The implementation of the EU Directive on Information and Consultation, March 2005

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ABSTRACT

Employee consultation in the UK, traditionally part of an event-driven approach taken by employers, is about to be challenged by the introduction of the European Directive of 2005, which essentially advocates a process-driven approach to employee consultation. With reference to two recent case studies, this paper considers whether or not the new Directive may in future lead to a reduction in asymmetry of information and power imbalance which currently lies strongly in employers' favour.

Keywords: event-driven consultation; process-driven consultation; information asymmetry; imbalance of power.

1.0 Introduction

This paper considers the issues surrounding the implementation of EU Directive 2002/14/EC, regarding the establishment of a general framework for informing and consulting employees in the European Community. The UK has one year to start implementing the EU Directive on Information and Consultation, that is, until 23 March 2005. Under the terms of this Directive, employers will be obliged to provide information on their general business situations; and to inform and consult employees on both the likely development of employment and on decisions which are likely to impact on work organisation and/or contractual relations.

1.1 Employee Representation in the UK

In the spirit of the history of Industrial Relations in the UK, according to Gospel and Willman (2004), transposition of the Directive into UK law will be characterised by the principle of voluntarism, with the legislation encouraging the dissemination of voluntary information and consultation agreements. However, as is well understood, the tradition of voluntarism has not been problem-free. In the past, several EU Directives requiring employers to disclose information have, in the UK, been put into practice only where there was a recognisable trade union presence. According to Gospel et al (2003) it was this inadequate disclosure of information which led the Labour government to introduce legislation in 1999 whereby with regard to information disclosure, primacy was granted to a trade union presence; but if there were a non-union situation, provision had to be made for disclosure through other representatives.

It can therefore be argued that the trend in recent years has been for disclosure legislation to relate to joint consultation rather than collective bargaining. This will fit well with the future dual channel representation of trade unions and works councils as perceived by the terms of the Directive; but does not necessarily fit comfortably with past industrial relations practice. Similarly, consultation in the UK has typically been event-driven, that is, employers have consulted a propos of specific issues. The common complaint about this approach has been that such consultation has been concerned with isolated issues (such as redundancy); and that it usually occurs when there is no realistic change of those being consulted being able to alter the consultation proposals. Under the new Directive, the focus will be on process-driven consultation, for example via on-going discussion in works councils.

1.2 Information Disclosure

Issues which may arise, therefore, are concerned first with the extent to which employers may be reluctant to disclose information, particularly since traditionally, the employer-employee relationship has been characterised by informational asymmetry; and second the extent to which the aforesaid dual channel approach can be readily implemented in the UK.

Based on two brief case studies that focus on event-driven consultation of trade unions, and on an in-depth interview with a recently-retired European Works Council (EWC) employee representative, the paper will therefore consider first, how well or otherwise event-driven consultation has worked in the past; and second, opinions of recent experiences with process-driven consultation.

2.0 The proposed directive

A directive is a form of EU law, the principles of which member governments are obliged to bring into their domestic law (Grant, 2002). Most EU employment law is issued in the form of Directives; and these require unanimous agreement from all member states. However since the signing of the Maastricht Treaty, individual member states that may have strong objections to a particular Directive, have been allowed to opt out of certain Directives. This opting out, in turn can be countermanded by the ruse of introducing a Directive as a Health and Safety measure, as the latter requires only a qualified majority (Grant 2002). Despite their obligation to enshrine EU Directives into national law, individual member states are allowed approximately two to three years to implement the directive; and are given leeway with regard to the method of implementation to be adopted.

One vehicle for facilitating consultation procedures are European Works Councils (EWCs). The UK Conservative government, at the time of the signing of the Maastricht treaty, negotiated an opt out of the EU Works Councils Directive. However, this was purely territorial in effect. If a UK company had European subsidiaries in Europe, the UK company was exempt from the WC Directive, but the subsidiaries were not: “given the multi-national character of these enterprises, it would have been strange if the management were to have implemented a regime of information and consultation for employees in their establishments in continental Europe and neglected to do

so for those in the establishments based in the UK. Indeed there is evidence of a number of European-style Works Councils established in the UK, albeit on a voluntary basis" (Grant, 2002).

