

Involvement of employees

EU Company Law

Exam question

Discuss the employees' rights at company level in the light of Community law.

Introduction

Participation of employees

- Giving information to employees.
- Consulting employees.
- Participation in decision making.
- Here: employee participation = all forms of employee participation, i.e. information, consultation and participation in the strict sense!

Methods and intensity varies in the different MS

- Ex, Germany:
 - Representatives of employees → right to participate in decision making on the supervisory board.
- Ex, Spain and Belgium:
 - Participation solely through works councils.

Europeanization

- European level of decision making is becoming more and more important:
 - **At company level:** transnational restructuring and relocation.
 - Division of labor in economic branches and industry sectors.
 - Regulation of working conditions, economic development and employment policy.
- At the same time the instruments of workers influence and European co-determination are still weak.
 - Social Dialogue.
 - Consultation at European level.
 - Legislative framework of employee participation.

Community law on employee participation

- A set of Directives:
 - Establish rights and obligations for employees and their representatives to be informed and consulted.
- **EWC Directive (94/45/EC):**
 - To improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.
- **Framework on Information and Consultation Directive (2002/14/EC):**
 - Seeks to strengthen dialogue within enterprises and ensure employee involvement upstream of decision-making, with a view to better anticipation of problems and the prevention of crises.
- European Company (**SE**): Directive (2001/86/EC).
 - Provides for the involvement of employees in enterprises adopting the European Company Statute.

- **Collective Redundancies Directive (98/59/EC):**
 - Provides that an employer who envisages collective redundancies must consult and provide workers' representatives with specified information concerning the proposed redundancies.
- Directives on **safeguarding** employee rights (2001/23/EC):
 - (in the event of the **transfer of undertakings**)
 - provides that rights and obligations that arise from a contract of employment or an employment relationship that exists on the date of a transfer shall be transferred to the new employer.

Works Councils

- Definition
 - Organization representing workers, which functions as local/firm-level complement to national labor negotiations.
- Most commonly-examined implementations → in **Germany**:
 - **General labor agreements** are made at the national level by national unions (e.g. IG Metall) and national employer associations (e.g. Gesamtmetall), and
 - **local plants and firms** then meet with works councils to adjust these national agreements to local circumstances.
- Directive (94/45/EC) on the establishment of a European Works Council (EWC) or similar procedure for the purposes of informing and consulting employees in companies which operate at European Union level.
- Example:
 - “Employees of Karstadt agreed Saturday to take salary cuts”
 - June 10, 2009
 - Karstadt employees protest against the
 - Arcandor insolvency in Munich.
 - German retail group Arcandor AG threw in the towel on Tuesday, filing for insolvency after the Berlin government rejected its request for emergency state aid.
 - November 7, 2009
 - Staff representatives and Arcandor's judicial administrator agreed on cost cuts of 150 million Euros over three years.
 - Employees give up bonus holidays and 75 percent of their Christmas bonus!
- « **EWCs have a key role** to play in anticipating and managing the social dimension of change in large enterprises Europe-wide. They also contribute to improving corporate governance – a key factor in sustaining competitiveness. »
 - Vladimir Spidla, Commissioner for Employment, Social Affairs and Equal Opportunities, Brussels, February 2008
- **Management view**
 - EWCs serve to understand how a company operates and what is going on in different countries; they get employees involved in company policies.
- **Employees view**
 - EWCs coordinate transnational solidarity of employees and add on national rights;
 - they negotiate beneficial solutions for employees in company restructuring.
- Conflict with employers → sometimes judicial remedies: - **If rights are not fulfilled**
 - NL: acts contrary to works council → latter may appeal to Enterprise Chamber of the Court of Appeal in Amsterdam + action will be affected.
 - F: failure to carry out consultations → penal sanctions but action not affected.
- EU law:

- EU Framework Directive 2002/14/EC, Article 8:
 - Provides for appropriate measures in the event of non-compliance with the obligations stated in the Directive + adequate penalties in case of infringement.

