

PASCALE LORBER*

National Works Councils: 'Opening the Door on a New Whole Era in United Kingdom Employment Relations'?

Abstract: This paper intends to look at the challenges that the European Directive on national information and consultation¹ will pose to the legal framework in the United Kingdom.² In particular the author will consider whether the statement that 'national works councils would open the door to a new era in the United Kingdom employment relations'³ is a true one. This will be done by briefly looking at the aim and the content of the Directive and more particularly at the reaction of the UK government when it comes to transposition in light of the first consultation paper produced by the Department of Trade and Industry on this issue.⁴ This paper will therefore focus on the preliminary attitude of the government towards this instrument and whether it bodes well for substantial changes in collective relations.

1. INTRODUCTION

According to Collins *et al.*, 'the notion that the workforce should routinely participate in managerial decisions that might affect their livelihoods still seems like a distant peak on the horizon of British industrial

* Lecturer, Faculty of Law, University of Leicester.

1 Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

2 Thereafter, abbreviated to UK.

3 From J. Monks, TUC General Secretary, when the final text of the Directive was adopted. European Works Council Bulletin (cited in this paper as EWCB) 37, January/February 2002, p. 2.

4 *High Performance Workplaces. The role of employee involvement in a modern economy. A discussion paper.* July 2002. See <<http://www.dti.gov.uk/er/consultation/informconsult.htm>> (cited in this paper as *High Performance Workplaces*).

relations'.⁵ This can be explained by the state of the law and by cultural reasons. First, the participation of workers' representatives in the decision-making of companies currently only exists through a fragmented puzzle of provisions. Employers have to inform and consult workers' representatives in specific subjects: collective redundancies, transfer of undertakings and health and safety issues primarily.⁶ There is therefore no routine participation. The only exception concerns multinationals which have to set up European Works Councils.⁷ Consequently some UK workers, whether employed by foreign multinationals or by UK multinationals, benefit from a collective voice through the central information and consultation forum. The overall result is that most employees do not have the opportunity to know about decisions which affect their interests, let alone be consulted about them, on a permanent basis due to the absence of a general mandatory framework for workers' participation. Second, the general tradition or culture when it comes to decision-making is one more characterised by managerial prerogative, ownership of business, and confidentiality of information.⁸ Further, trade unions in the past have not been in favour of 'collaboration' with management, even if this perception has now significantly changed.⁹

Considering this general picture one wonders whether the European Directive on national information and consultation and its transposition by the UK government could go towards resolving some of these issues. It intends to set up minimum requirements for information and consultation of employees on decisions which affect their interests. It will affect undertakings with at least 50 employees or establishments with at least 20 employees. It has been labelled as the National Works Council Directive, first because it imposes permanent information and consultation on national undertakings, to complement the European Works Council Directive;¹⁰ second, because most member states already have information and consultation bodies, named national works councils, which function fulfil the requirements of the Directive. This explained

5 H. Collins *et al.*, *Labour Law*, Hart, 2001, p. 1066.

6 For a general account of the system, see S. Deakin and G. S. Morris, *Labour Law* Butterworths, 3rd ed., 2001, from p. 792.

7 Cited in this paper as EWC.

8 H. Collins *et al.*, No. 5 *supra*.

9 P. Lorber 'An attempt to assess the curious impact of the European Works Councils Directive on the United Kingdom system of industrial relations and labour law' (1997) 9 *Jagiellonian University Yearbook of Labour Law and Social Policy*, 95 from p. 114.

10 Council Directive 94/45/EC [1994] O.J. L254/64.

why there is such a strong emphasis on looking at the UK when implementing this European instrument. Together with Ireland, the UK does not have a mandatory system of works councils which purpose is to be informed and consulted on a regular basis on decisions concerning the financial, organisational or employment situation in the company. The question is how this new piece will be added to the puzzle of legislation and how it will impact upon the actors of UK industrial relations.

In order to estimate the potential effects, it is first necessary to see what can be achieved through the text of the Directive and then whether the government's view so far goes in the direction of substantial changes.

2. THE DISAPPOINTING CONTENT OF THE DIRECTIVE

The final text of the Directive was overall a disappointment in that it is a much weaker version than the original text presented by the Commission in 1998.¹¹ Before considering these aspects, it is first worth looking at how it retained some positive features which appear to draw on some of the weaknesses of prior directives on information and consultation.

2.1. *The Gains and Positive of the Directive*

The first positive feature is that the Directive was adopted.¹² This was also done in a relatively speedy manner – it only took just over four years – which is also an achievement considering the opposition of some governments to the proposal, most notably the UK,¹³ as well as employers' associations, with UNICE refusing to negotiate on the subject,¹⁴ thus compelling the Commission to legislate.¹⁵ Further, as pointed out by Neal,¹⁶

11 COM(1998) 612.

12 For an account of the legislative process leading to the adoption of the Directive, see M. Hall, A. Broughton, M. Carley and K. Sisson, *Works Councils for the UK? Assessing the impact of the EU employee consultation Directive*. An IRS report in association with the Industrial Relations Research Unit, Warwick Business School, 2002, from p. 3 (cited in this paper as Hall *et al.*)

13 *Ibid.*, from p. 5.

14 *Ibid.*, p. 5.

