

**The information and consultation Directive:
unnecessary “regulation” or an opportunity
to promote “partnership”?**

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The Warwick Lowry Lecture

This Warwick Paper contains the text of the first Warwick Lowry Lecture delivered by Keith Sisson on 12th March 2002 to an invited audience at Warwick Business School. The Lecture, organised by the Industrial Relations Research Unit in conjunction with ACAS, is named in honour of Sir Pat Lowry.

Sir Pat was for many years an honorary Professor at Warwick and a long standing member of the Business School's Advisory Board. He provided guidance and encouragement to the work of IRRU who sought to mark his contribution to the field in this way.

It was, of course, in practical industrial relations that Sir Pat made his major contributions. He was involved directly in events seen as landmarks of industrial relations in the 1970s and 1980s, at British Leyland between 1970 and 1981 and as Chairman of the Advisory Conciliation and Arbitration Service from 1981 to 1987.

Keith Sisson was Director of IRRU for many years and is now an emeritus Professor of Warwick Business School. He makes a clear and compelling case for systematic employee consultation and raises a number of challenging questions for policy makers and senior managers.

Linda Dickens
Jim Arrowsmith

The information and consultation Directive: unnecessary “regulation” or an opportunity to promote “partnership”?¹

Keith Sisson

I regard it as a pleasure as well as great honour to give this the first Lowry lecture. Like everyone in the audience and in the field of industrial relations more generally, I had the most enormous respect for Sir Pat both as an individual and as a practitioner. I also happened to share two features of his background, albeit in very different eras, which meant our relationship was perhaps closer than it might otherwise have been – both of us served our industrial relations apprenticeship with employers’ organizations (he with the Engineering Employers’ Federation and me the Newspaper Proprietors Association) and both of us played rugby for the Wasps.

I’ve chosen a topic of which I hope Sir Pat would have approved: ‘The information and consultation Directive: unnecessary “regulation” or an opportunity to promote “partnership”?’ It is not only controversial, but also highly relevant for the policy and practice in which he was so closely involved. It also has very significant implications for ACAS, which he led with such distinction.

I don’t know whether Sir Pat would have agreed with my argument. I’m pretty sure, though, that he would have expected it to be stated clearly and without equivocation. It involves three basic propositions:

1. The regulation on information and consultation that Directive brings is very necessary – it’s a matter of regret that the opposition of the UK government held it up for so long.
- 2 The implementation of the Directive represents a once in a lifetime opportunity to improve the quality of UK industrial relations with the potential for widespread general gains that have come to be associated with the concept of “partnership”.
3. The opportunity is not going to be realized, however, without a great deal of effort and fresh thinking on the part of government, management and trade unions.

I will begin by briefly reminding ourselves of the main provisions of the Directive. I then want to present the cases both for information and consultation and for regulation in the UK context. I will then consider how the opportunity presented by the Directive might be maximized.

The Directive in outline

The main details of the Directive will be found in the box.

Box 1. Key features of the Directive

- The purpose of the Directive is to establish a general framework setting out minimum requirements for the right to information and consultation of employees.
- Member states can choose whether to apply the Directive to undertakings with at least 50 employees or establishments with at least 20 employees.
- Information and consultation are defined as taking place between the employer and employee representatives. The Directive requires:
 - information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;
 - information and consultation on the situation, structure and probable development of employment and on any anticipatory measures envisaged, in particular where there is a threat to employment; and
 - information and consultation, with a view to reaching an agreement, on decisions likely to lead to substantial changes in work organization or in contractual relations.
- Information and consultation arrangements defined by agreements between management and labour, including at undertaking or establishment level, may differ from those set out by the Directive.
- Employers may require employee representatives to treat information as confidential, and need not inform or consult where to do so would seriously harm or prejudice the undertaking or establishment.
- Sanctions for non-compliance must be effective, proportionate and dissuasive.
- Member states will have three years to implement the Directive, i.e. until March 2005. However, countries with no "general, permanent and statutory" system of information and consultation or employee representation (effectively the UK and Ireland) may apply the Directive in three phases:
 - undertakings with at least 150 employees (or establishments with at least 100 employees) must be covered as from the Directive's March 2005 implementation deadline;
 - undertakings with at least 100 employees (or establishments with at least 50 employees) must be covered as from March 2007; and
 - full application of the Directive (i.e. to undertakings with at least 50 employees or establishments with at least 20 employees) will be required as from March 2008.

Source: Mark Hall, Andrea Broughton, Mark Carley and Keith Sisson, *Works Councils for the UK? Assessing the impact of the EU employee consultation Directive*, London: IRS/IRRU (2002).

Especially important to note are the following.

