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FOR COLLECTIVE BARGAINING OR JOINT
CONSULTATION?**

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

By
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Abstract

The legal obligation on employers to provide information to employees has grown since the early 1970s. At that time, the emphasis was on disclosure for collective bargaining. In the 1980s and 1990s, the emphasis shifted more to disclosure for joint consultation. In the context of new legislation, the possibility of further interventions from Europe, and a greater commitment to openness in other areas of company and public life, disclosure of information for collective bargaining and joint consultation at work is again on the agenda. This paper focuses on disclosure for both of these processes. Disclosure for collective bargaining is the most developed and potentially significant area of the law from an industrial relations perspective. Disclosure for joint consultation, however, has been the most dynamic area in recent years. Voluntary information provision by firms has also been a significant part of developing human resource management practice. The paper therefore provides a broad examination of the law on disclosure. The UK provisions are conceptualised as constituting an *agenda-driven* disclosure model; i.e. the trigger for their use lies within the bargaining agenda. By contrast, the provisions stemming from European initiatives are *event-driven*; i.e. they are triggered by specific employer initiated events that affect employment contracts in other ways irrespective of the representative context. In the final sections, we attempt a broader evaluation of the intent and impact of the legislation and assess the pros and cons of the different approaches.

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1. INTRODUCTION

In the UK, the legal obligation on employers to provide information to employees and their representatives has grown since the early 1970s. In the beginning, the emphasis was on disclosure for collective bargaining, and, despite the changes of the Conservative years, this legislation remained on the statute book and has slowly developed in terms of jurisprudence. 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, growing European influence, and the preference of many employers for information provision as part of new human resource management strategies.⁴ In the context of new legislation from a Labour government and the possibility of further interventions from Europe,⁵ a dilemma confronts British labor law as to whether there should be more disclosure for collective bargaining or for joint consultation or both.

In its policy document, *Fairness at Work*, the present Labour government stated that ‘employers will in the future have clearer obligations to inform and consult recognized trade unions or, in their absence, other independent employee representatives.’⁶ To date, the government has introduced various aspects of European social policy, such as the European Works Councils (EWCs) and amendments to existing legislation on collective redundancies and transfer of undertakings, all of which contain disclosure provisions. In its Employment Relations Act, it has extended the right to information disclosure for collective bargaining to the area of training.⁷

4 For an overview of employer initiatives, see J. Brown, ‘Managerial Disclosure of Financial Information to Employees: A Historical and Comparative Review’, *Journal of Industrial Relations* 39 (1997), pp. 263-286.

5 For possible new European initiatives, see the Commission’s proposal for national works councils, *Communication on Worker Information and Consultation*, COM (95) 547 Final, 14 November 1995, and *Establishing a general framework for informing and consulting employees in the European Community*, Proposal for a Council Directive 98/0315 (SYN).

6 Department of Trade and Industry, *Fairness at Work*, Cm 3968 (London, 1998), p. 29, para 4.32. However, in practice, the white paper says little on how obligations to inform will be made clearer.

7 Clause 5, *Employment Relations Act*. However, where an employer is guilty of non-disclosure, the Act does not prescribe the use of an arbitration-type mechanism to be described below, but rather the sanction of compensation for the individual employee.

Outside the employment law area, there are new proposals for more disclosure in company law and for greater freedom of information in public life.⁸ In the corporate governance area, there are also new proposals for greater voluntary disclosure to shareholders, though not to other stakeholders in the enterprise.⁹ The government has also encouraged the development of so-called partnership agreements between employers and unions which are posited on a greater sharing of information. Also, within management, there has been a continued interest in information sharing, in the context of management-sponsored consultative committees, briefing groups, and other communications initiatives. In the light of this activity and the promise of a new openness, there are a number of questions. Should there be changes in the 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 employees in specific situations? Or should there be greater disclosure for both joint consultation and collective bargaining, and, if this were to happen, might the one undermine the other

This article focuses on disclosure for both collective bargaining and joint consultation purposes. Disclosure for collective bargaining is the most general area of the law from an industrial relations perspective. However, disclosure for joint consultation and for specific purposes has been the most dynamic area in recent years. The article therefore begins by surveying the broad legal situation. It then more specifically considers the law on disclosure of information for collective bargaining.¹⁰ This is followed by an examination of the law on

⁸ For company law, see Department of Trade and Industry, *Modern Company Law: For a Competitive Economy* (London, 1998); for the proposed Freedom of Information Act, see Chancellor of the Duchy of Lancaster, *Your Right to Know: The Government's Proposals for a Freedom of Information Act*, Cm 3813 (London, 1997); for financial disclosure by political parties, see Committee on Standards in Public Life, *Inquiry into the Funding of Political Parties*, under Lord Neill of Bladen.

⁹ See, for example, Cadbury Report, *Report of the Committee on the Financial Aspects of Corporate Governance* (London, 1992) and Hampel Report, *Committee on Corporate Governance* (London, 1998). These reports say nothing about disclosure to employees.