15 According to the procedure laid down in Art. 138 EC Treaty.

16 A.C. Neal, 'Information and Consultation for Employees – Still Seeking the Philosopher's Stone?' in M. Biagi (eds.) *Quality of Work and Employee Involvement in Europe*, Kluwer Law International, 2002, p. 98.

this instrument completes the existing and already solid European framework for information and consultation of workers.¹⁷

The second positive point is that a number of aspects are improvements in comparison with the EWC Directive. They relate mainly to the content and process of information and consultation. The EWC Directive was mainly procedural in setting up options on how to establish EWCs, leaving it principally to the parties to decide upon the kind of information to be provided and the process of consultation, simply defined as the exchange of views and establishment of dialogue.¹⁸ Article 4 of the National Works Council Directive defines in a much more detailed fashion the content of the obligation to inform and consult. It lists the topic for information and consultation and is prescriptive in the manner and timing of the obligation. Thus, employees' representatives should be informed on the recent and probable development of the undertaking's or the establishment's activities and economic situation.¹⁹ They are also informed and consulted on the following issues: 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; and on decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies and transfer of undertakings.²⁰ This is a definite list which is quite large if interpreted liberally. What is also novel to a certain extent is the further definition of the process of information. The Directive states that it must be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to conduct an adequate study, and, where necessary, prepare for consultation.²¹ Consultation is also a process much more regulated than in previous Directives, with the obvious aim to make it more meaningful. As with the

17 Information and Consultation first appeared in specific areas: Collective Redundancies Directive (75/129/EEC now consolidated in Council Directive 98/59/EC OJ L225/16), Transfer of Undertakings Directive (77/187/EEC, now consolidated in Council Directive 2001/23/EC [2001] OJ L82/16); Health and Safety Directive (89/391/EC [1989] OJ L183/1). The European Works Council Directive (94/45/EC [1994] OJ L254/64) established the first general obligation to inform and consult on a permanent basis on transnational issues; and finally the Directive on employee involvement on boards of companies supplementing the European Company Statute (Council Directive 2001/86/EC [2001] OJ L294/22).

18 Art. 2(1)(f).

19 Art. 4(2)(a).

20 Art. 4(2)(b) and (c).

21 Art. 4(3).

EWG Directive, consultation is defined as the exchange of views and establishment of dialogue between the employees' representatives and the employer. This is, in itself a weak definition, but it is surrounded by a fixed set of rules²² which makes it much more substantial. Consultation shall take place:

- while ensuring that the timing, method and content are appropriate;
- at the relevant level of management and representation;
- on the basis of the information the employer is required to supply and of the opinion which the employees' representatives are entitled to formulate;
- in such a way as to enable employees' representatives to meet with the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; and
- with a view to reaching an agreement on decisions within the scope of the employer's powers likely to lead to substantial changes in work organisation or in contractual relations.

Consequently, this is a much more detailed procedure where both employers and employees' representatives are active, as they both have to inform, explain, justify and make proposals.

Bercusson²³ usefully summarises the various steps that need to be taken in this process of information and consultation:

- 1) Transmission of information/data
- 2) Acquaintance with and examination of data by employees' representatives
- 3) Conduct of an adequate study
- 4) Preparation for consultation
- 5) Formulation of an opinion
- 6) Meeting
- 7) Employer's reasoned response to opinion
- 8) 'exchange of views and establishment of dialogue', 'discussion', 'with a view to reaching an agreement on decisions'
- 9) 'the employer and the employees' representatives shall work in a spirit of cooperation'

²² Laid down in Art. 4(4).

²³ B. Bercusson, 'The European Social Model comes to Britain', *ILJ*, Vol. 31, 2002, p. 209, at p. 230.

2.2. *Disappointing Features*

While a number of issues could be argued here, three aspects have been identified as constituting 'disappointment', principally because they are examples of the weakening of the Directive.

2.2.1. *The Option to Opt-out*

The Directive itself allows for the opt-out of its provisions on information and consultation. Article 5 allows management and labour to define the practical arrangements for information and consultation freely and at any time through negotiated agreements. Such agreements, including the ones which predate the Directives' transposition deadline, may establish provisions which differ from those in Article 4 while respecting the principles set out in Article 1. The latter are mainly two fold: first, practical arrangements for information and consultation are to be implemented by member states in such a way as to ensure their *effectiveness*.²⁴ Second, practical arrangements for information and consultation must be implemented by the employer and employees' representatives in a spirit of cooperation and with due regard to their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.²⁵

This is the possibility for the social partners to have tailor-made agreements, which in itself is commendable and is in line with other European instruments such as the EWC Directive or the Directive on employee involvement supplementing the European Company Statute. The disappointing feature is that the whole process can be weakened by the possible opt-out of some of the provisions on information and consultation. It is difficult to reconcile this provision with the first general aim of the Directive which is to set up minimum requirements.

2.2.2. *The Timing of Consultation*

The one aspect that is not dealt with and which was the frightening issue for employers, in particular in the UK, is: does consultation take place before the decision is made or is consultation about implementing the decision made by management? The original draft referred to information and consultation prior to the decision being made.²⁶ However this

24 Art. 1(2).

25 Art. 1(3).

26 Art. 2(1).

was deleted from the final draft. It has already been noted by commentators²⁷ that the preamble of the Directive signals that the intention of the drafters was to require employers to inform and consult prior to the decision being made. Evidence is found in recitals 6 and 13 of the Directive. The former explains the rationale behind the Directive stating that it was promulgated because national and Community legal frameworks had been frustrated by employers making decisions public without having informed and consulted beforehand employees. The latter similarly reinforces the point by noting that the current national and Community legal frameworks 'adopt an excessively *a posteriori* approach to the process of change'. These are important points as they could be used as construing tools should the European Court of Justice need to decide on timing of the consultation process.

