

Careless whispers: confidentiality and board-level worker representatives

Impact of
board-level
information

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Received 4 March 2019
Revised 1 September 2019
17 December 2019
Accepted 18 December 2019

Abstract

Purpose – The article focuses on the role that ‘confidential information’ plays in relation to the work of board-level worker representatives, and their interaction with other worker participation mechanisms. Thus, the purpose of the paper is to explore the implications of confidentiality of board-level information for effective worker participation. The main argument is that if board-level worker representatives are excessively constrained by confidentiality provisions, their capacity to work effectively is brought into question.

Design/methodology/approach – A qualitative research was undertaken on a sample of 12 public limited companies in Slovenia. In each company, three interviews were conducted: with the CEO or board member, with a board-level worker representative and with a works councilor, who was not a board-level worker representative (36 interviews in total). Each of these interviewees has a particular role, and interest, in handling confidential information. Thus, a method of triangulation by groups was employed. The interviews were conducted at the company premises during October and November 2017. The results were analysed by the content analysis method.

Findings – This research confirms that in the majority of companies, nearly all of the material and information discussed by the board is deemed to be ‘confidential’. Consequently, communication between board-level worker representatives and the works council is rendered difficult, if not impossible. The results indicate an urgent need to redefine the concept of confidentiality and to reinforce the level of communication between management boards and works councils.

Research limitations/implications – The research is limited to one country, which, by no means, is fatal, as international comparisons, although of greater breadth, often lose some depth of analysis (especially, for example, where there are differences in legal contexts). Although the issues discussed in the paper are of relevance to all those with an interest in worker participation mechanisms, they cannot be generalised mostly due to national specificities.

Originality/value – The question of confidentiality as between the board, board-level worker representatives, works councils, trade unions and other form of worker representation, despite its importance, has been raised quite rarely in research. In this research, three groups of stakeholders (CEO/board member, board-level workers representative and works council members) have been covered, with the aim to extend the understanding of how confidentiality obligations impact relationships between these.

Keywords Confidentiality, Boards, Board-level worker representatives, Works council, Worker participation

Paper type Research paper

Introduction

Models of worker participation are perennially discussed in the industrial relations arena, be it from the perspective of the law (Fulton, 2006), economics (Addison and Schnabel, 2009), human resource management (Addison, 2009) or sociology (Kalleberg *et al.*, 2009). This research contributes to the work on this topic by focusing primarily on the role of board-level worker representatives, and, more specifically, the role that ‘confidential information’ plays in relation to the work of board-level worker representatives, and their interaction with other worker participation mechanisms. The interaction of board-level worker representatives with



The authors are grateful to the Slovene Directors’ Association, which offered substantial assistance in organising interviews, and to the anonymous reviewers for their constructive and helpful comments.

Funding: There was no specific funding for this research.

other forms of worker representation (notably works councils and trade unions) is crucial for the representatives' power resources (Lafuente Hernández, 2019; Haipeter *et al.*, 2019) and the effective implementation of the basic principles of worker participation, especially in relation to information and consultation rights (Waddington and Conchon, 2016).

Despite its importance, the question of *confidentiality* between the shareholder board members, board-level worker representatives, works councils, trade unions and other form of worker representation has been addressed quite rarely in the literature to date [1]. Gold (2011), however, found that the issue of confidentiality, and particularly how to handle sensitive or restricted information about company strategy and operations, were the most serious and problematic issue facing board-level worker representatives. Waddington and Conchon's (2016) comprehensive work revealed a trend in various European countries to label almost *everything* discussed at board-level as 'confidential'. According to their study, one of the most important reasons for the increased labelling of documents and discussions as 'confidential' is management's fear that worker (and, to a lesser extent, shareholder) representatives might communicate information discussed at the board to external parties, including the media (see also Cremers and Vitols, 2016). This fear is especially acute where the information refers to sensitive financial or other issues, which can affect the implementation of a growth strategy (Timming and Brown, 2015). Disclosure of confidential information can occur, as Davies and Hopt (2013) observe, even where mandatory rules on boardroom secrecy are well-established (as in Germany).

It might be understandable that management would wish to label as much information as possible as 'confidential', in an attempt to try and reduce the risks of disclosure. However, the consequences of such action, and of greater (mis)use of the 'confidential' label, can include a limitation of the right, and duty, of board-level worker representatives to coordinate with, and report back to, other worker representatives (Waddington and Conchon, 2017; De Spiegelaere and Jagodzinski, 2016), and therefore present a significant obstacle to the proper functioning of worker representation on boards (Lafuente Hernández, 2019).

This article explores the implications of confidentiality of board-level information for effective worker participation. Our focus is on the restrictions confidentiality obligations place on board-level worker representatives in fulfilling their representative roles. Our main argument is that if board-level worker representatives are excessively constrained by confidentiality provisions, their capacity to work effectively is brought into question, and their relationships with other worker representatives, notably the works council members, is rendered more difficult. Furthermore, we emphasise that the content of the information in question is key. What is 'prohibited' and consequently non-communicable must depend on the topic and sensitivity of the information; not all information can or should be treated in the same manner.