Consultation & information in the enterprise

- Directive on a general framework for informing and consulting employees in the EC (2002/14/EC)
 - Aimed to strengthen the social dialogue provisions of the 1998 directive, in particular in relation to the promotion of information and consultation.
- The directive left it up to the MS to determine the practical arrangements for exercising these rights (Article 1).
 - It also stipulated that all of the necessary steps had to be taken to guarantee the results imposed by the directive at all times.
- Scope (Article 3)
 - according to the choice made by MSs, to:
 - undertakings employing at least 50 employees in any one MS, or
 - establishments employing at least 20 employees in any one MS.

Information

- Access to information in the process of decision-making is an important right of employee representatives
 - ‘Information’ is defined as
 - the ‘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’ (cf. art. 2(f)).
- More specific (cf. art. 4(2))
 - **information** on the **recent and probable development** of the undertaking’s or the establishment’s activities and economic situation;
 - **information and consultation** on the situation, **structure and probable development of employment** within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a **threat to employment**;
 - Information must be given in time for the employees to prepare and take appropriate measures for a decision.
 - **information and consultation** on *decisions likely to lead to substantial changes in work organisation or in contractual relations*.
- Special conditions for confidential information (cf. art. 6).
 - Certain **harmful information** is not obligatory to disclose to employees or to consult with them.

Consultation

- Important legal instrument for developing consultation.
 - ‘Consultation’ is defined as
 - ‘the exchange of views and establishment of dialogue between the employee representatives and the employer’ (cf. art. 2(g)).
 - Consultation is a stage in the process of management of the enterprise in which those consulted can influence decision-making.
- The ‘method’ of consultation includes, for example:
 - meetings,
 - Feedback, and
 - advice from experts.

Collective redundancy

- Directive on collective redundancies (98/59/EC)
- Workers have the right to be informed and consulted in cases involving collective redundancies.
 - Employers are obliged to inform and consult workers when proposing collective dismissals for redundancy.
- **‘Collective redundancies’** = the minimum number of workers (the threshold) dismissed for one or more reasons not related to the individuals concerned.
 - Article 1(a):
 - ”dismissals effected by an employer for one or more **reasons not related to the individual workers** concerned ...”
 - The threshold is dependent on the size of the workforce and on the number of proposed redundancies.
- A collective redundancy **occurs where it is proposed that either:**
 - over a period of 30 days, at least 10 dismissals in establishments normally employing more than 20 and less than 100 workers may occur;
 - at least 10% of workers in establishments normally employing at least 100 but less than 300 workers are to be dismissed;
 - at least 30 workers in establishments normally employing 300 workers or more are to be dismissed;
 - over a period of 90 days, at least 20 dismissals are proposed, regardless of the size of the establishment.
- Employer’s obligations in relation to consultation and in relation to notification of the redundancies (acc. to art. 2 and 3).
 - Article 2(1) provides: ‘Where an employer is contemplating collective redundancies, he shall begin consultations with the worker representatives **in good time with a view to reaching an agreement.**’
 - Article 3: Employers shall notify the competent public authority in writing of any projected collective redundancies.
 - The consultation must **cover ways and means to avoid or reduce the redundancy** and mitigate the consequences.

Transfer of undertakings

- Directive on the transfer of undertakings (2001/23/EC)
 - Regulates the interests of employees in such a transfer.
- Chapter II (safeguarding employees’ rights):
 - In the event of transfer of an undertaking,
 - the **terms and conditions** of employment in contracts and collective agreements are safeguarded;
 - but **employment itself** is **not** always guaranteed.
 - The **regulations’ main aims** are to ensure that,
 - just because of the transfer, employees are **not dismissed** before or after
 - (unless there is an 'economic, technical or organizational' reason),
 - employees’ most important **terms and conditions** of contracts are not worsened before or after the transfer
 - (unless there is an 'economic, technical or organizational' reason),
 - affected employees are **informed and consulted** through representatives.
- A **transfer within the meaning** of the Directive:

