

THE EMPLOYEES (PROVISION OF INFORMATION AND CONSULTATION) ACT 2006



A guide to the new information and consultation processes for unions

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If the concept of a social market is to have meaning, Europe must become demonstrably fairer, more equal and inclusive in its economic and political structures. This should be apparent to its citizens, not just in the market place and in their relationship with government, but also, where it matters vitally, at work. The way that work is organised, the manner in which decisions that affect jobs and income are made, the quality of workplace relations, all hugely influence our quality of life. The European Directive 2002/14/EC '*establishing a general framework for informing and consulting employees*', if applied widely and wisely, can result in a constructive dialogue between workers and employers to the benefit of both. A well informed and consulted workforce is more likely to be motivated and receptive to change. The involvement of employee representatives can contribute to more balanced and informed decision making. Managers who listen are likely to give priority to improving the working environment. Providing workers with information and a real consultation process will not solve all problems but it has the potential to strengthen the partnership process where it matters most, in offices and factories.

The Employees (Provision of Information and Consultation) Act, 2006, became fully operative on 23rd March 2008 and now applies to all undertakings with 50 or more employees. Congress remains unhappy about some aspects of the legislation which we believe depart from the spirit, and perhaps even the letter, of the European Directive. Notwithstanding its limitations, the Act provides an opportunity for employers and unions, managers and workplace representatives, to negotiate new structures that enhance the level of mutual engagement, openness, and trust within undertakings. This is best achieved where workers are capably and professionally represented by unions. These guidelines are designed to provide information and advice to workers representatives when negotiating information and consultation agreements and subsequently when participating within the agreed structures.

We intend to monitor progress in the implementation of the legislation and will continue to assist unions and workplace representatives in the task of securing rights for employee information and consultation at work.

David Begg

General Secretary, June 2008

BACKGROUND

Proposals for a directive to provide workers with a right to information and consultation have been discussed at European Commission and Council level for thirty-five years. Limited rights were contained in directives on Collective Redundancies 1975 and Acquired Rights/Transfer of Undertakings 1977. An overall Framework Directive was finally agreed by the Council of Ministers in 2001. That directive has been transposed into Irish law by the Employees (Provision of Information and Consultation) Act 2006.

WHAT IS THE EMPLOYEES (PROVISION OF INFORMATION AND CONSULTATION) ACT 2006 AND WHO IS IT FOR?

The 2006 Act provides workers with many more legal rights to information and consultation with management about the company they work for than existed before.

Previously, unless rights had been secured by collective bargaining or they were contained in directives on Collective Redundancies 1975 and Acquired Rights/Transfer of Undertakings 1977, information was disclosed and consultation took place at the discretion of management.

Since 23rd March 2008 the Act pertains to all undertakings that employ fifty or more staff. An undertaking is any organisation carrying out an economic activity, whether it is operating for gain or not, with the exception of purely administrative government departments.

Although the Act provides for workers rights to information and consultation this is not automatic. It is necessary for a union and its members to trigger the legal process by making a formal written request.

TRIGGERING THE PROCESS

Under the Act the process to negotiate an information and consultation agreement must be triggered by a written request to management by ten percent of the employees. This ten percent, the “*relevant workforce threshold*” is subject to there being a minimum of 15 and a maximum of 100 employees making the request. This means that in a small employment with 60 employees, 15 employees or 25% of the staff would need to be involved in making a request while in a larger employment of 1,000 employees, 100 employees or 10% percent of the staff could trigger the process.

An employee means any person who works under a contract of employment. Self employed people working on contracts for services do not count as employees.

Although it is not provided for in the Act, where a union represents ten percent or more of the workforce and collective bargaining exists, it is likely that an employer will enter into information and consultation negotiations when a union makes a formal request.

MAKING A REQUEST THROUGH THE LABOUR COURT

A request to begin negotiations may be made directly to the employer or through the Labour Court.

Making a request through the Labour Court might be considered in situations where employees are reluctant to publicly associate themselves with seeking information and consultation negotiations. The names of those seeking negotiations may be forwarded to the Labour Court with a request that they will not be disclosed to the employer. The Court would obtain a full list of employees from the employer and determine whether the relevant worker threshold has been met.

