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**Impact of the information-consultation directive on social dialogue in the Member
States: balance and perspectives**

**The Information-Consultation Directive of 2002:
assessment and scope for industrial relations in Europe**

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OVERALL INTRODUCTION

The Directive 2002/14, establishing a general framework for informing and consulting of workers, is the prolongation of the construction process of Community Labour Law, accompanied by a reflection on good undertaking governance. This process began with a debate on the “democratisation of the economy” in relation to the first major restructurings¹, the effects of which on employment were discussed at the first European summit on employment in 1970 (Didry et Mias 2005). It thus continues a democratic tradition to be found at the centre of systems of industrial relations in Europe, notably in the form of the “industrial democracy” envisaged by the Webbs at the end of the 19th century in their analysis of the action of British trade unionism. It culminated in the implementation of bodies of staff representation, or works councils, in undertakings, such as the “*Comité d’entreprise*” in France or the “*Betriebsrat*” in Germany. These structures form the framework of a possible debate – between management and employees – on the future of the undertaking. By introducing a right to information-consultation, the Directive 2002/14 is part of this process of a right organising the economic relations in the undertaking.

The democratic dimension contained in this right in fact reverses the traditional economic viewpoint of the undertaking. The discussions on the “restructuring” and “rationalisation” of the undertaking presuppose the existence of a “good” structure imposed from the outside and to which the undertaking should adapt. In this respect, the right of information-consultation introduces a discussion process on what the undertaking is and should be. In other words, the information-consultation operates in a reverse way, as a principle of “joint regulation” (Reynaud, 1979) or of co-construction of the undertaking. From this point of view, the debate is the engine of the construction of the undertaking. By participating in decisions, the players can influence the decision-making process, the economic situations thus not being considered as exogenous factors, but as social constructions resulting from a debate. To take up a comment of the economist Amartya Sen (1999), the democracy is not limited to a decision-making procedure. To emphasise the democratic dimension of the economic activities is to underline more fundamentally the cognitive dimension of social activity and its constructed nature, involving a reflexive process, the result of which is unknown at the outset, because of externally imposed (economic, technological) factors.

With respect to the democratic dimension contained in the right to information-consultation, the aim of this document is to evaluate the contribution of the Directive 2002/14 for the reinforcement of that which appears as a European value: employee participation in strategic business decisions.

To evaluate the scope of the information-consultation directive in Europe involves however a double difficulty: the variety of systems of industrial relations and the limits of an evaluation of simple legal transpositions when we want to grasp the contribution of a right of information-consultation in the development of industrial democracy in the undertaking. In fact, beyond the legal implications of the transposition of European standards into national legislation, the evaluation of the information-consultation directive involves taking a closer look at how it is part of industrial relations practices. The rules of legislation produced at European level do not have an immediate effect on the behaviour of players at national and undertaking level. They make up reference frameworks which do not have an influence on the players, although these use the scope of these laws in their individual situations. Thus the

¹ Henk Vredeling, then Dutch socialist deputy and Member of the European Parliament, highlights the absence of “provisions for employees in the case of a collective redundancy” referring to the Fokker and VFW merger in 1972 resulting in the announcement of 750 redundancies.

rules in the area of information-consultation of the employees imply a process of appropriation, referred to by Claude Didry (2000) as an “institutional learning process”, characterising the final phase of the transposition, the transposition of the rule in the aspirations of players. This institutional learning process varies depending on the scope of the laws on the procedures of information-consultation, and depending on the experience that the players make of it, a factor which can only be evaluated from a certain distance. In order to highlight this institutional learning process and the resulting development of the capacities, we were obliged to reject a top-down system of “governance”. This interpretation allows us to evolve from a positivist vision of the law, whereby the transposition is no more than a simple adaptation of the national regulations and of the undertaking players to Community legislation. To understand the scope of the directive, it is necessary, conversely to retrace the process of the multi-level transposition, the subject of debates on the transposition of Community regulations in national legislation and the concrete observation of information-consultation in the undertakings.

The aim of this document is therefore not to provide an exhaustive account on the state of the transposition of the directive, but rather to consider the effect of the directive on issues such as the diversity of national traditions and the concrete governance of undertakings. After an analysis of the contribution of the text of the directive for a reinforcement of democracy in the undertaking (part 1), the document will envisage the transposition of the directive as a double process, at national level (part 2) and at undertaking level (part 3). This perspective is inspired by the very text of the directive, which opens up the way to a “reflexive governance” (Deakin, 2007, Koukiadaki, 2008) of the transposition process of the right to information-consultation. In fact, the directive says it is the responsibility of the Member States and, in certain conditions, of undertakings to specify the content of this right, thus creating areas for experimentation and elaboration of rules at national and local level. In relation to the room for manoeuvre of national and undertaking players, the evaluation of the complex transposition process should also allow us to examine the scope of the directive for the European social model (part 4). Is the diversity of practices indicated by the reflexive dimension of the transposition of the directive the opportunity for a reinforcement of a form of competition between States, as can be observed in the debates on industrial relocations, for example, or does it form the basis of a European unit around the project of democracy in the undertaking?

PART 1. THE INFORMATION-CONSULTATION DIRECTIVE AS THE BASE OF ECONOMIC DEMOCRACY IN THE UNDERTAKING

The right to information-consultation forms the basis of a debate on the future of the undertaking where the information of the management is confronted with the knowledge of the employees, based on their experience. This participation of employees in decisions that affect them implies the construction of an economic knowledge which presupposes the existence of a worker representation including all undertaking employees. On reading the very text of the directive, we want to examine which elements it really contains for a reinforcement of economic democracy in the undertaking².

1.1. Economic democracy as a European value

The Directive of 11 March 2002 responds to the basic aims of the EU project. From 1957 on, and as a result of the intervention of trade union representatives in the European Coal and Steel Community (ECSC), the Treaty of Rome establishes the value of “economic and social progress”. After the trade unions were widely involved with the European institutions in the 1960s, the Commission proposed in 1974 a “social action program” aiming to “reinforce the participation of social partners and the employees in economic decisions and in undertaking life”. In the 1980s, social dialogue became one of the most effective mechanisms of Community reflection, resulting in the recognition of an action of the Commission in this area by the Single European Act, and then in the institutionalisation of this action through the Social Protocol annexed to the Treaty of Maastricht. The Community Charter of Fundamental Social Rights of 1989, under the influence of the first undertakings of this social dialogue, and on the initiative of President Jacques Delors, recognises “the information, consultation and participation of workers” as one of the main principles of the European social model. By establishing a general framework for information and consultation, the directive of 2002 aims to consolidate and deepen the European basis for a democratic management of undertakings. The directives of 1975 on collective redundancies and of 1977 on undertaking transfers marked the beginning of an effort to organise this base. Considered as the “youngest of the three sisters”, the Directive 2002/14 was also intended to ensure a national base for the transnational exercise of a right to information-consultation introduced by the directives of 1994 establishing the European works council (EWC) and of 2001 on worker involvement. The adoption of the 2002/14 Directive – also called the “Vilvoorde directive” – intervenes however in the specific case of the Renault-Vilvoorde affair, which demonstrated the fragility of the rights of information-consultation where the directive on the EWCs was not strongly established at national level.

This importance of the participation of workers and of their representatives in undertaking life and in the economic decisions on its future is presented right from the preambles of the directive, which explain that limits of national legislations require a Community initiative. It is pointed out that, *“the existence of legal frameworks at national and Community level intended to ensure that employees are involved in the affairs of the undertaking employing them and in decisions which affect them has not always prevented serious decisions affecting employees from being taken and made public without adequate procedures having been implemented beforehand to inform and consult them”* (Preamble 6,

² This presentation makes use of the analysis of Didry and Meixner (2008).

our emphasis). Apart from the mention of some economic decisions particularly harsh on the employees, with, for example, the strong reaction following the closure of the Renault factory at Vilvoorde, the standards are evaluated here with respect to the value of participation in very strong terms, because the European legislator talks about the “involvement” of employees. This value of the involvement of employees corresponds to a strong model which touches the deepest origins of social tradition in Europe and which is mentioned once again by the term “cooperation” used in the third paragraph of the first article: *“When defining or implementing practical arrangements for information and consultation, the employer and the employees’ representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees”* (our emphasis).

This importance attached to participation or cooperation of workers in economic life played an essential role in the development of national social models on which the European social model is based. From the 19th century on, it took the form of trade union (and in a wider sense political) action in favour of a democratisation of the economy. In a perspective of democratisation of society, the idea of an industrial democracy formulated by the Webbs at the end of the 19th century in Great Britain involves the implementation of structures – like the trade union organisations and collective bargaining – aimed at ensuring a better redistribution of the business profits. In Germany, the idea of *“Wirtschaftsdemokratie”* (economic democracy) involves a co-management of the economy by the trade unions, the action of which is envisaged as a lever in order to participate in the defining of economic strategies, at both State and undertaking level. Beginning in the 1920s, it resulted in the *Betriebsfassungsgesetz* or “Works Constitution Act” of 1952. In France, this collective dimension of the economic life was the central part of social reform projects proposed around the turn of the 19th-20th centuries by politicians such as Alexandre Miller, and the major project of *“conseils du travail”* (or “labour committees”), aiming to create an integrated employee representation from establishment right up to national level (Didry, 2000).

When we link this with the aim to achieve a European undertaking, we see that the value of the information-consultation directive, together with the implementation of European Works Councils (by a 1994 directive) and of social dialogue (Social Protocol of 1991) could thus start a process capable of consolidating a European entity. It represents a counterweight to the sometimes over-valorisation of a principle of competition between national entities, regarded as the last refuge in the face of endless industrial restructurings encouraged by the integration of the internal market. This principle of competition is not restricted to economic players, affecting the workers, but also provokes competitive tendencies between the national systems³ with a growing suspicion with regard to the internationalisation involved in the construction of Europe.

By transferring to the Member States the task of organising the practical arrangements of the rights of information-consultation, the directive reintroduces however an uncertainty regarding to what extent nationalism is exceeded. Article 4, which describes the framework of the practical arrangements of information-consultation, thus also specifies that *“the Member States shall determine the practical arrangements for exercising the right to information and consultation”*. Conform to the principle of subsidiarity, and in the respect of national legislation and practises in the area of relations between social partners, the directive opens the way to a possible weakening of the rights to information-consultation through an effect of competition in the area of employment policy.

This competition effect is reflected in the debates, which animated the negotiations held over three years in the Council preceding the adoption of Directive 2002/14. Countries such as France, which were favourable to the reinforcement of rights to information-

³ Streeck (1997) suggests that there is competition between national systems of industrial relations, making it difficult to overcome the pluralism of national systems in the European Union.

consultation, opposed other countries, such as Great Britain and Germany, who rejected any new initiative of the European Union in the area. This strong opposition to the directive, proposed by the Commission in 1998, explains the adoption in 2002 of a text of considerable flexibility. Beyond the significant room for manoeuvre granted to the Member States, the directive makes provision for “transitional provisions” (article 10) regarding the transposition in relation to the size of undertakings concerned. While the Member States had up until 23 March 2005 to transpose new European rules, the States who introduced a general right to information-consultation for the first time had up to 2008 to progressively apply the directive to undertakings of 150, then 100 and finally 50 employees. With the aim of reinforcing the national and local levels in the drawing up of rules of information-consultation, article 5 specifies that “*the Member States may entrust management and social partners at the appropriate level, including at undertaking of establishment level, with defining (...) through negotiated agreement, the practical arrangements for informing and consulting employees*”. These agreements may also “*establish (...) provisions which are different*” to those introduced by the directive. Another reason for the adoption of minimal measures was absence of negotiations between social partners at European level prior to the Council debates. In fact, the initiatives of the ETUC (European Trade Union Confederation) to open a debate on the directive proposal of the Commission came up against the refusal of BusinessEurope (formally UNICE: Union des industries de la communauté européenne) to negotiate on measures which the European employers deemed as being costly for undertakings and in conflict with the [principle of subsidiarity](#)⁴. The debates, which animated the intergovernmental negotiations in the Council, as well as the refusal of employers to negotiate, are clearly reflected in the underlying tensions in the directive.

1.2. The consultation as an aspiration of information

The aim of the directive is to define the terms of information and consultation. From this point of view, articles 2 and 4 are essential. Article 2 introduces the definitions of terms used in the rest of the text, and notably the definitions of information and consultation. Information is defined, in point f), as the transmission of data by the employer to the employees’ representatives. It corresponds therefore to a flow going from the employer to the representatives, suggesting that “data” is produced by the employer on which the consultation may be based. The consultation is presented as “the exchange of views and the establishment of dialogue between the employees’ representatives and the employer”, the definition of the terms “employees’ representatives” and “employer” being referred – in the previous preambles – to those in force in the Member States.

The relation between information and consultation remains to be constructed. Article 4 on the “*practical arrangements of information and consultation*” determine three large areas to which these two practices should be applied. The first one is essential because it concerns the recent and “probable” (i.e. future) developments of “undertaking activities” and of its “economic situation”. This only gives rise to information, as defined in article 2. Here we touch on an important point in the directive, which corresponds to one of its limits. The economic situation is considered as fixed by “information”, i.e. documents transmitted by the management, without any provision for a discussion of these documents being expected. An intermediate stage, the discussion of this information, through the intervention of experts aiming at assessing it, in the light of the experience of employees’ representatives, would

⁴ Tensions arose however in the European employers, notably between the British employers, who on principle refused to negotiate at all, and the Belgian employers who wanted to participate in a debate on a text which would have a significant impact for the undertakings.

enable the employee representatives to emerge from a form of economic fatalism, but without questioning the management power of the employer. In the scheme of the directive, the consultation is only conceived as a second stage, on employment-related questions and on the basis of information previously delivered by the undertaking management.

A second point concerns *“the situation, the structure and the probable development of employment within the undertaking or establishment”* and discusses the debate of *“anticipation”* measures to confront a possible threat to employment. The term of *“anticipation”* places employment in an external position with respect to the previously defined economic situation and in an objective way. To put it bluntly, this term leads us to envisage employment as an adjustable variable. To emerge from representation of employment as an adjustable variable, which responds to the requirement that the employees⁵, employment and the undertaking must *“adapt”* to a given economic situation, we can imagine an exchange on the potential of innovation of the undertaking in relation to both information and consultation.

A third point concerns the modifications of the work organisation and its impact on contractual relations, with the aspiration of possible modifications of these contracts and, as an after-effect, the implementation of redundancies. Only in these last two areas do we see a two-way movement of information and consultations. Two aims are therefore implicitly assigned to the consultation. In the case of consultation on decisions susceptible to affect the employment level, the aim is to obtain a *“response [from the employer] to any opinion they [the employees’ representatives] might formulate”*. A movement of exchange is suggested here, with the transmission of information and then the formulation of an opinion and the corresponding response of the employer. But the text remains implicit here, the question of a *“timely”* transmission of information only being mentioned in paragraph 9 which explains the need for the adoption of the directive. Regarding the debates on the questions of work organisation, the information process is located however in a process of negotiation where *“the consultation is carried out with a view to reaching an agreement”*.

But this crucial passage of the directive does not refer to the modes of constitution of the information, to its regularity or to that of the consultation. The information seems to remain a product ascribable solely to employer without any form of prior consultation being possible in order to establish, and with the explicit resort to experts, alternative information on the economic situation of the undertaking. The scope of a procedure of information-consultation is here lessened by a focalisation on the projects of the employer and the impact of these projects on employment, suggesting, even in an implicit way, that the agenda is set by the employer. This vision of information produced unilaterally by the employer is reinforced by article 6 on the confidentiality of the information establishing that *“the employer is not obliged to communicate information or undertake consultation when the nature of that information or consultation is such that, according to objective criteria, it would seriously harm the functioning of the undertaking or establishment or would be prejudicial to it”*.

On the basis of this restrictive concept of information, the directive however highlights the proportionality of *“means”* and the relevance of *“level”* so that the consultation can take place with sufficient information. It also requires the Member States to make provision for procedures to fall back on if the right to information is not respected by the back-up and the confidentiality of the information. It also seems, on reading article 6 on the *“confidential information”* that the *“employees’ representatives”* may *“possibly”* be assisted by *“experts”*, included no doubt among the *“methods”* envisaged in the a. of Point 4 of Article 4.

⁵. C.f., for example, Preamble 7: *“There is a need to strengthen dialogue and promote mutual trust within undertakings in order to improve risk anticipation, make work organisation more flexible and facilitate employee access to training within the undertaking while maintaining security, make employees aware of adaptation needs, increase employees’ availability to undertake measures and activities to increase their employability, promote employee involvement in the operation and future of the undertaking and increase its competitiveness”* (our emphasis).

The right to information-consultation may aim to establish an exchange between management and employees' representatives, but the directive does not determine the scope of this exchange. Depending on whether we stress the unilateral character of the consultation based on the confidentiality of the information, or the aim of carrying out a consultation "with the aim of resulting in a agreement", this exchange is susceptible to reveal the difficulties of implementation of decisions, in a feedback process, but it can also demonstrate the limits of data on which these decisions are based. By its regularity, this exchange can finally result in a more precise knowledge of the activity of the undertaking, for both the undertaking manager and the employees' representatives, in a perspective of co-construction of strategic business decisions.

The directive is therefore very general and not very specific on the rhythm of information and consultation, all the while setting directions for all information and consultation procedures. We note, in article 9, however, a minimal articulation of the procedure defined by the directive and the different consultation procedures established by the Directives 1998/59/CE (consolidating the "collective redundancies") and 2001/23/CE (consolidating the "transfer of undertakings"). This question, linked to that of the role of the European Works Council in the multinational groups, probably implies an "institutional learning process" on the part of the players, with, in particular, legal actions to obtain the enlightenment of jurisprudence on these points.

1.3. A preference for permanent and elective representation

The information and consultation of employees targeted by the 2002 directive does not specify how the employee representation should be organised. However, it presupposes that the existence of this representation by distinguishing it from the "direct involvement" of employees in the paragraph 16⁶. The directive mentions the "representatives" of employees right from the first article, all the while remaining vague in the definition given in article 2. In the terms of the paragraph e) of article 2, in fact, "we understand 'employees' representatives' to mean "the employees' representatives provided for by national law and/or practices". This interpretation of an information-consultation for employees' representatives was confirmed recently by the Court of Justice of the European Communities (ECJ) in a case concerning the 98/59 Directive on collective redundancies (c.f. box).