A right to information and consultation

The Directive provides for the right to information and consultation of employees in undertakings or establishments, depending on the choice of individual governments. The threshold for undertakings is 50 or more employees and for establishments at least 20 employees. The implication of referring to the "right" to information and consultation is that employees may not necessarily exercise it and that employers need not be obliged to inform and consult where employees this is the case. The practical consequence is that governments will have to make provision for some form of 'trigger' mechanism.
Consultation = employee representation

The key point, to which I will return later, is that, while the Directive is without prejudice to existing arrangements for informing and consulting with individual employees, information and consultation are defined as procedures involving employees' representatives as provided for by national laws and/or practices. In effect, then, the UK will have to make provision for a universal right to employee representation so far as the undertakings or establishments covered.

Information must be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to conduct an adequate study and, where necessary, prepare for consultation. Consultation, defined as the exchange of views and establishment of dialogue between the employees' representatives and the employer, shall take place:

- ◆ while ensuring that the timing, method and content are appropriate;
- ◆ at the relevant level of management and representation;
- ◆ on the basis of the information the employer is required to supply and the opinion which the employees' representatives are entitled to formulate;
- ◆ in such a way as to enable employees' representatives to meet with the employer and obtain a response, and the reasons for that response, to any opinion they might formulate; and
- ◆ with a view to reaching an agreement on decisions within the scope of the employer's powers likely to lead to substantial changes in work organization or in contractual relations.

Permanent arrangements - works councils for the UK?

A literal reading of the Directive might be taken to mean that the machinery could be ad hoc - with information and consultation taking place on each issue as it arose. Permanent machinery is nonetheless *implicit* in the Directive. For reasons to which I will come back to later, permanent machinery in its turn implies some form of works council arrangements.

Lengthy period for implementation

Compared to some measures, the arrangements agreed for the Directive's implementation mean that both policy makers and practitioners have the time to prepare the ground that will be necessary to realize its potential. There is a general requirement that the Directive is implemented within three years of its entry into force of the Directive on publication in the *Official Journal of the European Communities* (in the event, 23 March 2002). Countries, however, where there is no general statutory system of representation, such as the UK and Ireland, will be able to introduce the arrangements over a six-year period from the date of adoption – undertakings with 150 employees or more will be covered as from the implementation deadline; undertakings with at least 100 employees will be covered two years later; and undertakings with at least 50 employees will be covered one year later.

Provision for implementation by agreement

The Directive establishes a "general framework" for informing and consulting employees. It is drafted in fairly broad terms and allows member states - and employers and employee representatives - considerable flexibility in respect of the practical

arrangements for implementing its provisions. Thus, member states may entrust management and labour with defining the practical arrangements for information and consultation freely and at any time through negotiated agreements, including at undertaking or establishment level. Such agreements, including those that predate the Directive's transposition deadline, may establish provisions that differ from the letter of the Directive while respecting its principles.

The case for information and consultation

I now want to present the case for information and consultation.

The individual case

Both the dignity of the individual and the opportunity for personal development are involved – work, after all, is one of the biggest single influences on people's life experience. In ACAS's words, 'Whatever the size, or type, of organization people need to talk to each other; they need to exchange views and ideas, issue and receive instructions, discuss problems and consider developments'².

The business case

Having to explain their position, take criticism and admit errors is something that few managers find easy; a right to representation also changes the power relationship with employees. Yet the considerable benefits of having effective information and consultation arrangements far outweigh any disadvantages. Having to explain policies to employees obliges managers to allow time for a fuller consideration of their proposals than would otherwise be the case, helping to ensure that the wrong decisions are not rushed through. Moreover, effective information and consultation is a critical tool in obtaining the input of employees - the scrutinizing of proposals by employees can lead to alternative and better decisions. Typically, their knowledge and experience of the details of operations on the ground, the problems and the pitfalls and how they might be dealt with, is often far superior to that of management. These details, after all, are their job.

There is also a growing body of survey evidence – from mainland Europe, the UK and the USA - to suggest that arrangements for information and consultation, if implemented together with other so-called 'high commitment management' practices, are positively associated with improvements in performance outcomes³. For example, the 1998 Workplace Employee Relations Survey, which is representative survey of workplaces with at least 25 employees, found 'compelling evidence' of an association of a range of high commitment management practices (including individual and group forms of consultation) with better organisational performance.

The society case

The UK government also stands to benefit a great deal from effective information and consultation arrangements, with the prospects of achieving several of its key policy objectives being considerably enhanced. For example, such arrangements could go a long way towards reducing the soaring costs of the employment tribunal system – remedying the lack of adequate workplace procedures for handling disciplinary cases, which is one of the reasons behind the resort to litigation, being one of the first tasks to which employee representatives might contribute. Similarly, it might be expected that

such arrangements would give a much-needed boost to improving the UK's training record and achieving a better work-life balance, both of which the government has committed itself to. These are issues that employee representatives will almost certainly come under pressure from their constituents to raise. The "knowledge-based" economy, which the government, along with other EU member states, is keen to promote is also inconceivable without the active involvement of individual employees.