AN EMPLOYER CAN TRIGGER THE PROCESS

An employer can trigger the process in the absence of an employee request. The employer does not need the agreement of the employees or their union to initiate the process. However, they do need the agreement of the employees or their representatives for any proposals they put forward. Union representatives should guard against employer proposals, which specify, “*direct involvement*.” (See page 13)

An employer must begin the process by arranging for the election of employee representatives to negotiate with them.

SETTING UP THE ELECTION

Once the process has been triggered arrangements for the election of employee representatives onto an Information and Consultation Forum, (ICF), begins. It is the ICF who will negotiate with the employer. In unionised employment, arrangements concerning the election would normally take place in consultation between management and the union(s). However, under the Act, it is the employer who is responsible for the election of employee representatives. The Act does not specify how many representatives there should be or how many constituencies. These issues should be decided in prior consultations. Any disputes about these issues may be referred to the Labour Court.

A trade union representing ten percent or more of the employees may appoint representatives on a pro rata basis. Therefore, if half the staff were in a union, that union has the right to nominate half of the employee representatives. Under the Act employee representatives must be employees of the undertaking and cannot be full-time union officials. However, union officials can act as advisors to Information and Consultation Forums. They may also act as advisors at meetings of an ICF with management if this has been agreed with the employer. (See page 7)

THE RETURNING OFFICER

A Returning Officer appointed by the employer will oversee the election of an ICF. There is no requirement in the Act that the Returning Officer is independent but their appointment must be agreed, *“with existing employees.”* The Act does not say that this must be discussed with any existing worker representatives or union but the union should insist on this. Agreement on the person selected as the Returning Officer will help to avoid any possible accusations of irregularities.

THE ELECTION

It is for the Returning Officer to call for nominations.

Any employee who has been employed by the undertaking within the state for one year on a continuous basis may stand for election as an employee representative provided they are nominated by two fellow employees or by a trade union represented within the undertaking. Should there be more candidates than available seats the Returning Officer must organise a secret ballot with the outcome being decided by proportional representation. The Returning Officer may authorise other persons to assist them in their work.

All employees of the undertaking employed in the state on the day of the election are entitled to vote. The employer should provide facilities for a secret ballot for all employees.

The election may take place in a single constituency or a number of constituencies representing different work locations or categories of employment.

All costs associated with the election are to be met by the employer.

STRATEGIC ADVICE FROM CONGRESS REGARDING ELECTIONS

From a union point of view elections are critical as the number and composition of an Information and Consultation Forum will have a crucial impact on the outcome of negotiations. A trade union should consider three issues in particular.

1. HOW MANY EMPLOYEE REPRESENTATIVES SHOULD BE INVOLVED IN NEGOTIATIONS WITH THE EMPLOYERS?

In large employments too many employee representatives will make negotiation and co-ordination on the employee's side difficult. A useful rule of thumb might be one representative per fifty employees.

Also unions should ensure that they have a minimum of two representatives on any Information and Consultation Forum, so that where unions are in a minority on a workforce a single representative does not have to work alone.

2. HOW CAN THE UNION ENSURE ITS MEMBERS PLAY A LEADING ROLE WITHIN THE PROCESS?

Unions need to remember that while they are automatically entitled to a certain number of seats on a pro rata basis there is nothing in the legislation to prevent union members standing for election for the remaining seats. Union representatives should be prepared to put themselves forward for election as chairperson and for all other offices of an ICF.

In most instances it is expected that the union appointees will be the established workplace representatives.

3. SHOULD THE ELECTION BE BASED ON A NUMBER OF CONSTITUENCIES?

Unions will want to ensure that the election process is such as to afford them the opportunity to maximise their presence on Information and Consultation Forums. A single constituency is proof that there has been no attempt to gerrymander, on the other hand, elections through constituencies that represent different localities or categories of employment can ensure a better spread of representation.

From a union point of view the important thing is to make sure that management level staff or non-union categories are not favoured by the designation of constituencies or by the level of resources afforded within the election process.

