

Hall, Mark; Purcell, John; Adam, Duncan

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## Reforming the ICE regulations: What chance now

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## **Reforming the ICE regulations – what chance now?**

**Mark Hall, John Purcell and Duncan Adam**

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**Industrial Relations Research Unit  
University of Warwick  
Coventry  
CV4 7AL**



## Editor's Foreword

The Warwick Papers in Industrial Relations series publishes the work of members of the Industrial Relations Research Unit (IRRU) and people associated with it. Papers may be of topical interest or require presentation outside of the normal conventions of a journal article. A formal editorial process ensures that standards of quality and objectivity are maintained.

Mark Hall and Duncan Adam are, respectively, associate fellow and research associate at IRRU. John Purcell is visiting professor at the School of Management, University of Bath. This paper was written for and presented at the British Universities' Industrial Relations Association annual conference in June 2015. Prompted by the Labour Party's manifesto commitment to review the operation of the 2004 Information and Consultation of Employees (ICE) Regulations, it draws on the authors' extensive research (e.g. M. Hall and J. Purcell, *Consultation at Work*, Oxford University Press 2012) into the (disappointingly limited) impact of the regulations to argue for significant reforms to increase their effectiveness. The elaboration of precise, evidence-based recommendations for improvement makes this paper distinctively and immediately relevant for policy. Moreover, as the previous Warwick Paper in Industrial Relations (no 101 by K. Hoque and N. Bacon) makes clear this work becomes even more topical in the context of the Trade Union Bill introduced into Parliament in the Summer of 2015. While Hall and colleagues do not deal with strikes directly, comparative reflections on the potential of workplace information and consultation bodies, e.g. works councils, in preventing industrial action have circulated for decades (e.g. J Rogers and W Streeck, 1995). As discussed by Hoque and Bacon in their paper, the reduction of facility time envisaged by the Trade Union Bill may worsen employment relations in the public sector and go in the opposite direction to what the evidence provided by Hall and colleagues would recommend.

Guglielmo Meardi

## **Abstract**

Drawing on analysis of 2004 and 2011 WERS data and extensive case studies of employee consultation bodies, this paper highlights major problems with the regulatory design and enforcement of the Information and Consultation of Employees Regulations 2004 and advocates reforms to improve their effectiveness in promoting and embedding meaningful consultation arrangements. Crucially, under the current regulations, the support of 10 per cent of the workforce is necessary for employees to initiate the statutory procedures. But union engagement with the legislation has been limited, and only rarely have non-union employees self-organised to trigger their consultation rights. The regulations have therefore proved peripheral, leaving wide scope for management inaction or unilateralism, and for unenforceable and sub-standard consultation arrangements. Key amendments proposed include lowering or preferably abolishing the workforce support threshold for triggering the regulations, integrating unions into the legal framework and applying minimum standards to voluntary agreements. The May 2015 election result means that there is little or no prospect government support for such changes during the current parliament. While moves underway at EU level may lead to some regulatory reform in this area, its implications for the UK will depend on the outcome of the upcoming renegotiation of the UK's relationship with the EU and referendum on continued UK membership.

## **Introduction**

Driven by the 2002 EU directive on informing and consulting employees, the Information and Consultation of Employees (ICE) Regulations 2004 established, for the first time in the UK, a comprehensive statutory framework giving employees the right to be informed and consulted by their employers on a range of key business, employment and restructuring issues.

The regulations, which have applied since 2005 to undertakings with at least 150 employees, since 2007 to those with 100-149 and since 2008 to those with 50-99, allow employers considerable flexibility of response, both procedurally and substantively. Employers need not act unless 10 per cent of their employees trigger statutory procedures intended to lead to negotiated information and consultation agreements. Voluntary 'pre-existing agreements' may pre-empt the use of the regulations' procedures. Under either route there is considerable latitude for agreed, enterprise-specific information and consultation arrangements. Only in the event that the regulations' procedures are triggered but no agreement is reached are (minimally prescriptive) 'standard' or default information and consultation provisions enforceable. For a more detailed outline of the regulations, see Annex 1.

The broad design of the regulations was agreed with the CBI and TUC and arguably represented a 'half-hearted' approach to implementing the directive (Hall and Purcell 2012), reflecting entrenched employer opposition to – and trade union ambivalence about – legislative intervention in this area. Despite this, it was widely expected by academic commentators and the TUC itself that the ICE regulations would reverse the decline that had taken place since the late 1980s in the incidence of joint consultative committees (JCCs), as measured by successive editions of the Workplace Employment Relations Study (WERS), and promote a more consultative culture in workplace relations. Some argued that the effective application of the regulations represented the 'last chance for collectivism' in a period of relative union weakness and shrinking collective bargaining coverage, especially in the private sector (Hall and Purcell 2012). However, a body of recent research indicates that the ICE regulations have had only a limited impact on the incidence, sustainability and effectiveness of employee consultation bodies.

The paper draws on the authors' analysis of WERS data concerning JCCs (Adam et al 2014) carried out for Acas, continuing analysis of WERS panel data on JCCs (Adam et al forthcoming), and in-depth longitudinal case studies of the experience of consultation bodies in 25 organisations (Hall et al 2013), to inform an assessment of the problematic regulatory approach

adopted by the ICE regulations. Taking account of suggestions for amendments to the regulations from various organisations and commentators, we set out an agenda for legislative reform. The final sections of the paper assess the prospects of such changes being made in the light of the outcome of the May 2015 general election and recent European Commission proposals for consolidating existing EU directives on employee consultation.

