FRESHFIELDS BRUCKHAUS DERINGER

Implementing the Information and Consultation Directive

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For further information
please contact

Nicholas Squire
65 Fleet Street
London EC4Y 1HS
T+ 44 20 7832 7419
F+ 44 20 7832 7001
E nicholas.squire@freshfields.com

Joanna Broadbent
65 Fleet Street
London EC4Y 1HS
T+ 44 20 7785 2446
F+ 44 20 7832 7001
E joanna.broadbent@freshfields.com
W freshfields.com

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Introduction

The Department of Trade and Industry (DTI) has now issued draft regulations, the information and consultation of employees regulations, implementing the EU Information and Consultation Directive in the UK. From April 2005 many UK companies will have to set up domestic works councils and inform and consult them about a wide range of business issues. All companies with more than 50 staff will be affected by March 2008.

The proposals represent a fundamental shift in typical UK practice on employee consultation. Although UK employers must already consult staff in connection with large scale redundancies and business transfers, this is the first time they will be required to consult staff on an ongoing basis.

Unions have hailed the rights and indicated that they 'could lead to the biggest change in workplace relations for a generation'. This reaction is unsurprising – information and consultation opens the door for unions to obtain far more information about and influence over a business than would be possible through statutory recognition. A much lower degree of support is required to obtain that influence. Business leaders have been notably less enthusiastic, with the Confederation of British Industry commenting that the government has 'made the best of a bad job'.

In this guide we look at how the new rights are likely to work in practice. We also discuss the opportunities employers have to minimise the eventual impact of the new legislation. As the regulations are in substantially final form (although have not been laid before parliament), employers should begin to think about suitable responses to the regulations now.

Which employers will be affected?

The regulations apply to undertakings with their registered or head office or principal place of business in the UK and will come into force in stages. They will apply to undertakings with 150 or more employees from March 2005, to undertakings with at least 100 employees from March 2007 and to undertakings with at least 50 employees from March 2008.

Broadly, the requirement to inform and consult will apply across a company or business rather than to individual workplaces. For example, a company with a head office and a number of branch offices will need one mechanism through which all staff are consulted. It will not have to consult at office level unless it chooses to do so (and staff agree).

Theoretically it would be possible to employ staff within a number of different group companies so that the threshold of 50 employees is never met within a particular undertaking. Information and consultation obligations would not be triggered because the employees of associated companies do not have to be taken into account when calculating the thresholds. In practice, the administrative burdens of this approach are likely to outweigh the perceived disadvantages of having to inform and consult. DTI guidance also suggests that tribunals will look at the reality of the situation rather than just at the terms of an employment contract, which means such a strategy may not be effective in any event.

Even though the basic requirement is for consultation within an undertaking, the regulations recognise that it might be desirable to deal with some issues at a different level. For example, purely local issues could be dealt with at individual establishments. Alternatively, where a company is part of a group structure, it might be preferable to deal with issues that affect a number of different businesses at a group level. As indicated below, the regulations give employers a choice about the level at which information and consultation takes place, as long as staff agree to the proposals. However, choosing to inform and consult at a level other than that of the undertaking will not necessarily prevent individual undertakings from requesting different arrangements subsequently, as outlined in 'Requesting information and consultation' below.

Only employees (not workers) are counted when deciding whether a business reaches one of the thresholds. The assessment will be carried out on the basis of the average number of employees over the previous 12 months. Some part-time employees (essentially those working less than 18 hours a week) can be counted as half an

employee when calculating the thresholds – although this is a matter of choice for the employer.

Requesting information and consultation

The regulations do not impose a blanket obligation on employers to set up information and consultation procedures. They will be obliged to do so only if employees request that a procedure be negotiated.

A request for negotiation must be in writing, dated and sent to the registered or head office or principal place of business of the employer. It must be made by 10 per cent of the workforce within the undertaking, subject to a minimum of 15 and a maximum of 2,500 employees. Alternatively, several requests can be made by different groups of employees, which between them demonstrate the necessary level of support. Where a number of requests are aggregated, they must have been made within a six month period.

If employees do not want to make a direct approach to their employer, an anonymous request can be made through the Central Arbitration Committee (CAC). Again, either a single or a number of requests will be considered.

