Manual for
European Workers'
Representatives

04
How to deal with confidential information

etui.

Main takeaways:

- The use of confidentiality clauses, which are an exception to normal information rights, should be limited and justified on reasonable grounds.
- Management's labelling of information as 'confidential' is not the same as 'withholding information'.
- The withholding of information by management must be strictly limited, based on specific provisions in national law, and applied only when 'objective criteria' threaten company interests.
- EWCs are 'insiders' in the company, not third parties.
- EWCs have the right to challenge management in court on the imposition of a duty of confidentiality.

Content

1. Introduction

A European Works Council (EWC) collectively represents the employees of a multinational company from all its countries of operation in Europe. An EWC's basic purpose is to facilitate the provision of information and ensure consultation of the workforce on company matters; information and consultation are also recognised as fundamental rights in the EU Charter of Fundamental Rights. This implies that there must be communication flows:

— from the management to the EWC to provide information ...
— ... and, subsequently, from the EWC to the employees they represent.

The Recast Directive includes the right for management to limit these information flows or apply special conditions to them if they deem it necessary. This means that management has a powerful tool in its hands that often acts as a crippling straitjacket on EWCs' rights and prevents the EWC from fulfilling its role.

This training manual deals with two serious forms of obstruction that management may use to block information flows. Firstly, management may label information as 'confidential', thus forbidding the EWC to share this information with others (including the employees it represents or local works councils). Alternatively, management may use the specific clause in the legislation (Art. 8 of the EWC Recast Directive and its transposition into national law) that allows them not to disclose information at all, because the disclosure of this information might be harmful to the company. Management often justifies this obstruction by arguing that stock exchange rules forbid the sharing of certain information with third parties.

In practice, as the results of the recent survey among EWC members show, many EWCs experience serious problems in executing their basic legal rights and serving their purpose. In this manual, we will explain how EWCs can distinguish between management's justified and unjustified claims, how EWCs can challenge management if they try to use these clauses in an improper way, and how EWCs can prevent this from happening again in the future.

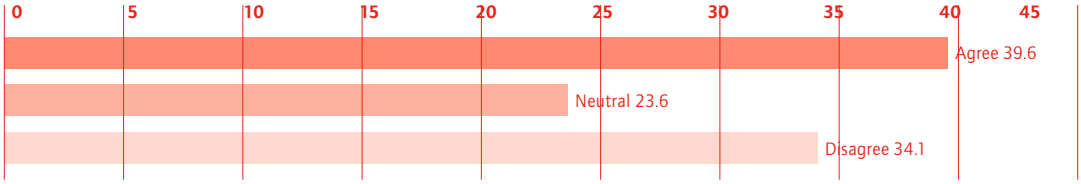
What do managers think about how confidentiality clauses are used in EWCs?

Management may deem certain information they release to the EWC confidential. In these circumstances, management assumes that EWC representatives will not share the confidential information more widely. Managers and workers' representatives differ in their views on how frequently confidentiality is used in practice. A survey endorsed by the Commission in 2016 (ICF) found that 15% of managers reported that their release of information to the EWC had led to breaches of confidentiality. Another study among managers (by BusinessEurope, 2016), however, reported that while managers working with EWCs within MNCs were concerned about confidentiality (particularly regarding the timing of the release of information) they did not think the issue was particularly problematic. The study argued that it could be handled within the EWC in a manner similar to the arrangements made with local workers' representation structures (e.g. works councils).

What do EWC members think about how confidentiality is used in EWCs?

EWC members perceive the use of confidentiality very differently from management. Four in ten EWC members participating in the ETUI survey in 2018 reported that management often refuses to provide information due to confidentiality, which is more than the number that disagreed with this statement.

Management often refuses to give information on the grounds of confidentiality



Source: De Spiegelaere and Jagodziński 2019.

In the same survey, 46.6% of EWC representatives reported that they often challenge management over confidentiality, whereas 21.8% disagreed with this statement.

Several factors increase the likelihood of an EWC challenging management over confidentiality:

1. Office holders challenge management over confidentiality more often (51.6%) than regular EWC members (43.7%). There is, however, much variation between EWCs when it comes to challenging managerial prerogative. Confirming previous case study evidence, the survey showed that the presence of an EWC coordinator helps EWCs to challenge management about confidentiality more frequently.

2. The EWC representatives who think that management withholds information are also those who often challenge management on confidentiality. Even those EWC representatives do not think that management withholds information report often challenging management on what is truly confidential (more than 3 in 10 EWC representatives). This data confirms an all too frequent use of confidentiality by managers and high levels of contestation over these practices within EWCs.

3. Confidentiality has serious implications on EWC operations. More than 7 in 10 workers' representatives who feel limited in their ability to report back attested to often challenging management over what information is confidential. In short, when EWC representatives think that management is using confidentiality to restrict their activities within the EWC, many of them challenge managerial use of confidentiality clauses.

The extent to which managers refuse to disclose information on the grounds of confidentiality may be explained by the fact that they often deem information confidential until the managerial decision has been finalised, which is also why so few engage in information and consultation processes prior to this (see also Meylemans and De Spiegelaere 2020; Kerckhofs 2015).

2. The difference between 'confidential' and 'non-disclosed' (withheld) information

Before we go deeper into the issue of 'confidentiality', and how to deal with it, we must clarify the distinction between the right of management not to disclose information and its right to impose the duty of confidentiality. This often causes confusion because the legislation itself is ambiguous.

Confidentiality and secrecy

The EWC Recast Directive (Article 8) states that Member States should include a clause about confidentiality in their national EWC legislation:

> '8.1 Member States shall provide that members of special negotiating bodies or of European Works Councils and any experts who assist them are not authorised to reveal any information which has expressly been provided to them in confidence.'

In the next clause the EWC Recast Directive also declares that national EWC legislation should give companies the right, under strict conditions, to withhold information from the EWC:

> '8.2 Each Member State shall provide, in specific cases and under the conditions and limits laid down by national legislation, that the Central Management situated in its territory is not obliged to transmit information when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them.'

To avoid confusion, we will refer to this second clause (8.2) as the right to 'secrecy'. As you can see from Article 8.2 of the EWC Recast Directive, the lifting of management's obligation to transmit information can only be applied under very specific circumstances laid down in the national EWC legislation.

Please note that in your national legislation 'confidentiality' may be translated into different terms, such as 'non-disclosure', 'secrecy', 'business secret', 'trade secret', or 'industrial secret'.

For a visual presentation of the difference between secrecy, confidentiality and normal information see infographic 1 *EWC: secrecy and confidentiality* at the end of this manual.

3. Why confidentiality? Acceptable and unacceptable reasons

'Information and consultation' is a basic right of employees. It is laid down in the EU Charter of Fundamental Rights. Therefore, the use of the clauses on confidentiality and secrecy should be very limited, and indeed restricted to exceptional cases. The EWC must be able to assess whether management makes unjustified use of these clauses and under what exceptional circumstances their use may be considered legitimate.

The EWC must be informed and consulted on decisions that can have a potential impact on workers' interests, at a point in time at which these decisions can still be changed. That implies that some of the information the EWC may receive will be confidential – that is, confidential to *the outside world, i.e. third parties*. However, an *EWC is not a third party* – it is an *internal body of the company*, an internal stakeholder composed of employee representatives of this company (just as local or group works councils are not third parties either). As such, given the obligations for management set out in the EWC Recast Directive, EWCs are part of – and an important step in – the *internal* corporate decision-making process.

If third parties obtain confidential information prematurely, it could indeed damage the company. Third parties could, for example, be competitors or stock market investors. For instance, if the company plans a big investment in a new business opportunity, competitors might quickly react and jump to buy its shares in the hope of making a profit. To name another example, if decisions have an impact on customers, then the company may want to inform important customers itself instead of letting them receive this information through the media.

These are all logical reasons to ask the EWC to keep some information confidential or secret – reasons that, most of the time, the EWC will understand – and they can be qualified as objective criteria. However, these grounds do not exclude the possibility of discussing the issue *inside* the company and with the EWC. The possibility of imposing a duty of confidentiality on EWC members is meant to enable detailed discussions of these issues with the EWC in a legally guaranteed secure environment and trust-based atmosphere. A duty of confidentiality is not meant to exclude the EWC from any discussion. In other words, it is a means to an end: the exchange of information between management and the EWC and, as such, cannot nullify the very objective and purpose of such exchange of information.

