwent many changes. In particular the British and Irish Governments agreed to lift their veto only after an extension of the period for transposition to 4 years had been obtained.

The reservations expressed by the body of European employers and by its national representatives, as well as by certain governments, show the extent to which the right of employees to information and consultation is still fragile in the European Union, despite its recognition at international and European level.

The right to be informed and consulted is a union right that is recognised at international level. Article 21 of the European Social Charter (revised) states: “With a view to ensuring the effective exercise of the right of workers to be informed and consulted within the undertaking, the Parties undertake to adopt or encourage measures enabling workers or their representatives, in accordance with national legislation and practice:

a. to be informed regularly or at the appropriate time and in a comprehensible way about the economic and financial situation of the undertaking employing them, on the understanding that the disclosure of certain information which could be prejudicial to the undertaking may be refused or subject to confidentiality; and

b. to be consulted in good time on proposed decisions which could substantially affect the interests of workers, particularly on those decisions which could have an important impact on the employment situation in the undertaking.”

Chapter IV, “Solidarity”, of the Charter of Fundamental Rights of the European Union, article 27, under the title of “Workers’ Right to Information and Consultation within the Undertaking”, states that: “Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices”. This article applies on the conditions laid down by the law of the European Union and national laws.
Finally, the Community Charter of the Fundamental Social Rights for Workers of 1989, to which the second recital of directive 2002/14/EC contains a direct reference, stipulates in its article 17 under the title “Information, consultation and participation for workers” that:

“Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. This shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community.”

Article 18 states that “such information, consultation and participation must be implemented in due time, particularly in the following cases:

- When technological changes, which, from the point of view of working conditions and work organisation, have major implications for the workforce, are introduced into undertakings;

- In connection with restructuring operations in undertakings or in cases of mergers having an impact on the employment of workers;

- In cases of collective redundancy procedures;

- When transfrontier workers in particular are affected by employment policies pursued by the undertaking where they are employed.”

In the Renault case, the arguments of the Nanterre (Tribunal de Grande Instance) refer to article 17 of the Community charter for fundamental social rights for workers of 1989 as providing justification for a preliminary ruling by the “juge des référés”¹. This is indication enough that failure to respect workers’ fundamental right to information and consultation represents a manifest offence calling for judicial intervention.

The acquis of the European Union in this field is substantial, and included articles 136 and 137 of the Treaty establishing the European Community, directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community, directive 98/59/EC on collective dismissals, directive 2001/23/EC on the transfers of undertakings and directive 94/45/EC on the European works councils.

Directive 2002/14/EC is a substantial contribution towards the consolidation of European Community social law. Although it introduces no major changes to the national system of some of the EU Member States, it must be recognised that all of those States have had, or will have, to adapt any of their national measures that is not in line with the directive. For other Member States, this is a disruption of their legal order. While, moreover, it is the main objective of the directive to put in place a general framework for informing and consulting employees in undertakings located in the European Community, it has a much more far-reaching impact, penetrating to the heart of the organisation of labour relations in Europe, in that the provisions of the directive explicitly refer to a national legal system for employee representation. The aim is to generalise a statutory structure for employee representation throughout the EU Member States, this being a major aspect, even a key factor, in defining a continental model of working relations in Europe. The impact of the

¹ *Juge des référés*: a judge empowered to issue provisional rulings on matters of special urgency.
directive on national law, will be all the greater in countries with a voluntarist tradition that do not have general, continuing and obligatory employee representation.

Furthermore, the provisions of the directive alter the legal and conventional landscape of the Member States in which workplace representation is conducted exclusively through the unions (as in the case of the many new Member States, with the exception of Hungary and Slovenia) or through elected representatives. In this way directive 2002/14/EC is likely to extend beyond the mere issue of information and consultation, becoming the keystone in the edifice of worker involvement in management of the undertaking in the European Community.

**Genesis**

This directive, published in the Official Journal on 23 March 2002, can be described as a Herculean task, so hard it was to bring it into being, even more laborious than with the directive on working time or the European works council directive.

In 1995 the European Commission, in its communication of 14 November 1995 (COM (95)547), took stock of the fairly unpromising status of the right of employees to information and consultation in the European Union. Even though most of the EU Member States have legislation on the subject, in many cases the fundamental right of employees to information and consultation enjoys only inadequate protection, particularly as regards the obligation to inform and consult in good time, given that the purpose of this law is in most cases treated as a mere formality, and given the dissuasive nature of the sanctions and the fields of consultation. This was to lead the Commission to launch consultation with management and labour, thus responding to the demand for Community action from the European Parliament, the Economic and Social Council and the unions.

The first phase of consultation of the European social partners, based on the provisions of article 3(2) of the Agreement on Social Policy (now article 138(2) of the European Treaty), in June 1997 was to lead – to nobody’s surprise – to no more than the publication of opposing opinions. The ETUC expressed its wish to embark on negotiations on the subject and looked for the introduction of constraining rules at Community level, whereas UNICE was categorically opposed, invoking the principle of subsidiarity and the existence of adequate national rules, while affirming that information and consultation were matters of the internal organisation and management of undertakings and were therefore part of the employer’s prerogatives.

The second phase of consultation, according to the procedure set out in article 138(3) of the EC Treaty, was launched by a Commission communication of 5 November 1997 concerning the content of a Community action, at the same time taking up some of the proposals made by the Economic and Social Committee (OJ C/212 of 22 July 1996, p. 0036). The document identified shortcomings in national legislations. The most striking of these related to the failure to anticipate and prevent the social problems that may arise from changes in the situation of an undertaking, as well as the excessive delays in convening consultation on measures designed to mitigate the social consequences of strategic decisions, and lastly the weakness of the sanctions for infringements of the right to information and consultation.
With management and labour maintaining their positions, the European Commission then presented a proposed directive on 11 November 1998, which was not discussed by the Council until November 2000. The proposal was the subject of a co-decision procedure and qualified majority voting pursuant to article 137(1) and (2) of the EC Treaty, a blocking minority on the Council being constituted by Germany and Denmark on the one hand and the United Kingdom and Ireland on the other hand. The impact of the directive is all the greater in the case of the latter two Member States in that they do not have a general system of information and consultation.

The United Kingdom government was opposed in principle to the adoption of the directive, arguing on the one hand that it did not respect the principle of subsidiarity and, on the other, that it was a disproportionate response to the Renault Vilvorde events. On the latter point the United Kingdom government was supported by Ireland. Although few Member States supported this position, the legal basis suggested by the United Kingdom government was article 137(3) of the EC Treaty, requiring unanimity on the part of the Council, which would have meant that the directive could not be adopted. The German government, in agreement with the United Kingdom government, was concerned with the priority it attached to the adoption of the directive on the European company, whereas the opposition of the Danish and Irish governments related to their preference for “voluntary” consultation agreements.

After bitter debate and after obtaining concessions, in particular on the system of sanctions and the periods allowed for transposition, the text was debated and amended by the European Parliament, especially as regards stricter sanctions in the event of an infringement of the obligations arising from the directive; the debate also covered the promotion of the social dialogue in SMEs not covered by the directive, and the reduction in the transitional period for undertakings with fewer than 100 employees or establishments with fewer than 50 employees. The revised text was the subject of arbitration between the European Parliament and the Council by a Conciliation Committee, whose proposals, accepted reciprocally by both protagonists, now form the present text of the directive.

In this manner, four years after the Renault Vilvorde affair, directive 2004/14/EC offers a general framework for the information and consultation of employees in the European Union, bringing democracy to undertakings in Europe and thereby the continental model of employee representation.

**Renault Vilvorde**

**Or the circumvention of the law and exploitation of its loopholes**

On 28 February 1997 the management of Renault announced in the press a massive restructuring operation, with the closure of the Vilvorde plant in Belgium, entailing 3,100 direct redundancies and about 1,000 job losses among its sub-contractors. This operation was to be followed a few months later in France by the announcement of 3,000 dismissals. The aim was to establish a bridgehead in Romania and to buy into the capital of the Japanese car manufacturer Nissan.

The blow was all the more brutal in that the management deliberately breached Community law and Belgian law as it related to its statutory obligation to inform and consult its workers before taking strategic decisions in the economic, financial and social domains and on major movements in subsidiaries. This decision, a form of...
revenge for the French government’s rejection of a one-off early retirement plan for employees aged over 55, was all the more shocking in that it related to what was regarded as one of the most productive sites, for which employees had four years earlier negotiated a flexibility and investment plan designed to retain their jobs. Renault’s decision was, moreover, presented as irrevocable, leaving no opportunity for workers’ representatives to discuss social measures in support of the restructuring.

Renault’s management applied the letter -but not the spirit- of Community law by playing on the fact that the transnational nature of the decision to restructure is not covered by Community law, with transnational restructuring not being subject to the law on employee information and consultation. The Renault management also (mis)used the opportunity afforded by article 13 of the directive on European works councils: it played on the fact that the agreement it had signed with the European Metalworking Federation, the International Federation of Professional and Managerial Staff in the metalworking industry and the French, Belgian and Portuguese unions – an agreement that existed before the directive – made no provision for consultation prior to a decision.

Clearly, though, the spirit of the “employment” directives (directive 98/59 on collective redundancies of 1998 and directive 2001/23 on transfers of undertakings of 2001) and the “European works council” directive (spirit found in all the directives on information and consultation) is to protect employees’ representatives from being confronted with a final decision by management regardless and from the right to be consulted that they are guaranteed under Community law being flouted.

