

# **Comparatively Open: Statutory Information Disclosure for Consultation and Bargaining in Germany, France, and the UK**

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## **Abstract**

Information provision is an important part of all mechanisms which give employees voice at work. This paper considers the law on information disclosure for joint consultation and collective bargaining in three countries, Germany, France, and the UK, chosen for their distinctive legal and institutional arrangements, within a common European Union context. It is argued that there is coherence between the law and institutions in Germany; in France, despite extensive legal support for information provision, the law and institutions complement one another less; in the UK, there are contradictory approaches and new dilemmas confronting the traditional system. Although European Directives harmonise statutory minima, there are few signs of common disclosure practice emerging across the three countries.

Keywords: Collective bargaining, information disclosure, unions, Germany, France, UK

JEL Classifications: J5, J50, J51

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## 1. Introduction

Information is a basic resource in enterprise decision-making. It is also essential for joint consultation, collective bargaining, and other mechanisms which give employees voice and regulate employment. In practice, most information relevant to employee relations originates with the employer and there is a pervasive asymmetry of information between employer and employees. Employees and their representatives will often seek information from the employer through consultation and in bargaining. The employer's propensity voluntarily to disclose information in part depends on the perception of the balance of common goals as against distributive interests (Kleiner and Bouillon 1988; Morishima 1989 and 1991).

In most countries, company information is publicly available as a result of statute. Under company law, there are obligations on firms to disclose information in annual accounts and as part of reporting requirements. Such information is often made available voluntarily to employees and used in wage bargaining by unions. However, it is usually highly aggregated and historical. Under individual employment law, in most countries, there are statutory obligations on employers to provide individuals with information on contracts of employment, health and safety, and pensions (Clark and Hall, 1992; Kenner, 1999). This may also extend to a more general 'good faith' obligation to provide individuals with reasonable information as part of their contracts of employment (Brody, 1998).

In some countries, notably the members of the European Union (EU), additional collective labour law specifically addresses the informational asymmetry between employers and employees by detailing obligations to provide information to trade unions for collective bargaining or to works councils or other bodies for joint consultation. These arrangements are of two types – which we term *process-driven* and *event-driven*.

Where information disclosure is process-driven, the trigger for its use lies within a bargaining or consultation agenda. The legislative approach to this tends to be a set of general rules on disclosure within a specified process such as a consultative or bargaining forum. The central purpose of such law is to enhance the operation of a process which itself may be either voluntary or mandated. By contrast, where information disclosure is event-driven, it is triggered by a specific employer-initiated event which affects employment contracts irrespective of the representative context – examples are changes of ownership or redundancy. Here, the central purpose of the law is to create a temporary process around an employer-initiated event which has implication for terms of employment.

The concern of process-driven disclosure is with a set of interlinked issues and with the vitality of the bargaining or consultative process; the concern of event-driven disclosure is primarily procedural justice in a specific context, such as the termination of employment contracts. Process-driven disclosure assumes an on-going relationship and may enable employee representatives to take proactive measures. Event-driven disclosure tends to operate more in a palliative rather than preventative way and need have no continuous impact on the relationship between employer and employees. However, from the employee perspective, there is one major advantage of event-driven disclosure: it can exist in the absence of representation, which in most countries has tended to shrink in scope and coverage. In the EU, both types commonly coexist within national legal frameworks.

Here we examine the character of three national sets of disclosure requirements in the EU. The purpose is to understand how they are framed, to assess their comparative effectiveness, and to consider the likely impact in different countries of EU Directives which seek to harmonise practices across member states.

The structure of the paper is as follows. In the next three sections, legal arrangements for information disclosure are considered in three countries, Germany, France, and the UK, chosen because of their distinctive approaches, within a common EU context. In part, the order reflects the historical timing of the development of law on disclosure in the three countries. In part, it also reflects the extent of the law, the coherence between different laws, and the complementarity between legal and institutional arrangements. In the final section, the three countries are considered comparatively and the impact of EU Directives is addressed.

## **2. Germany: A Coherent System Under New Pressures**

In Germany, company information is disclosed primarily to employee representatives in the works council and on the supervisory board of the company. Legislation was enacted on disclosure in the 1920s; it was re-introduced in 1952; since then there have been a number of further extensions of the law.

## 2.1 Works council representatives and their information rights

The Works Constitution Act (*Betriebsverfassungsgesetz* or *BetrVG*) of 1952 (as amended in 1972, 1988, and 2001) established the works council (*Betriebsrat*), giving it important powers in social, personnel, and economic matters. Under the law, at the workers' request, a works council must be established in any company with at least five full-time employees. Its duties are to represent employees, to see that their justified suggestions are implemented, and to ensure that laws and higher-level agreements are observed. In the absence of such laws or agreements, the *Betriebsrat* is entitled to conclude works agreements (*Betriebsvereinbarungen*) concerning various aspects of employment.