Another reason that is sometimes given as the reason for imposing confidentiality is the desire to avoid unnecessary or untimely unrest amongst affected employees. This is a more controversial issue. The EWC should not become the messenger boy for management; it should be management that informs affected employees about adverse consequences of its decisions as soon as possible. If it is still unclear which or even how many employees will be affected, the question will be: what should be communicated to the employees? As a responsible EWC member, you may wish to avoid a case in which your colleagues start to worry unnecessarily. This is, however, not an issue that management should decide unilaterally. In such cases it is the EWC representatives of the affected employees (who, after all, have the legal responsibility to collectively represent the interests of employees) who should have the mandate and authority to weigh all the pros and cons and decide what to communicate, when, and to whom. In general, unrest can be better prevented by full transparency than by not informing employees at all – because, one way or another, the workforce will start piecing together scraps of information, rumours will spread, and unrest will likely follow.

A third reason, and maybe the one most often cited by management, is that certain information might be sensitive due to the company's stock value and to stock market regulations. In many cases, this even leads to management making use of their right to 'secrecy' (withholding information altogether, Art. 8.2), meaning that they do not inform the EWC at all. However, in general, stock exchange rules or laws on insider trading can only be grounds for 'confidentiality'. These rules do not have the goal to limit the rights of worker representatives, but to prevent distortions on stock markets caused by uneven access to information and the use of insider information. The workers' fundamental rights to information and consultation are thus in no way subordinate to stock market rules or financial regulations. This view is, for example, confirmed by the British government's official interpretation of the rule, explained in the guidance document below.

Guidance of the Department of Trade and Industry of Great Britain (2005)

The UK Department of Trade and Industry offered official guidance to companies on how to deal with (amongst other things) confidentiality in information and consultation procedures (2005):

> 'It is important to point out that neither the UK Listing Rules, nor the City Code on Takeovers and Mergers, nor US rules prevent a company sharing price-sensitive information with representatives of employees before it is disclosed to the market, as long as those representatives are subject to an obligation of confidentiality. DTI does not believe there is any inconsistency between the obligations in the I&C Regulations and those in the Listing Rules or the Takeover Code, so there is no issue of one taking precedence over the other. However, the Listing Rules and the Takeover Code would limit the number of people who can be made privy to price-sensitive information and restrict who those people can be.
>
> When a company is preparing proposals, for example a restructuring, this does not have to be publicly disclosed during the planning stage provided the relevant information is kept confidential. However, the company may give such information which could affect the share price to certain categories of recipients. The categories include 'representatives of employees or trades unions acting on their behalf'. The company must be satisfied that such recipients of information are aware that they must not deal in the company's securities before the relevant information has been made available to the public.
>
> Before it has been announced to the market, any price-sensitive information could not be shared with the wider workforce, but only with a limited number of named individuals.'

Legitimate disclosure of insider information

The EU's Market Abuse Directive (2003/6/EC) includes significant provisions that allow the sharing of inside information under two conditions. First, the Directive permits companies and their advisers to disclose inside information on a selective basis, but only where there is **a legitimate reason** for doing so and the person receiving the information is subject to a duty of confidentiality. This could include representatives of employees. Secondly, the Directive requires companies that issue shares, or their advisers, to **keep a list of those who have access to inside information** concerning the company. These lists are to be made available to financial regulatory authorities on request.

From this we can draw an important conclusion: **if confidentiality is guaranteed by a legal provision, then there is no reason why the EWC cannot be informed**.

It may be that management would like to have additional guarantees, e.g. an agreement prohibiting EWC members from using the insider information to buy or sell shares on the stock market. But legislation in all EU countries based on the 2014 'Criminal Sanctions for Market Abuse Directive' already forbids this insider trading.

In specific circumstances, legislation may oblige management to be stricter because of extra confidentiality obligations they may themselves be subject to. Companies involved in a takeover or merger will need to comply with their obligations under relevant legislation or codes. Companies that have entered into a contract, e.g. for the sale or purchase of a plant, may be subject to contractual restrictions as to what information can be divulged to third parties. All these considerations are only important for third parties. Again, it has to be emphasised that **the EWC is an internal body of the company whose statutory duty is to inform employees, who are insiders and not third parties. Informing the EWC is therefore not the same as informing the public!** (see infographic 2 *Confidentiality: insiders vs. outsiders* at the end of this manual).

No contract or other agreement can exclude or limit the statutory right to information and consultation (Department of Trade and Industry of Great Britain 2005). It is only in accordance with the 'secrecy' provisions that these information rights can be limited and, as shown in Box 1 above, management can only apply these 'secrecy' provisions according to objective criteria and under the very specific circumstances laid down in the national EWC legislation.

Tip

As an EWC representative, you should not feel that you have to be a legal expert. If management wants to refer to specific laws or codes, they should specify exactly which clause in which law they are referring to and, preferably, quote the provision. This will allow the EWC to let these criteria be checked by their union or expert. But, more often than not, you will discover that management will not be able to give you the exact legal grounds or indicate the objective criteria!

4. Imposing confidentiality as an alternative to not giving information at all?

In all the above-mentioned cases, there is a relation between management's right to secrecy and the employee's duty of confidentiality. By applying the duty of confidentiality, management does not have to fall back on their right to secrecy. When management tells the EWC, 'We must apply our right to "secrecy", I cannot give you this information because of stock exchange rules', the EWC can answer: 'You can inform us under "confidentiality" rules'. Without the possibility to apply their right to confidentiality, or without the confidence that the EWC will keep to it, management will much more often use their right to secrecy. A similar trade-off may exist between the need for confidentiality and the timing of the information. The earlier the EWC receives information, the more likely it may be that confidentiality must be applied to some extent.

That is not to say that the EWC should always accept that information only be given confidentially. On the contrary, it is the task of the EWC to critically assess the need for confidentiality and, if they conclude there to be none, challenge this. At the same time, a flexible and creative approach may make all the difference between receiving information in confidentiality and not receiving it at all, or between receiving it in a timely fashion under confidentiality obligations and receiving it when it is too late.

5. Challenging confidentiality

It is not unusual that a regular EWC meeting is dominated by PowerPoints, with each slide containing an automatic header marked 'strictly confidential'. Sometimes this might even be attached to the slide announcing the evening dinner!

As a rule, EWC members should be allowed to share all the information they receive with the colleagues they represent. Confidential information should be an exception. If something needs to be kept confidential, it must be justified by management indicating reasonable grounds. Management may only use its right to confidentiality in specific cases (as mentioned in national legislation) and only under certain conditions. It cannot be applied arbitrarily or according to subjective criteria. There are several questions that an EWC should always insist on being answered:

'Why?': Management should explain how releasing such information could harm the company's interests and how sharing it with EWC members could contribute to such harm.

'What?': management should also make clear which specific parts of the information are confidential. This could be, for instance, the financial calculations underlying a decision, or specific sales figures.

'Until when?': another element that should be made clear is for how long this issue is to remain confidential. Will the company make an announcement at some point?

'Who?': the fourth element that management should clarify is *to whom* the information marked as confidential cannot be transmitted, and who the EWC representatives are allowed to share (some of) the information with. It is handy to know, as an EWC representative, who else has been informed about the issue, or who will be informed when. This will give you the opportunity to discuss the confidential issues with these people at national or local level (e.g. local works council members) and to develop your opinion. In practice, the need for confidentiality will change over time during a project. Step by step the need will decrease, and it will be gradually possible to share more pieces of information with more people (see infographic 3 *Confidentiality: the time dimension* at the end of this manual).

The conditions under which confidentiality has to be applied (i.e. which part of the information is confidential, for how long the information must stay confidential, and with whom the information can be shared) should not just be imposed, but mutually agreed between management and the EWC in each specific case.

When deciding whether information is confidential or not, management often tends to stay on the safe side, often to the extreme of labelling all information provided as confidential. The EWC *can* challenge this. This could be done as soon as the EWC notices that – for instance – all presentations that they receive are marked as 'confidential'. The EWC can also, at the end of a meeting, raise the question of which pieces of information they can share with their constituencies. It may turn out that management agrees that actually not that much is confidential. If the EWC disagrees with management on the need for confidentiality concerning specific information, in most countries it is possible to bring such a disagreement before court. A court in the country under whose jurisdiction the EWC agreement is signed will then have to make a decision on it.

