

ICE and Voice 10 years on The Information and Consultation of Employees Regulations in the UK and Europe



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1. Introduction

It is ten years since the introduction of the Information and Consultation of Employees Regulations. They were seen by some – including ourselves – as a fantastic opportunity to promote employee voice in the UK, and to move us to a more consensual and partnership based approach to social dialogue that is more in keeping with our European neighbours.

But it is fair to say that the regulations have not had the impact some of us had hoped for. Whilst not quite a damp squib, they've hardly exploded into life.

This has been a great shame. The UK performs poorly in terms of employee voice. Looking at worker participation across the EU, we come second bottom of the league, in the relegation zone just ahead of Lithuania. This matters, as having a voice at work is not just a fundamental right; it is good for employers and for employees.

It's also good for the country too. Employers who give their workforce a say and involve them in decision making tend to be more profitable and more productive. This is a vital lesson we can learn at a time when productivity has stalled in the UK. If we are competing in a 'global race', we're losing the

ground we've made up, and are in danger of falling far behind our continental neighbours and the rest of the G7. German and French firms have much stronger employee voice – and they're far more productive. We do not think these facts are unrelated.

In this publication, we look back at the ICE regulations 10 years on. We start by looking at the state of voice in the UK, before examining the regulations and the impact they've had on the UK labour market. We assess the various factors that explain the lack of impact they have had, before considering how the EU directive on information and consultation has been implemented in elsewhere, with case studies on Germany, France and Denmark. We then look at the future of the ICE regulations, trying to learn the lessons of our experience and of other EU member states.



Nita Clarke OBE

2. Executive Summary

Having effective arrangements for collective consultation in the workplace is a key part of promoting employee voice. Both voice and consultation have been shown to be linked to numerous positive outcomes; from supporting employee engagement and boosting performance and productivity, to improving decision-making, employee satisfaction and wellbeing. In addition to the strong evidence base, having a voice at work can also be seen as a fundamental right.

There is clearly room for improvement in terms of voice and consultation in the UK. Recent decades have seen a shift from indirect and representative voice towards direct and individual voice. This is in part due to the decline in union membership, but it also relates to changing managerial attitudes, and to changes in technology. There is evidence that the UK performs relatively poorly in terms of voice and consultation compared to our EU neighbours.

The Information and Consultation of Employees (ICE) Regulations were introduced from April 2005. Deriving from an EU directive, the regulations for the first time in the UK gave employees legal rights to generalized information and consultation on key issues affecting their work and organisation. The rights were not automatic; if employers did not choose to enact them, 10 per cent of employees across the entire undertaking would have to sign a petition to trigger them. The regulations did not give trade unions a formal role in information and consultation. The implementation of the regulations seems designed to limit their impact on the workplace and allow for maximum flexibility on behalf of employers. Indeed, this aim has been confirmed by the Civil Servant in charge of transposing the directive. The Government never intended the regulations to have much of an effect. This reflected both their ambivalence to the directive, opposition from employers, and the voluntarist and managerialist traditions of UK employment relations and labour market regulation.

The ICE regulations have failed to make the transformative impact some had hoped for. There was no change in the incidence of workplace Joint Consultative Committees (JCCs – workplace bodies concerned with consultation) between 2004 and 2011. However, there was an increase among medium-sized employers (50 – 249 employers) and the stability in the incidence of JCCs over the period

followed a decline in previous years. This suggests the regulations may have succeeded in promoting formal consultation structures in medium sized employers and in arresting the decline in consultation.

Asides from structures for consultation, there does not seem to have been a significant improvement in the culture of consultation. Discussions at JCCs seem to be increasingly focused on the management's chosen option, rather than providing for an open discussion on potential options. On the positive side, managers are more likely to say they wouldn't introduce change without consulting, and employees also seem more positive about their ability to shape decisions. However, this is likely the result of increased efforts from employers to promote direct and individual voice, rather than improvements in formal or representative involvement in decision-making.

In terms of explaining the limited impact of the regulations, the attitudes of the social partners seems crucial. The Government were ambivalent about the regulations, and were wary of imposing anything on employers against their will. The Confederation of British Industry (CBI) was strongly opposed to the regulations, seeing them as unnecessary and restrictive, and sought to water them down as much as possible. Whilst the TUC (Trade Union Congress) were in favour, the wider union movement were more skeptical of the value of information and consultation, seeing the regulations as a potential threat to trade unions. In this context, the regulations were '*effectively an idea without a constituency*' (Hall and Purcell, 2012).

Partly as a result of the reluctance of the Government and the opposition of employers, the regulations were transposed in a way that inevitably limited their impact. The 10 per cent trigger has proven to be a serious barrier, particularly in non-unionised workplaces and given the low levels of awareness of the regulations, and the fact that it applies to undertakings, rather than workplaces. As well as shaping how they were transposed, the voluntarist and managerialist culture of the British workplace also served to limit the impact of the regulations. The directive was more in keeping with the European model of social partnership rather than the British approach. Given this – and the fact the regulations lacked teeth – they have inevitably had a limited impact on the UK workplace.

Most EU member states have far stronger rights for information and consultation. In many countries, such as Germany and France, these rights predated the directive. In others, such as Denmark, existing rights were strengthened and/or extended. Information and consultation tends to be valued by social partners as helping improve the process of and outcomes from decision-making. It is seen leading to better-informed, socially optimal and more sustainable decision-making. In many EU member states, the rights for involvement and consultation sit alongside other rights that promote employee voice, through collective bargaining or representation in corporate governance. They are also complemented by a more established culture of partnership working and workplace democracy.

The ICE regulations could be reformed in order to better support voice and consultation at work. A priority would be to reduce the 10 per cent trigger, perhaps to 5 employees or 2 per cent of staff – whichever is higher. This should apply on a workplace level, rather than across an entire undertaking. Recognised trade unions should be

permitted to trigger the regulations. Quality of consultation matters too – consideration should be given to allowing representatives some time off for training. Employers should be required to consult on a wider range of issues, and on various options, not just management's preferred option.

However, if the Government is unwilling to consider strengthening the ICE regulations, there are things other actors can do to encourage better use of the regulations. The Department for Business, Innovation and Skills, The Advisory, Conciliation and Arbitration Service, The Chartered Institute for Personnel and Development, The Involvement and Participation Association and Engage for Success could help promote the benefits of information and consultation to employers, and encourage them to establish effective consultation forums. Trade unions could make better use of the regulations – as they have on the continent – to strengthen their position and complement collective bargaining. All these groups could also help raise awareness of the regulations, encouraging more employees to consider using them in their own workplace.

3. What are the benefits of voice and consultation in the workplace?

In this chapter, we look at the benefits of employee voice and consultation at work.