2.1 The Early Establishment of the EU Directive

Directive 2002/14/EC of the European parliament sets out a general framework for informing and consulting employees in the European Community. It seeks to establish a general framework wherein minimum requirements for the rights to information and consultation of employees can be established. 'Information' is defined as "transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it"; while 'consultation' means "the exchange of views and establishment of dialogue between the employees' representatives and the employer" (Article 2). The Directive applies to "undertakings employing at least 50 employees in any one member state, or establishments employing at least 20 employees in any one members state" (Article 3). The EU Directive acknowledges that existing systems may in some instances work well; and that when possible, these systems should be retained. However, this may not help trade unions to avoid some of the pitfalls of the current, mainly event-driven, system of information disclosure and consultation.

In response to earlier EU Directives, employers have been obliged to disclose information in two cases (Gospel and Willman, 2004):

1. Where it is proposed to make 20 or more employees redundant, the employer must first engage in consultation with either a recognised trade union (which will have primacy in union situations) or elected employee representatives (in non-union situations). The information to be disclosed must cover the 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.
2. Where the proposal concerns a business transfer, the employer must provide relevant information about the reasons for the transfer and its timing. In addition, when the employer envisages that certain 'measures' will be taken affecting employees, then the employer must consult with appropriate representatives 'with a view to reaching agreement'.

2.2 Limitations of Event-Driven Provisions

There are a number of important limitations of event-driven provisions (Gospel and Willman, 2004):

- The obligation to inform and consult applies only to the measures proposed by the employer. If there is no definite plan or proposal, then there is no obligation to consult. On the other hand, if there is a definite proposal, then the obligation to consult only applies to the measures proposed, and not to any other subject matter.
  In practice, management might well have taken various preparatory decisions already that constitute an overall business strategy within which the proposed measures are planned to fit, but on which there has not been any consultation. The employer may subsequently claim that any such decisions may be hard, if not impossible, to reverse.

- In light of the above, the initial information released by the employer in support of the proposal, is likely to be highly specific to the issue at hand. There is no necessary provision for linkages with other information that puts the proposal into a wider strategic context or is otherwise required for its proper evaluation.
- The obligation is on the employer to consult 'in good time', and not at the earliest opportunity.
  In practice, the employer may claim that in a fast-developing situation (caused by a turbulent business environment, for instance), definite proposals can only be formulated at a late stage – leaving little or no time to develop feasible alternative plans.
- The emphasis is placed on procedural justice for the individual employee – whether a member of trade union or not – and not collective entitlement claimed through a trade union.
  In practice, the position of representatives of the recognised trade union(s) involved may not be straightforward. Non-union employees or those belonging to a union lacking formal recognition may not be happy with the role of the recognised union as a key player in the consultation process – particularly if there are actual or perceived conflicts of interest between different segments of the workforce affected by the employer's proposal.
- Business transfers are not deemed to occur if there is a sale or transfer of shares, on the grounds that the employer remains unchanged.

However, in practice, a sale or transfer of shares may well imply a change in economic control, which is likely to lead to a change in business strategy. But the latter may involve decisions in preparation for employment-related measures to be proposed at some later date.

2.3 Power and the Disclosure of Information: a Process-Driven Approach

A key issues for the successful operation of the EU Directive is that of power. As long ago as 1970 Pateman (quoted in Salamon) was arguing that only if both sides have equal power in order to determine the outcome of the decision can 'real' participation ensue. According to Salamon (1998) "in the absence of such power equality, employees can only rely on management goodwill (i.e. its acceptance of and commitment to a participative philosophy or style of organisational management). There must be more than just the provision of information to employees or their representatives; there must be a genuine opportunity for employees to influence major strategic organisational decisions". One of the drawbacks of an event-driven system is that employees are 'consulted' (or rather informed) after the event, thus not allowing for any meaningful participation on the part of employees.

3 The Case Studies

To illustrate these issues, we shall look at two cases in which some or all of these limitations became apparent. Both cases – let us call them 'A' and 'B' – relate to events in manufacturing plants located in Scotland, occurring circa 2002 – 2003. In each case, representatives of the same trade union (representing mainly workers at shopfloor level) were involved in an event-driven consultation process with the senior management of a multinational company: the company was

US-owned in case A, and UK-owned in case B. Both companies operate in the same sector of manufacturing industry – one that has been in serious decline in the UK for the last decade or more. The company in case A is located towards the downstream end of the overall industry supply chain, and in case B towards the upstream end. One of the authors of the present paper acted as an Independent Expert on behalf of the trade union in both case A and case B.