However, the directive does not take sides in the choice of a mode of representation. It leaves the choice open between representation by election of representatives or by trade union accreditation. However, by suggesting that information-consultation is a right of employees, the directive implies that their representatives have been mandated by them, regardless of whether the employees in question are trade union members or covered, or not, by a collective agreement. This directive therefore demonstrates a preference on the part of Community legislation in the area of information-consultation for a permanent and elective employee representation (Laulom, 2005). This direction groups the jurisprudence of the Court of Justice of the European Union (ECJ), notably on the base of the 1992 decision condemning the United Kingdom for non-transposition of the directive of collective redundancies (75/129), by highlighting the insufficiencies of a representation system by trade union accreditation at a time of a sharp falloff in trade union membership rates. It however does not reject, as a whole, the possibility of a trade union process of the representation of employees, to whatever extent that the latter are all trade union members.

⁶ "This directive is without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives".

Information-consultation: a right reserved to personnel representatives

In a case between a car parts manufacturer located in Belgium, Mono Car Styling, and a group of employees, the (ECJ) specified on 19 July 2009 that the right to information-consultation was reserved to staff representatives. In this case, the undertaking had carried out collective redundancies following a significant drop in orders. An agreement was made with the staff representatives in the framework of the procedure of information-consultation to adopt accompanying measures for the thirty envisaged redundancies. Denouncing violations in the redundancy procedure, the employees took legal action resulting, on first hearing, in the granting of compensation for the damages incurred. After the decision was appealed by the undertaking at the Liège Labour Court, several questions were referred to the Court of Justice of the European Union.

To the question of whether such a limitation of the employees right to contest individually rendered without effect the stipulations of the 98/50 direction, the Court of Justice responded that *“it is clear, first of all, from the text and scheme of Directive 98/59 that the right to information and consultation which it lays down is intended for workers’ representatives and not for workers individually”*. The judgement specifies that the *“workers’ representatives are best placed to achieve the objective which the directive seeks to attain”* and that the right to information-consultation *“is intended to benefit workers as a collective group and is therefore collective in nature”*.

Beyond the form taken by the representation, the directive makes the protection of the representatives a requirement in order to guarantee their independence from the employers (Article 7). It also leads to envisage the different levels of the representation, exposing, for example, a *“right to information and consultation at the appropriate level”* (Art. 4, Paragraph 1). However, apart from these two references, the question of representation remains in the background of the directive, so the major heterogeneities between the different national legislations and the practises of information and consultation remain unchanged.

Also in this framework, the question of the representation levels is simply based on the legal divisions of the undertaking into businesses and establishment as intended by the employer and the holders of capital. This economic coherence refers in the directive to that which is only suggested in the definitions introduced in Article 2:

- a) *“undertaking” means a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States;*
- b) *“establishment” means a unit of business defined in accordance with national law and practice, and located within the territory of a Member State, where an economic activity is carried out on an ongoing basis with human and material resources”* (our emphasis).

In practise however, the very reality of the undertaking and of the establishment is sometimes under debate, notably in the present context where the distinction between legal and managerial structures of the undertaking may become blurred. The recognition of a *“Unité sociale et économique”* in France or of a *“Gemeinschaftsbetrieb”* “undertaking of a locality” in Germany is a means of moving away from the sometimes artificial divisions into businesses, and of re-establishing the coherence of the economic activity in which the employees’ work occurs. The definition of entities to be represented is thus already under discussion and contributes to a procedure on the bodies of the consultation procedure. This definition participates in the construction of a knowledge enabling a regular procedure of information and consultation. In France, this debate on the entities to represent is led by the representatives elected by the employees and the trade union delegates, and results in a first negotiation prior to the structuring or “re-structuring” of the staff representative bodies

(Meixner, 2010). This debate spreads the message to negotiations on European works councils and the knowledge of the group and of the undertaking that what that the employees' representatives consider as a negotiation in good faith (Béthoux, 2004).

Conclusion

As the 2002/14 Directive can direct the practices equally towards high or low levels of employee participation, as the form and the nature of the representation is not clearly fixed and it is left up to the Member States to specify the content of the information-consultation, the future of the directive is still unknown. Its fate is to be found in the fundamental contradiction of European institutions introduced by the European Employment Strategy (EES) (Salais, 2004), between the spirit of entrepreneurship and worker adaptability. This contradiction corresponds to a shift back towards an instrumentalist conception of employment law as an instrument of incitement for the creation of employment, without considering the quality of employment created or its potential in the area of innovation. This step back is simultaneously translated by a loss of European sovereignty and a transfer of the employment policy to the level of "national plans", leaving the initiative up to the Member States.

In this movement, the 2002 directive introduced however a different approach, that of *a right* organising economic links and thus opening *rights* for each party concerning the good functioning of the information-consultation procedure. It prolongs the institutional learning processes of employees' representatives and of social partners in the implementation of directives of collective redundancies and transfer of undertakings. In France, notably, the nullity of the redundancy procedure introduced by a law of 1993 led to important decisions, such as the decision of the Court of Cassation that redundancies were void in the case where the redundancy procedure was void, such as in the case of the Samaritaine department store in 1997 (Chollet and Didry, 2007). In Great Britain, the transpositions of the transfer and collective redundancy directives also meant that trade union threats of damage claims, including interest, were able to have an influence on business decisions. In the Rover case, for example, the trade unions managed to have an influence on BMW in their choice of buyer and the recapitalisation of the undertaking, enabling the Rover employees to remain in employment for some more years (Deakin and Armour, 2004). In this perspective, the 2002/14 Directive opens the way to a new stage in the institutional learning process in information-consultation, with the opportunity for the parties to integrate the different procedures and the different representative bodies, in order to use employee participation as a means of increasing the knowledge of economic activities of the undertaking.

PART 2. ASSESSMENT OF THE TRANSPOSITION IN THE MEMBER STATES

Introduction

The Member States had up until 23 March 2005 to conform to the Directive 2002/14. This second part goes back to the translation processes of European standards into national regulations. The aim is to examine the effect of this directive on already existing systems of national industrial relations, and also on undertakings, through the organisation of the employee representation and the evolutions of its function implied by the directive. The information-consultation of employees is not a right introduced newly by the 2002/14 European Directive. On the contrary, this directive is part of a set of measures of information-consultation, linked to the transposition of previous directives which made provision for rights of information-consultation in specific cases, such as economic redundancies (Directive 75/129), or the transfers of undertakings (Directive 77/187). It intervenes also in various national contexts (2.1.), discussing countries with a historic practise of information-consultation through bodies such as works councils, those where the employee participation is mainly orientated towards the trade union strike actions and collective bargaining and others, mainly the new Member States, with a weak structure of social dialogue. The need for the directive to be transposed into national legislation has thus caused various types of difficulties in Europe. Depending on the national traditions, the scope of the directive varies greatly in the EU Member States. The complexity of the scope may vary depending on the national situations in the area of information-consultation (2.2).

In this respect, it would seem that the national transpositions concentrated on the question of the conformity of the existing regulations with the principle of universality of representation, i.e. that all employees should be represented, while the definition of the content of the consultation was removed from the debates. In fact, the directive had an impact on the countries with systems of employee representation based, not a universal approach, but on trade union representation. Countries like Great Britain or Sweden where the employee representation is influenced by a trade union accreditation thus had to modify their existing systems, while it was considered that such countries as France and Germany already conformed to the directive. If the procedural capacity of employees to be represented has certainly been reinforced through the universalization of rights of representation, the substantial capacity of employees to have an independent opinion to influence management decisions was not explicitly reinforced by the national transpositions.

2.1. A transposition in line with in the national traditions

The right to information-consultation has evolved in different ways depending on the historical context of the various countries. The transposition of the information-consultation directive is therefore in line with the various national situations. In general, two types of tensions can be identified, on which a classification of the road taken by the various countries in the area of information-consultation can be based. On the one hand, the national legislation bases the exercise of this right on different modes of representation which can take the form of a representation which is either elected, trade union or mixed. On the other hand, the scope of the consultation can vary from a simple right given to employees to express their point of view to a real power of codecision. In the face of the national diversity of the legal measures

of information-consultation, it is certainly not surprising that this double tension is reflected in the double uncertainty identifiable at the very core of the directive.

2.1.1. The rights of representatives in Europe: from information to codecision

The representation systems of employees in Europe can be distinguished not only according to the representation mode, but also according to the rights they grant to the representatives. A tension between three types of country appears concerning the content of the information-consultation: the countries which provide for rights of information-consultation strongly orientated towards codecision; countries with a long tradition of employer participation (usually carried out in the form of collective bargaining, without making provision however for debate on the relevance of economic decisions) and finally the countries with a weak structure of social dialogue.

In a first group, we find countries like Germany and Sweden who make provision for rights of codecision which is carried out at different levels of the undertaking, from the establishment to the surveillance committee. But these rights of codecision do not affect all the subjects on which the employer should inform the employees and their representatives. In Sweden, the access to information thus opens the right to open negotiations for the topics not included in the right of codecision. In the same way, in Germany, the scope of the employees' rights varies according to the subjects, being strong in questions of organisation and weak in those of economic decisions⁷. France differs from these countries by its refusal to question the management power of the employer. However, the information-consultation procedure is of particular importance in that it gives a right of initiative not found elsewhere in the works council, i.e. the "*droit d'alerte*" contained in article L.432-4 of French Labour Law (right of triggering an early advance warning by the WC or personal delegates, thus enabling the elected representatives to ask the employer for an explanation when they become aware of something of a disconcerting nature that could have an influence on the company's economic status). France is at the very centre of this tension between the two types of countries and the definitions of the consultation, as is illustrated by the changing interpretation of the idea of consultation. In the case of France, the content of both information and consultation was reinforced over time. Established by decree on 22 February 1945, the obligation of consultation of the works council only forms the base from which different forms of information-consultation procedures can emerge. In this development of the different legal systems of consultation, collective redundancies occupy an essential place (Didry, 2000). The law of 18 June 1966 on the obligation of consultation of the works council in the case of layoffs also completes the procedure of 1945. The Auroux laws of 1983 introduced the possibility – in the case of proposed job cuts – for the works council to resort to an independent economic expert financed by the employer. In 1993, finally, a law made provision that the social plan should include redeployment measures without which the procedure of redundancies is declared invalid. The jurisprudence notably concerned the sanction of invalidity of redundancies strengthened the position of the opinion in the consultation. In this sense, the consultation is envisaged today as a (motivated) opinion where the information is used to form an opinion and whereby the consultation already involves the negotiation of the information provided by the employer.

At the other extreme, the United Kingdom and Belgium have a tradition where the trade union is more important than the personnel representation bodies. In Belgium, the impact of the labour committees long provided for by the law was limited because of the

⁷ The social plan which should accompany the redundancies is subject to a codecision procedure which may be obtained, as necessary, before an arbitration committee.

workforce-size threshold of 100 employees, but also because of the lack of interest from the trade unions who prefer direct negotiations with the employers. In the United Kingdom, up to very recently, the law did not provide for a general right of information for employees. An obligation of consultation of employees only exists through the transposition of European directives. The *Labour Law Protection Act* of 1975 thus introduces rights of information-consultation in the case of collective redundancies. The *Trade Union and Labour Relations (Consolidation) Act* of 1992 extends the rights of information-consultation in the case of economic redundancies provided for in the *Redundancy Payment Act* of 1965. Beyond the obligation to inform employees of the reasons for the redundancies, the number of job cuts, the amount of compensation etc... this law introduced the obligation to consult the representatives on the means of avoiding or reducing redundancies. The law therefore introduces a consultation on the relevance of the decision itself (and not just on its implementation). However, the British law seems to be less favourable than the directive, in that the directive makes provision for a consultation from the moment where the employer considers implementing redundancies (Deakin and Wilkinson, 1999), while the British law makes provision for a consultation once this decision has been taken by the employer. In this respect, the absence of permanent representative bodies and of a regular consultation procedure weakens the capacity of employees to formulate an opinion prior to the decision on the arguments put forward by the management to justify these redundancies.

In a third group of countries, there is only a weak structure of social dialogue in the undertaking. This applies mainly to the new Member States (NMS) of Central and Eastern Europe. Based on surveys carried out in Poland and in the Czech Republic, Meardi (2007) highlights that NEM do not have a strong tradition of social dialogue and that governmental policies in the area of industrial relations have not been established so far. Even more than in the old Member States, the trade unionism is affected by a significant weakening of its numbers and of its capacity for action. Added to this is the weakness of the regulation of the branch where “*the committees of sectoral dialogue are often no more than empty shells*” (Delteil *et al.*, 2010). Finally, although the undertaking represents a key area of social regulations, the relations between employer and employee are only loosely organised by the law and the very existence of a dialogue on the undertaking depends either on the managerial policy or on action of employees where trade unions exist.

This general statement also masks a diversity of national situations. In their survey of French multinationals in Hungary, Slovakia and Romania, Delteil *et al.* (2010) point out that these three countries form completely different entities with respect to their political, economic and cultural legacies and their integration into the EU. The European integration of Hungary and Slovakia is older than that of Romania. In terms of economic traditions, Slovakia comes from a country, Czechoslovakia with a strong industrial culture between the world wars, unlike Romania and Hungary. Concerning the communist past and the present transition, significant differences also exist between a “modern” Hungary ahead of its time since the 1970-1980s and a Romania long attached to the dogmas prevalent in Eastern Europe before the fall of the Berlin wall. Among the Countries of Central and Eastern Europe who joined the EU, Hungary and Slovenia are different from the rest in that they introduced at the beginning of the 1990s the possibility of creating - in the undertaking – elected representative bodies, parallel to the trade union bodies. Inspired by the German model, the Slovenian constitution of 1991 makes provision for a right of codetermination in the undertaking (notably concerning work organisation). This law was specified in 1993 by a law on employee participation in undertaking management. This law makes provision for employee representation in the Board of Directors, as well as in the works councils and in the group committee. It also specifies the content of the information-consultation, by fixing the stages of a procedure according to which the employer should inform the works council at the latest 30 days before taking his decision and should open consultation at least 15 days before taking the

decision. Following the example of German law, the Slovenian law provides for the implementation of an arbitration committee with the task of regulating conflicts between employer and the works council.

2.1.2. The representation in Europe: a universal versus a trade union approach

The national traditions also vary with respect to the systems of employee representation. There is a first group of countries which provide – albeit from different thresholds – a representation of all of the undertaking employees through election mechanisms. A second group consists of countries which have kept a representation which is strictly trade union. In a third group of countries, the representation is mainly trade union, but it may also be undertaken by an elected body when there is no trade union.

In the first group of countries, the rights to information-consultation are organised through a procedure which involves an elected organ of employee representation. In **France**, the “*Comité d’Entreprise*” (CE) or “works council”, established by decree on 22 February 1945 is at the core of the employee representation system. It is implemented in every undertaking of at least 50 employees. The obligation to represent the employees applies however to every undertaking of at least 11 employees through the “*instances représentatives du personnel*” (IRP) or staff representative organisations, elected or designated. In **Germany**, employee representation, as provided for in the *Betriebsfassungsgesetz* or “Works Constitution Act”, adopted in 1952 and revised in 1972, is ensured by the “*Betriebsrat*”, an elected body for each undertaking of at least five employees. As for **Belgium**, it has made provision since 1984 for the implementation of “*conseils d’Entreprise*” or “company committees” in the “technical business units” of 50 or more employees. The entry into force of this law, notable concerning the representation thresholds, was and is however still delayed by the King. First introduced for undertakings of over 200 employees, the election of “company committees” applied since 1979 to undertakings of over 100 employees, but still has not reached the legal threshold fixed 60 years ago. With a minimum representation threshold of 5 employees, Germany is one of the countries where the representation measures exceed those provided for in the directive. In this respect, we note that like most of the national measures, the directive excludes employees of very small undertakings from the right to discuss the decisions of their management. At the same time, the 2001 reform of the German law to facilitate the election procedures of representatives highlights how hard it is to make the employee representation effective in small and medium-sized undertakings. The effectiveness of the representation is particularly crucial in countries where the industrial fabric is mainly composed of such undertakings⁸. In the same way, regarding the representation in large undertakings, problems can arise in identifying the relevant representation level. In France and Germany, the representative bodies also cover a number of types of different levels where decisions are taken: establishment, undertaking, and group. Since the transposition in 1996 of the European directive on the implementation of European works councils (94/45), the French and German laws also made provision for the existence of a transnational representation body in the multinational undertakings. In undertakings which can be called “simple”, in that the legal personality coincides with the workplace, this usually takes the form of a “*Comité d’Entreprise*” or “*Betriebsrat*”. When an undertaking consists of several different establishments, the employee representation takes the form of committees per establishment, directly elected by the workers of the establishment in question. It happens that in compromising the autonomy of the establishments or of the undertakings in relation to each other, the representatives negotiate with the employer or obtain from the judge the

⁸ In Estonia, the number of undertakings employing over 50 employees is estimated at 2% (EIRO, 2009).

recognition of an “Economic and Social Unit”⁹ in France, or a *Gemeinschaftsbetrieb*¹⁰ in Germany, which have committees at the level of this unit.

It is however to be noted that if the employee representation in the first group is organised through an elected body, this does not mean that the trade unions are not present in the undertaking. In France and in Belgium, it is to be noted, parallel to the elected body, the existence of a trade union body which can in certain cases, notably in the small establishments, carry out rights of information-consultation. In Germany, the law does not provide trade union representation in the undertaking, but the significant articulation between the *Betriebsrat* and trade union in the branch representation system, usually means that the trade union intervenes in the undertaking, as the representatives of the *Betriebsrat* (Kotthoff, 1994) are frequently trade union members.