Perhaps most immediately fundamental, though, is the contribution the revitalization of information and consultation might make to closing the "productivity gap" with the USA and EU member countries such as France and Germany, which the Chancellor has identified as a major means of improving the nation's finances. As the joint CBI-TUC statement quoted below emphasizes, encouraging employee feedback and suggestions is key to continuous improvement, while collective voice is important in building a climate of trust in which this can take place.

The case for regulation

I now want, more contentiously, to argue the case for regulation to promote information and consultation.

Information & consultation - a fundamental individual right

I believe that the right to be informed and consulted at work is as fundamental, if not more so, than the right not to be unfairly dismissed or to be discriminated against. As I've suggested above, work is one of the biggest single influences on people's life experience - both the dignity of the individual and the opportunity for personal development are involved. Moreover, any asymmetry between industrial and civil society in terms of information and consultation cannot but be detrimental.

The failure of "voluntarism"

My second reason for arguing for regulation to promote information and consultation is that "voluntarism" is not working – UK management is not informing and consulting anything like to the extent that people are led to believe. This is clear from the findings of the 1998 WERS. Table 1 shows that in 1998 only one in four workplaces with 25 or more employees had a functioning joint consultative committee, i.e. a committee that meets at least every quarter. This is down from just under one in three twenty years ago. Significantly, too, workplaces where management recognizes a trade union are much more likely to have one than not – hardly evidence, in other words, that UK management has resorted to joint consultation as a substitute for collective bargaining, which was the traditional form of representative participation.

As will be seen from Table 2, which summarizes the WERS data on the incidence of the main forms of "employee voice", there has been an increase in the various forms of direct participation such as briefing groups or workplace meetings. Indirect participation involving employee representatives, however, has seen a marked decline - from around three quarters of workplaces with 25 or more employees in 1984 to little more than half in 1998. Perhaps most strikingly of all, nearly one in five workplaces, i.e. around 24,000, had no form of employee voice at all.

Table 1 Employee "voice": Functioning joint consultative committees

(% of workplaces with 25 or more employees)				
	1980	1984	1990	1998
All workplaces	30	31	26	23
Private sector	26	24	18	20
Public sector	39	42	45	32
Unions recognized	37	36	34	30
No recognized unions	17	20	17	18

Source: Neil Millward, Alex Bryson and John Forth, *All change at work? British employment relations 1980-1998, as portrayed by the Workplace Industrial Relations Survey series*, London: Routledge (2000), p. 109.

Table 2 Employee “voice”: direct and indirect (representative) arrangements
 (% of workplaces with 25 or more employees)

	1984	1990	1998
Direct only	11	20	30
Indirect only	29	18	14
Both	45	43	39
No voice	16	19	17

Source: Neil Millward, Alex Bryson and John Forth, *All change at work? British employment relations 1980-1998, as portrayed by the Workplace Industrial Relations Survey series*, London: Routledge (2000), p. 127.

It is sometimes argued that the growth in direct forms of employee “voice” does away with the need for representative participation. This is mistaken – the direct and indirect forms are complementary and mutually reinforcing. Obviously, an exclusive reliance on indirect forms makes little sense if the aim is to give greater empowerment to individual employees. Equally, however, direct forms are unlikely to maximize employee input on their own. Giving information to employees is not a substitute for consultation - effective consultation requires representation as the Directive recognizes. In the absence of representative structures, the danger is that the views of employees are simply not expressed; there is always a worry that suggestions for change will be interpreted as criticism and held against the person making them. In the words of the final report of the CBI-TUC Productivity Challenge Best Practice Working Group,

Involving individual employees or teams in decisions that affect the day to day organization of their work helps create a culture of autonomy and responsibility. And systems for encouraging employee feedback and suggestions are key to innovation and building commitment to continuous improvement.

Collective voice is important in building a climate of trust where individual employees are confident that their contribution will be valued. Equally valuable is its role in helping to identify shared objectives and resolve conflict. The involvement of employees’ representatives can create the sense of mutuality that is essential for the sustainability of new working practices – the belief that both the employer and workers are reaping real benefits from improvements in work organization⁴.

Essentially, in other words, It is a matter of legitimacy.