In Community legislature, therefore, lessons have been learned about the manipulation of Community law. Thus the structure of national obligations to inform and consult employees and obligations of a transnational nature within the framework of the European works council has been reorganised. Moreover, there has been a strengthening of the guarantees given to employees by Community law – in particular by the Court of Justice of the European Communities (Junk case, ECJ C-188/03 of 2 April 2005) – by reiterating the purpose of the directives on information and consultation: to allow effective information and consultation of the employees so that they can influence the decisions of the management of the undertaking and their social consequences. To be effective, information and consultation must be genuine and take place in good time, before any irrevocable decision is taken. Consultation, moreover, must be organised with a view to reaching an agreement, which imposes compliance with the obligation of good faith in implementing the consultation process. In this way, the ‘effet utile’ (useful effect) of the directives can be secured.

The Belgian Labour Court in Brussels ruled on 3 April 1997 that Renault had ignored the legal procedures regulating collective dismissals under collective labour agreement no 9, as well as the obligation to inform and consult the works council under collective labour agreement no 24. In a praetorian judgement, the decision to close down the plant was annulled by the the President of Labour Court until such time as the procedures for information and consultation had been complied with. The Court also called on the parties to reconsider the closure of the site and seek alternative solutions.

On 4 April 1997 the Nanterre County Court (Tribunal de Grande Instance) in France, ruling on an emergency ruling, ordered “Renault to desist from the implementation,
including through its subsidiaries, of the closure of Vilvorde under its management powers until such time as it has fulfilled its obligations towards the European works council”. This judgment was upheld by the Versailles Court of Appeal on 7 May 1997. However this latter court, contrary to the arguments put forward by the judge of the County Court (Tribunal de Grande Instance), posited that the obligation to inform and consult the European works council is not of a general order but to be assessed on a case by case basis in the light of the extent to which such a procedure may be deemed useful.

On 6 March 1998, an amendment to the advance agreement was signed between the French, Belgian and Spanish union bodies and the Renault management. This agreement took account of the decisions of the courts that had ruled against Renault after the closure of the Vilvorde plant.

It stipulated that “in the event of a planned exceptional decision which has transnational consequences and is of a nature such as to affect significantly employees' interests, the European group committee will meet in extraordinary session. In this situation, the European group committee will be consulted within the meaning of Article 2 of the [EWC] Directive of 22 September 1994 - that is to say the establishment of a dialogue and an exchange of views at an appropriate time such that the elements of the discussion can still be taken into account in the decision-making process.”
Chapter 1: Information and consultation of employees: a hard climb towards democracy in the undertaking in Europe

1. The fragmented nature of the Community right to employee information and consultation

Although directive 2002/14/EC is the first EU directive to establish a general obligation to inform and consult employees, it is even so a vital complement to the existing fragmented Community system providing for the right of employees to be informed and consulted in special situations in the life of their undertaking, in particular in the event of collective dismissal (Directive 98/59/EC of 20 July 1998) or the transfer of that undertaking (Directive 2001/23/EC of 12 March 2001) and the establishment of a European works council (Directive 94/45/EC of 22 September 1994), in order to protect their interests.

The organisation of mandatory information and consultation of workers’ representatives is, therefore, the common feature of these three EC directives. In the cases cited, a threefold obligation is placed on the employer: (1) to deliver sufficiently comprehensive and detailed information, in good time; (2) to conduct timely consultation on a specific subject (dismissals envisaged – in the case of the directive on “transfers of an undertaking”, the consultation may be not on the actual decision to transfer but on the measures being considered following the transfer); and (3) to negotiate with a view to seeking an agreement with the workers’ representatives. To a great extent, then, they share the same concept of timely information and consultation, with a constructive dialogue directed towards reaching an agreement.

2. The structure of the different levels of employee information and consultation

Although these directives have a common object, many of their elements vary. For example, their legal basis is different: the “employment” directives are based on former article 100 of the EC Treaty, whereas the directive on European works councils is the first to be based on article 2(2) of the Social Policy Agreement, which did not require unanimity. Moreover, the thresholds for the application of the “collective dismissals” directive are assessed as regards the establishment, i.e. a work unit employing at least 20 people, not as regards the undertaking deemed to be a decision centre according to Court of Justice case law (Judgment in Rockfon, ECJ 17 December 1995, C-449/93). In the “transfer of undertakings” directive, it is a case of an economic entity being transferred, identified as being an undertaking which, according to the interpretation of the Court, is an activity or set of material, intellectual and human resources placed in the service of an economic purpose (Spijkers judgment, ECJ 18 March 1986, C-24/85/EC).

Moreover, whereas the “employment” directives envisage serious and specific situations such as collective dismissals and the transfers of undertakings, the “European works council” directive is broader in that it covers the development of the activities of an undertaking, whether economic and social, financial and technical, as well as any event substantially affecting the interests of the employees. The “European works council” directive thus extends the right of workers’ representatives to be informed and consulted in exceptional circumstances - as that right is derived from the “employment” directives - to transnational undertakings.

Implementation report of Directive 2002/14/EC
The scope of the “employment” directives is still national, whereas the “European works council” directive hypothetically concerns only undertakings or groups with a Community dimension. Lastly, the latter directive leads to the introduction of an institution for the representation of workers through a new body created by Community law, whereas the “employment” directives refer to national representative bodies.

In many Member States, these directives are the vital and sometimes sole foundation for the right to employee information and consultation. They fill a legal gap and allow for a degree of harmonisation of social laws in Europe.

Directive 2002/14/EC in no way detracts from rights that already exist by virtue of the Community directives already in force in the Member States. The different levels of information and consultation are structured according to the purpose and nature of the information provided by the employer. The obligation to inform and consult has been extended to all undertakings and groups of undertakings of a Community dimension by means of the directive on the European works councils, and since the introduction of directive 2002/14/EC the obligation is now placed on all the undertakings and establishments located in the territory of a Member State. Whether at national or Community level, the employer must comply with the obligation imposed by Community law of informing and consulting the employees and their representatives, not only in the case of collective redundancies and transfers of undertakings, as specified by articles 9, 4 (2)(c) and (4)(e) of directive 2002/14/EC; from now on, too, there must be information and consultation on the evolution of an undertaking’s activities and economic situation, employment and any decision that might lead to major changes in the organisation of work.

3. Plugging the loopholes in Community law: extending the right to information and consultation

The Community legislator is attempting to plug the loopholes in Community law – the kind of loopholes used by Renault at the time of closing down the Vilvorde plant. In standardising the national rules on collective dismissal, inadequate account was taken of the transnational nature of restructuring on the European scale. Moreover, the “European works council” directive contains no explicit obligation to provide information before any decision to close down an establishment. Lastly, transnational undertakings are not exempted from the statutory obligations in matters of information and consultation where these form part of the law of the country in which the undertaking or establishment in question is located.

In this manner, and in accordance with articles 9, 4 (2)(c) and (4)(e) of directive 2002/14/EC, the specific features of each directive are maintained, and the scope of the right to information and consultation is broadened to all the Member States. In this manner, extra protection is provided against the repeated practice of undertakings or groups of undertakings in Europe of failing to comply with their obligations to inform and consult their employees at the time of closing down a plant (as in the case of Goodyear-Dunlop 2000) or when restructuring (as in the case Alsthom), as well as in privatisation cases (in the case of the Budapest Airport privatisation in 2005).

It has to be admitted that the European Union Member States have greeted this directive with little enthusiasm, to judge by the transposition measures. In general, it seems that the transposition of directive 2002/14/EC into national law has been minimal, if not incomplete, as demonstrated by this comparative study.
Chapter 2: The transposition of directive 2002/14/EC: a minimal European standard?

Directive 2002/14/EC aims to ensure that undertakings with over 50 employees or establishments with over 20 employees meet their obligation to inform and consult their employees before taking a major decision affecting those employees, especially in matters of employment. In order to do this, the Community legislator has introduced an effective right to information and consultation into national legal systems.

This harmonisation of the legal systems of employee information and consultation, however, comes up against the obstacle of existing national measures, especially as regards the definition of an undertaking and establishment. In addition, in generalising what is called the “continental” model of employee representation, it radically alters the British and Irish system of work relationships and inevitably encounters certain difficulties.

Moreover, in accordance with the principle of subsidiarity, the directive allows Member States considerable room for manoeuvre in applying the rules according to what they regard as the most appropriate practical procedures, especially in matters of sanctions. Governments have for instance performed reasonably well in the transposition of the obligation to lay down sanctions strong enough to dissuade undertakings from infringing the directive.

In the other matters, the question of thresholds and also of the content of the obligation to inform in good time, as well as the legal effects of effective consultation, have sparked off many national debates and generated substantial changes to the national law of Member States. Finally, the question of the confidentiality of certain information still gives rise to difficulties of interpretation.