The *BetrVG* 87(1) lists the areas of competence of the *Betriebsrat*. These include *inter alia*: working hours, wages and benefits, leave arrangements, monitoring of employees, health and safety, social facilities, standards governing pay systems, and principles governing suggestion schemes. The works council must act 'in a spirit of mutual trust', whereby both sides agree 'to refrain from activities which disturb operations or peace in the establishment.' (*BetrVG*, 2 and 74-2).

To carry out its functions, the works council has extensive access to information: it shall be kept 'fully and promptly' informed and any documents which it requires shall be made available 'on request at all times' (*BetrVG*, 80 (2)). Confidentiality is not a reason for failing to inform the council (Daeubler, 1995). To ensure that information is provided and can be used effectively, the Act and case law guarantee that access to information shall be in good time, which is defined as 'sufficient time for suggestions and objections to be taken into account at the planning stage.' (*BetrVG*, 106;90) The frequency of information exchange with the employer is legally mandated as monthly for both the *Betriebsrat* and its Economic Committee, to which annual accounts shall be explained. At the request of the council, information flow and meetings may be more frequent. In addition, when the workforce exceeds 1,000 employees, the employer shall directly inform employees in writing of the financial state and affairs of the undertaking at least once each quarter (*BetrVG* 74 (1)).

To facilitate its activities, the works council has a number of supports. Council members have the right to paid time-off for training and a number of works councillors can be released from normal duties. Operating expenses must be met by the employer, who must make available premises, equipment, and secretarial support (*BetrVG* 37-38 and 40-41). So as better to process information and to avoid overload, the council is entitled to form special committees. The most influential of these is the Economic Committee, mandatory in all

undertakings employing over 100 employees. Interpretation of information is facilitated through the right of recourse to experts and for the outside union to attend council meetings in an advisory capacity. In the case of multi-plant and affiliated companies, where it is felt that the real information and decision-making centre is beyond the reach of any one works council, a central council may be established by the resolution of individual works councils. The central council is composed of delegated members of the individual councils (*BetrVG* 28, 31, 80 (3), 106, and 108 (4) and (5)).

If it considers that there is obstruction to its rights or where the parties cannot agree on the interpretation of information or a course of action, the council has recourse to a conciliation committee. This consists of an equal number representing each side and is usually chaired by a non-voting labour court judge. Employers prefer not to go to such a committee, in part because they pay for the proceedings, but more important because, in areas of co-determination, any decision is legally binding and supersedes all other agreements between the employer and the council (*BetrVG* 76 and 87(2)). There is thus strong pressure to reach an agreement. The council has significant access to information and capability for processing it. As will be described below, its links with the outside union are crucial to its capacity in this respect.

German workers also have representation on the supervisory board (*Aufsichtsrat*) of their companies, with proportions depending on type and size of company. Meeting at least twice a year, its main functions are to elect the members of the management board (*Vorstand*) and to supervise its activities. The legal rights of employee representatives are identical to shareholders' representatives and they therefore have access to any information accessible to the *Aufsichtsrat*. At the very least, this allows a direct monitoring of annual accounts and balance sheets. At least once a year, the management board must supply the *Aufsichtsrat* with comprehensive information on all basic issues concerning the management of the enterprise. In addition, at any time, any member of the *Aufsichtsrat* can request additional information on affairs of importance for the enterprise. However, a duty of confidentiality applies to all members of the *Aufsichtsrat*. In practice, though the supervisory board in theory controls the management board, the latter is often very strong, not least because of its control over the flow of information. In practice, in most companies, the works council is the more important employee voice mechanism.

## 2.2 Special event disclosure and the minimal impact of the EU

Below we will see that EU Directives and special event disclosure have had some effect on developing law and practice on information disclosure in France and an even greater effect in the UK. By contrast, they have little impact on German law and practice. In all three countries, we focus specifically on collective redundancies, transfer of undertakings and takeovers, and the impact of the European Works Council (EWC), all areas of major importance where there have been EU Directives.

In the case of collective redundancies, the works council has always had a significant role. In firms with over 20 employees, the council has extended co-determination rights in the case of changes which may have ‘serious disadvantages’ for a substantial proportion of the workforce (*BetrVG* 111).

The labour court has specified that the works council shall be called whenever redundancies affecting 10 per cent or more of the labour force are planned and that a special works agreement must be concluded between the employer and the council, following ‘socially acceptable’ criteria for dismissals. Where the council has not been consulted or where no agreement has been reached, the dismissals are without effect. In practice, though most redundancies are accepted, this process affects the number and terms of redundancy (Standing and Tokman, 1991).

Despite the low number of hostile takeovers, there has been a growing concern about takeovers in Germany. However, there is no specific legislation in this area governing disclosure to employees. Yet, as described above, the legal rights of the works council and board representatives apply. In practice, as in other countries, it is difficult to reconcile the right to information and the confidentiality inherent in such situations. There are various problems - the secrecy rules imposed by national stock-exchanges, the danger of adverse market reactions given the time needed to convene such a meeting, the content of the information to be provided, and the nature of any sanctions to be applied for non-disclosure. At the present time, the German government is considering a bill concerning takeover procedures, on the lines of the French model to be discussed below.