Unlike the first group, most of the CCEE countries, as well as countries such as Great Britain and Sweden, have a tradition of employee representation carried out solely through the trade unions. In **Poland**, where there was no general right to information-consultation, the law still provided for the possibility of negotiating undertaking agreements on employment conditions, the salaries or the social benefits. This right is reserved only for the trade union organisations. Unlike the French and German systems, the traditional institutional arrangement of employee representation in **Great Britain** is organised solely through trade unionism. Historically, this model of the “sole channel” of representation is based on the exercise of the representation in view of collective bargaining. Organised by trade or profession, the trade unions are also, first and foremost, workforce cartels which regulate the entry of employees into the trade, and the conditions in which they operate. Also unlike France and Germany, the participation in strategic business decisions through rights of information-consultation, or codecision, was not provided for historically in the British context. This specific nature of representation also explains that there is no binding and detailed legal framework of the employee representation in the undertaking. A further difference between the United Kingdom and the cases of France and Germany is that the legislator provides for an organisation of the employee representation independent of the legal structure of the undertaking. Based on the principle of trade union accreditation for a negotiation unit, the collective bargaining does not necessarily cover all of the same undertaking. We therefore have to imagine the structure of the employee representation, and thus that of collective bargaining - as an essentially trade union structure - independent to that of the undertaking. Historically, the employee representation can only be carried out in undertakings who have granted an accreditation to a trade union. In these undertakings, the trade union representation incarnated by the “shop steward” could carry out functions equivalent to those of representative bodies in continental Europe (Terry, 2003). The absence of legal representation frameworks does not mean however that the United Kingdom does not have other “works council”-type forms of representation. There are undertaking agreements which make provision for the implementation of permanent representation structures. Composed of elected members, trade union members or sometimes both representation types, this type of body is frequently embodied by the notion of “*joint consultative committees*” (JCC), even if these committees have different practises. However, with the legal Community

⁹ The Economic and Social Unit is a jurisprudential creation of the 1970s, with the aim of countering fraudulent manoeuvres of certain employers who artificially created several units with the aim of maintaining the threshold of their workforce below 50 employees, thereby getting around the obligation to hold elections with the aim of establishing a works council. Thus, as soon as several legally distinct undertakings fulfill the criteria economic and social criteria established by the jurisprudence, the Economic and Social Unit must be recognised.

¹⁰ The law on the constitution of establishment committees makes provision for the creation of a common establishment, when two establishments share the use of equipment or workforce. In 2004, German Federal Labour Court specified that a common establishment had to be put into place – and therefore a common IRP (staff representative organisation) – when two establishments had a common human resources and employment policy strategy.

measures in the area of economic redundancies of 1975, obligations of information-consultation and therefore of employee representation were introduced into the United Kingdom. In 1994, a ruling of the European Court of Justice obliged the United Kingdom to ensure employee representation, through the organisation of elections - in undertakings intending to carry out collective redundancies even if they refused to accredit a trade union. The directive on the European works councils of 1994 contributed to extend the obligation of employee representation, not only in exceptional cases, but in a more general way, at least at transnational group level. In fact, the transposition of this directive by the introduction for the first time of the obligation to elect a permanent representation body marks a major change for employee representation in the United Kingdom. The previous European directives on collective redundancies (75/129) and the transfers of undertakings (77/187) had not introduced the obligation to put into place a permanent body, and undertakings fulfilled the obligation to represent either through direct information, or by the election of an *ad-hoc* committee to be dissolved as soon as the restructuring was over (DTI, 1999).

The Swedish system of employee representation is also based on the principle of trade union monopoly. In **Sweden**, the right to information-consultation is organised by the 1976 Co-Determination Act (*Medbestämmandelagen*, also known as MBL). In the Swedish system, the implementation of this law is linked to the existence of a collective convention. The undertakings not covered by a collective convention are not obliged, under Swedish law, to provide for employee information-consultation. Certain groups of employees in the private sector are thus not covered by a collective convention, and do not have representatives to ensure that the rights of information-consultation are respected. With coverage of almost all of undertakings by collective conventions, the Swedish employees are however very largely represented among undertaking management. An obviously major difference between the United Kingdom and Sweden is that, unlike Great Britain, Sweden has a very significant trade union presence which ensures a wide employee representation. In Great Britain, the transposition of the directive on information-consultation takes place in a context where the position of the trade unions is being weakened, which explains the low rate of employee representation in this country. The principle of trade union accreditation as a lever to implement an employee representation body lost its scope under the effect of a change of rules of the game of representation in the 1980s. The Thatcher government abolished the obligatory procedure of trade union accreditation (Deakin et Wilkinson, 1999) on the one hand, and limited the right to strike on the other hand, thus restricting the legal bases to obtain an accreditation¹¹.

In a third group of countries, the representation is organised mainly through trade unions, but works councils can be put in place where no trade union exists. In **Denmark**, **Finland** and **Italy**, the employees are mainly represented by the trade unions, but elected representatives. In the Countries of Central and Eastern Europe (CCEE), this means of representation, found notably in the **Czech Republic**, is known as the “Czech model”.

¹¹ The rate of accreditation went from 84% in 1980 to 65% in 1984. By the mid 90’s, only half of the undertakings of over 25 employees had accredited a trade union (Terry, 2003).

2.2. Various arrangements depending on the national traditions

We therefore see that Europe is confronted with very different systems of industrial relations providing employees with very different rights to information-consultation and representation modes. The result is that the directive has given rise to modifications of varying significance depending on the national systems of employee representation. A rapid glance at the forms and rights of representation would suggest a strong cognitive interaction between Community and national levels, in which certain countries, such as France or Germany, are at the head in that the workers' movement in these countries had constructed a form of elective representation coherent with the exercise of this right. Some countries however, of which the United Kingdom is the best example, have difficulty because of the lack of universal employee representation. It thus appears that what is happening behind the different representation systems, beyond the chosen type of representation - elected or trade union - is the overall capacity of the system of industrial relations to ensure a universal employee representation but also to organise the representation as a basis from which the employees are involved in a process of codecision on the future of the undertaking. In the light of the potential contribution of the 2002/14 Directive for the reinforcement of such an employee participation in business decisions, we note however that the processes of transposition of Community regulations at national level are focused mainly on the question of representation criteria, while the actual content of information-consultation occupied a very small place in the debates on the transposition.

Concerning the nature and form of the representation, the directive, by introducing a *general* right to information-consultation for all employees implies a universal employee representation. The practical arrangements of employee representation are however not specified in the directive. Confronted with the diversity of systems of employee representation, the representation can therefore continue to take several forms. It should however correspond to the principle of universality of representation provided for by the directive which thereby modified the national systems of employee representation which were based on a partial and incomplete representation of the work group in the undertaking. The issue of thresholds above which the rights of information-consultation should be applied is also at the centre of these debates on transposition. In addition, the strength of the basis of the practises of information-consultation influenced the ease with which the national legislation could be modified. We can therefore identify two transposition processes, one (c.f. table N° 1), according to which it occurs without any major difficulty, and a second (2.1), which is characterised by the complexity of the procedure (2.2). These two transposition processes are also associated with the debates caused by the directive at national level. The intensity of debates would seem to reflect the degree of participation of social partners in drawing up of national legislations. Depending on the different national situations, the directive did not bring about any change in existing systems. In other areas, it brought about a limited or significant change.

Table No. 1. The processes of the transposition of the Directive 2002/14 in national legislation.

	Strong rights	Weak rights
Trade union representation	<p><u>Sweden</u> Rights to IC* fixed by the 1976 Co-Determination Act and integrated in the collective agreements</p> <p>Transposition through an amendment to the 1976 law to integrate employees not covered by a collective agreement</p>	<p><u>United Kingdom</u> No general right to IC Representation based of the recognition of a trade union by the employer</p> <p>Flexible transposition through the Information and Consultation of Employees (ICE) Regulations which give the undertaking players significant room for manoeuvre.</p>
Universal representation	<p><u>France</u> Rights to IC introduced in 1946 and reinforced progressively by the law. The exercise of rights to IC is carried out by an elected body by all of the employees of an undertaking, the “Comité d’entreprise”.</p> <p>Transposition not required</p>	<p><u>Belgium</u> Rights to IC introduced in 1948. When there is no “Comité d’Entreprise”, the trade union exercises the rights to IC. The representation threshold is fixed at 100 employees.</p> <p>Condemnation of Belgium for non-transposition of the 2007 Directive.</p> <p>Agreement of 2007 which makes provision for a flexible transposition for undertakings of less than 100 employees.</p>
	Simple transposition	Complex transposition

Source: from Didry and Meixner, 2007, p. 63.

* information-consultation

2.2.1. Universal representation and strong rights: a simple transposition

The table (c.f. above) illustrating the impact of the directive on the national systems of industrial relations suggest that the ease of transposition of the directive in national right is less due to the nature, elected or trade union, of the employee representation than to its degree of universality and to the functions which it has assumed so far. Thus, where the representation is universal and the consultation significant, the transposition turned out to be easier.

In **France** and **Germany**, although certain legal and trade union experts were able to request the transposition of a particular point of the directive, the transposition was not judged

necessary because of the existence of IC rights which go beyond the measures provided for by the directive. This approach was reinforced by the fact that the German and French systems acted as models for the directive. We could have expected, in France, a modification of the legislation to organise the consultation “with a view to reaching an agreement”, by arriving at a negotiation right for the works council. In Germany, we could have envisaged the lowering of the threshold for the implementation of an economic commission (provided for from 100 employees onwards). But it seems that the European directive was considered as a minimal regulation to which the country in question was required to conform and not as the opportunity for a debate on the content and the real scope of rights of information-consultation.

This interpretation of the directive as a minimal regulation caused a paradoxical situation in **Slovenia** where the Community law caused a weakening instead of a reinforcement of national law. While Slovenian law, inspired in 1993 by the “German model” was conforming to Community law, the transposition of the directive provided however the opportunity to specify in greater detail representation rights. But this did not result completely in a reinforcement of employees rights. Certainly, the law relating directly to the Directive 2002/14 makes provision for additional resources for the representatives. At the same time, the confidentially clause brought about a strong restriction of the IC rights. The law of 2006, contrary to that of 1993, therefore no longer obliges the employer to inform the works council of a drop in salaries, of disciplinary procedures or of change of status. Only in the case of redundancies is the employer required to consult the works council.

Despite the non-universal character of the regulation of employee information-consultation, the directive did not bring about major changes of existing measures in **Sweden**. In a country where almost all employees are represented by the trade union organisations and where there is an established practice of codecision, it was sufficient to change the law on codecision to extend the right to information-consultation to the few employees not covered by a collective convention. Swedish law now stipulates that employees not covered by a collective convention must be informed and consulted through trade union representatives, in the undertaking or in the trade union federation. The representation continues to depend on trade unions the role of which is thus reinforced in the case where there is no collective convention.

2.2.2. Weak rights and trade union representation: a complex transposition

2.2.2.1. The nature and the thresholds of representation at the centre of national transpositions

On the contrary, in the United Kingdom and in Belgium, the directive was associated with major transposition difficulties because of its substantial impact on the existing systems of employee representation. Unlike Germany, France and Sweden, or even Slovenia where the directive went largely unnoticed, intense debates took place in the United Kingdom and in Belgium on the rights of information-consultation. In this respect, the **United Kingdom** is a particularly striking example of a complex transposition of the directive, as there was no previous general right to information-consultation of employees. In a system where the employee representation was based on a system of accreditation of a trade union in the undertaking, the problem of the existence of undertakings without an accredited trade union brought about the adoption of a permanent mechanism allowing for universal representation. The directive was transposed in 2005 through a law on information-consultation of workers which introduced, for the first time, a binding framework for employee representation. The

specific nature of the law on the employee information and consultation (“*Information and Consultation of Employees Regulations*”, ICER) is based on the flexibility of the measures which it introduces. On the one hand, it makes provision for transition periods to reach the representation threshold of 50 employees and only came fully into force in 2008. On the other hand, it allows undertakings which had previously negotiated agreements on employee representation (“*Pre-existing agreements*”, PEA) to keep the existing measures. Also, the British transposition of the directive, by its little binding nature, gives the impression that it wants at all costs to avoid changes towards a significant consultation of employees. The greatest changes concern the possibility for the workers to claim the implementation of a representation organ, once 10% of them express their approval of the negotiation of an agreement. In the continuity of reforms undertaken by the Thatcher government, the trade union monopoly of the representation is also questioned. But the rights of the employees are also reinforced through the possibility of electing representatives for all the employees.

In a report for the Dublin Foundation, Hall (2008) identifies five major issues of the transposition of the Directive 2002/14 at national level: the thresholds, the nature of the representation, the nature of the rights (binding or requiring mobilisation on the part of the employees), the possibility of leaving it up to the undertaking players to specify – once the minimal legal requirements had been fulfilled – the content of information-consultation measures; the sanctions (fines, arbitration committees, work tribunals, etc). Through the case of the United Kingdom, we can easily see how the debates on the national transposition of the 2002/14 Directive focused more on employee representation than on the content of the information-consultation. More precisely, the national legislations specify especially the thresholds and the very nature of the representation.

The transposition process of the Directive 2002/14 in **Belgium** sheds some light on the issues of the forms of representation behind the question of the generalisation of the right of information-consultation. In Belgium, the transposition of the European directives in the area of employment law goes through the Conseil National du Travail or CNT (National Labour Council) on which sit both employer and trade union representatives. After the period of just over three years given to the Member States to translate the minimal requirements taken at EU level into national law, the CNT issued an opinion on 24 March 2005, according to which the employers and workers organisations were unable to reach agreement on this subject. As the CNT had provided over 1,500 opinions since its creation in 1952, this was an exceptional situation of blockage. This situation is all the more surprising as the law of 1948 makes provision for the implementation of company councils in undertakings of over 50 employees. A simple transposition however comes up against a triple historic debate which revived discussions at the centre of the CNT (Orianne, 2010).

The first difficulty concerns the definition of the representation thresholds. Because if at European level, any undertaking of less than 250 workers is considered to be a small or medium-sized undertaking, in Belgium this applies to any undertaking of less than 50 workers. In this context, the question arose whether the threshold defined by the 1948 law should be abolished. On this topic, the employers’ organisations oppose vigorously the wide interpretation which the trade unions want to give the directive. They think that Belgium fulfils the directive perfectly. This position is also based on the idea that the directive reinforces restrictions for the small and medium-sized undertakings and that any administrative, financial or legal restriction to the creation and development of small and medium sized undertakings should be avoided. On the contrary, the trade unions evoke the principle of democratisation of the undertaking affirmed by the directive in order to lower the representation thresholds and reinforce their presence in the undertaking. There is a second debate on the nature of the representation. There are three representation bodies in Belgium: the “*Comités d’Entreprise*” (in undertakings of at least 50 employees), the “*Comités pour la*

prévention et la protection au travail (CPPT)” and the trade union delegations. In this system, the trade union organisations occupy a central role, in that where there is no works council, the trade union delegation is responsible for the tasks normally allocated to the works council. But the trade union delegations do not have a status recognised by the legislator. On the question of the nature of the representation, the CNT members seem however to be in agreement, in order to avoid an extension of the boundary of representation of works councils (considered by the employers to be inappropriate for small and medium undertakings), to a trade union representation by the trade unions. In order to understand the institutional blockage, we have to come back to a second issue, that of the effectiveness of standards. Although the threshold of 50 workers is officially established by the law of 1948, for the creation of a works council, in practise this threshold has never been reached in Belgium¹².

The non-application of this law has a strong influence on the practical arrangements of the transposition of the Directive 2002/14/EC, especially as this question was often repressed by both trade union representatives and employee organisations. In this context, the transposition of the directive turns out to be complex and results, firstly, in an impasse at the CNT and then to the condemnation, on 29 March 2007 of Belgium by the European court of Justice for “violation of State” for the non-transposition of the directive. The legal argument employed is that of the non-application of the Belgian law of 1948 which fixes the threshold at 50 workers. Following the condemnation of Belgium by the Court of Justice of Luxembourg on 29 March 2007, the government put pressure on the social partners to find a rapid solution. On 23/11/2007, the social partners came together in a body external to the CNT, to conclude an agreement on social dialogue in Belgium. The solution is characterised by both its legal complexity and transitory nature. The taboo on the effectiveness of Belgian law explains why the right to information-consultation which exists for undertakings of over 100 employees is not simply extended to other undertakings. The agreement makes provision for an extension of the competence of the CPPT in undertakings of 50 to 99 workers, and confers on trade union delegations the exercise of rights of information-consultations in the absence of works councils in undertakings of less than 50 workers.

This issue of the nature of the representation is also to be found in the CCEE countries where the area of industrial relations is less weakly structured than in Belgium or the United Kingdom. According to Meardi et al. (2008), this issue is notably explained by a certain hostility of governments towards trade unions. Propositions of anti-trade union legislation were in fact formulated by the Polish, Czech, Slovakian and Estonian governments. In this context, the governments insisted on the implementation of work council-type elected bodies which aimed to undermine the trade union representation. It is only following a strong trade union opposition that the trade unions, in certain cases, obtained a privileged role in the newly created works councils.

2.2.2.2. The influence of the social partners on the content of the national laws

These cases of complex transposition of the Directive 2002/14 differ from cases of simple transposition by the degree of employee participation in debates on transposition. The

¹² Article 28 of the law of 1948 allows the King to delay the entry into force of the measures on the institution of a company committee (conseil d’entreprise) in undertakings of less than 200 employees. Before every professional election (i.e. every four years since 1948), a royal decree fixing the electoral procedure determines the threshold to be respected. The degrees of application of the law brought about a progressive lowering of the threshold up to 100 employees in 1979. The national threshold, established at 50 by the legislator, has therefore never been applied. Some legal experts question, on this point, the legality and the constitutionality of these royal degrees of application, in the the King is using his power to delay the entry into force of the law.

complexity of the transposition also depends on issues for trade union and employer organisations arising from the introduction of a general right to information-consultation. The influence of social partners on national legislations varied however depending on the situation. Hall (2008) thus distinguishes three groups of country: those where the social partners had almost no influence on the law, those where just some of their demands were granted by the legislator and finally, those where the social partners had a significant influence on the content of the legislation.

