

**Policy Department
Economic and Scientific Policy**

**Impact and Assessment of
EU Directives in the field of
"INFORMATION & CONSULTATION"**

(IP/A/EMPL/FWC/2006-03/SC1)

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EXECUTIVE SUMMARY

This report reviews the impact of European Community Directives in the field of information and consultation – notably the directive on collective redundancies (98/59/EC) from 1975, the European works council directive (94/45/EC) from 1994, and the information and consultation directive (2002/14/EC) from 2002.

It responds to the request to review the scope of the legislation and its impact, including in the new Member States, and the extent to which the social partners are satisfied with present legislative arrangements.

It provides a background to proposals to review the operation of the European Works Council directive, and to consolidate information and consultation legislation.

Scope and content of legislation

Community legislation on the information and consultation of employees has developed over the last 30 years in terms of both scope and content.

In terms of scope, it has gone from the specific – basic requirements concerning the information and consultation of employees in the context of collective redundancies – to the latest, broad, approach – aimed at ensuring the spread of good practice information and consultation procedures at the workplace on a routine basis.

In terms of content, each successive piece of legislation has tended to be stronger than its predecessors, in terms of both the obligations placed on employers, and the extent to which enforcement requirements have been strengthened.

EU legislation and national industrial relations systems

The impact of Community information and consultation legislation cannot be considered in isolation, but rather in the context of each Member State's industrial relations system.

Legal systems also vary across Member States, which can affect the extent to which the terms of Community legislation are effectively implemented.

There is no evidence at the present time that any Member States are in breach of their obligation to transpose Community information and consultation legislation into national law.

The capacity of Member States to implement Community legislation

The capacity of individual Member States to ensure the effective application of social legislation appears, on the basis of related social policy research, to vary considerably. This is not just an issue of the quality of the procedures or structures, but of culture.

In terms of culture, the position is seen to range from respect for all laws, including those derived from EU information and consultation legislation (the Nordic countries), to one in which EU legislation is little respected (including Greece, Portugal, Italy and, perhaps surprisingly, France) or subservient to national concerns (the case in Germany, the UK and Spain).

Governance and the 'good law' principle

If Community Information and Consultation legislation is to live up to the principle that 'a good law is an enforceable law', much more emphasis needs to be put on implementation and enforcement.

The latest Information and Consultation legislation has stronger conditions in principle – sanctions have to be effective, proportionate and dissuasive – but that still leave the institutional and operational arrangements to the Member States, which appears to be a source of continuing weakness.

The European Commission is currently undertaking a 'quality of legislation' review of:

- The Collective Redundancies directive (98/59/EC) and the European Works Council directive (94/45/EC) in the 10 new Member States,
- The Information and Consultation Directive (2002/14/EC), Transfer of Undertakings (2001/23/EC), European Company Statute (2001/86/EC), and European Cooperative Society (2003/73/EC) in 25 Member States.

These reports are expected in mid-2007, although they are unlikely to address the issues of implementation and enforcement in any depth.

Collecting empirical evidence

In general there has been little systematic empirical research, or scientific analysis, of the developments of information and consultation practices within Member States, or of the specific impact of Community legislation on such practices.

The research results identified are generally qualitative rather than quantitative, and most commonly take the form of case studies, or expert opinions. Examples can often provide insights, but it is difficult to judge if they are indicative of a wider reality, or merely 'outliers'.

The European Foundation will, however, produce the first EU-wide report on the 2002/14/EC directive by mid-December, which is expected to address issues of implementation, enforcement and sanctions, based on the contribution of a network of national correspondents covering all Member States.

Issues from an employee and trade union perspective

From the perspective of employees, while the legal coverage has evolved in a positive direction, several general weaknesses remain

- Information and consultation arrangements do little, of themselves, to protect employees against job losses – they mainly ensure that employees receive advanced warning.
- All information and consultation legislation is limited to companies above a minimum size threshold, meaning that some 25% of employees in manufacturing and 50% of employees in services are not covered.
- The Works Council directive is now well established with over 750 agreements in operation, even though this has stalled at around a third of potentially eligible companies. However, there are a number of detailed practical issues causing difficulties.
- The latest, and most general, Information and Consultation directive has the potential to significantly improve the quality of workplace relations, but it remains to be confirmed which of the two threshold options – of 50 or 20 employees in undertakings or establishments respectively.

While the 2002/14/EC legislation is generally welcomed by the trade union movement, and seen as a strengthened base for future work, there is concern (especially in some new Member States) that TU-based systems of representation could be under-mined by the possibility for employees to opt for direct representation.

There are also a series of issues where trade unions would have preferred greater precision in the legislation – notably in relation to the right to be informed, the timing of such information, the scope of the information, the use of confidential information, the extent of technical support available

Threshold issues remain, made worse by allowing Member States to choose alternative thresholds, as indicated above, and some possible uncertainty concerning the coverage of all employees, whatever their work status with the company.

Evolving employment and industrial relations systems

Over the longer term, other challenges need to be addressed across the Union: the implications of the growth of different workplace relationships – the spread of ‘flexible’ contractual and working time arrangements in some sectors and companies contrasting with the development of ‘high performance’ workplaces, built around team-working and networks.

There are also the implications of changes in overall labour market policies in the direction of ‘flexicurity’ – where the emphasis shifts from protecting specific jobs to protecting long-term employment prospects and income through wider support, including retraining.

Convergence and the new Member States

In most EU policy areas, convergence is seen as a ‘good thing’. However, the EU’s industrial relations systems remain heterogeneous and complex even though Community legislation has, in principle, established minimum standards in terms of information and consultation, and the works council directive has established a framework linking national and European concerns.

Even if this is the case in practice, it is not clear whether this has resulted in any overall convergence of practices and outcomes between Member States since it is possible that countries with higher standards have raised their own standards even further, leaving the gap as wide as before.

Whether the future is any different will partly depend on developments in the new Member States – including the manner and extent to which they embrace, not just European legislation, but the European social model more generally.

These countries are still developing their industrial relations systems and social dialogue capacity, and having to address information and consultation issues in particularly difficult circumstances, with representative bodies such as trade unions much weaker than in most other parts of the Union.

Shared responsibilities

The effectiveness of Community legislation in respect of information and consultation depends on a range of bodies: the original legislators, Member State governments, employers and their representative bodies, employees and their representatives, notably trade unions, national courts, the European Court of Justice and the European Commission. Failures on any of their parts are liable to undermine the full and effective use of the legislation that is available.

Recommendations

In order to address the various concerns outlined above, the European Parliament is recommended to:

- Advocate much more *monitoring and comparative EU-wide research regarding information and consultation practices in the Member States*, with the particular aim of improving enforcement, especially in countries that are seen to be lagging behind, noting that the European Foundation for Living and Working Conditions plans to ask its EIRO network of correspondents to provide a first overall assessment of the implementation of the 2002/14/EC directive for the end of 2007.
- Encourage the European Commission to pursue its proposal to *consolidate Community information and consultation legislation* in order to identify the potential benefits and costs, and clarify the practical options and implications (including in relation to the legal base) as a basis for consultation. In particular, the Commission could be asked to indicate the benefits of imposing the most recent conditions (as in the European Company Statute) onto earlier legislation, and the implications of changes in legal base for the role of the European Parliament.
- Insist again on the early *review of the European Works Council directive* – now 7 years overdue – paying particular attention to ways in which practical problems can be resolved, and delays in negotiating new agreements reduced
- Encourage the Member States to work individually, and together, in order to ensure more effective *enforcement of EU legislation at national level*, not least through the adoption of best practice – such as accessible labour courts – and encourage the *Social Partners* to make full use of national legal systems to pursue their goals, with resort to the European Commission infringement procedures where they feel national governments are not acting correctly
- Press the European Commission and the European social partner organisations to develop additional, parallel, ways of promoting best practice information and consultation arrangements for the 40% or so of *employees who are excluded from the protection of legislation* because they work in small businesses, or are excluded on the basis of their work contract.
- Promote the *wider economic and employment benefits of the EU social model*, with the information and consultation of employees at its heart, and raise public and political awareness of the EU's strong performance in terms of competitiveness, productivity, and its ability to combine modern and effective quality business practices with social justice and democracy at the workplace through the effective use of legislation.

INTRODUCTION

The latest directive (2002/14/ EC) concerning the information and consultation of employees came into force in 2005, and the European Commission proposed, in its 2005 Social Agenda, the possible consolidation/codification¹ of this and other legislation in the field of information and consultation into one directive.

This report is provided in response to the request for an overall assessment of the effects of the directives in this field in terms of:

- The scope of the legislation, with particular attention being paid to gaps or weaknesses
- The application of the legislation – the extent to which it has been effectively transposed, implemented and enforced across the different Member States
- The impact in the new Member States where there is limited experience of such legislation and where social dialogue is often weak
- The extent to which the social partners are satisfied with the present legislative arrangements, or are seeking changes

In this context, the report presents the background to the possible revision of the European Works Council Directive and the consolidation/codification of information and consultation legislation.

In doing so, the report raises some more general concerns regarding the responsibilities of European and national authorities and social partners in ensuring that workplace democracy keeps pace with the ever increasing economic integration of the Union, and the evolution of employment and social policies generally.

¹ The terminology used in the English and French texts respectively

PART A

EU LEGISLATION: INFORMATION AND CONSULTATION

EU legislation with respect to information and consultation developed initially in response to specific industrial relations concerns rather than fundamental principles.

- It began with the 1975 Directive action requiring employee information and consultation concerning impending collective redundancies (Council Directive 98/59/EC).
- The 1977 Directive relating to the safeguarding of employees' rights in the event of transfers of undertakings also included provisions requiring information and consultation with employees' representatives about the transfer and its implications for employees (Council Directive 2001/21/EC)
- In 1994 the European Works Council Directive was adopted in response to the politically sensitive consequences of increasing trans-national restructuring by multi-national companies as EU economic integration accelerated (Council Directive 94/45/EC).
- In 2001 the employee involvement Directive linked to the European Company Statute was adopted, requiring that arrangements for employee involvement must be established in every European Company (Council Directive 2001/86/EC). Similar provisions were included in the subsequent 2003 European Cooperative Society Statute and the accompanying employee involvement Directive (Council Directive 2003/72/EC).
- Most recently, the 2002 information and consultation Directive established an EU-wide framework for information and consultation within undertakings at national level of employees (Council Directive 2002/14/EC).

For employees to be informed and consulted about developments that affect them in their working lives can therefore be seen as an emerging EU 'right', with a specific reference in the Community Charter of the Fundamental Social Rights of Workers (point 17) and Article 87 of the draft Constitutional Treaty, as well as in the body of legislation outlined above.

Although such rights may already be partly or fully reflected in national legislation, or in the methods and practices developed by the social partners for reaching agreements or resolving conflicts at national level, this is an important political advancement for the EU as a whole, especially in the New Member States where arrangements or traditions of workplace democracy have been very different, or absent.

THE MAIN DIRECTIVES²

Collective redundancies Directive³

- Introduction – 17 Feb 1975
- Amended – 24 June 1992
- Consolidation – 20 July 1998
- Coverage – 25 Member States

² European Commission (2004)

³ Council Directive 98/59/EC

- Review – The Commission’s social agenda 2005-2010 proposed the updating of the Directives on collective redundancies and transfers of undertakings with the aim of ‘better regulation’. In April 2006 the Employment and Social Affairs Commissioner told the EP’s Employment Committee that the collective redundancies Directive would be revised during 2007.

The main objective of the legislation is to ensure that employee representatives are informed and consulted ‘in good time’ of any proposed redundancies, and informed of the reasons for the redundancies. Consultation ‘with a view to reaching an agreement’ is intended to cover ways and means of avoiding or reducing the number of redundancies, and of mitigating their effects.

Transfer of Undertakings Directive⁴

- Introduction – 14 Feb 1977
- Amended – 29 June 1998
- Consolidation – 12 March 2001
- Coverage – 25 Member States
- Review – The Commission’s social agenda 2005-2010 proposed the updating of the Directives on collective redundancies and transfers of undertakings with the aim of ‘better regulation’.

The main objective of the legislation is to ensure that employment rights and terms and conditions are respected by the new owner of the business. The Directive includes provisions requiring that employees’ representatives are informed about the reasons for the transfer, the legal, economic and social implications for employees and measures envisaged in relation to the employees and, in relation to the latter must be consulted ‘in good time’ and ‘with a view to seeking agreement’.

European Works Council Directive⁵

- Introduction – 22 September 1994 for application no later than 22 September 1996
- Extended to UK on 15 December 1997, for application no later than 15 December 1999
- Coverage – 25 Member States
- Review by Commission in consultation with the Member States and management and labour at European level foreseen for no later than 22 September 1999. Commission report on the application of the Directive (April 2000) was followed by the launch in April 2004 of formal social partner consultations on EWCs under art.138 of the EC Treaty. Second-stage consultations were initiated in April 2005 but with no conclusion to date.

The objective is to improve the right to information and consultation of employees in large companies operating in different Member States through the establishment of European Works Councils (or employee information and consultation procedures). There is no obligation on companies to have EWCs, but provisions are made in the legislation for a negotiating body to be established between the central management and worker representatives with a view to creating such bodies. Fall-back ‘subsidiary requirements’ apply in the event of a failure to agree.

⁴ Council Directive 2001/23/EC

⁵ Council Directive 94/25/EC

European Company Statute employee involvement Directive⁶

- Introduction – 8 October 2001
- Coverage – 25 Member States
- Review – no later than 8 October 2007

The main objective of the legislation is to ensure that arrangements for employee involvement – information and consultation, plus board-level representation in some circumstances – are established in every European Company. Negotiations with employee representatives should lead to a written agreement on the employee involvement arrangements – essentially an EWC-like representative body. Fall-back ‘standard rules’ apply in the event of a failure to agree.

Information and consultation of employees Directive⁷

- Introduction – 11 March 2002 for application no later than 23 March 2005
- Consolidation – none, but could be foreseen in Commission proposals in Social Agenda 2005-2010
- Coverage – 25 Member States
- Review – foreseen not later than 23 March 2007

The objective is to establish minimum requirements concerning the information and consultation of employees across the EU with the establishment of practical arrangements within countries.

European Cooperative Society Statute employee involvement Directive⁸

- Introduction – 22 July 2003
- Coverage – 25 Member States
- Review – no later than 22 July 2009

The main objective of the legislation is to ensure that arrangements for employee involvement – information and consultation, plus board-level representation in some circumstances – are established in every European Cooperative Society. Negotiations with employee representatives should lead to a written agreement on the employee involvement arrangements – essentially an EWC-like representative body. Fall-back ‘standard rules’ apply in the event of a failure to agree.

RESEARCH METHODOLOGY AND DATA

Comparative multi-disciplinary research

The drafting of information and consultation legislation is a particular concern of labour lawyers but the subject matter attracts the attention of those working in many disciplines – including other types of lawyers (human rights lawyers, company law specialists etc), industrial relations experts (who are also specialised) and other social sciences – economics, politics, sociology, psychology, as well as the parties most directly concerned: employers and employees and their representatives.

Most social science research is specialised (involving one discipline – economics, sociology, law etc) and narrowly focused (on specific issues or specific localities).

Because research is specialised, researchers from individual disciplines, and sub-disciplines, tend to have a particular perspective on the subject matter, and highlight aspects of the subject where their discipline has something to contribute.

⁶ Council Directive 2001/86/EC

⁷ Council Directive 2002/14/EC

⁸ Council Directive 2003/72/EC

Likewise, since most research is conducted nationally, most researchers have a national focus, even when they are accustomed to comparing the situation in their country with that in others – which is different, of course, from a general comparative perspective.

Comparative (multi-country) research is consequently rare compared with national or sub-national research; multi-disciplinary research (bringing together lawyers, economists, sociologists, other specialists) is also rare; and comparative, multi-disciplinary research is particularly rare.

This is also partly due to the cost and practical problems associated with preparing and conducting such research (which are considerable) and the fact that funding for such research is limited, and often difficult to access.

Data concerning information and consultation

The above may help to explain the paucity of good quality comparative information concerning the practice of information and consultation across the Member States. The problems are compounded by the limited use made of quantitative data by researchers from a law, politics or industrial relations background, compared with economics.

This is illustrated by the fact that, as far as we could establish, nobody had ever made/published the relatively straightforward calculation of the number of workers who are excluded in the different Member States by the application of minimum thresholds, or the quantitative consequences of offering Member States the possibility of choosing alternative levels of threshold – 50 for enterprises and 20 for establishments – as in the 2002/14/EC directive.

In this context, the policy departments of European institutions such as the European Commission focus on developing policy and ensuring that legislation enacted is respected, and do not necessarily see themselves as repositories of data and research knowledge.

Hence, while the European Commission commissions some research relating to policy initiatives, it relies on other bodies to monitor developments: Eurostat where it involves comparative data collected in a systematic way through EU-wide surveys, or specialist agencies such as The European Foundation for Living and Working Conditions.

In these conditions, the European Commission's use of data and research tends to be pragmatic. For example, while it receives information about some European Works Council agreements⁹, it does not document them in a systematic way and, like most others concerned with these issues, relies on the data collected and collated by the European Trade Union Confederation (specifically the European Trade Union Institute and the Social Development Agency).

More generally, the extent to which research is conducted reflects policy interest and motivation – hence the ETUC tends to do more than UNICE in this particular area. This may bias the issues that are addressed, but it does not seem to lead to any bias in the analysis.

TRANSPOSITION, IMPLEMENTATION AND ENFORCEMENT

The role of the courts in relation to directives

The contents of EU Directives are transposed into national legislation, rather than applied directly, with national and European courts involved in their implementation and enforcement in particular ways.

If a group of employers, or their representatives, are unable to resolve a conflict with their employer, their first recourse is to their national courts since they have jurisdiction over the national legislation that has been enacted in order to satisfy the requirements of a Community directive.