The ICE regulations define consultation as *'the exchange of views and establishment of a dialogue' between employer and employees, through their representatives, on 'the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking.'*

Consultation is an important part of employee voice. There has been increasing focus on the concept of voice in recent years. In *Engaging for Success*, MacLeod and Clarke described voice as meaning that *"employees' views are sought out; they are listened to and see that their opinions count and make a difference. They speak out and challenge when appropriate. A strong sense of listening and responsiveness permeates the organisation, enabled by effective communication."* (MacLeod and Clarke, 2008). However, consultation is just one aspect of voice among many. Employee voice includes a number of other processes such as formal workforce meetings; team briefings and meetings with line managers; union recognition and collective bargaining; online communication and employee surveys.

There is a growing body of evidence that demonstrates the importance of voice and consultation at work – both for the employee and for the employer.

Employee engagement

Employee engagement has been shown to be linked to numerous positive outcomes, from absence and retention, to customer satisfaction and productivity (Rayton et al, 2012).

In *Engaging for Success*, MacLeod and Clarke identified employee voice as one of the four 'enablers' of employee engagement. These were four factors that were *"commonly agreed to lie behind successful engagement approaches"*, with the others being a strategic narrative, engaging managers, and integrity (MacLeod and Clarke, 2008). Giving employees a voice and involving them in decision-making is seen as being crucial to employee engagement.

Performance and productivity

Consultation and employee voice seem to be linked to organizational performance and productivity. Effective consultation, used alongside other voice mechanisms, makes up an important part of what's known as High Performance Work Systems. As the TUC have shown, such workplaces tend to have higher productivity and profitability (TUC, 2014). Townsend et al. found in a study of luxury hotels that *"hotels with effective voice systems were able to demonstrate better performance in measures of employees' satisfaction, line manager performance and employee turnover"* (Markey and Townsend, 2013).

It is notable that responsiveness matters. Bryson et al (2006) who found that *"managerial responsiveness to employee voice does lead to superior labour productivity, especially in non-union workplaces"*. More than allowing employees to speak up, managers need to genuinely consult and involve their workforce. As Holland explains *"if management does not afford employees a genuine right to participate in organisational decision-making, voice arrangements may just be seen as a fig leaf concealing managerial unilateralism and will be seen by employees as no more than rhetoric"* (Holland in Wilkinson et al, 2014).

The link to productivity is important both to individual employers, and to the country as a whole. Productivity in the UK has stalled since the recession, and is now well behind both the pre-crisis trend and the G7 average. Improving productivity is essential both to delivering sustainable improvements in living standards (although distribution matters too) and to boosting international competitiveness.

Improving decision-making and preventing conflict

There is strong evidence that consultation and voice can improve decision-making. Employees are well-placed to contribute to decision-making. They often have a detailed understanding of their organisation, the processes and procedures, the product, and the customer. Research has shown, allowing employees to *"input into work and business decisions can result in better decisions and improve understanding"* (Wilkinson et al., 2014). The process of involving employees in decision-making can help lead to decisions which are better for both employers and

employees or 'socially optimal' (Freeman & Lazear, 1995). The directive itself recognises this, stating that *'timely information and consultation is a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy.'*

"Allow employees to have a say in decision-making, affecting their own organization, and they may come up with better ways to doing things in the organization... People on the ground have more knowledge of day-to-day work tasks than senior management."
Tony Dobbins, Bangor University

In addition to improving the quality of decisions, consultation is important to ensuring an effective process and preventing conflict. The process of consultation can serve to build trust and improve the manager-employee relationship (Rees et al., 2013). As the TUC has argued, by giving employees a platform to voice their issues and opinions, information and consultation allows managers an insight into the views of the workforce, reducing misunderstanding and preventing conflict (TUC, 2014). Through giving employees a voice, and consulting them on important decisions in a transparent and open way, employees are more likely to feel they have had a say, even if the final decision would not have been their preferred option.

Employee satisfaction and wellbeing

There is a well-established link between voice, consultation and job satisfaction. This is both a good in and of itself, and for organisations. Effective information and consultation has been shown to improve worker satisfaction, which leads to greater employee loyalty and commitment (Wilkinson et al., 2014). Bryson et al. (2006) found that in two thirds of their case studies, *"managers reported some improvement in employee attitudes and behaviours as a result of employee voice, albeit to varying degrees"*.

Workplace rights and democracy

There is clearly a strong case based on sound evidence of the benefits of voice and consultation at work. However, some would also argue that there is an ethical or rights-based case for consultation and

voice at work. The TUC for example argues that increased democracy in the workplace can be seen as *"an intrinsic good in itself"* and a key part of social justice (TUC, 2014). Similarly, Hall and Purcell (2012) argue that *"consultation can be regarded as a fundamental human right"* which also has benefits in terms of economic efficiency.

"The benefit of voice and consultation is about citizenship, democracy, and allowing people to have an inclusive say in things that matter to them. When it comes to the workplace, this is almost replicating the systems in society the idea that we can vote for government, we vote for local authority, local councils. The principal is - we should have some equal say in the workplace under things that matter to people at work. The benefits that then derive from that is a more engaged workforce, a more inclusive society, and whether that makes a better performance is a by-product, not the driving motive of voice, in my opinion"
Tony Dundon, NUI Galway

Barriers to voice and consultation

There are a number of commonly identified barriers to voice and consultation. Employers often highlight concerns over the time taken to engage in detailed consultation, particularly when it relates to urgent organizational change. Others express concerns over the sharing of sensitive or confidential information with the workforce, particularly at listed companies.

The views and approach of management can sometimes be a barrier to employee voice and consultation, particularly given the emphasis on the managerial prerogative in British employment relations. For voice to work effectively, employers need to recognise the benefit of voice. Van Wanrooy et al. have found that approaches to consultation at a workplace are *'in part shaped by the personal characteristics of the person in day-to-day responsibility for personnel and employment issues at the workplace'* (van Wanrooy et al., 2013).

Finally, management capacity may also be an issue. Many workplaces have neither recognised trade unions nor formal consultative forums, and as a result, many managers lack experience in formally consulting or negotiating with employees.

4. What is the current state of voice and consultation in the UK?

Having examined the benefits of consultation and voice, in this chapter we will consider the current extent of voice and consultation in the UK.

Trade unions and voice

There has been a substantial decline in trade union membership in the UK, from a peak of 13 million in 1979 to just 7 million today. The fall in union density (the percentage of workers who are union members) has been even more substantial given the increase in the size of the labour market during this period. Density is particularly low in the private sector, where just 14.2 per cent of employees are union members. It is higher in the public sector at 54.3 per cent, but this level is falling (ONS, 2015).