1. Mapping the right to information and consultation in the European Community

Summary table - national transposition

<table>
<thead>
<tr>
<th>Country</th>
<th>TIMELY TRANSPOSITION?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>Transposition not considered necessary</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>Transposition planned: 1 January 2007 Measure 378 – Ministry of Labour’s 2005 Plan of action</td>
</tr>
<tr>
<td>Cyprus</td>
<td>Law 78(1)2005 establishing a general framework for employee information and consultation, 2005</td>
</tr>
<tr>
<td>Czech Republic</td>
<td>No transposition initiative</td>
</tr>
<tr>
<td>Denmark</td>
<td>Law 303 of 2 May 2005 on information and consultation</td>
</tr>
<tr>
<td>Estonia</td>
<td>Amendments of the laws on the unions and on representation of employees.</td>
</tr>
<tr>
<td>Finland</td>
<td>Law 139/2005 amending Law 725/1978 on cooperation with undertakings, came into force on 23 March 2005</td>
</tr>
<tr>
<td>Country</td>
<td>Status</td>
</tr>
<tr>
<td>------------</td>
<td>---------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>France</td>
<td>Transposition not considered necessary</td>
</tr>
<tr>
<td>Germany</td>
<td>Transposition not considered necessary</td>
</tr>
<tr>
<td>Greece</td>
<td>No transposition initiative</td>
</tr>
<tr>
<td>Hungary</td>
<td>Amendments to the Labour Code of 17/03/2005 by law VIII 2005/32 01532-01533</td>
</tr>
<tr>
<td>Ireland</td>
<td>Proposed Bill (Employees – provision of information and consultation - Bill), July 2005; approval expected at end 2005</td>
</tr>
<tr>
<td>Iceland</td>
<td>Current negotiations on transposition by negotiated agreement. If this fails, a Bill is planned for early 2006</td>
</tr>
<tr>
<td>Italy</td>
<td>No transposition initiative</td>
</tr>
<tr>
<td>Latvia</td>
<td>Law on works councils</td>
</tr>
<tr>
<td>Lithuania</td>
<td>Recent law on works councils</td>
</tr>
<tr>
<td>Luxembourg</td>
<td>No transposition initiative</td>
</tr>
<tr>
<td>Malta</td>
<td>Bill in preparation</td>
</tr>
<tr>
<td>Netherlands</td>
<td>Amendment of the law on works councils of December 2004, coming into force on 1 January 2006.</td>
</tr>
<tr>
<td>Norway</td>
<td>Section 8-3 of a new Act on Working Environment and Worker Protection (entry into force 1.1.2006)</td>
</tr>
<tr>
<td>Slovenia</td>
<td>No transposition initiative</td>
</tr>
<tr>
<td>Slovakia</td>
<td>Amendments to the Labour Code by Law 210/2003, in force since 1 July 2003</td>
</tr>
<tr>
<td>Sweden</td>
<td>Amendment to the law on works councils on cooperation, based on an official experts’ report commissioned by the government (SOU 2004: 85)</td>
</tr>
<tr>
<td>Spain</td>
<td>Tripartite Agreement of 8 July 2004.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>Negotiations from February to July 2002 and framework agreement between management and labour and government Amendment to Employment Relations Act in 2004 Information and Consultation Act, no 3426 of 21 December 2004, came into force on 6 April 2005</td>
</tr>
</tbody>
</table>

**General comments**

Half of the Member States have transposed directive 2002/14/EC in time, i.e. before the appointed deadline of 23 March 2005.

The following Member States have not yet transposed directive 2002/14/EC: **Germany, Austria, France**, arguing that their existing national legislation already provides adequate
The transposition of directive 2002/14/EC: a minimal European standard?

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**Concept and definition of employee representation**

Although there is a varied landscape of national systems of employee representation in Europe, in particular for historic, economic and political reasons, in general they are based on a “continental” model of labour relations, the characteristic of which is to offer a statutory, universal basis for worker involvement and thereby making it general, permanent and mandatory. A common European base, then, can be clearly perceived by comparison with what are referred to as the “voluntarist” Anglo-American and Asiatic systems.
Directive 2002/14/EC, in referring explicitly in its article 2(e) to the representatives of employees as the institution with which the right of information and consultation is deposited, requires countries with a voluntarist tradition to arrange by statute or agreement for the creation and operation of such a body.

Moreover, Directive 2002/14/EC introduces changes to the Member States’ systems of employee representation that directly affect the very organisation of representation.

1. a. A time-honoured union right in Continental Europe

The representation of employees in Europe is organised according to two different models, depending on whether such representation is by the unions or by persons elected within the undertaking.

In what is called the “monistic” system, only the union (represented by shop stewards) is recognised as the employer’s interlocutor, enjoying in the performance of its mission the union right to worker information and consultation. This is the case in Sweden and Finland.

In practice, and although the law provides for the possibility of elected representation, the union has an exclusive role of representation in Greece and Portugal. In Italy, Norway and Denmark, the union is backed by what may be mixed representation.

Under the dualistic system, whose basis is essentially statutory, employee representation is organised around two bodies, one being a trade union body and the other one being elected. These bodies make up the two poles of employee representation, but the way in which they intervene differs: the trade union negotiates, whereas the elected representative body is informed and consulted. Elected representatives are (unionised or not unionised) employees in Germany, Austria, Spain and the Netherlands. The worker representation is mixed in France, Belgium and Luxembourg.

National transpositions

Most Member States refer to national law in determining the concept of employee representation. For instance, depending on the thresholds applicable in each Member State, the two main employee representation bodies are the works council, an elected body (the ‘conseil d’entreprise’ in Belgium, the ‘general assembly’ in Bulgaria, etc.), and union representation of the employees. Small undertakings do not usually have a statutory structure for worker representation. In France, for example, a third institution has been set up, the ‘délégués du personnel’, who have access to the right of information and consultation, just like the other two bodies.

Many unions in the Member States (Poland, Estonia) where the monistic system of representation of the interests of employees is the rule, are opposed to the opportunity offered by Community legislation to designate or elect non-union worker representation where union representation already exists within the undertaking. The arguments advanced are of two kinds: that it is an additional cost for the undertaking, or that it is a source of social conflict (Poland).
To avoid conflict between the union and the elected forms of representation, a proposal put forward by Solidarność (Polish independant trade union affiliated to the ETUC), based on the interpretation of article 2(e) of the directive (“the employees’ representatives provided for by national laws and/or practices”) and rejected by the government, aimed to exclude from the scope of the law on information and consultation those undertakings in which trade unions are established. According to the draft law, the trade unions retain a monopoly over the proposal of candidates in undertakings employing over 100 employees. In undertakings with fewer than 100 employees, employee representation must be established and may, in the absence of trade unions, go back to electing employees on the proposal of at least 10 of their colleagues.

Only the Swedish trade unions appear not to be alarmed by the opportunity offered by the directive to share with an elected representation the right to be informed and consulted. The system of worker representation in the undertaking passes via the trade unions and, given the particularly high rate of unionisation in Sweden, the unions cover 90% of establishments in the private sector. Moreover, and since 1991, it is no longer compulsory for worker representatives to be employees of the undertaking; they may be regional union representatives.

1.6. A major innovation in Common Law countries

In the United Kingdom, as in Ireland, the legal framework for the representation of employees is minimalist. Employees’ rights arise essentially from the transposition of European directives on collective redundancies, the transfer of undertakings and the European works councils. There are no official consultation bodies, nor is there a strong tradition of social partnership. While shop stewards alone represent employees, this representation is on a “voluntary” basis, since the accreditation of the trade unions depends on the goodwill of the employer. Although there exists a certain tradition of agreements under which employees are consulted, this has differed over time. In the same way, the nature of the agreements varies considerably from one employer to another.

The transposition of directive 2002/14/EC introduces a significant change in the English and Irish legal systems, to the extent that it calls for the voluntarist nature of their system of workplace relations to be dropped to permit the general exercise of the employee’s right to information and consultation. On this point the British and Irish governments had proposed a broader framework of reference so that “alternative” agreements could be reached with management and labour as regards employee information and consultation, the preference being for existing forms of direct consultation. The Irish transposition measures provide that the parties to an agreement (pursuant to article 5 of the directive) must establish a forum for information and consultation consisting of the elected employees’ representatives.

Although the directive designates “the employees’ representatives provided for by national laws”, this representation of the work force is mandatory, as has been stated by the European Court of Justice in the case of the Commission v, United Kingdom of 8 June 1994 (C-382 and C-383/92) finding against transposition measures of the directives on collective dismissals (Employment Protection Act 1975) and the transfer of undertakings (Transfer of Undertakings (Protection of Employment) Regulations 1981), to the extent that in both cases the right to be informed and consulted was attributed solely to trade unions recognised by the employer. There was no provision for a consultation mechanism...
in the absence of a trade union representative. This finding illustrates the principle that there is an obligation to create the appropriate statutory resources on Member States where these are lacking in their procedural and institutional system.

The transposition of directive 2002/14/EC to British and Irish national law is a step towards what has been called “uncharted waters”. The impact of the directive on works councils has in fact been limited to a few compulsory measures on information and consultation for multinational undertakings whose head office is located either in the United Kingdom or in Ireland, and for those whose activities are conducted in these two Member States. The national transposition measures are not being inserted into a pre-existing institutional framework but rather an institutional void, which is all the greater in the case of undertakings in which no trade union representation exists. In these undertakings, the risk is of the emergence of a hybrid system in which there is either employee representation or direct consultation, with employees being consulted on issues that should be negotiated by the trade unions. The danger is that this distinction between consultation and collective bargaining may be lost and that the employers may be tempted to negotiate issues with a non-accredited representation of the employees.

The TUC (Trades Union Congress), however, sees the directive as a genuine opportunity for making a constructive change to the UK system of labour relations. It is still too early to determine the impact of the directive on the trade union movement in the United Kingdom, but the TUC is now working to ensure that work force information and consultation becomes a real right for the largest possible number of employees in the United Kingdom. Moreover, according to the ICTU (Irish Congress of Trade Unions), giving employers the possibility of direct information and consultation of employees in practice helps to minimalise the institution of worker representation.