⁹ There is no requirement to do so in the Directive

If, in the course of their judgements on such cases, the national courts are uncertain about how to interpret national law in the light of Community directives, they can ask the European Court of Justice to interpret through preliminary rulings, thereby building up appropriate case law.

If the employees or their representatives consider that they have a complaint against a Member State, rather than their employer, because they believe their government has not applied Community legislation correctly in the establishment of national law, they can bring their complaint to the attention of the European Commission, with a view to opening infringement procedures.

Such procedures involve the services of the European Commission contacting the Member State, seeking a response and explanation, and, if they are not satisfied, passing the dossier to the European Court through the Secretariat-General of the Commission.

Monitoring transposition

In line with commitments set out in the directives, the European Commission undertakes early, post-adoption, legal reviews in order to ensure that the intentions of directive are not prejudiced from the start by a poor transformation of the text.

In the past, implementation reports have been prepared for EU15 with respect to the Collective Redundancies, Transfers of Undertakings and European Works Council directives.

The European Commission is currently preparing implementation reports concerning the following pieces of Community legislation:

10 New Member States

- Collective Redundancies directive (98/59/EC)
- European Works Council directive (94/45/EC)

25 Member States

- Information and Consultation Directive (2002/14/EC)
- Transfer of Undertakings (2001/23/EC)
- European Company Statute (2001/86/EC)
- European Cooperative Society (2003/72/EC).

The end product of these country-by-country reviews – which will focus on their legal transposition but may also provide some information on their application – will be Synthesis reports, originally scheduled for spring 2007, but now expected to become available by the middle of 2007.

GOVERNANCE AND THE COMMITMENT OF THE MEMBER STATES

Political pressures for improved governance are strong in relation to legislation in a number of policy areas at EU level – notably in relation to the internal market¹⁰ – but the arguments are not commonly heard in relation to social legislation, least of all labour law, despite general concerns expressed by the social partners about implementation in some Member States.

The European Commission has undertaken infringement procedures to ensure correct application of social legislation over the years, but it has been less active in addressing enforcement procedures and sanctions more generally.

¹⁰ Allio L. and Fandel M-H. (2006)

The latest Information and Consultation legislation contains stronger conditions than earlier legislation in respect of sanctions – which have to be ‘effective, proportionate and dissuasive’. However, that still leaves decisions about the detailed ways in which these criteria are fulfilled to the individual Member States.

If EU information and consultation legislation is to live up to the criteria that ‘a good law is an enforceable law’, then sanctions need to be appropriate, provisions such as labour courts need to be in place (to speed decisions, avoid costly legal processes, ensure that expert advice is available) and more general policy support given in order to ensure a positive reception for the underlying objectives set out in the preambles to the articles in the legislation.

Research confirms the importance of accurate transposition, but suggests that, even when a directive is appropriately transposed into national law, its goals are unlikely to be met if there is poor or weak *implementation* – including lack of monitoring of its effects, and any failings or unexpected outcomes – or if there is poor or inadequate *enforcement* by public agencies or the courts of law¹¹.

Problems of implementation and enforcement can reflect administrative capacity – some Member States have a greater ability than others to transpose, implement and enforce legislation. However, the difficulties can also be political and social, and depend on the general ‘culture’ of respect, or otherwise, for legislation in general, and EU legislation in particular.

The social policy directives covered by this particular research did not include those concerned with information and consultation legislation. However, given their rigorous methodology, and detailed coverage of the themes addressed, the researchers feel confident in categorising the EU15 Member States in three broad ‘families of nations’ in terms of the ways in which they *typically* react to EU Directives in the field of EU social policy.

Their categorisation is as follows:

- Countries with a culture of compliance, where the law is respected, whether it be national or European. Denmark, Sweden and Finland are in this group
- Countries dominated by domestic political concerns which count much more than European ones. These comprise Germany, Austria, UK, Netherlands, Belgium, Spain
- Countries where there is little respect for EU law and compliance is not seen as an important goal. These comprise Greece, Portugal, Luxembourg, France, Ireland, Italy.

In justifying their possibly unexpected classification of some countries, the authors report, for example, there are often long delays in Germany as domestic political differences are resolved. Likewise in Austria, with the added issue of poor detailed work in transposing the texts.

In the UK the speed and degree of transformation is seen to vary with the political views of the government of the day, while in Belgium there is often conflict over the respective roles of government and social partners.

In Greece and Portugal, both the transformation and execution of EU legislation is seen to be poor, not least because of the widespread use of Ministerial decrees outside the mainstream of legislation.

¹¹ Falkner G. et al (2005)

In France **EFFECTIVE** enforcement cannot make up for what is seen as bad transposition – often under the pressure of Commission infringement procedure. In Ireland, the process of transposition is considered to be overly influenced by domestic politics, with poor enforcement, while Italy suffers from both poor transformation and enforcement.

Overall this research underlines the importance of implementation and enforcement, and the need for the European Institutions to ensure that national governments play a more active and effective role after EU legislation has been enacted.

THE SCOPE OF THE DIFFERENT DIRECTIVES

The three main pieces of legislation on which we focus – on collective redundancies, European works councils, and information and consultation – share common elements concerning the information and consultation of employees, but they function in somewhat different ways.

Collective redundancies

The collective redundancies Directive (like the transfers of undertakings Directive) provides conditions that should come into force when circumstances demand it – namely when collective redundancies threaten, or when ownership of a company changes. If, in those circumstances, the legal conditions are not respected, then there is recourse at national level, with ultimate recourse to the European Court of Justice under the conditions outlined earlier.

The extent to which the legislation is effective in practice depends therefore, not just on the state of industrial relations in the Member State concerned and the willingness and ability of the social partners to co-operate within the framework of the legislation, but on:

- The ease with which it is possible for either party (notably workers and trade unions) to have recourse at national level, whether this is through specific labour courts, or the legal system more generally.
- The existence and scale of sanctions and penalties incorporated into national legislation in order to implementing the requirements of the legislation.

Moreover, the rigour with which this directive is applied in practice is particularly affected by the general respect or otherwise for the law, especially social legislation, in the Member State concerned, as indicated above.

European Works Council

The European Works Council directive places a strong emphasis on the negotiation of arrangements tailored to the circumstances of the enterprise. The nature and extent of the information and consultation arrangements that are put in place are essentially determined by detailed agreements negotiated by the parties against the background of this legislation.

Under Article 13, companies in which ‘an agreement, covering the entire workforce, providing for the trans-national information and consultation of employees’ was in existence at the Directive’s implementation date (22 September 1996) are exempt from the terms of the Directive for as long as the agreement continues to apply.

Since that date, the Directive’s ‘special negotiating body’ (SNB) procedure has applied, under which negotiations about the arrangements for establishing an EWC (or, alternatively, an information and consultation procedure) can be triggered unilaterally by either employee representatives or management.

The constitution of the SNB – made up of employee representatives from each member state in which the enterprise has operations – is determined by law, and Article 6 of the Directive requires any resulting agreement to address certain points, but the parties still have the discretion to agree enterprise-specific arrangements.

Statutory EWCs, as set out by the Directive's 'subsidiary requirements', are applicable only where management refuses to open negotiations despite an employee request; where the negotiations via an SNB do not produce an agreement after three years; or where management and the SNB agree to adopt the statutory model.

The subsidiary requirements set out a basic constitution for an EWC; identify the trans-national issues on which central management must inform and consult the EWC; and provide for annual meetings, with the scope for additional meetings in 'exceptional circumstances' – essentially in the event of major restructuring.

Although there have been very few cases in which a company has been required to establish a statutory EWC, the Directive's subsidiary requirements have had a strong influence on EWC arrangements introduced by agreement, providing a benchmark for negotiators on the main constitutional and operational issues.

Information and consultation 2002/14

The latest piece of legislation differs again in that it aims to establish a 'general framework' for informing and consulting employees in the EU. Consequently the Directive is drafted in appropriately general terms and allows Member States – and employer and employee representatives – considerable flexibility regarding the practical arrangements for implementing its provisions.

As with the European Works Council directive, there is scope for national implementing provisions to tailor the directive's provisions on a number of important issues to reflect national practice. Member states are allowed – but not required – to enable the social partners to negotiate information and consultation arrangements that depart from and even fall short of the standards established by the directive.

PART B

THE APPLICATION OF THE DIRECTIVE ON COLLECTIVE REDUNDANCIES

BACKGROUND

The 1975 EC directive relating to collective dismissals, as amended in 1992 and consolidated in 1998, arose out of the economic and employment difficulties that followed the first global oil crisis of 1973, and which had resulted in many closures and restructuring of businesses, and a sharp rise in unemployment.

The Commission presented its case for a directive on economic and social grounds. It noted the significant differences that existed in terms of conditions, procedures and measures across the Member States, and argued that this created disparities in terms of competition, which were likely to influence the decisions of national or multi-national undertakings, in particular as to where partial or total closures were to take place.

It also made the more general social arguments, however, in terms of avoiding any negative impact on the overall balance of regional development within the Community, as well as the need to provide some guarantees to those adversely affected by economic change. To this end the directive sought to harmonise some of the basic national positions, while recognising that rules governing redundancies form only a part of the laws on dismissals.

The autonomy of management and labour were respected, with the legislation being seen as a 'point of departure' - creating a framework within which the two sides could negotiate. Hence the directive was limited to the essential points, reflecting the view that 'systematic joint action by management, the authorities and workers representatives was the best way of obtaining Community rules on redundancy and of providing social protection and acting as an economic regulator'.

Thus, while the directive is sometimes seen as providing a general framework for addressing collective redundancies, its main consequence was to set out minimum requirements for information and consultation in the event of collective dismissals, while allowing for more favourable conditions for workers through national laws, regulations or procedures.

The directive represented one of the first pieces of European Community legislation in the field of labour law, with subsequent amendments – partly in response to growing case law - taking account of the increasingly trans-national character of corporate operations and decision-making.

Amendments to the information and consultation requirements made in 1992 obliged employers to consult workers representatives and provide the required information 'in good time'. They also sought to ensure that employers in an undertaking controlled by another employer could not use their lack of knowledge about the ultimate employer's intentions as an excuse for not respecting their obligations. However, these amendments did not, following case law, appear to oblige employers to think ahead and anticipate possible collective redundancies, but only to consult when they were actually contemplating them.

Under the legislation, Member States have to ensure that judicial and/or administrative procedures are in place and available to workers or their representatives. The European Commission's original proposal had been to allow proposed redundancies to be declared 'null and void' if the requirements of the directive were not met. However this was not accepted, even though most of the then Member States already had such provisions.

Even though the directive leaves sanctions to the discretion of the Member States, the European Court of Justice has ruled that certain sanctions are inadequate and must be tangible for the employer, i.e. have a certain level of severity, and national governments have been obliged to modify their arrangements, including in Germany and the United Kingdom.

However, the issue of sanctions is not straightforward under the present arrangements since some Member States, notably Germany, do not regulate collective redundancies as a substantive issue, but only as an issue of information relating to the labour market, whereas most Member States consider information and consequences together. Moreover, sanctions under the present arrangements have a wide variety of legal bases – employment law, civil law, administrative law and criminal law.

The application of the legislation has been subject to a series of legal judgements by the European Court of Justice, including one delivered on 18 January 2007 concerned the calculation of collective redundancy thresholds in France after the French government had sought to exclude young people on special job creation programmes from such calculations. However, the court ruled that under French law those under 26 years of age were nevertheless employees, despite their job status, and under the terms of the EU directive should be included in the calculation of collective redundancy thresholds.

The ECJ therefore held that, while the Member States could determine the method for the calculation of thresholds, this did not allow them to define the concept of an employee so as to exclude a particular category of worker even on a temporary basis.

On 18 February 2000 the European Parliament called on the European Commission to evaluate the application of the collective redundancies directive, as well as to speed up its review of the European Works Council directive. This was in the context of a resolution linked to a decision by Goodyear-Dunlop to close a plant at Cisterna in Italy with the loss of 549 jobs. This followed previous high profile cases of closures and redundancies such as Renault Vilvoorde in 1997 and Michelin in 1999, as well as the ABB-ALSTOM rationalisation that had threatened 4000 redundancies.

ASSESSING THE IMPACT OF THE LEGISLATION

The operation of the collective redundancies directive has attracted little research interest in recent years, presumably because it is well established, at least in the old Member States, and other industrial relations and social and employment policy developments have risen higher up the agenda.

However, the European Foundation for Living and Working Conditions is currently documenting the scope of national legislation (including the specific requirements of Community legislation) with respect to collective dismissals as part of a European Restructuring Monitor (ERM) review of national policy provisions that can influence the way large-scale economic restructuring takes place¹².

The ERM review appears to confirm that national legislation in all Member States respects, as a minimum, the conditions set out in the Directive on Collective redundancies. This covers such factors as the size threshold of companies to be included, the minimum number of redundancies, the extent of advanced notice, the need to notify public authorities, the sorts of information to be provided by employers to employees, etc.

¹² This work is not yet published but will be made available on the website of the European Foundation for the Improvement of Working and Living Foundation

In these respects, the employer has to inform and consult the employees or their representatives on the reasons for the job cuts, the number of dismissals, the categories of employees concerned, the criteria determining the employees concerned, and the method of calculating redundancy payments.

The Foundation's review provides some information concerning cases where the legal requirements in some Member States go beyond the minimum conditions prescribed in the Directive. For example, Austrian and German works councils have some rights of co-decision over dismissals, whereas the bulk of the EU15 Member States provide for information and consultation rights only.

Legislation in Austria, Denmark, Germany and Luxembourg explicitly states that the consultation procedure with employee representatives should aim to minimise the number of redundancies and to soften the impact of redundancy where it cannot be avoided.

These countries, together with France, the Netherlands and Spain provide for a statutory obligation to draw up a social plan. There is no such obligation in Finland and Sweden, but the local labour market authorities and the social partners do provide for a trade union negotiation right to establish 'employment plans'.

Apart from Spain, where employers may require state authorisation in order to carry out redundancies, and Greece, where governments may intervene at their discretion, governments are not directly involved in the redundancy process. However the need to notify public authorities – notably, but not always, the local employment centres – of possible redundancies triggers a range of other actions and activities.

In Finland and Sweden, for example, local job centres elaborate 'employment programmes' helping redundant employees to find new employment, to start their own company, or obtain training. In the United Kingdom, special task forces are brought into play alongside the usual support arrangements in the case of major redundancies.

In some countries, for example Holland and Poland, the minimum period of notice before redundancies take place can be extended. In Hungary such notice can, in certain circumstances, be extended for up to one year.

The 27-country review indicates considerable differences between Member States concerning the recourse available to employees when their employers fail to comply with the requirements of the legislation, and the severity of the sanctions and penalties than can be imposed.

In some Member States – Belgium, Greece, Spain, Italy, Hungary, Luxembourg, the Netherlands, Austria – the intended dismissal of workers may be set aside (declared null and void) by local courts if the legal conditions – notably concerning the period of notice, but also the quality of the information provided – have not been respected.

In other Member States – the Czech Republic, Denmark, Estonia, Cyprus, Latvia, Lithuania, Slovenia, Malta and Poland, as well as Bulgaria and Romania – on the other hand, financial penalties appear very limited, and infrequently applied.

In Finland and Slovakia, the potential size of fines appear to be significant, but they are infrequently used. In the United Kingdom, on the other hand, many cases pass through the courts or other procedures. Ireland has recently strengthened its legal sanctions, and Portugal describes failures as 'serious administrative offences' that can justify significant fines.

In France and Germany, employers and employees normally seek to resolve disputes without recourse to the courts or other third parties.

This review also asks whether or not collective agreements – which may contain equivalent or better conditions for employees concerning collective dismissals – are enforceable through national courts. This is seen to be the case in Belgium, the Czech Republic, Denmark, Estonia, Spain, France, Italy, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Poland and Slovakia.

On the other hand, collective agreements are not enforceable through the courts in Germany, Greece, Cyprus, Austria, Poland, Finland or the UK (unless, in the latter case, collective dismissal arrangements are specifically mentioned in the employment contract).

THE APPLICATION OF THE DIRECTIVE ON INFORMATION AND CONSULTATION

BACKGROUND

The most recent directive on information and consultation – which had begun life in a European Commission work programme in 1995 – was adopted in 2002 and came into force in 2005.

In the final stages of the negotiation, the European Parliament adopted a series of amendments to the Council's common position on the draft Directive. These proposed changes were welcomed by trade union bodies, but criticised by employers' organisations.

While the European Parliament had endorsed the bulk of the Committee's proposals, three amendments *failed* to receive sufficient votes:

- One requiring Member States to provide *more stringent sanctions* where employers seriously breached their information and consultation obligations in respect of decisions that might lead to the termination of employment, and to enable employees' representatives to have such decisions suspended.
- Another requiring Member States to *prevent undertakings from reducing the size of their workforce or changing their structures* with the aim of depriving employees of the right to information and consultation.
- Another seeking to reduce the period within which Member States must *transpose the Directive* into national law from three years, as set out in the Council's common position, to two years.