2.2.3. *The Sanctions and Remedies*

Article 8 reiterates a well-known formula: Member States must provide for appropriate measures in the event of non-compliance by employers or employees' representatives with the provisions of the Directive. They must also provide for adequate penalties in situations of infringement. These penalties must be: effective, proportionate and dissuasive. This is not a surprising provision in comparison with other instruments in this field. However, in its original proposal, the Commission had been daring and provocative. It had put forward that if there were a serious breach of the obligation to inform and consult the workers' representatives, the decision made would have no legal effect on the contract of employment until adequate information and consultation had taken place.²⁸ This was innovative and in response to the frustration arising out of well-publicised events where companies had substantially restructured without informing and consulting prior to the decision made, employees subsequently finding out in the media that jobs had been cut. This was the case for Renault Vilvoorde in 1997²⁹ or for Marks and Spencer in 2001.³⁰ However, this was considered by a number of countries as too heavy a burden on employers and too prescriptive to sit adequately with countries' industrial relations culture.³¹

27 Hall *et al.*, No. 12 *supra*, pp. 10-11; Bercusson, No. 23 *supra*, pp. 238-239.

28 Art. 7(3).

29 See P. Lorber, 'The Renault Case: The European Works Councils Put to the Test', *IJLLIR*, Vol. 13, 1997, p. 135.

30 See EWCB 33, May/June 2001, p. 1 and EWCB 34, July/August 2001, p. 2.

31 M. Hall, *et al.*, No. 12 *supra*, p. 6.

Considering the positive and negative aspects highlighted, it can be put forward that the Directive is therefore not revolutionary. It mainly consolidates some traditional features of European law on information and consultation when it comes to substance, on sanctions for example, but also on recipients of information and consultation and confidentiality of information, as will be examined below, and process, as flexibility is given to national legislator and social partners in the implementing of the measure. With this as a canvas, how will the United Kingdom government adapt this measure to the national labour law environment?

3. TRANSPOSITION OF THE DIRECTIVE IN THE UNITED KINGDOM: THE APPROACH OF THE GOVERNMENT

As seen earlier, the UK is not unfamiliar with the obligation of information and consultation as national measures transposed Directives which imposed such obligation, notably the Directives on collective redundancies, transfer of undertakings, health and safety and EWC.³² However, the employer must only inform and consult either in specific situations or if it qualifies as a multinational. The result for the majority of the workforce is a lack of a general flow of information and regular consultation on issues which affect their interests. The Directive is therefore a welcome instrument in that it will close the gap in the information and consultation landscape at national level. It will also allow UK workers to have similar rights than their European counterparts as most of them already benefit from a mandatory system of regular information and consultation. The impact on the UK workforce will not be negligible since the government estimates that undertakings with 50 employees or more constitute 1% of enterprises but employ 75% of employees.³³ The enterprise of transposing the directive into national law poses a number of challenges to the government as will be considered in a first part. This is evidenced by the method chosen for implementation as will be seen in the second part.

32 The Collective Redundancies Directive was originally transposed in 1975 and is now found in Trade Union and Labour Relations (Consolidation) Act 1992, s.188-192; the Transfer of Undertakings Directive was transposed in Transfer of Undertakings (Protection of Employment) Regulations 1981; the European Works Council Directive, extended to the UK by Council Directive 97/74/EC [1998] OJ L10/22, was implemented by the Transnational Information and Consultation of Employees Regulations 1999. For health and safety consultation, national legislation was in place in several instruments before the enactment of European provisions but it had to be revised following Council Directive 89/391/EC [1989] OJ L183/1.

33 *High Performance Workplaces* at 5.4.

3.1. *The Challenges of Implementation*

Three issues are of particular importance: the transposition of a measure to which the government was opposed; the necessity to introduce new 'arrangements' for the provision of information and consultation; and the implementation of this measure in a fragmented legal framework on worker participation constructed on an ad hoc basis.

3.1.1. *The Opposition to the National Information and Consultation Directive*

The government has been opposed to the European measure since the outset, principally because it would have to impose on companies to establish new systems of information and consultation. Several other reasons have been put forward to explain this opposition.³⁴ The government did not see the need for such Directive as most Member States already had information and consultation mechanisms in place. This measure was therefore contrary to the European principle of subsidiarity. Further, it could be advanced that the government did not want to alienate the business community. The proposed Directive and discussions relating to its necessity and content took place when the government was reviewing the legal framework for collective relations, including conceding to trade unions a statutory right for recognition for the purpose of collective bargaining.³⁵

From an *opposition de principe* to this measure, the government then proceeded to amend and block most of the innovative features of this Directive while it was going through the various phases of the European legislative process.³⁶

3.1.2. *The Establishment of New 'Arrangements' for the Provision of Information and Consultation*

The fact that the UK does not statutorily impose upon employers to inform and consult workers' representatives on issues linked to the economic and employment well-being of the company on a regular basis, either through national works councils or other mechanisms, means that transposition of the Directive will constitute a novelty. This explains why

34 M. Hall *et al.* No. 12 *supra*, p. 5.

35 This was done through the Employment Relations Act 1999.

36 M. Hall, *et al.*, No. 12 *supra*, from p. 5.

the government was keen to negotiate a longer period of implementation. This is formally included in the Directive as Article 10 states that member states with no general, permanent and statutory system of information and consultation, nor of employee representation for information and consultation purposes will be able to apply the Directive transitionally. The implementation of the Directive will take place in three stages:

- i) undertakings with at least a 150 employees, or establishment with at least 100 employees must be covered by the date of the Directive's original implementation deadline (March 2005);
- ii) undertakings with at least a 100 employees, or establishment with at least 50 employees must be covered two years later (March 2007);
- iii) undertakings with at least a 50 employees, or establishment with at least 20 employees must be covered a year later (March 2008).