The article looks in-depth at the issue of confidentiality from the perspective of board-level worker representatives at national level, using the case study of Slovenia, and focusing on three key questions. First, what board-level information is labelled as 'confidential' and why? Secondly, how do board-level worker representatives deal with non-communicable information? Thirdly, how does (non)disclosure impact the relationships between different worker representation mechanisms? Our aim is to draw attention to the relatively neglected issue of how labels of 'confidentiality' affect the work of board-level worker representatives via in-depth qualitative research.

The article proceeds as follows. First, we discuss the concept of confidentiality in the context of existing work on different forms of worker participation in the enterprise. We then outline the main characteristics of the Slovenian context, and the specific model of worker participation in Slovenia, focusing on the roles of the different worker representation mechanisms (namely, board-level worker representation, works councils and trade unions). We present our data and measures, and then discuss the main implications of how confidentiality affects the interaction between key stakeholders.

Confidentiality: an unlimited managerial choice or an obstacle to workers participation?

It is clear that, even within the EU, very different ‘models’ of worker representation, and forms of worker participation, continue to co-exist (Waddington and Conchon, 2016; Munkholm, 2018). In the ‘Anglo’ world (e.g. the UK and Ireland), the emphasis remains on the ‘single-channel of representation’, in which trade unions, where they exist of course, continue to play the dominant role of representing worker interests (Hyman, 1997). In others, like Germany, dual-channel representation structures are the norm, with an important role at the enterprise for works councils, and a recognition that different forms of representation (trade unions, works councils, etc) depend, to some extent at least, on cooperation with which other (Weiss, 2004). A significant focus of EU law measures on worker participation over the past 20 years or so has been on extending rights of information and consultation to workers^[2]. Board-level representation of workers, which is the primary focus of this article, refers to the phenomenon where workers elect or appoint representatives to the strategic decision-making body of companies^[3]; mechanisms for this type of worker participation exist in 17 of the EU member states, although they vary widely in how they operate (Munkholm, 2018). As a result, very different dynamics have developed in terms of the relations between different forms of worker interest representation (Hauptmeier, 2012). These dynamics exist at different levels, namely, national, sectoral and, the focus of our inquiry, the individual enterprise.

While our primary focus is on board-level worker representation, it is important to note that other forms of worker representation have an important impact on worker participation in corporate governance. Trade unions might have a direct role, through negotiating collective agreements which guarantee board-level worker representation (Munkholm, 2018), or through the appointment of worker representatives to company boards (as is the case in Germany). Equally, this role might be indirect, as unions are often regarded as facilitators of the establishment of works councils (Rigby *et al.*, 2009), and the latter often have a role in the nomination of board-level representatives (e.g. in Slovenia, as we will discuss). Indeed, the interconnection between trade unions and works councils is often seen as being extremely important for strong employee voice. In the context of declining trade union density, ‘the legalised rights of the works council’ can be seen ‘as a primary source of trade union stability and resilience in difficult economic and political circumstances’ (Hyman, 1997, p. 315).

However, it must also be acknowledged that different worker representatives may have quite different interests and priorities. Whereas trade unions may be expected to focus on the ‘quantitative’ issues of pay and other core working conditions, works councils’ agendas concentrate more on ‘qualitative’ issues (e.g. training), while board-level worker representatives are expected to be involved in strategic decision-making, sharing the responsibility for such decisions with the other board members (Seifert, 2016). It can be difficult, of course, to draw a definitive line between some of these (overlapping) issues and processes. Furthermore, where individuals hold multiple roles, things can be even more complex (Zybała, 2019). For example, if there are board-level worker representatives, who are also trade union officials, it may be difficult to ensure that matters discussed in the former role (e.g. relating to corporate strategy) will not seep into the performance of the latter role (collective bargaining).

The key determinants of worker representatives’ institutional power are state intervention and legal rules (Gumbrell-McCormick and Hyman, 2015). As Jensen and Meckling (1979) have argued, it is unlikely that companies would introduce board-level worker representation, if not under a legal obligation to do so. The legal and (state-determined) institutional context, moreover, is not only vital in determining the model of worker participation that exists, it is also crucial in how the relationships between different categories of worker representatives develop. As we will argue, using the Slovenian example, the legal context sets out the boundaries of the ‘territory’ in which the different forms of

worker representation operate, and, as a result, significantly influences the manner in which their relationships develop. This is very clear in terms of the focus of this article: the right to access, and share, information.

There is, of course, a significant body of research that attests to the benefits of employee participation for organisational practice (for example, see [Busck et al., 2010](#); [Addison, 2009](#); [Weber and Schmid, 2009](#)). In general, for worker representatives, being adequately informed does not just represent the fulfilment of legal obligations, but, as many studies have confirmed, the more information such representatives receive on management decisions, the stronger their motivation to work in the interests of the company ([Looise et al., 2011](#)). Moreover, there is evidence to suggest that collaboration between works councils, trade unions and board-level worker representatives is not only beneficial in terms of worker participation, it can also lead to more successful corporate decision-making ([Van den Berg, 2004](#); [Nahtigal, 2014](#)). Placing limits on managerial prerogative in the context of board-level decision-making context can have benefits, in that it can ensure closer, and more-disciplined, consideration of the board-level issues under discussion ([Van den Berg, 2004](#)). Despite all of this, however, management often sees worker voice as an internal management *choice*, rather than an integral part of a set of workers' *rights* ([Dundon et al., 2004](#)).