The amendments that were adopted included:

- A new 'recital' to guarantee that *employees' representatives* are elected by employees, or designated by employees' organisations.
- A new 'recital' stating that *'more stringent, dissuasive penalties and specific judicial procedures* should be applicable in the case of decisions taken (a 'replacement' for the proposed amendment to the main body of the Directive that had been lost in the vote).
- Extending the *definition of 'information'* to include 'all relevant data' and to specify that it must take place 'before the decision is taken'.
- Specifying that *consultation should take place 'during the planning stage* of a decision in order to enable influence to be exerted on the decision-making process'.
- Adding that Member States must 'foster and promote social dialogue' in *small and medium-sized enterprises* not covered by the Directive.
- Specifying that employee representatives should be *informed about the undertaking's 'economic and financial situation ...* including changes to organisational structures and market developments'.
- Providing that 'if the implementation of a decision will have *significant adverse consequences for employees*, the final decision may be postponed for an appropriate period...with the aim of avoiding or mitigating such adverse consequences'.
- Specifying that *'agreements must be between the 'social partners'* (rather than 'management and labour'). 4

- Specifying that *employees' representatives should have legal protection* against being disadvantaged with regard to career, wages and training, the right to paid training leave, to organise regular meetings etc.
- Requiring Member States to 'examine in cooperation with the social partners appropriate ways in which the principles laid down in this Directive can be *implemented in public administrations*'.
- *Deleting the transitional arrangements* in the Council's common position concerning Member States where there is no 'general, permanent and statutory system' of information and consultation or workplace representation.

During the European Parliament debate, Commissioner Anna Diamantopoulou declared that:

'The Council's common position strikes a delicate balance between different points of view and divergent interests on the sensitive issues at stake. While I understand your desire to improve the text, it would be unwise, in my view, to depart now from that balance and jeopardise the actual adoption of the proposal.'

The Commission nevertheless indicated its support for certain amendments, as well as its partial support for the proposed amendment that was *not* adopted by the European Parliament, namely the one seeking tougher sanctions for non-compliance.

The conciliation procedure was launched in November and agreement was reached in December. The official text was published in March 2002, with implementation by 23 March 2005.

The compromise involved four amendments to the Council's common position.

- The reduction of the transition period to a total of six year, in three stages.
- The inclusion of a new 'recital' noting that the restriction to undertakings and enterprises of a minimum size should not prejudice other national measures and practices aimed at fostering social dialogue.
- The addition of a recital stating that penalties for the infringement of the Directive's obligations should be 'proportionate in relation to the seriousness of the offence'.
- The fourth was a drafting change clarifying the term 'information' in Article 4(4)(c).

In addition, a *joint declaration* by the European Parliament, Council and Commission was appended to the Directive, drawing attention to the June 1994 judgments of the European Court of Justice in two cases brought against the UK for *inadequate implementation* of the EU Directives on collective redundancies and transfers of undertakings (*Commission of the European Communities v United Kingdom*, cases C-382/92 and C-383/92). These judgments established that Member States must provide mechanisms for designating the employee representatives who are to be informed and consulted.

TRANSPOSITION AND TRANSITION

The transitional arrangements put in place for Member States without established statutory systems of employee consultation and representation – just the UK and Ireland at that time – enabled these countries to phase in the coverage of the Directive: starting with undertakings with 150+ employees (or establishments with 100+ employees); followed by undertakings 100+ employees (or establishments with 50+ employees); and the full application of the Directive to all undertakings with 50+ employees (or establishments with 20+ employees) by 23 March 2008.

The directive came into force in March 2005, but a number of Member States had failed to meet that deadline for transposing it into national legislation, and four new Member States – the Czech Republic, Estonia, Poland, Slovenia – plus one existing Member State – Greece – received official reminders from the European Commission.

Three Member States – Austria, France and Germany – considered that their national legislation already contained adequate provisions, and that no change was required. Other Member States either amended their national laws, or created new ones – notably in the case of the United Kingdom and of Ireland.

As far as can be ascertained, the social partners were eventually consulted regarding the transposition of the Directive in all Member States, but without governments necessarily taking full account of their comments.

FROM THE SPECIFIC TO THE GENERAL

In moving from the ‘specific’ issue of information and consultation in the context of collective redundancies to the introduction of ‘general’ principles in its legislative coverage, the EU is seen to be creating a solid basis for the long-term development of collaborative industrial relations within Member States, and across the EU as a whole – shifting away from reactive responses to difficulties such as redundancies, towards a more positive, forward-looking, approach to co-operation between employers and employees inside businesses.

The judgement of a leading European law firm alliance, Eversheds, following a detailed review of the impact of Directive 2002/14/EC in all 25 Member States, is that its implementation ‘*changes the focus ...from the classic ‘ad hoc’ situations...to a more general obligation to enter into dialogue with the workforce*’.¹³

More generally, the ETUI/REHS Benchmarking Working Europe 2006 Report argues that Directive 2002/14/EC ‘*makes a substantial contribution towards the consolidation of Community labour law*’.¹⁴

ASSESSING THE IMPACT OF THE LEGISLATION

The impact of EU legislation in the industrial relations field depends a great deal on the prior position and traditions in the different Member States – the contrast between countries like Germany and Austria (where there are well established works councils); the Nordic countries (where collective agreements can take precedence over legislation); through to the United Kingdom and Ireland (where no statutory systems had existed prior to adoption of recent EU legislation).

However, systems of workplace representation are complex and vary considerably within as well as between Member States. Hence the conclusion in the Commission’s 2006 Industrial Relations in Europe Report¹⁵ that even a wide-ranging directive such as 2002/14 ‘*will not harmonise the mechanics of workplace representation across the European Union*’. This complexity is difficult to capture in concrete analytical terms, not least because ‘*comparative studies on workplace industrial relations are very often limited to a study of the institutional arrangements and not the actual practices*’ Moreover, when such research is carried out, it is generally in the form of case studies, from which it is not easy to generalise.

¹³ Eversheds and Employment Law Alliance (2005)

¹⁴ ETUC (2006)

¹⁵ European Commission (2006c)

The reviews of the legislation being carried out for the European Commission and the European Foundation will not fully resolve the issues either – the former because it will deal mainly with the ‘quality’ of the transposition of the legislation, and the latter because the resources available are limited relative to the complexity of the issues to be covered. However, both pieces of work will cover all EU Member States whereas most research is less comprehensive.

Trade Union perspectives

A report covering a number of Member States has been undertaken by the European Trade Union Research Institute ETUI/REHS using its national correspondents¹⁶. In describing the experience of transpositions in some detail, it illustrates how the freedom offered to the Member States by the directive can result in significantly different arrangements being put in place.

The most general issue raised concerns the lack of clarity in much of the directives’ text – an issue that was visible at the transposition stage, and which could be a source of difficulty as the Directive is implemented across the Member States. The main concerns raised are in respect of the following:

The right to information and consultation

A distinction is drawn between the automatic right to be informed and consulted – as in Sweden – and rights that are limited in various ways – for example, by the need to limit requests to specific information, or by size of workforce thresholds.

The three years allowed under the legislation for negotiation of information and consultation procedures is seen to be too long, and an obstacle to the effective implementation of the Directive.

The definition of an ‘undertaking’

The definition of an undertaking is seen as a potential problem, as is the definition of thresholds. These can vary somewhat, according to previous national practice, and for different purposes, and be affected by the way in which employees with different work status – permanent, temporary, or sub-contracted – are, or are not, included.

The role of worker representatives

The Directive allows for the possibility of workers representatives to be drawn directly from the workforce, or to be represented, for example by trade unions, which is seen by some trade unions in some countries as a source of conflict and difficulty.

Confidentiality

Here, in respect of the Works Council Directive, there is uncertainty as to how far, and in what respect, confidential information can be, not only accessed, but also transferred between national and European levels.

Resources and the protection of employee representatives

The report criticises the ‘vague wording’ of the directive with regards to the support available for employee representatives, which could be a further source of conflict in the future.

Sanctions

The text of the Directive requires Member States to provide adequate administrative or judicial procedures in the cases of disputes, as well as adequate, effective, proportionate and dissuasive sanctions. As such it reflects the need established by European Court of Justice case law for any consultation to take place in good time, and with an appropriate level of management, in order for it to be effective.

¹⁶Schomann I., Clauwaert S. and Warneck W. (2006)

This report highlights the importance of Article 4(e) that obliges management and labour to consult with a view to reaching agreement on decisions that may lead to significant changes in the organisation of labour, but which it claims is overlooked in many transpositions.

Research expert perspectives

In November 2006, a European Seminar, bringing together a group of experts, was held on ‘The impact of the recent EU directives and national policy changes on employee representation in the workplace’ with a particular focus on the 2002/14 Directive¹⁷.

The main findings of this seminar were that:

- The EU Directive has created a *universal right* to information and consultation at the workplace – at least in companies above a minimum size – but the issues to be included are not defined very precisely.
- In many Member States, the directive is not seen to have any major impact, although it creates *statutory rights* for the first time in the UK and Ireland, and probably also in some new Member States.
- The legislation creates some *potential uncertainty* for existing TU-based systems of representation since other forms of worker representation are possible under the legislation.
- Linked to the above is the issue of who is granted *collective bargaining rights* at the workplace – the trade unions or worker representatives in some other form – given the move towards more decentralised forms of bargaining in Europe.

Other issues raised were:

- Representation ‘gaps’ – for example *poor coverage of atypical workers* and others – and workforce apathy making it difficult to ensure active participation
- The growing *difficulty of ensuring effective employer-employee discussions* as the structure and ownership of companies become more fragmented and trans-national.
- The relationship between formal issues of rights and representation at the workplace – as addressed by the directive – and the more general development of *good practice working relationships* and human relations management.
- The relationship to issues such as *autonomy and team-working* in workplaces where there is an on-going direct interaction between employer and employee.

The coverage gap in relation to SMEs – especially those categorised as ‘modern sweatshops’ – is seen to be a major weakness, and ‘the development of an SME-specific information and consultation regulation’ was seen as a necessary step forward.

In the view of the researchers, European policy makers should also address the following issues:

- What can be done to ensure that representation arrangements within companies are established and operate independently, and are not simply set up by employers to reflect their interests?
- What is the relationship between information and consultation arrangements and (a) collective bargaining rights and (b) methods of direct participation? Do these need to be clarified from a legal point of view?
- How to bring about a general change of attitude among employers – away from a ‘minimalist’ compliance approach, towards one of ‘participatory leadership’ including the mechanism that ‘triggers’ the move to establish a workplace representation

¹⁷ Van Gyes G. (2006)

In the view of the researchers the long term aim must be to move beyond the issue of statutory rights of employee representation – that the directive has addressed – and address the issue of the *quality of employee representation* needed in Europe in the face of the global knowledge economy.

Reviews of workplace provisions in different Member States have also been undertaken by the Social Development Agency, allied to the ETUC, in the light of the introduction of directive 2002/14/EC but they do not comment on the impact of the legislation as such.¹⁸.

¹⁸ Fulton L. (2005) and Bercusson B. et al (2006)

THE APPLICATION OF THE EUROPEAN WORKS COUNCIL DIRECTIVE¹⁹

BACKGROUND

The creation of European Works Councils (EWCs) was a major exercise in innovative institution building, bridging the gap between trans-national corporate decision-making and the national information and consultation rights of employees, and bringing together employee representatives from each country in which the company has operations, in order to promote information disclosure and consultation with group-level management²⁰.

No official record is kept on the number of multinational companies with established EWCs, or the numbers of new agreements concluded. However, figures are compiled by the ETUI and presented in its annually updated publication²¹. This work is supported by further analyses undertaken by the Social Development Agency.

The above report indicates that some 770 companies – around a third of the 2,200 companies that currently fall within the scope of the Directive – have established EWCs. The 2004 EU enlargement also brought some 300 additional companies within the scope of the Directives, including 31 headquartered in the new Member States, although over two-thirds of existing companies with EWCs already had operations in the new Member States.

In practice, large companies with an international ‘reach’ are more likely to set up EWCs than smaller companies operating in just a few countries. Consequently, the number of *employees* covered by EWCs – some 14.5 million – account for more than 60% of all employees in the 2,200 companies covered by the directive.

Recent years have also seen the establishment of some worldwide works councils in multi-national companies such as Renault, Daimler Chrysler, Volkswagen, and the Royal Bank of Scotland.

No systematic data is available on the incidence or revision/renewal of EWC agreements, although a survey of 39 larger multi-national companies with EWCs, with headquarters in a range of countries, indicated that half had renegotiated their EWC agreement between 2002 and 2004.

Pressure to revise or renegotiate EWC agreements can result from changes in practices in companies, changes in the business structure of the company, or the effects of enlargement. For example, most agreements for companies headquartered in the Netherlands are only valid for four years.

In the case of mergers and major acquisitions, the establishment of an EWC for the newly formed group has sometimes involved fresh negotiations under the procedures of the Directive, but not necessarily so. For example, the 2002 EWC agreement concluded at the Arcelor steel company was negotiated under the Directive’s special negotiating body procedure.

In contrast, following the 2001 merger that established the GlaxoSmithKline pharmaceuticals group, representatives from the two EWCs covering the two companies that had combined, negotiated a new agreement with the new group management.

¹⁹ see various EWCB European Works Council bulletin reports (2001-6)

²⁰ Hall M. and Marginson P. (2005)

²¹ Kerckhofs P. (2006)

RESEARCH FINDINGS ON EWCs IN PRACTICE

There is no comprehensive data on the extent to which companies consult EWCs on restructuring issues, and the impact that this has, or not had, on management decision-making, and research evidence presents a mixed picture. With the European Commission's April 2004 consultation document on EWCs noting that instances where information and consultation have been 'absent or ineffective' during restructuring have given rise to 'concern and anger' among employees.

Surveys do suggest indicates fairly widespread dissatisfaction amongst EWC representatives, particularly regarding the quality of information and consultation. On the other hand, while many EWCs are seen as largely 'symbolic' – involving a low level of information provision and no formal consultation, and little or no contact between employee representatives, or with management, between annual meetings – others have developed a more active and influential role, with ongoing contact between employee representatives, and regular liaison with management.

A 2004 survey of 39 multinational companies by American management consultants ORC asked senior management whether they had ever adjusted a business decision in the light of consultation with the EWC. In the majority of cases, companies stated that the EWC had 'not made specific recommendations' and in six other cases management had 'declined to accept the EWC's views'. However, this review also indicated that, in the light of discussions with the EWC, some companies had adjusted or altered a decision, or at least its implementation.

Similarly, a 2004 survey of member companies' experiences by the Confederation of Danish Industries employers' organisation found that management decisions were only affected by discussion at EWCs to a slight degree.

A 2004 study by Warwick University on UK and US companies found that the impact of the EWC on management decision-making was greatest in single-business companies whose operations are spread across countries and where production and other activities are integrated across European borders. On the other hand, the impact of the EWC on management decision-making was largely absent in multi-business companies whose operations tended to be concentrated in one country and/or where there was little or no cross-border integration of production.

In this context, the extent to which an EWC is 'active' depends to a significant degree on whether or not there is a European-level management structure that corresponds to the EWC. Where there is a close 'fit' between the management structure and the EWC, the latter is more likely to have an impact on management decisions.

EWCs are also more likely to exercise influence where the management's approach to the EWC is proactive – for example, seeing it as a mechanism to improve employee understanding of the rationale for business decisions.

The nature of pre-existing structures of employee representation are also important in facilitating the development of employee-side organisation and activity; in particular, the existence of representative structures at national group level in the main countries of operation and/or a pre-existing international network amongst employee representatives on which the EWC can build.

A European Foundation report analysing of the practical operation of EWCs in over 40 EWCs in companies headquartered in five different countries – France, Germany, Italy, Sweden and the UK – underlined again the diversity in practice, with cases ranging from instances where management adopted a minimalist approach to those where employee representatives were provided with comprehensive information aimed at helping the workforce understand the rationale of trans-national business decisions.

This survey reports, once again, however, that employee representatives in most EWCs tend to be informed at the point at which decisions on trans-national business issues are taken, with little or no involvement in framing the content of the decision. Overall, consultation 'in good time' was rare.

This may be why, from a management perspective, the EWC process was not generally seen as slowing or impeding the decision-making processes and, at best, the intervention of the EWC could result in improved implementation outcomes.

According to the Foundation study, the main factors conditioning the overall influence of EWCs were the business strategies and structures of companies, the industrial relations practice and traditions in the home country, and the resources available to the EWC and the degree of cohesion of the employee side.

The most visible indication of a real EWC influence is the negotiation of agreements or joint texts by, or within the context of, EWCs. Such texts have been negotiated in a small but growing number of companies. The content of these joint texts vary considerably. Most address social/trade union rights, corporate social responsibility and the handling of company restructuring, but other topics include health and safety, skills training and gender equality. Most establish general frameworks for company policy.

In a number of cases the joint texts promote or require action on the issues concerned at lower levels within the organisation. For example, the agreements on restructuring that were concluded between 2000 and 2001 in Ford Europe, General Motors Europe and Danone established specific principles and procedures that were to be followed throughout the organisations, reflecting the practices of traditional collective agreements.

LITIGATION CONCERNING THE OPERATION OF EWCs

The Directive and national implementing measures have given rise to only a limited amount of litigation. Cases that have arisen at EU and national level have notably covered:

- The provision of information prior to the establishment of EWCs
- The right of EWCs to be consulted
- The position of EWCs following mergers
- The legal standing of EWCs and their right to pursue litigation.

PROVISION OF INFORMATION PRIOR TO THE ESTABLISHMENT OF EWCs

The European Court of Justice (ECJ) has issued three judgments originating in Germany concerning the interpretation of the EWCs Directive. All concern aspects of the obligation on employers to respond to requests by employee representatives for information enabling them to prepare for the possible setting up of an EWC.

- In the Bofrost case (C-62/99), the ECJ ruled that each undertaking within a group was obliged to meet employee representatives' requests for information relating to the structure or organisation of the group
- In the Kühne & Nagel case (C-440/00), the ECJ underlined the obligation on the management of group undertakings to supply the central management with the necessary information
- The ADS Anker (case C-349/01) led to the ruling that Member States are required to oblige central management to provide group undertakings with the information necessary for establishing an EWC

This series of ECJ judgments has sought to clarify the rules on transparency in the initial dealings between employee representatives and company management prior to any employee request for negotiations about establishing a EWC. This should limit the scope for companies to refuse to disclose information in an attempt to avoid or delay negotiations.