The UK business context

My third reason concerns the implications of the wider UK business context. The reason why British management is not informing and consulting to the extent that they should be if they were adopting “best practice” is that key features of this business context militate against making the kind of investment in human capital that effective information and consultation arrangements require. Most importantly, they include:

- ◆ an overwhelming emphasis on shareholder value as the key business driver as opposed to the interests of other stakeholders
- ◆ institutional share ownership by investment trusts and pensions funds, which encourages a focus on short-term profitability as the key index of business performance rather than long-term market share or added value;
- ◆ the relative ease of take-over, which not only reinforces the pressure on short-term profitability to maintain share price, but also encourages expansion by merger and acquisition rather than by internal growth;
- ◆ and a premium on “financial engineering” as the core organizational competence and the domination of financial management, in terms of personnel, activities and control systems, over other functions.

Not to be forgotten either is that there are even fewer countervailing pressures to “short-termism” than there used to be. For example, the widespread decline of multi-employer bargaining means that, unlike other EU member countries, there is no longer the capacity to generalize desirable arrangements across sectors.

As a former Director general of the CBI, Adair Turner, has recently argued⁵, there are really are only two ways of ensuring capitalism fulfils the full range of social objectives:

- ◆ a stakeholder or “communitarian” model in which those who run enterprises are expected to take on a wider set of responsibilities, e.g. Germany; and
- ◆ the classical “liberal” model in which constraints of tax and regulation are used to secure the wider objectives.

It is against this background that individual employment rights take on their particular significance. Bearing in mind that the “stakeholder” model would require extensive revisions to corporate governance arrangements, of which there appears not the remotest chance in the UK, they are the only way of securing wider social objectives. Arguably, if the government is to achieve its goal of the “knowledge economy”, it will need to introduce more of them - in training and development, for example.

Maximizing the opportunity: the national level

If the full potential of the Directive is to be realized a great deal will depend on the climate that the government creates for its implementation. A grudging and minimalist approach will be in no one’s interests. Rather what is required is recognition of the critical role that effective information and consultation arrangements can play.

Handling transposition

How the government goes about formulating the Regulations that are the most likely means of implementing the Directive will be especially critical. This is not just because of the background of its own and UK management’s opposition to the Directive. There are some very tricky issues to be resolved such as

- ◆ the nature of any “trigger” mechanism for initiating the introduction of information and consultation arrangements where they do not already exist;
- ◆ the choice of “undertakings” or “establishments” as the basis of the Regulations;
- ◆ the status of existing information and consultation arrangements (which may or may not have been agreed);
- ◆ the identification of employee representatives (e.g. the scope for selection via union structures in undertakings where unions are recognized);
- ◆ deciding whether to make provision for fall-back arrangements;
- ◆ deciding whether to roll up existing legal provisions for consultation, e.g. for collective dismissals, into those for information and consultation more generally; and
- ◆ the enforcement arrangements.

On the face of it, the government has three options in drawing up its implementation plans. One is standard consultation as in the case of previous Directives. The danger here is that the “nitty-gritty” gets left to civil servants, which may result in the lack of clarity experienced with the Regulations implementing the Working Time Directive, for example.

The second option is to allow the CBI and TUC to devise the basis for the regulations. However, this is problematic too. For a start, some would argue that these organizations are not fully representative. Especially risky, however, given their very different views on the need for a Directive at all, is that they would simply engage in public posturing, leading to a failure to agree and the problem being returned to the government for resolution.

The third option, and the one likely to be most creative in stimulating greater interest in and understanding of the opportunities and challenges rising from the Directive, would be to set up a commission or taskforce along the lines of that established to implement the National Minimum Wage. Such a body, like its predecessor, would be ideally placed to launch a detailed consultation exercise with the full range of interested parties together with an investigation of a range of 'best practice' arrangements. Conceivably, such an approach might result in recommendations that the government felt did not fully meet the Directive's requirements, but such an outcome could be guarded against by the government giving the commission or taskforce clear terms of reference.

The need for a coherent social policy

The critical role of the government does not stop with the transposition process. It needs to recognize the fundamental importance of workplace industrial relations and develop a "joined-up" approach – sound-bites such as "flexibility and fairness" are not enough. An analogy with macroeconomic policy will be helpful. Just as it has come to be accepted that there is a need for government to develop a consistent macroeconomic policy framework, so too it has to be recognized that the same is true of social policy. As already argued, leaving it to the parties to do as they think fit simply does not work in a context where the corporate governance pressures to pursue short-term profitability are so powerful – there needs to be strong countervailing pressures, of which social policy is one key ingredient.

A major problem is that responsibility for the area is extremely fragmented. Currently, there would appear no fewer than three government departments covering employment issues (the Department of Trade and Industry, the Department for Education and Skills and the Department for Work and Pensions), not to mention the Treasury.