Where voice and participation mechanism exist, however, it is clear that duties of confidentiality have the potential to conflict with the rights of workers to proper information and consultation. Some research on the problems raised by confidentiality obligations in the context of European Works Councils points to the widespread use of confidentiality clauses by management ([Voss, 2016](#)). [Pulignano and Turk's \(2016\)](#) research revealed that confidentiality is a serious and an ongoing matter of contention and concern, especially in larger companies, and for those listed on the stock exchange. [Gold and Rees \(2013\)](#), in their analysis of the operation of European Works Council (EWCs) in three multinational companies across six EU member states, pointed to the problems faced by worker representatives in how to deal with confidential information, especially the difficulties of what can, or cannot, be disclosed to the wider workforce.

Some proposals to overcome this problem have been to include definitions of 'confidentiality' in national legislation ([Gold and Rees, 2013](#)), to develop clearer EU-wide legal definitions of 'confidentiality' and to develop better sanctions for breach of legal confidentiality obligations ([Pulignano and Turk, 2016](#)). It is commonly argued that any reform measures regarding the limits and the scope of confidentiality arrangements need to take into account both the specific corporate culture of the company ([Hassel et al., 2018](#); [De Spiegelaere, 2016](#)) and the manner in which the role and function of board-level worker representation is understood at national level (which can vary significantly, depending on the member state in question; [Lafuente Hernández, 2019](#)). Notably, where there is a lack of trust between management and worker representatives (which, as we will see, is typical of the Slovenian case), the practice of labelling everything as 'confidential' may be more entrenched and difficult to change (see the discussion in [Whittal et al., 2009](#) on managements' 'open-door' policy, in the German context).

In the next section, we go on to discuss these issues of worker participation mechanisms, relationships between different worker representatives and the issue of confidentiality in the Slovenian context.

Worker participation and confidentiality in Slovenia

Slovenia, due to its political history, provides an interesting case study in terms of worker participation. As a part of the former Yugoslavia, a feature of the industrial relations model was the worker self-management system, giving workers an important role in the decision-making process; in many cases, the decisions of worker representatives *replaced* those of management ([Mrčela, 1996](#); [Stanojević, 1997](#)). Another inheritance of the old Yugoslav

system was a highly organised social structure. For example, during the process of transition, management and labour formed 'survival coalitions' based on non-conflictual micro-exchanges to build competitiveness and secure employment protection (Guardianchic, 2016). However, contemporary relations between the social partners are not good, and trust between them is low, at both central and local levels (Franca and Pahor, 2014). Recent attempts at social dialogue confirm this, as the social partners have faced severe obstacles in concluding collective agreements at different levels (Počivavšek, 2015). Slovenia, however, is the only country that has transitioned from a socialist to a market economy, while at the same time developing a worker participation system (Stanojevic, 2019). For instance, Croatia, also part of the former Yugoslavia and an EU member state, has not developed a comparable system. Of course, beyond the national specificities, the issues discussed here (confidentiality and board-level worker participation; relationships between different types of worker representative groups) are of relevance to all those with an interest in worker participation mechanisms.

Worker participation in Slovenia is regulated by the Constitution of 1991, and the Worker Participation in Management Act (WPMA) 1993. A works council can be established in companies with at least 20 workers, while companies with at least 50 workers must provide for board-level worker representatives. Works councils can nominate their representatives to the board of directors (a non-executive director in the one-tier system) and the supervisory board (in the two-tier system) when the threshold is reached. Works councils, equally, have the power to recall these representatives if unsatisfied with their work. The number of board-level worker representatives varies according to the corporate governance system and the company's legal status. There are no official data regarding the number of works councils and board-level worker representatives in Slovenia, but it is estimated that both are present in larger companies (those with more than 250 workers; Eurofound, 2013).

The role of trade unions in the context of the WPMA is very limited. Their influence is mostly of an indirect nature, particularly the right to nominate candidates for the works council, who are then elected by the workforce as a whole. However, more broadly, trade unions in Slovenia are significant actors in the industrial relations system. They had an important role in the transition processes and, according to Stanojevic (2019), the process of neoliberalisation in Slovenia, relative to other countries in the former Communist Bloc, has taken place in a more gradual and organised manner, largely due to the role and policies of the unions. Trade unions in Slovenia, however, have focused their attention mostly on their collective bargaining function; this has not been without success, as the coverage of collective agreements in Slovenia is high (ILO, 2017). The trade union movement was also heavily involved in the enactment of the WPMA; for example, by organising and participating in workshops with German experts on worker participation (Franca, 2018).