### **Incidence, sustainability and effectiveness of employee consultation bodies**

Analysis of 2004 and 2011 WERS data (Adam et al 2014) suggests that the ICE regulations had some impact in terms of an increased incidence of workplace-level JCCs in smaller organisations falling within the scope of the regulations, but in overall terms failed to drive an increase in the proportion of 'ICE qualifying' workplaces (those in organisations with 50 or more employees) having either a workplace- or higher-level JCC.

Looking specifically at workplaces belonging to organisations with 50 or more employees, the proportion that had workplace-level JCCs remained stable at 13 per cent. Disaggregated by size band, there was a small increase in the incidence of JCCs among workplaces belonging to organisations with 50-99 employees that reported having workplace-level JCCs (up from 10 per cent to 12 per cent) and a statistically significant increase among those in organisations with 100-149 employees (up from 9 per cent to 20 per cent). A non-significant increase from 9 per cent to 15 per cent is also recorded for workplaces belonging to organisations with 150-249 employees. These increases may be attributed to the influence of the ICE regulations. However, these increases were offset by the decline in the incidence of higher-level JCCs, reflecting the increasing decentralisation of HR management to workplace level (van Wanrooy et al 2013: 52-53). Thus, the proportion of workplaces belonging to organisations with 50 or more employees reporting any JCC fell from 59 per cent in 2004 to 46 per cent in 2011.

A further factor highlighted by WERS data is the degree of churn in the existence of JCCs. As emphasised by MacInnes (1985) thirty years ago, consultative arrangements have traditionally been subject to a high degree of turnover, so a consistent proportion of workplaces with consultative arrangements does not imply stability. Our ongoing analysis of WERS panel data (Adam et al forthcoming) shows high attrition levels among JCCs between 2004 and 2011. Although the overall incidence of workplace-level JCCs in ICE qualifying panel workplaces remained broadly the same (17 per cent in 2004 compared with 19 per cent in 2011), approaching half (45 per cent) of such workplaces that had JCCs in 2004 no longer had one by

2011, suggesting problems with the sustainability or embeddedness of JCCs despite the existence of the ICE regulations.

In qualitative terms, Hall et al's (2013) case study research in 25 organisations has questioned how far the ICE regulations promote effective consultation. The research examined the introduction and operation of consultation bodies in organisations drawn from each of the workforce size bands progressively covered by the regulations' phased implementation – those with at least 150 employees, those with 100-150 employees and those with 50-100. All the participating organisations were from the private and voluntary sectors, though some had recently left the public sector. Fourteen organisations recognised trade unions for the purposes of collective representation in at least some parts of the organisation. Assessed against the regulations' default provisions that require information and consultation concerning strategic business issues and major organisational change, a substantial minority of participating organisations were categorised as 'active consulters' but the majority were merely 'communicators'. These differing trajectories reflected internal organisational dynamics, principally management's approach to consultation. Beyond providing the catalyst for managerial moves to introduce or revamp consultation arrangements, the statutory framework has been unimportant in terms of shaping consultative practice.

### **Flaws in regulatory design**

These disappointing outcomes reflect key problems with the regulatory design and enforcement of the ICE regulations and have important policy implications.

Crucially, under the current regulations, the support of 10 per cent of the workforce (and a minimum of 15 employees) is necessary if employees are to initiate the statutory procedures. In many circumstances, particularly where there is no union presence, this is 'likely to prove a tough standard to meet in practice' (Hall 2006) in order to secure and operationalise what is supposed to be the fundamental, unconditional right to information and consultation under EU law (Ales 2009). The regulations do not enable recognised unions to trigger negotiations over consultation arrangements (nor are recognised unions guaranteed representation in the regulations' default consultation arrangements where these apply) and union engagement with the legislation has been very limited (Hall et al 2015). Only rarely have non-union employees self-organised to trigger their consultation rights. In none of Hall et al's (2013) case study organisations did employees or unions utilise the statutory trigger mechanism. The initiative to establish or relaunch consultation bodies was almost invariably management's – a finding

consistent with earlier survey research (reviewed by Hall and Purcell 2012: 99-101) suggesting that voluntary activity around new or revised consultation arrangements following the regulations was predominantly employer-led. This picture of only limited employee/union engagement with the regulations is reinforced by the very low volume of ICE-related cases reaching the Central Arbitration Committee (CAC).

For these reasons, the legislative framework has generated little pressure on employers to adopt agreed information and consultation procedures, and left wide scope for management inaction or unilateralism. It seems reasonable to suggest that the low uptake of the statutory provisions by employees and unions helps explain why the ICE regulations have had only limited impact on the overall incidence of JCCs.

A further significant criticism of the regulations concerns the scope they provide for employers to reach pre-existing agreements – PEAs – that remain outside the ambit of the regulations' procedures for legal enforceability, and are unenforceable unless they themselves provide voluntarily for legal enforceability or other dispute resolution procedures. Of Hall et al's (2013) case study organisations, 12 had voluntary agreements or PEAs that had been signed by employee representatives, while in 11 cases the consultation arrangements had been introduced unilaterally by management. In few cases did management regard agreements signed by employee representatives explicitly as PEAs. In any event, agreements were usually drafted primarily by management, with only limited input from employee representatives, blurring the distinction between agreed and unilaterally-introduced arrangements. Importantly, under such arrangements, employee representatives had no legal avenue for seeking redress in the event of a management failure to consult. There was only one example of a 'negotiated agreement' reached under the regulations' procedures, adopted in a major engineering company at the insistence of national-level union officials to ensure the enforceability of the consultation procedures introduced.