3.1 Case A

The event that triggered case A was the company's sudden announcement of its plans to close, as soon as possible, its two remaining factories in Scotland. The company presented a confidential report to the Joint Negotiation Committee (JNC), consisting of representatives of the recognised trade union and formally appointed representatives of non-unionised employees. This report provided, *inter alia*, some (index) figures for the declining sales of the company's main product and the high level of average production costs of the two Scottish plants versus other plants in the company's international manufacturing network. Overall, the company presented its closure plans as driven by its deteriorating competitive position. A few alternative proposals for dealing with this problem were set out very briefly, but immediately dismissed as infeasible. Therefore, the closure plans were presented as the only viable option. At the same time the company proposed to submit a formal 'advance notification of redundancies' to the Department of Trade and Industry (DTI).

After the company's announcement, there was a rapid deterioration in relations between the company and the trade union concerned. The company had stopped production at the two factories by sending its employees home on full pay. Even the intervention of several high-profile politicians did not bring about any change in its proposals. About a month into the consultation process, the parties agreed that the trade union could bring in an Independent Expert (IE) for advice on the feasibility of any alternatives to the company's closure plans. The company promised, with certain conditions attached, to provide relevant information to the IE and pay his professional fees – but insisted on a tight deadline of four weeks for submission of the final report, immediately to be followed by the commencement of formal negotiations with the trade union.

The IE visited the two plants and conducted interviews with managers and various groups of employees, both shopfloor workers belonging to the trade union concerned and other employees. In the meantime, he also requested, and received, detailed performance figures from the company. Finally, he flew to the company's European head quarters for a half-day meeting with the top management team, at which the company's competitive position, its operations strategy and the relative performance of the two Scottish plants were discussed in detail. By the stipulated deadline, the IE presented a report to the trade union containing his analysis of the company's plans, together with an outline suggestion for a potential alternative solution. The latter would involve a radical change in the strategic role of the Scottish plants, necessitating substantial redundancies but not their complete closure. After presenting his report, the IE withdrew from the consultation process and formal negotiations started. Eventually, these led the union to accept the closure plans, in return for acceptable redundancy terms.

3.2 Case B

Case B was triggered by two meetings (held about a month apart) of the company's European Works Council (EWC). One of the company's top managers used these meetings to announce a new supply chain strategy, to be implemented in the following year and affecting both the Scottish plant and a similar one in France. Rather than complete closure, the plan was for each of these plants to be severely downsized, with the Scottish plant losing about half of its manufacturing workforce. The company's stated reasons were essentially the same as in case A: a deteriorating competitive position caused by declining sales in West-European markets and the high level of average production costs of the West-European plants relative to plants in Eastern Europe and elsewhere in its global manufacturing network.

The union's senior shop steward for the Scottish plant was also a prominent representative on the EWC. Through this, he became aware that the company had instituted a statutory consultation process with the employee representatives of the French plant, including the involvement of an IE to assess that plant's financial position. Therefore, he requested that he should, similarly, be able to benefit from advice from an IE. After some haggling over the scope of the IE's project brief, agreement was reached. The IE was to advise the union on the situation of the Scottish plant and to investigate possible alternatives to its proposed downsizing, taking into account financial, strategic and operational issues. On the advice of the IE, a clause was added that, while the assignment was to be carried out in the context of a local consultation between the company and the union, the feasibility of any alternatives to the proposed downsizing should take into account not only the company's position in the UK but also in Europe as a whole. The IE followed a similar procedure as in case A, although now all meetings were held at the Scottish plant. Again, he completed his assignment by presenting a report to the trade union containing his analysis of the company's plan. However, in this case he advised that the company's proposal appeared to represent the 'least bad' option in the given circumstances. Important details of the plan, in particular the precise number of redundancies and their manner of implementation, were still to be worked out and would become the subject of formal negotiations through the usual channels. But then something happened that was more or less completely unexpected (at least as far as the trade union and the IE were concerned). The company suddenly announced that it had been approached by a group of major shareholders who wanted to make to a cash offer to acquire a majority of the shares in the company, and thus to take economic control. Given what the IE knew about these potential new owners from the business and financial press, this news was ominous in that it would almost certainly lead to a change in business strategy that might not be favourable to the continuing existence of the Scottish plant. However, nothing more could be done at that stage.