However, at central and local levels, unions and works councils have coexisted rather uneasily, with their relationship being described as somewhat competitive (Stanojevic and Gradev, 2003; Franca and Pahor, 2014). This can be seen, for example, in the establishment of the Slovene Association of Works Councils, a privately established network that aims to professionally support works council and the development of economic democracy in Slovenia. There are signs of attempts to improve the relationship. In 2018, the Association of Works Councils signed an agreement with the biggest trade union confederation in Slovenia (Zveza svobodnih sindikatov Slovenije) to foster further development of works councils and to promote the establishment of joint committees of works council members and trade union representatives (Gostiša, 2018). This relatively recent initiative, however, has not yet yielded demonstrable impacts at the local (enterprise) level.

What one sees, therefore, in the Slovenian context is a system of worker representation and participation, in which the interconnections between the different actors are generally weak, both legally/institutionally and in their relations 'on the ground' (with some localised

exceptions). Unions have no formal role under the WPMA, and focus their efforts on traditional collective bargaining on 'core' terms and conditions of employment. Works councils have various rights to information and consultation (e.g. information on the economic situation of the company; consultation rights on health and safety issues), and are assigned certain co-determination rights (e.g. in establishing criteria for assessing employees' performance) under the WPMA. The role and duties of board-level workers representatives, defined in the [Companies Act 2009](#), are determined in accordance with the terms of operation of the supervisory board. According to the [Companies Act 2009](#), supervisory boards in Slovenia control company operations, finance, accounting and company assets, and are charged with providing reliable information to shareholders. They nominate the CEO and board members, and are generally responsible for the assessment of management performance and risk management oversight.

There is no distinction made in law between the role and duties of worker representatives and shareholder representatives on the supervisory board, and both groups have the same rights in terms of access to information. Members of the works council have different information rights (explained below), but both board-level worker representatives and works council members enjoy the same rights to protection against dismissal.

In such circumstances, what determines access to information, and the extent to which it can be shared, are highly significant, as the ability to acquire relevant information is seen as a core component of the 'efficacy' of workers representatives ([Hyman, 1997](#)). In Slovenia, the law dictates that board-level worker representatives receive *all* information to which members of the supervisory board are entitled. Works council members are entitled to receive information on a range of topics (see above). Trade unions are in the worst position in this regard, as they are limited to a right to request information on quite a narrow range of issues (e.g. collective redundancies).

Slovenian legislation does not define the term 'confidentiality'. The law does not set any limitations to what companies may deem confidential in respect to information and consultation of workers; theoretically, companies have full discretion to earmark documents as 'confidential', as long as there is compliance with internal company rules. However, as noted, the WPMA does define the topics about which the works council must be informed, on which it must be consulted and in respect of which it has co-determination rights. Therefore, adequate information must be supplied in order to comply with these obligations. Although it is alleged in some of the literature that breaches of obligations under the WPMA can be observed in practice ([Franca and Pahor, 2014](#); [Arzenšek and Musek Lešnik, 2016](#)), there is no relevant case law on this, suggesting that works councils have not pursued these breaches in the courts.

Our focus, in this study, was on how the labelling of information as 'confidential' (which, obviously, precludes it being shared) impacted the work of board-level worker representatives, and, particularly, their relationships with other worker representatives within the organisation. In the next section, we briefly outline the methodology for the study.

Research data and methodology

We conducted empirical research in 12 public limited companies in Slovenia, which are mostly state-owned ([Table 1](#))[4]. In each, three interviews were conducted: with the CEO or board member[5], with a board-level worker representative and with a works councillor, who was not a board-level worker representative (36 interviews in total). Unlike [Gold \(2011\)](#), we did not interview trade union representatives (although as we will see, some of our respondents had multiple representative roles, including union roles). As noted, union representatives do not have any formal connection with board-level worker representation (under the law), have limited legal rights to request any information (confidential or

otherwise) and, in the Slovenian context, tend to focus on traditional issues of collective bargaining. Our focus was primarily on those with legal responsibilities under the WPMA, particularly the board-level worker representatives. Where relevant, however, we have reported where the labelling of information as 'confidential' impacted the relationships between those interviewed and trade union representatives.

Each of the respondents has a particular role and interest in handling confidential information. The CEO/board member is in regular communication with all of the board members, and usually has responsibility to determine whether information is confidential or not. Board-level worker representatives are at the forefront of the confidentiality challenge, as they have obligations to the works council (which nominates, and has the power to recall, them), as well as obligations to the organisation under corporate legislation. Works council members have legal entitlements to receive certain information from the board, and have certain expectations of board-level worker representatives, including that the latter will disclose appropriate information. Thus, we employed a method of triangulation by groups (Denzin, 2012). The semi-structured interviews were conducted at the company premises during October and November 2017.

Sampling procedures were twofold. First, we identified and selected companies; secondly, interviewees were selected by using a snowball sampling procedure (Wertz *et al.*, 2011). Sampling was carried out on the basis of three criteria: that the organisations were public limited companies (bound by stricter rules regarding the disclosure of information), were large (more than 250 employees) and had board-level worker representatives. Since there is no public database on the presence of board-level worker representatives, data were obtained by inquiring into each company separately. The response rate was 65 per cent (12 companies). Eleven of the participating companies operate a two-tier system, and one operates a one-tier system (Table I). Companies operate in services and the industrial sector, and all bar one are partially state-owned; in four companies, the state ownership is more than half. In the majority of companies, worker representatives make up one-third of the supervisory board.