Though giving the possibility of creating EU-wide consultation institutions for German firms, the introduction of the EWC Directive has had a limited effect within Germany itself. During the negotiations on the Directive, the German unions tried to preserve the ‘workers’ only’ composition of EWCs. However, in the end, the Directive did

not align with the German definition. German unions have been concerned about the possibility that use of EWCs may undermine the position of the domestic works council.

### **2.3 Trade unions and information disclosure**

In Germany, there is no direct legal right for unions to receive company information for collective bargaining. This reflects the tradition that unions operate outside the enterprise and bargain at multi-employer level, for a whole industry or part thereof. Under multi-employer bargaining, information on any one company is of less relevance and the German legislature has never therefore seen fit to mandate information disclosure to unions. However, unions have an exclusive prerogative on collective bargaining matters and works' agreements cannot derogate from collective agreements negotiated by unions (*BetrVG* 77 (3)). Workplace union delegates (*Vertrauensleute*) may be invited to attend meetings with the employer, but have no information rights.

In practice, however, German unions play a major role in the receipt and processing of company information. First, they play an important role through the works council, and 79 per cent of works council members are union members (Jacobi *et al*, 1992). Moreover, at the request of members, the union has the legal right to be present at all council and Economic Committee meetings (*BetrVG* 2). In addition, the unions provide training and advice to *Betriebsrat* members. Second, German unions also play an important role via the supervisory board. Most board level representatives are also union members. Moreover, full-time union officials may sit on supervisory boards as employee representatives, and this allows them direct access to company information, subject to the confidentiality requirements.

Summing up, German law requires that substantial information be provided in good time to worker representatives. The approach is largely process-driven and facilitates the development of an employee agenda. However, there are challenges. First, though EU requirements have not had a major impact on German practice, there has been fear that EU measures, for example EWCs, may undermine stronger German requirements. Second, there are new fears concerning takeovers and some debate as to whether new legal requirements should be introduced to deal with these specific events. Third, in recent years, employers have criticised the 'straightjacket' of collective agreements at industry level, and settlements have allowed for specific works agreements (negotiated by the works council) which permit a measure of flexibility on matters such as hours and work organisation. These so-called opening clauses (*Öffnungsklausen*) constitute a new dynamic in the German system and allow



for more devolution to works councils. As a result, some commentators speak of the German system ‘in crisis’ and speculate that works agreements may supplant collective bargaining with the union. If decoupling were then to take place, this would have major consequences for the German system of information provision with its complementarity between works council consultation and union collective bargaining (Hanau, 2000).

### **3. France: Extensive Law but Blocked Institutions**

France has multiple mechanisms for information disclosure to employees. In this respect, the legislature has been inventive and law has been built up in layers over time, reflecting critical political events. The French approach has involved both process- and event-driven elements.

#### **3.1 The comité d’entreprise and its information rights**

In successive amendments to the *Code du Travail (CdT)*, since 1945, the law has established and extended the rights of the *comité d’entreprise*. Such committees are mandated in companies with 50 or more employees. As further amended in the early 1980s, the purpose of the committee is ‘to ensure expression of employees’ views and to allow their interests to be taken into account’ in decisions concerning a wide range of work, employment, and economic matters. To this end, the committee is to be informed and consulted on matters relevant to the organisation, management, and general operation of the enterprise. This obligation requires the employer to provide written information, in sufficient time to allow it to be considered. In turn, the committee may formulate comments and questions which must be answered by management (*CdT 420-1 - 426-1, 431-432*).

Under the statute and case law, the *comité d’entreprise* has a right to be informed and consulted on broad aspects of pay and conditions, personnel policy, working time, work organisation, health and safety, and levels of employment. It also has the right to be consulted on wider social consequences of significant decisions: important alterations in the structures of the enterprise, its economic organisation, and legal status; the evolution of R&D policy; mergers, acquisitions, and sales of significant parts of the company; and restructuring of the broader group to which the establishment belongs (*CdT 431-4,432-4,432-11*).

To ensure that information is provided and can be processed effectively, the *comité d'entreprise* has legal supports similar to the German *Betriebsrat*. Thus, the employer must make available facilities and allow time-off for training and involvement. In order to carry out its duties, it is entitled to form special committees, such as health and safety committees (*CdT 236*). Consideration of information is facilitated by the right of recourse to experts and provision for the presence of union delegates (*delegués syndicaux*) in an advisory capacity. In the case of multi-plant enterprises and holding companies, where decisions are made higher up in the organisation and where information received by any individual committee might be incomplete, a central committee may be established with related information rights.