Legal right to challenge confidentiality

In many countries, the EWC can go to court (or some similar labour council or arbitration institute) to challenge the imposed duty of confidentiality. This is the case for EWCs that are established under the laws of Belgium, Cyprus, the Czech Republic, Finland, France, Ireland, Italy, Lithuania, Luxembourg, the Netherlands, Malta, Norway, Poland, Portugal, Romania, Spain, Sweden and the UK. In other countries however, for instance Austria and Germany, such a specific clause is lacking.

Note that in most countries, this right to challenge the application of the confidentiality status is a right of the EWC, not an individual right of an EWC member. Therefore, in most cases the court of the country under whose legislation the EWC agreement is signed will be the ruling court, not the court of the individual EWC member.

Special attention should be paid to the use of confidentiality between employee representatives. The next chapter will be devoted to this.

6. Confidentiality between employee representatives?

The EWC represents the employees of an MNC across Europe. To do so, it must be able to communicate and discuss with the employee representatives (and sometimes directly with the employees) in the different countries in which the company has operations. If there is a duty of confidentiality that forbids the EWC members to do this, then the EWC is seriously weakened.

Article 12.3 of the Recast Directive, which concerns the relation between the EWC and the local employee representation, has important implications for our discussion on confidentiality. It stipulates:

> 'The Member States shall ensure that the processes of informing and consulting are conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.'

According to the Recast Directive, it is for the parties (EWC and management) to agree on a clause on the specific rules about the linkage between the EWC and local levels of information and consultation in the EWC agreement. The national legislation should also provide for fall-back solutions in case the EWC agreement does not include such a clause. In some countries (the UK, Italy, the Netherlands, and Spain) the national EWC legislation specifies that the provision of information to and consultation of the EWC and of the local employee representation bodies shall begin:

— 'simultaneously'; or
— 'as far as possible at the same time'; or
— 'within reasonable time of each other'; or
— 'in a coordinated manner'.

These are useful phrases to apply in an EWC agreement too. If all levels are informed at the same time, there is no reason to impose confidentiality on EWC representatives with regard to local representatives. This, however, should be addressed and secured in the EWC agreement.

A second tool to make sure that communication between the different levels of employee representation will not be blocked by a confidentiality duty is to copy general clauses from national legislation into the specific rules laid out in the EWC agreement. For instance, the German EWC Act explicitly declares that the duty to observe confidentiality shall not apply vis-à-vis the employee representatives of local establishments nor vis-à-vis employee representatives on the supervisory board. The Austrian, Estonian, Hungarian, Irish, Luxembourgian and Slovenian EWC Acts contain similar clauses. When negotiating an EWC agreement, it could be argued that if such rules apply for the representatives from several countries represented in the EWC, they should also apply to other members. It is of crucial importance in this respect that, in almost all cases, members of employee representation bodies are also bound by a confidentiality clause based on the local rules for trade union representatives, shop stewards and/or local works councils. Many EWCs have been able to obtain agreement from management that they may discuss confidential information with their fellow employee representatives in local bodies under the condition that these representatives also be bound to confidentiality.

No confidentiality between employee representatives: example from an EWC agreement

'A person who has received information subject to confidentiality may, notwithstanding the duty of confidentiality, transmit such information to other employee representatives or experts in the same body. The right to transmit information shall only apply where the provider of the information notifies the recipient of the duty of confidentiality. In such cases, the duty of confidentiality shall also apply to the recipient.'

7. Tips and tools to limit the imposition of confidentiality

As we could see from the previous paragraph, there may be good reasons for confidentiality that need to be accepted, if only to avoid the use of a 'secrecy' clause. But how can confidentiality be prevented from obstructing your effectiveness, rights, and duties as an employee representative?

Pay attention to the clause in the EWC agreement [1]

Most EWC agreements specify more detailed rules for applying the general legal provisions on confidentiality and secrecy to practice. From the employees' point of view, such a clause should state that where companies use their right to secrecy in order to withhold information, they must notify employees' representatives that this is the case and inform them of the 'why', 'what', 'who' and 'until when' (see section 5 of this manual). It should also include wording on allowing an appeal to the applicable court to test whether the confidentiality request or the withholding of information is valid. Such a clause should also contain wording that stipulates that the confidentiality requirements will be used only as an exception and not unreasonably.

Examples from EWC agreements

Skandinaviska Enskilda Banken (SEB)

Art. 19: 'Management may prescribe a duty of confidentiality for EWC representatives and experts if such is required in the best interest of SEB. If information is received by an EWC representative subject to confidentiality, **the EWC representative may transmit such information to other EWC representatives or experts** connected with the EWC if the representative notifies the recipient of the duty of confidentiality. The EWC representative **may also transmit such information to local trade unions applicable for the workplace and local work councils/employee representative bodies** (if applicable) prescribing the duty of confidentiality as applicable. The SEB EWC can in cases when confidentiality is prescribed **ask Group HR for the reasoning behind such prescription.** It should be clearly stated **what parts of the information/documentation is subject to confidentiality** and what parts are not. The SEB EWC shall receive information about timing for when such confidentiality is no longer applicable in order to be able to fulfil its information tasks. When forwarding information that is partly confidential, the EWC shall receive a general information statement about the information matter in question that can be forwarded to the employees or applicable representative bodies.'

Continue reading →

1. Based on UNITE the Union, https://www.unitelegalservices.org/media/1582/information-and-consultation-regulations-unite-guide-for-members.pdf

ING Group

Art 8.b: 'With respect to the provision of information, the Executive Board may impose a requirement of confidentiality **if there are reasonable grounds** to do so. Where possible, **the grounds for imposing an obligation of confidentiality, the duration** of the confidentiality, **the information** subject to such obligation ("confidential information") **and a list,** which may be amended from time to time, identifying those **persons with whom the confidential information may be shared** shall be stated or provided before the matter in question is considered. The list, referred to in the previous sentence, **shall include other employee representatives and experts,** unless the Executive Board explicitly determines otherwise. The Executive Board shall not transmit the information in question to those who refuse to accept the obligation of confidentiality.'

The clause should make clear that the central management may impose a requirement of confidentiality only in exceptional cases. Many companies have published their 'corporate values', or 'business principles'. It might be worthwhile to check if these documents contain text on such issues as 'transparency', 'openness' and 'dialogue'. If so, these could be included in the clause on confidentiality in the EWC agreement. For instance:

> 'In line with our basic business principles of transparency and openness, central management aims to inform the EWC in a timely fashion and as comprehensively as possible, and to limit, as much as possible, the use of its right to impose a confidentiality obligation or to not disclose sensitive information.'

Moreover, the clause on confidential information should make clear that central management may only impose a requirement of confidentiality if there are reasonable grounds to do so and that this should be announced in advance, indicating the grounds for imposing the requirement, what written or orally provided information is covered, and for how long it applies. Management should also make it clear whether there are any persons towards whom such confidentiality does not need to be maintained. It would also help to have a provision to allow representatives to consult with a limited circle of other stakeholders , such as a union officer or a legal representative, in order to assess whether the information has been correctly labelled as 'confidential' in accordance with the legislation based on the Recast Directive.

Finally, even if such specific arrangements cannot be included in the EWC agreement itself, it may still be worthwhile to invoke them in oral discussions about confidentiality.

This last part covers the concept of 'circles of confidentiality'.

The circles of confidentiality

In many cases, the confidentiality requirement can be limited by specifying three key elements:

- the specific part of the information that should remain confidential;
- the duration of the duty to maintain confidentiality;
- and the 'circles of confidentiality'.

The 'circles of confidentiality' concept is very useful for preventing the misuse of general confidentiality clauses. For example, some companies use terms such as 'company confidential', indicating that the information may be shared inside the company but not with third parties. The 'circles of confidentiality' concept formalises this in a clearer way (see also infographic 4 *Circles of confidentiality* at the end of this manual).

Circle 1 Board-level employee representatives (BLER)

Some information is provided only to the management boards or to the supervisory boards that are considered managerial organs. In some countries, however, workers in specific types of companies or in European Companies (SE, Societas Europea) are entitled to elect their representatives either to the Supervisory Board or Management Board (depending on national legislation and corporate structure of the company), who then have access to such information.

Circle 2 Select Committee of an EWC

The management may sometimes prefer to give information only to the Select Committee. This, however, is rather controversial and can prove highly problematic (see text box, page 16).