To help employees work out the level of support needed to make a request, they (or an employee representative – which is not defined, but which in practice will mean a trade union representative) are entitled to ask an employer to provide information about workforce numbers. If the information is not provided within a month of a request, or the information that is provided is false or incomplete, the CAC can order the employer to provide it within a specified time.

Following receipt of a valid request, the employer's response will depend on i) whether there are existing information and consultation mechanisms within the business and ii) how many employees have supported the request for negotiation.

Qualifying pre-existing arrangements

If a qualifying agreement is in place that sets out how employees or their representatives will be informed and their views obtained, the employer may be able to choose how to proceed. To qualify, an agreement must be in writing, cover and have been approved by all employees and set out how the employer will inform and seek the views of representatives. Draft government guidance indicates that the approval requirement is reasonably onerous – approval in a ballot, by signature of a majority of the workforce, or agreement of employee representatives who represent a majority of the workforce. It is not a test that many existing arrangements will meet. It is clear that an information and consultation procedure that has been imposed by an employer and that staff have not had an opportunity

to comment on or approve will not be a qualifying pre-existing arrangement.

If a qualifying agreement is in place and less than 40 per cent of employees have made a request for negotiation, the employer can choose to test the level of support for the request in a ballot. A ballot must comply with various requirements as to timing and conduct. The employer must notify staff of its intention to hold a ballot within one month of receiving the request for negotiations. The ballot must then be called as soon as reasonably practicable, although at least 21 days must elapse after notification of the ballot before it is held.

Arrangements for the ballot must ensure that it is fair; all employees must be entitled to vote; voting must take place in secret as far as reasonably practicable; and votes must be accurately counted. Employees must be given the results of the ballot as soon as reasonably practicable after the ballot is held. If an employee believes that the requirements have not been met or that an employer is not entitled to hold a ballot in the first place (for example, because there is no qualifying agreement in place), he can complain to the CAC. The CAC can order an employer to rerun a ballot or enter into direct negotiations without a ballot.

If at least 40 per cent of the workforce and the majority of those voting support the request in the ballot, the employer must enter into negotiations. If the necessary level of support is not shown, the employer does not have to negotiate a new procedure and can continue to operate the existing arrangements.

Following consultation, a similar process has been introduced to deal with pre-existing agreements at group level. Where consultation takes place at group level, employees within a constituent undertaking could nonetheless make a request for negotiation. If less than 40 per cent of employees covered by the pre-existing agreement supported the initial request, the employer could choose to hold a group-wide ballot to gauge the level of support. If less than 40 per cent of employees supported the request in the ballot, the pre-existing arrangement would continue.

Where more than 40 per cent of employees support the initial request, the employer will have to begin negotiations immediately – it is not entitled to ballot staff. Where there are no qualifying arrangements, negotiations must be started once a valid request is received. Again, the employer is not entitled to hold a ballot to gauge the level of support.

Employer notification

Although there is no obligation on an employer to start the negotiating process before receiving a request from employees, it can choose to do so. If so, it must publish a written, dated statement of its intention to initiate the negotiating process. This must be published in such a way as to bring it to the attention of all the employees – for example, by email or by posting on staff notice boards. The statement must say that it is made for the purposes of the regulations.

Limitations on requesting negotiations

The regulations contain safeguards to prevent numerous requests for negotiations from being made in quick succession. Where an agreement has been negotiated pursuant to a request, or standard information and consultation provisions apply, no further request for negotiation (eg to try and amend the terms of those arrangements) can be made for three years. An employer cannot notify an intention to negotiate within that period either. Similarly, where a request for negotiation has been defeated in a ballot, no further request for negotiation can be made for three years.

The only exceptions to this are where there have been material changes in the undertaking since the arrangements came into force that mean that the arrangements no longer cover or have been approved by the employees in the undertaking. Employees could therefore make a further request following an acquisition if the acquisition has resulted in material changes in the undertaking – as might be the case if a relatively large number of employees have been integrated into the business.

Challenging requests and notifications

If an employer believes that a request for negotiations is invalid, perhaps because it is made within three years of an earlier request, it can apply to the CAC for a declaration to that effect. Similarly, if an employee representative or employee believes that an employer's notification of intention to negotiate is invalid, it can apply to the CAC. In either case the application must be made within one month of the relevant request or notification.