However, in practice, a number of companies use 'consultative committees' which perform similar function than the one described in the Directive. The Workplace Employee Relation Survey reported that over half of workplaces had a joint consultative committee,³⁷ but their nature and functioning vary greatly. The national employers' association, the CBI, carried out a survey in 2002 which includes findings concerning the extent of formal employee consultation procedures. Interestingly, it shows that 35% of companies already have permanent mechanisms for informing and consulting, such as staff councils. However, these are typically present in larger firms.³⁸ Legally, the existence of such instances was acknowledged by the statutory instrument that transposed the EWC Directive as it refers to consultative committee.³⁹ Nevertheless, statutory works councils will remain a novelty in the United Kingdom employment law landscape.

One can wonder why the UK lacks in such regulatory framework in comparison with systems in place in other member states. The reasons are many and varied. The role of the law and government intervention in this field has not been traditional. Historically, the policy of *laissez-faire* in industrial relations meant that government was not keen in interfering

37 M. Cully, S. Woodland, A. O'Reilly, and G. Dix, *Britain at Work as depicted by the 1998 Workplace Employee Relations Survey*, Routledge, 1999, p. 98 (cited in this paper as M. Cull *et al.*).

38 EWCB 42, November/December 2002, pp. 7-8.

39 Transnational Information and Consultation of Employee Regulations 1999 (TICER), Regs 13 and 15 state that when such committees exist, they can nominate, amongst their members, UK employees who sit on Special Negotiating Bodies whose function is to set up a European Works Council.

in the regulation of the labour market. It was left to the parties involved, employers, employees and their representatives, traditionally trade unions to administer their relationships. The role of the legislator had therefore been minimal, in particular in the collective field. There were however exceptions to this tradition during the two wars, where the government promoted the establishment of joint consultative committees or workplace committees in industries and establishment either to improve employer-employee relationship, or improve productivity. These bodies were mainly found in the public sector and fell into disuse over the years.⁴⁰ The general requirement of information and consultation subsequently mainly came from European obligations.

Further, the social partners had not militated for the existence of such bodies. For a period of time, there had been resistance from both employers and traditional employees' representatives towards works councils-like bodies.⁴¹ From the employers' side, the opposition relates mainly to avoiding red tape and not delaying decision-making. Such antagonism generally remains as the CBI was hostile to the Directive and supported the government in its blocking of the Commission's proposal.⁴²

From the trade unions' point of view, there has been a serious change of attitude in the last few years towards works councils. Originally, they were not welcome and did not sit adequately with the model that trade unions aspired for in their relations with employers. 'The reasoning behind this opposition has varied from the claim that the trade unions' job is simply and solely to negotiate terms and conditions, and not to usurp the function of management, to the proposition that trade unions should not be collaborationists in a system of industrial power and private wealth of which they disapprove.'⁴³ Further, any proposal for the introduction of 'Works Councils' for the purpose of information and consultation was considered as a risk either to 'duplicate existing structures' which would have been 'superfluous', or 'to supersede existing trade union arrangements'.⁴⁴

However, following the decline of trade union membership and coverage of collective bargaining, the trade union movement reviewed its position on this issue. It expresses support to these structures, in particular as they could help trade unions to regain influence in the workplace.⁴⁵ The

40 Hall *et al.*, No. 12 *supra*, p. 23.

41 P. Lorber, No. 9 *supra*, from p. 117.

42 Hall *et al.*, No. 12 *supra*, p. 5.

43 TUC 'Industrial Democracy'. Interim Report by the TUC General Council. 1973. Para 24.

44 *Ibid.* para 94.

45 To illustrate the enthusiasm for EWCs, see P. Lorber, No. 9 *supra*, from p. 115.

TUC welcome the adoption of the Directive, considering it a 'lifetime opportunity to modernise the workplace'.⁴⁶

3.1.3. Background of Fragmented Legal Framework on Information and Consultation

The UK law implemented on an ad hoc basis the various directives dealing with information and consultation, adding layers of obligations and ultimately resulting in a fragmented legal framework. Often copying the text of the directives, the provisions dealing with the process of information and consultation are defined differently depending on the situation, whether the employer dismisses for economic reasons or operates a transfer or communicates with its EWC. Similarly, various methods of designating employee representatives and different types of remedies exist depending on the implementing measure.⁴⁷ One can therefore wonder whether the transposition of the national information and consultation Directive will simply mean the adding of an extra layer of regulations. If this is the case, how will this fit in with the existing obligations to inform and consult? For example, who will be informed and consulted when restructuring is on the agenda, including collective redundancies and/ or transfers? Will it be the national works council or equivalent structure or the representatives designated for redundancies or transfer situations? The Directive in its Article 9 states that it is without prejudice to the specific information and consultation procedures found in the Acquired Rights Directive, the Collective Redundancies Directive and the EWC Directive. Interestingly, the government hints at this problem in the consultation paper when looking at redundancies.⁴⁸ The idea is put forward that consultation takes place in two stages. The first phase deals with explaining reasons for a decision and the second with the implementation of it. It is envisaged that the first stage of consultation would be done through a national works council or equivalent and the second phase would be dealt with by employees' representatives designated for collective redundancies consultation.⁴⁹ Supposedly, the same scheme would be applied for a transfer. However, to avoid duplication of employees' representatives and of dialogue, it might be worth considering a works council

46 TUC press release, 17 January 2003, <http://www.tuc.org.uk/em_research/tuc-6126-f0.cfm>.

47 For detailed information on the content of the obligation to inform and consult in these situations, see S. Deakin and G.S. Morris, No. 6 *supra*.