Most board-level worker representatives and works council members are also trade union members; three board-level worker representatives hold, at the same time, the position of president of the works council and president of the local trade union (Table II).

System of corporate governance		Sector		State ownership			Workers representative on board		
One-tier	Two-tier	Services	Production	None	≤50%	>50%	20%	33%	38%
1	11	8	4	1	7	4	1	9	2

Table I.
Demographics of companies ($N = 12$)

Demographic characteristic/ position of the interviewee	N	Trade union member	Trade union representatives	Work council member
CEO/board members*	48	0	0	0
Board-level worker representatives (12)	12	7	7	7
Works council members (12)	12	10	7	12

Note: *We use the term 'CEO/board members' to refer to members who are *not* board-level worker representatives (i.e. shareholder members)

Table II.
Demographics of interviewees ($N = 36$)

We employed a content analysis method (Stake, 2005). The categorisation process was based on the interview questions. Most interview questions were the same for all three groups of interviewees; some questions differed according to the specificity of their position in the company.

The study, therefore, builds on that of Gold (2011), where the author only interviewed trade union representatives. We have focused on other stakeholders, and, in so doing, we aim to extend the understanding of how confidentiality obligations impact relationships between these. However, unlike Gold, our study is limited to one jurisdiction. This is by no means fatal, as international comparisons, although of greater breadth, often lose some depth of analysis (especially, for example, where there are differences in legal and institutional contexts).

The (mis)use of the ‘label’ confidential

According to interviewees, in eight companies, ‘all’ materials of the board (irrespective of the issue under discussion) are labelled as confidential by senior management; in three, ‘most’ materials are so labeled; in one, materials are only ‘partially’ labelled confidential. The groups of interviewees offered different explanations for such widespread use of the ‘confidential’ label.

Half of the CEO/board members referenced previous experiences where sensitive information had been leaked to the media (although, interestingly, generally not by board-level *worker* representatives, but by *shareholder* representatives). Moreover, a quarter of them pointed to the fact that Slovenia is a small country, and, therefore, information spreads very fast; a CEO/board member from company 3 referred to the ‘confidential’ label as ‘hollow’. Four of this group felt that it is ‘better to label everything “confidential” just to be on the safe side’. Five board-level worker representatives believed that the main reason for the label was to ensure ‘self-protection’ for the document maker. Three referred to deficiencies in the legal definition of ‘confidentiality’:

out of fear, because we don’t have a clear answer as to which piece of information is public and which is not, everything is labelled as strictly confidential.

A third of works council members thought the labelling was down to a simple mistrust of workers on the part of management. As alluded to above, trust between workers’ representatives and management is not the strongest point of the Slovenian system of worker participation (Franca and Pahor, 2014). However, works council members had high expectations regarding what information should be shared with them, and, as a result, felt that only what is ‘truly confidential’ should be so labeled, for example, sensitive stock-exchange-related information.

The majority of interviewees in all three groups believed that transparency and organisational culture play an important role. All the interviewees (including the worker representatives) opined that more training centred on the importance of maintaining confidentiality in designated cases, and on the possible consequences of the disclosure of such information, is required for all board-level worker representatives and works council members. Cremers and Vitols (2016) similarly concluded that the rules regarding confidentiality need to be clarified and better understood by worker representatives.

The research highlighted another aspect of the issue of confidentiality; the willingness of senior management to share confidential information depends significantly on the economic performance of the company. The results of the study revealed that ‘if times are better, everything is more open’, a common observation of the majority of board-level worker representatives and works council members. Similarly, Gold and Rees (2013) found that confidentiality was mentioned as being more problematic in the context of, for example, restructuring, as management had to ‘trade-off’ maintaining confidentiality and providing

timely information. It has also been observed that, under less favourable economic and competitive conditions, works council are perceived to be less efficient, and their input less appreciated by management (Van den Berg *et al.*, 2011). In such circumstances, confidentiality is given more weight, as management has less interest in vindicating information and consultation rights (Voss, 2016)[6].

We can see, therefore, that, while worker respondents were often critical of the 'self-preservation' instincts of management, in labelling information non-communicable, the latter was concerned about the leaking of information. This points to a certain 'trust deficit' in the organisations studied. However, all three groups of interviewees felt that the 'confidentiality' label is sometimes abused, and all three pointed to a need for better clarity for all stakeholders on what should really be deemed 'confidential'.

Confidentiality and its impact on the relationships between different worker representatives

The majority of CEO/board members believed that the practice of labelling information as 'confidential' did not influence the relationship between board-level worker representatives and the works council. These respondents saw the roles of the different worker representatives, and the information to which they were entitled, as completely distinct. Moreover, they opined that the agenda of the board 'does not interest the works council'. Most CEO/board members similarly viewed the trade unions as centred only 'on wages and other bonuses', and lacking in the commercial awareness needed to fully comprehend board-level information.