The negotiating process

Once a valid request has been received, or supported in a ballot, the employer must begin the negotiating process as soon as reasonably practicable and in any event within three months of the request or ballot result. At the outset, an employer must make arrangements for the appointment or election of 'negotiating representatives' to conduct negotiations on behalf of the employees. Various requirements apply – all employees of the undertaking must be able to take part in the appointment or election and at the end of the process all employees must be represented. These requirements are not unduly onerous and employers should be able to ask each department, site or function to choose a representative on an informal basis. A formal ballot will not always be necessary, although may be appropriate in some cases, such as a large number of employees putting themselves forward as representatives. Complaints about the appointment of representatives can be made to the CAC.

Employers who have received a request to negotiate can also seek to reach a group-wide agreement rather than one that applies to a specific undertaking. In this case, the employer in undertakings where there has been no request must notify staff of its decision to start negotiations.

Once representatives are chosen, information and consultation procedures should be negotiated within six months (starting three months after the initial request or ballot result). The parties can extend this period by agreement. The regulations do not specify what or how negotiations must take place – that will be entirely for the parties to agree. Whatever procedures are adopted, the aim of the process is to reach a written, dated agreement that sets out the circumstances in which employees will be informed and consulted. All employees of the undertaking must be covered. The Advisory, Conciliation and Arbitration Service (ACAS) will be able to help parties to reach an agreement.

Information and consultation can take place through elected or appointed representatives or directly with employees. All of the negotiating representatives, or a majority of the representatives and 50 per cent of the employees, must approve the agreement. Approval from employees can be signified through a ballot (in which case approval is required from 50 per cent of those who vote, not a majority of the total number of employees). The requirements applicable to a ballot to gauge the level of support for a request to negotiate also apply to a ballot in these circumstances. If a ballot is held, a negotiating representative can complain to the CAC that it

did not meet the various requirements and if the complaint is upheld the CAC can order the employer to re-run the ballot.

This process gives employers a degree of freedom to agree procedures suitable to their circumstances – although reaching an appropriate agreement in six months could be difficult if an extension of time cannot be agreed with the representatives. In principle, it will usually be desirable for an employer to reach agreement with its staff if possible. This enables it to avoid some of the uncertainties inherent in the default information and consultation process outlined below. There are a number of issues that employers should consider when negotiating an agreement.

- Which employees will be covered by the agreement? Will different arrangements apply to different groups of staff?
- What subjects will be open for information and consultation? As an absolute minimum, representatives will expect to be informed about employment threats and opportunities, changes to terms and conditions of employment and the economic prospects of the business as a whole. These are the basic areas for information and consultation under the default agreement and representatives are unlikely to agree to anything less. However, within these basic parameters, there is scope to define more precisely what is meant under each heading. For example, is it intended that there be information and consultation about business acquisitions or disposals by way of share sales, even where the proposed sale or disposal will have no impact on employment prospects? If so, at what stage will such information and consultation occur? The more specific the agreement, the less scope there is for subsequent argument.
- How will the new arrangements interact with existing consultation obligations? It may be possible to agree that consultation in the event of a collective redundancy or business transfer situation be dealt with under existing consultation requirements. This would prevent the need to consult two separate bodies of employee representatives on the same issue but with slightly different requirements in terms of content and timing.
- How will the new arrangements interact with existing trade union relationships? Where those relationships are good and the majority of the workforce is unionised, it is likely that most if not all employee representatives will be union representatives. The number of representatives each union will have will be a matter for agreement, but will typically reflect membership levels. However, where membership is patchy, or relations poor, employers may see information and consultation as a way of minimising union

involvement – for example, by providing that all representatives must be elected and choosing the relevant constituencies carefully.