A related problem is that the substantive content of both PEAs and negotiated agreements is largely unregulated. There is no requirement that they should meet the default information and consultation standards that they 'displace' (Davies and Freedland 2007: 153). This flexibility is allowed by the directive itself, but enables agreed information and consultation arrangements that fall well short of the default provisions established by EU law. In the context of management's likely dominance of the process of drawing up such agreements, especially in non-union situations, the requirement for employee approval provides only limited protection.



Moreover, unlike the legislation relating to European Works Councils (EWCs), the ‘minimalist’ default provisions do not set out an institutional and operational model for information and consultation that could provide a benchmark or point of reference for those involved in drawing up PEAs and negotiated agreements, particularly employee representatives.

These aspects of the legislative design of the ICE regulations are key factors likely to have contributed to the peripheral influence of the statutory framework on the processes and practice of consultation observed in Hall et al’s (2013) case study organisations.

### **What amendments need to be made to the regulations?**

In the light of the research evidence highlighting the limited impact of the ICE regulations to date, the focus of this section of the paper is to identify the key changes to the regulations that would improve the take-up and practice of consultation in the UK. It draws on the ‘agenda for promoting active consultation’ advocated by Hall and Purcell (2012: 172-178) and takes account of proposals for amending the regulations from various sources, including the TUC and the independent public policy think tank, the Smith Institute. The TUC (2014) argues that ‘the UK’s approach to the implementation of the ICE regulations must be refreshed to make meaningful information and consultation a widespread reality’. The Smith Institute (2014) identifies a range of ‘weaknesses’ in the regulations and lists potential remedies that were discussed during its ‘Making work better’ inquiry. It recommends that ‘the government should simplify and amend the existing ICE regulations to give employees a stronger collective voice and bring the UK more in line with other EU countries’.

#### *Triggering the obligation to have consultation arrangements*

We have already argued that the required support of 10 per cent of the workforce to trigger statutory negotiations over consultation arrangements is a high hurdle. This is reflected in the low numbers of known cases in which employee-initiated negotiations have taken place. The ICE regulations, in contrast to the regulations that implement the EWCs directive, do not provide that employee representatives may make the request on behalf of the required number of employees.

Lowering the proportion – or number – of employees needed to trigger the regulations is clearly one approach that could be adopted. The liberal think tank CentreForum has suggested five per cent (Brîone and Nicholson 2012), while the TUC (2014) proposes a minimum of five employees, irrespective of the size of the organisation, as in Germany. There is also a strong case for

enabling recognised unions and possibly other existing (non-union) employee representatives to initiate statutory negotiations. Without the more realistic possibility that employees are able to trigger the regulations' procedures, the prospect of the jointly agreed implementation of the right to information and consultation by both management and employees will remain remote.

We would favour the more radical approach of abandoning any trigger mechanism and requiring all undertakings with the specified number of employees to establish a consultation body. The TUC considers that this step might be appropriate 'in the medium term'. It argues that, even with a lower workforce threshold for triggering the regulations, there may well be workplaces where workers 'fear the consequences of attempting to trigger a consultation arrangement, or where they are simply not aware of their rights'. It believes that 'a new universal requirement' of this nature could provide the means to secure 'a powerful shift in the UK towards a workplace culture where consultation with the workforce became the norm rather than the exception' (TUC 2014: 33). A similar approach was proposed in February 2013 by Labour peers Lord Lea of Crondall, a former assistant general secretary of the TUC, and former TUC leader Lord Monks, who put forward an amendment to the Enterprise and Regulatory Reform Bill that, had it been adopted, would have phased in a direct requirement on employers to initiate negotiations with employee representatives about an information and consultation agreement. Directly requiring employers to have consultation bodies might risk rekindling union concerns that existing union-based representation arrangements could potentially be destabilised, but our research suggests such fears have proved largely unrealised under the existing provisions (Hall et al 2015). The experience of the redundancy consultation provisions – WERS data for both 2004 and 2011 indicate high rates of compliance – suggests that making the requirement to have consultation arrangements directly applicable would substantially boost the impact of the regulations. An ongoing obligation of this nature should also help embed consultation arrangements and counteract the high attrition rates highlighted by WERS panel data.

A related issue raised by cases referred to the CAC and by the TUC concerns the application of the regulations to 'undertakings', i.e. the legal entity employing the workers concerned, rather than to establishments or other business units, and in particular the existing requirement for the support of at least 10 per cent of the undertaking-wide workforce before employees can initiate the statutory procedure to establish information and consultation arrangements.

Employee/union attempts to apply the regulations to narrower (or wider) business units have

been rejected by the CAC, albeit ‘not with any enthusiasm’, an approach upheld by the EAT in June 2015 in the case of *Lee and others v Cofely Workplace Ltd*. The TUC (2014: 34) suggests ‘changing the regulations so that rights to information and consultation arrangements are based on establishments rather than undertakings [as this] would make them both more effective and easier to activate’.

