A BRITISH DILEMMA: DISCLOSURE OF INFORMATION FOR COLLECTIVE BARGAINING AND JOINT CONSULTATION

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I. INTRODUCTION

Information is a basic resource in enterprise decision-making and thereby affects the working lives of those employed in the firm. It is essential for collective bargaining, joint consultation, and other mechanisms that regulate employment. In this article, U.K. law on information disclosure by employers to employees and their representatives is examined as an important topic in its own right. It is also used to explore the tensions that have occurred when the traditional British approach based on collective bargaining has been compelled to come to terms with a continental European tradition, drawn more from Germany and France and based more on disclosure for joint consultation.

In the United Kingdom, the legal obligation on employers to provide information to employees and their representatives has grown since the early 1970s. Initially, the emphasis was on disclosure for collective bargaining and despite the extensive legal changes of the Conservative years, this legislation remained on the statute book and slowly developed in terms of jurisprudence. However, in the 1980s and 1990s, there was a new emphasis on disclosure as part of joint consultation at work. This reflected a number of factors—the predisposition of Conservative governments, the preference of many employers for information provision as part of new human resource management strategies, and crucially the growing influence of

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European Union (EU) membership.[1] From 1997 onwards, the Blair New Labour government has introduced various aspects of European social policy, such as the European Works Councils (EWCs) and amendments to existing legislation on collective layoffs or redundancies and transfer of undertakings, all of which contain disclosure provisions. In its 1999 Employment Relations Act (ERA), the New Labour government extended the right to information disclosure for collective bargaining to the area of training.[2] On the other hand, it opposed the long-proposed EU Directive on Information and Consultation on the grounds that this would introduce methods and institutions unnecessary and alien in the British context. More recently, as a result of the changing power balance in the EU, it has reluctantly accepted a version (albeit it a weak one) of this directive.[3]

A dilemma confronts the industrial relations actors and the labor law system in Britain as to whether there should be more disclosure for collective bargaining or for joint consultation or both and as to how to reconcile traditional British approaches and those inspired more by continental European practice. There are a number of questions. Should there be changes in the present U.K. law on disclosure for collective bargaining, so as to improve the general flow of information and to make the agenda of negotiations more meaningful? Should there be more legislation on disclosure for joint consultation to strengthen the position of all employees in certain specified situations? Should there be greater disclosure for both joint consultation and collective bargaining, and, if this is to happen, might the one undermine the other? In this context, will the United Kingdom finish up looking more like its continental counterparts? To which countries might it approximate—to Germany where disclosure for joint consultation seem to articulate well with collective bargaining

1. For an overview of employer initiatives, *see* J. Brown, *Managerial Disclosure of Financial Information to Employees: A Historical and Comparative Review*, 39 J. INDUS. REL. 263-286 (1997).

2. ERA § 5 (1999).

3. This has emerged out of a *Proposal for a Council Directive Establishing a General Framework for Informing and Consulting Employees in the European Community*, submitted by the Commission on November 17, 1998 (COM (1998) 612 final), followed by an *Amended Proposal for a Directive of the European Parliament and of the Council Establishing a General Framework for Improving Information and Consultation Rights of Employees in the European Community* (presented by the Commission pursuant of Article 250 (2) of the EC Treaty).

or to France where by contrast the two processes seem to complement one another less effectively?[4]

The article begins by surveying the broad legal situation. It then more specifically considers the traditional British approach in terms of disclosure of information for collective bargaining.[5] This is followed by an examination of the recently more dynamic area of the law on disclosure for joint consultation in specific circumstances. In the final sections, we attempt a broader evaluation of the British situation in the European context.

II. THE LEGAL CONTEXT

Provision for legally based disclosure of information for collective bargaining was enacted in the Employment Protection Act (EPA) of 1975 by the then Labour government and was backed up by a Code of Practice from the Advisory Conciliation and Arbitration Service (ACAS). Despite a proposal from the Conservatives to repeal the legislation in 1996,[6] the law remains unamended and is now contained in the Trade Union and Labor Relations (Consolidation) Act (TULRCA) of 1992.

Under § 181(2) of that Act, an employer is 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.[7] However, a precondition has to be satisfied. Section 181(1) provides that the bargaining must be about matters and in relation to workers in respect of which the union is recognized by the employer.[8] Employers are then specifically exempted under § 182(1) from supplying certain types of information: (a) which might jeopardize national security; (b) which it would be illegal to disclose; (c) which has been communicated in confidence; (d) which relates specifically to an individual; (e) which would cause substantial injury to an employer's undertaking for

4. *See* Howard Gospel & Paul Willman, *The Right to Know: Disclosure of Information for Collective Bargaining and Joint Consultation in Germany, France, and Great Britain*, mimeo 2002.

5. For earlier commentaries, *see* Howard Gospel & Paul Willman, *Disclosure of Information: The CAC Approach*, 10 INDUS. L.J. 10-22 (1981); Howard Gospel & Graeme Lockwood, *Disclosure of Information for Collective Bargaining: The CAC Approach Revisited*, 28 INDUS. L.J. 233-248 (Sept. 1999).

6. Department of Trade and Industry, *Industrial Action and Trade Unions*, Cm 3470 (London, 1996).

7. The employer's obligation applies also to information relating to an associated employer as defined in § 178(3) TULRCA (1992).

8. Collective bargaining is defined in § 178(2) TULRCA (1992).

reasons other than its effect on collective bargaining; or, (f) which relates to legal proceedings. There are two further restrictions under § 182(2): (a) the employer does not have to disclose information, the compilation of which would involve a disproportionate amount of work; and, (b) the employer does not have to disclose documents other than those specifically prepared for the purpose of providing the information.