¹⁰ For earlier commentaries, see H. Gospel and P. Willman, 'Disclosure of Information: the CAC Approach', *Industrial Law Journal*, 10 (1981), pp. 10-22; H. Gospel and G. Lockwood, 'Disclosure of Information for Collective Bargaining: The CAC Approach Revisited', *Industrial Law Journal*, Vol 28, No. 3, September 1999, pp.233-248.

disclosure with an emphasis on joint consultation in specific circumstances. In the final sections, we attempt a broader evaluation of the British situation.

2. THE LEGAL CONTEXT

Provision for legally-based disclosure of information for collective bargaining was first contained in the Labour government's 1970 Industrial Relations Bill. Overtaken by a general election, similar clauses re-appeared in the Conservatives' Industrial Relations Act 1971, supplemented by a Code of Practice.¹¹ These sections were then re-enacted in Labour's Employment Protection Act (EPA) 1975 and were backed up by a new Code of Practice from the Advisory Conciliation and Arbitration Service (ACAS). Despite a proposal from the Conservatives to repeal the legislation in 1996,¹² the law remains unamended and is now contained in the Trade Union and Labor Relations (Consolidation) Act (TULRCA) 1992.

Under section 181 (2), 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.¹³ 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.¹⁴ Employers are then specifically exempted under section 182 (1) from supplying certain types of information: (a) which would be against the interests of national security; (b) which it would be illegal to disclose; (c) which had been communicated in confidence; (d) which relates specifically to an individual; (e) which would cause substantial injury to an employer's undertaking for reasons other than its effect on collective bargaining; or (f) which relates to legal proceedings. There are two further restrictions on union rights under sections 182 (2): (a) the employer does not have to

11 Commission on Industrial Relations, *Disclosure of Information*, Report No. 31 (London, 1972).

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

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

disclose information, the compilation of which would involve a disproportionate amount of work; (b) the employer does not have to disclose documents other than ones specifically prepared for the purpose of providing the information.

The ACAS Code of Practice lists items which might be relevant to collective bargaining, under the headings of pay and benefits, conditions of service, manpower, and performance and financial matters. A second list contains items which might cause substantial injury to the employer: cost information on individual products, quotes on the make-up of tender prices, and detailed analyses of proposed investment, sales, or prices. The Code states that substantial injury may occur, if customers or suppliers would be lost.¹⁵

Under section 183, if a union considers that an employer has failed to meet 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. If a settlement is not forthcoming, the Committee then hears the complaint and issues a declaration, stating whether it finds all or part of the claim well-founded. Where the complaint is upheld, the Committee specifies the information that should be provided and a timetable for disclosure. Where the employer still fails to disclose, the union may bring a further complaint before the Committee, which again may issue a declaration.¹⁶ If the employer still refuses to disclose, the union may again complain to the CAC and request that certain improvements in terms and conditions be incorporated into the contracts of relevant employees.¹⁷ If the CAC upholds the complaint, it may make an award either for the improvements desired by the union or other terms and

14 Collective bargaining is defined in s.178 (2) TULRCA 1992.

15 Advisory Conciliation and Arbitration Service, Code of Practice on Disclosure of Information to Trade Unions for Collective Bargaining Purposes (London, 1977), paras. 11 and 15.

16 See s. 184 TULRCA 1992.

17 See s. 185 TULRCA 1992.

conditions, as it considers appropriate.¹⁸ This then becomes an implied term of the individual employee's contract of employment.¹⁹

Other more recent UK legislation on information disclosure relates either to joint consultation or to joint consultation and collective bargaining.

In response to European Directives, 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 UK law by the Employment Protection Act 1975 (EPA) and the latter by the Transfer of Undertaking (Protection of Employment) Regulations 1981. The provisions have been amended several times over the years.

In relation to redundancy, the EPA provided that an employer must not dismiss an employee for redundancy without first consulting with any independent union recognized by him whether the employee is a member of the union or not. The information to be disclosed is specified: reasons for the redundancies, the number to be dismissed, the methods of selection and implementation, and the calculation of redundancy payments.²⁰ The legislation also required the employer to give a reasoned reply to any representations, which might be made. In terms of timing, the requirement to consult was activated at the time when the employer was proposing to make employees redundant. The legislation also provided that, where there were special circumstances which made it impracticable to comply with the requirements, the employer should take all such steps towards compliance as were reasonably feasible in the

18 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.

19 The final part of the procedure does not envisage disclosure of the contested information by its incorporation into the contracts of relevant employees. 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.