It is already apparent that employers will prefer a minimalist interpretation of the directive. On the other hand, to counteract the decline in interest in the trade union question, the trade unions are trying to maintain and even reinforce their traditional legitimacy as the employer’s sole interlocutors. For British trade unions, in fact, the right to information and consultation is essentially a trade union right. The existence of this right under the directive, or recognition that it is the right of another (elected) representative body, would encourage employees not to unionise. This might, moreover, reduce the unions’ field of action to mere consultation and could be used by less scrupulous employers as a means of circumventing the law on trade union representation.

Changes have therefore been made to the law in the UK since 1998, designed to secure consultation with both the trade union representatives recognised by the employer and with the elected representation.

The UK and then the Irish governments have drafted bills with a view to the transposition of the directive. These have been submitted for public consultation. In the United Kingdom, but not in Ireland, the proposals were based on discussions between the ministerial department and management and labour, and as a result it has been possible to draw up a pre-agreement on the general outline of transposition.
2. The stumbling blocks for national transposition and difficulties encountered in the transposition

Directive 2002/14/EC is a major contribution towards the consolidation of European Community social law, paving the way from the all too necessary harmonisation of the rights of the Member States in matters of employee information and consultation. It has not of course introduced major changes into the national systems of most EU Member States, but it is interesting that all of them have had to adopt one or other of their national measures where these were not in line with the directive. Moreover, in the transposition to national law – always a difficult exercise – certain stumbling blocks have become apparent; the developments with the main such obstacles have been as follows.

2.a. Direct and automatic right, or a right requiring the prior intervention of workers’ representatives

The terms of the directive do not specify whether the right to information and consultation requires specific intervention by the workers’ representatives or whether it is automatic. The directive states, “the practical arrangements for information and consultation shall be defined and implemented in accordance with national law and industrial relations practices...” (article 1(2)).

National transposition

In many Member States, the right to information and consultation is a right “on demand”: in other words, the intended recipients of this right must claim its formal application from the employer, sometimes even when the thresholds are complied with.

There are, therefore, two distinctive groups of countries. The first consists of the countries in which the right to information and consultation is automatic, as in Sweden. The second group consists of the countries where there is a specified quota for access to the right to information and consultation (see chapter on thresholds) such as Germany, Belgium, France and Spain, or a requirement for a specific request to be made to the employer either by workers’ representatives or by a group of employees, as in the United Kingdom and Ireland. In these two Member States, when a group of employees initiates such a request to the management of the undertaking, it must represent at least 10% of the workforce (i.e., a minimum of 15 employees). In principle the employer must enter into negotiations with the employees with a view to reaching agreement on setting up an adequate standing procedure, which may not be renegotiated until three years after its signature. The risk is that the employees have to overcome procedural difficulties in order to obtain access to the right of information and consultation. In general, it is clear that few employers will voluntarily take advantage of this option. Moreover, non-unionised workers, who are also entitled to this right, may not be able to make use of it due to the lack of information and initiative on the part of the employer. The ICTU (Irish Congress of Trade Unions) was opposed to this procedure and would have preferred an approach under which employees would have had a guaranteed right of information and consultation. Lastly, the threshold of 15 employees means that employees working in undertakings employing fewer than 15 would have no access to the right of information and consultation.
2.b. Definition of the undertaking and establishment / choice of and compliance with thresholds

i) Definition of the undertaking

The definition of an undertaking is undoubtedly not very explicit when one refers to article 2(a) of directive 2002/14/EC, which states that “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”.

The Community concept of an undertaking, essentially associated with right competition law (articles 85 et seq. of the EC Treaty) has, however, been defined and refined in the case law of the European Court of Justice.

The concept of an undertaking according to ECJ case law, therefore, is one of “every entity engaged in an economic activity”, regardless of its legal status and the way in which it is financed (Höfner judgment, ECJ 23 April 1991, C-41/90), whether it is a legal or a natural person (Gøttrup-Klim judgment, ECJ 15 December 1994, C-250/92), whether it is profit-making or non-profit-making (Fédération française des sociétés d’assurance judgment, ECJ 16 March 1995, C-244/94). The Court has further refined this definition by specifying that the undertaking refers to an organized grouping of persons and assets facilitating the exercise of an economic activity (Süzen judgment, ECJ 11 March 1997, C-13/95).

The exceptions to this rule relate to bodies exercising powers that are typically those of a public authority (Eurocontrol judgment, ECJ 19 January 1994, C-364/92) as well as organisations fulfilling a social function such as basic social security systems based on the principle of national solidarity (Poucet & Pistre judgment, ECJ 17 February 1993, C-159/91 and 160/91, and Garcia judgment, ECJ 26 March 1996, C-238/94).

Moreover, and as further discussed in chapter 1, Community law has added to the concept of an undertaking what some people call the labour factor and others the human factor, by associating the employees with the destiny of the undertaking on the occasion of collective redundancies and the transfer of undertakings. The concept of an undertaking is thus closely linked to the general principle of Community law directed towards recognition of the employee’s right to information and consultation.

National transpositions

In most domestic transposition measures, the term “undertaking” or “establishment” is taken to refer to current national definitions (France, Germany, Romania, independently of the transposition measures in Bulgaria). These definitions may be very diversified, to the point of not reflecting the terminology proposed by the directive. In Belgium, for instance, the concept of an “unité technique d’exploitation” or technical operating unit is used to determine the structure in which the rights of information and consultation are exercised. It corresponds to the concept of an “establishment” according to the directive. The interpretation by management and labour of the concepts of an “undertaking” or “establishment” proposed by the directive was the basis for their disagreement and caused negotiations to fail, especially due to the consequences of the choice of establishment for the exercise of the right of information and consultation: the threshold required by the directive is 20 employees, not 50 as laid down by Belgian law.
In other Member States the term “employer” covers all these concepts without any special distinction, as in **Poland**. In this particular case, the transposition of the terms “undertaking” and “establishment” is applicable to all or to a group of employers engaged in an economic activity and employing at least 20 people.

The exception to the right of information and consultation, according to the directive (article 3(2)), applies to undertakings directed towards more cultural aims. In general, the national transposition measures incorporate this exception without amendment. Some of the Member States, however, have extended this exception to public or semi-public services and broadcasting undertakings employing at least 50 employees, as in **Poland**, where in this case the law provides for the creation of a works council. In the **United Kingdom**, some public services are not covered by the transposition measures.

In **Belgium**, moreover, collective labour agreement no 9, which is certainly not the statutory transposition of the directive but which regulates the employees’ right to be informed and consulted, applies only to the private sector.

**ii) Choice of and compliance with thresholds**

<table>
<thead>
<tr>
<th>Country</th>
<th>Thresholds according to the directive / number of employees</th>
<th>Thresholds for election of a representative body / number of employees</th>
<th>Thresholds for election of a works council / number of employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Austria</td>
<td>No amendment to national law</td>
<td></td>
<td>5 – Betriebsrat</td>
</tr>
<tr>
<td>Belgium</td>
<td>No amendment to national law</td>
<td>20</td>
<td>100 - conseil d’entreprise</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>No amendment to national law</td>
<td>General assembly</td>
<td></td>
</tr>
<tr>
<td>Cyprus</td>
<td>100</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>50: March 2007</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>30: March 2008</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Denmark</td>
<td>5</td>
<td></td>
<td>35 – Sambedjudvalg</td>
</tr>
<tr>
<td>Finland</td>
<td>30</td>
<td></td>
<td></td>
</tr>
<tr>
<td>France</td>
<td>No amendment to national law</td>
<td>11 délégation du personnel</td>
<td>50 - comité d’entreprise 50 - délégation syndicale</td>
</tr>
<tr>
<td>Germany</td>
<td>No amendment to national law</td>
<td></td>
<td>5 – Betriebsrat</td>
</tr>
<tr>
<td>Greece</td>
<td>20</td>
<td></td>
<td>50</td>
</tr>
<tr>
<td>Ireland</td>
<td>150</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>100: March 2007</td>
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</tr>
<tr>
<td></td>
<td>50: March 2008</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Iceland</td>
<td>No amendment to national law</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>Italy</td>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Luxembourg</td>
<td>No amendment to national law</td>
<td>15</td>
<td>150 - comité d’entreprise</td>
</tr>
</tbody>
</table>
The scope of article 3(1)(a) and (b) of Directive 2002/14/EC relates to undertakings employing at least 50 people or establishments employing at least 20.

In every Member State, thresholds are calculated on the basis of the number employed by the undertaking, regardless of the form of employment contract, except for temporary workers and trainees, apprentices and those in supported jobs (in the case of France), except in Germany where temporary workers are included in the work force for the purpose of calculating thresholds. It therefore appears that special protection is required for temporary workers and it is highly regrettable that the European Commission has given no follow-up to this matter since the failure of the European negotiations in 2002. In general, part-time employees are included in the work force but are counted in proportion to their working hours.

The introduction of thresholds for establishing the right to information and consultation is in addition to the existing thresholds (which are often different from those stated in the directive) in domestic laws of certain Member States, for example as they apply to the introduction of a works council, for example, this often being the sole body holding specific rights to be informed and consulted. This new level of representation somewhat modifies the powers granted to works councils, extending them to all undertakings employing at least 20 people. This practice already applies in many Member States such as Belgium. In the absence of a works council, for example, the delegates elected by the personnel to the ‘comité de prevention et protection au travail’ (committee for prevention and protection in the workplace) in a technical operating unit, provided that it employs at least 50 people, or - if such delegates do not exist - the union delegates in a technical operating unit with 5 to 50 employees, exercise the right of information and consultation.