In July 2004, an employer's failure to provide information on the size of its workforce by country, when requested by an employee, was the subject of the first ever ruling under the UK's EWCs legislation.

THE RIGHT OF EWCs TO BE CONSULTED

Most cases under this heading have arisen in France. The 1997 court ruling against Renault for failing to consult its EWC correctly over the closure of its Vilvoorde plant, and similar rulings against Otis and Panasonic in 1998, remain the most high profile and significant cases of this kind.

More recently, legal action against the Honeywell group in France and Belgium reportedly resulted in the company disclosing previously withheld information, while it is reported from Germany that litigation concerning the rights of EWCs has taken place against two companies, Jungheinrich (logistics) and Crawford Tor (doors).

An important issue unresolved in French case law concerns the relationship between consultation at EWC-level and consultation with national works councils. Two court rulings reportedly support the view that consultation with the EWC should be given priority, whereas in another case involving ST Microelectronics, the court held that consultation at both levels should take place concurrently.

THE POSITION OF EWCs FOLLOWING MERGERS

In the Netherlands, in the first ever EWC case, the Amsterdam Court of Appeal ruled in April 2004 that the Dutch telecommunications company Equant NV did not act unlawfully when it terminated the 1997 agreement establishing the Global One European Employee Forum (EEF) following Global One's merger with Equant in 2001.

Equant, which itself is part of the France Telecom group, informed the EEF in 2002 that it was terminating the agreement and intended to initiate negotiations to set up an EWC at the level of Equant. The EEF considered it was entitled to continue in existence until a new agreement was concluded, but this was rejected by the company.

Subsequently, in view of moves to establish a group-wide France Telecom EWC, France Telecom decided against having an EWC specifically covering Equant. The court ruled that Equant was entitled to terminate the agreement establishing the EEF, and could not be forced to establish an Equant EWC because France Telecom, not Equant, constituted the group's controlling undertaking.

THE LEGAL STANDING OF EWCs AND THEIR RIGHT TO PURSUE LITIGATION

In 2002, during a hearing at the UK's Employment Appeal Tribunal concerning a case initiated by the employee members of the P&O (shipping) European Works Council, subsequently withdrawn, the judge questioned whether, in the (common) situation where an EWC is a joint management-employee body, as at P&O, the employee side, as opposed to the full EWC, has the legal standing under UK law to be able to pursue a complaint.

In 2003, a French court dismissed a case concerning alleged lack of consultation over restructuring at Alstom on the grounds that the agreement setting up the EWC did not grant its secretary a permanent mandate to take legal action on its behalf. However, in 2002, the Court of First Instance of the European Communities granted the Legrand EWC leave to intervene in a competition law case connected with the company's merger with Schneider.

EWCs and I&C

The importance of the Works Council Directive in relation to information and consultation, lies mainly in respect of the framework it provides – establishing for the first time trans-national industrial relations structures in multinational companies operating in the EU – rather than any specific conditions.

Previously there was little or no means by which employees or representatives could be consulted on trans-national decisions. However, according to research, there is still little evidence that information and consultation procedures have had a major influence on the way companies restructure, although this varies a great deal.

The actual arrangement regarding information and consultation vary across agreements – some referring to regular information flows, others in exceptional circumstances, and some on specific topics. The term consultation is usually expressed in general terms, as in the directive, with more specific references rare.

The framework seems to be in place, but rarely does this contain specific terms concerning the timing, which is crucial in allowing for meaningful consultation. There can be differences between formal arrangements, and what actually happens – working in both directions – although there is little evidence of EWC seriously influencing management decision-making.

Research suggests that, while some EWCs are largely symbolic, others have an active role, and some even exert an influence. This is seen to be determined by a range of factors, notably the extent to which employees are organised through Trade Unions or Works Councils outside the framework of the EWC. At the same time, employers' attitudes and behaviour – co-operative or hostile – are also important.

The overall assessment would seem to be that:

- The main limitation of EWCs to date is that most are still mainly concerned with passing on information about decisions made, and with dealing with their consequences, with little real consultation prior to the decisions being made
- While most EWCs do not have a direct influence on events at present, they can be seen as part of an industrial relations learning experience, with a positive impact on both sides of the table
- Most people interviewed about their experiences with EWCs are positive overall, and some EWCs have initiated innovative industrial relations experiences in their companies.
- In so far as there are weaknesses in the workings of EWCs in the new Member States, these are mainly the result of the uneven and underdeveloped nature of some of their industrial relations systems, rather than specific weaknesses relating to EWCs

More generally, while it is recognised that the European Works Councils were 'born out of restructuring', the issues only partly overlap, and there is a clear view from the trade union side that the wider role of European Works Councils should be developed, and not restricted to restructuring alone.

The diffusion of good practice

Good practice amongst EWCs can be diffused in a variety of ways, and some leading multinational companies belong to networks or groups that regularly engage with the practice of, and policy towards, EWCs.

Management consultants, law firms and trade union officials are often involved in drawing up agreements in companies. As a result, particular developments or innovations in EWC practice tend to spread across companies over time.

Academic research has identified a discernible 'learning effect' whereby good practice developments – such as provision of training for employee representatives and convening of employee-side meetings immediately following EWC meetings – are reflected in the provisions of other, new or revised, EWC agreements.

More generally, a range of EWC-related seminars and related initiatives have been undertaken by the social partners, acting jointly or separately. Many have been supported financially by the European Commission, which allocates significant funding each year through a budget line supporting social partner projects on employee involvement issues.

EWCs have also been an important issue for European-level industry federations of trade unions, and a significant amount of the briefing of EWC members and monitoring and diffusion of best practice is carried out by them. Officials from these federations, as well as from national trade unions, frequently act as 'experts' to EWCs in their sector. National trade union federations and individual unions also provide training courses and seminars aimed at equipping EWC representatives to fulfil their roles effectively.

National and EU-level employers' organisations have also convened seminars which facilitate exchanges of practice between companies with EWCs. For example, the French employers' organisation MEDEF carried out a questionnaire survey of companies with EWCs, and held a seminar in September 2004 to present an assessment of ten current practises.

PART C

THE NEW MEMBER STATES

CONTEXT

National industrial relations practices and traditions vary between all Member States, but the differences between the new and old Member States are particularly marked, with the new Member States relying much more on tripartite and national level ‘concertation’ rather than collective bargaining, as in EU15 countries. Where collective bargaining does take place in the new Member States, it tends to be at the level of individual companies, rather than sectors.

The European Commission has supported a range of ‘capacity building’ initiatives in support of the social dialogue in central and eastern Europe, almost always on the basis of partnerships with bodies in EU-15²². This is intended to make the social dialogue more of a ‘tool of governance’, enabling employer and trade union organisations to engage actively in the development of national labour market and social policies, and to strengthen their capacity to implement the *acqui* more generally.

In terms of systems of workplace representation²³, the pattern also varies across the whole of the EU, but here the new Member States tend to reflect the same diversity that characterises the EU-15 Member States. There are two basic possibilities – representation through trade unions, or through works councils – but there are many detailed permutations around this in practice.

In some new Member States, representation is mainly through trade unions – as in Cyprus, Estonia and Latvia – although there are provisions for non-union representatives in Estonia and Latvia (following UK practice) and also in Malta if there is no trade union representation.

In other Member States – the Czech Republic and Lithuania – the works council is the main channel for representation, but it has to stand aside in favour of trade union representation if one is chosen within the company. This is also the system that Poland is seeking to introduce.

In other cases, works council and trade union representation can both be present – as in Hungary, Slovakia and Slovenia. In practice, however, one side or other tends to dominate: trade unions in Slovakia, and works councils in Hungary and Slovenia.

Such organisation complexities – along with the equally complex histories of these countries, and the widespread decline in trade union membership – help explain some of the conflicts taking place at national level as the new Member States come to terms with the possibility of establishing viable systems of workplace democracy, as well as the reluctance, or apathy, of many employees as well as employers about such processes.

Despite this, there are signs that the pressures for closer co-operation at company and workplace level are growing, and that employers and employees alike are beginning to see the potential benefits. Studies in a number of these countries (the Czech Republic, Estonia, Slovenia, Hungary, Slovakia) demonstrate positive results, although, in most cases, success seems to be dependent on the presence of effective trade union representation.

²² European Commission (2006d)

²³ European Commission (2006c)

EUROPEAN WORKS COUNCILS

Of the companies that are newly covered by the European Works Council Directive, the main impact has been in multi-nationals headquartered in the 'old' Member States since relatively few – 30 or so – companies that are headquartered in the new Member States are of sufficient size and trans-national scale to fall within the scope of the Directive.

Of these, around 12 have their headquarters in Hungary, 10 in Poland and seven in the Czech Republic, although it had been thought that a Maltese-based hotel group and as many as five Cyprus-based banks might be covered by the Directive. From among these companies, the only EWC to have been established to date is at a Hungarian-based oil and gas group.

The extension of the coverage of the EWCs Directive to the 10 new Member States has nevertheless had significant implications for existing EWCs. The ETUI has estimated that two-thirds of the multi-national companies that have a EWCs, have operations in one or more of the new Member States. The implication is that the scope of the EWC, and employee representation on it, will have to be correspondingly enlarged.

In practice, employee representation from the new Member States had already been established amongst a minority of relevant companies with EWCs prior to enlargement. In 2002, the ETUI had reported that there was some form of employee representation – either an observer or a full member – from the accession countries in the EWCs of a quarter of the 323 companies that had both a EWC *and* an operation in at least one of these countries.

In terms of their operation, data from Poland and the Czech Republic suggest that EWC representatives were fairly equally balanced between those having full member status and those being observers. The Dublin Foundation EIRO centres in Hungary, Lithuania and Slovenia also report that, in the case of some foreign-owned companies with EWCs, employee representatives from the Hungarian, Lithuanian and Slovenian operations, had full member status.

Reports from the EIRO national centres²⁴ in the 'old' Member States indicate the active way in which companies had reacted to the enlargement of the Union in respect of their EWCs. For example:

- Prior to enlargement, observer status for employee representatives from the new Member States was already widespread amongst EWCs in Austrian-based companies.
- Most recent agreements in French-based companies had anticipated EU enlargement by providing for employee representatives from the accession countries, initially as observers. Axa was a rare exception.
- Amongst EWCs in German-based companies, arrangements for extending the coverage of existing arrangements were reported to have been underway in a number of companies, with EWC office-holders travelling to the new Member States to establish contact with their counterparts.
- EWCs in several Italian-based companies already included representatives from the new Member States, usually as observers. For example, Fiat's revised 2001 EWC agreement accorded observer status to a representative from Poland. Agreements were then reviewed to formalise these observers' status as full members.
- All of the EWCs in the relevant Finnish-based, and most of those in the relevant Spanish and Swedish-based companies, had been enlarged to include representatives from the new Member States.

²⁴ European Foundation for the Improvement of Working and Living Conditions (2006)

- A more mixed picture was evident amongst EWCs in UK-based companies. A few, such as BAT (tobacco), have long provided for representation from the new Member States. Others, such as HSBC (finance), introduced observer status in the run-up to enlargement, while a further group of companies had yet to amend their agreements to extend the coverage of the EWC.
- The Norwegian-based Orkla Media and the Norwegian Union of Journalists had initiated projects to assist trade unions of journalists in, respectively, Poland and Estonia, to secure representation and participation in the two companies' EWCs.

An important practical difficulty in achieving the enlargement of EWC representation was seen as the absence of local representative structures in the new Member State operations, with the EWC being faced with the difficult task of prompting or organising local elections in order to choose a representative.

Enlargement of EWCs to encompass the new Member States can also prompt changes in the basis of employee representation. Where agreements contain a ceiling on the total number of employee representatives, the result of these being invoked in the context of EU enlargement is leading to adjustments in representation across countries.

In some instances operations are grouped into multi-country groupings. For example, in some German-based EWCs, the Baltic countries are reported as being entitled to only one employee representative from their combined operations. Some other EWC agreements in German-based companies are reported to have been amended to introduce the kind of minimum size thresholds (most frequently either 100 or 150 employees) already found in some 45% of agreements, below which employees in a given country are not entitled to direct representation on the EWC.

At the UK-based GlaxoSmithKline, a revised agreement was adopted in 2004 to accommodate the accession of the 10 new Member States, in each of which the company has operations, with some small increase in the number of representatives but with restricted participation for countries where the local operation employed less than 1,500.

In order to facilitate the integration of newly enlarged EWCs, some trade unions (Germany's IG Metall and United Services Union) provided training courses and other forms of support for members who are EWC representatives.

Reports and studies concerning the integration of employee representatives from the new Member States into enlarged EWCs suggest that, while enlargement may exacerbate any existing difficulties, they do not create new kinds of obstacle, and there is little evidence of systematic 'east-west' rivalry.

An international study on these issues, involving trade union confederations from France, the UK, Holland, and some new Member States did, however, show the differences between the formal inclusion of representatives from the new Member States and the extent to which they were genuinely integrating them into EWC activities.

An investigation of EWC employee representatives in six companies with operations in Poland found that both 'established' and 'new' representatives still had little familiarity with the prevailing industrial relations and labour law situation in the new and 'old' Member States, respectively.

'Established' representatives suggested that developing such mutual understanding was made all the more difficult when standards were so different across the enlarged EU. Yet, neither 'established' nor 'new' representatives identified any systematic obstacles to developing 'east-west' cooperation and in several cases were able to point to practical examples of this.

According to the Dublin Foundation's EIRO national centres, 'established' EWC representatives and/or their trade unions in the 'old' Member States report that enlargement of EWCs merely exacerbated already existing communication problems and language barriers, and the range of national labour law and industrial relations frameworks with which representatives needed to become familiar.

The expectations of some representatives of the new Member States have been reported, however, as being unrealistically high. However, other evidence from EWC employee representatives from the new Member States suggests that they see advantages coming from EWC membership, although they also critical of certain aspects of the way they work.

For example, Czech and Slovak Republics representatives generally regarded their membership of EWCs as useful. Amongst the benefits cited are: better information about the economic situation and business plans of the company; closer contact with the parent company; the opportunity to exchange information and experiences with colleagues from other countries. This includes comparisons over employment and working conditions that can be useful in relation to local negotiations.

Polish trade union representatives also underlined the practical benefits that the experience of participating in a wide-ranging dialogue can bring to local level industrial relations. Amongst the problems highlighted, however, were language barriers (despite the availability of interpretation), the relative infrequency of EWC meetings, and the fact that information from the management side was not always provided in good time.

The impact of the introduction of EWCs in the new Member States is also addressed in a recently European Foundation case study based research report covering the Czech Republic, Hungary, Poland and Slovenia²⁵.

This reports varied experiences. However, while many EWCs were seen to be overstretched and to be having difficulty coping with the impact of restructuring and relocation, the most effective EWCs were found to be those that were built upon well-organised industrial relations structures on the employee side.

The main challenge seems to be that *'the idea of social dialogue and partnership as well as the fundamental right of employees to be informed and consulted on certain issues in a timely way is a new, and in many cases a rather alien practice for many local management representatives, particularly at middle management level'*.

In this study EWCs in the new Member States were categorised as 'experienced' and 'inexperienced'. This affected their effectiveness, but in neither case were practical problems (recovering travel costs, getting time off, etc) reported, although lack of language training was seen as a weakness.

One major frustration in the new Member States is simply the fact that, while the issue of cross-border restructuring may be high on the agenda in the old Member States, the concern in many of the new Member States is more often with domestic issues, that are not necessarily part of the EWC agenda.

Overall, and despite weaknesses and lukewarm management attitudes, the research concludes that EWCs are welcomed in the new Member States, and are having a positive impact on information and consultation processes.

²⁵ Eckhard V. (2006)

INFORMATION AND CONSULTATION 2002/14

As indicated above, it will be some time before all the new Member states into a pattern of industrial relations that is consistent with EU principles and practices, and which suits their national needs, practices and traditions.

In this context, the Information and Consultation directive 2002/14 has raised particular issues, notably for trade unions, who are unhappy that it provides for alternative channels of representation at a time when they are working to build or defend their rights, not only to be informed and consulted, but to negotiate collective agreements with employers.

For the moment, these negotiations are working themselves out within national systems, and it is too early to predict how they will finally settle down. However, if the experience with European Works councils is a guide – which suggests that the more organised the employee side is, the more effective the European works council – it seems likely that the role of trade unions will grow in so far as they can strengthen their organisational capacity and expand their membership, which are of course closely related.

Where the European trade union movement has expressed concern²⁶ is in relation to enforcement, noting weaknesses in the effectiveness of legal systems and processes in some new Member States. This report claims, for example, that in Poland, applications to the courts on grounds of non-compliance have been dismissed in the past on grounds of low level of damages suffered. Likewise, in the Czech Republic, the law does not provide any specific sanctions in cases of the infringement of the rights of information and consultation.

At the time of its adoption, the 2002/14 Directive was expected to have its biggest impact on the 'voluntarist' industrial relations systems of the UK and Ireland (since these were, at the time, the only EU Member States without a generally applicable system of information and consultation through works councils or similar bodies established by law or by central collective agreement.) and thereafter in the new Member States.

It is still too early to judge how days in the new Member States, but the review of the 'impact' in the United Kingdom that follows, suggests that it could be a gradual, evolving process, that will depend on the wider development of workplace representation and bargaining, and that this could be a medium to long term process, whose speed depends partly on what the countries can achieve themselves, and the amount of support they can obtain from other Member States where good practice is much more securely established.

²⁶ Schomann et al (2006)

PART D

INFORMATION AND CONSULTATION IN THE UK – THE IMPACT OF 2002/14/EC IN A MEMBER STATE WITH A ‘VOLUNTARIST’ TRADITION²⁷

IMPACT ON VOLUNTARY SYSTEMS

The 2002/14/EC Directive was widely expected to have its biggest impact on the 'voluntarist' industrial relations systems of the UK and Ireland since these were, at the time, the only EU Member States without a generally applicable system of information and consultation through works councils or similar bodies established by law or by central collective agreement.