The board-level worker representatives and the works council members had quite a different view. More than half of board-level worker representatives and half of the works council members believed that the practice of labelling information as 'confidential' strongly influenced their relationship. In general, the board-level worker representatives felt such labelling meant they could not engage in meaningful joint deliberation with the works council. Echoing some of the findings in the literature outlined above (Gold and Rees, 2013; Franca and Pahor, 2014), these respondents felt that had they more of an opportunity to communicate more fully with the works council, decisions would be adopted with greater awareness, and, therefore, legitimacy. It would also allow board-level worker representatives to better substantiate board decisions to the works council (and the wider workforce).

Some board-level worker representatives believed that the practice by senior management of labelling information as confidential did *not* hinder their functioning; however, these respondents were *also* members of the works council. Being a member of the works council allowed them—inter alia—to further investigate and raise questions connected to the topics on the board agenda. However, this clearly raises questions as to the legitimacy of workplace democracy, diversity of representation, and the effective representation of a variety of worker views; it is certainly not ideal if only those worker representatives who have *multiple* positions feel they can effectively function in the face of confidentiality labels. As a works council member from company 6 put it: 'if all three (representative) functions are concentrated in just one person, the role of one form of worker representation is hidden behind the other'.

A majority of works council members expressed frustration that they often did not have adequate information or data in advance of their meetings with management. It has been suggested, in such circumstances, that it can be beneficial to hold 'pre-meetings', where board-level worker representatives consult with other worker representatives prior to a session of the board (Gold, 2011; Waddington and Conchon, 2016). In this study, almost half of the board-level worker representatives did not consult at all with the works council prior to a board meeting. For the others, the decision whether to consult depended on the content of the discussion. Interestingly, half of the CEO/board members also considered such consultation

as a viable option *if* the discussion concerned the position of the workers. The other half, however, believed such consultation is never appropriate.

Not surprisingly, nearly half of the works council members *expected* pre-meetings to occur, if there were important decisions being made concerning the position of workers. The majority expects, first, that board-level worker representatives will speak for, and advocate, workers' interests, regardless of the issue under discussion. Secondly, more than half believe that board-level worker representatives *must* report to, and inform, works councils about events in the board after a board meeting. In this respect, only three members of the works council specifically referenced that board-level worker representatives are bound by the duty of confidentiality, and that certain information cannot be disclosed by the latter.

The results point to a big divide regarding the impact of confidentiality on the relationships between different worker representatives. For the CEO/board members, there is no impact (as they view the different representation functions as completely separate). In general, however, the worker representatives felt that the routine labelling of information as 'confidential' negatively influenced their relationships. Board-level worker representatives often felt excessively constrained in their meetings with the works councils, and members of the works council expressed a frustration at an information gap; some information they *expected* to be shared with them was not disclosed, for reasons of confidentiality. The interviewees who were both works council member and trade union representatives did not display any differences in terms of responses, illustrating again the primary emphasis of the unions on the collective bargaining function. Interestingly, it was only those board-level worker respondents who held other roles (especially as members of the works council), who felt that routine use of confidentiality labels did *not* negatively impact their work and their relationships with other worker representatives.

Confidential board information and the works council

The WPMA clearly states that members of the works council are subject to confidentiality obligations. Notwithstanding this, however, our research revealed very low levels of support amongst the other interview groups for disclosing confidential board information to the works council (one-fifth of the interviewees). The main reasons, expressed by the majority of CEO/board members *and* board-level worker representatives, were a lack of awareness amongst works council members of the importance of confidential information, and of the consequences that may arise in the event of its disclosure. One CEO/board member reported how he observed a *board-level worker representative* texting about an ongoing discussion during a board meeting, and asked sarcastically: 'if a board-level worker representative behaves this way at the board meeting, how will 15 members of the works council behave?'. According to CEO/board members, much also depends on the skills and competences of individual works council members. This echoes [Gold and Rees \(2013, p. 550\)](#), who stress the importance of the *qualifications* of EWC members, and the *procedures* by which they are elected. Two other key justifications for not disclosing confidential information to the works council were given by CEO/board members. First, respondents noted that works council members do not have the same level of responsibilities (legal and decision-making) as board members (see also [Munkholm, 2018](#)), and, secondly, they argued that the documents discussed by the board are often very complex and demanding.

While half of the works council members were adamant that works councils should have access to *all* materials and confidential information, half doubted the competence of works council members to handle the confidential information in an appropriate manner. This latter interview cohort agreed that many works council members need more training in fulfilling their functions, because they are not aware of the full implications of information being deemed 'confidential'. As one works council member from company 8 stated, this often results in colleagues saying 'things that shouldn't be said'.