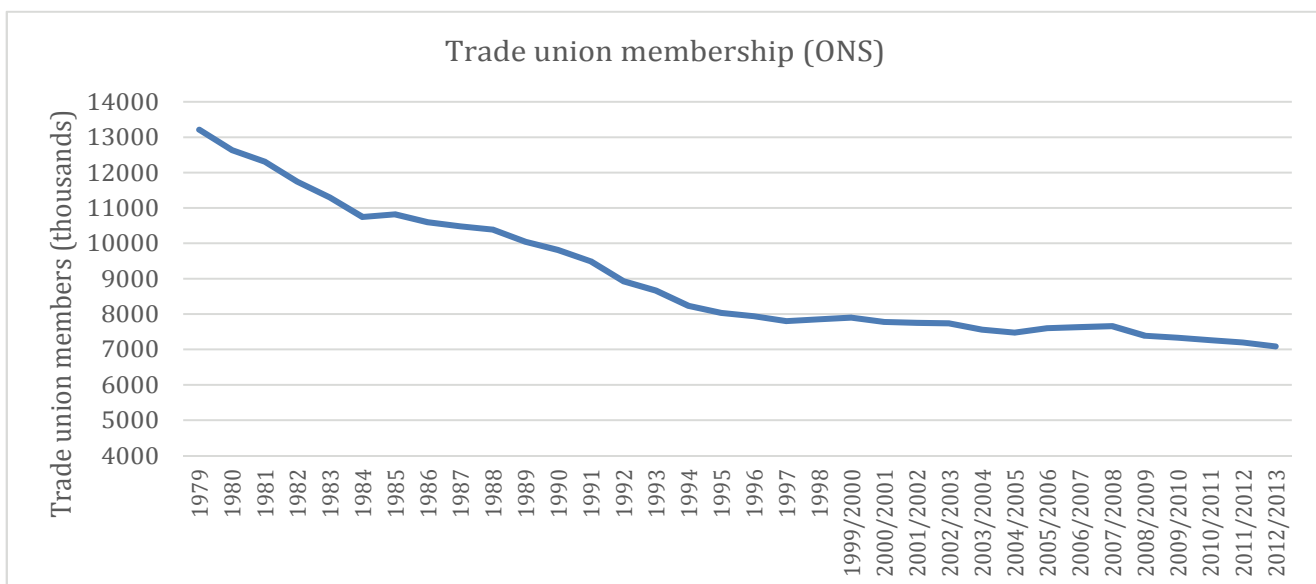
This has had a substantial impact on employee voice in the UK. In the post-war period, trade unions played a leading role in voice at work. But this role has declined along with membership levels and the prevalence of collective bargaining, and new forms of voice have evolved. Alongside this, there has been a long-term shift from representative voice and consultation, towards direct methods of consultation such as employee surveys, team meetings and emails (Millward et al., 2000). Managers seem to have a strong preference for the latter, with four in five (80 per cent) saying that they would rather consult directly with employees than with trade unions (Wanrooy et al., 2013).

Successive UK Governments have been reluctant to introduce significant new measures to strengthen

voice at work. This reluctance was evident in the introduction of the ICE Regulations themselves. Some have argued that this has led to the emergence of a “*representation gap*” and that there is a pressing need for alternative means or mechanisms for employees to have a say at work (Marginson et al., 2010). The UK clearly performs relatively poorly when compared to our EU neighbours in terms of voice at work. The UK comes second bottom of the European Participation Index – a multi-dimensional measure of worker participation developed by the ETUI (European Trade Union Institute) – beaten into last place only by Lithuania.

Scope of voice – negotiation, consultation and information

There is mixed evidence about the scope of voice in the UK. There seems to have been an increase in the willingness of managers to consult employees before introducing changes in the workplace. The Workplace Employee Relations Study (WERS) shows that eight in ten managers (80 per cent) in 2011 agreed that they do not introduce change without discussing implications with employees, compared to seven in ten (72 per cent) in 2004. Workplace managers are then ‘*on their own accounts at least, more favourably disposed towards consultation than had been the case in 2004.*’ As mentioned above, managers have a strong preference to consult directly with employees with four in five (80 per cent) favouring this approach, rather than with unions (van Wanrooy et al., 2014).



But what about the reality of consultation? According to WERS, there seems to have been relatively little movement in terms of the incidence of consultation or negotiation over organisational change in recent years. Across all areas of organisational change, employers were far more likely to consult rather than negotiate. This mirrors a wider change in which employers in liberal market economies – such as the UK – have moved away from negotiation, towards consultation (van Wanrooy et al., 2014).

Along with the long-term move away from negotiation towards consultation, there also seems to have been a narrowing of discussions in consultative forums. According to both managers and employee representatives on Joint Consultative Committees (JCCs – defined as ‘any committee of managers and employees that is primarily concerned with consultation rather than negotiation’), such forums are increasingly seeking feedback on management’s preferred options, rather than seeking solutions to problems, or seeking feedback on a range of options (van Wanrooy et al., 2013). Managers seem increasingly to be checking proposals with employees, sometimes perhaps in a tokenistic way, rather than involving the workforce in a genuine and open discussion about how to address workforce challenges and improve practices. As van Wanrooy et al. conclude, ‘while consultation may typically happen to some degree or other, the opportunities for extensive involvement and influence on the part of employees may often be limited’ (van Wanrooy et al., 2014).

“[The decline in collective bargaining] doesn’t mean that there isn’t alternative forms of voice such as non-union works councils, but these tend to be ‘shallower’ – they have less impact than representative, collective forms of voice largely because they are dependent on the employer to allow them to happen.”

Tony Dundon, NUI Galway

Employee perceptions of voice

WERS has some useful findings on employee perceptions of voice at work. One in two employees (52 per cent) says that their managers are good/very good at seeking the views of employees or their representatives. Slightly fewer say that managers are good/very good at responding to those views (47 per cent), and just one in three (35 per cent) say they are good/very good at allowing employees or their representatives to influence decisions. This suggests that many employees see their managers’ efforts to get their views as merely a cosmetic exercise, with

no real outcome in terms of impacting on final decisions. Although these figures are concerning, they have increased slightly from the previous WERS survey conducted in 2004.

There seems to be substantial unmet

demand for employee voice; just 43 per cent of employees are satisfied/very satisfied with their involvement in decision-making at work. There is evidence that consultation makes a difference here; employees at organisations where the employer had consulted or negotiated over the most important change in the workplace were 3 per cent more likely to say they were satisfied with involvement in decision-making compared to when managers had just given information to employees, and 4 per cent more satisfied than when managers had not involved staff at all (Van Wanrooy et al., 2013).