The ACAS Code of Practice lists items that might be relevant to collective bargaining, under the headings of pay and benefits, conditions of service, and performance and financial matters. A second list qualifies these with items that might cause substantial injury to the employer, such as cost information on individual products, quotes on the make-up of tender prices, and detailed analyses of prices, sales, or investment. The Code states that substantial injury may occur if customers or suppliers would be lost.[9]

The enforcement procedure is an arbitration type mechanism designed to promote collective agreements.[10] Under § 183, if a union considers an employer has not met the statutory requirement, it may complain to the Central Arbitration Committee (CAC). If the latter feels the complaint may be settled by conciliation, it must refer the matter to ACAS. Where a settlement is not forthcoming, the Committee then hears the complaint and issues a declaration. If the complaint is upheld, the Committee specifies the information to be provided and a timetable for disclosure. Where the employer is still recalcitrant, the union may again complain to the CAC and request that certain improvements in terms and conditions be incorporated in the contracts of relevant employees. If the CAC upholds the complaint, it may make an award either for the improvements desired by the union or other terms and conditions, as it considers appropriate.[11] This then becomes an implied term of the individual employee's contract of employment.[12] Other more recent U.K. legislation on information disclosure relates either to joint consultation or to joint consultation and collective bargaining and

9. ACAS, *Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes*, ¶¶ 11 and 15 (London, 1977).

10. It is to be noted that in the area of training, § 5 of the 1999 ERA does not prescribe the use of this mechanism, but rather compensation for the individual employee.

11. *See* §§ 184-185 TULRCA (1992). The terms and conditions may reflect the improvements, which the union could have expected to gain through collective bargaining, if the employer had not withheld the information.

12. However, it could be argued that this view did not accord with the approach taken by the CAC in the case of Holokrome Limited and Association of Scientific, Technical and Managerial Staffs (Award No 79/451), which will be referred to below.

derives largely from obligations incurred as a result of EU membership.

In response to European directives, based in part on practices derived from Germany and France, employers have been obliged to disclose information to recognized unions and to employee representatives in the event of redundancies and business transfers. These obligations were the result of the Collective Redundancies Directive (75/129) and the Acquired Rights Directive (77/187). The former was originally enacted into U.K. law by the 1975 EPA and the latter by the Transfer of Undertaking (Protection of Employment) Regulations of 1981. The provisions have been amended several times over the years as a result of a complicated to-and-fro between British governments and the European Court of Justice (ECJ) and the European Commission.

In relation to redundancy, as initially transposed into U.K. law, the EPA provided that an employer must not dismiss an employee without first consulting with any recognized union whether the employee was a member of the union or not. The information to be disclosed is specified: reasons for the redundancies, number to be dismissed, methods of selection and implementation, and calculation of redundancy compensation.[13] The legislation also required the employer to give a reasoned reply to any representations. In terms of timing, the requirement to consult was activated at the time when the employer was proposing to make employees redundant. Where there were special circumstances that made it impracticable to comply with the requirements, the employer should take such steps towards compliance as were reasonably feasible in the circumstances.[14] If an employer failed to disclose and consult, the trade union could present a complaint to an industrial tribunal.[15]

In relation to business transfers, the disclosure obligations provided that before a relevant transfer, the employer should inform any independent recognized trade union of the following matters: reasons for the transfer and its timing, implications for employees concerned, measures the employer might take in relation to affected employees, and measures that the transferor envisaged the transferee might take in relation to such employees.[16] The employer was placed under a duty to inform, but there was not always a duty to consult.

13. EPA § 99, now § 188(4) TULRCA (1992).
14. EPA § 99, now § 188(7) TULRCA (1992).
15. EPA §§ 101-103, now § 189(4)(b) TULRCA (1992).
16. Regulation 10(2), Transfer of Undertakings (Protection of Employment) Regulations (TUPE) (1981).

The obligation to consult arose where an employer envisaged that he would take measures in relation to any affected employees. In these circumstances, the employer had to consult appropriate representatives with a view to seeking their agreement on the proposed measures.[17] The duty to furnish information was activated when a transfer was proposed and the obligation to give information applied to all the above areas.[18] As with the redundancy provisions, if there were special circumstances, the employer had to take such steps towards compliance as were reasonably feasible.[19] Where an employer failed to inform or consult, the union or affected employees could present a complaint to an industrial tribunal.[20]

There then began an elaborate to-and-fro between the institutions of the EU and the U.K. legislature. Thus, the law was amended in response to a 1994 ECJ decision that the United Kingdom had failed to properly implement the directives in that the right of consultation was only available to recognized trade unions, in line with the traditional British practice.[21] This led to the introduction by the then Conservative government of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations of 1995.[22] These regulations provided that in the event of redundancies or business transfers, the employer must consult with either a recognized trade union or employee representatives elected in advance or ad hoc.[23] The regulations also introduced two further changes relating to redundancy: The first only required consultation where the employer proposed 20 or more redundancies over a 90-day period and the second relaxed the previous requirements concerning the timing of redundancy consultation. Subsequently, as a result of criticisms of these self-same regulations and as a continuation of the to-and-fro described above, the incoming Labour government introduced new rules concerning the employers' obligations when consulting on redundancies and transfers. The alterations to the law are contained in the Collective Redundancies and Transfer of Undertakings (Protection of

17. *Id.* at 10(5).

18. Banking Insurance and Finance Union v. Barclays Bank plc [1987], ICR 495.

19. Regulation 10(7), TUPE.

20. If the complaint were upheld, the tribunal could then award appropriate compensation of no more than four weeks pay to the affected employees. *See* Regulation 11, TUPE.