- This issue is linked to that of how employee representatives will be chosen where union representatives will not automatically be appointed as employee representatives. Can the company rely on a relatively informal system of election, or will it be necessary to hold a ballot? Does the company need to organise the ballot or can it be left to the representatives? (For example, where union representatives are involved, can it be left to the union to appoint a representative?) How long will employee representatives hold office? How will replacement employee representatives be selected if a representative leaves employment before his term of office is complete? If these relatively technical issues are considered at the outset, there is less room for subsequent dispute about the operation of the procedure.
- Who will represent the employer? The agreement should probably set out which members of management will represent the company. Again, it might be appropriate to provide that different issues will be dealt with at different levels of management – the more serious the issue, the more senior the level of management that may need to be involved. As a general point, it can be helpful for a company to make a senior manager or director responsible for the process. This can help both to demonstrate a company's commitment to information and consultation and to build a constructive working relationship with employee representatives.
- At what level will information and consultation take place? As indicated above, particularly for large companies or groups, different issues may be best dealt with at different levels. For example, issues that are relevant to all employees within a particular group could be dealt with at group level, with other issues dealt with at company or establishment level. Depending on the complexity of the company structure, it may be appropriate to develop local works councils and a group-wide works council made up of a representative from each local works council. If such a structure is adopted, the scope of the issues to be discussed by each forum needs to be clear from the outset.
- What is the scope of the employee representatives' influence on the process? There is no requirement under the Directive for the employer to obtain the consent of employee representatives before implementing business decisions. However, under the default procedure certain consultation has to take place 'with a view to reaching agreement' and therefore must occur before final business decisions are taken. The advisory status of the representative body should be made clear from the outset.

- When and where will information and consultation take place? For example, regular meetings every six months could be arranged. Provision should also be made for special meetings to discuss particularly significant events, such as a threat to employment or a proposed acquisition or disposal. The location of meetings should be specified and arrangements for expenses incurred in attending meetings agreed (where meetings do not take place at establishment level and therefore require employee representatives to travel to the meeting).
- What level of support or training is to be provided to employee representatives? There is no obligation on the employer to provide the employee representatives with training or assistance to enable them to carry out their work. In practice and in the interests of developing a constructive working relationship, the employer is likely to wish to provide some training for employee representatives at the outset about their role and to provide facilities to enable them to perform their roles as employee representatives. It will usually be sensible to provide guidelines about the amount of time the company feels that it will be reasonable for the employee representative to spend on his duties.
- How will confidential information be handled? What obligations are imposed on representatives who have access to confidential information and how will those obligations be enforced?
- How will any disputes be dealt with?
- How long will the agreement last and what are the processes for renegotiating it?

Not all of these issues necessarily need to be dealt with in the agreement itself. However, they will need to be discussed and ironed out during the negotiating process. That process is likely to be smoother if the employer has a clear idea of the types of issues that are likely to arise from the outset and has given some thought to the structure that will work best within its business.

Default information and consultation procedure

In some cases the parties may not be able to reach agreement during the six month negotiating period and be unwilling to agree to an extension of time to allow for further negotiations. If this is the case, or the employer has failed to arrange for the election or appointment of negotiating representatives, a default information and consultation procedure applies. Even once the default procedure applies, it can be varied by agreement between the employer and employee representatives at any time. Such a variation only needs to be agreed by a majority of information and consultation representatives.

Electing representatives

Under the default procedure, information and consultation representatives must be elected within six months of the expiry of the initial six month time limit for a negotiated agreement (or within six months of the initial request if negotiating representatives were not appointed). The employer must hold a ballot to elect one representative per 50 employees, with a minimum of two and maximum of 25 representatives. Various conditions apply to the ballot.

- A number of separate ballots can be held for different constituencies if that would better reflect employee interests.
- All employees on the date of the ballot are entitled to vote and all employees on the last day on which candidates may enter the ballot are entitled to stand for election.
- An independent supervisor must be appointed to supervise the conduct of the ballot. He must ensure that those entitled to vote and stand for election have the opportunity to do so, that voting takes place in secret as far as reasonably practicable and that votes are fairly and accurately counted.
- Employee representatives or employees must be consulted about arrangements for the ballot before they are finalised and the final arrangements for the ballot must be published and brought to the attention of employees and employee representatives.
- The independent ballot supervisor must publish the results of the ballot as soon as reasonably practicable after the ballot is held.
- If the independent ballot supervisor considers that one of the requirements has not been met, he must publish an ineffective ballot report. The results of the ballot shall be of no effect and the ballot has to be reheld.

- All the costs of the ballot (including the costs of the independent ballot supervisor) have to be met by the employer. (This obviously gives the employer an incentive to make sure that the ballot arrangements are right first time.)