However, the impact in the UK still remains unclear, and will take time to evolve, not least because of the transition arrangements – as may also prove to be the case in the new Member States.

UK EXPERIENCE WITH 2002/14

The Information and Consultation of Employees Regulations came into force in April 2005 in the United Kingdom in order to implement the 2002 European Union Information and Consultation Directive.

The new UK legislation offers employers considerable flexibility, both procedurally and substantively, and can be described as an example of 'reflexive' employment law that underpins and encourages autonomous processes of adjustment by the social partners.

In particular, employers need not act unless their employees trigger statutory procedures intended to lead to negotiated agreements. Voluntary, 'pre-existing agreements' may effectively pre-empt the use of the Regulations' procedures. Under either route there is considerable latitude to agree enterprise-specific information and consultation arrangements reflecting managerial and employee preferences, including, controversially, reliance on direct means of information and consultation rather than via employee representatives. Only in the event that the Regulations' procedures are triggered, but no agreement is reached, are (minimally prescriptive) 'standard' or default information and consultation provisions enforceable.

Experience with analogous UK legislation – that on trade union recognition and the 1999 Regulations that implement the European Works Councils (EWCs) Directive – suggests that the main impact of the Regulations may be a kind of 'legislatively prompted voluntarism'. In this light, much discussion has centred on whether they will turn out to be a largely ineffective 'damp squib'.

THE MAIN PROVISIONS OF THE UNITED KINGDOM REGULATIONS

The United Kingdom Regulations followed extensive consultation by the United Kingdom government, and an outline scheme agreed in discussions between ministers and the Confederation of British Industry (CBI) and the Trades Union Congress (TUC) in 2003.

²⁷ Hall M. (2005) and Hall M. (2006)

Coverage and commencement

The Regulations applied initially (from 6 April 2005) to undertakings with 150 or more employees, but will be extended in two further stages to cover undertakings with at least 100 employees (from April 2007) and then those with at least 50 (from April 2008). This is permitted by the Directive under contentious arrangements negotiated by the UK and Irish governments, and which are also available to the new Member States.

It is claimed by government that about 75 per cent of UK employees could ultimately be covered by the Regulations, but that estimate is higher than one presented elsewhere in this report .

Initiating negotiations

Where requested by 10% of the employees in an undertaking (subject to a minimum of 15 employees and a maximum of 2,500), employers must undertake negotiations to reach an agreement on information and consultation arrangements. Employers may also initiate the negotiation process themselves.

Where a request for negotiations is made by fewer than 40% of the employees and there is a 'pre-existing agreement' (PEA) in place (which may provide for either representative-based or direct means of information and consultation), the employer can ballot the workforce on whether they support the request for new negotiations. Only if the request is endorsed by at least 40% of the workforce, and the majority of those who vote in the ballot, need negotiations proceed.

Negotiated agreements

Negotiations on an information and consultation agreement must take place between the employer and representatives elected or appointed by the workforce. The resulting 'negotiated agreement' must cover all employees of the undertaking and set out the circumstances in which employees will be informed and consulted – either through employee representatives or directly.

Default requirements

Where the employer fails to initiate negotiations following a valid employee request, or where the parties do not reach a negotiated agreement within six months, 'standard information and consultation provisions' specified by the Regulations will apply. These require that the employer must inform/consult elected employee 'information and consultation representatives' (one for every 50 employees or part thereof, but with a minimum of two representatives and a maximum of 25) on:

- business developments (information only);
- employment trends (information and consultation); and
- changes in work organisation or contractual relations, including redundancies and business transfers (information and consultation 'with a view to reaching agreement').

Enforcement and sanctions

Enforcement of agreements reached under the statutory procedure, or of the standard information and consultation provisions where they apply, is via complaints to the Central Arbitration Committee (CAC), which may order the employer to take the necessary steps to comply with the agreement/standard provisions. (Note that this does not apply to PEAs.)

The Employment Appeal Tribunal will hear appeals and is responsible for issuing penalty notices. The maximum penalty payable by employers for non-compliance is £75,000.

Confidentiality

Employee representatives and other recipients must not disclose information or documents designated by the employer as confidential. Employers may withhold information or documents the disclosure of which could seriously harm or prejudice the undertaking. Disputes over employers' decisions to impose confidentiality restrictions or withhold information may be referred to the CAC.

Options open to employers, trade unions and employees

Although the Regulations provide a legislative stimulus to the establishment of employee information and consultation arrangements, a key government objective appears to have been to maximise the flexibility available to employers.

First, rather than obliging all undertakings to conform to the requirements of the Directive, the Regulations' 'trigger mechanism' means that employers need not act unless 10 per cent of their employees request negotiations. Employers may therefore decide to maintain existing arrangements where they consider their current information and consultation machinery (or lack of it) is unlikely to be 'challenged' by employees via the Regulations' procedures. Conversely, in some circumstances, employers may see advantages in initiating the statutory negotiating procedure themselves.

Second, PEAs can be concluded at any point before the date a valid employee request to initiate negotiations is made under the Regulations. Subject to securing the necessary employee approval, the provision for such agreements enables employers to establish new information and consultation arrangements, adapt existing ones or underpin them by formal agreements, with the aim of effectively pre-empting the use of the Regulations' statutory procedure (significantly higher thresholds of employee support being required to trigger new negotiations where undertakings have PEAs in place).

Third, even where the statutory negotiating procedure is invoked, the emphasis of the Regulations is on promoting enterprise-specific agreements. The Regulations contain very little prescription concerning the contents of either PEAs or 'negotiated agreements' reached via the Regulations' statutory procedures, and the parties are given a free hand in agreeing the nature of the information and consultation arrangements that will apply.

A wide variety of outcomes is possible in terms of the substantive provisions of agreements, including the 'company council' or joint consultative committee model, consultation at levels above or below that of the undertaking, union-based arrangements (supplemented by representation of non-union employees as necessary), different arrangements for different parts of the workforce, and the use of direct forms of information and consultation (or a mixture of direct and representative forms).

The option of relying on direct forms of information and consultation was included in the legislation in response to employer lobbying, but concerns have been expressed over its compatibility with the Directive, Article 2 of which defines information and consultation as processes involving employee representatives.

The CBI guide to the Regulations comments that 'important flexibilities have been delivered and it is vital for companies to utilise these', and it identifies PEAs as providing 'the greatest level of flexibility to agree arrangements which best suit the structure and the culture of the organisation'.

The British conciliation service ACAS, the manufacturing employers' body EEF and leading law firms have also encouraged employers to be 'proactive' and to seek to reach PEAs. But, at the same time, employer approaches are likely to be influenced by their assessment of employee demand for new or modified information and consultation arrangements, and the likelihood of negotiating procedures being successfully invoked by at least 10 per cent of the workforce.

Broad employee satisfaction (or at least lack of active dissatisfaction) with existing or updated arrangements is likely to be enough to preclude the use of the trigger mechanism and the need for negotiated improvements. Moreover, it is questionable whether many employers currently without formal information and consultation arrangements will actively seek to introduce them, unless they are prompted by employees.

From the trade union perspective, it is notable that the Regulations do *not* accord any specific statutory rights to unions as such. Indeed, unions have been ‘written out of the script’ as far as the standard information and consultation provisions are concerned (under which the information and consultation representatives must be directly elected by workforce ballot).

Elsewhere, however, the Regulations do offer unions or union members a range of potential roles or opportunities to intervene. These include negotiating and approving PEAs, collecting names for an employee request for a negotiated agreement, acting as negotiating representatives (at the employer’s discretion), standing as candidates for election to information and consultation bodies and providing expert advice to employee representatives. In the case of both PEAs and negotiated agreements, it is open to the parties to agree that union representatives, and even external full-time officials could potentially represent unionised sections of the workforce.

Even where the Regulations result in the introduction of a consultation body elected by all employees – the most common selection practice for existing joint consultative committees – this still offers unions the opportunity of strengthening their presence in workplaces where they are not recognised, and raises the prospect of union members becoming representatives with the right to be consulted on a range of key issues, irrespective of union recognition.

At the same time, the Regulations offer potential benefits for organised workplaces, where the scope of bargaining/consultation associated with union recognition is often very narrow. The existence of statutory consultation rights covering a wide range of issues could enable recognised unions to address a substantially broader agenda than is currently the case, as well as securing better information about the organisation’s business plans.

On the other hand, there are concerns within the trade unions that the Regulations could undermine some union-based arrangements by prompting some employers to reassess existing union recognition arrangements, particularly if they apply to only a narrow section of the workforce or if union membership is low. Unions may also fear that their presence could be diluted or marginalised by the introduction of more broadly based consultation arrangements, and some may even refuse to take part in consultation bodies alongside non-union employee representatives.

Finally, as far as undertakings with no union presence are concerned, the 10 per cent threshold of workforce support required by the Regulations to trigger the process of negotiations with an employer could prove a tough standard to meet, unless major events, such as redundancies, provided a catalyst.

The extent to which employees actively seek to trigger the introduction of information and consultation arrangements under the Regulations may well be limited by their lack of awareness of their new statutory rights, procedural hurdles and employer hostility, especially in smaller undertakings and those with no tradition of representation, as well as by union ambivalence towards the new legislation.

THE SPREAD/REVISION OF INFORMATION AND CONSULTATION ARRANGEMENTS

Survey findings concerning the spread or revision of information and consultation arrangements in the light of the Regulations present an uneven picture.

There had been some speculation that moves by organisations to put in place information and consultation arrangements in anticipation of the Regulations might be reflected in an upturn in the proportion of workplaces covered by joint consultative committees at the time of the UK's 2004 Workplace Employment Relations Survey. This did not prove to be the case. Whereas 47 per cent of workplaces were covered by a joint consultative arrangement in 1998, the proportion stood at 39 per cent in 2004. At the same time, however, there was an increase in some forms of direct communications with employees.

A CBI survey reported that nearly half (47 per cent) of respondent companies had, as at May 2005, permanent mechanisms for informing and consulting employees, such as a staff council (compared with 49 per cent in 2004, 47 per cent in 2003 and 35 per cent in 2002) and a further 19 per cent said that they intended to introduce such a structure over the next year.

A survey of client companies published in May 2005 by management consultants ORC Worldwide and law firm Baker & McKenzie found that 55 per cent of respondents had no plans to establish new information and consultation arrangements or alter existing ones before the commencement date of the Regulations. Some 85 per cent of respondent companies had assessed the impact of the Regulations on their business and employment relations, and 80 per cent considered the Regulations would have 'little impact' or would require 'no significant change'.

On the other hand, a 2004 Labour Research Department survey of workplace trade union representatives found that the extent to which unions were informed and consulted on a range of issues had increased since a similar survey in 2002. The survey found a 'sharp increase' in the reported incidence of information and consultation bodies involving employees who were not union members – up from 11 per cent of responses in 2002 to 25 per cent in 2004 – and that over a quarter of these had been set up since 2002.

More recent surveys also suggest more active employer responses to the Regulations. In October 2005, an Industrial Relations Services survey covering mostly private sector firms found that over two-thirds of respondents reported having permanent consultative forums. Nearly half said that they had made changes to their information and consultation arrangements in the previous two years, of which 65 per cent said that the changes had been made in order to comply with the Regulations. A further 16 per cent of respondents said that changes were planned in the next two years – again, mostly to comply with the Regulations or partially for that reason.

In autumn 2005, a smaller-scale questionnaire survey carried out by Warwick University provided further evidence of active employer responses to the ICE Regulations, with 41 per cent of respondents reporting that they had an information and consultation body or employee forum and half the firms saying they informed and consulted via recognised trade unions. But the most popular practice was information and consultation directly with employees, reported by 59 per cent of organisations.

Asked specifically about their responses to the Regulations, 37 per cent of respondents said that they had already modified their arrangements, 7 per cent intended to introduce new information and consultation arrangements, and 20 per cent intended to review their current arrangements.

A particularly striking finding from these last two surveys is the very low expectation that employers seem to have (only 3 per cent in each case) that their employees will request negotiations on the establishment of information and consultation arrangements under the new Regulations.

EMPLOYER AND TRADE UNION APPROACHES TO THE REGULATIONS

The author also undertook a series of interviews with officials and advisers from employer and trade union organisations, management consultancies and other advisory bodies. These gave little indication of a widespread adoption of formal PEAs, despite the protection they offer employers against employee requests for new arrangements, nor of trade unions and employees utilising the Regulations' statutory procedures.

Employers

Interviewees from management consultancies and employer bodies reported that many companies had reviewed or audited their current information and consultation practices in the light of the Regulations, and assessed the prospects of their employees seeking to trigger the statutory procedures. However, many if not most companies appear to have taken the view that their existing arrangements are broadly consistent with the aims of the legislation, and/or that employee 'challenges' under the Regulations are unlikely.

In other words, their approach is one of 'risk assessment' rather than 'compliance'. The consultants/employer representatives could cite only one instance of an employee request being received by a client/member organisation. Moreover, when companies had moved to 'reposition' their information and consultation arrangements, this had typically been driven by internal employment relations considerations, not compliance-led.

Relatively few companies were reported to have put PEAs in place. Examples of those which have done so include Prudential, which set up a new, all-employee UK consultative forum in 2005, Northern Foods, which also overhauled its consultation machinery in 2005, and digital technology company ARM, which formalised the arrangements for its Consultation Forum, first set up in 2002, in a PEA 'signed off' by employee representatives at the end of 2004. Elsewhere, consultation arrangements may be management initiatives, not the subject of PEAs.

Few companies that have introduced PEAs are reported to have 'started from scratch', that is, from having no existing consultation arrangements.

Generally speaking, proactive management strategies seem rarer in companies without existing consultative arrangements or unionised workforces. There is some suggestion of a lack of awareness of the implications of the Regulations on the part of management, particularly in smaller companies. According to one employers' organisation official, the legislation is 'not even on the radar screen' of most companies with under 150 employees.

Some organisations were reported to have introduced or formalised direct methods of information and consultation for certain groups of employees (e.g. head office or managerial staff) not previously covered by existing consultative arrangements. But it appears that, in larger companies at least, reliance solely on the use of direct methods of information and consultation is unlikely to be considered a realistic or desirable means of meeting the Regulations' requirements.

One exception to this, reported by a trade union interviewee, is Yell (formerly Yellow Pages), where a 'communications and consultation policy' based on information cascades, team briefings, and electronic communications, was introduced with employee approval (via email) but no discussion with recognised unions.

Among US-headquartered non-union companies, widely perceived as being hostile to collective representation, it is perhaps significant that computer company HP, one of the first such companies to respond to the Regulations, chose not to go down the direct information and consultation route to compliance. Its PEA-based UK Consultative Forum, introduced in 2003, involves elected employee representatives from the various parts of the business and operates alongside established direct forms of employee involvement within the company.

It is notable too that the EEF's guide to the Regulations includes a model agreement for an 'information and consultation committee', and comments that the alternative approach 'based on direct information and consultation with all employees' may be 'difficult to organise and operate effectively, except in the smallest undertaking'.

Trade unions

Despite the TUC's support for the introduction of the information and consultation legislation, there is considerable ambivalence within the trade union movement about its organisational implications, especially for unionised workplaces. Unions have tended to be defensive regarding the new legislation, concerned that the introduction of workforce-wide information and consultation arrangements could threaten union-based representation where it exists.

There are few signs that unions are setting out to use the Regulations strategically, although a number of major unions have developed model information and consultation agreements. One union interviewee commented that, in practice, unions were generally 'reacting to employers, not initiating things'.

Not surprisingly, a primary union concern is to protect and enhance existing bargaining arrangements as far as possible. Some unions have advised officials to approach employers to seek to 'slot in' a clause on information and consultation into existing recognition agreements. One union interviewee explained that his union wanted to 'use the legislation to develop its collective bargaining relationships' in companies where the union already had recognition.

Some employer and management consultant interviewees reported examples of union reluctance to cooperate in reaching agreements on company-wide information and consultation arrangements in cases where large parts of the workforce were unorganised, reflecting union apprehension that existing collective bargaining arrangements could be marginalised or undermined.

One of the most active unions on the issue of information and consultation – Amicus – reported head office awareness of/involvement in information and consultation developments in at least 30 companies, and has negotiated a model information and consultation agreement with the printing employers' federation.

In a number of cases, Amicus has responded to company attempts to introduce 'substandard' information and consultation arrangements by submitting employee requests for negotiations which, although falling short of the 10 per cent threshold in the Regulations, have usually resulted in negotiations with the union over revised arrangements. The Amicus interviewee described this strategy as 'reactive rather than proactive', but nonetheless 'effective in securing improved arrangements'.

Amicus officials consider that 'negotiated agreements' reached under the Regulations' statutory procedures are preferable to PEAs on the grounds that their provisions are enforceable via the CAC whereas those of PEAs are not.

Union interviewees were divided on the scope for using the Regulations as a broader organising tool. One described the Regulations as 'not very helpful'. Another said that, submitting a 10 per cent employee request under the Regulations could provide an effective route to building union membership, and prepare the ground for an eventual claim for statutory union recognition. He added, however, that, if unions were to exploit the organising opportunities offered by the Regulations, they would need to commit the necessary staff and training resources.

CASE-STUDY EVIDENCE

Case studies undertaken by the author in four large companies offer further insights into how management and (where present) unions have approached the issues raised by the introduction of the information and consultation legislation.

In three of the four cases, management's motivation in establishing or revising company-wide information and consultation machinery was at least in part to adapt to the emerging legal framework.

At B&Q, the imminent adoption of the information and consultation Directive was, along with employee feedback, a factor behind a review of its Grass Roots consultation framework, first set up in 1998, that led to a 'revamp' in 2002.