48 *High Performance Workplaces*, chapter 3.

49 *Ibid.* para. 3.5.

as a sole counterpart for both stages provided that the subject matter of information and consultation are not less than what is prescribed for redundancies or transfer consultation. Generally, it could be argued that a point has been reached where streamlining and reorganisation of all provisions in this field are needed. This would be courageous for the government and it would improve clarity and certainty. It would be beneficial for employees as they would know who to speak to at local level, for employers as again they would have one body to address and for trade unions as it might be a way to regain a place as representatives of workers. However, this does not seem to be the preferred route of the government.

3.2. *The way to Implementation*

The method chosen for implementation by the government was a consultation process in two stages. First it published a consultation paper entitled 'High Performance Workplaces: the role of employee involvement in a modern economy' in July 2002.⁵⁰ Parties had until December 2002 to express their views. The second stage of consultation will be a proposal of regulation and summary of previous rounds of consultation according to the Department of Trade and Industry. This should happen in the current of 2003.

Facing its first challenge, the new measure is justified by the government as being necessary for the fair treatment of workers, high performance workplaces, partnership and employee involvement.⁵¹ Theoretically, the advantages and benefits of workers' participation through information and consultation are well known. First, it is recognised as a fundamental human rights. Two European instruments refer to it: the 1989 Community Charter of Fundamental Social Rights of Workers in its point 17 – as noted in recital 2 of the Directive – and the 2000 Charter of Fundamental Rights of the European Union in its Article 27. Second, a number of arguments have been advanced which legitimate the promotion of information and consultation. The economic argument⁵² is that when employers and employees have a dialogue on issues which affect them all, it is necessarily beneficial to the economic well-being of the enterprise, including productivity. In terms of business efficiency, it is also beneficial for management to talk to employees' representatives considering that known and debated decisions are more readily

⁵⁰ See No. 4 *supra*.

⁵¹ *High Performance Workplaces* – Executive summary.

⁵² S. Deakin and G.S. Morris, No. 6 *supra*, p. 835.

accepted and implemented than if the same decisions are announced through the media.⁵³ Similarly, it is not to be ignored that when consulted, employees' representatives could make suggestions not envisaged by management.⁵⁴ The democratic argument⁵⁵ is that as in any democratic settings, workers should have a right to participate in the decisions which affect their interests and working lives. The most effective way to do so is via workers' representatives who should be informed, consulted and their views should be taken into account. The economic argument seems to be prominent in justifying the implementation of the National Works Council Directive as high productivity is linked to effective workers' participation.⁵⁶ Nonetheless, the Secretary of State for Trade and Industry, in her foreword to the consultation document stated:

‘A modern forward looking business does not keep its workers in the dark about important decisions affecting them. It trusts them and involves them and strives for leadership at all levels’.

The purpose of the consultation paper was to consult widely on best practice existing on employee involvement. This round of consultation was a way of sounding the market by raising questions such as: what benefits are there to inform and consult employees about their organisation, whether the parties had experience in information and consultation, what should be the key feature of domestic legislation to implement the Directive, *etc.*⁵⁷ In this context, it is a comprehensive paper which sets out the case for employee involvement in companies, the existing practice in the UK, the legal framework in other European countries, how the issue could be approached at national level and the current legal framework on information and consultation in the UK.

Considering the first consultation document, some features of the future transposing legislation seem to stand out, while some areas will clearly cause difficulties but have not yet been addressed.

3.2.1. Potential Features of the Future Legislation

Three characteristics seem to emerge from the government paper: no ‘one size fits all’ model will be imposed on companies, while arrange-

⁵³ Collins, *et al.* No. 5 *supra*, p. 1057.

⁵⁴ *Ibid.*

⁵⁵ S. Deakin, and G.S. Morris, No. 6 *supra*, p. 835.

⁵⁶ E.g. *High Performance Workplaces* – paras 1.4-1.6.

⁵⁷ *Ibid.* p. 6.

ments for information and consultation will only be put in place if there is support for it. Finally, the government is likely to make use of the opt-out of the Directive. These aspects fit in with the agenda of flexibility promoted by the government.

3.2.1.1. A 'one Size Fits it all' Approach will not be Adopted

This is specifically stated in the consultation document: 'a single, static model... will not do'.⁵⁸ Despite the fact that the Directive is inspired by the national works council model and is a 'nationalisation' of the EWC, the consultation paper makes it clear that other European countries model will not be imported and national works councils might not be the format that is appropriate for all firms.⁵⁹ For that matter, the Directive does not use the phrase 'national works council', but talks of information and consultation arrangements. It therefore seems that UK national works councils will not be imposed by statute. The government is keener on taking into account current practice and base the legislation on existing arrangements. As noted earlier, these include a variety of mechanisms ranging from direct participation to joint consultative committees.⁶⁰ Practically, this would translate in leaving the parties to use the instances they already have in place and/or negotiate arrangements tailored to their specific circumstances. Giving priority to the national system and to negotiation between the social partners is certainly in line with European aspirations, as seen in the EWC Directive and the Directive accompanying the European Company Statute. It is also in conformity with the national agenda which promotes partnership and flexibility. This is therefore a positive aspect. However, two issues could be cause of concern. First, what is the scenario if no mechanism exists and negotiation to set up arrangements fail? The legislation should ensure that a statutory fall back model is applied, requiring minimum standards in conformity with the Directive. This methodology has already been applied in collective relations, either in implementing the spirit of a Directive as in the case of EWC, or in the purely national setting for recognition of a trade union by an employer for the purpose of collective bargaining.⁶¹ The government has signalled in the consultation paper that this route will also be followed for national information and

58 *Ibid.* para. 5.3.