Notwithstanding the above, however, the research revealed, partly due to the frustrations and expectations outlined in the preceding section, the existence of some questionable disclosure practices. In some of the companies, CEO/board members and board-level worker representatives, aware that works councils have specific information and consultation rights irrespective of board obligations in relation to confidentiality, developed 'under-the-table' understandings, allowing board-level worker representatives to communicate specific information to the works councils. This is a form of 'tacit' consent on the part of management that allows board-level worker representatives to be, effectively, in breach of the duty of confidentiality. However, CEO/board members noted that, in these companies, if the worker representatives were to abuse this mutual agreement, they would no longer be given 'permission' to communicate confidential information. Furthermore, some board-level worker representatives confessed that they had shared confidential information with the works council at their own discretion, and/or partly because of pressure by works council members. A board-level worker representative from company 11 noted:

maybe the management board has abused the confidentiality clause by labelling as confidential all information which concerns workers... (in these circumstances) the board-level worker representatives will find a way to submit the information to the works council.

This inevitably raises the point that it would be preferable to seek legitimate ways of more openly sharing confidential board information with works council members, considering the role and function of the works council in the organisation.

The research therefore reveals a reticence on the part of both management *and* board-level worker representatives to reveal confidential board information to the works council. Both groups, and indeed many of the works council respondents themselves, are concerned primarily about the ability of the works council to fully grasp the implications of information being confidential. Nonetheless, we also identified some questionable practices, by which disclosure of confidential information to the works council took place in apparent breaches of confidentiality obligations (either by management 'turning a blind eye', or by dint of unilateral action by board-level worker representatives). In all cases, a focus on establishing clear and transparent rules and procedures around information disclosure in organisations, and ensuring more adequate training of worker representatives would be proactive steps.

Disclosing confidential information

Among CEO/board members, there was unanimous support for a 'zero tolerance' approach to the disclosure of confidential information to external parties. Board-level worker representatives and works council members were also conscious of the need to not disclose information, but were more likely to consider disclosure to the *media* as an option, especially in cases where the management board may be acting unlawfully. Most works council members were of the view that, if a board-level worker representative discloses confidential information to a works council member, this should *not* be considered a breach of obligations. Remarkably, a majority of CEO/board members also failed to unequivocally condemn the improper communication of confidential information to the works council. Here, the CEO/board members referred, somewhat obliquely, to the works councils' rights to information and consultation, which, in their view, somewhat muddied the water in terms of what should, and should not, be communicated to the works council. Here, we can refer again to the finding in the previous section. In the absence of clear and transparent rules and procedures around confidentiality obligations, various informal practices and understandings can emerge. It seems that a majority of interviewees had an instinctive sense that certain matters, though labelled 'confidential', *should* be communicated to the works council (and, through it, to the unions and wider workforce). This is probably an instinct reinforced by the overuse of the 'confidential' label outlined above.

Interestingly, none of the worker respondents made reference to the possibility of disclosure to trade unions; again, this might be explained by the fact that a number of trade union representatives are also board-level worker representatives or works council members. However, it perhaps also speaks to the lack of strategic engagement between the different forms of workplace representation in these organisations. Board-level worker representative from company 4, referring to the unions, was explicit: 'we must be clear on what is our function, and what is their function'. While it is true that trade unions have little formal connection to board-level worker representatives under the law, better coordination between these worker representatives and stronger informal links might better serve the interests of the workforce in general. It would also, in Hyman's terms, be likely to improve the 'efficacy' of the worker representatives, if we conceptualise this in terms of 'the ability to acquire relevant information (intelligence), to formulate policies coherently and dynamically (strategy), and to implement them appropriately (competence)' (Hyman, 1997, p. 311).

Conclusion

This research looked at the issue of confidential information and the role of board-level worker representatives. Our research confirms the problem observed by Waddington and Conchon (2016), in that, in the majority of companies we studied, nearly all of the material and information discussed by the board is deemed to be 'confidential' by senior management. Often, this seems almost like a reflex response. In the absence of a clear legal definition, or shared organisational understanding, of what, precisely 'confidentiality' *should* encompass, there is an overuse of the label. This has the effect, first, of creating a lack of trust between the board (*including* the worker representatives that sit on the board) and the worker representatives (works councils and trade unions; Franca and Pahor, 2014). Secondly, it means that corporate decision-making is subject to less scrutiny and consideration (Van den Berg, 2004). Thirdly, clearly demonstrated by the data, as all stakeholders (management and worker representatives) recognise the need for worker 'buy-in' for various decisions, it results in tacit, contingent, informal (and borderline unlawful, in some instances) arrangements that see confidential information 'leak out' in certain circumstances.

Thus, there is there is a need for a better understanding of, and justification for, the use of the label 'confidential information'. The interests and rights of workers, on the one hand, and the interests of the organisation to keep confidential information appropriately protected against disclosure, on the other hand, must be more explicitly considered and balanced; blanket labelling is not the answer. In this respect, the introduction of a legal definition of 'confidential information' in Slovenia would be welcome (at present, national corporate law only defines 'business secret', which does not overlap with the wide range of issues discussed at board meetings in the case study organisations). It would also be a step forward for organisations, in their internal company rules, to clearly set out a complementary organisational definition of 'confidential'. However, while it is important to set out these definitions in law, it is also crucial in individual organisations to develop a common internal cultural understanding of *what* is confidential and what is not, and *why* information should be deemed confidential. In all areas, an alignment of understanding of issues between worker representative and management, underpinned by trust and transparency, is crucial in the successful fulfilment of respective roles (Sapulete and Van den Berg, 2017). Here, ideally, legal change would be bolstered by social partner action, in the form of, for example, codes of practice or guidelines, developed by worker representatives in conjunction with the Association of Work Councils and/or the Slovenian Directors' Association. While clarifying definitions and developing common understandings will never be enough to overcome certain inherent conflicts of interest in the labour relationship, such action can lead to the building of trust and a step towards acknowledging common interests and goals.