- A transfer of an economic entity which retains its identity,
 - meaning an organised grouping of resources which has the objective of pursuing an economic activity... (Article 1(b)).
- **Does not apply to transfers which go merely through the sale of a company's shares.**
- EXAMPLE
 - Imagine a company that has in-house cleaners.
 - The company decides that they want to tender-out the contract for cleaning services.
 - The new company that takes over the work may employ the same cleaners.
 - If it does so, the directive states that the new employer will have to employ the cleaners subject to the same terms and conditions as they had under the original employer.
 - If any staff are dismissed by either employer for a reason connected with the new arrangement this will automatically be deemed an unfair dismissal and the new employer will be liable for any statutory claims arising as a result.
- BENEFITS v. CRITISM??

EWC Directive (94/45/EC)

In general

- European Works Councils are bodies representing the European employees of a company.
 - Ensure that workers are informed and consulted by management on the progress of the business and any significant decision at European level that could affect their employment or working conditions.
 - EWCs in figures:
 - today around 908 EWCs exist;
 - = 36% of eligible companies or over 14 million workers across the EU!
- Applies to Community-scale undertakings or groups of undertakings.
 - Designed to give adequate information to and consultation opportunities to employees affected by corporate decisions.
- Sanctions and penalties are a matter for each MS.

Key terms

- ‘Community-scale undertaking’ (Article 2(a)):
 - any undertaking with at least 1000 employees within the MSs and
 - at least 150 employees in each of at least 2 MS's.
- ‘Group of undertaking’ (Article 2(b)):
 - a controlling undertaking and its controlled undertakings.
- ‘Community-scale group of undertakings’ (Article 2(c)):
 - a group of undertakings with the following characteristics:
 - at least 1000 employees within the MS,
 - at least two group undertakings in different MS, and
 - at least one group undertaking with at least 150 employees in one MS and another group undertaking with at least 150 employees in another MS.
- ‘Consultation’ (Article 2(f)):
 - the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management.
- ‘Controlling undertaking’ (Article 3):

- an undertaking which can exercise a dominant influence over another undertaking by virtue, for example, of ownership, financial participation or the rules which govern it.

Main objectives

- Establishing of a EWC or a procedure for informing and consulting employees in every Community-scale undertaking/group of undertakings:
 - on the basis of an agreement between the central management and a special negotiating body.
 - With the purpose of informing and consulting the employees.

The central management:

- Responsible for creating the conditions and means necessary for the setting up of a EWC or an information and consultation procedure;
- Initiates negotiations on its own initiative
 - or at the written request of at least 100 employees or their representatives.

Special negotiating body

- Comprising a minimum of 3 and a maximum of the number of MS:
 - has the task of determining
 - with the central management, by written agreement,
 - the scope, composition, competence and term of office of the EWC
 - or the arrangements for implementing a procedure for the information and consultation of employees;
 - **may decide, not to open negotiations or to terminate the negotiations already opened;**
 - requires at least 2/3 of the votes,
 - such a decision would stop the procedure to conclude the agreement
 - and would **nullify** the provisions of the Annex. (bilaget)
 - A new request may be made after 2 years.
- The members of the special negotiating body and of the EWC, and any experts who assist them, will not be authorized to reveal any information which has expressly been provided to them in confidence.

Exemptions

- Community-scale undertakings/groups of undertakings in which there is already an agreement covering the entire workforce, providing for the transnational information and consultation of employees, will not be subject to the obligations arising from the Directives.
- When these agreements expire, the parties involved may decide jointly to renew them.
- Where this is not the case, the provisions of the Directives will apply.