21. EC Commission v. U.K. [1994], IRLR 392.

22. SI No. 2587 (1995).

23. *See* §§ 188-198 TULRCA, as amended by the Trade Union Reform and Employment Rights Act of 1993 and the Collective Redundancies and Transfer of Undertaking (Protection of Employment) Regulations of 1995.

Employment) (Amendment) Regulations of 1999. These regulations served to strengthen the role of the trade union in information and consultation and will be discussed in section V below.

There are other requirements for disclosure of information under U.K. law that are posited, as much or more, on joint consultation as on collective bargaining.[24] Under the Health and Safety at Work Act of 1974, and related regulations (some derived from European Directives), employers are under a general duty to inform and consult safety representatives concerning the promotion of health and safety. In particular, there has to be consultation about all measures that may substantially affect the health and safety of employees and consequences of the introduction of new technologies. As part of this process, employers must disclose necessary information. In the EU context as described above, the Health and Safety (Consultation with Employees) Regulations of 1996 require employers to consult with employees not covered by safety representatives appointed by a recognized trade union.[25] In these cases, employers are obliged to disclose such information as is necessary to enable employees or their representatives to participate fully and effectively in consultations.[26] The provisions of the act are enforceable by the Health and Safety Executive and non-compliance can result in fines.

In this overview, there is a final and significant area. In the case of multinational companies, there are disclosure obligations contained in the EWC Directive (1994/45/EC), the stated aim of which is to improve the right to information and consultation of employees in enterprises operating across the EU.[27] Relating to undertakings or groups of undertakings with over 1,000 employees and with 150 employees or more in at least two establishments in different member states, this requires the establishment of a EWC or an alternative employee information and consultation procedure. Central management must meet at least once a year with the EWC for the purposes of consultation and the provision of information on the basis of a report drawn up by management. The information disclosed

24. We exclude from discussion the disclosure provisions under pension law. *See generally* S. 42 Pensions Act of 1995; Occupational Pension Schemes (Disclosure of Information) Regulations of 1996, SI No. 1655; Occupational Pensions Scheme (Contracting–Out) Regulations of 1996, SI No. 1172.

25. Safety Representatives and Safety Committee Regulations of 1977, SI 1977/500.

26. Regulation 5, The Health and Safety (Consultation with Employees) Regulations of 1996, SI 1996/1513.

27. This was implemented in December, 1999, by the Transnational Information and Consultation of Employees Regulations of 1999, under § 2(2) of the European Communities Act of 1972, and came into force in January, 2000, SI 1999/3323.

must relate in particular to the following: the economic and financial situation of the business; the probable development of the business, production, and sales; the situation and trend of investment and employment; collective redundancies; and, substantial changes concerning organization, new working methods, transfers of production, mergers, retrenchment, or closures. In addition, in exceptional circumstances (for example, in the event of the closure of an establishment), there should be an extra ad hoc meeting for information disclosure and consultation as soon as possible. In the case of the United Kingdom, failure to comply with the regulations gives an applicant the right to make a claim to the Employment Appeals Tribunal, which may impose a fine for non-compliance.

For the future, the British government has now agreed (albeit reluctantly) to accept yet further movement towards continental European arrangements and, in late 2001, endorsed the directive for establishing a general framework for informing and consulting employees in national level undertakings.[28] This will give U.K. employees the right to be informed about their employer's economic situation and to be informed and consulted on certain specific issues, such as restructuring, changes in work organization, and redundancies. The information and consultation should be "in good time" and "with a view to reaching an agreement." As usual, employers may withhold information that would seriously harm the company or they may require that employee representatives keep this information confidential. Member states will be free to decide their own enforcement measures and financial penalties. U.K. companies with over 150 employees will have to implement the Directive by 2005, with a later phasing in for smaller companies with over 150 employees, the latter being the lower limit of coverage. However, in the shadow of the law, many firms will start earlier to put in place voluntary arrangements that they hope will comply with the law. It is uncertain what form the transposition into U.K. law will take, whether it will establish permanent or more ad hoc councils and at what level. Undoubtedly, however, the United Kingdom will go further down the legal road of disclosure for joint consultative purposes. At the same time, it also offers the possibility of moving away from disclosure and consultation for specific purposes to a more generalized obligation on the employer to inform and consult employees.

Thus, over the years, there has developed in the United Kingdom a body of legislation on information disclosure: Some is posited on a

28. *See supra* note 3.

traditional British approach and based on collective bargaining over an agenda of issues; and, some has been influenced more by continental European ideas and is orientated more to joint consultation on specific issues and events.

III. THE COLLECTIVE BARGAINING APPROACH

We turn first to how the law on disclosure for collective bargaining has worked. To date, the CAC has preferred to deal with disclosure cases via informal conciliation, with an ACAS presence. This would seem to have had considerable success. As the CAC has stated, "The Committee relies heavily on the process of conciliation to achieve a solution that improves existing industrial relations. . . . In cases resolved at this earlier stage, the procedure frequently results in a better understanding and the flow of much if not all the information requested."[29] If conciliation fails, a formal hearing takes place where written cases are exchanged, proceedings are minuted, and counsel sometimes represents the parties. The Committee then produces a written award, stating whether the union's claim is well-founded and giving considerations underlying the decision.

Since the introduction of the provisions, the Committee had handled an average of 20 cases per year. During that period, 66 cases have resulted in a formal declaration; two cases required the issuance of a second award after an employer's failure to honor a first declaration;[30] one case resulted in the application of the enforcement procedure under § 185;[31] and, four awards have been the subject of judicial review.[32] In terms of the flow, there was an initial enthusiasm for the procedure in the early years. Thereafter, the number of cases fell and remained low through the 1980s; subsequently, they have fluctuated through the 1990s.