Especially important for present purposes, however, is that the government's support for partnership is coherent and unequivocal. It sends totally the wrong signals, for example, for the government to extol the virtues of partnership at the company level and yet resist it at the national level. Worries about the much-reviled "corporatism" of the 1970s are understandable. The world has moved on, however, and there is a great deal to learn from the "deliberative" forms of governance involving on-going social dialogue at national and sector levels that many of our EU partners have developed in the last decade or so⁶. There is considerable scope, too, to use the many levers of influence that government has, such as the public sector and public contracts, to seek to drive good practices down through supply chains much in the way that the European Commission's high-level group on restructuring has recommended⁷.

A key role for ACAS

Taking another leaf from the experience of the Monetary Policy Committee, a particularly innovative step would be to give ACAS the responsibility for making recommendations on the implementation of this and future EU social policy Directives, thereby helping to cushion the decision making process from the "short-termism" of day-today political pressures. ACAS fulfils many of the requirements of the commission proposal outlined above and more. ACAS's reputation for independence is unparalleled, as is its experience of advising on and assisting with the introduction of the joint working that will be required⁸.

If this is seen as a step too far, there is nonetheless a very strong case for the government to re-visit ACAS's statutory responsibilities in order to emphasize the

importance it attaches to the promotion of effective information and consultation. For one thing is very clear. If the potential of the Directive is to be realized, the role of ACAS will be critical. For example, there is a growing consensus that, however the Regulations are formulated, ACAS should be asked to produce a detailed code of practice covering the kind of practical issues that are discussed below.

Thereafter the main burden can be expected to take the form of helping managers and employee representatives in individual organizations to introduce robust information and consultation arrangements that not only conform to the terms of the Directive but, even more importantly, promote more effective working relationships. This burden is likely to be considerable, given the lack of a tradition of information and consultation in many workplaces. Small and medium-sized enterprises, in particular, will need help in marrying the mostly individual or informal arrangements that tend to be their hallmark with representative systems. The government will therefore need to budget for extra resources if ACAS is to take on this important responsibility along with its other duties.

Maximizing the opportunity: the company level

Important though the role of the government will be in establishing the right context, the major task of maximizing the opportunity the Directive offers will rest with management and employee representatives. They not only have to face up to a number of practical issues in implementing the Directive, but also develop an information and consultation culture involving mutual respect, trust, co-operation, openness and honesty.

Facing up to the key issues

Management to pull the 'trigger'?

Depending on the Regulations implementing the Directive, it is highly likely that management will not be obliged to establish information and consultation arrangements unless requested to do so by employees. In theory, then, managers need take no action until they are so approached. As has been argued already, however, there is a strong managerial case for having effective representative information and consultation arrangements, regardless of the Directive. In the circumstances, there are very good reasons for management to take the initiative, i.e. to reach an agreement respecting the Directive's principles either with recognized trade unions or elected employee representatives, depending on the current situation within the company. Not only does this mean that they will be in a better position to shape the arrangements to suit their own particular circumstances, but also reap the benefits, in terms of employee morale and commitment, that are likely to come from demonstrating a positive approach.

Coming to terms with the notion of works councils

The Directive contains no *explicit* requirement that arrangements for information and consultation should involve a works council or, indeed, any permanent body. I believe nonetheless that the Directive implies the introduction of works council-type arrangements. It is not just that works council-type arrangements are the dominant form in other EU member states, the main difference being whether they are union- or employee-based. As I have already suggested, ad hoc arrangements do not make much practical sense - employee representatives need to be involved in an on-going dialogue if they are to make a meaningful contribution. Our trawl of developments for the IRS/IRRU publication assessing the impact of the Directive revealed that some form of permanent joint consultative committee and/or committee structure seems to have

invariably been involved in the recent revamping of information and consultation arrangements in many UK companies. Having a standing consultative body means that such companies can use it for all aspects of statutory consultation including redundancies and transfers.

Of course, where trade unions are recognized, consultation may take place through existing negotiating channels and there may be an understandable desire on the part of both management and trade unions to minimize change, especially where arrangements are long-standing and working well. Even so, in the light of the changed circumstances that the Directive brings, it may also make sense to think in terms of establishing a parallel consultative forum or committee for two reasons.

The first is that separating out the processes of negotiation and consultation in this way will help to resolve the issue of the representation of non-union employees for the purposes of information and consultation. The point is that the 1994 ruling of the European Court of Justice, specifically highlighted by the joint declaration of the European Parliament, Council and Commission that is appended to the Directive, required employers to consult representatives of non-union groups as well as employees covered by union recognition arrangements over impending redundancies and transfers. The same logic applies to the application of the new EU Directive. In many such workplaces, however, union representatives are likely to have a de facto monopoly of rights to be informed and consulted about the general range of issues specified in the Directive. The complication arises because there are very few workplaces these days where trade unions will have recognition in respect of 100 per cent of employees – there will almost inevitably be some groups, including managers, which are not covered. Proceeding with the traditional “single channel” approach therefore runs the risk of denying such employees their rights under the Directive.