59 *Ibid.* para. 5.2.

60 *Ibid.* chapter 2.

61 Employers and trade unions can negotiate such recognition and if it fails a statutory recognition route is available to the trade unions. This was introduced by the Employment Relations Act 1999 and is now found in TULR(C)A 1992, Schedule A1.

consultation.⁶² Second, if existing mechanisms only promote direct participation, the future legislation should ensure that some form of indirect participation is enforced to implement the Directive. As stipulated in recital 16 of its preamble, 'the Directive is without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives'. This acknowledges that direct and indirect participation are complementary but not exclusive as they fulfil different functions. The former focuses on commitment and motivation of individual employees, while the latter relates to democracy in the undertaking.

3.2.1.2. Existence of a Trigger Mechanism for the Establishment of Information and Consultation Arrangements

As a starting point, information and consultation are described as a right for those who want it.⁶³ Arrangements will therefore not be imposed, but triggered by the relevant parties, either management or employees or their representatives.⁶⁴ The government justified the method of trigger mechanism by the necessity to show there is a degree of support for information and consultation.⁶⁵ In terms of collective relations, this is in line with what is requested for recognition of a trade union for collective bargaining. Before being recognised as the partner for collective negotiations, the trade unions must show support of the workforce either by having the majority of the employees as members of the trade union or by a ballot which would show that the majority of the workforce is in favour of the recognition.⁶⁶ Further, the trigger mechanism reflects other countries' practice⁶⁷ and the EWC Directive.⁶⁸ However this system means that if there is no request from employees, there will be no arrangement for information and consultation. This can be criticized on two accounts. First, this method limits the extent of the right to information and consultation. This can be seen from the EWC Directive as it might be one of the factors explaining why, after nearly 10 years of adoption, only a third of companies covered have a EWC.⁶⁹ Leaving it to the

62 *High Performance Workplaces* para. 1.9.

63 *High Performance Workplaces* – Executive summary.

64 This was confirmed by the Employment Relations Minister unveiling the government likely approach to implementation. See EWCB 44, March/April 2003, p. 3.

65 *Ibid.*

66 TULRCA 1992, Schedule A1, paras 22 and 23.

67 For example, Germany, *High Performance Workplaces* para 4.2.

68 Art. 5(1).

69 EWCB 43, January/February 2003, p. 14.

parties to kick start the proceedings means that if management is reluctant, it is up to employees or their representatives to contact management to set up new arrangements. In the EWC context, this usually means having employees from different countries communicating with each other to engage with management, since the Directive requires a request from 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.⁷⁰ While the difficulty of getting people who often speak different languages to coordinate their request will not happen for the national works councils, it remains that in undertakings where there is no history of trade unions involvement or collective representation of employees, it might be questioned whether individual employees would be comfortable approaching management for the setting up of new information and consultation arrangements, assuming that they are aware of their rights. This might be the situation in particular in smaller undertakings. Second, as seen above, the right to information and consultation is recognised as a fundamental right. Why should support from the workforce be needed if this is accepted? This should therefore be universally available to all and not conditional. It seems reasonable to have a legislative provision which states that all undertakings with 50 or more employees shall have arrangements for information and consultation without impinging on the flexibility and negotiation agenda. A period of voluntary negotiation would be open to the parties, but if no negotiation has taken place, a mandatory national work council or equivalent would be imposed on management.

3.2.1.3. Use of the Opt-out Facility Given in Article 5 of the Directive

As noted earlier, according to this provision, employers and employees will be able to agree or use pre-existing arrangements that are best suited to their needs but their content could be different than what is prescribed in the Directive as basic requirements. The government seems to hint at the possibility to allow this option.⁷¹ Considering the lack of statutory general mechanism for information and consultation in the UK and the general approach towards flexibility, it is very likely that this private opt-out will be available in the final draft of the implementing measure. The idea that social partners or a group of employees and the employer can go below the minimum standards of a Directive is not unknown in the UK. Collective opt-outs are found in the shape of collective or workforce agreements, used as means of derogating from the basic employment

⁷⁰ Art. 5(1).

⁷¹ *High Performance Workplaces* at 5.8.

protection in the Working Time Regulations 1998⁷² implementing the Working Time Directive⁷³ and in the Maternity and Parental Leave Regulations 1999,⁷⁴ implementing the Parental Leave Directive.⁷⁵ For example, with regard to working time, collective agreements or workforce agreements can modify or exclude the application of the provisions on daily or weekly rest periods.⁷⁶ A collective agreement involves an employer and a recognised trade union while a workforce agreement, which was a new 'animal' created by the Working Time Regulations, is concluded between the employer and workers elected by the workforce. While such practices already exist, they have been criticised, principally because they allow non-experienced employees representatives (when unions are not recognised) to accept management proposals, leaving little room for negotiations.⁷⁷ In the context of national information and consultation, this raises the issue of who can negotiate the arrangements, a question that will have to be addressed along with 'who are workers' representatives'?⁷⁸ It also makes one wonder how this opt-out would be phrased in the legislation and how the judiciary would measure an Article 5 arrangement against the benchmark given by Article 1 of the Directive which is that the arrangement must be effective and in line with both the undertaking's and employees' interests.

In addition to pointers given by the first consultation paper, some questions remain unanswered at this stage, but they will clearly be controversial.

3.2.2. Questions not yet Answered and which will Cause Difficulties

Two issues are particularly important in the establishment of the arrangement for information and consultation. What will be the legal status of such arrangements? Who will be the workers' representatives? Of course, other aspects of the Directive will need to be addressed by the draft legislation and it is of interest to list them.