20 EPA s. 99, See now s. 188 (4) TULRCA 1992.

circumstances.²¹ If an employer failed to consult and disclose, the trade union could present a collective complaint to an industrial tribunal, which could make a protective award.²²

In relation to business transfers, the disclosure obligations relating to business transfers provided that, before a relevant transfer, the employer should inform any independent recognized trade union of the following matters: the reasons for the transfer and its timing, the implications for the employees concerned, measures the employer might take in relation to the affected employees, and measures which the transferor envisaged the transferee might take in relation to the employees.²³ The employer was placed under a duty to inform, but there was not always a duty to consult. 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.²⁴ The duty to furnish information was activated when a transfer was proposed, and the obligation to give information applied to all the above areas.²⁵ As with the redundancy provisions, if there were special circumstances, which rendered it impracticable to disclose, the employer had to take all such steps towards compliance as were reasonably feasible.²⁶ If an employer failed to inform or consult, the union or affected employee could present a complaint to an industrial tribunal.²⁷

In the case of both collective redundancy and business transfers, the law was subsequently amended in response to a 1994 European Court of Justice decision that the UK had failed properly to implement the Directives in that the right of consultation was only available to

21 EPA s. 99 See now s. 188 (7) TULRCA 1992.

22 EPA ss. 101-103, See now s. 189 (4) (b) TULRCA 1992.

23 Regulation 10 (2) Transfer of Undertakings (Protection of Employment) Regulations (TUPE) 1981.

24 Regulation 10 (5) TUPE.

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

26 Regulation 10 (7) TUPE.

27 If the complaint is upheld, the industrial tribunal may then award appropriate compensation of no more than four weeks pay to the affected employees. Regulation 11 TUPE.

recognized trade unions.²⁸ The Court's decision led to the introduction of the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995.²⁹ The 1995 regulations amended the consultation provisions of TULRCA 1992 and the Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 1981 in the following respects only. The regulations provided that, where employees were to be affected by redundancies or business transfers, the employer must consult with either a recognized trade union or employee representatives elected in advance or ad hoc.³⁰ 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. As a result of criticisms of the 1995 regulations, the Labour government has introduced new rules concerning the employers' obligations when consulting on redundancies and business transfers. The alterations to the law are contained in the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999. The 1999 regulations make amendments to the redundancy consultation provisions of TULRCA 1992 and the provisions of the TUPE regulations. We comment on these changes in section 5 below.

There are other miscellaneous requirements for disclosure of information under UK law which are also as much or mainly posited on joint consultation as on collective bargaining.

Under the Health and Safety at Work Act 1974 and related regulations (many derived from European Directives), employers are under a general duty to consult safety representatives concerning the promotion of health and safety. In particular, there has to be consultation about the introduction of measures, which may substantially affect the health and safety of employees, the arrangements for appointing or nominating representatives, and relevant consequences of the

²⁸ EC Commission v UK [1994], IRLR 392.

²⁹ SI 1995 No 2587.

introduction of new technologies. As part of this process, employers must disclose necessary information, and in this case non-compliance can result in fines. The Health and Safety (Consultation with Employees) Regulations 1996 require employers to consult with employees not covered by safety representatives appointed by a recognized trade union.³¹ 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.³² The provisions of the Act are enforceable by the Health and Safety Executive and local authority inspectors.

In the area of occupational pension schemes, there are also obligations which require specific information to be disclosed. Thus, the Pensions Act 1995 requires the disclosure of auditing and accounting information. Trustees must disclose the following: audited accounts; the auditor's statement about contributions under the scheme; and actual valuations and statements. The information must be disclosed to members and their spouses, beneficiaries, and recognized trade unions.³³ In addition, there are other regulations providing for the disclosure of information about the running of pension schemes. In this context, trustees have an obligation to provide the following: information about the constitution of the scheme, trust deeds, and rules; basic information about membership, contributions, tax status, contracting-out benefits, pension increases and transfers; specific information relating to certain occasions such as when benefits become payable at death or on resignation or when a scheme is wound-up. The information is to be made available for inspection on request or within a reasonable time after the request is made. Any question as to recognition of a trade union for the purposes of collective bargaining in relation to the members of a scheme must be referred to an industrial tribunal.³⁴ In addition, an employer who intends to establish a contracted-out scheme must issue notices to employees and

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

31 Safety Representatives and Safety Committee Regulations 1977 (SI 1977/500).

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

33 Section 42 Pensions Act 1995. H. Dawes and J. Samsworth, *Guide to the Pensions Act 1995* (London, 1995), p.52.

any recognized union. Notices must be in writing and include the following: the arrangements of the scheme and its coverage; the date from which it is intended to contract-out; contributions and benefits under the scheme and any changes subsequent to contracting-out; details of the running of the scheme; and names and addresses of persons to whom representations may be made on these matters. The employer must then consult on all these matters. Any question whether an employer has complied with the requirements can be referred to an industrial tribunal.³⁵

Finally, there are disclosure obligations contained in the EWC Directive (94/45/EC), the stated aim of which is to improve the right to information and consultation of employees in enterprises operating in the European Union.³⁶ Relating to undertakings or groups of undertakings with at least 1,000 employees and with at least 150 employees in at least two establishments in different member states, this requires the establishment of an 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 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 investments and employment; substantial changes concerning organization, new working methods, transfers of production, mergers, retrenchment, or closures; and collective redundancies. 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 is possible. Member states must provide for appropriate remedies in the event of a failure to comply; in particular employee representatives should have access to

34 The Occupational Pension Schemes (Disclosure of Information) Regulations 1996 SI No 1655.

35 Occupational Pensions Scheme (Contracting-out) Regulations 1996 SI No 1172.

36 Article 1 (1), European Works Council Directive 94/45/EC;

administrative or judicial appeal procedures when management claims confidentiality or fails to provide information.