Abandoning the trigger mechanism altogether, as we propose, would mean that the problems associated with employees/unions having to organise the support of 10 per cent of the workforce across multi-site undertakings would not arise. But in the absence of this, amending the regulations so that the requisite employee support thresholds – and the default information and consultation arrangements that may subsequently become enforceable – apply either at establishment- or at undertaking-level would be a feasible reform. While information and consultation at undertaking level enables access to higher-level management who are more likely to be responsible for strategic decisions, we have already noted that WERS 2011 showed a decline in the incidence of JCCs above workplace level, consistent with the increasing decentralisation of HR management to workplace level (van Wanrooy et al 2013: 52-53).

#### *Integrating unions into the legal framework*

Recognised unions should also be formally integrated into the legal framework for information and consultation more generally. As well as enabling recognised unions to activate the regulations’ statutory rights and enforcement procedures, the law should guarantee them a representative role in the event that the default standard information and consultation provisions become applicable, as is the case under the Irish legislation implementing the directive. This would mean enabling union representatives to represent those parts of the workforce covered by union recognition arrangements in the consultation body established, alongside elected representatives from elsewhere in the organisation, instead of requiring all-employee ballots for the election of information and consultation representatives under the default provisions as at present. The aim would be to reverse what Davies and Freedland (2007: 156) have described as ‘an almost complete divorce between the rules on consultation and the rules and practices of collective bargaining’. Such an approach would be consistent with WERS findings as well as those of our own research that ‘hybrid’ union/non-union arrangements are the mainstream format for consultation bodies in unionised organisations. It should also generally help to promote the embedding of consultation arrangements, even if in a few cases

good relations and effective joint working between union and non-union representatives may be difficult to achieve.

*Ensuring minimum standards are met*

Amendments are also needed to promote the type of active consultation envisaged by the directive's/regulations' default provisions. First, although allowed by the directive itself, it seems odd and inappropriate that agreement-based information and consultation provisions need not conform with the 'minimum requirements for the right to information and consultation' set out in Article 4 of the directive. These lay down the subject matter and basic requirements of the information and consultation process and are effectively 'copied out' by the ICE regulations' own default 'standard information and consultation provisions' (regulation 20). Specifying that both PEAs and negotiated agreements cannot derogate from this minimum 'floor' of rights would be consistent with the approach of most other EU countries. It would still provide employers and employee representatives with substantial scope to agree organisation-specific consultation arrangements but, in conjunction with stronger enforcement procedures, discussed below, would help avoid the limited and ineffectual information and consultation practices found in some of Hall et al's (2013) case study organisations.

Second, the regulations should be amended to include a basic constitution for a consultation body, applicable in the event that the default standard information and consultation provisions become enforceable. This might be similar to the model included in Acas's (2004) guidance, establishing elementary arrangements concerning its composition, role and remit, meeting arrangements, information and consultation procedures, election arrangements and facilities for representatives, and perform a similar function to the Trade Union Recognition (Method of Collective Bargaining) Order 2000 applicable in the context of the statutory trade union recognition procedure. The TUC suggests that such a constitution should be developed by the Department for Business, Innovation and Skills, in discussion with the TUC and CBI. Not only would this provide a workable template for operationalising the default provisions. It could also prove to be an influential point of reference or benchmark for the provisions of PEAs and negotiated agreements, similar to the 'statutory model effect' identified by Gilman and Marginson (2000: 38) in their analysis of the content of EWC agreements, and contribute to avoiding sub-standard agreement-based information and consultation arrangements. Notably, the Irish legislation provides more detailed default constitutional provisions than the UK's (currently highly minimalist) approach.

### *Improving enforcement*

There are strong arguments (see Ewing and Truter 2005: 634-638) that the regulations' arrangements in respect of the enforcement of both the standard and agreement-based information and consultation provisions are inadequate. The CAC may order employers found to have breached the terms of a negotiated agreement or the standard provisions to take such steps as are necessary to ensure compliance, but the CAC's powers do not extend to suspending the implementation of employer decisions taken in breach of the duty to inform and consult. A financial penalty, payable to the Treasury and not to employees as compensation, is the only available means of redress and, with an upper limit of £75,000, is widely seen as being an inadequate sanction, especially in the case of large organisations. It would seem to be at odds with directive's requirement that sanctions must be 'effective, proportionate and dissuasive'. Koukiadaki (2009: 413) suggests an increase in the level of financial sanctions. The TUC believes that employers who fail to inform and consult should be required to pay 'protective awards' to all affected employees, similar to those which apply to consultation on collective redundancies. More radically, if the regulations are to be enforced effectively, there is a strong case for requiring employers who fail to inform and consult properly on an issue to revert to the status quo ante until the necessary consultation has taken place, as in France, despite the exclusion of European Commission and European Parliament proposals to this effect from the final version of the directive. Such an approach is also supported by the TUC.

Another key weakness in the regulations' enforcement regime is that it does not apply to pre-existing agreements. Nor are PEAs required to be legally enforceable via contract law. The European Commission's (2008: 5-6) review of the application of the directive suggested that the unenforceability of PEAs may be problematic in terms of compliance. We would favour extending the regulations' enforcement regime to embrace PEAs, as does the TUC (Hall 2005: 117) and other commentators, including Koukiadaki (2009). As well as ensuring compliance with the directive, such a move would provide a potential means of redress for employees and representatives who find that, as in a number of Hall et al's (2013) case study organisations, information and consultation proves less extensive in practice than implied by the terms of the PEA. It would also need to apply if collective/recognition agreements constitute PEAs (as both the CAC and EAT have determined they may do, provided they meet the regulations' criteria, in the 2005/6 case of *Stewart & Moray Council*).