Items to be agreed in the agreement

- Special negotiating body
- Undertakings affected
- Composition of the EWC
- Information and consultation
- Venue, frequency and duration of meetings
- Financial and material resources
- Validity of the agreement

Subsidiary requirements (default requirements)

- Subsidiary requirements laid down by the legislation of the MS in which the central management is situated will apply:
 - where the central management and the special negotiating body so decide, or;
 - where the central management refuses to commence negotiations within 6 months of the initial request to convene the special negotiating body, or;
 - where, after 3 years from the date of this request, they are unable to conclude an agreement to establish a EWC or an information and consultation procedure, and the special negotiating body has not taken the decision not to open negotiations or to terminate the negotiations.
- Subsidiary requirements:
 - Designation of members
 - One meeting pr. Year
 - Extraordinary meetings
 - Information and consulting
 - Financial and material resources
 - Experts of choice.
- Information and consultation rights (subsidiary requirements)
 - Company structure
 - Economic and financial situation and trends
 - Employee trends
 - Organisational changes
 - Transfer of production
 - Mergers, downsizing and closures
- EWC Directive → Overview (transposition process)

EWCs in practice

- Research shows that only 24% of EWCs were informed before decision was taken..
- In services sectors even less
- How can you influence if you do not know...?
- No known cases where an EWC has materially influenced strategic business decision leading to restructuring.
 - However, there are cases where EWC avoided job losses or offered changes in working conditions.

Example General Motors

- Management presents restructuring plan to EWC:
 - concentration of production and closure of either Saab factory in Sweden or Opel plant in Germany.
- EWC involves financial and economic experts.
- Steering Committee develops alternative plan: no closure but staff reduction by normal attrition (leaving) within 2 years.
- After a series of EWC meetings, management eventually agrees on EWC plan. .

Example Legal Action – British Airways

- 2005 / 2006: company announces outsourcing projects of ground handling staff in Paris, Prague, Geneva and Zurich.
- 7 Nov 2006: announcement of outsourcing of Customer Service Department at Vienna airport.
- BA refuses to discuss "national" issue at EWC meeting.
- EWC suspends meeting and decides to take legal action.
- "We need to be brave"
- EWC claim: no consultation
- Court ruling on 7 Dec 2006:
 - management has to provide detailed information,
 - has to enter into consultation within 24 hours,
 - suspension of outsourcing,
 - 2.500 € fine/day of delayed consultation!
 - → Decision taken in another EU Member State
= transnational issue = EWC entitled to consultation

Directive amendments

- The original Directive was full of gaps.
 - For example, the negotiating parties were only meant to negotiate the "how", but not the "what" of the EWC
 - (i.e., the basic concepts of information, consultation, and the EWC's competence to deal with transnational issues.)
 - At least this gap has now been closed by the establishment of certain standards,
 - for example regarding the definition of "information", "consultation" and "transnational".
- The new EWC Directive has entered into force on 5th June 2009.
 - Directive 2009/38/EC 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.
 - The new rules will not take effect in national law until 5th June 2011.
 - However, several issues are today already of relevance to ongoing EWC negotiations and re-negotiations of EWC agreements.
- The objectives of the amendments made to the Directive are to:
 - give details of principles and definitions concerning the concepts of transnational information and consultation of employees;
 - define the transnational scope of the European Works Council, and to link the national and transnational levels of information and consultation;
 - give details of the functions and training of employees' representatives, and recognize the role of unions;
 - facilitate the provision of information when setting up a European Works Council, concerning the commencement of negotiations and rules on negotiating;
 - develop the subsidiary requirements applicable in the absence of agreement;
 - provide for the adaptation of agreements governing European Works Councils in cases of merger or acquisition of the undertaking or group of undertakings.
- **Information must be extensive enough and received in time in order to be able to carry out an in-depth examination of possible consequences and prepare for consultations where appropriate.**
- Consultation must take place **at the appropriate managerial level**, in the appropriate form, and at

the appropriate time so that the opinion of the EWC can be taken into account in company decision-making regarding the proposed measures.