3.2.2.1. Legal Status of the Negotiated Arrangement

If negotiations of arrangements on information and consultation between employers and employees' representatives are encouraged, what legal

72 SI 1998/1833.

73 Directive 93/104/EC [1993] OJ L307/18.

74 SI 1999/3312.

75 Directive 1996/34/EC [1996] OJ L145/4.

76 Reg. 23.

77 H. Collins *et al.*, No. 5 *supra*, p. 411.

78 See *infra*.

status will be given to such agreements? Would these agreements be legally binding or 'gentlemen agreements' as collective agreements are in the UK?⁷⁹ A similar question was posed when the EWC Directive allowed in its Article 13 for voluntary agreements to be negotiated.⁸⁰ Such article permitted parties to opt out from the provision of the Directive through an agreement provided that it ensured transnational information and consultation, that it covered the entire workforce and that it was negotiated before a given deadline.⁸¹ Article 13 agreements were considered as not legally binding by the government.⁸² However, agreements which resulted from the negotiation process included in the Directive,⁸³ between a Special Negotiating Body, composed of workers' representatives, and management, are considered as binding by the government.⁸⁴ Interestingly, the national information and consultation Directive does not lay down procedures on how to reach agreements as it is the case in the EWC Directive. One could imagine that to keep it simple in the UK transposition, TIGER 1999 could be used as a blueprint, combining the encouragement of negotiations between the parties and a statutory fallback position, should the negotiations fail after a time span. If negotiations are successful, the resulting agreement should be legally binding principally because Article 1 of the Directive imposes the effectiveness of the arrangements and Article 8(1) reminds Member States that appropriate judicial and administrative procedures must be in place to enable the obligations deriving from the Directive to be enforced.

3.2.2.2. *Who are Employee Representatives?*

According to the Directive,⁸⁵ employees' representatives should be the ones provided by national law and/or practices. This is a traditional area left to member states as was the case for the Collective Redundancies

79 According to TULRCA 1992, s.179.

80 P. Lorber, No. 9 *supra*, p. 111.

81 Two years after the publication of the Directive (24th September 1996) or the date of the national implementation whichever came the earliest. When the EWC Directive was extended to the UK in 1997, the equivalent to Art. 13 was Art. 3 for companies caught by the EWC Directive as a result of the extension to the UK. These undertakings had a further two years to use the Art. 3 negotiation (until December 1999).

82 M. Carley and M. Hall, *The Implementation of the European Works Council Directive*, *ILJ*, Vol. 29, 2000, pp. 103-120 (cited in this paper as M. Carley and M. Hall).

83 According to Arts 5 and 6, thus called Art. 6 agreements.

84 M. Carley and M. Hall, No. 82 *supra*.

85 Art. 2(e).

Directive,⁸⁶ the Acquired Rights Directive,⁸⁷ the Health and Safety Directive⁸⁸ and the EWC Directive.⁸⁹ However, this will probably be the most debated issue when it comes to implementation. The main reasons is the history and long saga on employee representation for the purpose of information and consultation, which went from giving recognised trade unions the role to undertake such tasks to a condemnation by the European Court of Justice⁹⁰ for not having an alternative method of representation in workplaces where unions were not recognised. This led to the creation of a dual channel of representation first for collective redundancies and transfer of undertakings situations⁹¹ with employers communicating with trade unions or elected representatives. This system was first criticised⁹² because it did not give priorities to trade unions if they were recognised. This was rectified by the Labour government.⁹³

Two models will be in conflict for the legislator this time round. On the one hand, the TUC will lobby hard for giving recognised trade unions priority to be informed and consulted as it is the case in collective redundancies and transfer of undertakings regulations since 1999 and health and safety since 1996.⁹⁴ Only if unions are not recognised should the option of election for representatives be envisaged. On the other hand, the government might use as the primary method what they consider as 'more democratic' i.e. the priority given to election of representatives, as was the case, to a certain extent, in TICER 1999.⁹⁵ This might also be justified as the method used in other European countries (for instance in Germany or France). Further, in the consultation paper, the government interestingly considers the existing practice in the consultative committees, using the 1998 Workplace Employee Relations Survey.⁹⁶ The result is that the majority of representatives on these bodies are elected representatives. The following methods of designation by order of importance are volunteers, appointment by management and appointment by staff

86 Art. 1(1)(b).

87 Art. 2(1)(c).

88 Art. 3(c).

89 Art. 2(1)(d).

90 Cases C-382/92 (transfer of undertakings) & C-383/92 (collective redundancies) *Commission v UK* [1994] ECR I-2435 and [1994] ECR I-2479.

91 P. Davies, 'A Challenge to Single Channel', *ILJ*, Vol. 23, 1994, p. 272.

92 M. Hall, 'Beyond Recognition? Employee representation and EU Law', *ILJ*, Vol. 25, 1996, p. 1.

93 M. Hall and P. Edwards, 'Reforming the Statutory Redundancy Consultation Procedure', *ILJ*, Vol. 28, 1999, p. 299.

94 See EWC Directive 43, January/February 2003, p. 10.

95 M. Carley, and M. Hall, No. 82 *supra*, from p. 114.

96 *High Performance Workplaces* para 2.14.

associations or trade unions. If the government tries to enact measures which respect the system in place in the UK, these findings could appear as strong justifications for preferring the election of representatives, rather than the automatic involvement of trade unions. However, trade unions are trained, independent and have the necessary resources to act as employees' representatives. This should render the whole process of information and consultation more meaningful and would ensure that employees' representation is effective in particular in light of the existing legal framework.