### *Broadening the subject matter for consultation*

Our research concerning the operation of consultation bodies suggests that the subject matter for information and consultation specified by the regulations should be reviewed and extended. There is clear evidence from our case studies (Hall et al 2013) that the inclusion of HR policies and practices as topics for consultation is beneficial although they are not currently covered by the regulations. These were not only staple agenda items for many consultation bodies we studied but were often the issues that generated the most interest among employee representatives since they were of immediate concern to, and had a direct impact on, employees. It was also no coincidence that, in two organisations where the consultation body was perceived to be on the verge of failure, management tabled HR policies for discussion in the hope of reinvigorating the information and consultation process. As well as the existing topics for information and consultation listed by the regulations' default provisions – business and economic developments, employment developments and organisational change and restructuring – there is a case for extending the right to consultation to include HR issues such as grievance and disciplinary procedures, pensions, payment systems, diversity policies and equal opportunities, training, working hours and holidays and flexible working arrangements. A range of specific HR issues are subject to statutory information and consultation requirements in other EU countries, most notably Belgium, Germany and the Netherlands.

#### *Supporting employee representatives*

A further reform to help promote active consultation concerns measures to support the development of employee representatives' competence and coordination. Our research highlights the correlation between active consultation and the existence of an organised and functioning representative body able to articulate employees' interests. The regulations provide employee representatives with the right to paid time off to perform their functions and protection from dismissal or detriment for exercising their entitlements but go no further, while representatives operating under a PEA have no rights at all. These rights and protections compare poorly with those accorded to employee representatives by UK legislation relating to consultation over redundancies and transfers. This provides the rights to training, access to employees and appropriate (office) accommodation and other facilities.

A broader range of rights is contained in the 'recast' EWCs directive, providing EWC representatives with rights to paid time off and the necessary financial and material resources to carry out their duties, to undertake training, to call special meetings of the EWC, to hold pre-meetings without management being present and to seek external advice. The absence of most

of these rights from both the information and consultation directive and the UK regulations effectively leaves such practices dependent on management good will. Non-union representatives are rarely trained and have very limited access to external advice. Adam et al's (2014: 41) analysis of data from WERS 2011 shows that only just over one-third of non-union representatives had ever received training in their role as an employee representative. Incorporating similar rights and facilities in the ICE regulations would provide further support for the development of active consultation.

#### *Ensuring representative-based consultation*

Finally, a brief comment is necessary concerning the scope under the regulations for PEAs and negotiated agreements to provide for direct forms of information and consultation only. The directive defines information and consultation as processes involving employee representatives while, in response to UK representations, its preamble (recital 16) states that the directive is 'without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise their right to be informed and consulted through their representatives'. Although the indications are that the scope for relying on direct forms of information and consultation in the UK has proved to be 'more symbolic than practical' (Hall 2005: 126), with few reported cases of agreements providing only for direct methods (Koukiadaki 2009: 406), the regulations' provisions on this point are at odds with the directive (Hall 2005: 115) and are likely at some stage to require amendment to ensure compliance. The European Commission (2008: 5) has already said that member states' provisions in this area warrant further examination. The Smith Institute (2014: 88) inquiry discussed 'whether to remove the possibility that direct methods of participation can be used as a suitable alternative to representative participation', noting that the current ICE regulations are 'almost certainly not in compliance with the requirements of the EU directive' on this point.

Taken together, the amendments in this package should encourage greater employee and union engagement with the ICE regulations' provisions, and promote more widespread, effective and embedded consultation arrangements. Of necessity, our suggested amendments go beyond what is strictly required to conform with the EU directive, thereby 'gold-plating' its provisions – a persistent charge levelled by employers' groups and Conservative politicians against domestic legislation that transposes EU legislation. But if, as we strongly believe it should be, the objective is the effective implementation of employee rights to information and consultation in the UK industrial relations context, the preferred government approach of 'minimalist'

compliance with EU directives is always likely to be inadequate. A sufficiently detailed legislative framework, taking account of the range of workplace environments – unionised, partially unionised and non-union – that will be affected by its provisions, needs to be developed in order to achieve this objective.

### **Post-election prospects for amending the ICE regulations**

With the Conservative party's victory in the May 2015 general election, there is little or no prospect of government support for a package of measures along these lines during the current parliament.

Only under a Labour or Labour-led government was reform of the ICE regulations likely to feature in the new government's programme. The party's workplace manifesto contained the specific commitment that 'Labour will review the current implementation and operation of the information and consultation regulations to examine how information and consultation in the workplace can be made widespread and more meaningful'. Wider support for such a move by Liberal Democrat, SNP, Plaid Cymru and Green MPs could also have been expected given their parties' respective manifesto commitments to strengthening employee participation in corporate decision-making.

By contrast, while the Conservative party's manifesto made no reference to the ICE regulations, the deregulatory tenor of its hostility to both national and EU-level 'red tape' affecting British businesses and its commitment to renegotiating the terms of EU membership clearly indicate that voluntary moves by the new government to strengthen the regulations are highly improbable and that, if anything, the opposite approach is more likely. The highly restrictive approach taken in the Trade Union Bill towards trade unions, including towards facility time for union representatives, demonstrate that key elements of the reform package for the ICE regulations that we have advocated in this paper would not find favour with Conservative ministers.