ADVICE ABOUT NEGOTIATIONS ON INFORMATION AND CONSULTATION AGREEMENTS

Following the election of employee representatives onto an ICF the business of negotiating an information and consultation agreement with management begins. The two sides have six months from the opening of the negotiations to reach agreement, though they may extend this time limit by mutual consent.

POSSIBLE OUTCOMES

There are three possible outcomes to the negotiations:

1. *It is jointly agreed to apply The Standard Rules. (See page 7. The Standard Rules may or may not require minor adjustments.)*
2. *A negotiated agreement (s) is concluded specifying particular arrangements for information disclosure and consultation within a particular undertaking.*
3. *The negotiations fail at the end of six months and The Standard Rules automatically apply.*

It is likely that many employers will attempt to negotiate an information and consultation agreement that is particular to their undertaking. Employee representatives may want to use the Standard Rules as a template during any such negotiations. The important thing for employee representatives is to ensure that any variations from the Standard Rules do not diminish employee's rights to information and consultation. Remember that if no agreement is reached within six months the Standard Rules must apply.

Early in any negotiations, the issues of training and what part union officials may take in negotiations should be addressed.

TRAINING

Training is vital for employee representatives and is in the interests of all parties.

Employee representatives are unlikely to be familiar with all of the legal and practical aspects of information and consultation. The content and duration of any training should allow employee representatives to negotiate based on knowledge of the process and legislation and to be on an equal footing with the employer.

A union may seek to provide training or to participate in joint training.

If the employer provides training, the provider, content, timing, release of employees to attend and pay arrangements should all be agreed.

NEGOTIATING A ROLE FOR UNION OFFICIALS IN THE PROCESS

Non-union representatives are unlikely to have any experience of collective bargaining and for many union representatives, negotiating a legally binding agreement on information and consultation processes may be a new challenge. Full-time officials can provide valuable advice and guidance to Information and Consultation Forums.

It is up to the representatives on an ICF if they want to be advised by a full-time union official. An employer cannot block a union official from sitting in on a meeting of an ICF. An employer may, however, object to a union official participating in negotiations between an ICF and the employer, as this is not provided for in the Act. This does not mean that it is not permissible and the employer's consent to the involvement of trade union officials in meetings with them would be significant.

USING THE STANDARD RULES AS A GUIDE TO NEGOTIATIONS

The Standard Rules are contained in Schedule 1 of the Act. What follows is a summary of how they could apply.

HOW MANY SHOULD BE ON AN INFORMATION AND CONSULTATION FORUM?

The Standard Rules provide for the setting up of an Information and Consultation Forum made up of at least three and not more than thirty elected or appointed employee representatives.

The number agreed should reflect the size of the undertaking. A useful rule of thumb might be 1 representative per 50 employees, subject to a maximum of 20.

Management are not a part of an ICF under the Standard Rules. Other agreements entered into may involve joint participation but employee's representatives should still be able to meet separately.

RULES OF PROCEDURE FOR FORUMS AND HOW OFTEN SHOULD FORUMS MEET?

The Standard Rules say that it is up to an ICF to adopt its own rules of procedure, subject to certain minimum requirements:

1. *The arrangements for the meetings of the forum shall be agreed by the employer in consultation with the employees or their representatives but the employer may not unreasonably withhold consent to proposals put forward by the employees.*
2. *The minutes of forum meetings with the employer shall be approved by both the employer and employee's representatives.*
3. *Before any meeting with the employer the forum shall be entitled to meet without the employer concerned being present.*

4. *Without prejudice to sections in the Act, which refer to confidentiality, the members of the forum shall inform employees of the content and outcome of meetings of the forum.*
5. *The forum shall have the right to meet with the employer twice a year. Where there are exceptional circumstances, the forum shall have the right to request a meeting with the employer and consent to this meeting cannot be unreasonably withheld.*

In most employments it should be possible to negotiate arrangements that provide more than the minimum two meetings a year laid down in the Standard Rules. Additional meetings could be topic related or sub committee meetings. The appropriate number of meetings will be dictated by the size and circumstances of the undertaking. In large undertakings meeting once a month might not be unreasonable. In smaller undertakings once a quarter might suffice.