5. The ICE Regulations

The Information and Consultation of Employees Regulations (ICE Regulations) for the first time established a framework of statutory rights for employees to be informed and consulted by their employers on key issues affecting their work and the organisation.

They were introduced in the UK on 6th April 2005 for employers with over 150 employees, and by 2008, they covered all organisations with over 50 employees. The regulations derive from the European framework directive on information and consultation (2002/14/EC). This directive aimed to *'establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community'*. The aim of the directive was to ensure employees were well-informed of any issues that would affect their employer, or their employment, that they were consulted on such issues in order to *'promote employee involvement in the operation and future of the undertaking and increase its competitiveness'*.

The UK was far slower in implementing the regulations than many other EU countries. The CBI was resistant to implementing the directive, arguing that there was no need for the regulations and that a prescriptive approach could be damaging for business. The TUC was strongly in favour of the measures and pushed hard for the Government to implement the directive. The Government itself did

not seem to see information and consultation as a priority.

In implementing the directive, the UK took a far more permissive and flexible approach to the regulations than in other EU states, as is explained below. The transposition of the laws appears in keeping both with the voluntarist tradition of British employment relations, and it seemed to reflect the demands of the CBI in terms of maximizing flexibility.

The requirement to inform and consult employees is not automatic. Instead, the regulations need to be initiated either by the employer, or by employees requesting this. For the latter, there is a trigger mechanism under which 10 per cent of employees across the undertaking have to formally request the rights.

The regulations permit pre-existing agreements (PEAs), as long as they are approved by employees. These are not enforceable and they give employers the opportunity to pre-empt the use of the regulations.

The regulations cover only information and consultation. Under the regulations, employers are required to provide employees and/or their representatives with information and to solicit their views. However the final process of decision-making remains with management (Gollan & Wilkinson, 2007).

Employers who do not abide by the regulations are eligible to be fined by the Employment Appeal Tribunal (EAT). The maximum penalty is £75,000 which is payable to the Treasury rather than employees.

6. What were the expectations of the ICE Regulations?

Looking back a decade, there seems to have been high expectations of the ICE Regulations. The quotes below demonstrate the views of some of the key actors in mid-2003 when the Government published its proposals on how the EU Information and Consultation directive was due to be implemented (Hall, 2003).

"I want these changes to lead to a 'no surprises' culture at work where employers and employees discuss common ground and find solutions to mutual problems. I want to see an end to the climate where people only hear about job losses from the media, over their breakfasts. We have reached this agreement with the CBI and TUC through constructive dialogue and discussion. It's exactly the spirit in which we all want new rules on information and consultation to operate in workplaces across Britain"

Patricia Hewitt – then Secretary of State for the Department of Trade and Industry

"These new rights could lead to the biggest change in workplace relations for a generation. But that's not a threat, it's an opportunity for both employees and employers to improve the quality of working life and boost productivity."

Brendan Barber, then General Secretary, TUC

"The government has made sense of a poor piece of EU legislation. It has protected the good consultation which already exists ... and avoided overly rigid rules and damaging one-size-fits-all solutions. Employers won't welcome the new law but they recognise that the government has taken CBI concerns on board."

Digby Jones, then Director-General, CBI

"The good news for employers is that they can agree with their employees that existing good practice will continue, and will satisfy the requirements of the Regulations. This means for example that where employers currently inform and consult their employees directly, rather than through representatives, they can continue to do so provided their employees are happy with the arrangements. The threat that all employers would be required to squeeze into a single legal straitjacket, and establish works councils, has not materialised."

Mike Emmott, Head of Employee Relations, CIPD

"Compelling companies with as few as 50 employees to consult and inform their workforce about a range of managerial decisions is potentially burdensome and not necessarily the best way to achieve best practice."

Tim Yeo, then Shadow Secretary of State for Trade and Industry

7. What has been the impact of the ICE regulations?

Having examined the introduction of the ICE regulations, we now go on to look at their impact on the UK workplace.

Structures and consultation

WERS provides useful evidence of the impact of the regulations through measuring the incidence of JCCs. JCCs can either be at the workplace level, or at a higher level, covering multiple workplaces. The survey was conducted in 2004, just before the introduction of the regulations, and then again in 2011. If the ICE regulations were effective in promoting more workplace representative structures for consultation, we would expect to see a significant increase in the incidence of workplaces with a JCC.

The data seems to suggest that the ICE regulations have not had a significant impact. The proportion of workplaces with a JCC remained steady at 7 per cent. There was a decline in the proportion of workplaces with a JCC operating at the higher level, from 26 per cent to 18 per cent. As a result, the number of workplaces covered by either type of committee declined 33 per cent to 25 per cent (van Wanrooy et al., 2013).

However, there was an increase in JCCs among medium sized workplaces that were big enough to be subject to the regulations. There was a slight increase among workplaces with 50-99 employees (10 per cent - 12 per cent), and a significant increase among those with 100-149 employees (9 per cent - 20 per cent) and 150-249 employees (9 per cent - 15 per cent). Furthermore, the stability in the overall incidence of workplace JCCs from 2004 to 2011 followed a significant decline from 1998 to 2004. This has led Hall and Purcell to argue that the regulations did have some impact in terms of boosting JCCs in medium sized workplaces, and in arresting the long-term decline that had preceded their introduction.

'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 having either a workplace- or higher-level JCC.'

Hall et al., 2015

There is some evidence from employer surveys conducted following the introduction of the regulations (Hall and Purcell, 2012):

A 2008 survey by IRS found two in five employers had set up a consultation body after 2003. Most had made changes in the previous three years with 45 per cent citing some influence from the legislation.

A 2008 CIPD survey found 39 per cent of employers had introduced a new information and consultation agreement since the introduction of the regulations, with 76 per cent forming a voluntary agreement formalizing existing arrangements and 22 per cent introducing new arrangements following negotiations.

A 2006 survey of trade union representatives by the Labour Research Department showed of the two thirds who had formal information and consultation arrangements in place, half had been drawn up, amended or reviewed following the ICE Regulations.

Although these surveys show some impact, this may have been limited, relating for example just to influencing the wording of the agreement, or formalising an existing approach to information and consultation, rather than introducing something new or significantly improving existing practice.

Another measure of the impact of the ICE regulations is the number of occasions on which unions and employees have enforced the

		No JCC	Workplace JCC	Higher level only
Private Manufacturing	2004	87	11	2
	2011	91	5	4
Private Services	2004	69	5	25
	2011	79	6	15
Public Sector	2004	29	19	52
	2011	36	15	48
All	2004	66	7	26
	2011	75	7	18

regulations through using the trigger. Hall and Purcell found that over the first six years of the regulations, an average of just six cases a year came to the CAC (the recognised EU social partner which represents national business federations across Europe), a figure they described as 'remarkably low' (Hall and Purcell, 2012). The tiny number of cases seem more to reflect the difficulty with the trigger, and a lack of engagement by unions and employees, rather than willing compliance from employers.