However in practice, the obstacles to the setting up of a trade union delegation in small undertakings are that it is impossible for the unions to arrange for their presence in these structures and that there is no effective protection against dismissal on the grounds of trade union membership. Here again, access to the right to information and consultation is limited by the need to be unionised. In Germany, access to financial information is received for the ‘Wirtschaftsauschuss’ (economic committee), which assists the works
council and is set up only in undertakings with at least 100 employees. It would thus be necessary to adapt article 106 of the law on undertakings (Betriebverfassungsgesetz, BetrVG) in order to broaden this right of information to undertakings with fewer than 100 employees.

In Poland the draft law provides for such adaptation to take places in stages, stipulating that until March 2007 the law will apply to undertakings with over 100 employees, the current thresholds for the creation of a works council, and between March 2007 and March 2008 to undertakings with over 50 employees.

The calculation of thresholds is still a national prerogative and one that may lend to abuse, in particular by indirectly excluding atypical employees from the undertaking’s work force. Furthermore, there are prerequisites as to length of service (Poland).

The only country not having thresholds for the introduction of trade union representatives, i.e. those who hold the right of information and consultation, is Sweden.

2.c. Agreements as per article 5

Directive 2002/14/EC promotes the social dialogue by highlighting the role of workers’ representatives in ensuring compliance with the right of information and consultation (recital 1). Recital (23) of the directive points out, “it will be for Member States to comply with and adapt (this right) to their own national situation, ensuring, where appropriate, that management and labour have a leading role by allowing them to define freely, by agreement, the arrangements for informing and consulting employees ...”. Furthermore, article 1 of the directive states that the implementation of the arrangements for information and consultation will be carried out in a spirit of cooperation, taking into account the interests both of the undertaking and of the employees.

Article 5 of the directive states that the 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.

Lastly, article 11 of the directive provides that Member States may delegate to management and labour the introduction of the required provisions by way of agreement in order to comply with the directive.

National transpositions

In general, few Member States have made use of the opportunity offered by article 5 of the directive, although some of them have done so. In the United Kingdom, for instance the CBI and TUC have negotiated and for the first time concluded a framework agreement on its transposition to national law.

In Denmark, the domestic act, adopted en 2003, implementing the Directive ensures the respect of so called "co-operation" agreements. Thus it only applies if the given enterprise is not covered by one of the above-mentioned agreements. In the private sector, for example, LO and Danish Employers Federation reached an agreement in 1986 that applies to all enterprise with a minimum of 35 employees. It establishes procedures on
information and consultation as well as on the setting-up of work councils. The work council is a body with a shared representation between employers and employees, with an equal number of seats. Shop stewards are automatically members of the work council. If a dispute arises over the content of the agreement (alleged breach by the employer), the case may ultimately be brought before a special body (the cooperation board), which has the power to sanction breaches of the agreement. In a relatively well-known case in 2001, whereby ISS Denmark and Jysk Rengøring merged, the employer was fined of 250,000 DKK. However disputes are not so common, and in any case normally settled locally. Similarly, cooperation agreements exist in other areas of the private labour market and in the public sector. However in the public sector, the agreement applies when the public employer has minimum 25 employees.

Other Member States have excluded it, as in Germany, because of the fact that the right to be informed and consulted is regulated by the law on the undertakings (Betriebsverfassungsgesetz, BetrVG).

2.d. Definitions of information and consultation and the practical procedures

The purpose of the guarantees accorded to employees’ representatives by directive 2002/14/EC is to ensure that the information and consultation procedure is effective. As regards both the content of information and consultation once these take place, and the resources used, the aim is to enable employees’ representatives not merely to be informed of the activities of the undertaking and their effects on employment but to formulate opinions to management, to prepare for consultation and to take part in decision-making on employment. The aim is to reinforce the dialogue and boost confidence within the undertaking.

i) Definitions

According to article 2(f) of the directive, information means the transmission of data enabling employees’ representatives to acquaint themselves with the subject matter. The information must therefore be pertinent and make it possible for the employees’ representatives to organise an adequate response to the proposed decisions and consultation with the management of the undertaking.

ii) What is the subject of information and consultation?

According to article 4(2) of directive 2002/14/EC, “information and consultation shall cover:

(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 the establishment, and on any anticipatory measures envisaged, in particular where there is a threat to employment;

(c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations ...”

The directive thus extends the right of workers’ representatives to general and regular information on the economic and social situation of the undertaking or establishment, and occasionally on decisions likely to lead to substantial changes in work organisation, in particular in the event of collective redundancies and transfers.
iii) How is the information provided?

The directive states that information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to conduct an adequate study and, where necessary, prepare for consultation.

This is a transcription of ECJ constant case law, for the purpose of reinforcing the requirement to seek a result, in particular by means of the prior nature of the information and consultation of workers’ representatives.

iv) How does consultation take place?

On this point, article 4(4) of the directive is specific, transcribing European Court of Justice case law on the ‘effet utile’ (useful effect) of consultation: it must take place when the timing and content are appropriate and at the relevant level of management and representation so that the employees’ representatives can intervene. The objective, then, is to make consultation effective, i.e. to ensure that it occurs at the point at which it is necessary in order to achieve the aims being sought by the information and consultation process, namely before management takes a decision.

Moreover, consultation means the exchange of views and establishing a dialogue (article 2(g), article 4(d)) with a view to reaching an agreement on decisions coming within the employer’s purview on matters of employment. The purpose of the right to information and consultation is, then, the obligation to negotiate in order to seek consensus on the practical procedures and the consequences of managerial decisions.

This constant quest for the ‘effet utile’ (useful effect) of directives is a recurring feature in the case law of the European Court of Justice, arising from its teleological interpretation of Community legislation. In an important judgment, for instance (Junk judgment, ECJ C-188/03 of 2 April 2005), inspired by the opinion of Advocate General Tizzano, the Court places this interpretation on article 2 of Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, affirming that employees must be informed and consulted prior to a decision, and more particularly that the procedure for notification of redundancies referred to in articles 3 and 4 of the same directive must have been closed before the employer’s expression of its intention to put an end to the contract of employment.

National transpositions of the notion of Information

In most domestic transposition measures, the term “information” adopts the content as it appears in the directive (Belgium - collective labour agreement no 9, independently of the transposition measures in Bulgaria). It seems that the content of information as laid down by domestic laws is in general as broad as, or even more detailed than, what is proposed by EC legislation (in France and Spain, content is regulated by industry agreements, where the emphasis is on restructuring and changes to the structure of the undertaking affecting the volume of employment). In Germany, §§ 80 Abs. 2, 90 Abs. 2 Satz 1, 106 Abs. 2, 111 Abs. 1 BetrVG foresee that the information should take place at due time and in a comprehensive manner. Nevertheless, the nature of the information may differ in individual Member States depending on the body representing the employees to whom the information is addressed. In small and medium-sized enterprises, usually with fewer than 50 employees, the representative body can have only limited access to information.
In **Belgian** law, the concept of information is specified by collective labour agreement no 9. It corresponds to a unilateral act on the part of the employer. Economic and financial information is provided only to the works council, in other words only in undertakings with over 100 employees.

However, an omission can be observed here and there, whether deliberate or not, in the transposition of the definition of “information”: for instance, the proposal as to transposition into **Polish** law covers only the option for employees’ representatives to read the subject in question, not to examine it. Moreover, the text and spirit of the directive sometimes seem to be toned down, even ignored, when, as regards the content of information (article 4(2)(b), the necessary references to employment are not embodied in the domestic transposition law, as in **Poland**. In **Romanian** law, the transposition of the concept of information remains vague and open to interpretation. In most Member States, information must generally be provided in good time and serve as a preliminary to consultation. In certain Member States, however, current legislation does not cover these factors, as in the **Czech Republic**. It is required to be comprehensive (**Germany**), precise and in writing (**France**).

**National transpositions of the notion of Consultation**

Existing laws in Member States on the consultation of workers’ representatives are fairly broad in general, covering all the points set out in directive 2002/14/EC. Most of these laws go a good deal further than the directive, covering both regular consultation on subjects of a general nature (economic, financial and social aspects) and consultation on more specific subjects (restructuring, dismissals). Consultation must take place prior to the employer reaching a decision. This is the case, for example, in **Spain**, **Belgium**, **France** and **Germany**. In this respect, the directive thus does not add to existing national law.

The important element of article 4(e) is the obligation placed on management and labour to consult with a view to reaching an agreement on decisions that may lead to significant changes in the organisation of labour. This “obligation of means”, however, appears in only a very few transposition measures. Moreover, even though **French** law is already particularly exacting and precise on matters of information and consultation, no obligation to reach an agreement is imposed. Despite the fact that **France** has not felt it necessary to transpose the directive, it must be observed that an adaptation of French domestic law appears to have been necessary on this specific point. In other national transposition measures, the concept of consultation remains vague (**Romania**).

Certain Member States (**Poland**) have added the concept of good faith in the conduct of consultation with a view to an agreement.

**2.e. Limits to the right to information and consultation: business confidentiality**

Article 6 of the directive envisages two important limits on employees’ right to be informed and consulted. On the one hand, the employees’ representatives and the experts who assist them may be forbidden to reveal to third parties the information, which has been provided to them in confidence. On the other hand, an employer may not be obliged to communicate information where it might seriously harm the functioning of the undertaking, to the extent that it can argue that there are objective criteria for its action and that it is a specific situation as envisaged by the laws of the Member States. To avoid abuse in this qualification of the interest of the undertaking in maintaining business
confidentiality, Community law required Member States to provide for administrative or judicial review procedures.