In the **Czech Republic** and in **Hungary**, the legislation was adopted without the social partners having any real influence on its content. Confronted with this situation, the law does not seem to resolve the disagreements between trade unions and employers, notably on the nature of the representation. In the Czech Republic, where the law granted a representation privilege to trade union organisations, a judgment of the Constitutional Court reintroduced uncertainty regarding the trade union representation ruling that a works council could exist parallel to the local branch of a trade union.

In the second group of countries, the legislator retained certain proposals of the social partners. In **Estonia** (EIRO, 2009), for example, if the transposition of the directive is based on a law, the social partners greatly influenced the content of a law which they had strongly opposed. The criticisms dealt mainly with the representation mechanisms and the representation resources, in a context of the introduction, for the first time, of a general framework of employee representation in the undertaking. The criticism from the employers concerned the representation thresholds and the maintenance of a double-channel of representation, two measures which exceeded the content of the directive. More basically, the employers criticised the costs caused by this law, notably for small and medium sized undertakings. The employers' associations thus demanded the abolition of temporary assignment measures of employee representatives in undertakings of over 500 employees. Although their request was rejected, the argument of costs pushed the government to abandon their intention of requiring the employer to finance training measures for the elected representatives. Thus, the law influences this obligation through the negotiation of an undertaking agreement. As for the Estonian trade unions, they rejected a first version of the law which reduced trade union rights in the area of employee representation. This first version excluded the trade unions from the area of information-consultation, unless they had elected members in the works council. Following collective mobilisation – supported by the international trade union organisations – the trade unions were able to maintain the right to participate in information-consultation procedures, alongside the works councils. The trade union demand to reserve a right of designation of candidates to the elections of the works council went unheard however, because this demand was considered to be excessive in a context where the trade unionism rates barely exceed 10%. Concerning the delegation period, the legislator did not modify the measures applied to undertakings of over 500 employees, for other undertakings, a trade union delegation time was established which did not depend on the number of employees, as used to be the case, but on the number of trade union members. The opposition of the social partners forced the government to withdraw a first version of the law presented in 2005. The issue of debates is also reflected in their length, which in September 2006 resulted in Estonia receiving a warning from the European commission for non-transposition of the directive. At the end of 2006, the government finally adopted the law on the employee representation which came into force on 1 February 2007. This law introduces a new representative body: a works council elected by the general assembly of staff which represents all of the employees of the undertaking. The collective negotiation remains a prerogative of trade unions, but when there is no trade union, the works council can negotiate agreements with the employer. The law specifies the field of application of the rights of information-consultation. In a context where only 2% of the undertakings employ over 50 employees, the legislator decided to apply the rights to IC to all undertakings of over 30

employees. Finally, the information-consultation rights as provided for by Estonian legislation are binding. Where there is no works council, the employer is required to inform the employees directly. The binding nature of the rights concerns, in particular, the aspect of information. The consultation procedure, on the other hand, should be the subject of an initiative of the employees and of their representatives. The employer thus has seven days to respond to this request and initiate a debate. Finally, the law makes provision for improving and redefining information-consultation rights in undertaking agreements.

The last group contains countries such as the United Kingdom, Belgium, Bulgaria, Italy and Poland where the social partners had a strong influence on the law. In the **United Kingdom**, the ICER mainly took up again the proposals put forward by the Confederation of British Industries (CBI) employers' organisation and the trade union organisation Trades Union Congress (TUC). Although these two organisations had long been opposed to the adoption of a law on information-consultation, their positions evolved during the discussions (Koukiadaki, 2008). The trade unions considered that the introduction of a general right to information-consultation, involving the implementation of measures guaranteeing the representation of all employees, questioned the trade union monopoly, with the ensuing risk that representatives might be elected who were not trade union members. The proliferation, in the 1990s, of managerial practises of direct information of employees only increased the reluctance of trade unions about the transposition of the directive. In a context of trade union decline, the trade union finally had to change their position on the universality of representation, in the hope that they could use the binding rules to develop their presence in the undertakings. On the employers' side, although the undertakings were very hostile to the reinforcement to employee rights, the promotion of the directive by the Blair government as a managerial tool of communication explains the involvement of the British employers in the negotiation of the first agreement of British social partners on the implementation of a European standard. In **Poland** (EIRO, 2009), the law takes up a trade union demand that a works council should only be implemented in undertakings with a trade union local branch. In undertakings with a local branch of a trade union, the members of the works council are also nominated by the trade union. In the other cases, the works council is elected by the workers. The employers wanted to implement the directive through undertaking agreements with the trade unions, pointing out that the implementation of works councils was expensive. This demand on the part of the employers explains a progressive application of the obligation to implement works councils, according to the representation thresholds of the number of employees in the undertakings. It was only in 2008 that the law was applied to all undertakings of over 50 employees. In **Italy** (EIRO, 2009), the directive was transposed by the common notice or statement ("*avviso comune*") of 27 November 2006 signed by the main employer and trade union organisations. This agreement was integrated into the Italian legislation in January 2007 (EIRO). The agreement established that the rights of IC apply in undertakings of over 50 employees and specifies the notions of information and consultation (content, moment, relevant level of the IC). It says that the implementation of arbitration committees for conflicts concerning the confidentiality of information is the responsibility of national branch agreements. This agreement confirms the autonomy of the social partners in the production of Italian employment law. In **Bulgaria** (EIRO, 2009) finally, the transposition was carried out through a law negotiated at the heart of the "national tripartite cooperation committee". The law is particularly influenced by trade union organisations which wanted to avoid competition between trade unions and the bodies of elected representation in the undertakings; the law of July 2006 introduced for the first time in Bulgaria a general mechanism of representation for all undertakings of over 50 employees. A general assembly convoked by at least 10% of the employees, by the local branch of the trade union or by the employer, elects employee representatives who could participate in information-consultation procedures. Alternatively, the general assembly can also decide to confer the rights of

information-consultation to trade union representatives. Three points of disagreement remain however between employers and trade unions. First of all, the trade unions wanted the election to take place by secret ballot. But this possibility was rejected by the employers who considered it too expensive. Secondly, the trade unions would have preferred the employers were not able to convoke the general assembly in the area of information-consultation, fearing that the representation bodies would thus be bypassed and substituted by a procedure of direct consultation of the employees. Thirdly, the trade unions had requested resources to exercise the functions. In the face of the opposition of the employers, the resources could be allocated only in the framework of undertaking agreements.

Conclusion

The 2002/14 Directive is part of the traditions which differ greatly depending on the national situations. The directive therefore gave rise to national reconfigurations of varying significance. Hall (2008) distinguishes *three broad groups of countries depending on the extent of the changes to existing systems of information and consultation and workplace representation required in order to implement the directive* (c.f. Table No. 2). In countries such as France or Germany, the national traditions in the aspect of employee representation in the undertaking explain why the directive did not involve any change in national legislation. In a second group of countries, the introduced change turned out to be limited. This is the case of Greece and of a certain number of CCEE (Czech Republic, Hungary, Latvia and Lithuania) where information-consultation already existed, but was of a recent nature, and therefore required a reinforcement of certain measures. The change was also limited in the Scandinavian countries where information-consultation is based on collective agreements covering a very large majority of employees, but not all. In a third type of country, the change introduced by the directive was major. This was due in certain cases to specific reasons, like the need to reinforce collective conventions, and the content of the information-consultation in Italy, or because the issue of the nature of the trade union representation was subject to considerable debate, like in Estonia. In other cases, the introduction for the first time of a general right to information-consultation, like in the United Kingdom or in Poland caused a reformulation of rules of the game of social relations in the undertaking. It is also in countries with the greatest legal changes that the impact of the directive is potentially greater concerning undertaking practices.

Table No. 2. The scope of the 2002/14 Directive for national systems of industrial relations.

No change	Limited change	Major change
France, Germany, Austria, the Netherlands, Spain, Portugal	The Czech Republic, Slovakia, Hungary, Latvia, Lithuania, Sweden, Denmark, Slovenia, Finland	Belgium, Luxembourg, Italy, Estonia, Bulgaria, Cyprus, Malta, Ireland, Poland, Romania, United Kingdom

Source: from Hall (2008)

A second characteristic of the Directive 2002/14 is that it establishes minimal requirements and does not aim at harmonising the national legislations in the area of rights of employees to information-consultation in the undertaking. This characteristic gives significant scope to Member States regarding the content, which they intend to give to Community regulation. There results a diversity of configuration of information-consultation: thresholds,

nature of representative bodies, content of the information-consultation, nature of rights, etc. The participation of the social partners in the drawing up of national legislations was strongest in countries where the directive had the greatest potential impact. More basically, *these processes of transposition correspond to the beginning of the learning process of the rule of information-consultation there where there was no general right to information-consultation or this was incomplete.* With regard to the national modifications of rights of information-consultation, the principle of universality of representation was at the centre of national transpositions of the directive. Even if the transposition process does not necessarily remove the uncertainty regarding the mode of representation, it at least establishes general criteria. On the other hand, the directive did not result in any of these cases, in a true reinterpretation of notions of information and consultation, the contents of which were not better specified. This first observation on the transposition of the directive in the national legislations suggests therefore, at undertaking level, a convergence of case studies towards a universal employee representation, presupposing at the same time, a diversity of practices depending on the different understandings of information and consultation.

PART 3. THE SCOPE OF THE DIRECTIVE FOR UNDERTAKING GOVERNANCE

The directive had different effects on the legislations depending on the national traditions. According to the country, modifications of varying importance were required in order to conform to the directive. The overall aim of these modifications was to develop the employee representation system in order to ensure the universal character of the right to information-consultation. Countries such as Sweden or the United Kingdom, who only made provision for representation in the case where trade unions were recognised – by means of either an accreditation system or through the existence of a collective convention –, opened the representation up to a greater number of employees. This suggests that there was a development of democracy in the undertaking, in that the generalization of a right to information-consultation establishes the basis of a debate on the undertaking, notably through the reinforcement of the institutional frameworks required by a debate, on representation, for example (3.1).

The content attributed to ideas of information-consultation by national legislations remains vague, however. The question arises whether consultation is no more than a one-sided process, i.e. the informing of representatives by the employer, or whether the information is used for a consultation with a possible impact on the undertaking's future, thereby providing greater knowledge of the economic activity and of managerial decisions. The question of how national systems were affected by the directive only therefore arises in the case of countries that had to carry out legislative modifications. But an evaluation of the real scope of a right to information-consultation for a democratization of the undertaking is just as interesting for the countries with previous experience of it, in order to fully realise the possibilities of such a legal framework. In the light of the vague nature surrounding both the ideas of information and consultation, and the actual organization of the representation, the concrete observation of information-consultation at undertaking level should enable us to specify the scope of the democracy for undertaking governance. More precisely, this third part aims to question, through a series of undertaking case studies, how the debate between the management and employee representatives is organized concretely in order to evaluate the scope for the process of “joint legislation” of the undertaking, the prospect contained in the directive (3.2).

3.1. Information-consultation as the basis of a reinforcement of the employee representation

3.1.1. The law as a resource to establish the information-consultation frameworks

In the light of the low numbers of representative bodies to be observed notably in the countries potentially most concerned by the introduction of a general right to information-consultation, the directive does not resolve the problem of the representation gap, which is intensified by the drop in trade union membership rates. However, an essentially statistical approach does not take into account of the process of change caused by the directive. Although the application of the directive appears quantitatively slow, this situation should not prevent us from realizing how European law was employed to establish permanent frameworks of information-consultation.

In a quantitative perspective, the comparison of coverage rates of employee representation in the undertaking highlights a much contrasted situation of the concrete scope

of the Directive 2002/14 (c.f. table N°3). The existing statistics call for several comments. It should be noted, first of all, that it is difficult to compare information when we do not have statistics for all of the countries concerned by the directive. In some respects, the availability of statistics already represents an indication of the importance given to employee representation by the national players, in both quantitative and qualitative terms. Secondly, there is no denying that the available statistics are not uniform. The existing statistics are based on different national situations and also vary according to the needs of surveys, so they do not refer to the same representation threshold in calculating the coverage rate of undertakings. Although the information is difficult to compare, the existing statistics still allow us to distinguish some conclusions on the quantitative scope of the Directive 2002/14 with regard to the measure of employee representation.

The differences are first of all national. In the countries where the directive has the greatest potential impact, the application at undertaking level seems slow. This is notably the case of the **United Kingdom**, where the Directive 2002/14 did not have the same effect as the directive on the European Works Council (c.f. box). A similar situation can be observed in the CCEE. In **Slovakia** and in Poland, few undertakings implemented procedures of information-consultation after the directive was passed. In **Poland**, of the 17,000 undertakings (of over 50 employees) concerned by the law, only 2,000 have an information consultation body (Meardi, 2007, p.3). Of these 2,000 bodies, 90% existed already. According to a survey of the Bulgarian confederation of independent trade unions, employees were elected in less than 6% of the undertakings in which the confederation is present. In comparison to other CCEE, Slovenia is an exception for several reasons. First of all, this country is noted for a relatively high coverage rate. A survey carried out in 2004 in large undertakings estimated the presence of works councils in Slovenia to be around 64% (Meardi, 2007). The trade union organizations estimate this coverage rate to be 80%. Unlike other countries where the directive brought about a reinforcement of laws of information-consultation, in **Slovenia**, the transposition of a confidentiality principle resulted in a more restrictive definition of the right to information, a drop in the presence of the works councils. A survey of 2001 had actually shown that almost 77% of undertakings of over 200 employees had a works council.

The quantitative impact of the information-consultation directive in Great Britain

In theory, the new Information and Consultation of Employees (ICE) Regulations should be applied to 37,000 undertakings and to 75% employees in Great Britain. According to a survey of the Confederation of British Industries (CBI) in 2006, 57% of undertakings had a form of permanent representation, compared to 35% in 2002, 47% in 2003, 49% in 2004 and 47% in 2005. However the representation was organized on the basis of a trade union in only 43% of cases (Koukiadaki, 2008). These figures, despite the extension of representation mechanisms that they reveal, suggest that there is no rush towards representation, unlike the situation following the directive on the European Works Councils (EWCs). As for the employers, we notice that the incentives for the implementation of employee representation are limited by the vague nature of the legislation concerning the deadlines of the application of the legislation for each threshold established. At the same time, the size of undertakings seems to have had a role. While the EWC directive applied mainly to large undertakings, the ICE Regulations applies mainly to small undertakings confronted with high implementation costs. On the other hand, the trade unions seem to have an ambiguous position with respect to the concrete application of the information-consultation directive. While the Trades Union Congress or TUC (a federation of trade unions in the United Kingdom) regard the new legislation as a means of reinforcing the trade union influence in the undertaking, the trade unions also fear that this new legislation could become a threat in undertakings where the representation is organized only

on a trade union basis. On this subject, Koukiadaki (2008) adds that trade unions prefer, where possible, to demand a trade union accreditation rather than to demand the organization of elections in the framework of the ICE Regulations. In the sense where, in effect, the putting into place of an ICER agreement requires the support of a significant number of employees, the accreditation where the trade unions obtain the support of employees, is more advantageous, particularly in terms of negotiation rights, than an information-consultation agreement. This ambiguity of the trade union position therefore explains why the trade unions do not carry out an active campaign in favour of the implementation of the legislation.

We should also remember that the application of the legislation to all of the undertakings covered by the European directive was only planned for 2008 by the British legislation. The undertakings most concerned by this new legislation are those of 50-99 employees. But these are the very ones who are least likely to negotiate anticipation agreements. We will have to wait for the next WERS (Workplace Employment Relations Survey) survey for the full picture of the quantitative impact of the European information-consultation directive in Great Britain

There are several possible explanations for the scarcity of bodies of employees' representatives in undertakings. The practice of employee representation is difficult, because employees often lack sufficient knowledge of their rights, and also because of a passive attitude on the part of the trade unions, who see the law as a lever used to marginalize the trade union delegates. These fears are confirmed by the studies underlining the place of the mechanisms of direct participation of employees in the CCEE. The weakness of collective players in the workplace and of institutions of social dialogue in Eastern countries means that the employers can decide the form of employee participation, whether this takes the form of direct participation methods or involves the importation of participation mechanisms established in Western Europe. Using a survey on the ground, carried out between 2006 and 2008, among the eight large industrial French groups established in **Hungary, Slovakia and Romania**, Delteil *et al.* (2010) highlighted the preference of management for a "managerial social dialogue". They stress the predomination, in these subsidiaries of French groups, of direct management practices of the workforce (individual meetings, general assemblies, surveys...), which are more prevalent than various forms of dialogue and paritarism associated with social dialogue as it is practiced in the head offices of Western Europe. Although the mechanisms of direct participation of employees also multiplied in the **United Kingdom**, the observers of British industrial relations warn against over-estimating the force of these processes which do not exclude indirect forms of participation, i.e. through representative bodies, including trade union bodies (Terry, 2003).

In the Member States who considered that the directives would bring little or no change to their national situation in terms of employee representation, the transposition still appears unequal. Although in **France and Sweden**, the undertakings are covered between 90% and 95% by a representative body, this figure for **Germany** is only 47%. This difference is due to the legislative frameworks and to the national systems of industrial relations. The reference thresholds are not the same in France and Germany, when it concerns measuring the presence of works councils. In France, the coverage rate refers to an average for all undertakings of over fifty employees, while in Germany the figure refers to an average for undertakings of over five employees. In France, employee representation is a binding right, i.e. the employer is obliged to set up a representation body. In Germany, on the other hand, this right is not automatic. It must be requested by the employees and this could be one explanation for the significantly lower presence of *Betriebsräte* compared to the French works councils, notably in small and medium sized undertakings. In Sweden, the strong presence of

representative bodies can be explained by the high coverage rate of collective conventions which guarantee employee representation.

Table No. 3: Information-consultation and its coverage rates.