There is evidence of some significant churn in terms of the incidence of JCCs. Hall, Purcell and Adam have identified 'high attrition levels' among JCCs between 2004 and 2011. Although there was little change in the overall incidence of JCCs over the period, almost half (45 per cent) of organisations with a JCC in 2004 no longer had one in 2011. They argue that this '[suggests] problems with the sustainability or embeddedness of JCCs despite the existence of the ICE regulations.'

What about the balance between union and non-union representation? Some in the union movement thought the regulations might be used by employers to introduce non-union representation in order to undermine or pre-empt unions. The evidence shows these fears were misplaced. Non-union representation has not increased dramatically since the introduction of the regulations and there was stability in terms of the proportion of JCCs which included a union representative, remaining unchanged at 28 per cent of all JCCs (van Wanrooy et al., 2013). However, there has been a formalisation of the role of non-union representatives, with more regular meetings with management, more time spent on the roles, and information provided on more issues (Charlwood and Angrave, 2014).

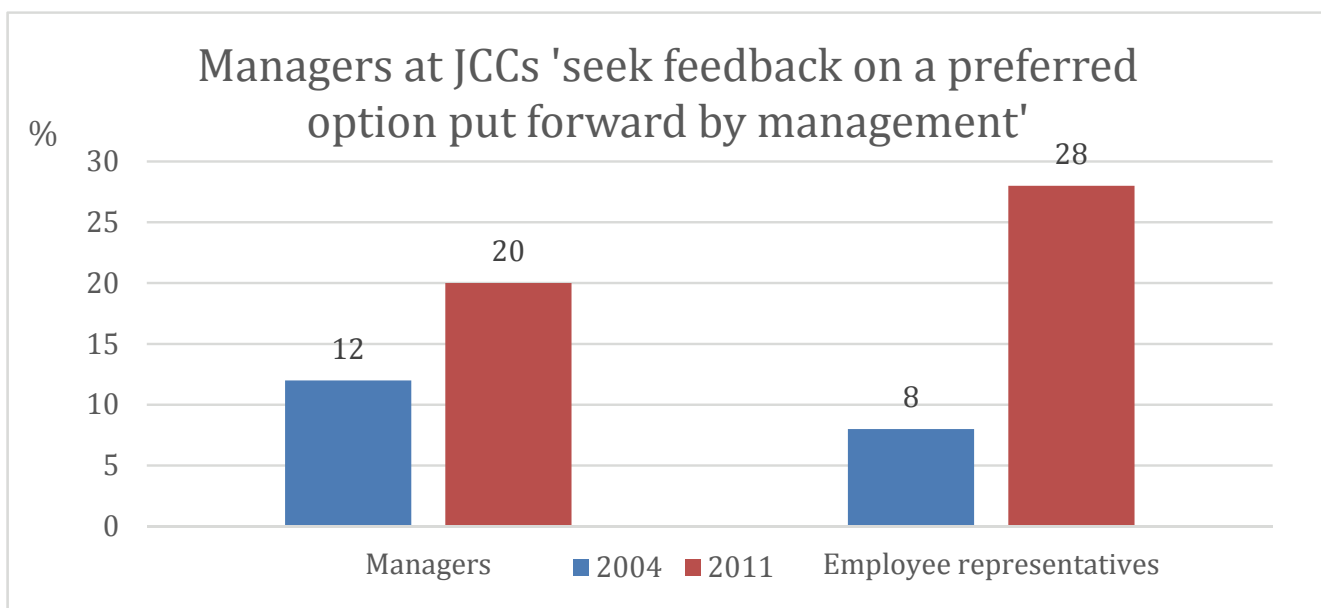
Cultures and consultation

Beyond just looking at the structures for consultation in the workplace, it's also important to consider culture and the approach to consultation. Again, the evidence does not seem to show a significant improvement here. Hall and Purcell's study of consultation at work after the introduction of the ICE regulations looked in detail at 25 case study organisations and their approach to consultation. They found that only a minority could be described as 'active consulters' and that the majority were just 'communicators' (Hall et al., 2013).

WERS has some mixed evidence in terms of the culture of consultation. A concerning finding is that discussions within JCCs seem to have become more circumscribed and narrow. The graph below shows that both employers and employee representatives increasingly report that JCCs only feedback on a preferred option, rather than discussing alternative options (van Wanrooy et al., 2013).

However, as shown above WERS also shows a significant increase in the proportion of managers who said that they would not introduce workplace changes without discussing the implications with employees (from 72 per cent in 2004 to 80 per cent in 2011). Employees also seem marginally more positive about the extent of employee voice in their organisation in 2011 than they were in 2004, in terms of both seeking the views of employees/employee representatives, responding to these views and allowing them to influence decisions.

So, there seems to have been a slight improvement



in perceptions of voice among employees and the self-declared willingness of employers to consult. Yet the incidence of JCCs has not increased, and the discussion within them has become increasingly circumscribed. This seems to be consistent with the shift away from formal and collective consultation to a more individualised and informal approach to dialogue, despite the introduction of the ICE regulations.

While the increase in perceived voice is to be welcomed, it does not seem to be as a result of the ICE regulations. The regulations seem to have failed to have a significant impact on consultation in the UK – either in terms of the incidence of JCCs, or on the culture of consultation and the willingness of employers to involve staff in discussing important issues at work. There does seem to have been a moderate impact on medium-sized employers, and the regulations perhaps contributed to stabilising the decline in workplace JCCs. However, they clearly have not lived up to the high hopes and expectations some had for the ICE regulations.

8. Why have the ICE regulations not had more of an impact?

The ICE regulations have at best had a limited impact on the UK workforce. In this chapter we examine the various factors that explain the failure of the regulations to live up to the hopes some had for them.

'The government's objective at that time was really to limit the impact and where possible to promote voluntarism and that was reflected in the design of the regulations – voluntary arrangements that were tailored to the individual organisation. If you accept that was the aim of the regulation to promote voluntarism, I think there has been some success there.'

Philip Sack, Institute of Directors

Government ambivalence

There seems to have been a lack of enthusiasm and support for the ICE regulations from across the social partners – the government, employers, and the trade unions.

The Blair Government clearly did not see information and consultation as a priority. It had promised to sign up to the 'Social Chapter' but there was little enthusiasm for further EU regulation, or for further employment regulation in particular.