The Act does not define exceptional circumstances but they are generally understood to refer to proposed organisational changes, which have important adverse consequences for employment.

Other rules of procedure might include:

1. *Is there to be a chair, vice-chair, secretary and so on and if so how are they to be elected?*
2. *How are agendas for both forum meetings and joint meetings with management to be drafted?*
3. *How are issues to be decided?*
4. *Should there be a quorum for meetings to be valid?*
5. *Can non-forum members; other employees or trade union officials be invited to participate at forum meetings as observers?*
6. *What sort of liaison with management will be necessary between meetings and how is this to be organised?*
7. *How are employees to be communicated with?*

CONSULTATION BETWEEN EMPLOYEE REPRESENTATIVES AND EMPLOYEES

The Standard Rules place an obligation on employee representatives to inform employees of the outcome of forum meetings. This may be understood as implying a need to engage with employees before meetings so that the representatives can understand any issues employees wish to have brought up and after meetings to inform them of what happened.

WHAT RESOURCES SHOULD THE FORUM BE PROVIDED?

The Standard Rules make clear that the forum is a separate body, independent of the employer, with the power to regulate its own internal procedures and entitled to be funded by the employer so that it can function properly in representing employees in information and consultation discussions.

The employer must meet the expenses of the forum and provide its members, *“with any financial resources that are necessary and reasonable to enable them to perform their duties in an appropriate manner.”*

The Act provides for forum members to be given the necessary time off, *“that will enable them to perform their functions as employee representatives promptly and efficiently.”* The right to time off is subject to *“the needs, size and capabilities of the undertaking concerned and shall not impair the efficient operation of the undertaking.”*

The Act also provides for forum members to have their expenses covered.

It seems clear that the expenses referred to are meant to cover the costs associated with forum meetings, travel, hotels, meals and the like but the financial resources referred to are potentially more encompassing. The financial resources needed to pay for training could be one such need. What about expert assistance? Financial resources may also be needed to provide office accommodation, equipment and communication requirements.

PROTECTION OF EMPLOYEE REPRESENTATIVES

An employee representative may not be penalised in any way for performing his or her function in accordance with The Standard Rules.

WHAT TYPE OF INFORMATION IS AN EMPLOYER REQUIRED TO PROVIDE?

The Standard Rules require an employer to consult and provide information under three headings:

1. BUSINESS INFORMATION

The Standard Rules require an employer to provide information, *“on the recent and probable development of the undertaking’s activities and economic situation.”* This can be taken to include:

1. *Changes in the company’s business strategy.*
2. *Market trends having a significant impact on the company’s business prospects.*

3. Corporate changes such as takeovers, outsourcing, closures, disposals, transfers of production and the opening of new facilities and outlets.
4. The launch of new products or services or the discontinuation of existing products or services.
5. Changes in technology, which may have a substantial impact on the way the company is organised or operates.
6. Organisational changes, such as changes in senior management.

The information given to the forum needs to be “appropriate” to enable “the forum to conduct an adequate study and where necessary prepare for consultation.”

2. EMPLOYMENT INFORMATION

The Standard Rules refer to information on, “the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment.”

The information to be provided clearly refers to overall employee numbers and not individuals.

“Situation” can be taken to mean:

1. The overall number of employees currently at work in the undertaking.
2. Expected patterns of recruitment.
3. Any anticipated cutbacks or redundancies.
4. Employee turnover figures.
5. Working time patterns.
6. Retirement patterns and possible changes to retirement schemes.

“Structure” could mean:

1. How employees are distributed within the undertaking geographically or in different grades.
2. Categories of employees; full-time, part-time, contract, agency, etc.
3. Plans or organisational changes that will impact on the structure of employment.

Fundamental to the aims of the legislation are, “anticipatory measures envisaged where there is a threat to employment.” The Act is not about preventing or even slowing change. The aim is to ensure that the change necessary to maintain and improve an undertaking’s competitive position are balanced by initiatives that assist displaced employees to develop their knowledge and skills so that they can find alternative employment in the undertaking or elsewhere.