The frequency of information exchange with the employer is legally mandated. Monthly, there should be a meeting of the *comité d'entreprise*, though extraordinary meetings may also be called in exceptional cases. Quarterly, it must receive information covering the changing composition of employment, the state of orders and production schedules, and planned changes in plant, equipment, and production methods. Annually, the employer must give a written report covering the following: the composition of the wage bill, the economic state of the enterprise, the value of production, and the flow of financial funds and their application. In workplaces over 300 employees additional information concerning performance and capacity of the plant is required.

Under legislation passed in 1977, the information provided to the *comité d'entreprise* must include an annual workplace *bilan social* (*CdT 438-5*). This summarises the position of the undertaking in the social area and must provide information on the following: employment, pay and benefits, health and safety, conditions of work, and the state of industrial relations. It must be endorsed and can be amended by the *comité d'entreprise* and must be made available to employees (*CdT 438*).

Thus, the French *comité d'entreprise* has extensive legal rights to information. However, a number of limitations exist. In contrast to Germany, the French *comité d'entreprise* has managerial employees in membership and is chaired by the employer. Moreover, there are weaker links with unions which in turn have less capability and power than their German counterparts (Hege, 1998). Though the unions have a monopoly right to present candidates in first-round committee elections, the fact that density has fallen to less than 9 per cent (ETUI, 1998), in part explains why the number of union candidates is shrinking. Trade union members provide 56 per cent of committee members, as compared with 79 per cent in Germany. On balance, this has meant that the French *comité d'entreprise* has been less able to obtain and use company information (Sellier, 1990, 1995; Hege, 1998,).

### **3.2 Further legislation and special event disclosure**

In addition to the legislation referred to above, in the area of collective redundancies, successive governments have seen fit to enact further measures. From the mid-1970s to the mid-1980s amendments have been made to the *Code du Travail* mandating information and consultation in redundancy situations (Howell 1992; Jenkins 2000). In addition, in 1989 and 1993 legislation made it obligatory that firms must draw up a *plan social*. This document must state the number of workers to be made redundant, their redundancy payments, training schemes, and possible relocation elsewhere in the company. If the *comité d'entreprise* feels that information provided in the social plan is inadequate, it may ask a tribunal to halt the dismissal procedure and require the production of a new plan. A number of important cases, involving firms such as Crédit du Nord, IBM France, La Samaritaine, and Michelin, have interpreted the law favourably for employees but also stimulated demands for further legislation (Bledniak 1999; Jenkins 2000: 133-41)

In the case of takeovers or a change in control via the transfer of shares, judicial decisions have interpreted the *Code du Travail* to mean that an employer must inform and consult on the employment consequences of these matters. In addition, further legislation in 1989 stipulated that as soon as a target-company becomes aware of a takeover bid, it must inform the *comité d'entreprise*. The latter may then decide to invite the bidding party to present its case, outlining any possible effects on employment (*CdT 432-1*). However, in practice, successful legal challenges in the case of takeovers have been limited. One major problem here is that stock exchange confidentiality rules conflict with legislation on information to the *comité d'entreprises* (Commission des Operations de Bourse, 1998).

### **3.3 The role of trade unions and collective bargaining**

In the case of trade union collective bargaining, there were traditionally no statutory rights to information. Indeed, unions have had the legal right to operate in the firm only since 1968. Since then *delegués syndicaux* may be appointed according to the size of the workforce and have the right to facilities and time-off for the performance of duties and protections against dismissal (*CdT 132-2,412-6,412-20,451*). As in Germany, French unions have a monopoly on collective bargaining, and, for a collective agreement to be valid, it can only be concluded with a union. Moreover, where a union branch exists, it is illegal for an employer to conclude a works agreement with a *comité d'entreprise* (Bledniak, 2000). Any union affiliated to one

of the five representative confederations has the right to conclude collective agreements or works agreements for all employees - including for non-unionised workers.

The 1982 Auroux laws, introduced by the Mitterrand government, had a number of somewhat contradictory purposes. One was to introduce a right of expression for employees. A further purpose was to encourage collective bargaining. In the latter respect, the law introduced an obligation on employers to conduct negotiation every year at the establishment level on working hours and work organisation and every five years at the industry level on job classification. The bargaining parties were encouraged to agree upon necessary information to be disclosed (*CdT 132-27*). In practice, the legislation had a positive effect on the number of collective agreements at both national and enterprise level. However, the unions had difficulty in leading in plant-level negotiations and in practice employers often chose to enhance the position of either the *comité d'entreprise* or the direct expression bodies. The same thing has occurred with the 1998 legislation on the 35 week which also stimulated negotiations both with unions and *comités d'entreprise* and enhanced the flow of information to employees. However, again, simultaneously employers have in many instances been able to divide the *comité d'entreprise* from the union.