The government also favored a partnership approach to employment regulation, under which the regulations would be transposed with the consent of employers. They went as far as possible to allay the concerns of the Confederation of British Industry (CBI) and to implement the regulations in a way which allowed maximum flexibility for employers. As we shall see, this meant that the regulations lacked teeth and therefore had a very limited impact. The fact that the CBI criticized the EU directive but publicly praised the regulations in the UK demonstrates the extent to which the Government acquiesced to their demands on the regulations.

Employer opposition

Secondly, as explained above employers and the CBI were far from keen on the regulations. Following the introduction of the 'Social Chapter' and the National Minimum Wage, employers were increasingly opposed to what they saw as a stream of new regulation. They also did not see the need for new

rules on information and consultation. Digby (now Lord) Jones, the then Director General of the CBI called the ICE directive '*a poor piece of EU legislation*', claiming that its '*rigid rules and damaging one-size-fits-all solutions*' were not needed in the UK, as existing practice and regulation was seen by employers as being sufficient. Hall and Purcell have argued that the strong opposition of the CBI was crucial in explaining the reluctance of the Government to embrace the regulations (Hall and Purcell, 2012).

The concerns over the directive reflect the traditional management culture in the UK. As shown above, there is a clear preference among managers to engage directly and individually with employees, and the UK has never embraced the partnership models of social dialogue that characterise employment relations in much of the EU. Even though the regulations only require consultation – rather than negotiation – they did not fit well with the dominant management culture in the UK which tends jealously to guard the 'right to manage'.

'The most common response of unions to JCCs has been described as 'cautious scepticism'. This response arises from a fear that such employee voice channels do not comprise a wholly separate domain from trade union-based collective voice and that they have the potential to encroach upon, and undermine, trade union activities; thus reducing union influence and power and limiting workers' input.'

Pyman in Wilkinson et al (eds),

Trade union indifference

The regulations also lacked strong support from the trade union movement. There was strong support from the Trade Union Congress (TUC), which was a strong supporter of industrial partnership at the time. However, this enthusiasm was not universally shared throughout the movement.

This was for a number of reasons. Many saw the regulations as potentially being a 'Trojan Horse' that anti-union employers could use to bypass unions or pre-empt trade union recognition. This is in part understandable; in the UK, unlike in many EU countries, there was no right for unions

automatically to trigger the regulations, and there was no protected role for them in terms of representation. As Hall and Purcell argue, *'the fact that the regulations do not accord any specific statutory rights to recognised unions is likely to have contributed to unions' ambivalence towards the legislation'* (Hall and Purcell, 2012).

But the reluctance was perhaps also about culture. Industrial relations in the UK have traditionally been characterized by adversarialism, a culture that doesn't fit with the partnership-based model of information and consultation. Whilst the TUC under John Monks had embraced the continental partnership model of industrial relations, the wider movement was more reticent to do so. The trade unions were willing to accept information and consultation, but it was not seen as a priority by many and it was viewed with suspicion by some.

As a result of this luke-warm response, incidences of trade unions using the regulations to trigger information and consultation have been relatively rare (Hall et al., 2015). There have been some notable exceptions such as Unite who have made good use of the regulations in complementing collective bargaining. Without the support of trade unions, the 10 per cent trigger for the regulations has proved far more of an obstacle. It has also contributed to the very low level of awareness of the regulations among British workers, as unions have not generally promoted the rights extensively.

The fears of some in the trade union movement about the impact of the regulations seem not to have been born out. As we shall see below, the approach of most British unions also contrasts with the way unions have enthusiastically embraced information and consultation in many other EU states.

'After 25 years in which the role of unions was undermined by politicians and much of the media, it is perhaps no surprise that some unions were defensive in this situation.'

TUC, 2014

This combination of luke-warm support from trade unions, ambivalence from the government, and resistance from employers can be seen as a significant factor in limiting the impact of the regulations. As Hall and Purcell explained, *'prioritizing information and consultation was effectively an idea without a constituency'* (Hall and Purcell, 2012).

The 10 per cent trigger

The requirement of 10 per cent of employees to trigger the regulations has clearly been a significant barrier to the success of the ICE regulations. Whilst 10 per cent may not sound like an insurmountable barrier, the evidence shows that the trigger has been very rarely used, with just 6 cases a year going to the CAC. As Hall and Purcell have found, the initiative to set up or relaunch ICE bodies has invariably been from managers, with none of the 25 case studies in their 2012 study having been triggered either by the unions or by employees (Hall et al., 2015).

Part of the challenge of the trigger is that it applies to undertakings, rather than to business units. This means that even if employees could generate sufficient support in their workplace, if they were part of a large chain, they would have very little chance of getting 10 per cent across the entire undertaking.

The trigger mechanism is particularly challenging in non-unionised workplaces. In these cases there is no organisation to bring employees together and take the lead on gathering signatures. Employees in such workplaces may also be less willing to do so as they lack the protection of a union and may fear employer retaliation. However, the reluctance of unions to embrace the regulations has meant that the use of the trigger has been low even in well unionised workplaces.

"The trigger mechanism - it is not impossible but it is a very difficult hurdle to get across. So if companies really want to avoid this, they have a very powerful tool in helping them to avoid it. So I think if we are serious about making the regulations work then the trigger mechanism needs to be looked at"

Tim Page, Senior Policy Officer, TUC

This has been aggravated by the very low awareness of the ICE regulations among employers and particularly among employees. There was very limited publicity of the regulations at the time of their introduction and there has been virtually nothing since. A survey conducted in September 2005 showed that just 12 per cent of employees were aware of the new rights that had been introduced earlier that year (Donkin, 2005). Awareness is likely to have declined significantly from those low levels given both the passage of time and the low levels of usage of the regulations. In the context of low awareness of the regulations, motivating enough employees to reach the 10 per cent trigger is particularly difficult.

Alongside the lack of awareness of the regulations, there may be an issue around a lack of demand for them. WERS shows that 43 per cent of employees are satisfied or very satisfied with the amount of involvement they have in decision-making, compared to just 20 per cent who are dissatisfied or very dissatisfied (Dromey, 2014). There is clearly an unmet demand for voice, but it is far from universal. As we've seen, employers tend to prefer direct and individual communication rather than indirect, representative forms, and some have argued that employees do too (Wilkinson et al., 2007). Furthermore, even if employees were aware of the ICE regulations, they may not necessarily see them as the solution, offering as they do just consultation rather than negotiation.

British workplace culture

Part of the reason for the limited impact of the ICE regulations inevitably lies in the distinctive workplace culture of the UK. The UK can be characterized as a liberal market economy (LME) in which there are relatively low levels of employment regulation, low levels of employee involvement, and low levels of worker representation. This contrasts with many other EU member states which can be seen as coordinated market economies (CME), where there is greater regulation, involvement and representation, and stronger social dialogue.