There are two recent proposals from the EU, concerning National Works Councils and Information and Consultation obligations. In the first case, the Commission seeks to establish an EU-wide framework of minimum standards of information and consultation at national level, giving employees a greater voice in the running of companies via enterprise councils. The present Labour government is opposed to these measures, preferring instead to encourage voluntary agreements based on the notion of social partnership. In the second case, the Commission has proposed a directive on establishing a general framework for informing and consulting employees in EU countries.³⁷ The Commission argues that change is necessary because of the weaknesses of national and EU law, since, where at present information and consultation rights do exist, these are often formal and *a posteriori* exercises.³⁸ If these latter proposals were adopted, they would be an interesting step back towards a more general approach to disclosure in UK labor law.

Therefore, over the years, there has developed in the UK a body of legislation on information disclosure, some based on collective bargaining over an agenda of issues, some orientated more to joint consultation on specific issues and events.

3. THE COLLECTIVE BARGAINING APPROACH

To date, the British CAC has preferred to deal with disclosure cases via informal conciliation, with an ACAS presence. If conciliation fails, the parties proceed to a formal hearing. This is a more formal occasion where written cases are exchanged, the proceedings are minuted, and counsel sometimes represents the parties. The Committee then produces a written award, stating

³⁷ Commission of the European Communities, Establishing a general framework for informing and consulting employees in the European Community, Proposal for a Council Directive 98/0315 (SYN).

³⁸ Ibid page 2.

whether the union's claim is well founded and giving general considerations underlying the decision.

The informal conciliation procedure 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.... The cases which go to full hearing and are published therefore give a slanted impression of the effectiveness of the procedure. In those resolved at an earlier stage, the procedure frequently results in a better understanding and the flow of much if not all the information requested.'³⁹

Between 1976 when the disclosure provisions first came into force and the end of 1999, the Committee had handled 476 complaints, an average of 20 per year. During that period, 65 cases required a formal declaration; two cases resulted in the issuance of a second award after an employer's failure to honor a section 184 declaration;⁴⁰ one case resulted in the application of the enforcement procedure under section 185;⁴¹ and four awards have been the subject of judicial review.⁴² There was an initial enthusiasm for the procedure in the early years; thereafter the total number of cases fell and remained low through the 1980s; subsequently they have fluctuated considerably in the 1990s.

These fluctuations may reflect a number of factors. On the one hand, the decline and low level through the 1980s might in part have reflected the indirect success of the provisions on voluntary disclosure. Survey evidence shows that about one fifth of manual shop stewards in private manufacturing reported that they had sought information under the legislation in 1984 (- this compared with around one tenth of stewards in private services, the public sector, and among non manual-stewards). The survey evidence suggests that the proportions making use of

³⁹ CAC, Annual Report, 1982, page 20, para. 3.15.

⁴⁰ Holokrome Limited and Association of Scientific, Technical and Managerial Staffs, Award No. (79/451) and Ackrill Newspapers Ltd and National Union of Journalists Award, No. (92/1).

⁴¹ Holokrome Limited and Association of Scientific, Technical and Managerial Staffs, Award No. (79/451).

the provisions remained stable over the period up to 1990. Those who had made such requests were asked how much information management had supplied – all, most, some, or none at all. Four-fifths of shop stewards said they received all, most, or some of the information in 1984, a figure which remained the same in 1990.⁴³

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 too busy dealing with the legislation of the Thatcher years. This explanation might in turn be allied to the decline in the coverage of collective bargaining in the 1980s. In these circumstances, the disclosure of information may not have seemed a high priority for beleaguered trade unions and their shop stewards. Thus, they may have chosen not to initiate disclosure claims, either because they had other more pressing problems or because they could not mobilize sufficient workplace support around related issues.

In the early 1990s, the number of complaints increased, though with a significant proportion being later settled or withdrawn. In this latter respect, it should be noted that the main reason for a union to withdraw a case is that it has been settled. It is difficult to isolate one particular factor to explain the higher level in the early and mid 1990s, since the cases cover a wide range of industries and subject matter. The interest might reflect a combination of economic upswing, accelerated business change, and more pragmatic adjustment on the part of 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. Information is as important to constructive collective bargaining as ever. Recent experience emphasizes that one element in the management of change is the provision of

42 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).