3.3 Comparison of Cases A and B

Based on a comparison the two cases sketched above, the following similarities (and also some differences) are briefly highlighted:

Each case was driven by the strategic agenda of the company involved. Since each of these companies is a multinational manufacturing company, its business and operations strategy must be seen from a multinational (or better, 'transnational') perspective.

In each case, the initial company announcement (the 'event') triggered episodes of information disclosure, consultation and formal bargaining.

Each case was characterised by 'information asymmetry' to the disadvantage of the trade union. Although each company committed itself to disclosing specific information, this was restricted in both its type and scope. Apart from information disclosed as part of the original announcement, anything else had to be specifically requested. To do this effectively, one needed to gain a full understanding of both the specific issue and its wider strategic context.

Each case also demonstrated the relevance of significant inequalities in the power balance between the parties, as well as the importance of trust. In each case, the plants concerned were elements in the company's international manufacturing network. But a company might consider such individual elements expendable, if their role can be readily substituted. On the other hand, it is very hard for trade unions in practice to coordinate their actions on an international basis. In this situation, the trade union is potentially at a severe disadvantage, and its trust in the sincerity and truthfulness of the company's pronouncements becomes a key issue in the consultation process. However, in case A this trust was severely damaged by the crisis atmosphere engendered by the sudden nature of the company's announcement and the tight timeframe imposed. In case B, such problems were, at least initially (that is, until the announcement of the takeover bid), less severe because the company used the EWC (see below) to forewarn the union of its plans and to put them in their appropriate strategic context, giving more time and scope for effective consultation.

In each case, the trade union played a key role in the consultation process, which was also recognised by non-union employees. In case A, the lack of an effective works council with elected representatives from all employees appeared to hamper communications between the union representatives and fellow employees. In case B, the role of the senior shop steward on the EWC seemed to help matters. Although the task of the IE was, strictly speaking, only to advise the union, in both cases his involvement also provided a channel through which the union could communicate with non-union employees to some extent.

3.4 A Process Approach in Practice via a European Works Council Forum

The senior TU shop steward from Company B (a multinational firm operating in over sixty countries) first became involved with European directives when he was asked to be his plant's EWC employee representative some nine years ago, representing both TU and non- TU members alike. The operation of the EWC involved gatherings of employee representatives from all over Europe. The manner in which Company B used the consultation process was described as manipulative in terms of the information passed to EWC employee representatives: the international meetings (often in London or Brussels) would follow on from evenings of lavish hospitality, usually involving consumption of much alcohol. Inevitably, EWC representatives would be jaded the following day. So-called information sessions were brief, and presentations were from the management side only. Question and answer sessions were organised to take place when many delegates were leaving to catch flights home: input from EWC employee representatives, was thus minimal, with the company at all times in charge of the information released. EWC representatives became wise to managerial tactics over time; but despite their best efforts, the agenda very much remained under management control. A further blockage to the consultation process was the attitude of the senior shop steward's local TU members: no one was interested in the EWC unless its meetings discussed issues that directly impacted on the local

situation. Indeed there was considerably more interest shown by non-TU members in the role of the EWC. There was also a lack of support from the local TU Headquarters.

4 Conclusion

In conclusion, the potential for effective consultation procedures, based on real power sharing and equality of access to relevant information, appears some way off. Given the historical events-driven nature of UK consultation procedures, and the leeway granted to national governments with regard to its implementation, it is likely to be some time before the Directive's effectiveness can be properly assessed. The evidence from the two cases referred to above suggests that an event-based approach has not been effective with regard to meaningful consultation. It is acknowledged that there will always be an imbalance in favour of management with regard to information and power. The question is, to what extent will the EU directive, with its emphasis on a process-driven approach, address this imbalance with a view to its moderation in favour of the workforce.

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