At BP Exploration, consultation arrangements introduced in 1999 were prompted by the merger between BP and Amoco and mirrored the principles of the EWCs Directive, although subsequent adjustments were made 'with an eye on the new legislation'.

At BMW's Hams Hall engine facility, a plant council introduced in 2000 sought to break with the traditional pattern of employee representation within the UK automotive sector. The information and consultation Directive (then still in draft form) was reportedly not a major factor, but the company recognised that the plant council would be consistent with the new legal framework.

Each of these cases involved considered forward planning by management to position the company to manage the implications of the new statutory framework. Moreover, both B&Q and BP Exploration, whose information and consultation structures were not introduced on the basis of agreements with unions/employees, subsequently moved towards the establishment of PEAs to underpin their arrangements.

The fourth company, Abbey National, relied on existing union-based consultation procedures, although some 65–70 per cent of the employees are not union members. This reflected the union's opposition to separate representation for non-members and concern on the part of both management and union leaders that opening up the consultation machinery to non-union representatives could provide an organisational foothold for rival unions in the financial services sector.

This latter case highlights the implications of the Directive's and the Regulations' policy of universal, workforce-wide information and consultation rights for organisations that currently consult via recognised unions. Only rarely will unions be recognised as representing the whole workforce, as at Abbey. Elsewhere, employers may feel under greater pressure to introduce consultation arrangements that specifically cover non-union employees or groups.

None of the four companies sought to pursue compliance strategies based on direct forms of information and consultation, even though all operated a variety of direct employee involvement initiatives alongside their collective consultation mechanisms. However, in each case their introduction of representative-based information and consultation arrangements predated the publication of the draft UK Regulations.

PROVISIONAL CONCLUSIONS CONCERNING THE UK EXPERIENCE

In the absence of systematic data on how employers, trade unions and employees are responding to the new legislation, any conclusions must inevitably be provisional. Surveys have identified considerable levels of (employer-led) activity in terms of reviewing, modifying and introducing information and consultation arrangements. But, contrary to expectations before the introduction of the Regulations, there is a relative paucity of reported pre-existing agreements.

Many leading companies seem to be adopting evolutionary managerial responses to the legislation, which is consistent with a 'risk assessment' rather than 'compliance' approach – something that is facilitated by the design of the UK legislation.

For example, while the EWCs Directive's deadline for voluntary 'Article 13' agreements drove the adoption of a substantial number of such agreements, the absence of a single cut-off date in the Regulations for PEAs may be one reason why there has not been a similar upsurge in new or revised agreements in response to the Regulations.

More importantly, there have been very few reported instances of the 'trigger mechanism' being utilised by employees. This may reflect trade union ambivalence towards the Regulations and their focus on protecting existing union-based arrangements. It is also consistent with the view that the required support of 10 per cent of the workforce for a valid employee request to trigger statutory negotiations represents a high threshold.

Both the CBI and the TUC supported the inclusion of the trigger mechanism in the Regulations, but one of the most notable findings of the surveys is the fact that very few employers seem to expect their employees to trigger negotiations under the Regulations.

Indeed, although the emphasis of the Directive (and the UK Regulations) is on agreed information and consultation arrangements or adherence to regulated minimum standards, in the absence of employees triggering the statutory procedures the scope for unilateral management action – or inaction – is very wide. Indeed, the adequacy of a 'reflexive' approach to the promotion of information and consultation, where the onus is on the employers, trade unions and employees to initiate action to implement the intentions of the legislation, may well be questioned, not least by EU institutions.

This issue may take on additional significance when the legislation is extended to cover companies with 100–150 employees and 50–100 employees in 2007 and 2008 given that these companies are much less likely than larger companies to have existing consultation bodies, a union presence or well-resourced personnel departments likely to take a proactive approach to the legislation.

On the other hand, there are some grounds for optimism. Some of the surveys suggested that a significant minority of respondents were planning future action in response to the Regulations. The Department of Trade and Industry has sought to promote company visits and training sessions for employers to encourage the development and improvement of employee consultation practices. There are signs too that some trade unions are beginning to adopt more active strategies for using the Regulations' provisions.

Case law developments may also help kick-start a wider response to the Regulations. The first two decisions issued under the Regulations have important implications for both employers and unions. The CAC (and, on appeal, the EAT) ruled that a union recognition agreement at Moray Council was 'insufficiently detailed' to constitute a PEA for the purposes of the Regulations – with repercussions for employers and unions who are seeking to rely on such arrangements elsewhere. The CAC also ordered Macmillan Publishers to disclose data sought by Amicus about corporate structure as well as employment levels. This ruling could prove useful to unions in terms of developing company-specific organising strategies. Moreover, events in both cases demonstrate that the 10 per cent threshold for triggering negotiations is not insurmountable.

PART E

INFORMATION AND CONSULTATION IN SME'S

ENTERPRISE SIZE THRESHOLDS

The restriction of much EU labour law legislation to enterprises above a minimum size is more significant than generally realised. Our analysis²⁸ indicates that, when a threshold of 20 employees applies, some 23% of employees in the manufacturing sector, and 49% of employees in the services sector, lie outside the protection of legislation, meaning that around 40% of all employees are not covered.

These proportions vary between Member States, with more workers excluded in the South of the EU than in the North due to the average size of firm being smaller. Among the larger Member States, Italy stands out in that over 40% of employees in manufacturing, and 66% of those in services, are not covered by these directives.

The new Member States tend, for the moment, to be close to the EU average – even in the small Baltic State economies – because of the continuing presence of large enterprises from pre-market reform days. This implies, however, that the numbers falling outside the legislation could increase in the new Member States with the creation of more SMEs as their economies evolve with a growth in particular in the various services sectors.

POLICY ISSUES ARISING

With regard to information and consultation, there are a number of questions that can be asked concerning the situation with regard to small and medium sized firms:

- To what the extent are those small and medium sized firms (whose statistical definition can vary from firms with under 10 or under 20 employees to those with 50, 100, 250 or even 500 employees) who fall within the scope of Community information and consultation legislation, actually respecting it?
- Would it be possible to extend the effective application of the legislation by reducing the threshold levels at which the existing legislation applies, and what would be its impact on firms?

Percentage of all employees in firms with less than 20 employees

%	Manufacturing	Market services
BE	17.8	44.0
CZ	22.2	55.0
DK	14.4	33.3
DE	14.9	37.6
EE	16.5	47.7
ES	31.3	55.3
FR	18.5	33.3
IE	10.8	42.3
IT	40.9	66.0
CY	49.6	54.5
LV	15.8	43.1
LT	14.1	55.6
LU	9.5	32.5
HU	20.5	57.7
NL	22.6	40.1
AT	18.4	44.2
PL	23.6	59.5
PT	32.8	58.0
SI	17.6	49.3
SK	8.9	34.0
FI	13.9	36.8
SE	na	40.0
UK	18.3	30.7
BG	17.1	35.1
RO	9.4	54.3
NO	17.4	34.5
EU25	22.8	48.9

Source: Eurostat, Structural Business Statistics

²⁸2002 Structural Business Statistics survey (Eurostat)

- Would it be possible to find other solutions – for example to provide more basic legislation for firms with under 20 employees, or to develop non-legislative actions through institutional channels such as employer organisation and trade unions?

These questions are difficult to answer for two main reasons:

- The information available concerning small and medium sized firms is limited in most Member States
- The institutional arrangements and conventional practices vary enormously between Member States and between sectors.

In terms of the latter, differences cover such issues as trade union membership, the use or otherwise of works councils, the extent and nature of collective bargaining, as well as the extent to which they are involved in training, use modern management techniques and so on.

A recent review for the European Foundation for the Improvement of Living and Working Conditions²⁹ throws some light on these issues.

For example, in Austria virtually all SMEs are formally engaged in representative institutions through mandatory membership of the Chamber of the Economy, and are considered to have considerable influence because of the ‘one member, one vote’ principle. In other Member States, including Belgium, Denmark, France, Italy, the Netherlands and Spain, SMEs are also actively involved in employer organisations.

In Italy, in particular, there are a large number of associations at sector level which are affiliated to the Italian confederation of SMEs, covering some 50,000 firms and one million employees (representing, on average, 20 employees per SME although, in practice, the distribution is likely to be highly skewed).

On the other hand, in the United Kingdom and Ireland, statutory regulation has traditionally played only a limited role and national and sector level structure are weak, with membership of representative SME bodies in the United Kingdom put no higher than 5 or 10%.

Major differences are equally apparent across the new Member States. In Slovakia, SMEs have not formed themselves into representative organisations, while in Poland there are 3 main SME bodies, whose members employ 2.5 million people.

Slovenia is seen to be closest to the Austrian model with two employers’ organisations with compulsory membership and two voluntary associations, although all four bodies participate in social dialogue at sector and national level.

It is more difficult to identify the extent of employee involvement in SMEs and data on trade union membership by size of firm is not generally available. However specific surveys suggest very low figures – only 2% in France, 15% in the Netherlands and 13% in Ireland.

In Belgium, on the other hand, trade union membership does not seem to be lower in SMEs than elsewhere (including in sectors like construction where membership is very low in other Member States, notably in the UK), probably because of their role in administering social insurance funds. In Finland, too, trade union density is as high in SMEs as elsewhere, although it is not clear if this applies down to the smallest firms.

Among the new Member States, situation vary with Poland (which accounts for half the population of the new Member States) reporting that trade unions appear to operate in only 5% of enterprises with 10-19 employees, and virtually not at all below that level.

²⁹ Edward P. and Monder R. (2006)

The extent to which there is a works council tradition is also important. In Austria, works councils can be set up in enterprises with as few as 5 employees – the same threshold as in Germany. No data about actual application appears to be available from Austria, although data from Germany appears to show that they exist only in some 7% of establishments with fewer than 50 employees.

In the Netherlands, on the other hand, 80% of enterprises with 10-50 employees have a works council. In Spain elected worker delegates operate in enterprises with 6 or more employees, and data indicates that over a third of firms with 6-49 employees have such arrangements.

Arrangements regarding collective bargaining also tend to influence the way both sides address workplace relations. In the UK there are virtually no procedures for the application of sectoral agreements, while in Austria the practice of concluding collective agreements through the compulsory-membership Chamber of the Economy means that virtually all SMEs are covered by their provisions. In the Netherlands, too, virtually all SMEs are covered by sector-level collective agreements, as appears to be the case in Finland.

In Poland, Slovakia and Slovenia, trade unions are the only employee representative bodies, which means that collective agreements are rare in small and medium-sized enterprises, and absent in micro enterprises (commonly defined as under 10 employees, but sometimes under 5). In Slovakia, agreements only cover about 10% of private sector employees, and considerably fewer in SMEs.

In most countries, limited formal employee consultation in SMEs appears to be accepted as inevitable, although in Belgium there has been long-standing debate on this issue, with unions seeking enlarged rights, and employers' organisations defending the existing position, most recently in the light of the directive 2002/14/EC, with unions seeking a reduction of the threshold for certain rights.

In the light of all this, and in view of the exclusion of firms employing fewer than 20 persons from Community provisions concerning information and consultation, it is hardly surprising that the review conducted for the Foundation produced little information in response to the question 'Do alternative formal structures exist for information and consultation and social dialogue?'

However, the researchers were able to unearth some information suggesting that traditional stereotyping of small businesses – run in essentially autocratic manners without inputs from their employees, being overburdened by legislation and taxation, and being unwilling or unable to spend the time or money to invest in the skills of their workforce – may be very misleading.

Indeed, a 2003 survey of training found that 50% of SMEs overall in EU15 saw 'competency development' as a key part of their business strategy, with particularly high levels of informal and informal activity in the Nordic countries and Austria, but also in Ireland despite its wider 'voluntarist' traditions.

In terms of modern human resource management approaches, and the development of practices such as team-work and career development, the evidence does seem to suggest that SMEs under-perform compared with larger firms. However, much depends on the nature of the business – with modern service sector business performing much better than traditional, family-owned, businesses. On the other hand, a German survey on 'high performance' work systems found that while such practices were used in more than half of businesses with more than 500 employees, they were used in only a third in businesses ranging from 20 to 199 employees, and in little more than 10% in businesses with under 20 employees.

Despite these apparent weaknesses, there is off-setting evidence that informal arrangements in SMEs may substitute for the absence of more formal arrangements, including with regard to training. Likewise, the much quoted regulatory burden (which does not generally mean just employment legislation) may not be perceived by SMEs as so important as often quoted, given that the SME observatory reported, in a 2002 survey, that the administrative burden came only third on the list of constraints.

In the light of this complex and varied evidence, it is far from clear in which direction policy could go in order to extend the coverage of Community legislation to small businesses, employing under 20 persons, or possibly under 50 if the option available for governments is widely exercised under directive 2002/14/EC.

What is clear is that those employees who are already treated less well than employees in large business in respects of other matters, such as pay (which are typically estimated for SMEs at 80% or less of the levels in larger businesses) are also those who have the least protection in terms of their wider rights to be informed and consulted about matter that concern their livelihood and practices at their workplace.

Whether legislative, fully or partly, solutions could be found, or whether other actions would need to be pursued, is an issue that requires a good deal more attention than can be given here. However, it seems difficult to justify concentrating efforts on refining the information and consultation conditions on those who are already covered to some degree, and ignoring the 40%, or potentially 50% or more, who receive no such protection at all.

PART F

REVIEW OF THE EWC DIRECTIVE AND THE PROPOSED CONSOLIDATION OF INFORMATION AND CONSULTATION DIRECTIVES

THE REVIEW OF THE EWC DIRECTIVE

The Commission has clearly been reluctant to address the issue of the revision of the EWCs Directive. The ETUC has been critical of the Commission's approach to the 'second phase' consultation of the social partners, among other things for linking the issues of European Works Councils and restructuring more generally, and has renewed its call for the revision of the European Works Councils Directive which it describes as 'unavoidable' in its Memorandum to the German Presidency in early 2007.

As well as this angry response from the ETUC and a specific response regarding the recent Gaz de France case, the European Economic and Social Committee recently published an own-initiative report calling for the 'rapid updating' of the EWCs Directive and setting out a range of proposals for the revision of the EWCs Directive.

At the same time as it has been reluctant to support the revision of the EWCs Directive – where there is an effective obligation to act – the Commission has proposed a consolidation/codification of all information and consultation directives.

CONSOLIDATION OF INFORMATION AND CONSULTATION PROVISIONS

The Commission initiative, included in its February 2005 social agenda³⁰, to 'consolidate' the various existing information and consultation provisions in EU legislation is expected to address the relationship between the national and transnational aspects of the legislation and between its general and specific provisions.

There are significant differences between the social partners over the aims and objectives of this exercise. UNICE said it would oppose any moves going beyond a 'genuine codification' of existing legislation, whereas the Commission's initiative might be seen as consistent with ETUC aspirations for the EWCs Directive to be brought into line with the more 'advanced' provisions on key issues that are contained in the more recent information and consultation Directive, and in the employee involvement Directives linked to the European Company Statute and the European Cooperative Society Statute.

A central issue concerns the definition of information and consultation procedures, which are more detailed in the 2002 information and consultation Directive than in the EWCs Directive. The 2001 ECS employee involvement Directive also stipulates stronger (fall-back) information and consultation rights than the EWCs Directive and differs from the latter in a number of other areas: for example, a composition of SNBs and statutory RBs more proportional to national workforce size, shorter SNB negotiations, and a clearer role for trade unions in SNBs.

The 2003 ECSS employee involvement Directive continued this 'ratcheting up' process. It includes all the refinements made to the EWCs Directive incorporated in the ECS employee involvement Directive, and adds a few more that could also provide the basis for proposals to amend the EWCs Directive.

³⁰ European Commission (2005c)

These include the requirement for member states to ensure gender balance among employee representatives, and the inclusion of corporate social responsibility among the issues for information and consultation.

The ETUC initially welcomed the Commission's 'consolidation' initiative, but has not reacted since, and did not mention the issue in its submission to the German Presidency³¹. UNICE has stated that, unless there were a specific commitment to simplification, it would not favour such a consolidation.

It is known, informally, that national Government industrial relations officials who discussed the issue at a meeting in the first half of 2006, did not support the initiative, but it is not known whether this reflected their personal views or those of their governments.

The Commission Services continue to study the possibility and implications of such a consolidation, but no public position has been taken by the responsible Commissioner, or the Commission as a whole, concerning its eventual presentation.

SOCIAL PARTNER POSITIONS CONCERNING THE REVISION OF THE EWC DIRECTIVE³²

In April 2000 the Commission published a report on the application of the European Works Council Directive.

In September 2001 the European Parliament adopted a resolution in response to the Commission's report calling for a rapid revision of the Directive and proposed a range of amendments.

In 2003, the Commission announced in its work programme that it would consult the European-level social partners organisations about the possible revision of the Directive that year.

In September 2003, at the request of the Commission, the EESC adopted an Opinion that examined the experience of EWCs, looked at their impact, and the case for revision, but without making specific recommendations for amendments.

In April 2004, the European Commission launched its formal consultation of the social partners, following the procedure set out in article 138 of the Treaty.

This first stage of consultation related to the possible direction of Community action, and the Commission sought the social partners' views on 'how best to ensure that the potential of EWCs to promote constructive and fruitful trans-national social dialogue' can be 'fully realised', including the possible revision of the EWCs Directive.

The consultation confirmed that UNICE/UEAPME and CEEP were opposed to the revision of the Directive, and that the ETUC was in favour. The EU-level social partners organised a seminar in September/October 2004 as part of their joint social dialogue work programme, which led in March 2005 to a joint text on lessons learnt in European Works Councils'.

In April 2005, the Commission launched what it claimed to be the second stage of consultations of the social partners, but in the form of a Communication linked to the general issue of restructuring.