- The responsibility of the EWC for dealing with issues which have transnational implications has been clarified.
 - Whether the EWC is to be informed and consulted depends on the nature and scope of the potential impact of a proposed measure as well as on the managerial level involved.

European Company – SE

- European Company Directive (2001/86/EC)
 - Information
 - Time, manner and content must permit employees representatives an in depth assessment.
 - Consultation
 - Time, manner and content must permit employees representatives to express an opinion which may be taken into account in the decision making process.
- Employees of a European company could set up a representative body, similar to the EWC, with rights for:
 - Information – Consultation – Participation.
- European Work Councils and the Representative Body in the SE Company are connecting with the protection of employees rights, in-company democracy and the management privilege.

	EWC Directive	SE Directive
Concerned companies	'Community-scala undertakings' > 1000 employees > 150 in each of at least 2 MS	'Community scale undertakings' that want to establish an SE
Procedure	Negotiations between management and a special negotiating body Agreement or standard rules	Negotiations between management and a special negotiating body Agreement or standard rules
Rights	European Works Council: Transnational information and consultation rights	SE Works Council: (Improved) transnational information and consultation rights participation rights

Rights

Information and consultation

- On questions which concern the SE itself and any of its subsidiaries or establishments situated in another MS or which exceed the powers of the decision-making organs in a single MS.
 - Must have adequate time, manner and content.

Participation

- The right to elect or appoint some of the members of the company's supervisory or administrative organ
 - => board-level representation

Employee involvement within MS key aspects

Belgium

- Works councils are established in enterprises (defined as "technical work/production units") employing **50 employees or more**;
 - Trade unions (fagforeninger) may have their representatives at company level (FX re social

policy).

- The works council is not a joint body in the strict sense.
 - **Both parties (employer and employees) are represented**, but not necessarily in equal numbers.
 - Only the number of employees' representatives is expressly specified.
 - All that is stipulated regarding the number of employer's representatives is that it may not exceed the number of employees' representatives, so it may be smaller.
 - **4 year period** + enjoy protection against deterioration → dismissal only permitted on limited grounds.
 - Case of conflict: may submit question to court.
- Elections are organized to form the works council, but only as regards the employees' representatives:
 - employers are free to choose their own representatives themselves.
 - Elections for the employees' representatives are based on lists of candidates.
 - The employer must publicly display the lists put forward even if the number of candidates on each does not exceed the number of seats on the works council that may be allotted to that union.
- **The works council's responsibilities** mainly fall under the heading of information and consultation.
 - It has decision-making powers on only a few matters.
 - See basic information, collective dismissal or redundancy, company auditor, company welfare services, demand for reinstatement, employee involvement, enterprise, financial information, group insurance, new technologies, professional and managerial staff, protected employee, reinstatement, senior executives, work rules.

France

- Institution of employee representation → companies with **more than 50 employees**.
- Composition:
 - A collegiate body composed of employee members elected by the workforce
 - and the head of the company (who chairs the council and takes part in certain votes)
 - and of representatives appointed by the trade unions (who act in a purely consultative capacity).
- **Employer bears costs.**
- Negligence of employer → criminal offence from the employer.
- Position in the company:
 - it has charge of company welfare and cultural facilities;
 - the law invests it with only consultative powers in regard to employer initiatives concerning the organization and management of the company;
 - and other than in the case of profit-sharing agreements, it possesses no formal bargaining power.
- Fine line between consultation and bargaining
 - Numerous agreements, formal or otherwise, are concluded between the head of a company and the works council, and the courts accord these a certain legal force, at the least as unilateral undertakings on the part of the employer.
- The institution is a complex one:
 - It is a counterweight to managerial prerogatives, yet also enables their exercise to be rationalized.
 - It is a complement to union power, yet is also virtually its competitor.

Germany

- As soon as a company has **five or more employees**, the employees have the right to found a works council.