In practice, the distinction between confidential and other information is difficult to establish. When an international or European element is also introduced, the situation is even more complex, as it is sometimes the case that domestic measures do not cover the confidential aspect of business. This means that employers are making growing use of this option in order to refuse to communicate certain information, as they have no guarantee that it will be treated with sufficient discretion.

**National transpositions**

In general, either the Member States have followed the text of the directive to the letter or their existing national measures were already sufficiently detailed not to call for amendments, as in **Sweden**, where the employer can negotiate the confidentiality of an item of information. If negotiations break down, but there exists a serious risk of substantial prejudice for the undertaking or for a third party, the court may impose a duty of silence. In **Finland**, section 12 of the Act on co-operation within undertakings on business secrecy of 1978, includes rules concerning both works councils and EWC.

However, a tripartite committee is working on a new proposal to separate works councils and EWC in their own acts and should make its proposal for new legislation by 30th of April 2006. In **Germany** the obligation of confidentiality concerns the members and the substitutes of the works council. However, the obligation of secrecy does not apply among the members of bodies representing employees (article 79 BetrVG). In **Belgium**, the law provides for cases in which the employer is not required to reveal information (articles 27 et seq. of the Royal Decree of 1973). In **France**, there is provision for two mechanisms for adapting the principle of confidentiality, relating to the consultation of the works council after the publication of a merger operation concentration (L. 432-1 bis of the Code du travail) and when launching a public offering (L 432-1 ter of the Code du travail).

However, French law does not lay down “conditions and limits” (article 6 of the directive) allowing the employer not to communicate information to representatives of his personnel. Here again, an adaptation of the law would have been desirable.

In general, the sanctions on the grounds of failure to comply with the duty of discretion are essentially criminal. Moreover, any provision for the employer to derogate from the right of information and consultation is subject to prior authorisation by the labour inspectorate.

Other Member States have adapted current domestic law to the directive. In **Poland**, for example, members of the works council and their experts are required to keep silent on confidential information where this is justified, even after their mandate as representatives has expired. In **Romanian** law, the employer signs a confidentiality agreement with the employees’ representatives. Although in practice the employer may place a restrictive interpretation on its obligation to inform and consult, it is bound by the agreement and will be on trial for the unwarranted withholding of information.

On the other hand, in **Bulgaria** the concept of confidentiality is not even defined, and it emerges only at the time of the signature of collective agreements when information on
the financial and economic situation of the undertaking is relevant. In Slovenia, the transposition measures do not mention the employer’s right to resort to business confidentiality.

In Norway, most collective agreements (usually not accredited with general effect) are separated into two parts. The first part being a general agreement ("Hovedavtale"), containing inter alia regulations giving the shop stewards/union officials an unlimited right to information and consultation at as early a stage as possible. These regulations do not contain regulations on confidential information. But according to case law from the Norwegian Labour Court (court of last instance), even confidential information can be passed on to the (local) union organisation, provided that the recipients respect the provision of confidentiality. In the preparatory discussions on stock exchange laws, insider-trading rules do not prohibit shop stewards/union officials from passing on confidential stock exchange information to their union organisation, provided that the recipients respect confidentiality.

2.f. Resources and Protection of workers’ representatives
The European legislator says little on the resources that should be granted to employees’ representatives in order to exercise their mandate. According to article 7 of directive 2002/14/EC, it is for the Member States to ensure, that employees’ representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties they have been assigned. Recourse to experts is mentioned indirectly in the case of confidential information revealed to employees’ representatives and to “any experts who assist them” (article 6(1)). This very vague wording leaves ample room for manoeuvre by Member States in transposing the directive into domestic law.

National transpositions
In general, the Member States give special protection to employees’ representatives, whether they are elected or unionised, considering them as protected employees. This special protection requires an exceptional procedure implying the information to the representative bodies within the undertaking and formal intervention by a public body such as the inspectorate of labour.

This protection is directed towards maintaining working conditions and earnings and prohibiting dismissals during the period of the representation mandate, covering also the period following the termination of the mandate, one that ranges, depending on the law, from 6 months to two years. In Belgium legal protection is broad, covering the prohibition of any discrimination, transfer and dismissal. It does not, however, relate to union delegates, who enjoy protection under a different agreement (collective labour agreement no 5). Furthermore, this protection does not include the reinstatement of workers representatives in case of unjustified dismissals. In Finland, only the employees’ representatives who are “shop stewards” are granted broad protection, based on an agreement negotiated between the unions and employers’ associations. In the absence of such an agreement, the protection granted is inadequate. Transposition law 139/2005 does not reinforce this protection. In France the protection is intended to be very broad, covering not only the employees’ representatives (personnel delegates, members of the works council, union representatives and members of the health and safety committee) but also any employee having a representative function such as a mandated employee and the
employee’s adviser, up to employees who have asked for elections to be set up but not trying to obtain representative functions, and candidates standing for election.

Although this protection is satisfactory in the Member States as a whole, there is a tendency in Europe to try to reduce protection against dismissal, as in Poland. In Bulgaria, only trade union representatives enjoy protection against unjustified dismissal. In Ireland, the transposition law stipulates only that the employer must not penalise the employee in the framework of his mandate as representative. Czech law does not provide for any special protection.

In most Member States, employees’ representatives may perform their mandate during their working hours. In Sweden, for example, the representatives can carry out their mandate during paid overtime when necessary, and they are entitled to a room and to the assistance of experts in undertakings with over 50 employees. In Spain, they have a statutory credit of 15 to 40 hours a month, depending on the size of the workforce, and are entitled to a room. On the other hand, there is no provision in law for the assistance of experts except in matters of health and safety.

Other domestic transposition measures stipulate, however, as in Poland that the rule is that the mandate is to be performed outside working hours. Although Irish law allows representatives to perform their mandate in their own time, it does not state whether this is in paid working time.

2.g. Sanctions
Following a recurring formula in Community social matters, directive 2002/14/EC leaves it to the discretion of Member States to provide for civil and/or criminal sanctions against employers in case of non respect of the right to inform and to consult workers’ representatives. The sanctions process thus refers the organisation of the judicial and administrative review to the domestic laws. On several occasions in the course of revision of the “employment” directives and at the time of proposing directive 2002/14/EC, the Commission had suggested that Member States be required to set up procedures enabling employees’ representatives to have decisions annulled (dismissals, transfers, the closure of undertakings) where they do not comply with the information and consultation procedures laid down by EC law. On none of those occasions did the Council accept the proposal.

According to the terms of article 8 of the directive, Member States shall provide for adequate administrative or judicial procedures as well as adequate, effective, proportionate and dissuasive sanctions, taking the wording used in the case law already mentioned (ECJ, Commission v United Kingdom, 8 June 1994, case C-382/92).

National transpositions
In general this article has been transposed into domestic law in a proper manner or is already to be found in existing domestic measures, sometimes with recourse to case law as in France. The French measures transposing the “collective redundancies” directive, as interpreted by the ‘Court de Cassation’ (Samaritaine, Cassation, 13 February 1997), mean that the nullity of a redundancy programme leads to the reinstatement of dismissed workers. Thus, and according to a praeXtorian jurisprudence that is widespread in certain Member States, one of the most effective penalties is to stop any action by the employer
that requires information and consultation before it is put into practice (Belgium, Netherlands and France).

The offence of obstruction, generally characterised by the fact that the employer impedes the establishment and functioning of the body representing employees, is punishable by a fine or even a prison sentence in most Member States. Obstructing the right to information and consultation is classed as a serious offence on the part of the employer in Spain, rendering it liable to financial penalties imposed by the administrative courts. In France, an act that is characterised as an offence of obstruction is null and void. In the United Kingdom the Central Arbitration Committee is the body to which application is made in cases of failure to comply with the right to information and consultation, with the further right of appeal to the employment tribunal.

There is, however, a regrettable lack of precision in domestic legal measures, confirming a widespread practice in some Member States (Romania). On the contrary, provision for an accelerated procedure for administrative and judicial appeals in the event of failure to respect the employees’ right of information and consultation seems to be effective in many countries (France, Germany) in obliging the employer to inform and consult. Moreover, there is a growing trend in the domestic jurisprudence of labour courts in Europe to adopt a restrictive interpretation of the employer’s duty to inform and consult.

Certain transposition measures do not appear to abide by the letter of the directive in that the sanctions they propose are inappropriate or not very dissuasive. In Poland, for instance, experience shows that the current system of recourse, derived from the 1991 law on trade unions and, in the context of the transposition of the information and consultation directive, extended to employees’ representatives, is ineffective, mainly due to the fact that applications to the courts on the grounds of non-compliance with trade union law are usually dismissed because of the low level of damages suffered. Czech law does not provide for any particular sanction in cases of the infringement of the right of information and consultation.
Conclusion

Directive 2002/14/EC has arrived in the European Union just at the right time to enable employees to defend their jobs through an effective, standing and regular procedure for information and consultation on recent and probable developments in the activities of an undertaking, on its financial and economic situation, the evolution of employment and in particular on decisions likely to lead to major changes in the organisation of labour.

As a vital complement to the “employment” and “European works council” directives, in many Member States directive 2002/14/EC represents the essential and in some cases the sole foundation for the employee’s right to information and consultation, filling a legal gap and paving the way for a higher degree of harmonisation of social laws in Europe. Establishing a standing structure for worker representation throughout Europe, it is an important feature and even an element in the definition of the continental model of labour relations in Europe, having a major impact in countries with a voluntarist tradition such as the United Kingdom and Ireland.