	Reference representation threshold	Undertakings covered by the IC	Source
Germany	5 employees	47%	IAB
Belgium	100 employees	2.2% (49% of employees)	ONSS 2005
France	50 employees	90%	REPONSE 2004
Great Britain	25 employees	63%	WERS 2004
Poland	50 employees	12%	Meardi, p.3
Slovenia	200 employees	64%	Survey of 2004 quoted in Meardi (2004)
Sweden	1 employee	95%	Statistics Sweden 2006

As well as the international diversity, the size of the undertaking is also a factor in the existence of a representative body. Thus, the small and medium sized industries usually have less representative bodies than large undertakings. This difference is particularly striking in Germany where the average coverage rate of 47% hides a more complex reality in terms of the size of the undertaking: while over 90% of the undertakings of over 500 employees have a *Betriebsrat*, this rate drops to 60% for undertakings of over 50 employees, and 10% for undertakings of over 5 employees (minimum threshold provided for by German law).

The *size of the undertaking* also varies depending on the sector. Thus, we find less representative bodies in the sectors dominated by small and medium-sized industries. Because of the significant numbers of small and medium-sized undertakings, the presence of representative bodies (elected or trade union), is estimated at 50% in Slovenian undertakings, and some 25% of employees are estimated to be covered by such a body. In **Belgium**, the significant presence of small and medium sized undertakings explains the coverage rate of 2%, when we take as a reference the number of undertakings of over 100 employees with representative bodies. However, the proportion of employees covered by this type of body is 49%. We can thus measure the impact that the lowering of representation thresholds would have in Belgium. If the threshold of 50 employees is applied, the information and consultation of employees would cover in theory 60% of salaried employment (in 4.65% of undertakings), while if the threshold of 20 employees is applied, this coverage would apply to 75.7% of salaried employment (in 11.8% of undertakings) (Oriane, 2010). Conversely, in large undertakings, the practice of information-consultation is often based on a dense network of representatives at different levels of the undertaking: establishment committee, central works council, group committee, European works council and, in some cases, a worldwide group

committee. A survey of the representatives in a large French bank showed that the 37,000 employees were represented by over 800 elected representatives in the 137 local works councils as well as at the central level of the undertaking (Meixner, 2009).

Overall, *the directive does not seem to have caused a massive move to set up employee representative bodies*. The existence of representative bodies varies greatly from country to country, but also from one sector or undertaking to another. Many undertakings have no representative bodies, either because the employees did not request them, or because the management tries to get around the measures that it considers as possibly detrimental to the optional functioning of the undertaking, notably in relation to the costs of such a body. In other cases, there is a dense network of representation, which forms the framework of a continuous practice of information-consultation. This diversity is reinforced by the plurality of the forms of representation.

In general, the universalism of the rule of representation as the representation of all employees seems to be accompanied by a diversification of the practices of representation. This process can be observed especially in the countries potentially most affected by the directive, and where the national legislations transposing the directive provide for the possibility of rights of information-consultation being exercised either through designated trade union representation or by an elected employee representation.

Is there ONE system of employee representation in the United Kingdom?

The transposition of the Directive 2002/14 coincided in the United Kingdom with the continual decline of trade unionism and of the representation in the undertaking since the 1970s. While some observers mention a representation gap, others put forward the idea of a fragmentation of representation forms, whereby trade union structures co-exist with other types of representation bodies. In the light of the last statistics available on the state of the employee representation in Great Britain, the assumption that there is a severe representation gap appears however somewhat hasty and not entirely accurate in our view. In fact, the British survey 2004 WERS (Workplace Employment Relations Survey) highlights that 49% of undertakings and 71% of employees are covered by a representation body (Kersley *et al.* 2006). This rate increases however with the size of the undertaking. 77% of employees, and 63% of undertakings of over 25 employees, have a representation body. 92% of employees in undertakings of over 500 employees are represented. The forms of representation also vary. With a coverage rate of 27%, the classic representation form of trade union representation based on accreditation for collective bargaining only represents a little over half of all the representation bodies in Great Britain. This situation contrasts of course with the history and the power of the trade union monopoly in this country, but it should not hide the existence of other forms of representation (trade union, elected or mixed). Thus the JJC ("*joint consultative committees*"), representation bodies (trade union, elected or mixed) orientated towards a consultation practice exist in 14% of establishments (local level) and in 25% of undertakings (central level). Alongside the trade union members, who carry out collective bargaining, 13% of undertakings have employees who are trade union members who are not accredited to negotiate with the management but who do have a function of employee representation. Finally, 5% of undertakings have a representative who is not a trade union member to defend the interests of the employees by means of regular dialogue with the management.

Finally, the idea of a general representation gap of trade unionism masks sectorial differences. In fact, WERS 2004 shows that the representation is particularly weak in the private sector. While 39% of undertakings of the private sector have a representation body, this figure rises to 90% in the public sector. This difference between the private and public sector is even stronger when we take into account mainly the forms of trade union

representation. While 82% of establishments are covered by trade union representation in the public sector, this figure is only 15% in the private sector. The data available for a private sector like the financial sector, with its coverage rate of 85% which is almost as high as that of the public sector, is a warning against coming to any hasty conclusion about the state of representation in Great Britain.

The place given to negotiation by the ICE Regulations brought about a reinforcement of a diversification of representation forms which have been around since the 1980s. The historical process of industrial relations is at the centre of a multi-layered institutional structure that explains why we can observe in Great Britain a diversity of forms of employee representation in the undertaking. Terry (2003) observes two types of path of the employee representation today in the United Kingdom. On the one hand, there is the classic system of accreditation by the employer of trade union delegates. In the beginning, this system was the only form of representation within the undertaking. But today we observe the emergence of a form of new representation in the British context not based on accreditation, but on the right to representation allocated not to a trade union, but to all undertaking employees. This type of representation, which has been called “modified single-channel”, appears as the most dynamic today.

In the light of the diversity of situations, and taking the case of Britain into account, it seems difficult to talk about ONE system of employee representation (c.f. box). Although contrasted, the statistical table on employee representation also invites us to mitigate the idea of a “representation gap” of employees in the undertaking that could be suggested by the drop of rates of trade unionism in Europe. Certainly, the statistics indicate the existence of a plurality of situations, suggesting that the directive does not have an automatic impact. However, studies highlight a mobilization of the Directive 2004/14 to introduce measures of employee representation in undertakings where none previously existed. Regarding the diversity of the coverage rates of employee representation, which factors - from the point of view of existing studies - reveal the conditions in which information-consultation becomes a relevant rule in the eyes of the players? It seems indeed that the transposition of the directive in the practice of undertaking players implies that the election of employee representatives by all employees - as a prerequisite for the exercise of information-consultation rights - is recognized as a legitimate measure by trade union organizations, and these people as relevant negotiation partners by the management. The identification by the players of a need for representation frameworks for the needs of information-consultation is also to be observed in a plurality of situations: the election as a reinforcement strategy of the trade union presence, an initiative of the management to better know the needs of the workforce in situations of significant turnover and finally when there are restructurings.

In a first configuration, the information-consultation directive is used by employees to reinforce the mechanisms which allow them to make their voice heard by the employer. These collective mobilisation efforts may also be the opportunity for trade unions to reinforce their presence at undertaking level. One such example is the case of the British publisher Macmillan, where the trade union Amicus took legal action against the employer in order to obtain a body of trade union representation (EIRO, 2007). Although the British law on information-consultation caused few conflicts, the Macmillan case highlights the potential scope of the right for employees and trade unions as a means of taking action against employers who do not apply the law. In the Macmillan case, the scope of the right is all the more important because the legal action of Amicus is part of a long term trade union mobilization aimed at obtaining a employees representation body, through the laws on information-consultation and on trade union accreditation. Contrary to what is suggested by the idea of competition between trade union bodies and elected bodies which animate the trade union organizations in Great Britain and in the CCEE, the action of Amicus also shows

how the election mechanisms can constitute a resource for the reinforcement of a trade union presence. At Macmillan, the 2004/14 Directive acted as a legal resource to establish the base of a debate with the management. In March 2006, 10% of the employees of Macmillan requested the opening of negotiations on an IC agreement. As the employer had not however opened negotiation in the six months following the request, Amicus obtained from the Court of Arbitration the application of minimal legal measures. As the management did not organise the election of representatives as provided for by the law, Amicus decided to take the case once more before the Court of Arbitration. On the request of the trade union Amicus, representing the Macmillan employees, the Central Arbitration Committee (CAC) arbitration court obliged the Macmillan management in February 2007 to hold elections in order to implement a permanent body of information-consultation.

In situations more specific to the CCEE, the introduction or the reinforcement of frameworks of employee representation intervenes on the initiative of management in the aim of widening the debate with the employees to resolve the problem of significant turnover (Meardi *et al.*, 2008). Meardi *et al.* also highlight how, unexpectedly, it is not so much Europe, but processes specific to the CCEE, which tend to reinforce the practice of social dialogue: at undertaking level the employers are forced to begin dialogue because of the shortage of workforce caused by huge employee departures in the form of turnover and emigration. With respect to theories on a process of reinforcement of managerial practices of consultation to the detriment of more classic forms of collective bargaining, it is interesting to note that the measures of direct participation are accompanied by a strong demand, notably on the part of the employers for a collective management of work. This is illustrated by the case quoted by Meardi *et al.* (2008) of an employee representative on the Board of Directors of an American bank who is required to assume the function of collective bargaining, or that of German automobile companies where the employees are represented by the human resources department. In this process, the Directive 2002/14 appears as a tool, a resource to organize an area of debate between management and employees. Because it would seem that the requests of the employees to implement representative bodies are better heeded by management when there is a high turnover of employees. Other studies show however that employee representation in the CCEE does not depend only on managerial initiatives. At Toyota in Poland, for example, the management at first refused to begin salary negotiations with the local branch of the trade union Solidarnosc, created in 2006 by a group of employees to express their dissatisfaction about the management salary policy. (Jürgens and Krzywdzinski, 2007). When 120 employees joined this trade union, the management was forced to open discussions with it. To avoid dealing with the local branch of the trade union, the management preferred however to organize the election of a works council, thus enabling the continuation of discussions with employees who were not trade union members. Since then, the rate of trade unionism of the 1,000 employees has reached 20%, and the trade union managed to obtain all the works council seats – like in the Macmillan case, the case of Toyota in Poland illustrates how the election of a works council can be the starting point of a reinforcement of the trade union representation in undertakings.

**From extraordinary to regular procedure:
the scope of restructurings for the election of employee representatives in a
London financial establishment**

The implementation of a representation body at one of the largest employers of the London financial scene goes back to 2005. The body, known as the “UK Forum”, is composed of eight representatives elected among the 8,000 employees in the United Kingdom, five of which specifically represent each of the five entities of the undertaking. The organization of elections of representatives in 2005 was a first milestone in this

undertaking. The practice of representation had already been introduced through the designation of representatives at the EWC, but these representatives had not then been elected.

The employee representation in the organization and its functions are regulated by a 2005 agreement. This agreement provided for an employee representation framework through elections every two years by all employees of eight representatives, and the holding of four meetings per year with the management. As well as the hours of delegation of the representatives for the meetings, the agreement also makes provision for the possibility of organizing preparatory meetings in the absence of management. The agreement also specifies the common establishment of the agenda among the employees. The consultation is defined here as a process aiming at “informing” the representatives and “discussing” with them “the impact and effects of potential organizational charges”. The process of consultation, which should be “transparent”, is clearly orientated towards the production of a decision in the interest of all parties. In this process, the management’s power of decision remains untouched, notably through a confidentiality clause, but this power is also implicitly restrained by the commitment of the management to “to take entirely into account the position of the forum *before* (our emphasis) the final decision is taken”. Although the agreement does not make provision for a consultation timetable, it still implicitly guarantees the moment of the consultation, as this should take place prior to the decision.

The decision of the bank to put a representation into place can be explained firstly by the implementation in the United Kingdom of the Directive 2002/14. The agreement is also part of a context of a restructuring project of workforce management activities. The impact of this project on employment is therefore judged to be unparalleled in the history of the undertaking, a reason why the management of human resources decides to consult the employees on this restructuring. In order to better confront the amplitude of change, both of the undertaking and of the chosen management method, a special *ad hoc* “asset management” committee was therefore put into place. This *ad hoc* committee was composed of employees of the “asset management” unit. It was after this first experience of consultation that the election of the “Forum” was organised. Since then, the role and the functioning of the consultation have greatly evolved. Restructurings may be still on the agenda, but consultations have been widened and cover today all of the projects and policies of the human resources of the undertaking (Meixner, 2009).

Finally, it seems that restructurings represent particularly favourable opportunities for the development of employee representation practices. This could seem paradoxical in that the restructurings represent tests of social relations in the undertaking. But it is just because the restructurings reinforce the uncertainty contained in the contractual employment relationship, that information-consultation is regarded by the players, as a means of collectively facing up to a new situation. The case of a London financial establishment also illustrates how the discovery of the procedure in an exceptional context can be the start of a regular practice of information-consultation, and the introduction of a permanent employee representation body (see box). The restructurings may present opportunities for institutional learning-processes of information-consultation. For the employees’ representatives, the carrying out of information-consultation implies the learning of an activity orientated, not just towards the redistribution of business profits, but also towards the production of knowledge on its economic activities.

3.1.2. A support of the representation functions: a more cognitive mobilisation

A second indication of the reinforcement of the representation under the effect of the mobilization of the right to information-consultation results from the support of the practice of the representation. The democratic tradition is at the centre of systems of industrial relations in Europe in the form, for example, of the “industrial democracy” envisaged by the Webbs at the end of the 19th century in their analysis of the action of British “trade unionism”¹³. In this context, the interconnection between trade union action and the strike constitutes the lever of a more equal distribution of resources between employees and undertakings. But the collective action of employees is not reduced to this collective pressure for a more equal distribution. Historically it led to a questioning on the means of the trade union action, with, for example, in Germany, a conceptualization of economic democracy (“*Wirtschaftsdemokratie*”) as codecision in economic matters. It is this second dimension of the employee representation that contains the recognition of rights to information-consultation.

For employee representation, the extension of these rights corresponds to a change with respect to its classic functioning. The participation in economic decisions implies in fact the capacity of employees and their representatives to study the information transmitted by the employer, and to formulate an alternative project to that of the management. In this context, the exercise of the representation involves a deepening of the knowledge of the undertaking, i.e. of the cognitive dimension contained in the representation. This also means that the representation can be exercised only in the form of supportive action on the part of the employees which aims to demonstrate their collective power. The right of information-consultation guides the representation towards the production of knowledge of the undertaking, which implies a mobilization which is more cognitive than collective. In this context, the conflicts between the management and the employees show more than simple discontent on the part of the employees, but are based on better identified aims, and aspire to using a better understanding of the undertaking to produce a counter-expertise. The legal conflicts which intervene to specify a particular issue of the consultation procedure bear witness to this.

In this process of “restructuring of the representation” (Meixner, 2010), in order to better exercise the rights of information-consultation, it is also the nature and the forms of representation that seem to change. The representation is carried out in the form of groups where the cooperation between the various players is based on the aim of constructing an understanding of the undertaking. Contrary to what is suggested by the idea of an exclusion of the trade union representatives from procedures reserved for elected bodies of personnel, surveys on the mobilization of information-consultation in the context of restructuring show that the elected and trade union representation is envisaged as an overall concept (Didry and Jobert, 2010; Meixner, 2009). In the context of France, the mobilization of information-consultation is the responsibility of the works council. However, the trade union organizations are well represented in these bodies which are gaining importance in the eyes of the trade unions as a resource to influence management decisions. This group is sometimes enlarged to include other players. The production process of knowledge of the undertaking involves the intervention in the capacity of experts, of players external to the representation bodies, and maybe even to the undertaking, on both management and representatives’ sides. This

¹³ The concepts of industrial democracy and trade unionism were examined by the Webbs in their reference publication “Industrial Democracy” (1897). For a French translation of the last chapter of this work, in which the authors summarize the main conclusions of the book and develop also their political program for trade union action, see Béthoux *et al.* (2008).

expertise is mobilized both externally and internally with the aim of interconnecting different areas of knowledge, ranging from legal expertise on procedures and contracts to the concrete experience of process of production in the workplace. The information-consultation thus appears as a cause which involves all the employees. This configuration of players sometimes takes the rather non-classical form of employee representation. In the above-mentioned London financial establishment, IC calls for the involvement, alongside the elected body, of delegates of different “communities” of employees (women, homosexuals, ethnic groups) with the aim of widening the outlook both on management projects and on the channels of information towards the employees. This configuration of players reflects a process of blurring of the borders between social dialogue, which reflects interactions between the employers (and their representatives), the employees (and their representatives) and the State on the one hand, and civil dialogue which includes a wider range of players, on the other.

The representation group is also constructed through a refining of institutional equipment of representation at different levels of the undertaking. In fact, the employee participation in strategic decisions means a greater understanding of the undertaking. In an undertaking where the workplace is separate from the decision-making centre, the exercise of the representation implies a real institutional architecture allowing employees to construct a multi-layered instructional structure. Depending on institutional contexts, this requirement covers different issues. In contexts where the legislator provides for different levels of representation corresponding to different undertaking boundaries, the difficulty for the representatives is to identify the relevant levels of the mobilization of the information-consultation, and then to construct a coherent functioning of these bodies, in order to prevent the architecture from taking the form of a simple stack of representative bodies. In other contexts, such as the United Kingdom, where the legislator does not establish the basis of a representation structure in the undertaking, the practice of consultations implies the putting into place of a representation system specific to the undertaking, independent of the trade union structure. In any case, a renegotiation of representation structures and means is essential for a good exercise of information-consultation. To specify the organization of the representation at undertaking level, an agreement was signed, for example, at Solvay-Sodi, a Bulgarian subsidiary of the Belgian Solvay chemical group. The agreement concerns the resources of representatives (training delegation period, preparatory meetings) and the “rules” and the content of the information. It also makes provision for the implementation of a representation body at group level. Generally in large undertakings, we can observe a *specialization of places of representation*, also in the form of sub-commissions which allow for a better identification of issues and a more targeted action on the part of the representation. A division of labour is therefore put into place in the representative body which responds to a desire on the part of the representatives to have a greater influence on the consultation through their special knowledge of a particular sector of activity or negotiation topic.