These fluctuations reflect a number of factors. On the one hand, the decline and low level through the 1980s might in part have resulted from the indirect effect of the provisions on voluntary disclosure. Survey evidence shows that in the mid-1980s, about one-fifth of shop stewards in private manufacturing reported that they had

29. CAC, *Annual Report*, at 20, ¶ 3.15 (1982).

30. Holokrome Limited and Association of Scientific, Technical and Managerial Staffs, Award No. 79/451; Ackrill Newspapers Ltd. and National Union of Journalists, Award No. 92/1.

31. Holokrome, *id.*

32. Ministry of Defence and Civil Service Union, Award No. 80/73; BTP Tioxide and Association of Scientific, Technical and Managerial Staffs, Award No. 80/107; BP Chemicals and Transport and General Workers Union, Award No. 86/1; A1 Services and Transport and General Workers Union, Award No. 91/2.

sought information under the legislation (this compared with around one-tenth of representatives in private services, in the public sector, and among non manual-stewards). The same survey suggests that the proportions making use of the provisions remained stable over the period up to the early 1990s. Those who had made such requests were asked how much information management had supplied—all, most, some, or none at all. Four-fifths of representatives said they received all, most, or some of the information over this time period.[33] On the other hand, the fall in formal complaints might also have reflected early disappointment with the provisions and the fact that from the early 1980s, the unions were preoccupied dealing with the legislation of the Thatcher years. This explanation might, in turn, be allied to the decline in the coverage of collective bargaining from the 1980s. In these circumstances, unions may have chosen not to initiate disclosure claims, either because they had more pressing problems or because they could not mobilize workplace support around the agenda of issues.

In the early and mid-1990s, the number of complaints increased, though with a significant proportion being later settled or withdrawn.[34] This renewed interest might reflect a combination of economic upswing, accelerated business change, and more pragmatic adjustment by unions. For its part, the CAC stated in 1991:

> At a time of many far-reaching structural changes in employer-employee relations, the agenda of items on which information will be required is ever lengthening. . . . One element in the management of change is the provision of information and, the greater the degree of change, the more will be the level of pressure on the arrangements through which information is disclosed.[35]

The upward trend may also have reflected a response from unions to the decentralization of business activities, individualization of employment relations, and privatization and outsourcing, all leading to a devolution of collective bargaining.[36] These changes were related to complaints in two specific areas. First, there were a series of claims on market testing and contracting out by public organizations and the decentralized bargaining around this. Second, there were a series of complaints involving changes in pay systems in general and the growth of individual performance related pay in

33. N. MILLWARD, M. STEVENS, D. SMART & W.R. HAWES, WORKPLACE INDUSTRIAL RELATIONS IN TRANSITION: THE ED/ESRC/PSI/ACAS SURVEYS 123-24 (London, 1992).

34. The main reason for a union to withdraw a case is that it has been settled.

35. CAC, *Annual Report*, p. 2, ¶ 2.2 (1991).

36. IRS Employment Review, *Disclosure of Information*, No. 624, p. 16 (January, 1997).

particular. In relation to the latter, the CAC has stated that both the establishment and outcome of performance related schemes constitute collective bargaining if the union is recognized for such matters.[37]

As to the type of information required, that concerning terms and conditions of the represented group has always been the main category and has also been the most likely to succeed.[38] Since the early 1980s, however, the emphasis has shifted towards new wage systems, such as performance and profit related pay and towards pension and other benefit rights. Requests for financial information have increased as a proportion of the total over the years, perhaps reflecting greater union awareness of the importance of such questions and greater management caution in a more competitive environment. However, importantly, this is one of the areas where unions are least likely to be successful. By contrast, requests for information on labor costs and employment budgeting has declined over time. Requests for disclosure of information on non-labor costs, plant location, and closures have rarely been successful. It is likely that the low success rate in the past has resulted in less frequent requests for such information. In total, since the introduction of the legislation, just over half of union complaints have been held to be well-founded. Such complaints have been most likely to succeed on terms and conditions of the represented group and on labor costs and employment budgeting; they have been least successful on terms and conditions of other groups within the same organization and on profits, financial affairs, and the overall state of the organization.

The most cited employer objection to disclosure has been that collective bargaining would not be materially impeded by non-disclosure. This was also the defense most likely to succeed. The objection that the information was not about a matter related to collective bargaining was also frequently raised. However, this defense has been less successful. In addition, a high number of objections were based on the argument that information related specifically to an individual and that the information had been supplied to the employer in confidence.

In summary, these provisions would seem to offer *in potentia* a broad set of legal rights for unions and a real method of improving collective bargaining. Over the years, an indirect effect may have been that their threatened use has induced employers voluntarily to

37. CAC, *Annual Report*, p. 5, ¶ 2.7 (1995).

38. This draws on CAC declarations only and does not consider disclosure during the course of complaint or prior to declaration, data that is not available.

disclose information. The number of cases settled or withdrawn may also indicate a measure of success. However, in practice, the obstacles and tests under the law are extremely restrictive and this is undoubtedly one reason why, after an initial enthusiasm, use of the provisions has fluctuated around a low level and the actual effect on supporting collective bargaining has been limited.

IV. A CRITIQUE OF THE LAW ON DISCLOSURE FOR COLLECTIVE BARGAINING

These provisions constitute some underpinning for collective bargaining in the United Kingdom. However, they also contain elements which reduce their value in improving the bargaining process.