Complaints about arrangements for a ballot may be made to the CAC, which can order modifications where necessary. Although the regulations provide detail about how the initial election should be carried out, they are silent on what happens where changes occur during the currency of the agreement – such as the resignation or dismissal of an employee representative.

Standard information and consultation procedures
Once representatives are elected, standard information and consultation procedures apply at undertaking level. The default procedures do not allow for group-wide information and consultation. Information has to be provided to the representatives on:

- the recent and probable development of the undertaking's activities and economic situation;
- the situation, structure and probable development of employment within the undertaking and on any anticipated threat to employment; and
- any decisions likely to result in substantial changes to work organisation or contractual relationships – including collective redundancies or transfers of undertakings.

Consultation must take place about the matters outlined in the last two bullets above.

The full range of situations in which the new obligations apply will become clear only over time, once the CAC starts considering claims about failures to consult. Guidance issued by the DTI gives some general factors to consider when deciding whether information and/or consultation obligations could apply, but cannot provide definitive guidance on precisely when there will be an obligation to inform or consult.

In the meantime, it is reasonably clear that changes to terms and conditions of employment will trigger a right to consultation. What is less clear is the number of employees that must be affected before consultation is required. The DTI guidance says that no minimum number of employees can be specified, but it is reasonably clear that the greater the number, the more likely it is that there will be a duty to consult. It is to be hoped that employee representatives and the CAC will take a pragmatic approach to what amounts to a collective issue suitable for consultation.

Another point to note is that a transfer of an undertaking or a proposal to make collective redundancies will trigger consultation obligations under the regulations in addition to the existing consultation requirements under Tupe and the collective dismissals legislation (TULRCA). However, following the initial consultation, the government has accepted that it would be undesirable for an employer to have to consult two different bodies of employee representatives about the same issue. Where the default rules apply, an employer can give information and consultation representatives written notification that it will consult under Tupe or TULRCA as the case may be. It then does not have to consult under the information and consultation regulations as well. However, the guidance makes it clear that such notification can be given only once the duties under Tupe or TULRCA have been triggered. Employers therefore may need to consult information representatives at an earlier stage about events that could ultimately give rise to another consultation obligation but before that obligation has actually arisen.

Another key issue is likely to be the application of the new rules to share sales. Although this is not obvious from the default procedure itself, it appears that a sale of a business by share sale will trigger information and consultation rights. Until now there has been no obligation on an employer to consult where there has been a share sale, as the identity of the employer does not change. In future, advance information and consultation is likely to be required. The extent of the obligation may depend on what the outcome of the share sale is likely to be. If there is no immediate impact on employment, there is an argument that the sale is merely an example of the organisation's development, in which case information but not consultation will be required. If, however, there are to be changes to contractual relations (for example, the harmonisation of terms and conditions of employment) or a threat to employment (for example, redundancies to avoid overstaffing) it is likely that both information and advance consultation will be required – possibly with a view to reaching agreement, which may imply before a deal is actually signed.

Information has to be given to representatives at a time that will allow them to conduct an adequate study and, where appropriate, prepare for consultation. No more concrete guidance is given on how much time is needed for an 'adequate study' to take place. Nor is there any indication how often information and consultation should take place, although the DTI guidance suggests that an annual meeting is a minimum requirement, with additional ad hoc meetings as necessary. In practice the frequency will vary depending on the nature of the information to be provided. Employers should

bear in mind the need to give employee representatives an opportunity to consider the information and (where information is not confidential) discuss it with the employees they represent and with other representatives before meeting the employer to discuss the material.

The default requirements do not require the employer to pay for ‘expert assistance’ for the information representatives of the sort that may be given by trade union officials, lawyers or accountants. (There could, of course, be agreement on this matter in a negotiated agreement.) However, the possibility of the representatives seeking to obtain expert assistance should be taken into account in deciding how long the representatives should have to consider the information before they meet the employer’s representatives.

Consultation must take place about the structure and probable development of employment and about any substantial changes that are envisaged. The timing, method and content of the consultation must be ‘appropriate’. It must take place on the basis of the information supplied by the employer and of any opinion formed by the representatives. Representatives must be able to meet the appropriate level of management and obtain an opinion from them in response. Consultation in relation to substantial changes has to take place with a view to reaching agreement.