- Large companies: more than **500 employees** → co-determination :
 - Representation of workers representatives → supervisory board.
 - The employer is in no way active in that process.
 - The employer must not hinder or forbid the election
 - but still bears the expenses related to the election as well as all costs that arise through the works council.
 - The works council must be informed about personnel planning (hiring and firing), technical and organizational changes. In these areas, the works council also has consultation rights.
 - **Information should take place at due time and in a comprehensive manner.**
 - In some cases the works council even has the **right to object** to certain actions (e.g. personnel disputes).
 - The **main fields of responsibility** are
 - work time (length, time of day, breaks, vacation etc.), and work environment.
- Dual structure of interest representation:
 - Collective Bargaining
 - Co-Determination
 - → legally separated
- Collective bargaining:
 - Between one Trade Union and one Employers' Organisations:
 - very centralised.
 - Separate tasks?
 - Legally:
 - Clear separation of tasks between collective bargaining (sectoral-level) and co-determination (company-level).
 - Reality:
 - Both levels are closely linked.
- Every member of the works council is **dismissal protected**
 - for the time in office plus one year after.
- Relationships between Workplace Actors
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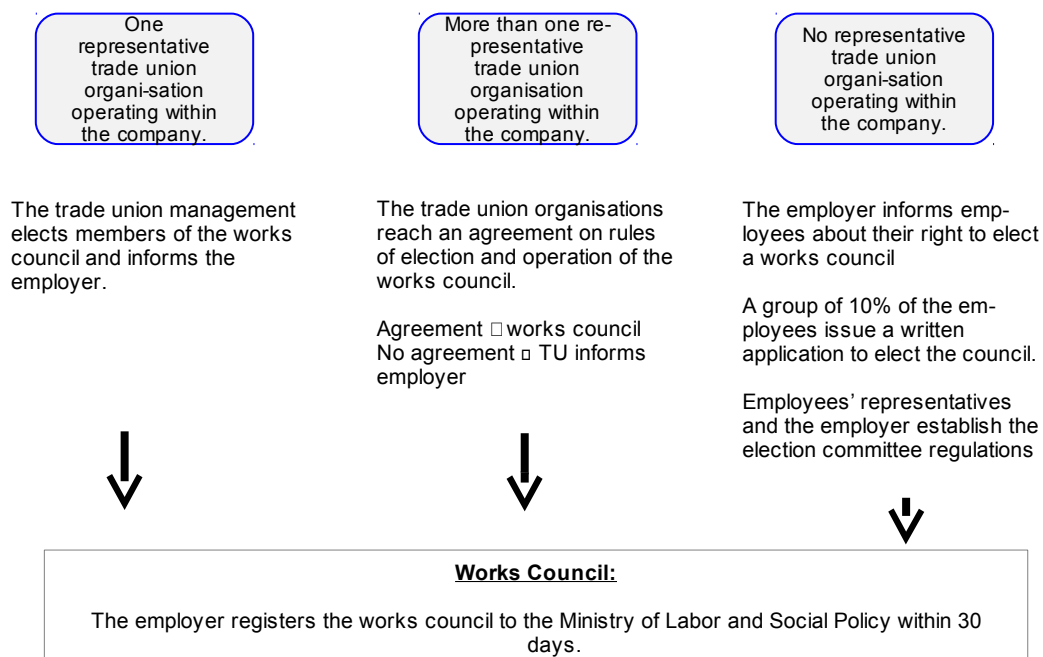
The Netherlands

- Institution of employee representation → companies with more than 50 employees.
 - Less than 50:
 - a works council is not compulsory but
 - the employer is **required to hold consultations** with the workforce
 - on the state of affairs in the enterprise and any particularly important matters that arise
 - at least twice a year
 - Works council evolved from being a channel for co-operation between employer and employees into a body that represents the interests of the workforce.
- The works councils appear to **concern themselves mainly with**
 - labor-related, organizational and technical production matters
 - and less with financial and economic aspects.
 - Also, they monitor the employer's policy rather than make proposals of their own.