In the first place, disclosure is limited to matters for which the union is recognized. Thus, claims for information relating to costs or to organizational restructuring where the topic had not previously been a bargaining subject, falls foul of the provision.[39] The two tests in § 181(2) are considerable obstacles to trade unions in seeking to extend collective bargaining. The test of "good industrial relations" practice is vague. The CAC itself has admitted that it is hampered, in the articulation of a standard, by the weak consensus as to practice. "Information, which is commonly disclosed in one sector, may be regarded as a tightly guarded secret in another."[40] Moreover, it has concluded that it cannot act as a trail-blazer or standard-setter.[41] The test of material impediment is an even bigger obstacle to a union seeking to pursue a complaint where it has managed without such information in the past. Many employers have successfully objected that there was no impediment and unions are severely disadvantaged in showing the need for information that they do not possess. Moreover, in an early case, the Committee produced a fairly restrictive definition of material impediment:

> It might be argued that this test is a question of relevance. All relevant information *prima facie* makes for more open and better bargaining. But, we note the negatively expressed rule. It speaks of evidence "without which" the trade union would be impeded.

39. *See, e.g.*, BL Cars Limited, MG Abingdon Plantand General and Municipal Workers' Union, Amalgamated Union of Engineering Workers, Transport and General Workers Union, Award No. 8065.

40. CAC, *Annual Report*, p. 6, ¶ 2:11 (1979).

41. Standard Telephone and Cables Limited and Association of Scientific, Technical and Managerial Staffs, Award No. 79/484, ¶ 25.

> This narrows considerably the test from one of relevance to one of importance.[42]

However, later in a more liberal interpretation, the CAC adopted a more flexible approach, which was upheld on judicial review.[43] In determining material impediment, the Committee stated that "one should recall that the purpose of the provisions is to improve collective bargaining. If the disclosure of information would secure a more constructive and less abrasive approach, it removes an impediment to the bargaining."[44]

A further limitation of the provisions relates to the timing of disclosure. The CAC may only adjudicate upon a past failure to disclose and may not declare what information the employer should provide in the future, even though this might improve industrial relations.[45] Thus, a union is constrained in planning its bargaining agenda in anticipation of having all relevant documents at the appropriate time. The bargaining process has to begin and the union suspends proceedings in order to present a claim to the CAC. The fact that the procedure must then be exhausted means that the matter in dispute must be capable of being pursued over a considerable length of time. Otherwise, it means the employer can delay disclosure of the information until its usefulness is limited or has passed. The often urgent need for the information and the laborious process for obtaining it may therefore dissuade unions from using the procedure.

A further shortcoming is the ACAS Code of Practice. On the evidence of some CAC declarations, this has not been of great assistance or guidance. Thus, in an early case, the CAC consulted the Code for guidance on two matters: on the general principle of "good industrial relations" practice and on the more specific question of how bargaining units might affect disclosure. It concluded that the Code gave no clear guidance on these points.[46] In another case relating to good practice, the CAC asked:

> What is the standard of good industrial relations? It cannot be some vision which each of us has of a desirable future since that will differ infinitely according to the individual. The legislation clearly intended us to be guided by a less subjective choice than that, for it is provided that we should be guided by the relevant

42. Daily Telegraph and Institute of Journalists, Award No. 78/353.
43. BP Chemicals, *supra* note 32.
44. BTP Tioxide, *supra* note 32.
45. *Id.*
46. Daily Telegraph, *supra* note 42.

> ACAS Code of Practice. The current code is of little help in this connection.[47]

A final weakness is the enforcement mechanism since the sanction neither forces disclosure of the information nor provides for a punitive element to be included in the award. To date, the full procedure has been used only once.[48] In that instance, the union requested the inclusion of the contested information in the employment contracts of those workers affected. The Committee awarded that "information relating to salary scales and any fixed increases for the grade of each individual employee should have effect as part of an individual's contract of employment." However, the union was unable to secure contractual incorporation of all the information awarded since parts of it were later regarded as unsuitable for inclusion in individuals' employment contracts. This is not surprising since there are undoubtedly differences between information useful in collective bargaining and information suitable for inclusion in an individual's employment contract.

Thus, the tests and exemptions relating to disclosure for collective bargaining are extensive and restrictive. They inhibit union claims for information and provide employers with a wide range of arguments against disclosure.

V. ALTERNATIVE LEGAL FORMS OF DISCLOSURE

One response to this situation might be that legislation in more specific areas and recent developments on disclosure for consultation emanating from the EU might provide an alternative and better way forward for providing information to employees. We now, therefore, return to the legislation as outlined in section II above.

It will be recalled in this respect that two of the most significant introductions into U.K. law have been in the areas of collective redundancies and the transfer of business undertakings. Over the years, they have caused considerable upheaval resulting in an extensive body of case law, the need to revise statutory regulations, and confusion in terms of actual industrial relations practice. The provisions pertaining to collective redundancies have several weaknesses. Above all, the information requirement is very focused on the specific redundancy situation. It does not allow for linkages to be made with other events or information, which might be germane to

47. Standard Telephones Cables, *supra* note 41.
48. Holokrome, *supra* note 30.

the background business decision and that might facilitate a broader agenda. Moreover, union complaints in this area have often been that information provided by employers is often too late or of insufficient detail. An early study suggested that information tended to be provided when the only issues that remained open for negotiation or consultation were the number of compulsory redundancies and the amount of redundancy payments.[49] Of course, unions would value broader information about the commercial decisions leading to redundancy and about alternative courses of action.