The ETUC argued that, according to the Treaty, a second stage consultation should relate to the content of an envisaged proposal, whereas this document merely encouraged the social partners to continue their joint work. Moreover, they argued that, while the work of EWCs and the issue of restructuring were related, their degree of overlap was limited, and it was inappropriate to address EWC issues in this way.

³¹ ETUC (2007)

³² EWCB European Works Councils Bulletins (2001-6)

In March 2006 the Commission adopted its 2006-8 work programme with no commitment to a revision of the EWC Directive, relying on a reference to the social partner 2005 agreement to promote and assess to justify taking no further action.

EUROPEAN ECONOMIC AND SOCIAL COMMITTEE OPINION

In September 2006, the European Economic and Social Committee adopted an own-initiative Opinion on European Works Councils³³ in order to ‘help make the role of EWCs more incisive, by means of updating (the Directive) so as to facilitate integration and social cohesion’.

The EESC recognises the “essential role” of EWCs in “stimulating and upholding social cohesion, and as a means of integrating European workers, with mutual knowledge and understanding helping European citizens to gain a clearer picture”.

The many thousands of EWC members are “directly and actively committed to creating a new society”. Furthermore, the “European social model, based on consensus seeking and social dialogue, respect for personal identity and dignity, conciliation of different interests, the ability to combine development with care for individuals and the environment, advocates creating a forum for meeting and discussion within trans-national companies”.

The EESC believes that the EWCs Directive has played an important part in achieving these objectives and has closely examined the current situation with regard to EWCs, in part by means of a hearing involving representatives of trade unions, employers and civil society.

It finds that experience to date “presents many positive aspects”. It especially highlights the fact that management and employees representatives on some EWCs have reached voluntary agreements on work organisation, employment, working conditions and further training. These accords are based on a “partnership for change” and their successful implementation is “entirely dependent on the will of the parties concerned”.

However, examination of the EWC experience also reveals a number of “areas of concern”. The most prominent of these is seen to be the low percentage of EWCs compared with the number of companies covered by the Directive. The EESC identifies “lack of workers’ initiative” as one of the reasons for the incomplete implementation of the Directive, although this might be due in some countries to “the absence of legislation protecting trade union rights in enterprises”.

Since the EWCs Directive came into force, the EU legal framework on information and consultation rights has been strengthened, the EES notes, through the 2002 Directive on national information and consultation rules; the 2001 employee involvement Directive accompanying the European Company Statute; and the 2003 employee involvement Directive accompanying the Statute for a European Cooperative Society.

These Directives provide a “more advanced view of information and consultation” than the EWCs Directive, together with “employee involvement procedures designed to ensure that they take place prior to any decisions”.

According to the EESC, these procedures “help to make European businesses more competitive on a global scale”.

The EESC identifies three main points that it feels should be “taken into consideration for a rapid updating” of the EWCs Directive.

- ‘Coordination’ of its information and consultation provisions with those dealing with the same issue in the three subsequent Directives mentioned above;

³³ European Economic and Social Committee (2006)

- An adjustment to the number of workers' representatives on special negotiating bodies (SNBs) and (statutory) EWCs to reflect EU enlargement and the right of representatives of each country concerned to participate in SNBs. The Directive (as amended in 1997) sets the maximum membership of SNBs at 18, the number of countries covered by the Directive at the time, but there are now 28 countries involved
- Recognition of the right of national and European trade unions to belong to SNBs and EWCs, and to make use of their own experts, not only during scheduled meetings.

The EESC proposes that, following a "reasonable period of integration" for the new Member States, and in the light of whatever the social partners may highlight from the lessons learned on EWCs, the Directive should be "subject to a review which takes account of these experiences and of those indications which can already be made".

The Opinion also links EWCs and corporate social responsibility (CSR). It states that the EESC "upholds the social dimension of businesses" in the EU, and the role played by EWCs. It notes that the European Commission commented, in a 2006 Communication on CSR, on the important role of employees and trade unions in implementing CSR practices.

The EESC states elsewhere in the Opinion that "assessment of current EWC practice suggests that the EWCs Directive should be reviewed in the light of the potential prospects in the area of corporate social responsibility and the new role that civil society organisations could play with European and world-scale companies, as well as the efforts those companies need to make to uphold fundamental social and trade union rights within their field of activity.

The EESC concludes that the "European social model is marked by the respect it shows for the rights on which human dignity is based, as well as by the protection it provides for the most vulnerable through welfare systems. In today's Europe, it should be indeed possible to exercise citizenship rights everywhere, including in the workplace and, in particular, within cross-border companies.

The EESC urges the Commission to recognise those new elements which have emerged since the EWCs Directive was adopted, and to identify the measures most likely to strengthen the feeling of belonging to the union."

The Opinion was debated at the EESC plenary session on 12 September. A compromise text was negotiable, but this eventually failed, and the text was eventually adopted by 144 votes to 76 against and 15 abstentions, with the employers' group voting against as it, and opposed any calls for a revision of the Directive. The employers then put forward an amendment that would have replaced the entire Opinion with a statement making the following key points:

- The Directive has paved the way for a new basis for transnational communication in companies, which have "accepted the challenges to integrate" EWCs into their structure and "tackled the new concept". Numerous EWC agreements have been concluded and the EWC concept "has only been able to take root in so many undertakings because the Directive provides for a framework which respects the existing culture within undertakings, while at the same time setting core requirements for information and consultation". Companies and workers have been able to conclude a variety of agreements that address their "individual requirements on a customised basis".
- EU enlargement is an important issue and the inclusion of employees from the new member states in the information and consultation process requires far-reaching adjustments, not least because of cultural differences. Stable conditions are needed, so that undertakings can involve management and employees from the new countries in their practices and at the same time pass on their experience. Further, some of the new member states transposed the Directive only two

years ago and need time to “adapt their national framework conditions”. Companies and workers have “already taken the right path in order to manage the challenging situation”.

- The social partners’ seminars on EWCs and the “joint lessons learned” should be taken into account in the EESC discussion. These made clear that “EWC and employers work together well” and “one should not interfere in a functioning system” by revising the Directive.
- The EESC should recognise that “undertakings in particular have made considerable efforts in connection with trans-national information and consultation of employees”. Management and employees are “on the right way to further enhance at company level the good job they have already made”.
- Against this background, the EESC should be of the opinion that there is no need to revise the existing and “well-functioning” Directive. Revision of legislative provisions would “interfere in complex and well-functioning structures without need”. The potential of EWCs cannot be increased by modifying the Directive and extending its scope. Rather, the parties involved at company level must be “left free to address their individual requirements on a customised basis”, adapting EWCs to new developments and globalisation. This is “only possible in the existing flexible framework, not through further restrictive legislative provisions.

The amendment was rejected by 139 votes to 82, with eight abstentions.

SOCIAL PARTNER CONCERNS

For a number of years, the ETUC has been pressing for amendments to the EWCs Directive and, in response to the Commission consultation document, it argued that 'weaknesses' in the Directive must be addressed, particularly to ensure that information and consultation over trans-national restructuring 'takes place in a serious and timely manner in all EWCs'

Key amendments put forward by the ETUC included the following:

- 'Improved definitions of information and consultation', reflecting the corresponding provisions in the 2002/14 information and consultation Directive, and the employee involvement Directives linked to the European Company Statute and the European Cooperative Society Statute;
- Specifying that information and consultation must take place in good time, i.e. 'before any decisions are taken', and that EWCs 'must have the right ... to draw up their own proposals in time for them, potentially, to be taken on board before the end of the decision-making process';
- The guaranteed participation of representatives of the sectoral European trade union federations in both special negotiating bodies and EWCs;
- 'A more closely specified procedure for renegotiating agreements', particularly when EWCs are involved in restructuring or merger processes. EWCs must be 'fully able to carry out their important role while restructuring is taking place until any legitimate replacement is up and running'.

In addition, the ETUC sought: a right to training for EWC members; a shorter period for EWC negotiations; stronger sanctions; measures to prevent abuses of confidentiality requirements; improved access to experts; guaranteed access for EWC members to company sites; and the right to preparatory and follow-up meetings of employee EWC members.

UNICE, on the other hand, was 'strongly opposed' to a revision of the Directive, stating that 'European employers are convinced that the best way to develop worker information and consultation in Community-scale undertakings is through dialogue at the level of the companies concerned.'

According to UNICE, 'the successful implementation of the EWCs Directive is due to the flexibility given to social partners at enterprise level to agree solutions best suited to their own circumstances. They, and not the legislator, can take forward the operation of EWCs in the future. Furthermore, an intervention by the EU legislator would be counter-productive as it could undermine the dynamic of gradual progress in the functioning of EWCs.

UNICE argued that the main challenge facing EWCs was the enlargement of the EU, which 'will involve more and new representatives from the new Member States with different economic conditions, social traditions, cultures and languages and the associated increased complexity and costs'. 'Changing the rules of the game' would be premature and disruptive.

UNICE concludes that, instead of revising the Directive, Community action should focus on:

- Monitoring the transposition and implementation of the Directive in the new Member States;
- 'Exchanging and learning from experiences of EWCs and other procedures of workers' information and consultation in Community-scale undertakings, notably against the background of enlargement'

In general, the reported views of national employer and trade union bodies on whether and how the EWCs Directive should be revised are largely consistent with the positions taken by UNICE and the ETUC.

National employers' bodies do not generally favour any revision or extension of the Directive, suggesting instead that the evolution of EWCs should be a matter for the parties at company level.

The Confederation of German Employers' Associations, the BDA, has, however, expressed itself in favour 'the opening of social dialogue at EU level on the basis of Article 139 [of the EC Treaty] with the objective of reaching agreement on practice-related orientations or guidelines for undertakings when applying the existing Directive'.

Similarly, the Movement of French Enterprises, MEDEF, has suggested carrying out a survey of techniques for improving the effectiveness of EWCs as part of the European social dialogue process.

On the trade union side, the various national trade union confederations are reported to favour an extensive range of amendments to the Directive, although some differences in emphasis are discernible. For example, in France the CGT-FO reportedly does not see revision of the Directive as a pressing matter.

National governments are not generally reported as having adopted a public stance on the prospective revision of the EWCs Directive. This is not surprising, given that the Member States do not need to address the issue of revision unless or until the Commission adopts a formal legislative proposal for amending the Directive.

The EESC has made similar calls before, for example, in a 2005 Opinion on the Commission's Social Agenda for 2005-10, where the EESC argued that "improvement" of the Directive was "long overdue". The initiative has again raised the profile of long-standing demands for revision from unions and the European Parliament. At the same time, the debate in the EESC underlined the strong opposition of employers' organisations to any revision.

Judgements on the issue are mixed. Some researchers take the view that 'Further legislative intervention does not seem likely to impinge greatly on current dynamics. Even though European trade unions are pressing for far-reaching amendments designed to generalise best EWC practice, a significant strengthening of the formal rights of EWCs as a result of the prospective revision of the Directive is doubtful'.

On the other hand, these same authors recognise that, in the past, the timing of developments in EU labour law legislation has been heavily influenced by particular industrial relations crises, and that any further major industrial relations difficulties could, once again, mobilise political support for action.

In this context, they point out that one of the problems facing employer representatives and proponents of a voluntary approach to improving the workings of EWCs is the continued presence of a long 'tail' of largely symbolic EWCs, that serve to fuel demands from European trade unions and politicians for stronger statutory consultation requirements, and which provide the kind of evidence that could support claims for strengthened policy interventions in the context of any future industrial relations crises.

STATEMENTS BY THE SOCIAL PARTNERS

Statements issued in the latter part of 2005 by the Secretary-General of UNICE and the General-Secretary of the ETUC in relation to the possible Revision of the EWC Directive.

UNICE – Philippe de Buck

Far-reaching EU legislation on worker information and consultation is in place. It comprises the Directives on European Works Councils (EWCs), national information and consultation, collective redundancies and transfers of undertakings as well as information and consultation provisions in various health and safety texts. To that can be added the even more demanding provisions on worker involvement in the European Company Statute and the Directive on cross-border mergers. And yet, despite the existence of these comprehensive legal requirements, there is a never-ending debate on the revision of the European Works Councils Directive.

Ten years after adoption of the Directive, some 750 EWCs have been set up. The business groups that have put in place a transnational procedure for worker information and consultation represent approximately 45% of the companies and 70% of the employees potentially concerned. Twenty-five percent of the companies falling within the scope of the Directive have sites in new EU member states. The Directive is now transposed in all 25 EU countries. Some companies anticipated EU enlargement and included representatives of workers from the accession countries long before it became a legal obligation. However, others currently seeking to enlarge their EWC report considerable difficulties in identifying workers representatives in the new member states in which they operate.

The EWCs Directive has proven its worth. Experience shows that EWCs can help management and workers to build a corporate culture and adapt to change in fast-evolving transnational companies or groups. Nevertheless, operating such bodies is complex and costly. Finding ways of reconciling different national industrial relations practices and occupational traditions, and addressing an increasingly diverse workforce, is a constant challenge. Similarly, ensuring a real sense of ownership of the EWC by the whole workforce is difficult. The development of a well-functioning EWC is a gradual learning process for all involved and cannot be achieved overnight.

Revising the EWCs Directive to introduce new obligations on employers is not only unjustified, it would also be counterproductive. The majority of agreements establishing EWCs were concluded before September 1996, on the basis of art. 13 of the Directive, which allowed greater flexibility to workers and management to design and operate procedures for transnational information and consultation in their company. In the meantime, a number of these agreements have been renegotiated. The responsibility for improving the functioning of EWCs lies with the representatives of the management and workers concerned, not with the legislator.

The role of EWCs in cases of restructuring has attracted most of the attention in the public debate. This linkage between two distinct issues has overshadowed the more general function of EWCs as a tool to ensure regular communication between management and labour on cross-border company issues and the variety of subjects discussed in these bodies. Moreover, it has disregarded the fact that restructuring is first and foremost a local issue.

As stated in the document *Orientations for Reference in Managing Change and its Social Consequences*, negotiated with the European Trade Union Confederation in 2003. EWCs can play a useful role when restructuring affects production sites in several EU countries. However, discussions on how to deal with the social consequences of change are always carried out at local level.

The EU social policy agenda puts a strong emphasis on social dialogue as a tool of EU social policy. Unice fully agrees that social partners are important players in Europe's labour markets. However, developing the social dialogue at EU level means focusing on key pan-European issues. Unice's aim is not to add a layer of collective bargaining over and above the existing national, sectoral, regional or company levels. European employers are not in favour of centralising collective bargaining at EU level. They therefore believe that the optional EU framework for collective bargaining which the European Commission envisages proposing is not desirable.

Finally, the EU social agenda also suggests consolidation EU provisions on worker information and consultation. Unice will strongly oppose any moves going beyond a genuine codification of existing legislation. Differences in definitions and formulations reflect the differences in the objectives of the various EU texts as well as the fact that information and consultation vary depending on the issue and level at which it is organised. European employers will not accept the introduction of new constraints on business under the false pretence of increasing coherence in EU legislation.

To conclude, the priority for Europe is to increase economic growth, improve companies' competitiveness and enhance job creation. The attention of EU institutions, national governments and social partners should not be distracted by unnecessary revisions of EU legislation. For this reason – and because it is convinced that the development of EWCs' activities in a way that benefits both the companies and workers is the responsibility of the parties to EWCs agreements and not of the legislator – Unice is opposed to a revision of the EWCs Directive.

Similarly, Unice is convinced that the EU social dialogue must not try and interfere with or substitute for social dialogue at other levels. However, as foreseen in the EU social dialogue work programme 2003-05, orientations for reference in managing change and its social consequences were negotiated with ETUC in 1003. Moreover, in 2005, shared lessons on European Works Councils adopted by the EU social partners were officially presented to the EU institutions (EWCB 57 p.8). Unice and its member federations are committed to promoting these two texts, based on good practices, across the European Union.

ETUC – John Monks

I became the general secretary of the British TUC in 1993; the year before the European Works Councils (EWCs) Directive was adopted. Back then, the form that this legislation would take was a hot topic for European-level social dialogue. My colleagues from other member organisations of the European Trade Union Confederation (ETUC) and I could already see that the challenge for trade unions would not be merely to set up EWCs in multinational companies but to develop them into tools that serve the needs of the workforce, supported to their full potential by trade unions. We needed to ensure that measures were put in place to prevent employees from ending up with tame, isolated bodies, controlled or ignored by their employers.

The Directive that was eventually adopted (belatedly in the case of the UK) has certainly helped trade unionists across Europe in creating some very good EWCs. Where trade unions are strong and employers are sensible we have had many examples of EWCs that have been of real benefit to the workforce and, indeed, to the company as a whole. However, in other less ideal circumstances we have also seen a number of situations that make it clear that the Directive remains flawed. So, for many years we in the European trade union movement have been campaigning to improve it.

At first we prepared our position for the review that art. 15 of the Directive says the commission had to conduct “not later than 22 September 1999”. However, no review of any substance ever took place. Since 1999, the ETUC and its members have lobbied continuously for improvements to be made in a revision of the Directive. In 2003, the year that I became the ETUC general secretary, we issued a new resolution making our priorities for revision absolutely clear. When the European Commission finally issued the first stage of an official consultation to review the Directive, almost five years after the 1999 deadline, this resolution was the basis of our response:

- The need for more precise definitions of information and consultation mechanisms;
- The formal recognition of the trade union role;
- The right of EWC representatives to necessary training;
- An improved right of recourse to experts; and
- The possibility to reverse or block decisions taken by companies in the event that information and consultation procedures are ignored or abused.

These demands for the improvement of the Directive were founded in the unparalleled wealth of experience that the trade union movement has developed in setting up and supporting EWCs. Our reasoning has been backed up by independent academic studies, the European Parliament and the European Economic and Social Committee. Even the first-stage consultation paper issued by the European Commission in April 2004 was supportive to a number of our arguments. However, the Commission has not yet shown any desire to change the legislation. Indeed, they have not even proposed that they correct contradictions in the Directive that arose as a result of EU enlargement.