43 N. Millward, M. Stevens, D. Smart and W.R. Hawes, *Workplace Industrial Relations in Transition: The ED/ESRC/PSI/ACAS Surveys* (London, 1992), pp. 123-4.

information and, the greater the degree of change, the more will be the level of pressure on the arrangements through which information is disclosed.⁴⁴

The upward trend in the early and mid 1990s may also reflect a response from unions to the decentralization of business activities, individualization of employment relations, and privatization and outsourcing. This might in turn be associated with a further devolution of bargaining.⁴⁵ This view is supported by the 1995 CAC report which states, ‘a common theme running through the complaints ... was that the differences between the parties were of a more fundamental character because the nature of bargaining had changed. This took two forms: firstly, that the structure had been revised or, secondly, that the payment system had changed and in turn put pressures on a bargaining system that neither party had hitherto encountered.’⁴⁶ These changes were related to complaints in two specific areas. First, there were a series of claims on market-testing and contracting-out and the decentralized bargaining around this. Second, there were several complaints involving changes in pay systems in general and the growth of individual performance-related pay in particular. In relation to the latter, the CAC has stated that both the establishment and outcome of performance-related schemes constitute collective bargaining for statutory purposes if the union is recognized for such matters.⁴⁷

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.⁴⁸ Since the late 1970s, however, the emphasis has shifted away from job evaluated grading arrangements and towards new wage systems such as performance- and profit-related pay and towards pension matters. Requests for financial information have increased as a proportion of the total over the years, perhaps reflecting greater union awareness of the

44 CAC, Annual Report, 1991, page 2, para. 2.2.

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

46 CAC, Annual Report, 1995, page 4, para.2.7.

47 CAC, Annual Report, 1995, page 5, para.2.7.

importance of such questions and greater management caution in a more competitive environment. However, significantly, 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 trade union complaints have been held to be well founded. Union complaints were more likely to be successful on terms and conditions of the represented group and on labor costs and human resource budgeting; they were least likely to be successful on terms and conditions in other organizations, 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 often-used employer objection to information disclosure has been that collective bargaining would not be materially impeded by non-disclosure (182 (2) (a)). This was also the defence most likely to succeed. The objection that the information was not about a matter related to collective bargaining was also frequently raised (181 (1)). However, this defence had the highest failure rate. In addition, a high level of objections was made under section 182 (1) (d) that information related specifically to an individual and under section 182 (1) (c) that the information had been supplied to the employer in confidence.

In summary, the provisions under TULRCA 1992 would seem to offer *in potentia* a broad set of legal rights. Over the years, an indirect effect may have been that the threat to use them may have induced employers voluntarily to disclose information. The number of cases settled or withdrawn may also indicate that the CAC has had some measure of success. However, in practice, the obstacles and tests under the law are extremely restrictive, and this is

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

undoubtedly one reason why, after an initial enthusiasm, use of the provisions has fluctuated around a low level.

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

These provisions constitute some underpinning for collective bargaining in the UK. However, they contain elements which reduce their value to trade unions. In the first place, information need only be provided for the purposes of collective bargaining as defined by the Act and disclosure is limited to matters for which the union is recognized.⁴⁹ Thus, claims for information, relating to costs and prices or to organizational restructuring where the topic had not previously been an accepted bargaining subject, falls foul of the provision.⁵⁰

The two tests in section 181(2) are considerable obstacles to trade unions. The first 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.’⁵¹ Moreover, the CAC has concluded that it cannot act as a trail-blazer or standard-setter.⁵² The second 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 arguing 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

49 See s. 181 (1) TULRCA.

50 See, for example, BL Cars Limited, MG Abingdon Plant and General and Municipal Workers’ Union, Amalgamated Union of Engineering Workers, Transport and General Workers Union, Award No. (8065).

51 CAC, Annual Report, 1979, page 6, para. 2:11.

52 Standard Telephone and Cables Limited and Association of Scientific, Technical and Managerial Staffs, Award No. (79/484), para.25.

“without which” the trade union would be impeded. This narrows considerably the test from one of relevance to one of importance’.⁵³ However, in the case of BP Chemicals (Award 86/1), the CAC adopted a more flexible approach which was upheld on judicial review. In determining material impediment, the Committee stated in this case 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.’⁵⁴

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 disclose in the future, even though this might avoid a subsequent dispute.⁵⁵ Thus, a union is unable to plan its bargaining approach in anticipation of having all relevant documents at the most appropriate time. The bargaining process would have to begin and the union suspend proceedings in order to present a claim to the CAC to obtain information which had been refused. The fact that the CAC procedure must then be exhausted before any sanction is applied 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 cause unions to give up on the procedure.