This process of (re) negotiation of the organization of the representation refers to the procedural dimension contained in the directive, in that it is left up to the Member States and the undertaking players to define the content and the means of the information-consultation. It also reflects the analysis of the German sociologist Friedrich Fürstenberg (2000) who showed how the transition from authoritative unilateral forms of social regulation to a practice of social dialogue requires reinforcement and a refining of representation structures. More basically, the renegotiation process of the representation at undertaking level shows that the undertaking, contrary to that which could be indicated by the establishment of representation thresholds – is not fixed, but that its internal and external business boundaries are also negotiated through the debate between the management and the employees. The act of identifying the employer, i.e. of the relevant negotiation partner for the employees, therefore becomes a central issue to ensure the actual exercise of the representation of employees, especially in a context where the managerial and legal structures tend to be separate (c.f. box).

Identification of the employer and deliberation on the business boundaries in the banking sector

For the past fifteen years or so, the banking sector has been an area of business restructurings which take the form of a fragmentation of activities of front and back office on the one hand and of a legal fragmentation of units coming under the same management on the other. For employee representation, this process is associated with a two-fold challenge: how to influence the decision of management where the information is parcelled out between different undertakings? How to tackle the diversification of working condition which can lead to inequalities between the activities? Faced with these issues, we observe in France and Germany that employee representation actively tries to recreate a relevant unit of the undertaking within economic and social units (*Unités Economiques et Sociales* or *UES*) (Meixner, 2009). This is a group of undertakings legally independent from each other but which share a management unit, a complementarity of activities and a community of workers. In the banking sector, this system is introduced either to create a representation unit, as in the case of mergers (example: Crédit Agricole) or in a more pro-active dimension, such as in the Deutsche Bank or at the Société Générale where this unit is used to improve the structural mutations of undertakings and to ensure a single representation for retail banking and the finance and investment banks. At the Société Générale, a “*unité économique et sociale*” (UES) was obtained before a court following the externalization of activities for asset management. At the Deutsche Bank, it was the intense mobilization of the group committee to ensure a representation common to all of the employees following the externalization of retail banking which ensured the creation of the UES. We can thus see how the redefining of representative frameworks to maintain cohesion of the community of workers also has an impact on the strategic choices concerning the activities of the bank and the business boundaries.

3.1.3. *Simples systems and complex systems of representation*

The institutional processes of representation suggest that the representation structures reconfigure themselves through the effect of a reinforcement of the mobilisation of the rights of information-consultation by the representatives. In large undertakings, this notably because in a situation where the undertaking increases in complexity, the employer is not fixed. In light of this situation, a main principle of the representation consists in a reconstruction of the unit of the decision centre around which the interests of the employees are represented, as illustrated notably by the mobilization of the legal tool of economic and social units.

Differences can be observed however with respect to the capacity of representatives to identify the employer and to organize the institutional infrastructure of the representation in order to influence the decisions at the relevant level of the undertaking. Although the distinction between trade union organizations and elected bodies does not appear to determine the capacity of the representatives to reformulate their function and to reorganize their representation practices, all the representation structures still do not appear to be uniform. The distinction between simple and complex representation systems (c.f. table N°4) provides a good illustration of this diversity of undertaking representation systems depending on their capacity to produce knowledge of the undertaking, and to present the relevant negotiation partner with a vision of the undertaking based on this knowledge.

Table No. 4. Simple system and complex system of representation.

	Simple system	Complex system
Rules of participation in decisions	Concentration on internal organisation of representation	Complex group of clarified rules
Structuring of the undertaking space	Simple institutional equipment Representation not exercised at relevant level	Complex institutional equipment Strong interconnection of representation levels Decision-making centre identified
Register of action	Support / contestation	Proposal

Source: Meixner (2009), p. 489.

The simple systems correspond to cases where the representation structure is not really suited to the complexity of the undertaking. The institutional equipment which structures the undertaking area is simple and the representation is not carried out at relevant levels. In some cases, it is difficult for the representation to emerge and sometimes to be heard by the employer. This is also true in the case of undertakings subsidiarised to the fragmentation of representation areas between the group and the subsidiary. A good example of this is the case

of a large German bank bought at the beginning of the 2000s by an insurance group where the institutional tools are not simple, but where a partitioned mobilization of representative bodies hindered their capacity to influence the complex decision-making process headed by the group management. While the successive restructurings of the bank were initiated by the parent undertaking, the decisions of the group management are not debated at group level. In other cases, the representation was carried out through a single body at central level, where the weakness of the local base prevents the development of a critical view on the management projects through better knowledge of the undertaking (see box).

A difficult exercise of the information-consultation in a simple representation system

The case of a French undertaking specialized in credit illustrates how the existence of representation frameworks orientated towards information-consultation is not easy in a context where the representation was usually carried out through the trade union organizations whose role was not to question management projects, but to negotiate a redistribution of business profits and to highlight individual claims (Meixner 2009). When the management announced a restructuring plan of the networks in the mid 2000's, the architecture of the representation in this undertaking turns out to be not adapted to employee participation in strategic business decisions. It thus appears that this change of structure of interactions between management and representatives caused a weakening of the integration of representatives in the decision-making process of the management.

Confronted with the inexperience of the information-consultation procedures, the management and the employees' representatives preferred to use trade union negotiation than to use the procedure of information-consultation to confront the restructurings. Although the negotiation allowed the implementation of measures accompanying the restructurings, the trade unions questioned the real capacity to influence restructuring projects outside information-consultation procedures. It later became clear that the consultation of the works council was a better means of organising an involved debate on the future of the undertaking. In order to remedy this little-developed practice of consultation in the works council, the representatives implemented trainings to acquire tools for reflection on the restructurings on the one hand, and also initiated a reflection on the institutional organization of the representation system overall, on the other hand, as this organization had turned out to be unsuitable for the mobilization of rights to information-consultation. The employee representation in this undertaking is in fact organized on the basis of personnel delegates, headed by a single works council at undertaking level. Initially placed in the network agencies, the personnel delegates are now present in the 17 regional centres which each employ between 80 and 300 people. The works council represents the entire 4,000 undertaking employees, those of both the commercial network and the headquarters. In a context where the majority of representatives have an experience of personnel delegates, both management and trade unions point out that the works council resembles more a "super personnel delegate" where the elected representatives debate in particular local issues, which are given greater attention than questions on the future of the undertaking and the consequences for employment.

A simple or partitioned system of representation frameworks also corresponds to a simple register of action which does not allow the expression of a complex opinion or complex strategic questions. In simple representation systems, the exercise of democracy consists of expressing either support or opposition to management projects. This is the case as soon as the representation bodies appear as the extension of the human resources

management. In a context where the representation is not constructed as an autonomous structure aiming to highlight the social configuration of the undertaking, the representatives support rather than discuss the managerial line. In other cases, the action of representatives is part of a criticism of management projects without succeeding in taking the protest any further. In the context of restructurings, for example, the denunciation of projects judged unjust – which is sometimes expressed through the collective mobilization of employees – and not towards the drawing up of a counter-expertise on the relevance of economic and industrial management choices.

On the other hand, the complex systems are based on complex institutional equipment. The representation levels and, where present, the representative bodies (elected and trade union) are strongly interconnected. The complexity of the institutional architecture seems in these cases as the basis of integration of employees in the decision making process. The mobilization of the right to information-consultation on the occasion of the merger of two French banks shows how the representation does not influence from the outside an undertaking path unilaterally forged by management, but that this path is also constructed through the structuring of representation institutions (see box).

Invent representation frameworks appropriate for the issues of information-consultation: in the case of the merger Crédit Agricole/ Crédit Lyonnais

Historically, the employee representation in the undertaking is organized in the United Kingdom through the figure of the shop steward, in Germany through the *Betriebsrat* and in France through the *Comité d'Entreprise*. This organization corresponds to a situation where the undertaking was the same thing as the employer. With the emergence of large undertakings with multiple establishments and the ensuing greater complexity of the undertaking structure, where it is not always obvious who the employer is, the negotiation partners of representation instances in the establishment do not correspond with the decision-making places.

The case of the merger of the Crédit Agricole with the Crédit Lyonnais is a good illustration of the inventiveness of representatives to impact on a process which the classic representation frameworks would not have provided for (Meixner, 2009). It also highlights a form of plasticity of representation areas which can be observed in the context of restructurings. In the debates on the implementation of the merger, although in the view of the both managements, the two undertakings are considered as a unit, the representation is carried out in periphery areas intended to become null and void. Confronted with a management intending to operate in a global perspective including the two undertakings, the representation is broken up. This results in a risk that the representation could move away at the very moment when the organisation of the new undertaking is being established. This situation is all the more precarious for the representation because of the risk that the management could create a situation of competition between the different representation bodies. In the face of an uncertain situation in a context where the new organization of the undertaking is not yet effective and when the management of the company act in a global approach of the existing undertakings the representatives completed the representation architecture with a dialogue committee to bring together the IRPs (staff representative organisation) of the Credit Lyonnais and of the Credit Agricole.

Implemented by an undertaking agreement of 17 September 2003, this committee - which does not replace the existing bodies – has the aim of being a body of dialogue to accompany the bringing together of the two banks. Composed of six representatives of each trade union organization, this committee allowed for preparation and coordination prior to the job-saving plan negotiations in the context of the merger. It is the expression of a

process doubly cognitive in the context of mergers, where the representatives were from undertakings with different histories. In such a situation, knowledge of the future undertaking is acquired first through knowledge of the past undertaking.

The rules of participation in decisions are clarified through the identification of the decisional centre. The institutional architecture is also mobilized as a cognitive equipment to increase the knowledge of the undertaking and to formulate opinions and alternative proposals, independent of the management.

3.2. Information-consultation and undertaking “joint regulation”

3.2.1. The co-construction of the undertaking as an aspiration of the information-consultation

The employer’s obligation to inform the employees and their representatives on the undertaking situation and consult them on projects concerning the undertaking’s future becomes a simple *project* which, in a situation of absolute subordination of employees to the employer, corresponds to a management *decision*. In this sense, the decisions concerning the undertaking are part of a process where the employee representation forms the base of a questioning of the targets and aims of the management projects. This *consultation* process sometimes takes the form of a *feedback* mechanism aiming to improve the management decision. In other situations where the players defend the diverging interests and try to reach agreement, the consultation corresponds to a *negotiation*. Embedded in information-consultation procedures, the negotiation can also evolve towards a shifting of the terms of the debate. In this context, the reflexive dimension contained in the representation serves as the basis of *deliberation* processes on the undertaking.

In a first form of mobilization, the procedures of information-consultation appear as a means, for the management, of optimizing their decisions in a feedback process. We find this representation approach in the British undertakings who have just introduced such procedures where we see that the consultation is not carried out with the sole aim of improving the actual decisions, but also to prevent the implementation of reorganizations from being opposed by opposition and criticisms in the establishments (Koukiadaki, 2008). In the context of a restructuring, the feedback mechanisms are part of management policy which tries both to highlight the insufficiencies such projects, and to make the employees support the management project. It is in this perspective that the consultation practices in the CEE are introduced, also in order to improve the undertaking image (Meardi *et al.*, 2008). In this perspective, the consultation of employees’ representatives is part of a “modern” approach of human resources where employee consultation is regarded as part of finding the “good solution”. The consultation can thus be understood not as a measure of corporate social dialogue but as a managerial decision method. That what may appear to be a simple game of question and answer sometimes evolves however towards a negotiation on the information transmitted by the management. The representatives will then point out the contradictions of a restructuring project which cuts back on the workforce, all the while attempting to improve customer service.

In a second type of situation, the information-consultation is used as a lever to open *negotiations*. This process can be observed particularly in the context of restructurings where it is often difficult to distinguish what corresponds to consultation and what to negotiation. In France and in the United Kingdom where employer is not legally obliged to negotiate its restructurings projects, the employee consultation sometimes results in a negotiation notably

on the future of employment. This negotiation deals with the implementation conditions of the reorganization of the undertaking and the impact of this on employment. The negotiations dealt mainly with material conditions relating to employee departures or mobility. In this type of negotiation, the participation of employees in decisions which affect them is carried out in a managerial process aiming to obtain forms of compensation for situations experienced as fatalities. But, the consultation does not deal with the actual decision, which is finally considered as an objective fact of the consultation. One such example is the process of social dialogue in the context of restructurings in the Polish subsidiary of the Alstom group (Lefresne and Sauviat, 2009). This restructuring shows that neither the access to information, nor the implementation of a formal dialogue resulting in the negotiation of an accompanying plan allowed the trade unions to discuss whether the analyses proposed by the management were well based. More fundamentally, it illustrates a situation frequently described by the observers of the social dialogue in the CCEE, i.e. the incapacity of trade unions to question the underlying hypothesis of the decision to restructure through fear of endangering the undertaking's "health". In other cases, the representatives do manage however to emerge from an essentially quantitative *a posteriori* management of employment to direct the debate with the management towards an anticipated approach of employment in the undertaking (c.f. box).

**From negotiation to the deliberation on employment:
the case of the Barclays "relocation" agreement**

In November 2003, the management and the representatives of Barclays bank signed an agreement on relocations which provided for redeployment and training measures for employees affected by this type of restructuring. By both its content and the process of negotiation which preceded it, this agreement illustrates the change of emphasis that employee consultation can produce on the future of employment in the context of restructurings¹⁴. In 2003, the Barclays management studied, for the first time, the tempting prospect of relocating certain activities in some so-called "low cost" countries. Relocations offer very interesting benefits. However, the management was also confronted with the problem how to recruit qualified employees, compounded with the effect of employee departures due to relocations.

It is on this contradiction that the trade union Amicus acted when all the efforts to push the management to abandon their project failed. The trade union thus began a reflection on how to preserve the jobs of employees affected by relocation projects dear to the management. In a context where the relocation of *back-office* activities were likely to increase, while the number of recruitments for the *front-office* activities was increasing, the trade union demanded a reinforcement of redeployment and training measures. As the management wanted to avoid forced departures, the agreement includes this trade union proposal.

In 2004, following this agreement, 523 jobs were relocated in India. Since then, some 300-400 jobs have been relocated, notably to India. Within the framework of the "relocation" agreement, a redeployment was found for 70% of the affected workforce, 50% in the undertaking, and 20% externally. The other 30% correspond to employees who preferred to leave the undertaking with a cheque, and the representatives say that redeployments are usually successful.

The "relocation" agreement of Barclays highlights how the employee representation can modify decision-making on restructurings, but also how it impacts on the very content of restructurings. Through the debate with the representatives, the very issue of restructuring

¹⁴ The analysis of the agreement is based on a case study of the Dublin Foundation of 2006. See: *European Monitoring Centre on Change* (2006).

is redefined. Effectively, the debate shows that the strategy of cost reduction to which the relocation responds, reinforces in reality another dimension of restructurings which is the management of employment in the undertaking. The job cuts in the *back-office* coincided with increased recruitments in the *front office*. To this paradox, the trade union opposes the idea of mobilizing the employees affected by the job cuts in the *back-office*, in order to respond to needs in the *front-office*. The representatives contribute to creating links between that which among the management appear as two independent phenomena. In this way, the debate shifts the agreement on employment from a quantitative to a qualitative point of view. The possibility of professional mobility, there where the bank had a recruitment policy directed towards specialized employees recreates a unit of the bank beyond the different activities (Meixner, 2009).

Finally, when the debate questions the relevance of information and projects proposed by management, the information takes the form of a *deliberation* process on the undertaking future. The debate first tries to establish a joint diagnosis on the undertaking situation (Didry and Jobert, 2010). In this perspective, the information does not correspond to a unilateral process which sees itself as the transmission of information by the employer to the representatives, but it appears as a process of co-construction of the knowledge of the undertaking. This debate can therefore result in the management being obliged to abandon its project in a case where the representatives succeed in demonstrating that the project lacks relevance. In other cases, the deliberation makes the issues and terms of the debate evolve in order to sometimes arrive at innovative perspectives on the management projects. In an anticipation approach which exceeds a quantitative approach of employment, the subject of the debate is changed, for example, from the reduction in the workforce to a questioning on the organization of work and its implications in terms of stress, or a provisional management of employment and skills. The shifting of issues of the debate also concerns a temporal and thematic extension of the consultation. The deliberation process effectively means that the players have enough time to learn more about the undertaking. More basically, it means that the management informs the representatives prior to the public announcement of the decision. In certain cases, the participation of employees in decisions on restructurings does not stop with the beginning of the implementation of the project, but is prolonged during the redeployment in follow-up committees, for example. In the case of Barclays, the successful experience of the negotiation framework of restructurings is at the centre of a progressive extension of the consultation to a wide range of subjects, also reminding us that the restructurings in the bank are not solely focused on employment. The consultation of representatives on the targets fixed by the management for each position in retail banking also highlights that it is all of the work organization which is affected by reorganization projects, and it is in this context that it enters into the framework of dialogue processes with the representatives. In a context where the managerial structure and the legal structure of undertakings tends to separate, a greater knowledge of the undertaking can lead, as in the banking sector, to a redefinition of business boundaries through a questioning of the nature of economic activities (c.f. supra/above).

3.2.2. *The clarification of the rules of employee participation*

In its most developed forms, the consultation takes the form of a deliberation on the future of the undertaking and of the activities which are constructed through the increasing complexity of representation frameworks which often also involves a clarification of the rules of employee participation. In a more technical perspective, the clarification of the rules of functioning of social dialogue is also related to the difficulty of organizing the debate in institutional frameworks little explored previously, which the players often say they “*only discover when problems arise*”. Three processes correspond to the products of consultation on the undertaking which “slips” (Adam and Reynaud, 1978) from the content of the consultation to the defining of the very rules of employee participation in strategic business decisions: the refining of the procedure, the articulation of levels and the defining of the temporality of the consultation.

The mobilization of the right of information-consultation is basically a transition from an authoritative process of standards production to more participation-orientated procedures of the social regulation. Concretely, the reinforcement of the consultation practice is based first of all on a refining of the consultation procedure. This refining goes notably by a defining of different consultation stages. The procedure of consultation introduced at the beginning of the 2000s in a large British bank allows us to understand the role of the representatives throughout the decision process – from its elaboration to its implementation (c.f. box). It forms the framework of a process of joint corporate definition in which the clarification of the rules of debate also forms the framework of a clarification of the management projects.