3. WORK ORGANISATION AND CONTRACTUAL RELATIONS

The Standard Rules refer to, “information and consultation on decisions likely to lead to substantial changes in work organisation, or in contractual relations.”

Rights to information and consultation under Collective Redundancies 1975 and Acquired Rights/Transfer of Undertakings 1977 also still apply. (See page 11/12)

There should be no attempt to convert the forum into a rival or second tier body that could overturn or amend agreements made between management and unions.

In the case of issues referred to by this heading, consultation under the Standard Rules should be, “with a view to reaching agreement.”

Changes in work organisation or contractual relations could cover:

1. Proposed redundancies.
2. Transfer of undertakings resulting in changes of ownership.
3. Changes in working time patterns.
4. Technological changes leading to organisational changes.
5. Changes in policies and procedures whether as a result of management decision or by legislation.

Pay and benefits are not covered by the Act.

THE ARRANGEMENTS FOR CONSULTATION

The primary reason an employer is obliged to give information to an ICF is to allow, “the forum to conduct an adequate study and where necessary to prepare for consultation.” The information must be given, “at a time, in the fashion, and with the appropriate content.” Under the Standard Rules consultation is to take place:

1. While ensuring that the method, content and timeframe thereof are appropriate.
2. At the relevant level of management and representation, depending on the subject under discussion.
3. On the basis of information provided by the employer and of the opinion, which the employees are entitled to formulate.
4. In such a way as to enable the forum to meet the employer and obtain a response and the reasons for that response to any opinion they might form.

5. *With a view to reaching an agreement on decisions referred to that are within the scope of the employer's powers.*

If the consultation is to be meaningful information must be provided in a form that allows employee representatives to understand it, think through its implications and where appropriate put forward alternative proposals. If the issues are complex and have wide ranging implications employees representatives may require independent advice and guidance. The Act does not say that an ICF is entitled to assistance by experts but experts are mentioned in the context of confidentiality. It is reasonable to assume that legislators anticipated situations in which employee representatives will need expert advice and that there is an obligation on employers to fund such independent advice.

Once they have received the necessary information and independent advice, if needed, employee representatives on an ICF must be given the time and opportunity to prepare a response. The ICF may disagree completely with what is being proposed or may have ideas and suggestions for modifications. Once the employee representatives have prepared their opinion then they must be given the chance to present it at the relevant management level. This could mean senior management if the issue is company wide or it could mean local management if the issue is confined to one site or line of business.

Management are obliged to give due consideration to an Information and Consultation Forum's ideas and suggestions in good faith. This goes beyond merely listening and means that they should be able to give reasons for accepting or rejecting proposals.

The phrase in the Act, *"with a view to reaching agreement"* does not mean that an agreement must be reached. It implies negotiations in good faith in an attempt to reach agreement. If no agreement can be reached management may make a final decision regardless of the views of an ICF.

OVERLAPPING INFORMATION AND CONSULTATION RIGHTS

The 2006 Act says that it is without prejudice to information or consultation rights conferred by Transfer of Undertakings Regulations, the Protection of Employment Act and the European Works Council Act. The Transfer of Undertakings Regulations obliges employers to inform employee representatives about the transfer of business activities and employees from one employer to another and to consult with employee representatives. The Protection of

Employment Act provides that when an employer, *"proposes to create collective redundancies he shall, with a view to reaching agreement, initiate consultations with employee representatives representing the employees affected by the proposed redundancies."* These rights still apply. This has important implications for trade unions and employers and could result in an employer having to conduct two parallel and potentially conflicting sets of

negotiations about proposed redundancies or takeovers; one with the ICF and one with the union. The best way to avoid such a situation arising is to argue for the involvement of trade union officials as expert advisors at meetings between the ICF and management. This opens up the possibility of co-ordinating all the information and consultative processes.

CONFIDENTIALITY WITH REGARD TO EMPLOYEES AND EMPLOYERS

An employer may refuse to provide information or undertake consultation if it would prejudice or seriously harm the undertaking or where it is prohibited by law.