In this context, the ICE regulations were not necessarily in keeping with the voluntarist approach to employment relations in the UK. This culture affected the impact of the regulations in two main ways. First, the regulations lacked teeth as they were transposed in a way that was intended to go with the grain of our liberal approach to the labour market. Secondly, our culture which emphasises management discretion and our relative lack of experience of consultation, meant that the regulations were not planted in fertile soil. The culture also affected the reaction of the social partners described above; employers were often resistant and the trade unions were luke-warm on the regulations. This contrasts with much of the rest of Europe where they were more readily embraced by both sides.

"The situation is that the regulations have been introduced in quite a minimal way. It supports a voluntarist tradition of employment regulation. It doesn't enforce employers to do things."

Tony Dundon, NUI Galway

Faced with regulation that is not consistent with the dominant views and values of employers, the risk is that you will only get 'ritualism' - complying just with the letter of the law - or even 'retreat' - avoiding or ignoring the law (Cullinane et al., 2015).

Reactions to the ICE regulations 10 years on

The following quotes reflect the views of key social partners and academics, looking back at the ICE regulations 10 years on.

"I think the overall impact has been disappointing. I think it has been a missed opportunity... I think the problem is not so much in the regulations, it's in the culture of UK workforce... I think the hope that we had that they would lead to a bigger impact in the sense that they would really brighten up employee voice - that has not been realized."

Nita Clarke, Director, IPA

"Damp squib may be a bit harsh but certainly the outcomes are very disappointing. I think there are major design flaws in the ICE regulations which have meant that employees and unions have found them difficult or unattractive to use and in particular, things like the 10 per cent trigger mechanism... I think that's a very high hurdle, a very tough standard for employees to meet, especially where there's no union present."

Mark Hall, University of Warwick

"I know there are some good examples of the Regs working the UK - UNITE have some good examples... If management wants it to work and unions want it to work, they can make it work but I think those good agreements are probably an exception rather than the rule because there is not enough in the regulations that forces companies to come to the table if they are really determined not to."

Tim Page, TUC

"I think the government interventions in the labour market are most effective when they go with the grain of development in business thinking. I think in medium and larger firms in particular, there has clearly been a trend towards more information being shared with the staff over the last decade and broader consultation is now more regular"

Neil Carberry, CBI

9. Information and consultation in the EU

Having examined impact of the ICE regulations in the UK, in this chapter we consider the impact in other EU states. This includes practices on information and consultation, how the regulations were transposed, and the views of social partners.

Information and Consultation in Germany

Under the German model of 'social capitalism', unions and works councils co-exist at both the plant and company levels.² When the EU directive on the ICE



Regulations was transposed in 2002, Germany's national legislation already met or exceeded the terms of the information and consultation directive – a view that the European Commission did not dispute. Therefore, no new measures were introduced to comply with its requirements.

Structure of the works councils

A works council – where working conditions between employees and employer are negotiated – can be set up within organisations employing five or more workers – but employees or trade unions need to take the initiative to do so. A report by the TUC in 2014 showed that in workplaces with more than 500 employees, 88 per cent had work councils in West Germany and 92 per cent in East Germany.²

"Managers increasingly have a preference for direct forms of communication... the greatest area of growth was in communication by email, rising from 35 to 49 per cent of workplaces. This kind of ongoing communication has its strengths – perhaps it reduces the 'bolt out of the blue' approach to decisions, but I am less sure it holds quite the same value as the kind of two way communication and engagement that perhaps we envisaged under the ICE Regs."

Sir Brendan Barber, ACAS and former General Secretary of the TUC

The number of members in a works council depends on the size of the organisation. For example, for a company with more than 1000 employees, there are 15 works council members – each member

representing approximately 67 employees within the organisation. All employees are covered by the works councils except senior managers. There are no members representing the employer, but the works council is required to work together with the employer.

Benefits of information and consultation

Dr Michael Bolte of the Department of Social Policy at the German Trade Union Federation (DGB) explained why employee voice is so important to German work culture: *"I think it's some kind of democracy in the company. If more people are involved in the decision-making process, you get better decisions than when you have only one person doing it. So the company needs to take into account its interests and the interests of its employees. Only then can we have better decisions."*

The German model of social dialogue and partnership seems to have played a crucial role during the financial crisis. As Stefan Straesser, senior adviser at the Missions of Confederation of German Employers' Associations (BDA) described: *"One of the good examples of social partnership between employers and employees in Germany was during the financial crisis of 2008-2009, especially when we introduced the short-time schemes. It is a system where you work less during the time of crises as demand is much lower, but at the same time, the employees get a financial compensation for it. It proved to be quite an efficient system to cope with the crisis and it was fundamental that the agreements were taken at company level and thanks to the works constitution in Germany, it was possible to do it quite quickly, and efficiently."* He further added that Germany's system of employee representation works well not only when the economy is in a good shape, but also when it isn't.

As part of its report, TUC spoke to Siemens, where the works councils are seen as *'a route to meaningful dialogue which, ultimately strengthens the company.'*² The management and trade unions at Siemens recognise that there will always be a *'conflict of interest'* between their positions but that knowing this and understanding the concerns of the other side is key to effective consultation.

Dr Michael Bolte believes that although Germany has a very good tradition of works councils and

¹ Eurofound. Impact of the information and consultation directive on industrial relations. European foundation for the improvement of living and working conditions. 2008

² TUC. Democracy in the workplace: Strengthening information and consultation. 2014

promoting employee voice – they need to be strengthened further. *“A very good tradition must be strengthened. We have to get the works councils to speak for all the people working in the company. You have to get them to speak for who are temporarily contracted or contract workers. That would be a first good step.”* Dr Bolte also believes that Germany needs to actively promote the work of works councils and the benefits they bring to employers and employees. As he explained: *“We have lots of stories of success, and lots of studies which show that companies with works councils are more effective, get more money, and the payment is better, but I think we must be louder to tell the good story.”* He also believes that trade unions, rather than the government, play a very important role promoting the good work of the works councils. As he explained: *“It is not the role for the government to promote workers voice. It is the role for the trade unions to promote workers voice. The work of the government is to build a good law to address this issue and support the work of the works councils.”*