The thrust of all these requirements indicates that consultation must take place before a final decision is taken and acted upon. Consultation must take place about ‘anticipatory measures’ that are ‘envisaged’. The reference to consultation taking place at an appropriate time also points to consultation occurring at a time that gives representatives a chance to have some meaningful input to a discussion. However, as noted previously, an employer is not obliged to obtain the consent of representatives to proposed measures. Having said that, there is an obligation on employers and representatives ‘to work in a spirit of co-operation and with due regard for their reciprocal rights and obligations’.

Penalties

Employers face sanctions if they fail to comply with a negotiated agreement or standard information and consultation procedure. Information and consultation representatives or (where no representatives have been chosen) individual employees can complain to the CAC about the failure. If the CAC upholds the complaint, it can make an order requiring the employer to take steps to comply with the relevant procedure within a defined period. ACAS has a statutory power to endeavour to conciliate a complaint before it is determined by the CAC. A CAC decision can be appealed to the Employment Appeal Tribunal (EAT) on points of law.

Where the CAC has upheld a complaint, a further application can be made to the EAT for the issue of a penalty notice. The EAT must issue a penalty notice unless it is satisfied that the failure was for a reason beyond the employer's control or that there was a reasonable excuse for the failure. A failure by a parent company to provide relevant information is not a valid excuse. A penalty of up to £75,000, payable to the Secretary of State, can be imposed. When determining the level of the penalty, the EAT must take into account the gravity of the employer's failure, the period over which it occurred, the reason for it, the number of employees affected and the total number of employees within the undertaking.

It should be noted that the regulations do not contain an express 'special circumstances' defence. In Tupe and the collective dismissals legislation, an employer can point to special circumstances that rendered it not reasonably practicable for it to comply with its information and consultation obligations. As long as it took such steps as were reasonably practicable, it will have complied with its obligations. In practice, this means that in an insolvency situation, for example, it may be possible for an employer to argue that it was not possible to consult employees for the requisite period. As long as such consultation as was reasonably practicable was carried out, no protective award can be made.

The omission of such a defence from the information and consultation regulations is surprising. Presumably, in the relatively rare cases where there are such special circumstances, it will be open to an employer to argue that its failure to inform and consult resulted from a reason beyond its control or amounts to some other reasonable excuse for the failure. The EAT should accordingly not issue a penalty notice. Alternatively, given that the reasons for a failure must be taken into account by the EAT when determining the amount of the penalty, the existence of genuine special circumstances might result in a lower penalty being issued.

The making of an order by the CAC has no effect on acts committed or agreements already made by the employer, nor can it prevent or delay any act or agreement the employer is proposing to commit or make. A business decision therefore cannot be unwound, even if it was not consulted upon. Although this will obviously be of comfort to employers, the suggestion that the £75,000 fine is the only real sanction for default is incorrect. The regulations also provide that any order of the CAC can be treated as an order of the High Court. This implies that where the CAC has made an order against an employer, a failure to comply with that order will amount to contempt of court. Imprisonment or an unlimited fine would be possible sanctions.

It is also clear that employee representatives (who will, in many cases, be union representatives and therefore have union backing) will not be able to obtain an injunction to prevent a particular step being taken by an employer before information and consultation requirements are met. Following the initial consultation, the regulations now expressly state that the only remedy for a failure to comply is by way of a complaint to the CAC.

Confidential information

One significant aspect of the regulations is the extent to which employers will be obliged to give representatives or employees confidential information. There is no duty on an employer to disclose information if the disclosure would cause prejudice or serious harm to the functioning of the undertaking. If information has been withheld on these grounds, employee representatives can make an application for disclosure to the CAC. The CAC can make an order for disclosure if it does not accept that disclosure would cause the harm or prejudice alleged. Effectively, a decision about whether or not particular information has to be disclosed rests with a third party – the CAC – and is not at the complete discretion of the employer. Again, failure to comply with a CAC order will be a contempt of court.

Employers can give information and documents to representatives or experts assisting them on condition that they are held in confidence. If the information is subsequently disclosed, the defaulter can be subject to an action for breach of statutory duty (unless he has made a protected disclosure). Employers may feel that this remedy is inadequate – it simply gives them the right to sue the defaulter and recover damages for any loss suffered as a result of the disclosure of the confidential information. In practice, suing an employee is unlikely to be worthwhile – either because specific loss flowing from the breach cannot be demonstrated or because recovering substantial damages from an employee is likely to be difficult. Disciplinary action against employees may also be an option – see the next section for further information.