Circle 3 EWC only

There might be occasions where **certain information**, for a **certain length of time**, may only be discussed between EWC members.

Circle 4 Employee representatives

Such information can only be shared with employee representatives (both local and EWC representatives).

Circle 5 Company information

This type of information can be shared with all employees, but not made available to the outside world.

Circle 6 Public information

Such information can be shared widely and has often already been made public before the EWC receives it.

Board-level employee representatives

In this manual we will not deal with 'board-level employee representation' (BLER) as it is a very specific and complex form of representation. In around 19 European EU Member States, the supervisory boards of larger or public-owned companies may contain members that have been appointed by either works councils and/or trade unions. The rights and duties of these boards vary quite widely, and so does the position of the employee representatives on them. However, in most cases, they receive much more information than local or European Works Councils. These board-level employee representatives are usually covered by the same or similar legislation pertaining to confidential information as EWC members, but may also be subject to additional specific provisions. In most countries, this is a separate piece of legislation from works council and EWC legislation.

There may also be board-level employee representatives at the European level in so-called European Companies (SEs). Again, this is based on legislation distinct from works council and EWC laws.

Because this manual is focused on dealing with the confidentiality issue within EWCs, we will not go into much detail about BLER here. However, in order to best represent workers' interests, EWC members are strongly advised to take notice of the existence of possible systems of BLER in their company and, wherever possible, establish close links with BLER members and exchange information. Moreover, it would be very useful to have a clause in the EWC agreement specifying that confidentiality does not prevent contact and the exchange of information with BLERs in the company.

For more information, please see www.worker-participation.eu and www.etui.org.

Select Committee only?

Management often has more confidence in sharing information with the Select Committee (SC) alone than with the entire EWC. The main reason is that the number of persons involved is much more limited and it is easier to control the flow of information. Other reasons might be that they meet each other more regularly so some level of mutual trust has already been developed, or because in an SC there is a smaller turnover of membership, or because members of the SC are often more experienced employee representatives. However understandable and convenient this might be from the point of view of management, it goes against the fundamental point of having an EWC.

The EWC is the representative body for all of a company's employees in Europe, and the SC does not constitute any kind of top-level representation above the EWC. According to the Recast Directive (Recital 30 of the Preamble), the function of the SC is 'to permit coordination and greater effectiveness of the regular activities of the European Works Council, together with Information and Consultation at the earliest opportunity where exceptional circumstances arise.' The EWC agreement should specify the role of the SC; the internal rules of the EWC may also add some more detail on working methods.

In practice, however, the SC is often the first point of contact. This can sometimes be useful, for instance if an extraordinary meeting is called and this enables the SC to start preparing for that meeting. But the EWC would become a mere formality if the SC were to receive information that it cannot discuss with the rest of the EWC, or at least with the affected countries within a short timeframe.

It may even happen that central management wishes to inform only the chairperson of the SC, without allowing the chairperson to discuss this with others. But central management has a duty to inform the entire EWC. Within the SC or the EWC, this way of working often leads to a lot of friction which would be better off avoided. One way the EWC could prevent the chairperson from being tempted by management to engage in such private consultations would be to include in its internal rules an obligation for the chair to always inform the rest of the SC of his/her exchanges with central management. Some EWCs may also have in their internal rules a clause prohibiting one-on-one contact between the chair and central management, and insisting upon the participation of a second SC member in these conversations. In addition, it may be useful to have a rule insisting that minutes or notes be taken after any communication with management, to be subsequently shared with the rest of the EWC.

Check public sources

Sometimes, an EWC receives financial information, all strictly confidential, in numbered copies that must be signed to confirm receipt. Then it turns out that the same information is already publicly available on the internet. Therefore, if you feel the company is making use of the confidentiality clause too often, it might be useful to check public sources. The most useful will be the 'investor relations' section on the company website. If the company is quoted on a stock exchange, the website of that stock exchange may also be a very useful source, such as the database of the US Stock Exchange (https://www.sec.gov/edgar.shtml).

Training

EWC members have different political and cultural backgrounds. In addition, their experiences in dealing with confidential information may differ. All this leads to different levels of awareness about the issue of confidentiality and to different expectations and behaviours when dealing with confidential information. The EWC has to find a way of dealing with this. If one individual representative acts against what has been agreed in the EWC on how to handle a certain piece of information, this may well damage the whole EWC by undermining management's trust in the members, as a collective.

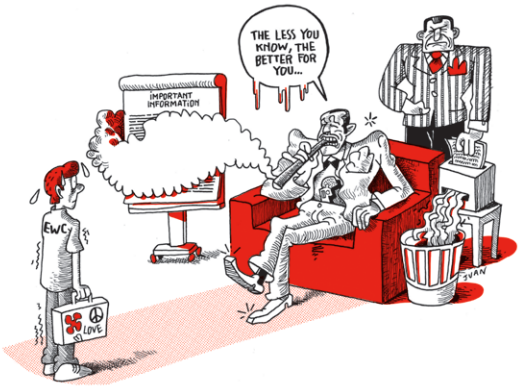
Because of the complicated aspects of this issue, both cultural and legal, EWCs may do well to pick this as a topic for a training session. In this way, the cultural and political context of confidentiality clauses, as well as the legal and practical aspects, can be thoroughly discussed, and common ground built within the EWC.

Develop a protocol

In most EWC legislation, the issue of confidentiality is not really solved in a workable manner. Conflicting legal provisions and different interests may also remain unresolved in the EWC agreement. Many EWCs have been able to establish an effective practice on a case-by-case basis. At a certain point, however, it may be useful to formalise this into a kind of internal 'protocol' because otherwise this practice may get lost when new managers and new EWC members come in.

A training course on confidentiality can be a good starting point to develop this 'protocol'.

In such a protocol, practical steps would be described on how to handle possible issues and conflicting interests when dealing with confidentiality. This can lead to a formal agreement with management, but it can also be applied as internal rules. The EWC may then inform the management about these rules, so that management knows what to expect.



Possible elements of a confidentiality protocol

a. Exception

The EWC is an important forum for informing the workforce and enabling employees to have their voice heard. Because of the importance of open communication, transparency and good labour relations, the central management will only use their right to secrecy or to impose confidentiality as an exception, if there is an urgent need to do so.

b. Mutual agreement

If central management makes use of their right to secrecy or to impose confidentiality, this will be announced to the Select Committee prior to the meeting and the need for it will be discussed. In the case of confidential information, the aim will be to come to an agreement about which information can be labelled as confidential, for how long, and who the information can

Continue reading →

be shared with at a certain point in time. The level and/or 'circle' of confidentiality will be clearly defined. As a general rule, it should be possible to inform other employee representatives who are also bound by a confidentiality clause, for instance in their national works council or trade union legislation.

If the information is highly confidential (for example, it may concern inside information on take-over bids), the company may request a list of the persons who have been informed.

If this is agreed to, the EWC will adhere to this agreement.

c. Dispute resolution

If a member of the EWC feels that he/she should disseminate certain confidential information in his/her country, he/she must discuss this with the Select Committee prior to any action. The Select Committee may then decide on behalf of the EWC if and how this can be done, specifying the content of the information, the timeframe for the disclosure, and which persons will receive it. This will be communicated to the central management and, if necessary, the Select Committee will clarify any unresolved issues with central management.

If no agreement can be reached, the case will be brought to court (or whatever may be the appropriate legal institution for dispute resolution – if it exists – in the jurisdiction under which the EWC agreement operates).

Legal responsibility for breaches of obligation to maintain confidentiality

The national legislation (criminal law, labour law or civil law) that pertains to an individual EWC member provides the procedures and the sanctions that can be taken against an employee who breaches the duty of confidentiality if the company were to bring the case to court. Countries in the EU have widely varying sanctions. Fines and potentially even imprisonment are consequences laid out in some national laws. Internal disciplinary measures may also be applicable, such as suspension from the EWC or dismissal from the company. These sanctions have a strong preventive effect, but there are no known cases of EWC members having been fined, let alone sent to prison because of breaking confidentiality rules. (See below for an example concerning a Danish employee representative on the national board of a company.)