### **Significance of EU-level developments**

Even though the outcome of the 2015 election rules out the prospect of the progressive reform of the ICE regulations being driven by domestic politics, it may be that, as so often before in the history of UK employee consultation legislation (Hall and Purcell 2012), EU-level developments could still provide the stimulus for change. Aspects of the ICE regulations that are of questionable compatibility with directive's provisions may ultimately reach the Court of Justice



of the EU as a result of litigation or a European Commission referral. But it is the Commission's intention to 'consolidate' the three directives on information and consultation, collective redundancies and transfers of undertakings that seems most likely to provide the impetus for amendments to the regulations.

#### *Fitness check exercise*

The proposed consolidation follows a 'fitness check' of the three directives during 2011-13, although the idea of consolidating various of the EU directives relating to information and consultation has been on the Commission's agenda for the past decade and has received support from both the European Parliament and the European Economic and Social Committee. The fitness check exercise was initiated by the Barroso II Commission and covered selected policy fields with the aim of assessing whether EU legislation was 'fit for purpose'. Its stated intention was 'not deregulation or less regulation but rather better/smart regulation and making EU legislation more responsive to current and future challenges'. The review of the three information and consultation directives included an extensive EEA-wide evaluation study of their operation and effects, carried out by consultants, which assessed the directives as 'broadly fit for purpose' (Deloitte 2012). However, the Deloitte report concluded that 'in practice, the legislation's overall effectiveness is evaluated somewhat less positively than its relevance, efficiency and coherence. In other words, it is delivering below its potential.' A European Commission (2013) staff working document echoed this conclusion while noting a number of specific 'gaps and shortcomings'. It also stated that 'the issue of coherence/consistency of the directives merits serious consideration and further discussion with stakeholders. This may lead to a possible consolidation/simplification of the directives.' The Commission's commitment to such a course of action subsequently strengthened and, as part of the wider 'regulatory fitness and performance programme' (REFIT), the current Commission promised a legislative initiative during 2015 to 'consolidate' and 'simplify' the three directives.

#### *Consultations launched*

On 10 April 2015, in a move that attracted little attention in the UK in the context of the general election campaign, the Commission initiated formal EU treaty-based consultations with EU-level 'social partner' organisations on the intended consolidation of the three directives.

The key issue highlighted by the Commission's consultation document concerns the potential alignment of the directives' definitions of 'information' and 'consultation'. The 2002 information and consultation directive includes provisions that define the concepts of 'information' and

'consultation' (but these are not as extensive as those in the 2009 recast EWCs directive or the 2001 directive on employee involvement linked to the European Company Statute), whereas the 1998 directive on collective redundancies and the 2001 directive on transfers of undertakings do not, but do set out particular information and consultation obligations. The Commission states that standardised definitions, in line with those of the EWCs and employee involvement in European Companies directives, would improve the clarity, consistency and coherence of the directives and 'contribute to a more effective exercise of the rights and obligations of all actors concerned' (European Commission 2015).

A further issue highlighted in the consultation document concerns whether or how far the directives should cover public administration, but the Commission has not pursued its earlier idea of seeking to reduce the relevant workforce size thresholds to cover more SMEs. The Commission also wants to specify that the processing of personal data should be carried out in accordance with EU data protection law.

Rather than revising each of the three directives, the Commission favours using the 'recasting' technique to produce a single new legal instrument, incorporating substantive amendments as well as unchanged provisions.

The consultation document represents the first phase of the formal consultation of the EU-level social partner organisations (ETUC, BusinessEurope, UEAPME representing SMEs, and CEEP representing public enterprises) required by Article 154 of the Treaty on the Functioning of the European Union. This provides that 'before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action'. If, after this first phase of consultation, the Commission considers EU action 'advisable', it is required to undertake a second phase of consultation with the social partners on 'the content of the envisaged proposal'. At either stage (but typically at the second phase of consultation, when the Commission sets out its proposed approach in more detail ) the social partners may inform the Commission that they wish to enter into dialogue between themselves on the issues concerned, potentially leading to an agreement that could form the basis for subsequent EU legislation.

#### *Potential social partner responses*

In the context of earlier Commission proposals for information and consultation legislation, the ETUC and BusinessEurope have each at different times favoured the idea of negotiating an agreement or opposed such negotiations. In 1994, ahead of the adoption of the original EWCs

directive, UNICE (as BusinessEurope was then known) and CEEP favoured entering negotiations with the ETUC while the latter preferred traditional Commission-led legislation. 'Talks about talks' came close to providing the basis for negotiations but ultimately failed because the CBI withdrew, arguing that the employers' side had conceded too much to the ETUC, and the Commission proceeded to issue a formal proposal for a directive (Gold and Hall 1994). In 1998, prior to the proposal for what eventually became the 2002 information and consultation directive, it was the ETUC that was positive about entering negotiations about a potential agreement on the issue, as was CEEP, while UNICE declined to participate. Although a subsequent leak of an unofficial text of the draft directive prompted UNICE to re-examine its decision, its rejection of negotiations was confirmed by its governing body.

The tables were turned again in the consultations that preceded the recasting of the EWCs directive. At the second phase of consultations with the social partners initiated in February 2008, the employers' side (BusinessEurope, UEAPME and CEEP) jointly called for the opening of negotiations. The ETUC indicated it was 'ready to negotiate' but stressed that it sought a quick conclusion to the negotiations so that the EWCs directive could be revised during the mandate of the Commission and Parliament at that time. After 'pre-negotiation' discussions with BusinessEurope, the ETUC concluded that the social dialogue route was 'impracticable' because it had not been possible to agree a concluding date for any talks nor reach a 'robust understanding on substantial amendments to the directive'. However, during the subsequent legislative procedure, at the invitation of the then French presidency of the EU, the social partners held further discussions on key issues relating to the revision of the directive and in August 2008 submitted 'joint advice' which helped shape the final version of the recast directive, including the definitions of 'information' and 'consultation'.