If the recipients of information believe that they have been subjected to an unnecessary duty of confidentiality, they can apply to the CAC. The CAC can order that the information no longer has to be held in confidence if it believes that disclosure will not cause prejudice or serious harm to the undertaking.

An order by the CAC concerning confidential information does not allow an applicant to seek a penalty order from the EAT. The regime surrounding confidential information is not therefore backed up by fines.

Protection for employees

The protection offered to employees who participate in the information and consultation process, whether as representatives, candidates or otherwise, is by now familiar. All such rights are enforced by way of a complaint to the employment tribunal.

Negotiating representatives, and information and consultation representatives have the right to reasonable paid time off to perform their duties. It will be automatically unfair to dismiss an employee representative or candidate because he performed or sought to perform a representative function. The usual compensation limits apply to automatically unfair dismissals. Representatives and candidates for election as a representative are also protected against being subjected to a detriment on grounds that they have performed functions as a candidate or representative.

However, it will not be automatically unfair to dismiss an employee for disclosing confidential information, unless the disclosure was a protected disclosure. Dismissing an employee for disclosing confidential information will therefore normally be dealt with under the standard unfair dismissal rules. Although disclosure of confidential information will usually amount to misconduct, a fair procedure will need to be followed and the employer will need to consider whether dismissal is a reasonable sanction in all the circumstances.

It will also be automatically unfair to dismiss an employee because he sought to take advantage of or enforce any of the rights provided by the regulations (such as the right to vote in a ballot or request information about employee numbers). An employee has a further right not to be subjected to a detriment short of dismissal on any of these grounds.

Individual complaints about unfair dismissal or being subjected to a detriment can be compromised in the normal way – either through ACAS or a compromise agreement. Other than in a compromise or COT3 agreement, provisions purporting to exclude or limit the operation of the regulations will be invalid. An employer therefore cannot validly agree with staff that the regulations do not apply in a particular workplace.

The way ahead

The regulations are due to come into force on 6 April 2005. In the meantime, there are various steps that an employer could (and perhaps should) be taking.

- Review existing workforce information and consultation arrangements. Are they working well? If so, consider whether they are likely to meet the requirements for 'pre-existing arrangements'. If not, the employer will not be able to rely upon them to avoid having to negotiate new arrangements if a request for negotiation is received.
- It may therefore be prudent to try and extend the arrangements to the whole of the undertaking, or to obtain the approval of employees to the arrangements (as necessary) to ensure that they will qualify as pre-existing arrangements when the new rules come into force. This may be a particular issue where information and consultation takes place at a group rather than a local level – have individual undertakings, or representatives from individual undertakings, had a chance to approve the procedures?
- Where there are no existing information and consultation arrangements, consider whether it is in the interests of the business to introduce such arrangements at this stage. As long as the arrangements qualify, the business will be able to rely upon the 40 per cent support threshold before existing arrangements have to be renegotiated.
- Even if it is felt unnecessary to put arrangements into place that meet the requirements for a 'pre-existing arrangement,' it is likely to be sensible to introduce some form of information and consultation process before the regulations come into force. Simply having such a procedure – as long as it reflects the needs of the business and gives employees some mechanism for feeding views back to management – is likely to reduce the risk of receiving a formal request for negotiations after April 2005.

For the reasons outlined in this guide, most employers will not wish to rely upon the default information and consultation procedures. Having procedures in place when the new rules come into force minimises the risks of the default arrangements applying subsequently. Employees may be content with those arrangements and not make a request for negotiations or any request may not command the necessary degree of support.

However, concluding arrangements that meet the needs of an individual business can be time consuming and arrangements inevitably take some time to introduce and be accepted by

employees. Employers should therefore consider the implications of the regulations for their businesses now – not when they actually come into force.