EWC-related litigation around the (ab)use of confidentiality

Managerial abuse of confidentiality obligations in EWCs has been known to cause conflict and cases have sometimes even reached the courts. The management at software company Oracle labelled information about planned redundancies confidential, despite it already being in the public domain, thus prohibiting EWC representatives from communicating more widely about the planned redundancies. The Central Arbitration Committee of the UK ruled that the management at Oracle had used confidentiality excessively (CAC judgement of 2018, case number: EWC/17/2017). Similar cases were brought to national courts across Europe by EWCs at Forbo (2004, Germany), ExxonMobil (2007 and 2008, Belgium) and Verizon (2019, the UK).

For more information, you can consult the litigation section of the ETUI database of EWCs at: www.ewcdb.eu/search/court-cases.

Confidentiality and insider trading litigation: can it be justified to share confidential information?

In a 2000 insider trading case in which confidentiality of information played an important role, the Danish Supreme Court ruled that an employee representative could share confidential information 'in the ordinary course of his function as an employee representative'

In August 2000, Knud Grøngaard, an employee representative on RealDanmark's board and Chairman of the Danish Financial Services Union's chapter in RealDanmark, disclosed that the board had decided to launch merger negotiations with Danske Bank. He told this to the Chairman of the Danish Financial Services Union, Allan Bang.

Grøngaard then disclosed the date of publication of the merger and the exchange ratio between the companies' shares. Allan Bang subsequently disclosed this information to his vice-chairmen and closest employees. This information was used by external individuals (third parties) to purchase stock and make profit based on insider trading/secret information.

The case was referred to the European Court of Justice (ECJ) for a preliminary ruling (i.e. an interpretation of the EU law C-384/02). Based on the ECJ's interpretation, the Danish Supreme Court concluded that an employee representative was generally entitled to discuss issues regarding a merger of great importance to the employees with the chairman of his or her trade union. Moreover, the disclosure was not only motivated by the desire to prepare for the merger, but also to discuss with Allan Bang what position to take on it, just as the information on the exchange ratio was disclosed in order for the union to assess whether there was an opportunity for a counter offer to possibly help avoid job losses.

The Danish Supreme Court found that Knud Grøngaard's disclosure was motivated and done in the ordinary course of his function as an employee representative. Allan Bang's disclosure of the information to his closest employees was done in the ordinary course of his work as the Chairman of the Financial Services Union. The Supreme Court thus concluded that Knud Grøngaard and Allan Bang did not break the law.

However, non-compliance with an obligation of confidentiality, either by the EWC or an individual, leads to another very serious 'sanction': the EWC will receive less information. For an information and consultation process to work, there is a need for a certain level of mutual confidence. If this is lost, the EWC will be in a difficult position. The information flow will break down. Therefore, it is the collective responsibility of the EWC to maintain confidentiality where confidentiality has been agreed on with management.

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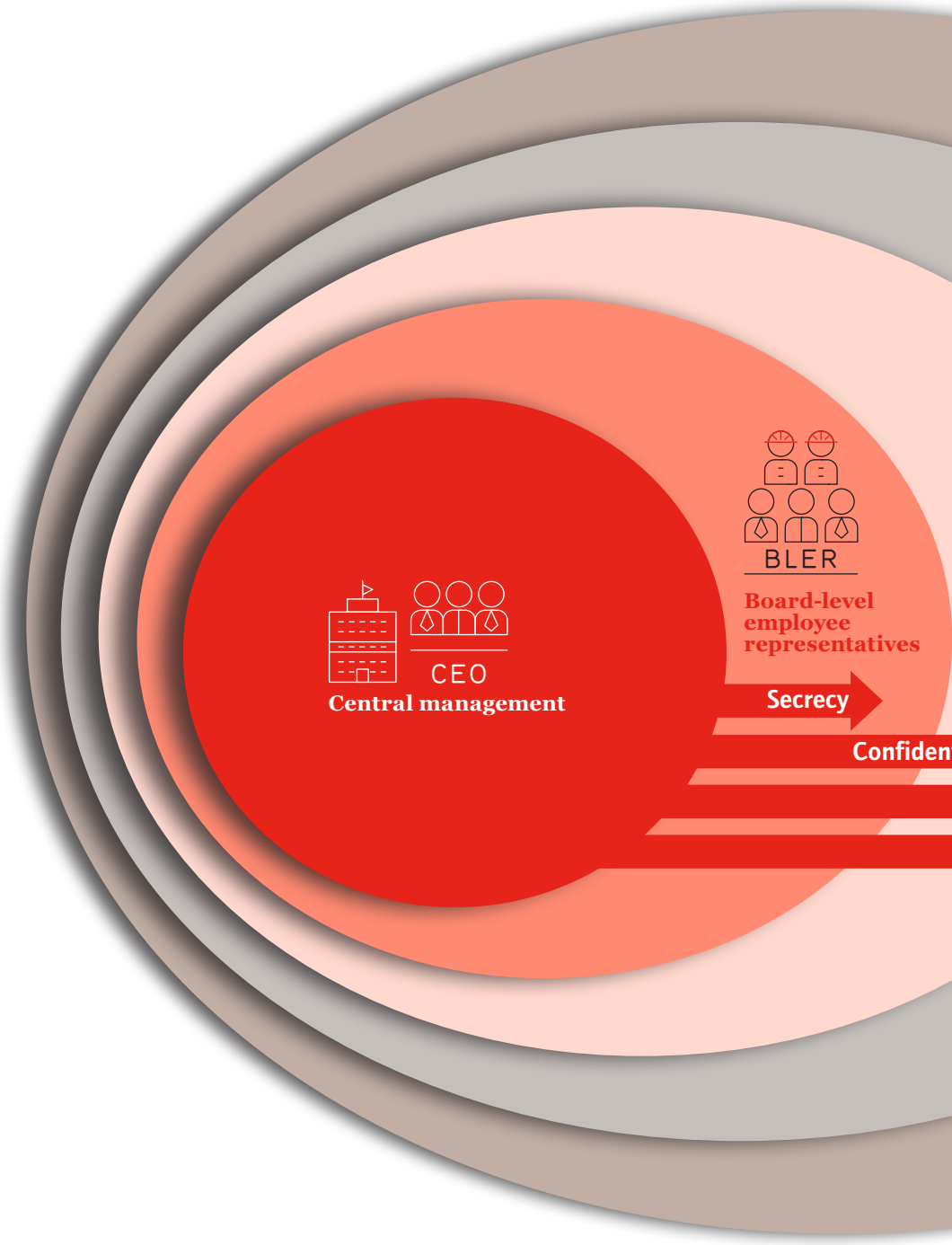
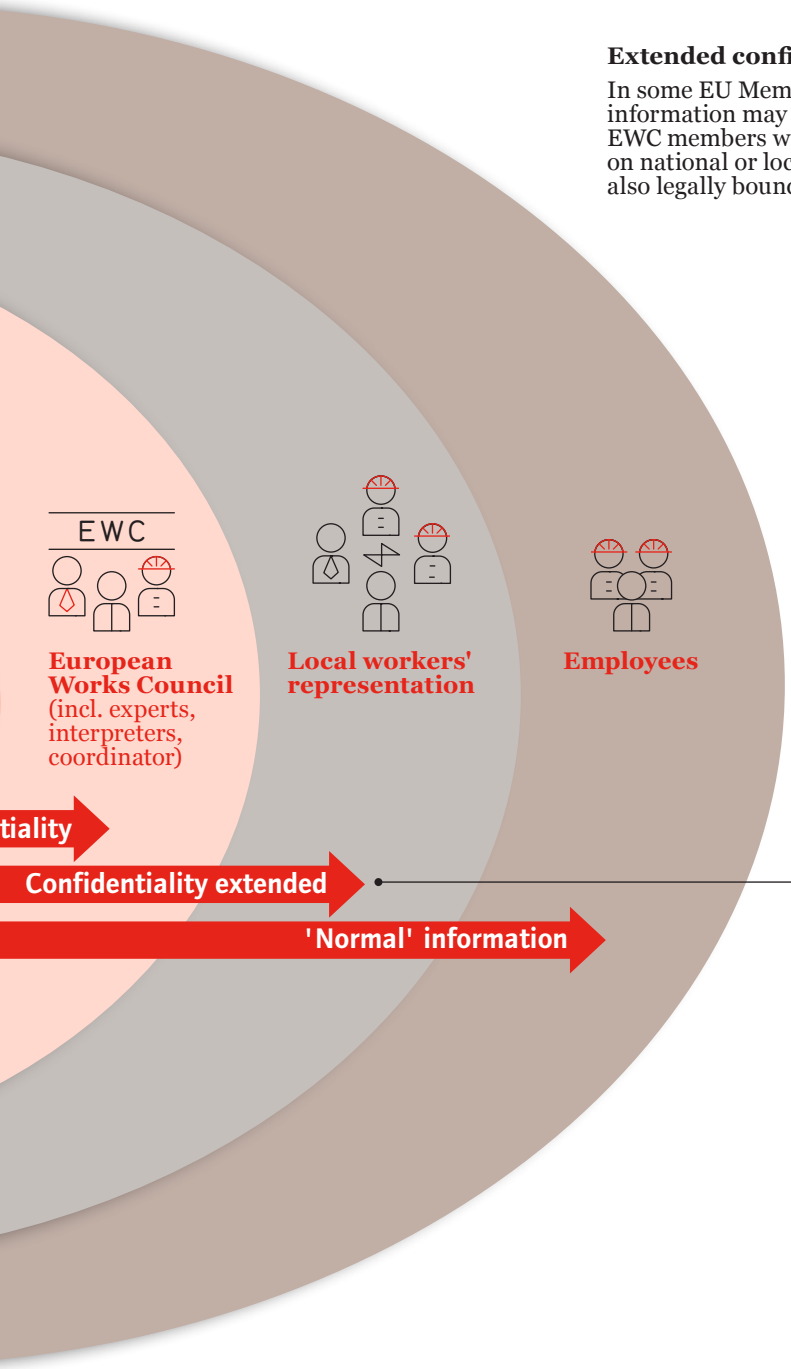
Infographic 1 EWC: confidentiality and secrecy