The 1995 Regulations referred to above had several shortcomings. In particular, according to critics on the union side, they were framed in a way that jeopardized the position of recognized trade unions. Employers could bypass such unions and choose to inform and consult instead with worker representatives who had been elected via a process, which the employer might potentially influence. In relation to the timing of disclosure, they also provided that, where the employer was proposing to make redundancies, consultation should be "in good time," rather than at the earliest opportunity. Furthermore, the regulations also provided that employers need not disclose information and consult if fewer than 20 people were made redundant in any one establishment. This was consistent with the threshold contained in the Collective Redundancies Directive, but it represented a retrograde step since originally U.K. law required consultation regardless of the number of dismissals.

In the to-and-fro process between the EU and the U.K. legislature described above, the Labour government introduced amendments to the legislation in the form of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations of 1999. The changes clarified and strengthened the law. First, in relation to redundancies, it is stipulated that representatives of all employees who might be affected need to be consulted and not just those whom it is proposed to make redundant. Hence, this enlarges the coverage of consultation. In effect, this change requires employers to consult over the consequential impact on "survivor" employees in areas such as work organization and workload.[50] Second, employers who recognize a trade union must consult that union and cannot bypass it by consulting other representatives. This provision applies to both redundancies

49. W.W. DANIEL, THE UNITED KINGDOM, MANAGING WORKFORCE REDUCTION: AN INTERNATIONAL SURVEY 67-90 (M. Cross ed., 1985).

50. M. Hall & P. Edwards, *Reforming the Statutory Redundancy Consultation Procedure*, 28 INDUS. L.J. 299 (1999).

and business transfers. Third, consultation may only take place exclusively with other representatives in cases where there is no recognized union. In such circumstances, the regulations prescribe specific requirements for the election of the employee representatives to be consulted. The rules place the responsibility on the employer to operate fair elections and also grant employees who believe that the elections do not accord with the law the right to make a complaint to an employment tribunal. Fourth, the regulations provide employee representatives with specific rights for time off for training, which also includes training in the understanding of business information. Finally, the remedies that employees and their representatives may obtain in cases where employers fail to comply with the regulations have been simplified and strengthened.

However, the changes have not remedied all the weaknesses of the previous regulations. Thus, employers are still only required to inform and consult "in good time" and not "at the earliest opportunity." Moreover, they have not removed the exemption from the consultation requirements of redundancy proposals affecting fewer than 20 workers. With respect to business transfers, the law on information and consultation applies whenever there is a change in the natural or legal person who is responsible for carrying on the business and who incurs the obligations of an employer towards employees of the undertaking. There is no transfer if there is solely a transfer of shares because the corporate personality does not alter, the employer remains unchanged, and continuity is unaffected. This is a significant limitation since the economic control of the undertaking may have changed and this may have important implications for the undertaking and its employees. However, as the regulations do not apply to such transfers, there is no requirement for disclosure or consultation in these circumstances.[51]

In addition, the obligation to inform and consult only applies to specific measures, which the employer envisages will be taken in relation to affected employees. If no measures are proposed, then no information or consultation is required. Trade unions might well wish to be consulted as much when measures were not envisaged as when

51. The House of Lords Select Committee recommended that takeovers by share transfers should be brought within the coverage of the European Acquired Rights Directive (77/187), *Transfer of Undertakings: Acquired Rights*, Select Committee on EC, 5th Report, HL Paper 38, at 16 (July 11, 1995). However, the government has not supported such an amendment. Department for Trade and Industry, *European Acquired Rights Directive and Transfer of Undertakings (Protection of Employment) Regulations 1981*, Public Consultation Paper, URN 98/513 (1997).

they were.[52] In addition, for the need to consult to arise, the employer must have formulated some definite plan or proposal on which it is intended to act as opposed to mere projections or forecasts. In practice, in a developing situation for reasons beyond an employer's control, measures might only be envisaged at a late stage. In that situation, if there was insufficient time for effective consultations to take place before the transfer, the employer could not be criticized.[53] Furthermore, the obligation to consult is restricted to the subject matter of the proposed measures and not the broader list contained in the legislation, let alone to any broader agenda of matters, which may in the circumstances concern employees.[54]

The Health and Safety at Work Act of 1974, and related regulations created new legal rights and also a new institution in the person of the safety representative. Here the law has aided the development of workplace processes of joint regulation. It may also have been significant in extending collective bargaining to smaller firms and in expanding its scope where it was already established. However, the law is weak in enforcing disclosure and smaller non-union firms are often unaffected.[55] The evidence suggests that employees benefit most in situations where health and safety is dealt with by joint union-management committees rather than by management acting unilaterally or in consultation with employee representatives.[56] The requirements introduced by the Health and Safety (Consultation with Employees) Regulations of 1996 have not overcome certain weaknesses. Though there is a requirement to consult with employees, there is no obligation on an employer to create any particular institutional arrangement and representatives do not have the right to require the establishment of a safety committee. Moreover, the provisions do not prescribe how elections should be

52. J. MCMULLEN, BUSINESS TRANSFERS AND EMPLOYEE RIGHTS 246 (1992).

53. IPCS v. Secretary of State for Defence [1987], IRLR 373.

54. The broader list of subjects is contained in Regulation 10(2), TUPE (1981). IPCS v. Secretary of State for Defence [1987], IRLR 373.

55. In establishments employing less than 50 people, there is rarely a full-time safety officer and employees of such firms are significantly more likely to suffer a major industrial injury. IRS Employment Review, *How Safe is Small?*, 252 HEALTH & SAFETY BULL. 11-14 (1996).