A further weakness of the provisions is the enforcement mechanism contained in section 185, since the sanction neither forces disclosure of the information nor provides for a punitive element to be included in the award. To date, this procedure has been used only once in the Holokrome case (79/451). In that instance, the union’s request to the CAC did not take the form of a terms and conditions claim, but was a request for the inclusion of the contested information in the employment contracts of those covered by the reference. The Committee awarded that

53 Daily Telegraph and Institute of Journalists, Award No.(78/353).

54 BTP Tioxide and Association of Scientific Technical and Managerial Staff, Award No. (80/107).

55 Ibid.

‘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 the 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, contested information, which might relate to matters between the employer and the union as opposed to the employer and the individual, would not be suitable for such inclusion.

Finally, there are shortcomings in 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 the scope of disclosure. It concluded that the Code gave no clear guidance on these points.⁵⁶ 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 ACAS Code of Practice. The current code is of little help in this connection.’⁵⁷

Thus, the tests and exemptions contained in the Act are extensive and restrictive. They inhibit union claims for information and provide employers with a wide range of arguments against disclosure.

⁵⁶ Daily Telegraph Ltd and Institute of Journalists, Award No. (78/353).

⁵⁷ Standard Telephones Cables Limited and Association of Scientific, Technical and Managerial Staffs, Award No. (79/484), para. 25.

5. 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 Europe might provide an alternative and better way forward for providing information to employees. We now, therefore, return to the legislation as outlined in section 2. However, we will see that this set of provisions also has certain other problems.

The provisions pertaining to collective redundancies have several weaknesses. In the first place, the specified information is very focused on the redundancy process itself. It does not allow for linkages to be made with other information, which might be germane to the background business decision. Moreover, union complaints in this area have often been that information provided by employers is often too late or in 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 size of compulsory redundancies and the amount of redundancy payments.⁵⁸ Of course, unions would value broader information about the commercial decisions leading to redundancy and about alternative courses of action.

The Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 were thought to have several shortcomings. In relation to the timing of disclosure, they provided that, 'where an employer is proposing to make employees redundant, he shall consult in good time,' rather than at the earliest opportunity. The 1995 regulations were also framed in a way, which jeopardized the position of recognized trade unions. Employers could by-pass 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. Furthermore, the 1995 Regulations also provided that employers need not disclose information and consult if fewer than 20 people were made redundant in any one establishment.

This is consistent with the threshold contained in the collective redundancies Directive, but it represents a retrograde step since originally UK law required consultation regardless of the number of dismissals.

The Labour government has now introduced amendments to the legislation on employees' information and consultation rights in the event of redundancies and transfer of undertakings. These are contained in the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999. The changes clarify what needs to be done by employers to undertake genuine consultation in the event of planning redundancies or the transfer from one employer to another. The changes proposed are intended to remedy weaknesses, improve the operation of the regulations, and ensure that the UK complies fully with European law in the following ways.

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. It has been remarked that this change will require employers to consult over the consequential impact on 'survivor' employees in areas such as work organization and work-load.⁵⁹ 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 and business transfers. Third, it is made clear that 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 legal requirements, the right to make a complaint to an employment tribunal. Fourth, the regulations provide employee representatives with specific rights for time

58 W.W. Daniel, 'The United Kingdom, Managing Workforce Reduction: An International Survey' in M.Cross ed. (London, 1985), pp. 67-90

off for training. Finally, the remedies that employees and their representatives may obtain in cases where employers fail to comply with the regulations are simplified and strengthened.

However the changes have not remedied all the weaknesses of the previous regulations. First, employers are still only required to consult ‘in good time’ and not ‘at the earliest opportunity’. Second, the government has not removed the current exemption from the consultation requirements of redundancy proposals affecting fewer than 20 workers.

With respect to business transfers, the law 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 a sale or transfer of shares, because the corporate personality of the company 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 future of 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.⁶⁰ 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).⁶¹ However, the government has stated that it is not inclined to support any such amendment to the Directive.⁶² In addition, the obligation to inform and consult only applies to the 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.

59 M. Hall and P. Edwards, ‘Statutory Redundancy Consultation Procedure’, *Industrial Law Journal*, Vol. 28, No. 4, December 1999.

60 I. T. Smith and G. H. Thomas, *Smith and Wood’s Industrial Law* (London, 1996) p. 62.

61 *Transfer of Undertakings: Acquired Rights*, Select Committee on EC, 5th Report, HL Paper 38, 11 July 1995, 16.

62 Department for Trade and Industry, *European Acquired Rights Directive and Transfer of Undertakings (Protection of Employment) Regulations 1981*, Public Consultation Paper, (1997), URN 98/513.

Trade unions might well wish to be consulted as much when measures were not envisaged as when they were.⁶³ 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. It has also been stated that 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.⁶⁴ Furthermore the obligation to consult is restricted to the subject matter of the proposed measures and not the other heads listed in Regulation 10 (2) TUPE 1981.⁶⁵ These restrictions on information disclosure may result in the employer unnecessarily withholding highly relevant information, which would be of value to employees and their representatives.