The precision of the consultation procedure at the level of a major British bank

In the absence of a precise legal framework, the practice of consultation is, in a large British bank, the source of a clarification of the consultation procedure (Meixner, 2009). This procedure makes provision for a complex consultation prior to any official announcement of a project concerning employment. An internal document of the undertaking clarifies the functioning of this procedure, giving notably an indicative framework of the length of the consultation procedure and also of its content.

A first major stage of the consultation concerns the very project of restructurings and is carried out over six to eight weeks. Firstly, the central management submits the restructuring project to the secretary of the national trade union committee of the undertaking as well as to the trade union official. He transmits information on the aims of the project, the characteristics of the new planned organization, the impacts (including figures) on employment and the envisaged calendar. This meeting is the subject of a Procès-verbal (report) to be communicated in the five days following the information. In a second stage, the information is communicated to representatives of entities concerned by the restructurings. At this stage, the information is transmitted to a larger circle of representatives and the procedure becomes more formal. It is at this point that the trade union is expected to formally express its opinion on the management project. The project of restructuring is therefore the subject of a common declaration transmitted to the employees and to local management. On the basis of these consultations, the human resources department is then given two to four weeks to draw up the concrete measures of restructurings, and prepare the announcement of the restructurings. When the restructurings are announced to the employees, they are no longer a project, but have already been decided.

In a second major stage, the consultation no longer involves the relevance of the project, but its concrete implementation. Conform to this aim, the second phase of the procedure occurs at the level of the units in question, or of the employees in question. The announcement to the employees is accompanied by the holding of individual interviews during which the management informs the employee of the accompanying measures negotiated with the trade union. Following these interviews, the representatives are informed of the concrete implementation of the project and of its real impact in terms of employment. Then the individual meetings take place. During the two weeks following these interviews, the employees notably with the help of the trade union have the opportunity to formulate objections concerning their situation and appeal. The project is therefore only implemented after a consultation period of at least fourteen weeks.

In large undertakings, the clarification of the stages of consultation is also accompanied by an organization of the procedure at the different consultation levels. The interconnection of consultation levels also corresponds to the second aim of clarifying the rules on how the procedure functions (c.f. box). Through this process, a centralization of the consultation also seems to operate as if the decentralization of the social regulation of the branch towards the undertaking were accompanied by a centralization of the regulation at undertaking level (Meixner, 2009).

Finally, the clarification of the rules affects the temporality of the consultation. If, in certain cases, more time is needed for debate to give the players time to produce a common position in the undertaking, the consultation on the actual consultation procedure may sometimes reduce the time of consultation. This second case can be observed, for example, at the level of an establishment when the consultation aims essentially to implement an agreement negotiated at group level. The centrality of the length of procedures is reflected in the importance given to it in France in the negotiation of method agreements in the situation of restructurings (Didry and Jobert, 2010).

The reinforcement of the consultation at the central level of the undertaking: the case of a major French bank

With the first restructurings affecting all departments of a large French bank, a centralization of consultations became necessary (Meixner, 2009). In the case of a decision affecting more than two units, the French Labour law requires a consultation of the Central Works Council as well as the consultation of the directly concerned local works councils. But the legislation does not specify whether this consultation should be successive or simultaneous. Neither does it define the order of consultations between the different representation bodies. Faced with this fact, the elected representatives wanted to reorganize the procedure of information-consultation of the "*instances représentatives du personnel*" (IRP) or staff representative organisations to give greater importance to the Central Works Council. Following the first important reorganization of the undertaking in 1993, the elected representatives demanded that the Central Works Council should be informed before the local bodies, insisting on the importance of consultation at undertaking level. Confronted with a management which was opposed to greater involvement of the Central Works Council in the procedure, the CFDT trade union (Confédération française démocratique du travail) instigated a legal action resulting on the implementation of a budgetary procedure in 1996.

This budgetary procedure was based on two principles: the information and the consultation at the level relevant to the decision and the implementation of a procedure which interconnects the representation levels. In this way, a consultation of the Central

Works Council was organised in two stages. A first consultation was held in July on the general directions and the underlying macro-economic elements. A second consultation was held in December, at the end of the decisional process defining the concrete budgetary directions in terms of employment (workforce numbers, development of structures...). Between these two consultations, a period of internal consultation was held on the budgetary choices where the general management “questions” the local management on the workforce requirements for the coming year. Once the Central Works Council had been consulted on the decided budgetary choices, each works council was then consulted during the first term on the local implementation i.e. on the type of management of the upper limits of workforce. The consultation of the Central Works Council which was initially practiced in an exceptional case is of the type that is integrated into the regular procedure of information-consultation.

3.2.3. A plurality of definitions of the undertaking

Because it forms the framework of a possible debate on the future of the undertaking, the consultation process can involve the confrontation of a plurality of visions of the undertaking. One single study on the mobilization of information-consultation in the banking sector in France, Germany and in the United Kingdom demonstrates the plurality of definitions of the undertaking as they are constructed through the debates between the management and the employees’ representatives. The reading of agreements resulting from the debates on the restructurings shows three main conceptions of the undertaking (c.f. table N°5). These three approaches of the undertaking are not mutually exclusive. The agreements are usually complex and they interconnect several visions of the undertaking, illustrating both the influence of the representation on management projects and the limits of this representation when there is a change of emphasis on the restructuring projects.

Table No. 5. The three conceptions of the undertaking: content of agreements, nature of debate and approach to restructuring.

	Content of agreements	Nature of debate	Approach of restructurings
The undertaking as management	Departure compensation	Compensation	Restructuring as a given fact
The undertaking as an employer	Redeployment measures	To bear in mind the contractual obligation of the employer	Restructuring as a process to be anticipated
The undertaking as a community of workers	Rules of employment and of representation	Deliberation	Restructuring as a opportunity to deepen the knowledge of the undertaking

Source: Meixner, 2009, p. 391.

A first approach to restructurings consists in considering them as externally imposed phenomena, notably as a result of the introduction of new technologies. In this perspective, *the undertaking is taken to mean the management* and the representatives direct the debate on the conditions of employee departures or mobility. Although representatives may have significant influence on these departure conditions, the restructurings are considered as externally-imposed facts, and the representatives often approach them with certain fatalism. In this type of debate, the “bank” for the representatives is first of all the management, and in this way they demonstrate a distance between them and projects which they do not always support but for which they too have no easy solutions, apart from cost and workforce reduction measures.

A second conception of the undertaking is visible through a set of measures which aim not so much at improving the departure conditions of employees as to guarantee the job security, either in the undertaking, or outside it. The agreements thus include redeployment and training measures, with the aim of keeping employees in employment. On the initiative of representatives, these measures are proof of a capacity of representatives to emerge from a quantitative *a posteriori* management of employment to orientate the debate with the management towards an anticipated approach of employment in the undertaking. The drawing up of these solutions requires cognitive work on the part of the representatives, aimed at increasing the knowledge of the work organization, to identify new professions and to explore redeployment measures. The change in outlook takes place over a long time, the time needed to gather information. At the same time, the redeployments require a post consultation, in the form, for example, of a follow up measure. The restructurings are therefore the opportunity to acquire greater knowledge of the undertaking which allows the formulation of alternative solutions. This definition of the restructurings issue is accompanied by a change in outlook on the changing undertaking. *The undertaking is here defined as an employer*, this comes back to clarify the contractual commitment between employees and the undertaking that the restructuring projects aimed to sever. According to this approach, the function of the management is not only to develop a strategic policy aiming at increasing business profits, but in their role as an employer, they have to face the contractual commitments which link management and employees. More precisely, the future of the employment is defined as an integral part of the future of the undertaking.

Finally, in a third group of cases, the employee representation introduces a deliberative process in the debate on restructurings. The agreements themselves are evidence of the reflexive dimension introduced by the mobilization of the representation, In a perspective where *the undertaking is conceived as a community of work*¹⁵, established by the employee representation, their representatives, in their interaction with the management, fix the rules of employment through a process of co-definition of the boundaries of the company. The community of work corresponds to a vision of the undertaking as both a social unit and a decision-making group, based on cooperation rather than on subordination. It also refers to the idea that it is the actual workers, through their representatives, who highlight the social link, the unit of the undertaking. In a context of uncertainty surrounding the organization, the cohesion of which is weakened by the externalisations, the works councils often appear as the only tools of reconstruction of the undertaking unit. Through the definition of the community of work, the representation establishes the undertaking which in return is defined as a decision-making group, i.e., like an organization based not so much on subordination than on cooperation between the management and the employees’ representatives. The community of

¹⁵ The notion of a community of work that is imposed progressively in the French jurisprudence as a response to the fragmentation of undertakings (Boussard-Verrecchia et Petrachi, 2008).

work is the expression of a conception of the undertaking which the German sociologist Friedrich Fürstenberg calls modern, i.e. “*more than a simple production device*” (2000, 1973, p.69), which can be managed like a vessel, on the sole basis of the engineers’ technical knowledge. The idea of a community of employees calls for a reformulation of the representation function, and, more basically, an emancipation process of the worker from a concept where his function is limited to carrying out a task towards a concept of a responsible worker who participates in finding solutions to problems which may arise in the undertaking.

Conclusion

The exploration of institutional information-consultation arrangements highlights a process of reinforcement of the employee representation at undertaking level. Firstly, from a quantitative point of view, this reinforcement corresponds to a network, of varying density - of staff representative institutions which moderate the idea of a representation crisis. This is more particularly obvious in cases where the directive is used by the employees and the trade union organisations as a resource to introduce or consolidate the undertaking representation bodies. At the same time, this network is also the product of a qualitative enriching of the rules of the game of joint regulation. The 2002/14 Directive generalises in all the Member States a right which reinforces the cognitive dimension of the representation with respect to the redistribution processes caused by the practice of collective bargaining; but especially it seems to gain importance in the eyes of the players. Although it seems that the learning of information-consultation intervenes notably in situations of restructuring, it also seems to be becoming a regular practice. This process results from the specific nature of information-consultation: the debate on the undertaking restructurings implies knowledge of the undertaking which leads the representatives to question the aspirations of the company, its definition and its future. As it is not fixed, this knowledge must be constructed through regular interactions with management but also with employees. It should illustrate the refining of the participation rules of employees in the decision-making processes and the interconnection of representation levels. However, the representation processes are diverse and depend on collective capacities of players to appropriate information-consultation rules. We can thus distinguish complex and simple systems of information-consultation. The difference between these systems lies first of all in the precision of the reformulation of the representative function directed towards the participation in strategic decisions. The systems are also distinguished by the way in which the undertaking area is structured. So in simple systems, the representation is carried out only with difficulty at the relevant decision level, the complex systems are characterised by a strong interconnection of representation levels, an interconnection which forms the basis of a deep institutionalisation through the consultation processes. However, the forms of mobilisation of representation are also diverse. In its simple form, the exchange is limited to information of the employees on management projects. However, in its more complex form, the representation is at the origin of a deliberative practice of democracy where the undertaking is not considered as the same thing as the management, but as a community of work.

PART 4. EUROPEAN SOCIAL MODEL AND PLURALITY OF REGIMES OF DEMOCRACY IN THE UNDERTAKING

Because it establishes a *minimal* right, the Directive 2002/14 could be at the origin of a top-down process of Europeanization where the weak practices of employee consultation gain in importance compared to deeper forms of employee participation. Confronted with the diversity of national employee representation systems, the uncertainties contained in the directive on this subject, on both the representation modes and the definition of notions of information and consultation could hinder the construction of a European system of employee representation which generates processes of solidarity rather than of competition at European level. This vision is nourished notably by a reflection on the scope of the integration into the European Union of countries with weak structures of employee representation. In this perspective, more precisely, the CCEE are envisaged as the “horse of Troy of the Americanisation” (Meardi, 2002), or as an area of experimentation of industrial relations in Europe. This vision is based however on a fixed reading of the European construction of industrial relations which does not take account of either the historic dimensions or the complexity of this construction. This approach can be contrasted with an interpretation of the European Union according to which the unit is constructed around the value of democracy which is translated locally by a multitude of paths of systems of industrial democracy.

The idea of a top-down EU construction firstly does not acknowledge the historic processes of the construction of industrial relations practices in countries considered as models in the subject of information-consultation. In France and in Germany, the construction of a complex system of representation of the undertaking occurred progressively thanks to the mobilisation of players. A more dynamic approach to construction invites us to reject hasty conclusions on the path of the Directive 2002/14 in the CCEE. As pointed out by Meardi (2002), the debates on the impact of the CCEE for the European social model would benefit from being less passionate. This would both mitigate the optimistic visions of those who regard the Community directives a form of salvation, and illustrate the contradictions of most pessimistic visions which contradict the observations on the ground. From a more realistic point of view, according to Meardi, the directives form a tool for the employees allowing them to throw light on and in certain cases to contest a managerial discussion which consists in justifying an individualism of labour relations on the basis of the European model – *the market economy*. From the implementation of European Work Councils, the author demonstrates how the asymmetry of power introduced by this discussion between management and employees tends however to be reduced after the representation had been mobilised. In certain cases, the representative bodies become places where employees have access to the same resource (rhetoric) than the management: the reference to a European – *social* - model where the good governance of companies is achieved by employee participation. This dynamic perspective of the impact of the Directive 2002/14 is reinforced by the learning processes which can be observed in the British context, also considered as weakly structured. More basically, by extending the access to rights of information-consultation to the employees of the CCEE and of the United Kingdom, the directive is at the origin of an *international convergence* in the European area around the practice of employee participation in business decisions.

The idea of an essentially top-down European construction is in line with an essentially *top-down* (downward) approach. Marginson and Sisson (2006) pointed out, on the contrary, the relevance of an interconnection in the analysis of the different levels of the creation of a common area in industrial relations¹⁶. In this perspective, the European construction is at the centre of an opening of possibilities regarding the path of industrial relations. The major contribution of Marginson and Sisson (2006) is to highlight the complexity of the European area of industrial relations which is being constructed at the same time beyond the nation-states, at transnational level and beyond, at sector or undertaking level. From an analysis of processes of industrial relations in Europe, they highlight a multi-level area which is constructed through a plurality of configurations between the different areas of creation of employment regulations.

Although the production of European legislation is sometimes envisaged as an interconnected “affair of Brussels”, disconnected from national historic areas, the identification of a set of interconnected practices shows that the European rules are not imposed from the outside but develop through the mobilisation carried out by the players. This perspective invites us to privilege “a crossed reading” of national and European processes to emerge from a vision of the European area as a group of States with independent paths. The complexity of the European construction is obvious in a process where the Community law influences the national paths, which also impact the creation of a body of common rules. The British case illustrates the complexity of a process animated by the processes which are both *top-down* and *bottom-up*. By repealing the privilege of a trade union monopoly on representation, the Thatcher government established the bases of a universal right to representation, for which positive guarantees were introduced by the New Labour government in interconnection with the transposition of the European Community *acquis* in the area of employment law.

Such an approach also invites us not to over emphasise the importance of national rules. This can be seen in the intra-national divergence of information practices which are produced under the use that the undertaking players make of the rule of information-consultation. In the CCEE, mostly because of the fragile structure of social dialogue on the ground, it would seem the universalisation of the rule is accompanied by a diversification of practices of employee participation (see box). The difficulty in grouping the undertaking case studies under the same national model suggests that the national coherences need to adapt following the impact of new European rules and practices.

¹⁶ For a discussion of the “influences and interferences” of the different levels, areas and players of European social dialogue, see notably Mias (2009).

The fragmentation of practices of social dialogue at undertaking level in the CCEE

From a survey on social dialogue in the CCEE, Delteil et al. (2010) highlights the process of diversification of “social corporate models” depending on strategies of positioning of companies on the market of products, according to which these adopt a strategy of volume or of differentiation.

A first type of minimal social dialogue is part of a strategy of volume. It can be observed in the companies linked to the automobile sector implanted in Romania or in Slovakia where the search of scale economies and cost reduction plays a determining role. Locally, this strategy encourages the use of the sub-contracting and/or of “untypical” jobs (CDD (fixed-term contract), agency work, etc...). At the level of “group” it encourages the development of a very strict policy with respect to the wage bill, and promotions, recruitments and skills management, which is defined in a very restrictive way. Conversely, the emphasis is put on the training and renewing of managerial competences on which depends the optimal implementation of productive resources. Overall, this strategic direction guides management to getting accustomed to a *minima* social dialogue: the trade unions remain social partners since they play the game of organisational flexibility.

In a second type of configuration, the differentiation and investment strategy is accompanied by a social dialogue orientated towards the improvement of the undertaking image. The case of a food-processing company in Slovakia shows that the maintenance of a competitive advantage really depends on the organisation of learning cycles, and that the lack of skills on the labour market means that the emphasis is put on the medium and long term training policies or careers management. In this context, the social relations become an entire component of the managerial policy which takes a very protective or paternalistic form.

In a third type of company, a double strategy of differentiation (at local level) and of standardisation (at group level) brings about a more societal than social dialogue. The differentiation strategy doubles as a strategy of “international” standardisation, and the skills required locally should be in keeping with the very formalised processes at global level (ISO standards, overall quality...). In such a context, the choice of company is to act on the values, the standards and the behaviours which play a decisive role in the integration of skills in the group. Consequently, it happens that the mother-company does not extend at all the model of social relations which has a long-standing reputation in France. Its strategy is based rather on a mixture of company culture and social relations particular to each country where the undertaking is implanted, combined with management standards established at “group” level.

Confronted with the double process of international convergence and intra-national divergence of information-consultation, the capacity of the directive to produce a European unity around a social model is less important for the uniformity of practices than for the universality of the value from which these practises are constructed.

To realise both the diversity of practices of information-consultation, all the while seeing them in the context of the common base of employee participation as a value anchored in Community legislation, we can envisage the structuring of the European area around a plurality of systems of democracy in the undertaking (Meixner, 2009). Information and deliberation, simple system and complex representation system – these four poles constitute

the *four cardinal points of a European cartography* that is not imposed over the classic cartography in terms of national systems of industrial relations, but takes into account the diversity of collective capacities to influence the definition of the undertaking (c.f. document No. 1). In this perspective, the form of the system depends on the interconnection between forms of consultation and the institutional configurations of representation. Effectively, it would seem that the deliberation is based on the construction and the expression of alternative knowledge to that of the management, which implies a complex representation system. Inversely, a simple representation system seems little favourable to the production of a deliberative process on the restructurings.