Moreover, the directive changes the landscape of labour law and collective bargaining in those Member States in which workplace representation takes place exclusively through either the trade unions (as in the case of many new Member States, with the exception of Hungary and Slovenia) or elected representatives. It also paves the way for the setting up of employee representation in undertakings that hitherto had no access to this because, for example, they had no trade union representation. It does not, however, enable all small and medium-sized enterprises to be covered, mainly because the thresholds proposed are too high.

The objective is only halfway achieved, however, so long as many Member States adopt a minimal interpretation in their transposition measures. Austria, Germany and France have not transposed the directive, feeling that the existing domestic measures offer adequate protection. This report demonstrates that the domestic laws in question should have been amended to comply with certain provisions of the directive. Furthermore, propositions have been elaborated (for example by a working group of the German DGB) to strengthen the directive in respect of the access to information and consultation in SMEs, where no worker representation is possible, as well as concerning the efficiency of the sanctions, by means of an non exhaustive checklist that would serve as incentive for member states.

At least five other Member States have failed to meet the deadlines for transposition. Fears have been expressed about the opportunity offered by the directive to resort to direct consultation (Ireland), especially in connection with the existence of an elected and/or trade union structure of representation. Leaving the choice to the employer would be tantamount to giving him a way of circumventing one form of representation and favouring another. Few trade unions would welcome the introduction of a dualistic system, seeing it more as a risk of sapping the strength of trade unions in undertakings than as a challenge to take up where representative bodies are not well informed of their rights and are therefore more open to influence by the employer’s side. One of the risks mentioned, for example, is the blurring of the distinction between consultation (more in the province of employees’ representatives) and collective bargaining (trade union prerogative), which might lead to agreements being reached within an undertaking on subjects more properly dealt with by trade the unions (such as pay schemes).
Conclusion

In general the right to information and consultation is not automatic, and its exercise is restricted by having to meet certain employment thresholds, which in the European Union vary from 5 to 150 employees. In several cases, these are an impediment to access to information, which is allocated only to an institution representing employees set up in undertakings with a workforce exceeding specific (often high) thresholds. Threshold is also a barrier to trade union presence in small undertakings.

Although in most Member States the transposition measures incorporate the directive’s definition of the nature of the information to be provided by the employer, it seems that access to certain information depends on the size of the undertaking (Belgium). In domestic measures, there are frequent omissions of certain references in the directive, such as the opportunity given to representatives to examine information, or omissions of the references to employment (Poland).

As regards consultation, many of these domestic measures go further than the directive, covering on the one hand regular consultation on subjects of a general nature (economic, financial and social aspects) and, on the other, consultation on more specific subjects (restructuring, dismissals). Moreover, although consultation must take place before the decision taken by the employer, only rarely in transposition measures is an obligation placed on the employer to consult with a view to reaching an agreement, and this is non-existent in French law even though it is one of the essential aims of the directive.

Provisions relating to the confidential nature of certain information have in general been correctly transposed, except Slovenia and independently of the transposition measures in Bulgaria, where they have not been transposed. In addition, French law does not state the conditions and limits that allow the employer not to disclose information to the worker representatives. Here again, an adaptation of the law would have been desirable.

While the protection of workers’ representatives is satisfactory in Member States as a whole, there is a tendency in Europe to try to reduce this protection in case of dismissal. In Bulgaria, for instance, only trade union representatives enjoy protection against dismissal. In Ireland, the transposition law stipulates only that the employer may not penalise the employee in the context of his mandate of representation. Czech law provides no special protection. In the same way, the resources granted to employees’ representatives in carrying out their mandate vary considerably from one Member State to the next, and are reduced to the minimum in the new Member States.

In general the Member States provide for appropriate administrative or judicial appeal measures as well as for adequate, effective, proportionate and dissuasive sanctions. In certain Member States, these domestic measures take account of the praetorian jurisprudence of the ECJ and have recourse to emergency rulings to suspend employers’ decisions. Some of the Member States, however, do not propose dissuasive sanctions (Romania), or even any particular sanction in cases of infringement of the right to information and consultation (Czech law). Moreover, not all courts function smoothly, especially in some of the candidate countries, making recourse more difficult.

The harmonisation of the legal systems of employee information and consultation often comes up against a varying level of protection in existing national measures. Moreover, respecting the principle of subsidiarity, the directive allows Member States considerable room for manoeuvre in applying the rules according to what they see as the most appropriate methods.
There is no doubt that directive 2002/14/EC, looking beyond the simple issue of information and consultation, could become the keystone in the edifice of worker involvement in the management of the undertaking in the European Community. It makes a substantial contribution towards the consolidation of Community labour law. Even so, the right to information and consultation, a European social value and a major and fundamental trade union right, remain a fragile acquis in the European Union, calling for a mobilisation of all the bodies concerned.
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Annex: 1. Text of the directive

23.3.2002 Official Journal of the European Communities L 80/29


THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the Economic and Social Committee (2),

Having regard to the opinion of the Committee of the Regions (3),

Acting in accordance with the procedure referred to in Article 251 (4), and in the light of the joint text approved by the Conciliation Committee on 23 January 2002.

Whereas:

(1) Pursuant to Article 136 of the Treaty, a particular objective of the Community and the Member States is to promote social dialogue between management and labour.

(2) Point 1.7 of the Community Charter of Fundamental Social Rights of Workers provides, inter alia, that information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in different Member States.

(3) The Commission consulted management and labour at Community level on the possible direction of Community action on the information and consultation of employees in undertakings within the Community.

(4) Following this consultation, the Commission considered that Community action was advisable and again consulted management and labour on the contents of the planned proposal: management and labour have presented their opinions to the Commission.

(5) Having completed this second stage of consultation, management and labour have not informed the Commission of their wish to initiate the process potentially leading to the conclusion of an agreement.

(6) The existence of legal frameworks at national and Community level intended to ensure that employees are involved in the affairs of the undertaking employing them and in decisions which affect them has not always prevented serious decisions affecting employees from being taken and made public without adequate procedures having been implemented beforehand to inform and consult them.

(7) There is a need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employers aware of adaptation needs, increase employees' availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness.

(8) There is a need, in particular, to promote and enhance information and consultation on the situation and likely development of employment within the undertaking and, where the employer's evaluation suggests that employment within the undertaking may be under threat, the possible anticipatory measures envisaged, in particular in terms of employee training and skill development, with a view to offsetting the negative developments or their consequences and increasing the employability and adaptability of the employees likely to be affected.

(9) Timely information and consultation is a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy, particularly through the development of new forms of organisation of work.

(10) The Community has drawn up and implemented an employment strategy based on the concepts of 'anticipation', 'prevention' and 'employability', which are to be incorporated as key elements into all public policies likely to benefit employment, including the policies of individual undertakings, by strengthening the social dialogue with a view to promoting change compatible with preserving the priority objective of employment.

Implementation report of Directive 2002/14/EC
Annex: 1. Text of the directive

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(11) Further development of the internal market must be properly balanced, maintaining the essential values on which our societies are based and ensuring that all citizens benefit from economic development.

(12) Entry into the third stage of economic and monetary union has extended and accelerated the competitive pressures at European level. This means that more supportive measures are needed at national level.

(13) The existing legal frameworks for employee information and consultation at Community and national level tend to adopt an excessively a posteriori approach to the process of change, neglect the economic aspects of decisions taken and do not contribute either to genuine anticipation of employment developments within the undertaking or to risk prevention.

(14) All of these political, economic, social and legal developments call for changes to the existing legal framework providing for the legal and practical instruments enabling the right to be informed and consulted to be exercised.

(15) This Directive is without prejudice to national systems regarding the exercise of this right in practice where those entitled to exercise it are required to indicate their wishes collectively.

(16) This Directive is without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives.

(17) Since the objectives of the proposed action, as outlined above, cannot be adequately achieved by the Member States, in that the object is to establish a framework for employee information and consultation appropriate for the new European context described above, and can therefore, in view of the scale and impact of the proposed action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve these objectives.

(18) The purpose of this general framework is to establish minimum requirements applicable throughout the Community while not preventing Member States from laying down provisions more favourable to employees.

(19) The purpose of this general framework is also to avoid any administrative, financial or legal constraints which would hinder the creation and development of small and medium-sized undertakings. To this end, the scope of this Directive should be restricted, according to the choice made by Member States, to undertakings with at least 50 employees or establishments employing at least 20 employees.

(20) This takes into account and is without prejudice to other national measures and practices aimed at fostering social dialogue within companies not covered by this Directive and within public administrations.

(21) However, on a transitional basis, Member States in which there is no established statutory system of information and consultation of employees or employee representation should have the possibility of further restricting the scope of the Directive as regards the numbers of employees.

(22) A Community framework for informing and consulting employees should keep to a minimum the burden on undertakings or establishments while ensuring the effective exercise of the rights granted.

(23) The objective of this Directive is to be achieved through the establishment of a general framework comprising the principles, definitions and arrangements for information and consultation, which it will be for the Member States to comply with and adapt to their own national situation, ensuring, where appropriate, that management and labour have a leading role by allowing them to define freely, by agreement, the arrangements for informing and consulting employees which they consider to be best suited to their needs and wishes.

(24) Care should be taken to avoid affecting some specific rules in the field of employee information and consultation existing in some national laws, addressed to undertakings or establishments which pursue political, professional, organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions.

(25) Undertakings and establishments should be protected against disclosure of certain particularly sensitive information.

(26) The employer should be allowed not to inform and consult where this would seriously damage the undertaking or the establishment or where he has to comply immediately with an order issued to him by a regulatory or supervisory body.