The second reason for establishing a parallel consultative forum or committee is that it is likely to improve the opportunities for joint problem solving associated with the “partnership” approach. The danger of combining the processes in the same machinery is that the more adversarial approach associated with negotiation can too easily come to dominate consultation as well, leading to a much-restricted agenda of issues being discussed.

Management in non-union companies may worry that the setting up of permanent machinery will provide opportunities for trade union members to be elected as employee representatives and thereby build union influence. Certainly this is what trade unions will wish to happen. Arguably, however, the outcome will depend on the company’s approach to people management in general along with the organizing abilities of the local trade union – the existence of permanent consultative machinery itself is unlikely to be the decisive factor.

The need for “genuinely representative” representatives

Not only is the very strong implication that provision must be made for employee representatives, but there is also a need to recognize that these employee representatives have to be genuinely *representative* of their constituencies. It will no longer be appropriate for managers themselves to appoint employee representatives, as they presently do in many companies with joint consultative committees. Depending on the details of the Regulations, the selection of employee representatives is likely to involve nomination via existing union structures or election by the employees, the details of which will need to be transparent and acceptable to the workforce.

Employee representatives so appointed and/or elected will also have to be given adequate time and resources to do the job. In the short run, the ACAS Code of Practice No 3, *Time off for trade union duties and activities*, which sets out guidance on good practice in carrying out the statutory duties for such time off, is likely to be the reference point. In the medium and longer run, UK management is very likely to come under pressure to move closer to the level of provision in other EU member. A common complaint of UK European Works Councilors is that the time and resources available to them are considerably less than those available their counterparts in continental Europe, which usually reflect the domestic arrangements for information and consultation⁹.

Deciding the subject matter of information and consultation

The Directive deals with the coverage of subjects for information and consultation in very general terms and the Regulations are likely to take the same approach. Even so, this coverage goes considerably beyond that of information and consultation arrangements in many UK workplaces, extending to what might be described as “strategic matters”. In practice, therefore, management and employee representatives will need to think carefully about drawing up their own agreed list. Virtually any topic they decide to include can be the subject of information and consultation. In practice, experience suggests that the parties mostly draw up a list of the topics on which there will be information and consultation, the implication being that, if a subject is not included, it is off limits. Almost invariably, though, the list expands over time as the relationship evolves, participants become more experienced and managers feel more comfortable with the process of regular dialogue particularly around policy items.

Confidentiality and no-go areas

For managers with little or no experience of consultation, the confidentiality of business information provided at meetings is likely to be a major concern. In practice, however, this is unlikely to be a significant problem. Employee representatives are usually expected to treat as confidential any information identified as such by management and there are few reported cases of employees breaching this understanding. If it is felt necessary, the obligation of confidentiality can be formalized as is the case of some agreements setting up European Works Councils, with the confidentiality obligation being held to apply after the representative’s term of office expires. There can even be arrangements providing for sanctions in the event of breaches. It is especially important, however, to recognize that the onus is on management to spell out which information is confidential - expecting employee representatives to treat all the information they are given as confidential is not appropriate and would undermine the whole exercise.

Managers often cite stock exchange rules as a reason why confidential information may not be given to employee representatives. As the Industrial Society report *The silent stakeholders*¹⁰ points out, however, the Financial Services Authority Listing Rules actually state that companies may give price-sensitive information about impending developments in confidence to a range of recipients including representatives of the company’s employees or trade unions acting on their behalf. Proposed mergers or acquisitions are a particularly sensitive area. But even here, consultation is permissible, if rarely carried out in practice. *The silent stakeholders* quotes a letter to the DTI setting out the Takeover Panel’s views which stated: ‘The Panel Executive sees no reason in principle why, if a company wishes to consult an employee representative [about a proposed takeover or merger], permission should not be granted’. The letter added: ‘The Panel Executive, however, is not aware of ever having received such a request.’

The DTI's own guidance on redundancy consultation is clear on this point too: 'Stock exchange rules do *not* preclude employee representatives from being informed and consulted in advance where collective redundancies are planned in connection with a takeover. Provision can be made for employees to be subject to confidentiality constraints for a specified period, but at the same time be sufficiently informed to hold meaningful consultations with the employer,'

Handling restructuring

If confidentiality is a key issue for management, the prime concern for trade unions is likely to be the handling of restructuring and in particular the amount and timing of information and consultation where closures and collective redundancies are involved. High profile closures and redundancies at Rover, Vauxhall (General Motors), Corus (formerly British Steel) and Marks & Spencer have inevitably raised the temperature of the debate. As in the case of mergers and acquisitions, there is especially anger where the first the workforce hears about redundancy is from the press, TV or radio.