A first system called **referendum democracy**¹⁷ refers to situations where the restructurings are imposed in a context where the employee representation is considered by the management as an obstacle to change. In a context of imposed job cuts, the representation practice corresponds to an opposition to management projects. But this register of action of employees is also explained by a simple institutional framework which is not directed towards a questioning on the strategic future of the undertaking. The undertaking which is constructed through these processes marked by unilateralism is reduced to the image produced by the management. The system of **free democracy** is the opposite to the first form of democracy. Complex structures of representation form the base of a questioning on the future of the undertaking. Through a questioning of the information provided by the management and an action on the consultation frameworks, the representation provokes a reformulation of the corporate strategy. This strategy is constructed through the debate between management and representatives who formulate specific criticism of management projects and propose alternative plans for the future of the undertaking. The representation, by deploying its political and cognitive or reflexive policy, shows the multitude of possible paths of the undertaking. In this way, the representation confronts the players with a choice. It also produces an emancipation both of the management and of the employees with regard to processes usually considered – notably under the effect of the introduction of new technologies- such as fatalities imposed from the outside. This autonomy of players is guaranteed by institutional arrangements which constitute a real structure of the company which interconnects different areas and places of production and of decision. In the second configuration, the industrial democracy appears as a stylisation of the world of democracy as it is envisaged by the capacity-orientated approach.

¹⁷ We refer to referendum democracy in the sense of Didry (2008b), who uses this notion to describe employees' representation practices in the form of collective mobilisations where the freedom of the employee is carried out in the simple form of opposition.

Document No. 6. European cartography of the systems of democracy in the undertaking.

Source: Meixner 2009, p. 537.

Between these two poles of referendum democracy and democracy as a basis elaborated from freedom, there are two other systems are characterised by institutional arrangements where the representation consists of an equipment which obliges the management to get involves in a debate on the restructurings, but the concrete mobilisation of which, alienated in certain cases by a centralised functioning, seems little favourable to the production of a deliberation on the future of the undertaking. The undertaking, in both configurations, is defined as an employer without this employer being specified with respect to its boundaries or as a decision centre.

In the system of **forced democracy**, the consultation on restructuring projects is experienced as an obligation either to conform to a legal framework or to perpetuate that which appears as a historic tradition of industrial relations in the undertaking. In this context, the interaction between management and representatives on the restructurings is at the origin of an arrangement of projects through a partial questioning, more by obligation than by conviction, of management projects. Because the action of the representatives is directed towards the testing of the information transmitted by the management, this arrangement is in line with an anticipated and qualitative approach of employment. But as the institutional arrangements mobilised are not appropriate to impact strategic decisions, the interactions between management and representatives cannot liberate themselves from an imposed relation of interdependence. In a similar way, in a fourth system of **democracy**, the mobilisation of institutional arrangements appears **alienated** both from the managers and the players of the representation. In this type of system, democracy is justified by the recognition of a pluralism of interests. On the side of the management however, employee participation is first of all envisaged as a necessary power-sharing in order to better control the path of the undertaking. The consultation therefore risks being instrumentalised as a *feed-back* mechanism where the opinions of representatives is collected to improve the strategic decisions from the knowledge that the employees involved in the production at the base of the undertaking have banking activities. The capacity of employees to question the management projects is at the same time limited in this form of industrial democracy by the institutional arrangements of the representation. Because the transmission towards the management of independent information, constructed by the employees, comes up against the obstacle of a centralised, or concentrated, function of the representation. In this context, where the negotiation is informed, but without this information being negotiated, the company is identified as an employer the complexity of which is however reduced to its only decision-making centre.

The idea of systems enables us to formulate of specific situations of employee representation in an overall context. An analysis in terms of system also aims at not over determining the role of the (national) institutions with respect to the role of the players. In a dynamic perspective of institutions, the players must effectively redefine the relations and institutional frameworks underlying their interactions. They produce “institutional learning processes” (Didry, 2000) which explain the reconfiguration processes of institutions and players as well as interaction means, also in a same undertaking. If the form of the system depends on the interconnection between the forms of consultation and the forms of institutional frameworks, this interconnection is not given by the institutional frameworks of representation. On the contrary, it is the product of the mobilisation which the players make of it. There results a European cartography of representation which, without imposing itself over the cartography of national systems of industrial relations, shows the changes to be observed as a result of the mobilisation of rights to information-consultation with respect to national industrial relations systems.

OVERALL CONCLUSION

The information-consultation directive completes existing but partial European and national standards in the area of information-consultation. It forms the basis of a democratisation of representation, from now on based on a principle of universality. Also, the major impact of the directive was to introduce universal representation in national systems of industrial relations where the exercise of information-consultation rights had been reserved only to trade unions (and their members). In this way, the extension of the representation introduces new possibilities regarding the constitution of a base of information, allowing for the construction, through the mobilisation of rights to information-consultation, of an economic unit of the company which goes beyond the simple consideration of financial strategies. In this respect, converging paths of companies could be observed through the observation of the concrete functioning of information-consultation. The institutional learning-process of representation, its means of action, the increase in knowledge about the undertaking and the use of this information to produce a counter-expertise on management projects are examples of the benefits of the right to information-consultation to be seen in undertakings with a long experience of employee representation. Although the national traditions in the area of employee representation had an impact on the path of the consultation practices in the companies, a comparison of case studies warns us not to over estimate the influence of national factors on this path.

However, is it possible to speak of an Europeanization of employee representation? Certainly, legal frameworks and diverging practices exist throughout the different countries. But the directive establishes the base of an organic European solidarity around employee representation which forms the framework of a possible debate on the path the undertaking has taken. The mobilisation possibilities of rights of information-consultation thus open perspectives of solidarity, which allow us to go beyond the idea of competition between systems of industrial relations advanced by Streeck (1998). The implementation of national representation bodies can allow for a prior discussion of employment questions which defuses managerial strategies of creating competition between different national sites (for example, in a multinational undertaking such as GM Europe). Instead, reflections within its representation bodies – national and transnational – on the industrial strategy are favoured.

A comparative approach of the observations at undertaking level thus calls for reflection on why there are variations in the consultation practices. In certain respects, the identification of a case where a right to information-consultation contributed to the development of a democratic approach to the functioning of the company reveals the *insufficiencies of the directive* in order to propose possible modifications. The question of institutional frameworks for the exercise of rights to information-consultation, i.e. employee representation appeared as an essential dimension of the exercise of the right to information-consultation. We have seen that the directive presupposed the existence of representative structures for the exercise of the right of information-consultation. However, it specifies neither the nature, nor the form, and nor the organisation of these structures. This question has turned out to be particularly important however to exercise a right of consultation which is understood as a co-decision in business decisions. Although the directive provides for a consultation at the relevant (decision-making) level, it does not set out the architecture of this representation in undertakings where the decisions concern more than one establishment. But, when there is a single representative body for a set of establishments with diverse activities, the wider its geographical spread, the greater the difficulty to get information directly from the base. So, the idea of adequate means for the exercise of the representation should also be specified. The question of representative architecture had also been mentioned by the

directive on the European Works Councils, which applies to countries which do not have a general right to employee representation. One of the difficulties of the European Works Councils was the identification and the designation of representatives in the United Kingdom, or in the new Member States which, up until the transposition of the directive on information-consultation had no national system of employee representation in the undertaking. The lack of articulation between a right of representation at national and transnational and levels is, in some ways, compensated by the 2002 directive, which obliges the Member States to provide for mechanisms of designation of representatives. The articulation in terms of procedure, which was already the subject of a Communication of the Commission in 1995 (COM (95), between the different levels of representation still remains to be defined. The same question arises regarding the articulation between the different directives which establish the rights to information-consultation, i.e. between the regular procedure of information-consultation and the exceptional procedures in the case of restructurings, at different representation levels. In this respect, we can question the vague nature surrounding the temporality of the consultation which the episode of Renault-Vilvoorde had allowed us to specify concerning the European Works Council. The fact that the processes of information and consultation were conceived as two distinct moments helped to buy time for reflection on the management projects, which were subsequently amended significantly. Finally, we can regret the absence of initiative on the part of the representatives in the area of consultation as provided for by the *droit d'alerte* in France (right of triggering an early advance warning by the WC or personal delegates, thus enabling the elected representatives to ask the employer for an explanation when they become aware of something of a disconcerting nature that could have an influence on the company's economic status).

All of these arrangements would be a way of reinforcing employee participation. A revision of the directive as envisaged by the European Parliament (2009) would be the opportunity to specify the content of the idea of consultation, which can range from the simple informing of employees by the management to the formation of a basis from which the representatives increase their knowledge of the undertaking in a process of co-construction. With regard to these uncertainties and implications for the real scope of rights to information-consultation, we can wonder about the relevance of a European abstentionism in the area of employment law as proposed by the Commission in the [Green Paper on Modernising Labour Law](#) (COM (2006)) and in its review of the application of the directive 2002/14 (COM (2008)).

BIBLIOGRAPHY

Books and articles

- ADAM G. et REYNAUD J.-D. (1978), *Conflits du travail et changement social*, Paris, PUF.
- BÉTHOUX É. (2004), « Les comités d'entreprise européens en quête de légitimité », *Travail et Emploi*, vol. 98, n°4, pp. 21-35.
- BÉTHOUX É., DA COSTA I., DIDRY D., MEIXNER M. et MIAS A. (2008), « Syndicalisme et démocratie (Traduction de « *Trade unionism and democracy* »), *Terrains et Travaux*, n°14, pp. 9-47.
- BOUSSARD-BERRECCHIA E. et PETRACHI X. (2008), « Regards croisés sur la communauté de travail », *Le Droit Ouvrier*, juillet.
- CHOLLET S. et DIDRY C. (2007) *Le fonctionnement des instances représentatives du personnel à la Samaritaine*, Document de travail IDHE, Série Règles, Institutions, Conventions, n° 07/04. Disponible en ligne : <http://www.idhe.ens-cachan.fr/ric0705.pdf>. Consulté le 04.12.2009.
- DEAKIN S. et ARMOUR J. (2004), « Le sauvetage de Rover : une alternative au pouvoir de l'actionnaire ? », *L'Homme et la Société*, n° 142-153, pp. 79-96.
- DEAKIN S. & WILKINSON F. (1999), « The Management of Redundancies in Europe : The Case of Great Britain », *Labour*, vol. 13 (1), pp. 41-89.
- DEAKIN S. (2007), « Reflexive Governance and European Company Law », CLPE Research Paper Series, vol. 3, n° 4.
- DELTEIL V., DIEUAIDE P. et GROUX G. (2010), « Les firmes françaises en Europe de l'Est. Recomposition des relations professionnelles et du dialogue social ? », in: F. Aballea et A. Mias (dir.), *Mondialisation et recomposition des relations professionnelles*, Toulouse, Octares, à paraître.
- DIDRY C. (2000), « La règle de droit comme équipement pour le travail juridique: le cas du licenciement collectif pour motif économique », in : Kirat T., Serverin E., (dir.), *Le droit dans l'action économique*, Paris, CNRS Editions, pp. 133-158.
- DIDRY C. (2001), « Le comité d'entreprise européen devant la justice : mobilisation du droit et travail juridique communautaire », *Droit et Société*, n°49, pp. 911-934.
- DIDRY C. et JOBERT A. (2010), « Les accords de méthode », in Didry C. et Jobert A., *L'entreprise en restructuration. Dynamiques institutionnelles et mobilisations collectives*, Rennes, Presses Universitaires de Rennes, à paraître.
- DIDRY C. & MEIXNER M. (2008), « The capability approach and the implementation of the directives and agreements resulting from the European Social Dialogue. Synthesis of the outcomes on information-consultation », Final report for the European Commission, *Convention Fonds Social Européen 2005-2007 : « Approche par les capacités et mise en oeuvre des directives communautaires en droit du travail »*.
- DIDRY C. et MIAS A. (2005), *Le moment Delors*, Bruxelles, Peter Lang.

- DTI (1999), « Redundancy Consultation: A Study of Current Practice and the Effects of the 1995 Regulations », *Employment relations research series*, London, Department for Trade and Industry.
- FÜRSTENBERG F. (2000) [1973], «Die Bedeutung der Mitbestimmung am Arbeitsplatz für die industrielle Demokratie», in : Fürstenberg, F., *Arbeitsbeziehungen im gesellschaftlichen Wandel*, München und Mehring, Rainer Hampp, pp. 69-80.
- HALL M. (2008), « European Directive on information and consultation», in : *Industrial relations developments in Europe 2007*, European Foundation for the Improvement of Living and Working Conditions, pp. 47-58.
- JÜRGENS U. & KRZYWDZINSKI M. (2007), « Verlagerung nach Mittelosteuropa und Wandel der Arbeitsmodelle in der Automobilindustrie», *Otto-Brenner-Stiftung*, Frankfurt/Main.
- KOTTHOFF H. (1994), *Betriebsräte und Bürgerstatus. Wandel und Kontinuität betrieblicher Mitbestimmung*, Munich-Mering, Rainer Hampp.
- KOUKIADAKI, A. (2008), « Reflexive Regulation and the Development of Capabilities : The Impact of the 2002/14/EC Directive on Information and Consultation of Employees in the UK», *Thèse de Doctorat*, Université de Warwick.
- LAULOM S. (dir.) (2005), *Recomposition des systèmes de représentation des salariés en Europe*, Saint-Etienne, Publications de l'Université de Saint-Etienne.
- LEFRESNE F. et SAUVIAT C. (2009), « Mode de gouvernance et régimes de restructuration : une étude de cas », *Travail et Emploi*, n°117, pp. 39- 51.
- MARGINSON P. and SISSON K. (2006) [2004], *European Integration and Industrial Relations*, Basingstoke, Palgrave Macmillan.
- MEARDI G. (2002), « The Trojan Horse for the Americanisation of Europe ? Polish Industrial Relations towards the EU», *European Journal of Industrial Relations*, n°8, pp. 77-99.
- MEARDI G. (2007), « More voice after more exit? Unstable industrial relations in central eastern Europe », *Industrial Relations Journal*, n° 38, pp. 503.523.
- MEARDI G., STROHMER S. & TRAXLER F. (2008), « Lights and Shadows of direct participation in foreign companies in the Czech Republic », Paper presented at the Third European Congress of Work and Labour Network, European Workplace Participation Forum, Rome, September 2008. Consultable on-line: http://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/gm_-_rome.pdf. Consulted, 7 December 2009.
- MEIXNER M. (2009), « Structures et dynamiques de la représentation des salariés : une cartographie européenne de cas de restructurations d'entreprise dans la banque en France, en Allemagne et en Grande-Bretagne », *Thèse de doctorat de sociologie*, Ecole Normale Supérieure de Cachan.
- MEIXNER M. (2010), « La représentation re-structurée ? Dynamiques de la consultation des salariés dans la banque », in Didry C. et Jobert A. (2010a), *L'entreprise en restructuration. Dynamiques institutionnelles et mobilisations collectives*, Rennes, Presses Universitaires de Rennes, à paraître.
- MIAS A. (2009), « Le dialogue social européen en interactions. Influences et interférences des différents instruments de l'Europe sociale sur les politiques et pratiques aux

différents niveaux, de l'Europe à l'entreprise », document de travail, *Europe et Société*.

ORIANNE J-F. (2010), « Dialogue social et changement institutionnel. Le cas de la mise en œuvre d'une directive européenne », *Droit et Société*, à paraître.

REYNAUD J.D. (1979), « Conflit et régulation sociale. Esquisse d'une théorie de la régulation conjointe », *Revue française de sociologie*, 20 (2), pp. 367-376.

SALAIIS R. (2004), « La politique des indicateurs. Du taux de chômage au taux d'emploi dans la Stratégie européenne pour l'emploi », in B. Zimmermann (dir.), *Les sciences sociales à l'épreuve de l'action. Le savant, le politique et l'Europe*, Paris, Ed. de la Maison des Sciences de l'Homme, pp. 287-331.

SEN A. (1999), *L'économie est une science morale*, Paris, La Découverte.

STREECK W. (1998), « The Internationalization of Industrial Relations in Europe: Prospects and Problems », *Politics and Society*, vol. 26, n° 4, pp. 429-459.

TERRY M. (2003), « Employee representation: shop stewards and the legal framework », In : Edwards, P., *Industrial Relations. Theory and Practice*, Blackwell Publishers, Oxford, pp. 257- 284.

WEBB S. & WEBB B. (1897), *Industrial Democracy*, London, Longmans.

Documents

COM (95) 547, Communication de la Commission en matière d'information et de consultation des travailleurs, 14.11.1995.

COM (2006) 708, Livre Vert sur la modernisation du droit du travail.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0708:FIN:FR:PDF>

COM (2008) 146, Communication de la Commission sur l'examen de l'application de la directive 2002/14/CE dans l'UE, 13.03.2008.

EIRO, «Leading publisher in breach of information and consultation procedures», UK0706069I, 2007.

EIRO, «Bulgaria: The Impact of the information and consultation Directive», BG0710029Q, 2009.

EIRO, «Estonia: The Impact of the information and consultation Directive», EE0710029Q, 2009.

EIRO, «Italy: The Impact of the information and consultation Directive», IT0710029Q, 2009.

EIRO, «Poland: The Impact of the information and consultation Directive», PL0710029Q, 2009.

EUROPEAN MONITORING CENTRE ON CHANGE (2006), « Managing large-scale restructuring: Barclays », *Company Case*, European Foundation, Dublin. http://www.eurofound.europa.eu/emcc/content/source/uk06001a.htm?p1=ef_publication&p2=null. Consulté le 03.03.2009.

PE (2009) 415, Rapport sur l'application de la directive 2002/14, Commission de l'emploi et des affaires sociales, Rapporteur : Jean Louis Cottigny, 27.01.2009.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0023+0+DOC+PDF+V0//FR>