Notwithstanding, French unions have an indirect access to information through the *comité d'entreprise* where they can be invited to assist and advise at meetings. Also, as in Germany, union influence extends through the training and expertise they provide to the *comité d'entreprise*. Union delegates must by law be invited to assist and advise the *comité d'entreprise* in all meetings with the employer. They receive information provided to committee representatives, including the annual *bilan social*, and they must be informed about training matters. Under the Auroux laws on the direct expression of employees, every three years, union delegates have the right to give an opinion on the results of employees' expression rights, and their amended report is forwarded to the Labour Inspector (*CdT 438-5*). In multi-plant companies, the law protects the right of every representative union to appoint a 'central union delegate' which allows a union presence at the level to the central *comité d'entreprise* (*CdT 412-12*).

In sum, the abundance and inventiveness of French statutes relating to information disclosure is striking. As it stands, French law provides substantial information to the *comité d'entreprise*. It also enjoins information provision via the *bilan social* and the right of expression. It provides some information directly to trade unions and some indirectly to them via the participation of union delegates in the *comité d'entreprise*. The approach is one which is largely process-driven, though there is also some event-driven disclosure. However,

the institutions which might use the law are weak and have difficulty developing effective agendas. In turn, this means the system lacks the complementarity and coherence of the German system.

#### **4. The UK: Towards Europe?**

In the UK, the legal obligation on employers to provide information to employee representatives had its origins in the early 1970s, later than in Germany and France. At that time, the emphasis was on disclosure for collective bargaining, and, despite the changes of the Conservative years (1979-97), the legislation survived. In the 1980s and 1990s, there was a new emphasis on disclosure as part of joint consultation at work reflecting both growing EU influence and the preference of Conservative governments and many employers for consultation over bargaining. The Labour government elected in 1997 introduced new trade union recognition law and adopted European social policy, including EWCs. It has also passed amendments to existing legislation on collective redundancies and transfer of undertakings, all of which contain event-driven disclosure provisions and extended the right to information disclosure for collective bargaining to the area of training (*Employment Relations Act (ERA), 1999, s. 5*). The government has also encouraged the development of so-called 'partnership' agreements between employers and unions that are also posited on a greater sharing of information (*ERA, s. 30*). More recently and albeit reluctantly, the government has accepted the EU Directive on Information and Consultation rights in national level undertakings (DTI, 2002; Gospel and Willman, 2003)

##### **4.1. Disclosure for collective bargaining**

Since 1976, employers have been obliged to disclose information, (a) without which a union would be materially impeded in collective bargaining and (b) which it would be in accordance with good industrial relations practice to disclose. Bargaining must be about matters for which the union is already recognised. Moreover, the employer specifically does not have to provide the following: information supplied in confidence or which would cause substantial injury to the firm; information which would involve a disproportionate amount of work in its compilation; and original documents other than ones specifically prepared for the

purpose of providing the information (Gospel and Willman, 1981). If a union feels that an employer has failed to meet the statutory requirements, and after an attempt at conciliation by Advisory Conciliation and Arbitration Service (ACAS), the Central Arbitration Committee (CAC) may make an award specifying information to be provided. If the employer still refuses to disclose, the CAC may award improvements in terms and conditions of relevant employees. A Code of Practice lists items which might be relevant to collective bargaining, under the headings of pay and benefits, conditions of service, and performance and financial matters. A further list contains items which might cause substantial injury to the employer, such as cost schedules, price quotes, and details of proposed investments (ACAS 1977).

In the early years, there was an initial union enthusiasm for the procedure; thereafter the number of cases fell and remained low through the 1980s; subsequently they have fluctuated considerably from the early 1990s onwards. However, over the whole period there have been only about twenty complaints to the CAC each year and only two or three formal awards per year. The downward fluctuation reflects a number of factors. On the one hand, the decline after the early years might have reflected the indirect influence of the legal provisions on voluntary practice (Millward *et al*, 1992, p123-4). On the other hand, the later decline in usage also reflected disappointment with the provisions. A temporary increase in cases in the early 1990s might have reflected a pragmatic adjustment on the part of unions to the difficulties of the Thatcher years. The upward trend also seemed to have reflected a response from unions to the growing decentralization of business activities, effects of privatisation and outsourcing, and individualization of employment relations (Gospel and Lockwood, 1999).

Overall, around half of union complaints have been held to be well founded. Complaints are more likely to yield information on terms and conditions of the represented group and on labour costs and human resource budgeting; they are least likely to yield information on terms and conditions of other groups within the same organisation and on financial matters and the overall state of the organization. The most successful employer objection to information provision has been that the information did not concern a matter subject to collective bargaining and that collective bargaining would not be materially impeded by non-disclosure. In addition, it is often claimed that the information had been supplied to the employer in confidence (Gospel and Lockwood, 1999).

The tests under the law are very restrictive. As noted, disclosure is limited to matters for which the union is recognized (TULRCA s. 181 (1); CAC Award 8065). The test of 'good industrial relations' practice is vague, and the CAC has never acted as a trail-blazer.