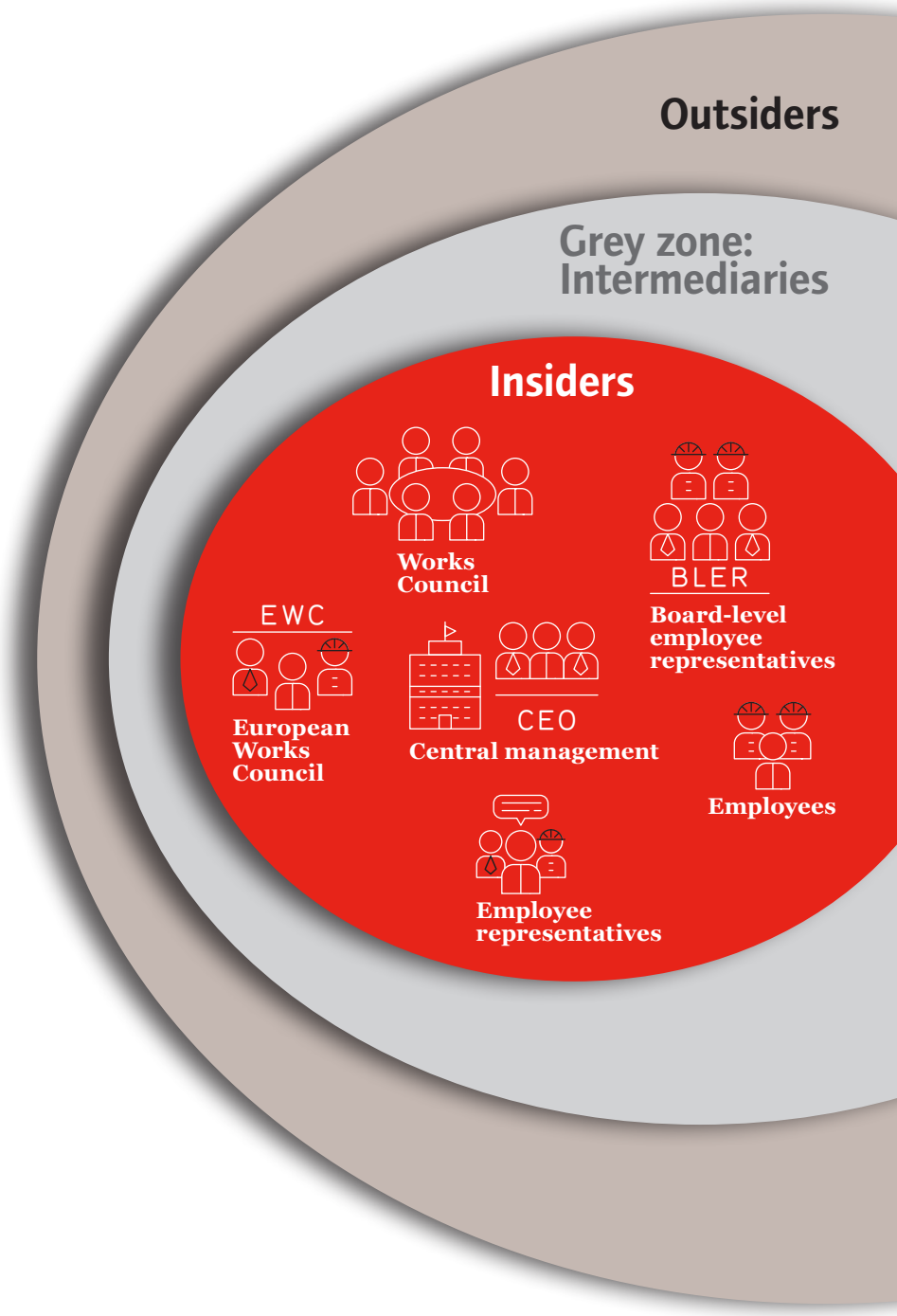


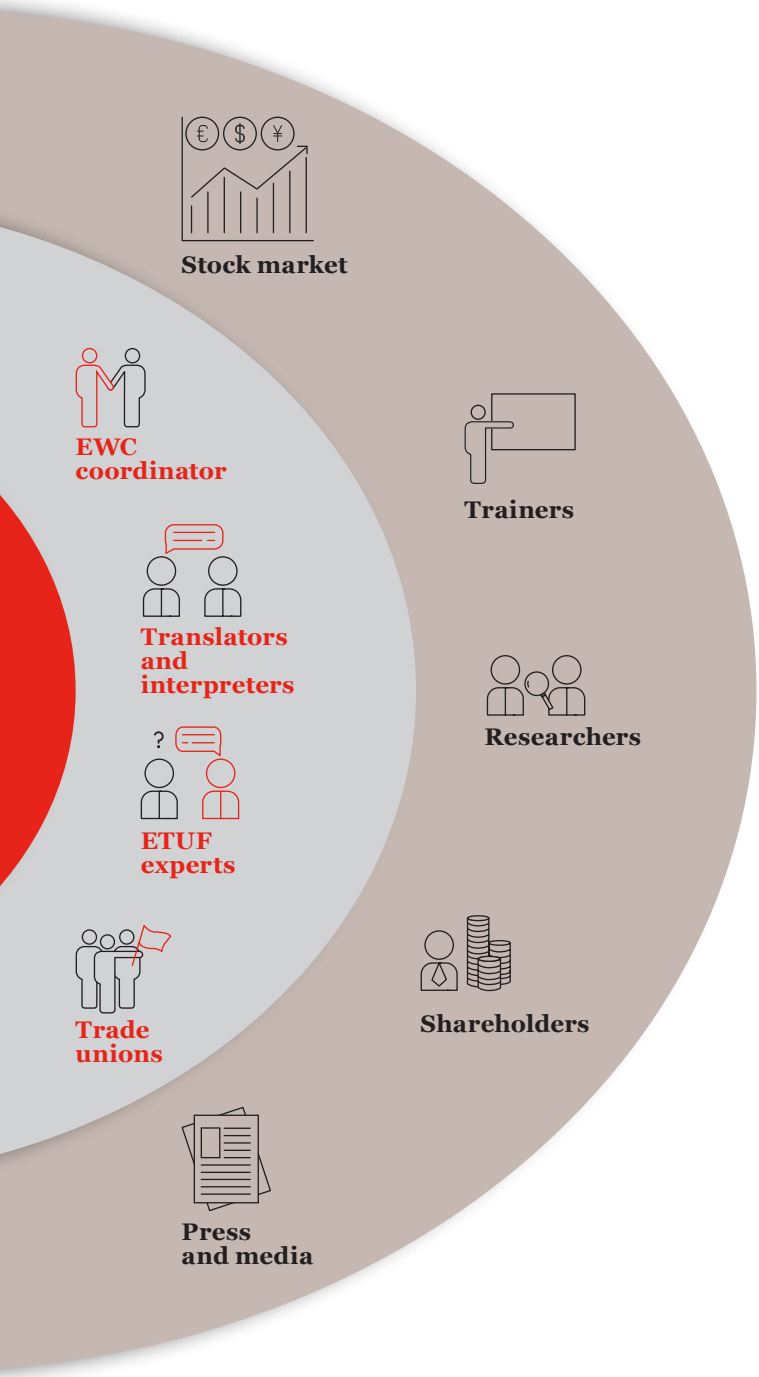


Extended confidentiality

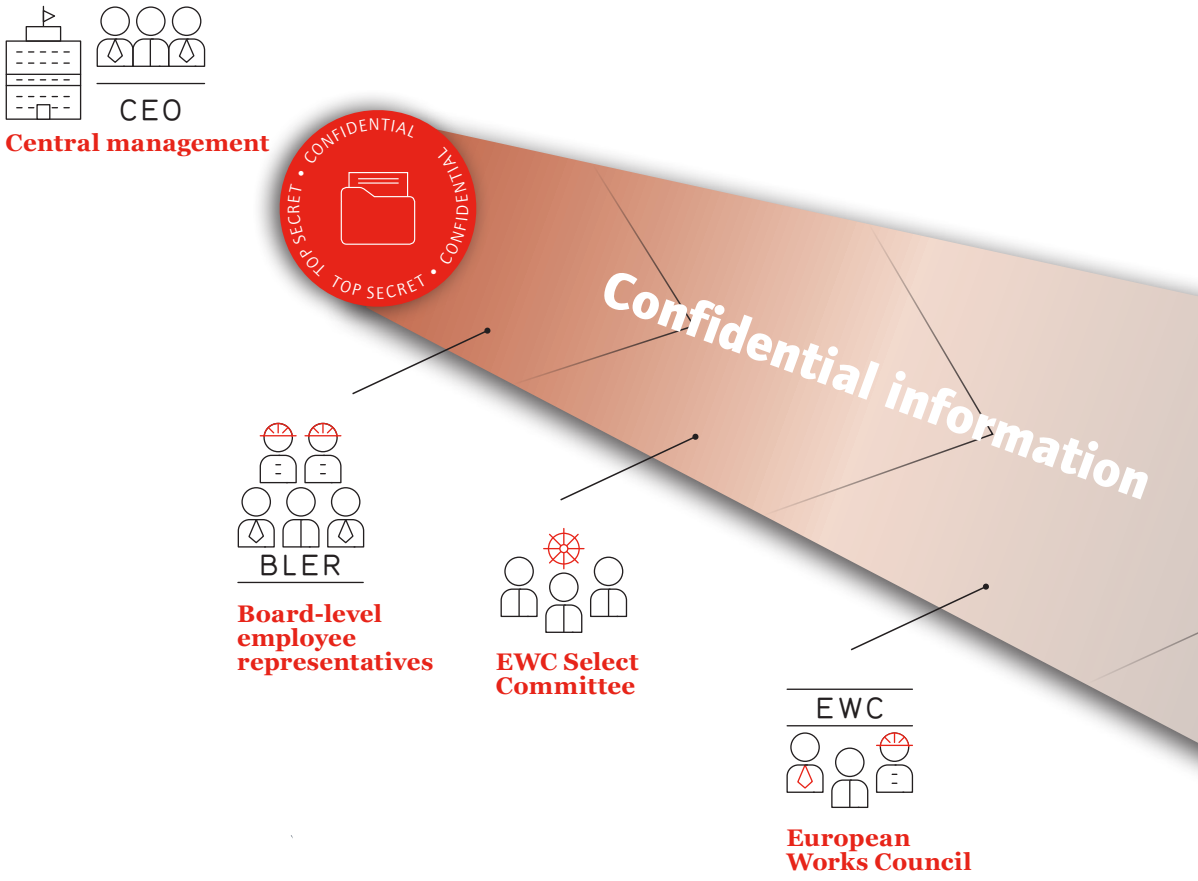
In some EU Member States confidential information may be legally shared further by EWC members with workers' representatives on national or local levels, as long as they are also legally bound to observe confidentiality.

Infographic 2 Confidentiality: insiders and outsiders



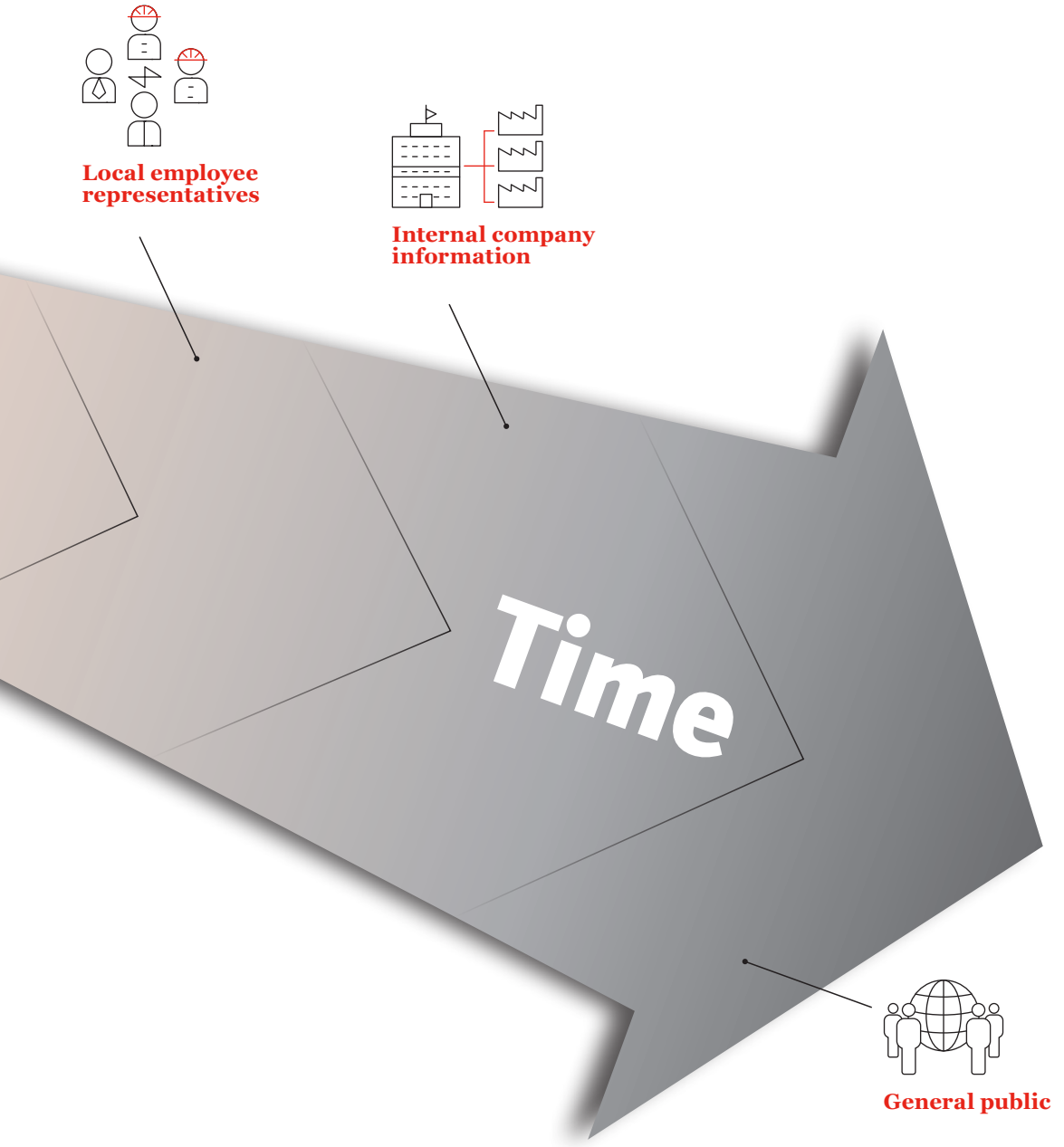

Stock market
EWC coordinator
Trainers
Translators and interpreters
Researchers
ETUF experts
Trade unions
Shareholders
Press and media

Infographic 3 Confidentiality: the time dimension

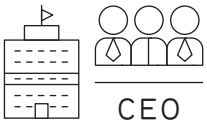


Lifespan of confidentiality

Confidentiality should not be imposed by management for indefinite time. On top of legal requirements in national law, the EWC Recast Directive, and arrangements in EWC agreements the European Trade Union Federations recommend that EWC insist on management to specify :
- **what** specific piece(s) of information is covered;
- for **how long** confidentiality must be applied;
- **to whom** it applies.