56. In addition, the effectiveness of safety representatives may depend on several factors, such as whether the representative was union appointed or management sponsored and how much training they may have received. *See* T. Nichols, A. Dennis & W. Guy, *Size of Employment Unit and Injury Rates in British Manufacturing: A Secondary Analysis of WIRS 1990 Data*, 26(1) INDUS. REL. J. 45-56 (1995); A. Robinson & C. Smallman, *The Healthy Workplace*, paper given at Workplace Employee Relations Survey 98 User Group, Workshop March 2000, National Institute for Economic and Social Research.

held, which may cast doubt on the independence of those elected.[57] Undoubtedly, greater disclosure and consultation rights for employees can result in higher health and safety standards in the workplace, which in turn can lead to a reduction in injuries and illness, better industrial relations, and improved performance. The Health and Safety Executive acknowledged this fact stating "improved information and consultation are the key to improving safety."[58] However, effective regulation seems most likely to occur where a union can link matters in a broader bargaining agenda.[59]

Finally, it might be argued that the EWC Directive represents a significant new route to increase employee rights to information and consultation in multinational companies and a possible vehicle for trade unions indirectly to influence strategic decision making. However, initial research on EWCs has revealed some cause for concern, suggesting that their activities are for the most part dominated by management and that they do not enable employee representatives seriously to generate an agenda of issues.[60] Trade unions and employee representatives need to be able to procure information that is of value and leads to a constructive dialogue. However, discussion with inexperienced works councils that lack union involvement is often limited. Moreover, it could be argued that the basic legal provisions for information and consultation are fairly limited, requiring only one meeting a year and the presentation of information that is especially prepared, highly issue-specific, and of a very aggregate nature. Another familiar shortcoming is that they allow management significant discretion to withhold information that might be prejudicial to the functioning of the undertakings concerned.[61] Finally, as described above, the enforcement mechanism in the case of employer non-compliance is not particularly strong. The effectiveness of EWCs, therefore, crucially depends on the existence of a trade union, the enforcement of the directive through the legal system, and the existence of effective sanctions of a

57. P. James & D. Walter, *Non-Union Rights of Involvement: The Case of Health and Safety at Work*, 26 INDUS. L.J. 35-50 (1997).

58. Health and Safety Executive Booklet, *Health and Safety in Small Firms*, MSIS 071, p. 4.

59. Unions have started to push for new rights to information on the following: the injury and illness rate at each workplace; details of any reports concerning possible occupational or environmental health problems; details of the safety, health, and environmental enforcement activity at the workplace; reports of any assessments of risks from workplace or environmental hazards; and, the findings of environmental audits. IRS Employment Review, 257 HEALTH AND SAFETY BULL. 7, IRS Services (May 1997).

60. For a good review of the literature, *see* T. Müller & A. Hoffmann, *EWC Research: A Review of the Literature*, WARWICK PAPERS IN INDUSTRIAL RELATIONS, No. 65 (Nov. 2001).

61. Article 8(2), EWC Directive.

proportional and dissuasive nature to be applied in cases of breach. To date, experience has not been encouraging in this respect. Nevertheless, for its part, the British Trades Union Congress, while recognizing the potential shortcomings in this respect, sees them as a potentially important way of gaining information and consultation in multinational enterprises.

In summary, the provisions on collective redundancies, business transfers, and (though to a lesser extent) health and safety have developed in an ad hoc way and as a reaction to European requirements. The provisions pertaining to collective redundancies and business transfers still have significant shortcomings. The EWC Directive offers some potential for employee representatives to develop an agenda of issues. Again, however, there are weaknesses that will inhibit employees and unions from securing information and consultation and thereby extending their influence within multinational companies.

VI. DISCUSSION AND CONCLUSIONS

To date, the existing U.K. law on disclosure would seem to have had a small, but positive impact, both direct and indirect, on the flow of information between employers and their employees in both collective bargaining and joint consultation situations. An improvement in disclosure for both these processes would seem to be important if employee voice-at-work is to be extended and if the currently fashionable concept of partnership is to be a reality. There is, however, a continuing tension in the United Kingdom between the traditional approach to disclosure and employee representation based on collective bargaining and the alternative approach to information and consultation rights derived in large part from EU initiatives.[62] Indeed, there is a possibility that the one may displace the other and the two approaches are often portrayed as dichotomous. In practice, British unions are coming to view the different approaches as complementary and are seeking to utilize both to produce a broad framework of information, consultation, and bargaining rights for employees and their representatives. Many unionized employers are also coming to see the possibility of combining information, consultation, and negotiation. Both union and non-union employers will have to come to terms with the new generalized disclosure and

62. M. Hall, *Beyond Recognition? Employee Representation and EU Law*, 25 INDUS. L.J. 15-27 (1996).

consultation requirements contained in the recently passed directive on national information and consultation.[63]

Yet, there are important analytical differences between the traditional U.K. approach and law on disclosure for collective bargaining and the European influenced provisions. These can be seen in the prior assumptions and models on which the two approaches rest.

The U.K. collective bargaining approach constitutes an agenda driven disclosure model, i.e. the trigger for their use lies within the bargaining agenda. By contrast, to date, the provisions stemming from the EU are more event driven, i.e. they are triggered by specific employer initiated events that affect employment contracts in various ways irrespective of the representative context. Whereas the concern of the former is with the vitality of a process, the concern of the latter is primarily procedural justice in a specific context, e.g. the termination of employment contracts. The latter operate in a palliative rather than preventative way and they need have no continuous impact on bargaining relationships. Their advantage lies in the absence of any necessary association with collective bargaining processes, which are shrinking in coverage. The dilemma for the United Kingdom is whether to concentrate on developing the agenda driven approach or the event driven approach, or a pragmatic compromise of a hybrid nature. The new directive on national information and consultation may offer some prospects of the reversion to a more agenda driven approach.