The test of material impediment has also proved a major obstacle to unions which have previously managed without such information. Timing is a problem; the CAC may only adjudicate upon a past failure to disclose and may not declare what information should be provided in the future. Finally, the enforcement mechanism is weak since the sanction neither forces disclosure nor provides for a punitive award.

#### **4.2 Event-driven disclosure**

More recent UK disclosure legislation has been event-driven and relates more to joint consultation than to collective bargaining. In response to EU Directives since the mid-1970s, employers have been obliged to disclose information to recognized unions and employee representatives in the event both of redundancies and business transfers. In both cases, the original law was amended in response to a 1994 European Court of Justice (ECJ) decision that the UK had failed properly to implement the Directives in that the right was only available to recognized unions. As a result of continuing criticisms, in 1999, the Labour government introduced further regulations which give primacy to a trade union where such exists, but which also provide for other representatives in non-union situations (Gospel *et al*, 2003).

Where it is proposed to make 20 or more persons redundant, the employer must not dismiss an employee without first consulting with either a recognized trade union or employee representatives elected in advance or *ad hoc* for the particular purpose. The information to be disclosed must cover the following: reasons for the redundancies, the methods of selection and implementation, and the calculation of redundancy payments. The employer must give a reasoned reply in 'good time' to any representations by employees. Where there are 'special circumstances' preventing compliance, the employer must nevertheless take steps which are feasible in the circumstances. If an employer fails to disclose and consult, the affected employees (but not the union) can present a collective complaint to an industrial tribunal for a financial settlement (*TULRCA*, 188(4), (7), and 89(4)).

In relation to business transfers, the employer must provide information on the following matters: the reasons for the transfer and its timing, implications for employees concerned, measures the employer might take in relation to affected employees, and measures which the transferor envisages the transferee might take (*TUPE*, 1981; 10). The employer is placed under a duty to inform, but there is not always an obligation to consult. The duty to

furnish information is activated when a transfer is proposed. The duty to consult arises where an employer envisages 'measures' which will be taken in relation to any affected employees. In these circumstances, the employer has to consult appropriate representatives 'with a view to reaching agreement'. As with the redundancy provisions, if there are special circumstances, rendering it impracticable to disclose, the employer has to take such steps as are reasonably feasible (*TUPE, 1981; 10 (5) and (7)*). If an employer fails in these obligations, the affected employees (but again not the union) can present a complaint to an industrial tribunal which can award a financial settlement.

These event-driven provisions have several limitations. First, by their nature they do not allow for linkages to be made with other information, which might be germane to the prior business decision. Second, the obligation is to consult 'in good time' and not at the earliest opportunity. As a result, union complaints have often been that information provided by employers is too late. Third, the emphasis is placed on procedural justice for the individual, not collective entitlement claimed through a trade union. Consequently, the redress is for the individual. Fourth, business transfers are not deemed to occur if there is a sale or transfer of shares, on the grounds that the employer remains unchanged. This is a real limitation since economic control may have changed and this may have important implications for employees. Finally, the obligation to inform and consult only applies to the measures which the employer envisages will be taken. If no measures are proposed, then no information or consultation is required. In addition, for the need to consult to arise, the employer must have formulated a definite plan or proposal on which it is intended to act as opposed to mere forecasts. Furthermore the obligation to consult is restricted to the subject matter of the proposed measures. In practice, in a developing situation, measures might only be envisaged at a late stage. In this situation, if there is insufficient time for effective consultations to take place before the transfer, the employer could not be criticized (*IPCS v Secretary of State for Defence (1987) IRLR, 373*).

Following the Labour governments' acceptance of the Social Chapter, the EWC Directive was introduced in the UK. Under the Directive, management must draw up a report and meet at least once a year with the EWC to provide relevant information and to consult. The information disclosed must relate to the following: the economic and financial situation of the business; the likely evolution of the business, production, and sales; trends in investments and employment; substantial changes in organisation, working methods, transfers of production, mergers, or retrenchment; and collective redundancies. In addition, in exceptional circumstances, such as a plant closure, there must be an extra *ad hoc* meeting



for information and consultation as soon as is possible. Redress for failure to inform and consult an EWC takes the form of a financial penalty.

The EWC Directive represented a reversion in the UK to a more process-driven approach and in multinational companies has also provided a possible vehicle for unions to raise concerns and generate a management response. In practice, however, the information and consultation provisions are fairly limited, requiring only one annual meeting and the presentation of highly aggregate information in a special report. Moreover, management may withhold information which might be prejudicial to the enterprise. In practice, activities are often dominated by management, and employee representatives often feel they cannot seriously participate in decision-making (IRS 1998).