Local employee representatives
Internal company information
Time
General public

Infographic 4 Circles of confidentiality



Central management

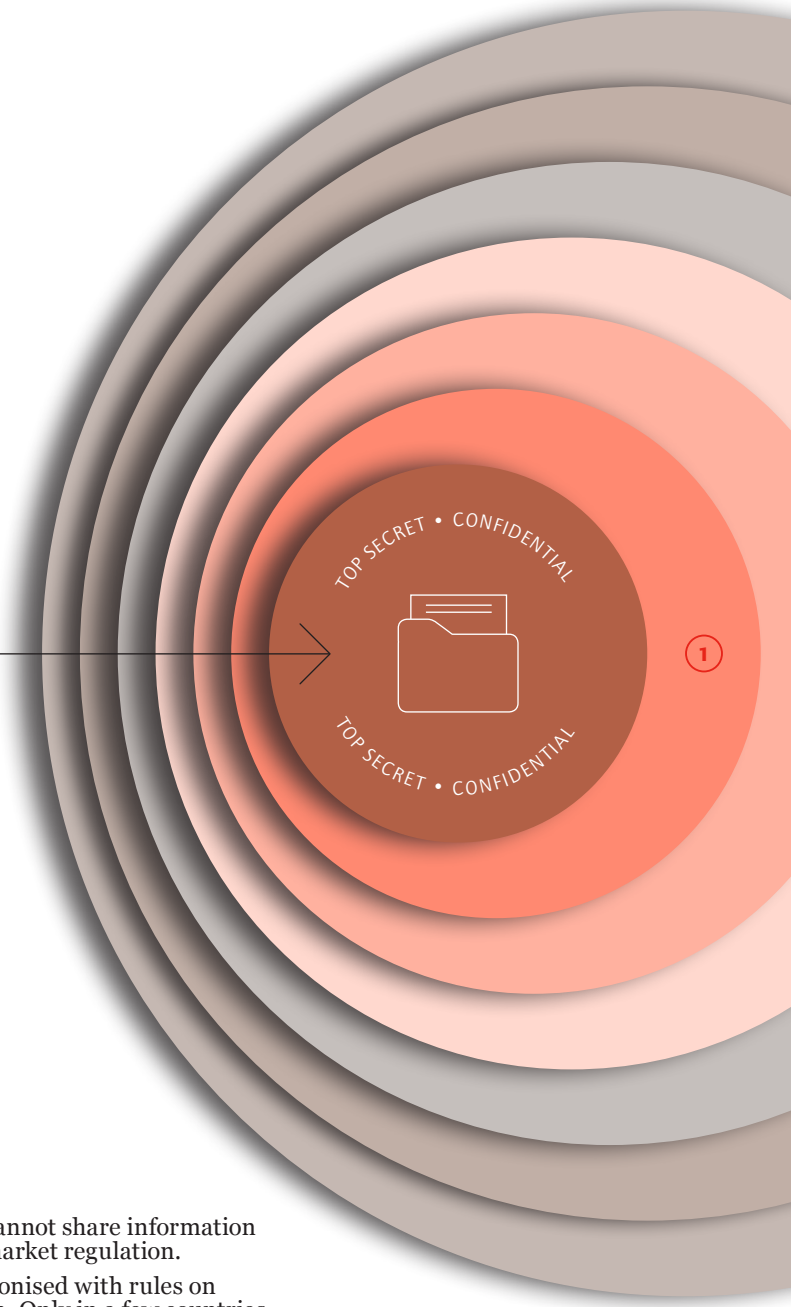
The central management is the source of information and decides whether to label information as confidential or to refuse to disclose it altogether. The management must take these decisions based on the law and within its boundaries. Management's decision regarding confidentiality or withholding information can be challenged in court.

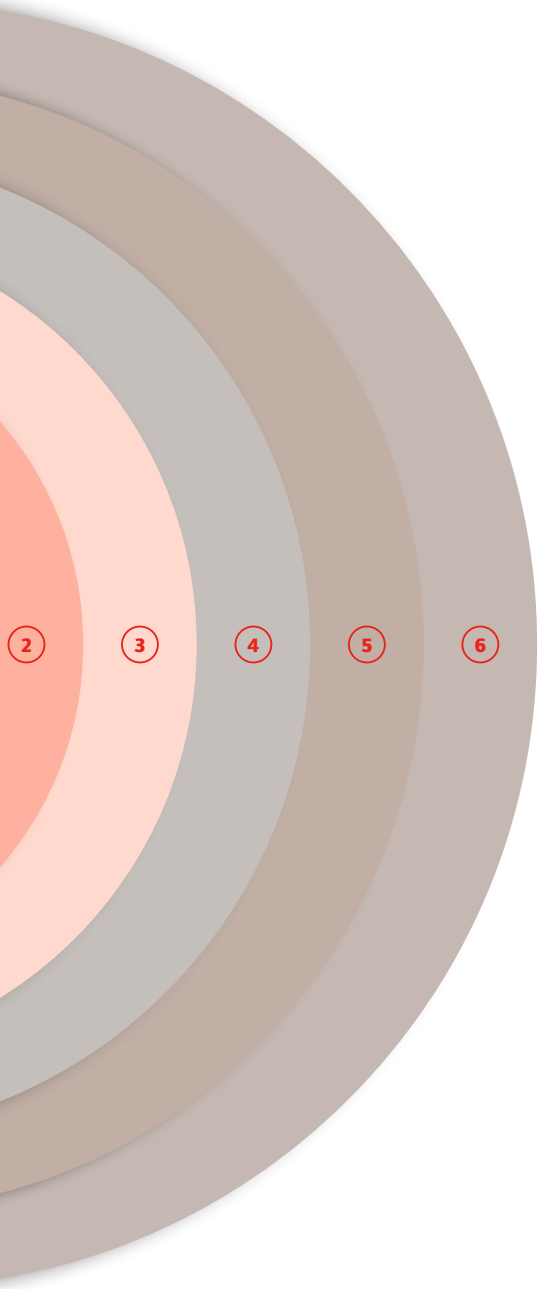
Stock market rules

Management often argues that they cannot share information due to limitations imposed by stock market regulation.

Stock market laws are often not harmonised with rules on workers' information and consultation. Only in a few countries (e.g. France) does stock market regulation explicitly take priority over workers' rights to information and consultation.

Important: stock market regulation is addressed to actors who are **outside** of the company.





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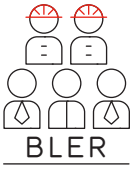
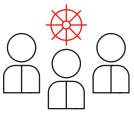


BLER: Board-level employee representatives

As members of the supervisory or management boards they have access to all information that he other directors receive (including the most secret company data).

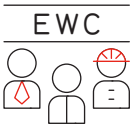
2



EWC Select Committee

Management may sometimes prefer to give information only to the Select Committee. This is highly controversial and makes communication problematic between the Select Committee and the rest of the EWC.

3



European Works Council

Information may only be discussed between EWC members (for a specific period)

4

Employee representatives

A next level of confidentiality concerns information that can be shared only with employee representatives within the company (such as the local or group works council or the EWC).

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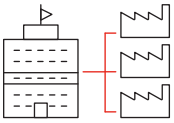

Internal company information

Information on this level can be shared with all empoyees inside of the company, but not with the outside world

6

General public

Such information has often already been made public by the company beforehand and can thus be shared broadly.

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This booklet was developed by the European Workers' Participation Competence Centre (EWPCC). It is the fourth of a series of practical and helpfully illustrated manuals for workers' representatives in transnational information and consultation bodies.

The authors would like to thank Bruno Demaître, Stan De Spiegelaere, Aline Hoffmann, Zane Rasnača and Cyprian Szyszka of the ETUI for their valuable feedback, advice and support in producing both the text and the graphics in this manual.

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D/2021/10.574/07
ISBN 978-2-87452-583-4 (print version)
ISBN 978-2-87452-597-1 (electronic version)

The ETUI is financially supported by the European Union. The European Union is not responsible for any use made of the information contained in this publication.

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