- **Structure and powers of the works council:**
 - The works council may form standing and ad hoc committees for the purposes of fulfilling its functions.
 - The employer is obliged to provide the council and its committees with facilities for consultation meetings and time for training.
 - **Prohibition of dismissal of works council members.**
- Right of consent:
 - The employer **must obtain the council's consent** for any decision introducing, amending or withdrawing the rules on labor-related matters specified in the Act.
 - Incl. rules on working hours and holidays, payment systems and job evaluation schemes, health and safety at work and the enterprise's works rules.
 - The council's **consent is not required** in cases where the matter concerned is already regulated by a collective agreement.
- Right to prior consultation *on economic matters*:
 - E.g. transfer of control of the company and the retrenchment, expansion or significant alteration of its activities, together with the right to regular consultation meetings with the employer and the right to information.

Poland

- The change of political system → consequences for employees' participation!
 - Have long been regarded by some observers as powerful institutions
 - In reality they are quite feeble and ineffective.
- At least 50 employees!
- The employer is obliged to inform the work council on:
 - the recent and probable development of the company's activities and economic situation;
 - the situation, structure and probable development of employment within the company and on any anticipatory measures envisaged, to maintain the level of employment;
 - decisions likely to lead to substantial changes in work organization or in contractual relations.
 - The work council has the right to issue an opinion on these matters.
 - In cases indicated in points (2) and (3), the employer shall consult the work council to reach an agreement between the employer and the work council.
- How a work council is established:



Spain

- Organ of workforce representation in enterprises or workplaces with **50 or more employees**.
 - Its members are elected by and from among all the employees (union elections) and hold their mandate for 4 years.
- Purpose:
 - to defend and promote employees' interests at work.
- **Powers and responsibilities:**
 - The right to **negotiate** company or workplace **agreements**;
 - the right to information or consultation on *financial, commercial and labor matters*;
 - responsibility for **supervising** and **monitoring** compliance with regulations on
 - labor matters, social security, employment and health and safety; and the right to take administrative and legal action.
- Its members must observe professional **confidentiality**.
- In contrast to the situation in other countries:
 - The **role of the workers' committee** in Spain
 - is principally one of **opposition**, rather than of involvement in joint management.
 - It occupies a central position in the Spanish industrial relations system both because of its powers and responsibilities
 - and because of its ability to bring trade union activities and programs into the enterprise and workplace,
 - given that, although it is not union-based, it has from the start been influenced and even dominated by the trade unions.

United Kingdom

- This term does not have the same specific meaning as in, for example, the West German context.
- Covers a wide range of committees at workplace level,
 - possibly involving only trade unionists, joint committees of unionists and managers, and non-union committees of managers and employee representatives.
- In a **unionized context** works councils are sometimes seen as the bodies dealing with non-collective bargaining issues, such as recreational and canteen facilities.
- April 2005 (the Information and Consultation of Employees):
 - introduced into UK law the right for employees to require their employers to negotiate about information and consultation arrangements;
 - applies to undertakings/companies with at least **150 employees**.
 - From 2007: undertakings with at least 100 employees could be asked to put in place information and consultation arrangements.
- **Powers:**
 - Employees have the **right to trigger negotiations** about arrangements for information and consultation with staff.
 - The requirement to negotiate can be triggered by a request from just 10% of the company's employees.

Overview

- Models of workplace employee representation bodies in the EU:
- Single channel worker representation by trade unions:
 - Sweden, UK, Baltic countries, Poland.

- The different trade unions have a certain number of seats on the work council or a major influence in the election of the council members:
 - Finland, Denmark, Italy, Belgium, Luxemburg, (Czech R, Slovak R.)
 - France, Spain, Portugal, Greece
- Work councils elected by the whole workforce that can be presented by any group at company level:
 - Austria, Germany, Netherlands, Slovenia