Employee representatives on an ICF must not disclose, to other employees or any third party information, which, *"in the legitimate interest of the undertaking,"* has been provided to them in confidence for good reason.

There may be a need to establish in negotiations exactly what types of information about the company employee representatives could be required to withhold from employees.

NEGOTIATED AGREEMENTS DIFFERENT TO STANDARD RULES

The alternative to applying the Standard Rules is to negotiate one or more consultation and information agreements. It is possible to have different agreements for different sites, different categories of employees or when undertakings have more than one line of business. However, there can only be one set of employee representatives elected to negotiate the terms of information and consultation agreement or agreements.

Negotiated agreements can be crafted to suit particular circumstances. At a minimum they must cover:

1. *The duration of the agreement and the procedure if any for its renewal.*
2. *The subjects for information and consultation.*

3. *The method and time frame by which information is to be provided, including whether it is to be provided directly to employees or through one or more employee representatives.*
4. *The procedure for dealing with confidential information.*

To be valid the agreement must be:

1. *In writing and dated.*
2. *Signed by the employer.*
3. *Approved by the employees.*
4. *Applicable to all the employees to whom the agreement relates.*
5. *Available for inspection by those persons and at a place agreed between the parties.*

Negotiated agreements by employees can be approved in one of three ways:

1. *The agreement is backed in a ballot by a majority of those employed.*
2. *The agreement is supported by a majority of the employee's representatives who were elected for the purpose of negotiating the agreement.*
3. *Where any other method agreed shows that the agreement has been approved. This could include acceptance by a union that represents all of the employees concerned.*

DIRECT INVOLVEMENT

Section 19 (1) of the Act states that, “a worker may exercise his or her right to information and consultation either directly or by means of a representative elected or appointed for that purpose.” This provision was opposed by Congress and is clearly intended to make it more difficult for employees in undertakings where the employer is hostile to collective representation to invoke their right to have representational arrangements for information and consultation. The right to “direct involvement” implies individual choice but the legislation goes on to regulate and effectively curtail an employees rights to be represented, “where a system of direct involvement is in operation for the whole or part of the undertaking.” In that situation a majority of those covered by the, “direct involvement system,” must approve of a proposal for a representational system. As there is no provision for an initial collective decision on direct involvement, the clear inference is that, in any undertaking where information and consultation is currently carried out exclusively within, “a direct involvement system,” that is, most non-unionised

employments, the right to have a representational system negotiated is dependent on a majority, not 10%, of employees seeking it.

Union and employee representatives are strongly advised to resist any attempt to confine information and consultation to, “direct involvement,” for all or a section of the workforce. Consultation can only realistically be conducted through representatives and any other system is an effective denial of consultation rights.

However, representational involvement does not preclude additional information being provided directly to employees and a representative forum does not prevent further consultation with employees affected by change.

It is important that any such supplementary information is channelled through the central representative forum.

WORKPLACE PARTNERSHIP

The Act requires those involved to, “work in a spirit of co-operation, having due regard to their reciprocal rights and duties and taking into account the interests of both the undertaking and the employees.”

The wording mirrors the social partnership agreement, which refers to workplace partnership as, “an active relationship based on a recognition of a common interest to secure the competitiveness, viability and prosperity of the interest. It involves a commitment by employees to improvements on quality and efficiency; and the acceptance by employers of employees as stakeholders with rights and interests to be considered in the context of major decisions affecting their employment.”

The National Centre for Partnership states that the new legislation, “represents an opportunity to foster and deepen customised, partnership style approaches to managing and anticipating change at the enterprise organisational level. In particular, enhancing and improving information and consultation practices can underpin improvements in co-operative problem solving, employee involvement and organisational capacity to manage change.”

The process of employers informing and consulting with employees can provide mutual benefits if it is carried out in a spirit of openness, trust and real dialogue. This shouldn't mean that differences are avoided or glossed over. What it should mean is that employees through their representatives have a voice and a say in running the enterprise.

SUMMARY OF PROCESS TO NEGOTIATE AN I+C AGREEMENT

SIX MONTHS TIMESCALE