(27) Information and consultation imply both rights and obligations for management and labour at undertaking or establishment level.
Annex: 1. Text of the directive

23.3.2002 Official Journal of the European Communities L 80/31

(28) Administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations based on this Directive.


(30) Other rights of information and consultation, including those arising from Council Directive 94/45/EC of 22 September 1994 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 (h), should not be affected by this Directive.

(31) Implementation of this Directive should not be sufficient grounds for a reduction in the general level of protection of workers in the areas to which it applies.

HAVE ADOPTED THIS DIRECTIVE.

Article 2

Definitions

For the purposes of this Directive:

(a) '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;

(b) 'establishment' means a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources;

(c) 'employer' means the natural or legal person party to employment contracts or employment relationships with employees, in accordance with national law and practice;

(d) 'employee' means any person who, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice;

(e) 'employees' representatives' means the employees' representatives provided for by national laws and/or practices;

(f) 'information' means transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it;

(g) 'consultation' means the exchange of views and establishment of dialogue between the employees' representatives and the employer.

Article 3

Scope

1. This Directive shall apply, according to the choice made by Member States, to:

(a) undertakings employing at least 50 employees in any one Member State, or

(b) establishments employing at least 20 employees in any one Member State.

Member States shall determine the method for calculating the thresholds of employees employed.

2. In conformity with the principles and objectives of this Directive, Member States may lay down particular provisions applicable to undertakings or establishments which pursue directly and essentially political, professional organisational, religious, charitable, educational, scientific or artistic aims, as well as aims involving information and the expression of opinions, on condition that, at the date of entry into force of this Directive, provisions of that nature already exist in national legislation.

3. Member States may derogate from this Directive through particular provisions applicable to the crews of vessels plying the high seas.

Implementation report of Directive 2002/14/EC 43
Practical arrangements for information and consultation

1. In accordance with the principles set out in Article 1 and without prejudice to any provisions and/or practices in force more favourable to employees, the Member States shall determine the practical arrangements for exercising the right to information and consultation at the appropriate level in accordance with this Article.

2. Information and consultation shall cover:
   (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;
   (c) information and consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).

3. Information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

4. Consultation shall take place:
   (a) while ensuring that the timing, method and content thereof are appropriate;
   (b) at the relevant level of management and representation, depending on the subject under discussion;
   (c) on the basis of information supplied by the employer in accordance with Article 2(1) and of the opinion which the employees' representatives are entitled to formulate;
   (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
   (e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c).

Information and consultation deriving from an agreement

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.

Confidential information

1. Member States shall provide that, within the conditions and limits laid down by national legislation, the employees' representatives, and any experts who assist them, are not authorised to reveal to employees or to third parties, any information which, in the legitimate interest of the undertaking or establishment, has expressly been provided to them in confidence. This obligation shall continue to apply, whereas the said representatives or experts are, even after expiry of their terms of office. However, a Member State may authorise the employees' representatives and anyone assisting them to pass on confidential information to employees and to third parties bound by an obligation of confidentiality.

2. Member States shall provide, in specific cases and within the conditions and limits laid down by national legislation, that the employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation is such that, according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it.

3. Without prejudice to existing national procedures, Member States shall provide for administrative or judicial review procedures for the case where the employer requires confidentiality or does not provide the information in accordance with paragraphs 1 and 2. They may also provide for procedures intended to safeguard the confidentiality of the information in question.

Protection of employees' representatives

Member States shall ensure that employees' representatives, when carrying out their functions, enjoy adequate protection and guarantees to enable them to perform properly the duties which have been assigned to them.

Protection of rights

1. Member States shall provide for appropriate measures in the event of non-compliance with this Directive by the employer or the employees' representatives. In particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.
2. Member States shall provide for adequate sanctions to be applicable in the event of infringement of this Directive by the employer or the employees' representatives. These sanctions must be effective, proportionate and dissuasive.

Article 9

Link between this Directive and other Community and national provisions

1. This Directive shall be without prejudice to the specific information and consultation procedures set out in Article 2 of Directive 98/59/EC and Article 7 of Directive 2001/23/EC.
2. This Directive shall be without prejudice to provisions adopted in accordance with Directives 94/45/EC and 97/74/EC.
3. This Directive shall be without prejudice to other rights to information, consultation and participation under national law.
4. Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State and in relation to the general level of protection of workers in the area to which it applies.

Article 10

Transitional provisions

Notwithstanding Article 3, a Member State in which there is, at the date of entry into force of this Directive, no general, permanent and statutory system of information and consultation of employees, nor a general, permanent and statutory system of employee representation at the workplace allowing employees to be represented for that purpose, may limit the application of the national provisions implementing this Directive to:

(a) undertakings employing at least 150 employees or establishments employing at least 100 employees until 23 March 2007, and
(b) undertakings employing at least 100 employees or establishments employing at least 50 employees during the year following the date in point (a).

Article 11

Transposition

1. Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive not later than 23 March 2003 or shall ensure that management and labour introduce by that date the required provisions by way of agreement, the Member States being obliged to take all necessary steps enabling them to guarantee the results imposed by this Directive at all times. They shall forthwith inform the Commission thereof.
2. Where Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by the Member States.

Article 12

Review by the Commission

Not later than 23 March 2007, the Commission shall, in consultation with the Member States and the social partners at Community level, review the application of this Directive with a view to proposing any necessary amendments.

Article 13

Entry into force

This Directive shall enter into force on the day of its publication in the Official Journal of the European Communities.

Article 14

Addresses

This Directive is addressed to the Member States.

Done at Brussels, 11 March 2002.

For the European Parliament For the Council
The President The President
P. COX J. PIQUE I CAMPS
Annex 2. Questionnaire

Questionnaire on transposition of directive 2002/14/CE establishing a general framework for informing and consulting employees in the European Community

General questions

1. Was directive 2002/14/CE establishing a general framework for informing and consulting employees in the European Community transposed in time (the deadline for transposition being 23 March 2005) into your country’s national legislation by means of new legislation, regulation or national collective agreement? Please state exactly which legal instruments were used for this purpose.

2. Were the social partners involved in the preparation and drawing up of this/these text(s)? Was their involvement satisfactory?

3. As regards domestic law in your country, does the directive involve any real change in terms of information and consultation of workers? Please specify.

4. Do you think that the directive will enable to put in place an effective dispute-prevention procedure? Please specify.

Specific questions

Article 2: Definitions

5. Is the definition given in the national transposition measures of the notions of “undertaking” and “establishment” different from that given in the directive? Please specify.

6. Is the definition given in the national transposition measures of the notions of “employer”, “employee”, and “employees’ representatives” different from that given in the directive? Please specify.

7. Are “atypical” workers (temporary, teleworkers, etc.) included in the notion of “workers” as given in the national transposition measures? If so, for which categories?

8. Is the definition of the notions of “information” and “consultation” in the national transposition measures different from that given by the directive? Please specify.

Article 3: Scope of the directive

9. Is the scope of the directive stated in identical terms in the national transposition measures? What method has domestic transposition measures used and chosen for calculation of worker thresholds? What are the actual consequences of this?
10. What categories of undertaking or establishment have been excluded by domestic transposition measures from the scope of the directive? For what reasons?

**Article 4: Practical arrangements for information and consultation**

11. Were you given the opportunity to define the practical arrangements for information and consultation? How did you define these arrangements? Please describe them.

12. Have the areas in which information and consultation are stated by the directive to be obligatory been transposed in any way differently from the directive’s requirements? Please specify.

13. Are the arrangements for information and consultation stipulated in Article 4 of the directive in any way different from already existing requirements in national law for information and consultation of workers? Please explain.

**Article 5: Information and consultation deriving from an agreement**

14. Were you granted the opportunity to define freely, by means of agreement, the information and consultation arrangements? How did you define these arrangements? What are they?

15. In the case of already existing agreements, did you have the opportunity to change the information and consultation arrangements used under these agreements? If so, how and using what procedure?

**Article 6: Confidential information**

16. What provisions have been enacted by the domestic legislation of transposition in relation to information supplied in confidence? Is there any other national legislation regulating the revealing of confidential information in relation to areas other than the information and consultation of workers?

17. Are there areas in which employers have the option of not informing and consulting workers?

18. If so, how do the employers make use of this opportunity?

19. What are the administrative or judicial review procedures in cases where the employer requires confidentiality or fails to provide information in order to safeguard the confidentiality of the information in question? How effective is this procedure?

**Article 7: Protection of employees’ representatives**

20. From what protection and guarantees do employees’ representatives benefit in domestic law? Please give details.

21. Does the national law (already) have provision for a system of protection against dismissal for workers’ representatives? If so, in what form?
**Article 8: Protection of rights**

22. What administrative and judicial measures have been put in place by the domestic legislation of transposition in order to enable enforcement of the obligations stemming from this directive?

23. What sanctions are provided for in the event of non-compliance with the directive’s provisions? Are they, in your opinion, effective, proportionate and dissuasive as required by the directive? If not, please give details.

**Article 9: Link between this Directive and other Community and national provisions**

24. In the framework of transposition of earlier directives defining the notions of information and consultation, how did the domestic legislation transpose these definitions? Has any attempt been made to harmonise the definitions of information and consultation of employees?

25. Do the directive transposition measures contain provision for a harmonisation of the national rules on information and consultation of workers?

**Article 12: Review by the Commission**

26. Do the directive’s provisions appear to you sufficient to ensure proper information and consultation of workers? Do you think that directive 2002/14/EC suffers from any shortcomings. Please give details.