Instead, in April 2005, the commission issued a Communication in which they claimed to include the second stage of the consultation process. I use the word “claimed” advisedly, because it certainly does not look like any other second stage consultation that we have seen in the past. This communication document is entitled *Restructuring and Employment: Anticipating and accompanying restructuring in Order to Develop Employment – the Role of the European Union*.

We at the ETUC were happy to see the topic of restructuring brought back onto the social dialogue agenda and we will certainly cooperate wherever we can with these initiatives in order to best represent the interests of working people throughout Europe. However, it did not contain a second stage of the consultation on the EWC Directive.

Nor are we satisfied with this document as a communication on restructuring. If Europe is to address the adverse effects of restructuring seriously we will need to see much more than has been proposed. Support mechanisms for workers hit by restructuring must be defined and developed; we must have compulsory social audits to allow the representatives of workers to assess the true impact of restructuring decisions; and we must allow the representatives of workers affected by mergers referred to the commission to have their voices heard and considered in terms of the social impact of those decisions. There are also a number of other relevant Commission initiatives that are already under way and yet, disappointingly, were not even mentioned in this communication. Plans for a pan-European framework for collective bargaining, the harmonisation of information and consultation rights and the debate on corporate governance all have an important connection to restructuring but were absent from this document.

But whatever its shortcomings as a communication on restructuring, it cannot be doubted that that is what it is – whereas I must repeat that it certainly was not the second stage of consultation on the EWCs Directive.

There are three good reasons why we must come to this conclusion.

First, a “communication” intended for a general audience is not and never has been a tool with which the commission conducts official consultations of the inter-professional European social partners.

Second, and perhaps more seriously, this “second-stage consultation” on EWCs was clearly grafted onto another consultation of a different type and on a different subject. Of course, EWCs have an important part to play in the management of cross-border restructuring in large multinational companies. However, EWCs do not have anything to do with restructuring in the vast majority of companies that do not meet the trans-nationality and employment size criteria to be covered by the EWCs Directive. Equally, they do a lot more than just deal with restructuring issues. So by mixing up the two consultations, the commission has undermined the debate on EWCs and the debate on restructuring.

The final and perhaps the most convincing reason for us to conclude that this was not really the second stage of a consultation, as set out in the EC treaty, is that art. 138(3) tells us that the second stage should take place on the content of the “envisaged proposal” for Community action – something that appears to be completely missing from this document.

In fact, it seems clear from the commission’s document that no legislative proposal to revise the EWCs Directive will be presented in the near future. This unhappy conclusion is also underlined by the current political situation. The commission has asked that the social partners try to reach an agreement on the “ways and means for ... promoting best practice in the way that European Works Councils operate, with a view to making them more effective ... especially as regards their role as agents for change”. However, although we do not rule anything out, it should be noted that up until now, Unice, the European employers’ confederation, has not been able to agree to any joint statement on further commitments in this area during our social dialogue meetings. Furthermore, they have made it very clear that they are opposed to any change in the legislation on EWCs.

A revision of the EWCs Directive is still needed. The European Commission recently supported an ETUC project in which Professor Jeremy Waddington conducted the most comprehensive survey of EWC members to date. The initial results of this work shows that there is still overwhelming support for the ETUC’s proposals for revision. The survey also shows the real problems that many EWCs have in living up to the intentions of the Directive under its current provisions. So, we must continue to press our case.

In the meantime, we in the European trade union movement must also try to address the problems of EWC members within the confines of the present legislation. We have already done a lot of important work in this regard, particularly through the European industry federation. However, we should look to see whether we can do more.

We must assess whether we can better support trade unionists serving on EWCs. We must look to offer more help and encouragement for EWCs and special negotiating bodies to negotiate better agreements. We will also be looking at whether we can offer support in legal cases by EWCs against employers who are not meeting their obligations as set out in the current Directive and in their agreements. Indeed, this last point could be particularly interesting as a way of clarifying some of the more ambiguous aspects of the law that we have asked to be addressed in the revision.

We have gained a lot with the creation of EWCs. Where they have been successful, they have proved to be a very important tool for informing workers and getting their voices heard. However, there are still too many EWCs which are not functioning in the way that was envisaged when the Directive was adopted. Changing this will not be easy, especially in the current political climate. Nevertheless, European trade unions will continue to take up the challenge on behalf of the millions of our current and future members who are employed in companies covered by the Directive.

Joint statement by the EU Social Partners

The EU-level social partners – ETUC, UNICE/UEAPME and CEEP – published a joint statement on the “lessons learned” from seminars that considered case studies of the operation of EWCs in nine leading companies, and presented the statement to the European Commission and EU employment ministers.

The main points were:

- EWCs “can help management and workers to build a corporate culture and adapt to change in fast-evolving trans-national companies”;
- The establishment of “a climate of mutual trust” between management and workers’ representatives in the EC is important for its effective functioning;
- Investing in language as well as technical training helps to “optimise” the functioning of the EWC;
- Finding ways of reconciling different national industrial relations practices and, addressing an increasingly diverse workforce is a “constant challenge”;
- All the case studies demonstrated that ensuring a real sense of ownership of the EWC by the whole workforce was a “considerable challenge”;
- Some companies seeking to enlarge their EWC have encountered difficulties in identifying worker representatives in the new member states;
- Managing multiple layers of information and consultation can sometimes be very complex;
- All the case studies underlined that the effective functioning of EWCs is a “learning and evolving process” requiring “fine-tuning over the years”.

The ETUC’s executive committee considered the joint text at its meeting on 15-16 March 2005. As with the earlier joint text drawn up by the social partners on restructuring, there appeared to be some scepticism as to the value of this initiative. Some of the points covered in the text were seen as reinforcing the ETUC’s approach to EWCs, while others were identified by ETUC officials as “ambiguous” or “unclear”.

The ETUC noted, for example, that the document stressed that clarity of procedures are important for creating mutual trust, and refers to the benefits of language and technical training. It also includes a positive reference to the role played by European sectoral federations – a point that the ETUC regards as “particularly important, since the current Directive does not formally recognise the role of unions”.

Less helpful, in the ETUC’s view, are the references to the potential benefits of “pragmatic” or “informal” approaches to the operation of the EWC – the ETUC would prefer to emphasise procedural compliance – and the absence of a stronger reference to union-avoidance activity in the identification of EWC representatives from new member states.

The text was also criticised for having no conclusion or planned follow-up.

In its discussions with UNICE over the statement, the ETUC had been careful not to agree to further joint work that could be presented or construed as undermining its calls for the revision of the Directive, which remains its priority. However, it accepted that the *Lessons Learned* document may provide a “useful framework” for discussing the practical functioning of EWCs and for negotiations over new or revised EWC agreements. It could also “provide some inspiration for the European Commission when it presents its proposals for revising the Directive”.

CONCLUSIONS

Scope and content of legislation

Community legislation on the information and consultation of employees has developed over the last 30 years in terms of both scope and content.

In terms of scope, it has gone from the specific – basic requirements concerning the information and consultation of employees in the context of collective redundancies – to the latest, broad, approach – aimed at ensuring the spread of good practice information and consultation procedures at the workplace on a routine basis.

In terms of content, each successive piece of legislation has tended to be stronger than its predecessors, in terms of both the obligations placed on employers, and the extent to which enforcement requirements have been strengthened.

EU legislation and national industrial relations systems

The impact of Community information and consultation legislation cannot be considered in isolation, but rather in the context of each Member State's industrial relations system. These national systems vary a great deal – not least in terms of institutional structures, the powers of the social partners, the importance of collective agreements, and the extent to which national systems already addressed these issues prior to the arrival of Community legislation.

Legal systems also vary across Member States, which can affect the extent to which the terms of Community legislation are effectively implemented. This can depend on the presence or absence of appropriate mechanisms at national level – such as labour courts, arbitration systems etc – as well as the extent to which there is a culture of respect for the law in general, and in relation to industrial relations.

There is no evidence at the present time that any Member States are in breach of their obligation to transpose Community information and consultation legislation into national law although some Member States were late in transposing the latest legislation and the detailed review underway may well identify specific weaknesses.

This is in line with past experience where the application of each of the major pieces of legislation containing important information and consultation provisions has evolved over time:

The collective dismissals directive, and the related transfers of undertakings directive, have a volume of case law, which has covered, in particular, the need to increase the severity of sanctions to deal with case of non-compliance

The use of the European works council directive has evolved in practice, with progressive improvements in the quality, if not the quantity, of agreements

The more general Information and Consultation directive only came into force in 2005, and little can be said about its application so far, other than that it is considered to have considerable potential, and it is included in the 'quality review' of the transformation of legislation that the European Commission is currently undertaking across all legislation in this field, with a report available by the middle of 2007

The capacity of Member States to implement Community legislation

The capacity of individual Member States to ensure the effective application of social legislation appears, on the basis of related social policy research, to vary considerably. This is not just an issue of the quality of the procedures or structures, but of culture.

In terms of culture, the position is seen to range from respect for all laws, including those derived from EU information and consultation legislation (the Nordic countries), to one in which EU legislation is little respected (including Greece, Portugal, Italy and, perhaps surprisingly, France) or subservient to national concerns (the case in Germany, the UK and Spain).

The need to develop an appropriate culture is seen as particularly relevant in the new Member States as they move from transposing Community legislation in this area – as they have now all done in principle – to implementing and enforcing it.

These countries are still developing their industrial relations systems and social dialogue capacity generally, and having to address information and consultation issues in particularly difficult circumstances, with representative bodies such as trade unions much weaker than in most other parts of the Union.

Governance and the 'good law' principle

Research into the practical implementation of EU social legislation in the different Member States, and concern about the quality of EU governance in general, suggests that there is a need to put much more emphasis on implementation and enforcement policy once the EC is assured that the legislation has been effectively transposed.

If Community Information and Consultation legislation is to live up to the principle that 'a good law is an enforceable law', there is a need to ensure adequate provisions – such as labour courts – to speed decisions and actions, and to avoid aggrieved parties having to take complaints through costly legal processes. Likewise, sanctions need to be appropriate, which does not seem to be the case in some Member States.

The latest Information and Consultation legislation has stronger conditions in principle – sanctions have to be effective, proportionate and dissuasive – but that still leave the institutional and operational arrangements to the Member States, which is seen to be a source of continuing weakness.

The European Commission is currently undertaking a 'quality of legislation' review of:

- the Collective Redundancies directive (98/59/EC) and the European Works Council directive (94/45/EC) in the 10 new Member States
- the Information and Consultation Directive (2002/14/EC), Transfer of Undertakings (2001/23/EC), European Company Statute (2001/86/EC), and European Cooperative Society (2003/73/EC) in 25 Member States.

These reports are expected in mid-2007, although they are unlikely to address the issues of implementation and enforcement in any depth.

The shortage of empirical evidence

In general there has been little systematic empirical research, or scientific analysis, of the developments of information and consultation practices within Member States, or of the specific impact of Community legislation on such practices.

The research results we have identified are generally qualitative rather than quantitative, and most commonly take the form of case studies, or expert opinions. Examples can provide insights, but it is difficult to judge if they are indicative of a wider reality, or merely 'outliers'.

There are various explanations for this unsatisfactory state of affairs:

- comparative, multi-disciplinary research is costly, difficult to fund, and unattractive to many researchers;
- the main policy interest in industrial relations appears to lie in achieving political agreements rather than evaluating the results;
- the main responsibility regarding the effectiveness of directives shifts to national governments following their transformation into national law.

More and better information is required, however, if the benefits and costs of Community information and consultation legislation are to be correctly measured and appreciated,

In this respect the European Foundation plans to produce the first EU-wide report on the 2002/14/EC directive by mid-December, which is expected to address issues of implementation, enforcement and sanctions, based on the contribution of a network of national correspondents covering all Member States.

Weaknesses from an employee and trade union perspective

From the perspective of employees, while the legal coverage has evolved in a positive direction, several weaknesses remain.

Information and consultation arrangements do little, of themselves, to protect employees against job losses – they mainly ensure that employees receive advanced warning. If protection goes further – for example, obliging employers to modify their plans to some degree – this is generally because procedures are laid down in collective agreements (as in France and Germany) or because there is the possibility of direct government intervention (as in Greece).

All information and consultation legislation is limited to companies above a minimum size threshold – those with less than 20 employees are excluded – which means that some 25% of employees in manufacturing and 50% of employees in services are not covered by the legislation.

The Works Council directive is now well established with over 750 agreements in operation, even though its use has stalled at around a third of potentially eligible companies. However, there are a number of detailed practical issues causing difficulties. In particular, the long potential delay of 3 years for negotiating agreement is seen as out of line with the one year delay specified in the European Company Statute directive.

The latest, and most general, Information and Consultation directive has the potential to significantly improve the quality of workplace relations, but its coverage depends on which of the two threshold options – 50 employees in undertakings or 20 employees in establishments – has been adopted by national governments in their legislation. The latter option could leave up to 35% of employees in manufacturing and 60% of employees in services outside the scope of the legislation.

While the 2002/14/EC legislation is generally welcomed by the trade union movement, and seen as a strengthened base for future work, there is concern (especially in some new Member States) that existing trade union systems of representation could be undermined by the possibility for employees (perhaps 'guided' by their employers) to opt for direct representation. There is a further concern that this could lead to a fragmentation or decentralisation of collective bargaining rights to the company level.

There are also a series of issues where trade unions would have preferred greater precision in the legislation – notably in relation to the right to be informed, the timing of such information, the scope of the information, the use of confidential information, the extent of technical support available – although it is recognised that these issues may become clearer in practice, especially if the courts are called upon to apply or interpret the law.

Moreover, there is a particular uncertainty as to whether all employees, whatever their work status in, or in relation to the company, are included in both the coverage of the legislation, and in determining whether the company or establishment comes within the threshold.

Evolving employment and industrial relations systems

Over the longer term, other challenges need to be addressed in terms of information and consultation, including the implications of the emergence of divergent trends in workplace relationships – the spread of ‘flexible’ contractual and working time arrangements in some sectors and companies, contrasting with the development of ‘high performance’ workplaces, built around team-working and networks in others.

There are also the implications of changes in overall labour market policies in the direction of ‘flexicurity’ – where the emphasis shifts from protecting specific jobs to protecting long-term employment prospects and income through wider support, including retraining.

At the present time, there is also much uncertainty about the future of industrial relations in a Union of 27 or more Member States, and whether traditional, often adversarial, industrial relations will be replaced by more social partnership, with or without the backing of legislation.

In this respect, the Member States with the highest standards of information and consultation (the Nordic countries) are also considered to be economically competitive, and among the ‘best places in which to do business’ – as judged by the 2006 World Economic Forum. However, their workplace relationships are based as much on the strength of their collective agreements, and national traditions, as they are on legislation.

Convergence

In most EU policy areas, convergence is seen as a ‘good thing’. However, Member State industrial relations systems remain heterogeneous and complex. Community legislation has, in principle, established minimum standards in terms of information and consultation, and the works council directive has established a framework linking national and European concerns.

Even if this is the case in practice, it is not clear whether this has resulted in any overall convergence of practices and outcomes since it is possible that countries with higher standards have raised their own standards even further, leaving the gap as wide as before.

Two things are well understood from the past. Firstly, that most Community labour law or industrial relations legislation has been adopted in response to economic and industrial relations crises and, secondly, that national industrial relations systems are slow to change and difficult to transfer to other Member States.

Whether the future is any different will partly depend on developments in the new Member States – including the manner and extent to which they embrace, not just European legislation, but the European social model more generally.

Shared responsibilities

The effectiveness of Community legislation in respect of information and consultation depends on a range of bodies: the original legislators, Member State governments, employers and their representative bodies, employees and their representatives, notably trade unions, national courts, the European Court of Justice and the European Commission. Failures on any of their parts are liable to undermine the full and effective use of the legislation that is available.

RECOMMENDATIONS

In addressing the above concerns, the European Parliament is recommended to:

- Advocate much more *monitoring and comparative EU-wide research regarding information and consultation practices in the Member States*, with the particular aim of improving enforcement, especially in countries that are seen to be lagging behind, noting that the European Foundation for Living and Working Conditions plans to ask its EIRO network of correspondents to provide a first overall assessment of the implementation of the 2002/14/EC directive for the end of 2007.
- Encourage the European Commission to pursue its proposal to *consolidate Community information and consultation legislation* in order to identify the potential benefits and costs, and clarify the practical options and implications (including in relation to the legal base) as a basis for consultation. In particular, the Commission could be asked to indicate the benefits of imposing the most recent conditions (as in the European Company Statute) onto earlier legislation, and the implications of changes in legal base for the role of the European Parliament.
- Insist again on the early *review of the European Works Council directive* – now 7 years overdue – paying particular attention to ways in which practical problems can be resolved, and delays in negotiating new agreements reduced
- Encourage the Member States to work individually, and together, in order to ensure more effective *enforcement of EU legislation at national level*, not least through the adoption of best practice – such as accessible labour courts – and encourage the *social partners* to make full use of national legal systems to pursue their goals, with resort to the European Commission infringement procedures where they feel national governments are not acting correctly
- Press the European Commission and the European social partner organisations to develop additional, parallel, ways of promoting best practice information and consultation arrangements for the 40% or so of *employees who are excluded from the protection of legislation* because they work in small businesses, or are excluded on the basis of their work contract.
- Promote the *wider economic and employment benefits of the EU social model*, with the information and consultation of employees at its heart, and raise public and political awareness of the EU strong performance in terms of competitiveness, productivity, and its ability to combine modern and effective quality business practices with social justice and democracy at the workplace through the effective use of legislation.

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