How the social partners will respond to the current consultations remains uncertain, and whether they will opt to negotiate an agreed approach themselves is unlikely to become clear until the Commission's second phase consultation document sets out in more detail its intended approach to consolidating the three directives.

Public indications of BusinessEurope's position on the proposed consolidation are scarce. It seems unlikely that the employers' organisation would wish to see further legislative intervention or more detailed regulation in this area. But it might view the narrow, technocratic exercise envisaged by the Commission as the least worst outcome, leaving little incentive to enter negotiations with the ETUC.

The ETUC's position is more extensively documented, its executive committee having adopted two resolutions on the issue in late 2013 (ETUC 2013; 2013a). In these, the ETUC was critical of the 'deregulatory' impulses behind the Commission's REFIT programme but reiterated its call for improvements to the information and consultation framework. While supporting the upward alignment of some of the provisions of the three directives, the ETUC opposes their merger into a single instrument, arguing that this would create an unacceptable risk of regression in workers' rights, even though the Commission consultation document insists that consolidation should not jeopardise the 'legitimate objectives' of the existing directives nor lead to 'unjustified regression'.

The ETUC supports the inclusion of public administration within the scope of the directives and the upward alignment of the directives' definitions of 'information', but is strongly opposed to the consolidation of the existing definitions of 'consultation', fearing it could significantly dilute the 'added value' of the specific consultation provisions of the collective redundancies and transfer of undertakings directives. Additional amendments sought by the ETUC include lowering or abandoning altogether the relevant workforce size thresholds, stronger and more effective sanctions for violating information and consultation rights, and giving employee representatives the right to access external (including union) expertise. It remains to be seen whether the ETUC is able to broaden the scope of the exercise beyond the limited parameters set by the Commission and secure more extensive reforms. It is likely to have allies in the European Parliament but fewer among member state governments. It is possible that in these circumstances the ETUC may see negotiations with its employer counterparts as offering both the possibility to pursue a broader agenda and the best chance of maintaining existing rights and protections.

Among the key actors in the UK, the TUC shares the ETUC view that, whilst there is a clear need to strengthen information and consultation rights, consolidation of the three directives is not the best way of achieving this. A key TUC concern is the potential for the consolidation exercise to become the vehicle for attempts to deregulate or weaken information and consultation rights. Notably, the TUC considers it vital to retain current provisions in the three directives that require consultation to be undertaken with a view to reaching agreement, as well as the requirement that consultation over collective redundancies specifically covers ways and means of avoiding job losses.

While there is no published statement available of the CBI's views on the consolidation of the directives, it is unlikely to favour the sort of changes put forward by the Commission. A report by the Business Taskforce (2013) appointed by the 2010-15 coalition government to look at EU regulation identified 'burdensome' proposals for changes to the information and consultation directives as a key issue. It argued that 'Further EU action in this area would be costly to business, without adding any real value. The European Commission frequently returns to this issue, despite a lack of evidence suggesting there is a problem with existing information and consultation rights.' It recommended that 'The European Commission should neither make new proposals nor change existing legislation on the information and consultation directives'.

#### *Implications for the UK*

One way or another, it seems likely that the Commission initiative will result in eventual EU legislation. Directives on the information and consultation of workers do not require unanimity within the Council, so neither the UK nor any other member state would be able to block such a proposal on its own. Under the EU's new 'better regulation' procedures, impact assessments for legislative proposals will be subject to impartial scrutiny, but this is a process that could potentially bolster, not undermine, the case for legislative intervention: unions have long argued that collective voice contributes positively to productivity and that any moves to reduce employee involvement would have a negative impact.

However, given the Commission's objective of 'consolidating' and 'simplifying' the three directives, few substantive revisions of the existing directives' provisions can be expected. Certainly any resulting legislation will not provide the basis for the sort of far-reaching amendments to the ICE regulations set out earlier in this paper.

Moreover, in terms of its application to the UK, any such legislation could be overtaken by events. The Conservative government's planned renegotiation of the terms of UK's EU membership and subsequent referendum are due to take place before the end of 2017, and possibly in 2016. The Commission's latest statement on the EU's 'better regulation' agenda (European Commission 2015a) urges the Council and Parliament to 'prioritise initiatives that would simplify or improve existing laws such as those initiatives identified in the Commission's REFIT programme – to deliver the intended benefits more quickly'. But EU legislative procedures typically take years not months to complete and directives typically allow member states a two or three year period within which to introduce national transposition measures. It is therefore possible that, by the time a directive giving effect to the proposed consolidation of the three

directives is adopted, and certainly by its transposition deadline, the UK could already have secured renegotiated arrangements that might possibly include limiting EU intervention in employment law or enabling the UK to opt out from such measures – a long-standing objective of employer organisations and the political right, but one on which the Conservative prime minister David Cameron has placed less emphasis in recent months – or have voted to leave the EU altogether – ‘Brexit’.