### **4.3 The UK: plus ca change?**

The recent passage of the EU Directive on Information and Consultation in national level undertakings has introduced into the UK another process-driven procedure which is likely to be highly influential. The Directive will affect large enterprises (over 150 employees) by early 2005 and cover all undertakings with more than 50 employees by 2008, thus covering about 75% of the UK labour force. In the Directive, consultation is defined as an 'exchange of views and the establishment of dialogue' (Article 2) - implying an ongoing process. Article 4 (2) outlines the substantive areas: there is an obligation (a) to provide information on the general business situation of the undertaking; and (b) to inform and consult on the likely development of employment and on 'anticipatory measures' which might threaten employment; and (c) there is an enhanced obligation to inform and consult on decisions likely to lead to substantial changes in work organization or in contractual relations. On item (c), consultation shall be 'with a view to reaching an agreement' (Article 4) - implying an ongoing process of give-and-take. These are minimum mandatory topics and other matters can be covered. Consultation must take place at an 'appropriate' time and so as to enable employee representatives to prepare for consultation. It shall also be 'at the relevant level of management and representation depending on the subject under discussion' - implying that there should be different levels of representation and consultation within an undertaking. In all cases, management is obliged to provide a reasoned response to representatives' opinions. Representatives are also to be given adequate 'protection and guarantees' to enable them to perform their duties (Article 7). On matters of confidentiality, information may be withheld which the employer considers would seriously damage the undertaking, and representatives

and ‘any experts who assist them’ may be made subject to an obligation of confidentiality. Sanctions for failure to comply shall be ‘effective, proportionate, and dissuasive’ (Article 8). Employers and employee representatives may negotiate different arrangements before and after transposition - but these would have to respect the principles of the Directive (Article 5).

Current plans for the transposition of the Directive into UK law (DTI, 2003) conform to two broad and related principles which have long characterised the UK – voluntarism and adaptability to pre-existing institutions. The proposal is for a triggering process allowing employees to request information and consultation arrangements or, where such exist, to question whether they comply with the Directive.

Employees are allowed to request negotiations with their employer on the establishment of information and consultation procedures. The request must be made by at least 10 per cent of the employees in the undertaking, subject to a minimum of 15 employees and a maximum of 2,500. If successful, the employer will be obliged to enter into negotiations with elected employee representatives to reach an agreement on information and consultation arrangements within the undertaking.

However, if such an agreement is in place and the request for a new one has been made by fewer than 40 per cent of the workforce, the employer may, instead of opening negotiations, hold a ballot of all the employees to ascertain whether the request is endorsed by at least 40 per cent of the workforce. Where it is, the employer must enter into negotiations on a new agreement. Where employers indicate their intention to hold a ballot on a pre-existing agreement, an employee representative or employee (where there are no employee representatives) may complain to the CAC if they dispute that the claimed agreement satisfies the conditions above. Where the CAC finds the complaint well-founded, it will order the employer to enter into negotiations instead of holding a ballot. Pre-existing agreements may not consist of arrangements unilaterally imposed by management without any discussion with employees and where employees have had no opportunity to signify their approval.

A key element here is that employers must make arrangements for employees to appoint or elect negotiating representatives. Negotiated agreements must be in writing, cover all the employees in the undertaking, and set out the circumstances in which the employer must inform and consult the employees. Moreover, agreements must either provide for the appointment or election of ‘information and consultation representatives’ who will be informed and consulted by the employer or provide that the employer will inform and consult the employees of the undertaking directly. Agreements must be signed either by all the

negotiating representatives or by a majority of them, in which case the agreement must also be approved in writing by at least 50 per cent of the employees or approved by 50 per cent of employees who vote in a ballot.

Where no agreement is reached within the six-month time limit or any agreed extended period, the fall-back is the application of the 'standard information and consultation provisions' which in effect copy over the requirements of Article 4 of the Directive. The employer is required to arrange for a secret ballot to elect one information and consultation representative for every 50 employees or part thereof, up to a maximum of 25. The employer will then be required to provide information on the following: the recent and probable development of the undertaking's activities and economic situation; the situation, structure and probable development of employment within the undertaking and any anticipatory measures which might affect employment; and decisions likely to lead to substantial changes in work organisation or in contractual relations, including decisions covered by the legislation on collective redundancies and transfers of undertakings.

Enforcement is to be via the CAC, with the penalty being a fine on the employer for non-compliance. The employer is protected by a right of confidentiality on information disclosed to representatives and may withhold documents which might cause serious harm to the undertaking. Information and consultation representatives are entitled to reasonable paid time off to perform their functions, enforceable through employment tribunal claims. Employees are also protected against unfair dismissal or detriment by an employer when acting as representatives or otherwise exercising their rights under the proposed legislation (Hall, 2003).

This is the first time that the UK's strategy for implementing an EU Directive has been agreed in tripartite discussions between the government, the Confederation of British Industry (CBI), and the Trades Union Congress (TUC). In the negotiations, the CBI's main objective was to protect existing company arrangements, whereas the TUC argued that arrangements that are not based on genuine agreement with the workforce must be capable of being challenged. In effect, the overall intent of the Regulations is a kind of legislatively-induced voluntarism, similar to the statutory trade union recognition procedure, with the new legislation driving the spread of voluntary information and consultation agreements, reached either ahead of its entry into force or as a consequence of its trigger mechanism being used.