3.2.2.3. *Other Issues*

A number of other substantive aspects will have to be considered more closely when the draft regulation is put to consultation. Some of these issues are found in articles of the Directive which are likely to be copied out by the government into national legislation, as was done by TICER 1999. Thus the content of the information and consultation obligation in Article 4⁹⁷ and the provisions on confidential information in Article 6 will probably not be departed from. With regard to the latter, three aspects are covered by the Directive. First, if employers disclose information strictly labelled as confidential, employees' representatives are not allowed to disclose it. However, member states can authorise its disclosure to employees or third parties if they are bound by an obligation of confidentiality. Second, employers can refuse to disclose information or consult on subject matters that they view as potentially harming their business or prejudicial to it. Third, employers' request of confidentiality or the withholding of information must be open to judicial or administrative review. Similar provisions were found in the EWC Directive and were reproduced in TICER 1999.⁹⁸

Two further aspects are left to Member States to determine. First, the scope of the measure will need to be decided. The government seems inclined to apply the new Directive to undertakings as opposed to establishments.⁹⁹ This seems more in line with national experience and will give employees' representatives the opportunity to communicate with a level of management which is likely to be responsible for decision-making. Second, the sanctions and enforcement procedures could be similar to the ones available under TICER 1999.¹⁰⁰ They involve two different

97 As described in the earlier part of this paper.

98 Regulations 23 and 24. See M. Carley and M. Hall, No. 82 *supra*, p. 118.

99 EWCB 44, March/April 2003, p. 3.

100 *Ibid.*

institutions, the Central Arbitration Committee and the Employment Appeal Tribunal, depending on the issue in dispute.¹⁰¹ The remedies themselves are either orders¹⁰² or financial compensation.¹⁰³ However, the national provisions on information and consultation for redundancies and transfer of undertakings give the employer a justification for lack of information and consultation.¹⁰⁴ This defence is only available if special circumstances render the process not reasonably practicable and the employer shows that he took all steps towards its performance as were practically reasonable in the circumstances. The existence of this provision has been criticised in that it does not appear in the original directives and it restricts the right to information and consultation.¹⁰⁵ One therefore wonders whether justification could be found in the transposition of the national information and consultation Directive. Such defence is not available in TICER 1999.

As far as implementation is concerned, overall, the government seems to be in favour of a minimalist approach in light of its general attitude towards the Directive since the outset. Further, it is likely to use TICER 1999 as a template. Indeed, when this was drafted, the proposal for national information and consultation was already circulated and the government might have considered the likelihood of future adoption and potential implementation. Finally, while one would have liked to see the fragmented law on information and consultation revised in the light of this essential Directive, there is no indication of such enterprise in the consultation paper. The transposition measure will therefore add another layer to the already complicated framework. It is not foreseen that the current government, responsible for reforms of collective redundancies and transfer of undertakings information and consultation obligation, and for the transposition of the EWC Directive, would reconsider these relatively recent instruments in the light of the new Directive. It has been advanced that to complement a light touch transposition, the government could

101 For example, a complaint on the failure to establish a EWC would be the jurisdiction of the Employment Appeal Tribunal – Reg. 20-, while a complaint about confidential information would go to the Central Arbitration Committee –Reg. 24.

102 For example, if employees request information as to whether the establishment is part of a Community-scale undertakings and the employer refuses, a complaint can be brought to the CAC which can order the employer to disclose such information. TICER 1999 Regs 7 and 8.

103 TICER 1999, Reg. 22.

104 TUPE 1981, Reg. 10(7) for transfer and TULRCA 1992, s.189(6) for collective redundancies.

105 P. Lorber, 'Information and Consultation' in C. Bourn, (eds.) *The transfer of undertakings in the public sector*, Ashgate, Dartmouth, 1999, p. 235.

require the Advisory, Conciliation and Arbitration Services¹⁰⁶ to draft a code of conduct which would help employers, employees and their representatives to know what is expected in practice.¹⁰⁷ ACAS already produces a leaflet on employee communications and consultation which has just been updated and which includes reference to the new Directive.¹⁰⁸

4. CONCLUSION

The question of the paper was whether the national information and consultation Directive would open the door to a whole new era in the UK employment relations. The idea of information and consultation is not new. The concept of joint consultative committee, composed of workers' representatives, performing a function amounting to receiving relevant information and being consulted on a number of issues which affect their interests, is not unknown in the UK. The novelty lies in the legalisation and regularisation of the information and consultation process. This will allow the majority of employees to benefit from a collective voice at work outside the field of collective bargaining. The challenges will be about the way this new instrument will fit in with the current legal framework and with traditional patterns of collective relations.¹⁰⁹ In this context, it will add a new facet to employment law. The 'arrangement' for information and consultation will become a new partner for the employer and a new forum for employees representatives, whether trade unions or not. While it is clear that the government has already in mind certain elements of the legal framework, the next round of consultation will be crucial in that it will have to take the measure of this novelty and endeavour to state clearly what is expected from employers and what right is available to employees and their representatives so that information and consultation have a true meaning in the UK framework.

¹⁰⁶ Known as ACAS.

¹⁰⁷ See Hall *et al.* No. 12 *supra*, p. 53.

¹⁰⁸ April 2003. Found at <<http://www.acas.org.uk/publications/b06.html>>.

¹⁰⁹ While this paper did not touch upon this question, a number of authors have considered the relationship between information and consultation on the one hand and collective bargaining on the other. See for example, H. Gospel, G. Lockwood, and P. Willman, 'A British dilemma: disclosure of information for collective bargaining or joint consultation?', *CLLPJ*, Vol. 22, 2001, p. 327.