Even if it does still apply to the UK, such a directive could prove to be a double-edged sword. While it would provide the opportunity for the TUC and others to campaign for the broader reform of the ICE regulations, there is the potential threat that having to legislate on the basis of the ‘consolidation’ directive might encourage a union-averse Conservative government to pursue deregulatory changes at the same time. Domestic provisions on redundancy consultation and the transfer of undertakings were weakened by the 2010-15 Conservative-Liberal Democrat coalition government, and there is a danger that the current Conservative administration would again be tempted to remove recognised unions’ prioritised status as the channel for consultation under the national collective redundancies and transfer of undertakings provisions, enabling employers to bypass unions and consult instead with other elected employee representatives, as happened between 1995 and 1999 (Hall and Edwards 1999).

## **Conclusion**

The disappointingly limited impact of the ICE regulations to date should focus attention on the consequences of their flawed legislative design and on potential reforms to improve the take-up and effectiveness of the statutory rights they establish.

The objective of domestic legislation on information and consultation should be to promote widespread, influential and sustainable consultation arrangements that reflect the UK industrial relations context, not merely the ‘minimalist’ transposition of EU directives. This paper has put forward a series of amendments to the ICE regulations that are consistent with this approach.

There is no realistic prospect that the Conservative government elected in May 2015 will pursue the necessary changes, but EU-level developments may provide some impetus for regulatory reform. The European Commission’s legislative initiative to simplify and consolidate existing consultation directives is unlikely to result in a major revision of their provisions. But, subject to the UK remaining in the EU and continuing to be bound by EU employment legislation, any resulting EU directive would require renewed legislative attention at national level to the issue of consultation. This would provide the opportunity for the TUC and others who support

stronger and more effective UK consultation legislation to press their case for the necessary changes, but also an opening for possible government revisions that could have the opposite effect.

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## **Annex 1 – Key provisions of the ICE regulations**

### **Coverage and commencement**

The ICE regulations came into effect on 6 April 2005, and initially applied to undertakings with at least 150 employees. Undertakings with at least 100 employees were covered from April 2007, and those with at least 50 from April 2008. An ‘undertaking’ is defined as ‘a public or private undertaking carrying out an economic activity, whether or not operating for gain’.

The regulations apply to Great Britain. Separate but similar regulations apply in Northern Ireland. However, the employment thresholds specified relate to the UK as a whole.

### **Initiating negotiations**

Regulation 7 enables 10 per cent of an undertaking’s employees (subject to a minimum of 15 employees and a maximum of 2,500), to trigger negotiations with their employer on an information and consultation agreement, to be conducted according to statutory procedures (see below). Employers may themselves initiate the negotiation process on their own initiative by issuing written notification to employees.

### **Pre-existing agreements**

Where a request for negotiations is made by fewer than 40 per cent of the employees and there is a pre-existing agreement (PEA) in place the employer can ballot the workforce on whether they support the request for new negotiations. If the request is endorsed by at least 40 per cent of the workforce, and the majority of those who vote, negotiations on a new agreement must proceed. If not, no further action is necessary. PEAs are defined as written agreements that cover all the employees of the undertaking, have been approved by the employee and set out ‘how the employer is to give information to the employees or their representatives and to seek their views on such information’ (regulation 8).

### **Negotiated agreements**

Where triggered under the regulations, negotiations on an information and consultation agreement must take place between the employer and representatives elected or appointed by the workforce (regulation 14). The resulting agreement must cover all employees of the undertaking and set out the circumstances in which employees will be informed and consulted—either through employee representatives or directly (regulation 16).

### **Standard information and consultation provisions**

Where the employer fails to initiate negotiations following a valid employee request, or where the parties do not reach a negotiated agreement within six months, ‘standard information and consultation provisions’ specified by the regulations will apply (regulations 18-20). These require that the employer must inform/consult ‘information and consultation representatives’ on:

- (a) ‘the recent and probable development of the undertaking’s activities and economic situation’ (information only);
- (b) ‘the situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking’ (information and consultation); and
- (c) ‘decisions likely to lead to substantial changes in work organisation or in contractual relations’, including decisions covered by the legislation on collective redundancies and transfers of undertakings (information and consultation ‘with a view to reaching agreement’).

However, as regards category (c), where employers come under a duty to consult trade union or employee representatives under the existing legislation on collective redundancies and transfers of

undertakings, they are not also obliged to consult information and consultation representatives under the ICE regulations provided they notify them accordingly on each occasion.

The standard provisions specify that there should be one information and consultation representative for every 50 employees or part thereof, with a minimum of two representatives and a maximum of 25). Representatives are to be directly elected by workforce-wide secret ballot.

### **Enforcement and sanctions**

Enforcement of negotiated agreements reached under the statutory procedure, or of the standard information and consultation provisions where they apply, is via complaints to the Central Arbitration Committee (CAC), which may order the employer to take the necessary steps to comply with the agreement/standard provisions (regulation 22).

The Employment Appeal Tribunal will hear appeals and is responsible for issuing penalty notices. The maximum penalty payable by employers for non-compliance is £75,000 (regulation 23). Where necessary, enforcement of CAC orders may be pursued through the courts.

### **Confidentiality**

Employee representatives and other recipients owe a statutory duty to the employer not to disclose information or documents designated by the employer as confidential. Employers may withhold information or documents the disclosure of which could seriously harm or prejudice the undertaking. Disputes over employers' decisions to impose confidentiality restrictions or withhold information may be referred to the CAC (regulations 25 and 26).

### **Employee rights and protections**

Information and consultation representatives under negotiated agreements and the default provisions – but not PEAs – have the statutory right to paid time off to perform their functions, and employees are protected from unfair dismissal or detriment for exercising their entitlements under the regulations, enforceable via Employment Tribunals.