The research also considered the impact of the overuse of the label 'confidential' on the relationship between different worker representative groups. Our primary focus was on the challenges for board-level worker representatives. While this group was aware of the duty of confidentiality, it was also aware of the high expectations, in particular, of works council members that the representatives report to them. Board-level workers representatives adopted various approaches in cases where 'confidential' information had implications for the general workforce, some of which were arguably a breach of their duties, and some of which involved 'under the table agreements' with management. Thus, an overly restrictive approach to what is 'confidential' is reflected in the adoption by board-level worker representatives of a range of 'counter' strategies (Gold, 2011; Neumann, 2018), and often borderline unlawful practices.

However, the overuse of the confidentiality label affected the relationships *between* groups of worker representatives in important ways also. Board-level worker representatives and works council members we interviewed mostly felt that the excessive limitations on the information they were allowed to communicate put a strain on their relations, to the detriment of the wider workforce. However, it should also be noted that some of the board-level worker representatives expressed concern about the competencies of works council members to manage information they might disclose to the latter in an appropriate manner.

Information is power. An overuse of the label 'confidential' privileges those with access to this information, and penalises those without. In our research, this contributes to, and exacerbates, a hard line between the representative functions of different groups (board-level worker representatives, works councils and trade unions), replicating at organisational level the jockeying for 'superiority' between worker representatives that can be observed at national level (Franca and Pahor, 2014). It was only where respondents held multiple representative roles that they felt the overuse of the 'confidentiality' label did not affect their ability to perform their functions effectively. We noted above that this is not necessarily healthy for the functioning of vibrant workplace democracy. Haipeter *et al.* (2019) similarly observed that, while board-level worker representatives that occupied multiple roles were involved at an early stage in the board's decision-making process, confidentiality considerations subsequently dictated that the decisions could not be discussed in the other representative bodies on which they sat.

Our argument is that it is necessary to develop, and implement, a robust, transparent and commonly understood series of rules and norms about 'confidentiality' in the enterprise, that explicitly recognise, and protect, the vital interrelationships between different worker participation mechanisms, and between these and management (see, also, Eurofound, 2013). It is necessary for *all* stakeholders to undertake systematic training about the importance of confidential information and of possible consequences in case of disclosure, and for organisational awareness raising, to better understand how confidentiality obligations need not hinder, but can support and strengthen, crucial stakeholder relationships (Pulignano and Turk, 2016). This is particularly true in the case of worker representatives. In Slovenia, as is surely the case elsewhere, overuse of the 'confidential' label contributes to a lack of strategic engagement between different groups of worker representatives.

Finally, there needs to be more careful consideration of the consequences of a breach of confidentiality obligations. In the case of Slovenia, the current legal situation is unacceptably vague. However, more broadly, this might be the focus of action at European level, not in terms of *legislative* measures, but in terms of exchanging best practice and developing common European guidelines. Arguably, other than in cases of serious and deliberate breaches of the confidentiality duty, litigation and penal sanctions are an undesirable means of addressing this issue. Norms and practices, which focus on maintaining corporate integrity, and meaningful employment relationships, which can be adapted to the level of the individual organisation, are undoubtedly preferable.

Notes

1. In this article, we use the term 'board' to denote the supervisory board in a two-tier corporate governance structure, and also to denote the board of directors in a one-tier corporate governance structure. 'Management board' is used to describe the executive board in the two-tier corporate governance structure.
2. Directive 2002/14/EC of 11 March 2002, establishing a general framework for informing and consulting employees in the European Community; Directive 2009/38/EC of 6 May 2009 on the establishment of a European Works Council or a procedure for the purposes of informing and consulting employees.
3. We have chosen in this article to refer to 'worker' representation, although the term 'Board-level employee representatives (BLER)' is also commonly used (the definition of 'employee', however, can vary significantly from one member state to another).
4. The fact that many companies are fully or partially state-owned is a potential limitation of the study. However, 'state-owned' in Slovenian law does *not* equate to 'public sector' in terms of the industrial relations model. The legal obligations (regarding the issues under examination) on these companies, as public limited companies, are those that apply to all such companies in Slovenia (see also Franca, 2018).
5. In the text, we use the term 'CEO/board members' to refer to members who are *not* board-level worker representatives (i.e. shareholder members).
6. Interestingly, given the contemporary focus on data protection and privacy, no respondents raised the issue of the confidentiality of 'personal information'. This is probably due to the nature of the supervisory board's work, which focuses on strategic and financial decisions.

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