Pensions law requires the disclosure of detailed information to members of schemes and their trade unions. Indeed, the provisions are very specific and do not constitute a significant extension of information rights. Moreover, it could be argued that the law does not provide for the disclosure of sufficient information to enable the performance of trustees to be properly monitored. Trustees can only be required to disclose information relating to the taking of particular decisions if it can be shown that they have not acted in good faith. The limited circumstances in which trustees must inform members of the reasons for their decisions fall short of what is required if the actions of trustees are to be effectively monitored and members' interests protected.⁶⁶ Information and consultation rights are especially important if trade unions and employee representatives are to be in a position to safeguard and further the interests of their members in occupational pension schemes. In this respect, although the Pensions Act 1995 requires trustees to provide a report to the Occupational Pensions Regulatory Authority if

63 J. McMullen, *Business Transfers and Employee Rights* (London, 1992), p.246.

64 *IPCS v Secretary of State for Defence* [1987] IRLR, 373, per Millet J.

65 *IPCS v Secretary of State for Defence* [1987] IRLR 373, per Millet J.

employer contributions are not paid on time, there is no obligation to disclose this information to employee representatives or trade unions.⁶⁷ In addition there are also disclosure issues surrounding the situation where an employer wishes to take a payment of surplus from an ongoing scheme. Whilst the requirements of section 37 (4) of the Pensions Act 1995 must be complied with before an employer can receive such a payment, trade unions have no information or consultation rights on the matter. Finally although trustees are under an obligation to provide a written statement detailing the principles governing investment decisions, there is no requirement directly to furnish more detailed information.⁶⁸

The Health and Safety at Work Act 1974 and related regulations have created new legal rights and also a new institution in the person of the safety representative. Here the law may have 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.⁶⁹ 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 by consultation with employee representatives.⁷⁰ The new requirements introduced by the Health and Safety (Consultation with Employees) Regulations 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. The provisions do not prescribe how elections should be held, which may

66 R. Nobles, *Pension Rights after the Pensions Act 1995* (London, 1997), pp.16-24.

67 See s 47 (9) (b), s 110, s 59 (1) Pensions Act 1985.

68 Section 35 Pensions Act 1995.

69 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?*, Health and Safety Bulletin 252 (1996), pp.11-14.

70 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, and W. Guy, 'Size of Employment Unit and Injury Rates in British Manufacturing: A Secondary Analysis of WIRS 1990 Data' *Industrial Relations Journal*, Vol 26 (1) (1995),

cast doubt on the independence of those elected.⁷¹ Greater disclosure and consultation rights for employees may result in higher health and safety standards in the workplace, which in turn would lead to a reduction in injuries and illness, better industrial relations, and improved performance. The Health and Safety Executive have acknowledged this fact stating ‘improved information and consultation are the key to improving safety.’⁷² In this area, unions have started to think about 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 relating to the company’s activities; 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.⁷³

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. If this is to be achieved, trade unions and employer representatives must be able to raise issues of concern and generate a management response. 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 participate in decision-making.⁷⁴ Trade unions and employee representatives need to be able to procure information which is of value and leads to a constructive dialogue. However, discussion with inexperienced works councils that lack union involvement will necessarily be limited. Agreements entered into by the special negotiating body and management under Article 5 (3) need careful scrutiny to ensure

pp. 45-56; A. Robinson and 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.

71 P. James, and D. Walter, ‘Non-Union Rights of Involvement: The Case of Health and Safety at Work’, *Industrial Law Journal*, 26 (1997), pp. 35-50.

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

73 The Transport and General Workers Union is leading attempts to obtain such information by attempting to include health and safety issues on the agenda of EWCs. *IRS Employment Review, Health and Safety Bulletin*, IRS Services, May 1997. 257, p. 7.

74 H. Ramsay, ‘Fool’s Gold? European Works Councils and Workplace Democracy’, *Industrial Relations Journal*, Vol 28, 4 (1997) p. 314.

management is not attempting to avoid the spirit of the Directive, since there is considerable scope for tactical maneuvering within the framework of the Directive. In circumstances where the subsidiary requirements apply, it could be argued that, the information and consultation provisions are fairly limited, requiring only one meeting a year and the presentation of information of a highly aggregate nature. Another potential shortcoming is that it allows management discretion to withhold information which might be prejudicial to the functioning of the undertakings concerned.⁷⁵ The effectiveness of EWCs will therefore depend on the enforcement of the Directive through the legal system and the existence of effective sanctions of a proportional and dissuasive nature to be applied in cases of breach. 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 consultation and information in multinational enterprises.⁷⁶

In summary, the provisions on collective redundancies, business transfers, and health and safety have developed both in an *ad hoc* way and as a reaction to European requirements. The provisions pertaining to collective redundancies and business transfers still have some shortcomings. The EWC Directive also has some weaknesses, which will inhibit employees and unions from securing information and consultation and thereby extending their influence within multinational companies.

5. DISCUSSION AND CONCLUSIONS

To date, the existing UK law on disclosure would seem to have had a small, but positive impact, 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

⁷⁵ Article 8 (2), EWC Directive.