One key concern is the reliance on employee representatives, which is central to the Directive, but fudged in the UK regulations. Many firms in the UK rely on direct communication with employees (Millward *et al*, 2000). The entire framing of the discussion

documents has focused on the positive impact of information provision and consultation on firm performance. On one interpretation, the UK Regulations imply that direct communication arrangements will satisfy the requirements of the Directive. If this is the case, unions, interested in extending employee representation, are likely test this at the ECJ and cause continuing tension and uncertainty in UK law in this area.

In conclusion, therefore, the UK began with process-driven disclosure based exclusively on collective bargaining. Primarily under the influence of EU Directives, event-driven disclosure and consultation were later introduced. With the EWC and the Information and Consultation Directive, there has been a reversion to process-driven disclosure, but based on consultation. The potentially far-reaching new Directive is posited on a long tradition of voluntarism.

## **5. Conclusions**

We argued in the introduction that information is a basic resource in enterprise decision-making. It is essential for all mechanisms which give employees voice and regulate employment relations. Though employers have an incentive to disclose some information to employees, informational asymmetry is pervasive in the employment relationship. In the legislation discussed above, this is indeed the assumption of national legislators, and the laws are posited on a belief that an adequate and timely flow of information will make consultation and negotiation more meaningful.

Given informational asymmetry and employer reluctance to disclose, there is a role for the law. The three different legal approaches to information disclosure reflect deep patterns of industrial relations and corporate governance in each country. The German arrangements reflect a system which values and promotes cooperative relations between stakeholders in an insider system of governance. Here, information disclosure is essential for the creation of trust and encourages an employee collective agenda (Teubner, 1998). In France, the law reflects a history of employer reluctance to disclose, especially to trade unions, in a situation where labour has never been an insider in governance and where there is less trust between the parties. At critical political points, governments have intervened to mandate disclosure and consultation in an attempt to give employees rights and to ease social tensions. However, the law has often been ineffective or had unintended consequences. In

particular, employers have tried to turn disclosure to their advantage and to the disadvantage of trade unions. In the UK, the traditional approach was to privilege adversarial collective bargaining in a market system of governance and a voluntaristic setting. Disclosure legislation was originally introduced to facilitate union bargaining agendas. It was always limited and its effective scope shrank with collective bargaining. More recently, EU membership added two new dimensions: first, a different concept of event-driven disclosure for the resolution of specific problems, the establishment of individual rights, and the promotion of cooperative relations; and, second, legal rights for the establishment of process-driven works council-type joint consultation arrangements. In the British case, these different approaches sit uncomfortably together.

Legal supports and guarantees do effect information provision. Thus, in Germany, disclosure rights for the works council give employee representatives good access to information, supplemented by information provided to employee representatives on company boards. The union plays a significant indirect role in information processing. In France, the legislature has tried repeatedly to make employers provide more information, especially for joint consultation. Such repetition itself suggests that these legal measures have had less effect on French disclosure practice. In the UK, in the area of collective bargaining, the effect of process driven legislation has been very limited. On the borderline between collective bargaining and joint consultation, newer event-driven legislation has had some, though to-date limited, impact.

There are also differences in the coherence of the law. In Germany, there exists an interlocking system which had its origins after the war. By comparison with France and the UK, a system has been created which has proved to be coherent and complementary in its parts. Thus there has been little felt need in Germany to change the law on information disclosure by the addition of new requirements of an event-driven kind. By contrast, in France, layers of law have built up in a less coherent manner, reflecting a periodic desire by the legislature to develop consultative and bargaining institutions at the workplace and to create a more effective industrial relations system. The result is a set of laws which co-exist without reinforcing each another. In the UK, the law has developed under two different influences – collective *laissez-faire* and, more recently, the principle of procedural justice for individuals initiated by EU Directive. The latter is likely to lead to major changes.

In practice, it would seem that disclosure for collective bargaining and for joint consultation are more likely to be additive where unions are already strong and can play a significant role in workplace regulation. The usefulness of the law depends on the existence

of institutions which can use it. Germany is an example in this respect, with a close relationship between the works council, board representatives, and the trade union in information receipt and processing. In France, where unions are weaker and have less effective ties with workplace bodies, the coherence between the law and institutional arrangements is less strong. As a result, periodically, the legislature has sought to intervene to promote greater coherence. In the UK, to date, there has been some confusion, but, with the passage of the new legislation, the UK will clearly move down the road to dual channels of representation via trade unions and works councils.

A final comment concerns the impact of EU Directives. The processes by which they are translated into national law guarantees the maintenance of national diversity in institutions at the expense of convergence of standards. This is true of our three countries and seems likely to hold for the foreseeable future. Thus, EU Directives guarantee a floor of information and consultation rights for employees while maintaining deep national differences.

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