The potential strength of disclosure for collective bargaining and the agenda driven approach is that it is a general process whereby issues can be linked together. Moreover, in the case of trade unions, they have the organizational capability to use information in that they are continuous associations with a real independence of the employer and with expertise and resources beyond the workplace. However, given the shrinkage of collective bargaining and the growth of non-union workplaces, disclosure for consultation has become more important in recent years. The suggestion of this article is that the legal framework should aim to provide good disclosure for collective bargaining wherever possible; where this is not possible, there is a need for the provision of good information for joint consultation. To this end, the collective bargaining provisions for disclosure need to be

63. Howard Gospel & Paul Willman, *Representing Workers—Negotiation, Consultation, and Information*, mimeo 2002.

improved along with better information provision for joint consultation.

Several changes to the law on disclosure for collective bargaining could be considered, which, if implemented, would represent an improvement on the current position with regard to disclosure for collective bargaining. The right to information could be made more extensive, especially in the areas of non-labor costs, financial matters, the state of the organization, and corporate strategy. The statutory restrictions on disclosure could also be more narrowly defined. The timing of disclosure is crucial and here employers might be placed under a duty to provide information "as soon as possible." Good disclosure practice requires more positive employer action and the role of legislation should be the promotion of such a development. Against this standard, the present law is inadequate. The "substantial injury" and other safeguards cast the employer as a reluctant divulger of secrets rather than an active participant in information transmission and social partnership at work. It would be in the interests of unions, therefore, to press for changes in the law based on a wider notion of the area of collective bargaining together with a more effective enforcement mechanism, but with an easement of the stringent safeguards concerning confidentiality, substantial injury, and production of documents. For deliberate breaches of the obligation to disclose, the law could impose financial penalties on recalcitrant employers and CAC declarations might be made enforceable in the courts. In this respect, the United Kingdom could look to the approach of Swedish law on disclosure to trade unions, where sanctions are stronger, with the possibility of punitive damages for deliberate breaches.[64] Finally, the ACAS Code of Practice might be reviewed, in particular so that the code gives better guidance on the general principle of "good industrial relations" practice. The code might encourage management and unions to agree on a joint policy on information sharing and to develop information agreements linking the provision to broader business and collective bargaining agendas.

In turn, the law on disclosure for consultation has a number of weaknesses. This is certainly the case by comparison with the broader disclosure provisions to German works councils and French *comité d'enterprise*.[65] Of course, in those two countries, the transposition of EU law caused little turmoil in their national systems. By comparison,

64. Howard Gospel, *The Legal Obligation to Bargain: An American, Swedish and British Comparison*, 21 BRIT. J. INDUS. REL. 343-57 (1983); Janice Bellace & Howard Gospel, *Disclosure of Information: A Comparative View*, INDUS. REL. RES. ASS'N 73-81 (1982).

65. *See supra* note 4.

in the United Kingdom, the introduction of EU law in a piecemeal fashion has resulted in a "shambles" where provisions set different standards and where clarification has been developed in the to-and-fro manner described above.[66] At a deeper level, we have argued that the U.K. law, as it has developed, is based on disclosure for very specific purposes; it is not easy to make linkages between information on a business transfer and the underlying commercial factors that gave rise to the strategic decision; and, it may encourage disclosure to representatives who lack the organizational capability and independence that unions possess. However, given the shrinkage of collective bargaining, disclosure for consultation has become more important in recent years. It would certainly be wrong, therefore, at least for U.K. unions, to throw the baby out with the bath water and to argue against strengthening of the law in this area. In the areas of collective redundancies, business transfers and health and safety, greater consistency and improvements could be made in terms of the timing of disclosure and the nature of information provided. Worker representatives need to be given sufficiently detailed information at the earliest opportunity if they are to be effectively involved in decisions at work. In the case of EWCs and the proposed national works councils, there should be access to less aggregated information at the earliest opportunity and with real sanctions against employers who fail to comply. In the U.K. context, it is then to be hoped that, in a more supportive legal environment, such provisions might both give strength to and derive strength from trade unions along German lines so that joint consultation and collective bargaining can complement one another. In this respect, it will be interesting to see how the new Directive on Information and Consultation is transposed into U.K. law and how it develops in practice.

Improvements to disclosure of information for collective bargaining and joint consultation could have significant benefits for employee relations. Trade unions and worker representatives would be in a better position to assess the employment requirements of firms and their ability to afford pay increases. In addition, they would be better placed to assess development plans, to monitor efficiency, and to ensure that management is best exploiting business opportunities. Information is of particular importance in the rapidly changing and competitive environment within which organizations now operate. The neglected area of disclosure of information could be a central part

66. K. Ewing, *Employment Rights: Building on Fairness at Work*, Industrial Law Society Annual Conference, p. 15 (Oxford, Sept. 2000).

in the Labour government's stated aim to build a more positive system of employee relations.[67] As Otto Kahn Freund wrote, "Negotiation does not deserve its name if one of the negotiating parties is kept in the dark about matters within the exclusive knowledge of the other which are relevant to an agreement."[68] By extension, this observation applies not only to information for effective collective bargaining, but also to information for meaningful consultation or any real notion of social partnership at work.

67. The Labour government had from the beginning stated that "employers should in future have clearer obligations to inform and consult recognized trade unions or, in their absence, other independent employee representatives." Department of Trade and Industry, *Fairness at Work*, Cm 3968, p. 29, ¶ 4.32 (London, 1998).

68. O. KAHN-FREUND, LABOUR AND THE LAW 110 (3rd. ed. 1983).