⁷⁶ Following the Governments' acceptance of the Social Chapter, the EWC Directive was extended to cover the UK by means of a separate directive adopted in December 1997. It was implemented in December 1999 in the Transnational Information and Consultation of

these processes would seem to be important if employee voice at work is to be extended and if the current concept of partnership is to be a reality. There is, however, a continuing tension in the UK between the traditional approach to disclosure and employee representation based on collective bargaining and the alternative approach to information and consultation rights derived in part from European Union initiatives.⁷⁷ Indeed, there is a possibility that the one may displace the other, and the two approaches are often portrayed as dichotomous. In practice, unions are coming to view the two approaches as complementary and are seeking to utilize both to produce a comprehensive framework of information, bargaining, and consultation rights for employees and their representatives.

However, there are important analytical differences between the UK law on disclosure for collective bargaining and the European influenced provisions. These can be seen in the assumptions and the bargaining models on which the two approaches rest.

The collective bargaining provisions are auxiliary in nature, in that they are intended to support the bargaining process. However, they are not intended to extend the coverage or scope of collective bargaining in that they are restricted to recognized unions and the use of the negative material impediment test implies that the provisions do not have the role of widening the bargaining agenda. The further assumptions of the law may be itemized. First, the provisions assume information asymmetry exists in the bargaining relationship. Second, they assume that it operates to the disadvantage of the union, or at least the collective bargaining process. The presumption of ss 184-5 is that disclosed information will yield some bargaining advantage. Third, they assume that at least some employers who have recognized trade unions will sustain information asymmetry to the point of impeding the bargaining process. This may occur where employers change their policies, for example on performance related pay, in ways

Employees Regulations 1999 under Section 2(2) of the European Communities Act 1972, and came into force in January 2000 (SI 1999/3323).

77 M. Hall, 'Beyond Recognition? Employee Representation and EU Law', *Industrial Law Journal*, 25 (1996), 15-27.

which require unions to gain access to more or different information on employment matters where the relevant information is not disclosed to individual employees. However, in many cases, a commitment to recognition sits awkwardly with an intent to impede the collective bargaining process.

One may debate whether the implicit bargaining model underlying this set of assumptions is, empirically, widespread. If employers recognize trade unions, under what circumstances would they wish to impede the collective bargaining process? One could argue that the provisions as currently detailed might be of more use to a union seeking recognition than to one which has achieved it. This would render the provisions truly auxiliary. Conversely, if employers wish to impede the collective bargaining process, why not derecognize the union? For much of the life of the provisions, no legal constraints have impeded this course of action. In short, the phrasing of the provisions is likely to render advantage to trade unions in a relatively small number of bargaining contexts; this is the most likely explanation for their limited use.

The UK collective bargaining approach constitutes an *agenda-driven* disclosure model i.e. the trigger for their use lies within the bargaining agenda. By contrast, the provisions stemming from European Directives are *event-driven* i.e. they are triggered by specific employer initiated events which 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. As we have suggested, 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 UK is whether to concentrate on

developing the agenda-driven approach or the event-driven approach or a pragmatic compromise of a hybrid nature.

The potential strength of disclosure for collective bargaining is that it is a general process whereby issues can be linked together. Moreover, trade unions 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 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 TULRCA 1992 provisions for disclosure need to be improved along with better information provision for joint consultation.

Several changes to TULRCA 1992 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 seem to 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, production of documents, and disproportionate work. 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 UK 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.⁷⁸

Finally, the ACAS Code of Practice might be reviewed 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 a joint policy on disclosure of information and to develop information agreements linking the provision to broader business and collective bargaining agendas.⁷⁹

In turn, the law on disclosure for consultation has a number of weaknesses. It is disclosure for very specific purposes; it is not always easy to make linkages, say between information on a business transfer and the underlying commercial factors which gave rise to the strategic decision; and it is disclosure to representatives who usually lack the organizational capability and independence which 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, 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, health and safety, and pensions, 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 any proposed national works councils, there should be access to less aggregated information, at the earliest opportunity, and

⁷⁸ H. F. Gospel, ‘The Legal Obligation to Bargain: An American, Swedish and British Comparison’, *British Journal of Industrial Relations*, 21 (1983) pp. 343-57; J. Bellace and H. F. Gospel, ‘Disclosure of Information: A Comparative View’, *Industrial Relations Research Association*, 1982, pp. 73-81.

with real sanctions against employers who fail to comply. In the UK 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.

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 skill levels and productive efficiency, and to ensure that management is best exploiting commercial 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 in the Labour government's aim to build a more positive system of employee relations. 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.'⁸⁰ 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.

79 This is in line with the analysis of information disclosure in J. Jackson-Cox, J. McQueeny, and J. Thirkell, *Strategies, Issues and Events in Industrial Relations*, (London, 1987), pp.197-9.

80 O. Kahn-Freund, *Labour and the Law*, 3rd. ed. (London, 1983), p. 110.