Management must by law consult with employee representatives in redundancy situations. However, trade unions complain that employers often do not consult on impending redundancies at an early enough stage to allow the consultation to have any effect, preferring to present unions and employee representatives with a *fait accompli*. This means that employee representatives are not allowed to put forward their alternatives to redundancy or their suggestions for making it more palatable to employees.

Here the recommendations that the European Commission's Employment and Social Affairs DG issued in May 2001¹¹ as part of a package of measures aimed at reducing the negative impact of restructuring are likely to be increasingly influential. Under a heading "best practices", companies are urged to do the following in restructuring situations:

- inform and consult employees at the earliest opportunity on the anticipated business environment and business prospects;
- involve all stakeholders in the design of restructuring plans;
- keep redundancies to a minimum through redeployment within the company or, failing that, securing alternative employment in spin-off or other businesses;
- promote the employability of employees, and life-long learning, at all times;
- provide additional specific training at times of restructuring for those likely to be adversely affected;
- be prepared to help fund the creation of alternative employment opportunities through supporting specific projects or establishing a special development fund; and
- be willing, where necessary, to use outside mediation to achieve solutions acceptable to all parties.

Information, consultation and negotiation - drawing the boundaries

Drawing the boundaries between information, consultation and negotiation is going to be perhaps the most difficult issue of all. Distinguishing between consultation and negotiation is especially difficult. This is above all true of UK practice. In other EU member countries, it is possible to divide responsibilities on the basis of the structure of collective bargaining, with negotiation being primarily the responsibility of employers' organizations and trade unions *outside* the workplace and consultation being the job of the works council or its equivalent *inside*. In the UK, the collapse of multi-employer

agreements in most industries means that such division of responsibilities is no longer possible. Complicating matters further is that the massive informality of industrial relations in the UK means that the tenor of relationships often reflects the wider economic and political situation – a meeting that resembles consultation in one time period can more closely resemble negotiation in another and vice versa.

The situation is complicated further still by the expectation under the Directive that consultation should be ‘with a view to reaching an agreement’ in the case of ‘decisions likely to lead to substantial changes in work organization or in contractual relations’. The clear implication is that management will not just ask for the views of employee representatives and take them into account, but also seek to reach agreement. Such a requirement has existed in UK law since 1993 in respect of consultation over impending redundancies and transfers of undertakings. The DTI’s guidance states that ‘the legislation does not require agreement to be reached but the employer must consult in good faith with a view to reaching agreement’. In practice, however, the outcome of redundancy consultation is variable, ranging from mutually acceptable arrangements through ‘acceptance of the inevitable’ to a feeling among employees that change has been imposed on them¹².

As in the case of many of the other issues being discussed, to minimize any misunderstanding, management and employee representatives will need to agree where consultation sits on the continuum between the formal noting of views and joint decision-making, and what each party expects from it. For example, it is important to recognize that the form that consultation takes will vary depending on the issue under discussion. In the case of corporate policy, consultation may involve the sharing of information about strategy with representatives and the noting of any views expressed. Consultation on operational policy might be expected to go much further, with management actively seeking representative input and expecting it to influence the way forward. When it comes to the complex changes in working arrangements, the parties may put together a joint task force with decision-making responsibilities to handle the issue.

Developing an information and consultation culture

As the IPA report *Sharing the challenge ahead* recently emphasized, it is important to recognize that, although structures and processes are *necessary* for effective information and consultation - without them too much depends on personalities - they are not *sufficient*. To reap the full potential of the Directive – in particular, the benefits associated with partnership arrangements - different kinds of behaviour will be required. Information and consultation structures, however sophisticated they may look on paper, will be ineffective in a command and control culture where there is little respect for employees or no belief in a consensus approach to decision making. The mutual respect, trust, co-operation, openness and honesty that are required do not come easily, however. Constant vigilance will also be needed to ensure that they are maintained and are not left to individual ‘champions’ who come and go. Although there are no easy answers, the IPA working party argued that several wider considerations are important in helping to create and maintain an information and consultation culture and the following is my own interpretation of them

Commitment from the top

Top management commitment to taking information and consultation seriously will be crucial. When a very senior manager is present at or chairs meetings, for example, the experience is that they are more open, honest and productive. This is because senior management involvement signals *to other managers* that the process is important, and wholehearted participation is required from them. Without this, middle managers may be less than enthusiastic about informing and consulting employees, since it very often removes their monopoly on information and influence.