AMSTERDAM
Apollolaan 151
1077 AR Amsterdam
T + 31 20 485 7000
F + 31 20 485 7001

BANGKOK
10th floor
Sathorn City Tower
175 South Sathorn Road
Khet Sathorn
Bangkok 10120
T + 66 2344 9200
F + 66 2344 9300

BARCELONA
Mestre Nicolau 19
08021 Barcelona
T + 34 93 363 7400
F + 34 93 419 7799

BEIJING
3705 China World Tower Two
1 Jianguomenwai Avenue
Beijing 100004
T + 8610 6505 3448
F + 8610 6505 7783

BERLIN
Potsdamer Platz 1
10785 Berlin
T + 49 30 20 28 36
F + 49 30 20 28 37 66

BRATISLAVA
Laurinská 12
81101 Bratislava
T + 421 2 5413 1121
F + 421 2 5413 1123

BRUSSELS
Bastion Tower
Place du Champ de
Mars/Marsveldplein 5
1050 Brussels
T + 32 2 504 7000
F + 32 2 504 7200

BUDAPEST
Oppenheim és Társai
Freshfields Bruckhaus
Deringer
Károlyi Mihály u. 12.
1053 Budapest
T + 36 1 486 22 00
F + 36 1 486 22 01

COLOGNE
Heumarkt 14
50667 Cologne
T + 49 221 20 50 70
F + 49 221 20 50 79 0

DÜSSELDORF
Freiligrathstraße 1
40479 Düsseldorf
T + 49 211 49 79 0
F + 49 211 49 79 10 3

Mailing address:
Postfach 10 17 43
40008 Düsseldorf

FRANKFURT AM MAIN
Taunusanlage 11
60329 Frankfurt am Main
T + 49 69 27 30 80
F + 49 69 23 26 64

HAMBURG
Alsterarkaden 27
20354 Hamburg
T + 49 40 36 90 60
F + 49 40 36 90 61 55

Mailing address:
Postfach 30 52 70
20316 Hamburg

HANOI
#05-01
International Centre
17 Ngo Quyen Street
Hanoi
T + 84 4 8247 422
F + 84 4 8268 300

HO CHI MINH CITY
#1108 Saigon Tower
29 Le Duan Boulevard
District 1
Ho Chi Minh City
T + 84 8 8226 680
F + 84 8 8226 690

HONG KONG
11th floor
Two Exchange Square
Hong Kong
T + 852 2846 3400
F + 852 2810 6192

LONDON
65 Fleet Street
London EC4Y 1HS
T + 44 20 7936 4000
F + 44 20 7832 7001

MADRID
Fortuny 6
28010 Madrid
T + 34 91 319 1024
F + 34 91 308 4636

MILAN
Via dei Giardini 7
20121 Milan
T + 39 02 625 301
F + 39 02 625 30800

MOSCOW
Kadashevskaya nab 14/2
119017 Moscow
T + 7 501 (or +7 095) 785 3000
F + 7 501 (or +7 095) 785 3001

MUNICH
Prannerstraße 10
80333 Munich
T + 49 89 20 70 20
F + 49 89 20 70 21 00

NEW YORK
Freshfields Bruckhaus
Deringer LLP
520 Madison Avenue
34th floor
New York, NY 10022
T + 1 212 277 4000
F + 1 212 277 4001

PARIS
2/4 rue Paul Cézanne
75375 Paris Cedex 08
T + 33 1 44 56 44 56
F + 33 1 44 56 44 00

ROME
Piazza di Monte Citorio 115
00186 Rome
T + 39 06 695 331
F + 39 06 695 33800

SHANGHAI
34th floor
Jinmao Tower
88 Century Boulevard
Shanghai 200121
T + 8621 5049 1118
F + 8621 3878 0099

SINGAPORE
Freshfields Drew & Napier
20 Raffles Place #18-00
Ocean Towers
Singapore 048620
T + 65 6535 6211
F + 65 6533 5007/8007/9007

TOKYO
Freshfields Law Office
Freshfields Foreign Law Office
Ark Mori Building
18th floor
1-12-32 Akasaka
Minato-ku
Tokyo 107-6018
T + 81 3 3584 8500
F + 81 3 3584 8501

VIENNA
Seilergasse 16
1010 Vienna
T + 43 1 515 15 0
F + 43 1 512 63 94

WASHINGTON
Freshfields Bruckhaus
Deringer LLP
701 Pennsylvania Avenue, NW
Suite 600
Washington, DC 20004-2692
T + 1 202 777 4500
F + 1 202 777 4555

9730