No less important, where trade unions are recognized, is commitment from senior shop stewards and full-time union officials. Just as there remains a strong resistance to collectivism in general and trade unions in particular on the part of many managers in the UK, many within trade unions see partnership as a threat. In particular, they are worried that it will compromise the traditional role of unions, which is to defend their members' interest. The increasing involvement of employee representatives in the management process that effective information and consultation arrangements imply will need a great deal of trade union encouragement and support.

Training and development

Experience suggests that training and development activities have a critical role to play in any major programme of change in people management. Establishing an information and consultation culture is no different. Indeed, substantial resources will need to be invested if effective information and consultation arrangements are to be introduced. Employees and their representatives will need training to make sense of the business information disclosed to them and the business decisions to which they are required to contribute. Many companies have provided technical training in reading balance sheets, profit and loss accounts, and other financial control mechanisms. This is unlikely to be sufficient in itself, however. Training in learning how to work together and understand each other's point of view is just as essential, if not more so.

Managers will also need training in how to inform and consult. Given the pressure to deliver short-term results, many managers have not had the opportunity to acquire the necessary inter-personal skills of listening and encouraging others to speak that are needed. Having to proceed in these circumstances without any preparation can be quite challenging and daunting. In the circumstances, it is hardly surprising that the opposition of middle and first-line managers in particular turns out to be one of the biggest causes of failure.

The management of managers

My final, and perhaps most critical, point also serves as a reminder of how far the subject of industrial relations has traveled. The research evidence suggests that it is the way managers are managed that has a critical bearing on people management more generally¹³. In particular, major innovations such as quality circles, TQM and teamwork have largely failed because senior managers ignore the implications for the way they appraise and reward their managers. Instead of prioritizing the softer development and inter-personal skills so essential to the success of these initiatives, they continue to put the emphasis on 'hard' operational or financial targets, reflecting the pressures of the wider business context discussed earlier. In the circumstances, it is perhaps not surprising that there are adverse reactions from middle and first line managers. Such developments are seen as "bolt on" extras, especially where there is little or no

preparation, which only add to workloads and count for very little in the overall scheme of things. Unless senior managers take the message on board, the same is likely to be true of information and consultation.

Notes and references

¹ My views on many of the issues touched on here have been shaped by working on two recent projects: one is a joint working party of the Involvement and Participation Association (*Sharing the challenge ahead. Informing and consulting with your workforce*. London: IPA. (2001)); the other is the joint IRRU/IRS study of the likely impact of the Directive (Mark Hall, Andrea Broughton, Mark Carley and Keith Sisson *Works Councils for the UK? Assessing the impact of the EU employee consultation Directive*, London: IRS/IRRU (2002)). I'm very grateful to the colleagues involved for the insights they have given me. Needless to say, they have no direct responsibility for the views expressed here and don't necessarily share them.

² Advisory, Conciliation and Arbitration Service. 2001. *Employee communications and consultation*. London: ACAS.

³ For an overview, see OECD. 2001. *Knowledge, Work Organisation and Economic Growth*, Paris: OECD.

⁴ CBI-TUC. 2001. 'Productivity Challenge'. Report of the Best Practice and Productivity Working Party.

⁵ Turner, A. 2001. *Just capital. The liberal economy*. London: Macmillan.

⁶ See, for example, Teague, P. 2001. 'Deliberative governance and EU social policy'. *European Journal of Industrial Relations*, 7, 1. 7-26. For the case of the Netherlands, which is regarded as one of Europe's 'success stories' in terms of very effective labour market and social policies, see Visser, J and Hemrijck, A. 1997. *'A Dutch miracle'. Job growth, welfare reform and corporatism in the Netherlands*. Amsterdam: Amsterdam University Press.

⁷ European Commission, 1998. *Managing Change: Final report of the high level group on economic and social implications of industrial change*. Luxembourg: Office for the Official Publications of the European Communities.

⁸ Advisory, Conciliation and Arbitration Service. 1999. *Towards better employment relations*. London: ACAS.

¹⁰ Burns, P. 2000. *The Silent Stakeholders*. London: Industrial Society.

¹¹ European Works Council Bulletin, 2001. Issue 34, July/August. 'Commission promotes package of measures in response to restructuring'. 9-11.

¹² Smith, J. Edwards, P. and Hall, M. 1999. *Redundancy Consultation: a Study of Current Practice and the Effects of the 1995 Regulations*, Employment Relations Research Series No. 5, London: Department of Trade and Industry

¹³ For a review of some of the evidence, see chapter 4 of Sisson, K. and Storey, J. 2000. *The realities of human resource management. Managing the employment relationship*. Buckingham: Open University Press.