Challenges

Although employers and employees strongly believe that worker rights have a range of benefits both for Germany’s employers and the economy as a whole, some believe that there is room for improvement – especially around ICE Regulations. As Stefan Straesser explained: *“We need to accelerate the information and consultation process. It sometimes takes too long and ends up being very costly to the employee. Usually you have three levels of works councils which means there is lot of travelling and the employer has to pay for it – hotels etc. From time to time, it is really costly. It depends on the works councils how active it is.”* The BDA is looking at the possibility of introducing electronic votes to speed up the process and improve connectivity between ‘plants’ but this would mean amending the ‘traditional’ works constitution act – which was last changed only in 2001. As Stefan Straesser described: *“It would be like opening Pandora’s Box”.*

Information and Consultation in France

France, which already had robust information and consultation structures in place did not have to make any major changes to



comply with the EU directive.² As Joëlle Delair, Secretary for Social Dialogue at the French Democratic Confederation of Labour (CFDT) explained: *“We weren’t very concerned about the transposition as we already had good voice mechanisms in place.”*

Structure of the works councils

Works councils, which act as a conduit for information and consultation – are required by law in all companies employing more than 50 people. Works councils must receive essential information about ‘the commercial, financial, structural and technical nature that are needed in order to understand company developments.’³ Recent legislation has simplified the topics which companies have to inform and consult on to 17 key areas, grouped under the following themes; the strategic orientation of the company; its economic and financial situation; and its social policy and conditions of work and employment.⁴ The works councils meet at least once a month.

Number of employees	Number of works council delegates
50 - 74	3
75 - 99	4
100 - 399	5
400 - 749	6
750 - 999	7

Thereafter, the number of delegates increases by one for each extra 1,000 employees until 5,000, then by one extra delegate for each 2,500. The maximum number of delegates, with 10,000 or more employees is 15.³

No trigger mechanism is required to put in place legally binding information and consultation procedures.⁴ French works councils have representatives from the employer and employee side, with a secretary who is an employee member, elected by other representatives.⁴ If an organisation has trade unions in place, they can nominate representatives on the works councils.³ Representatives in companies with more

³ <http://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/france/france-the-impact-of-the-information-and-consultation-directive>. Accessed on 23/10/2015

⁴ TUC. Democracy in the workplace: Strengthening information and consultation. 2014

than 50 employees have a right to 15 hours paid time per month to perform their duties as workers' representatives.⁵

In large companies, there are also employee delegates (DP) who can raise complaints and concerns with employers, and a separate committee which deals with health and safety issues (CHSCT), along with the works councils.⁶ However, works councils and employee delegates represent employees on most organisational issues.

According to the Directorate for the Coordination of Research, Studies and Statistics (DARES), works councils exist in 81 per cent of French companies that employ over 50 people.⁴

Benefits of information and consultation

In France, it is widely recognised that employee voice is strategically important to organisations. As Antoine Foucher, Deputy General Manager at Movement of the Enterprises of France explained: *"Employee voice is extremely important at national and sectoral levels...We negotiate with works councils on important reforms to labour market laws like training interventions, insurance and employment systems."* For instance, MEDEF negotiates with works councils on the training needs of employees, so that interventions can be provided according to the needs of the company: *"This agreement [between works councils and MEDEF] allows companies to implement a business friendly training policy for employees"* he adds.

As part of its report, TUC spoke to staff at Thales – a French company specialising in transportation, including air and rail traffic management, along with defence and security.² The company employs 65,000 people worldwide, of which 34,000 based in France. According to David Tournadre, Senior Executive Vice President for Human Resources at Thales, information and consultation is a strategic tool to enhancing engagement and social dialogue.¹ A central committee was also set up to deal with situations that arise during times of change – in particular with workforce issues.

Challenges

Although there is agreement amongst French social partners that information and consultation (I&C) has various benefits, they have differing views on the existing I&C measures. Employer groups like MEDEF believe that the regulations are crucial to taking forward social dialogue in France but that they are very complex in their present form. As Antoine Foucher explained: *"In organisations with over 50 employees, we have works councils, employee delegates, health and safety delegates and trade unions for collective bargaining. So we have four different actors and it becomes very complicated. On certain issues, we might have to consult with all the committees and the unions, but it is always with different people. So I think it is crazy - not excessive."* MEDEF and CFDT had joint negotiations earlier this year to resolve some of these issues, but talks failed and they didn't reach a deal.

Joëlle Delair, Secretary for Social Dialogue at the French Democratic Confederation of Labour (CFDT) is of the view that MEDEF and other employer organisations are refraining to engage in social dialogue in France. As she explained: *"MEDEF thinks that if they are less union-friendly – France will be able to compete at a global level. But we [CFDT] want to preserve the rights we [members] have."* CFDT recognizes that to be competitive in global markets, they need to work closely with MEDEF and other employer organizations – but that preserving employee rights will always be at the core of their organization. Antoine Foucher, Deputy General Manager at Movement of the Enterprises of France says that although most unions in France are willing to work with MEDEF and understand long-term business strategies of its members - some unions think that their duty is to *"to defend exclusively the interests of employees."*

⁵ FES. The role of works councils and trade unions in representing interests of the employees in EU member states (partnership or competition). Milan Jevtić. 2012

⁶ <http://www.worker-participation.eu/National-Industrial-Relations/Countries/France/Workplace-Representation>. Accessed on 23/10/2015

Information and Consultation in Denmark

In Denmark, minor changes to national measures were required to implement the directive. Cooperation committees, were extended for the first time to workplaces that were not covered by trade unions. The new measures also gave more influence to local cooperation agreements and *'provided for a clearer timescale for information and consultation'*.⁷ However, as Anders Levy, Special Advisor in the Ministry of Employment pointed out: *"You could say that the main challenge, the main concern of the government in 2005 was to implement the directive without creating any problems for the very well-functioning existing systems of I&C."* Social partners in Denmark worked closely with the government to ensure that directive had a smooth transition.



Structure of co-operation committees

Cooperation committees, the Danish equivalent of Works Councils are the main information and consultation body. When the EU Regulation on the ICE Regs was transposed in 2002, employee groups outside of The Danish Confederation of Trade Unions (LO) were also represented by the cooperation committees for the first time. This meant that some of the central social partners amending their cooperation agreements to comply with the directive. *'At the same time, the government enacted legislation to apply virtually the same arrangements to the 15 per cent of the workforce not covered by the collective agreements.'*²

Cooperation committees are mandatory in all companies with 35 or more employees. Social partners in Denmark worked closely with each other to make the legislation as flexible as possible for both employers and employees. As Anders Levy explained: *"We could actually have put the threshold higher, but the social partners wanted us to have the same threshold as in their collective agreements – so we did. That is one example of how the Danish legislation is sort of building on the already existing collective agreements, and I think that actually both employers and unions wanted us to make the Danish legislation implementing the directive as flexible as possible and that is what we did."*

The rights of these committees are set out in a national agreement between LO and The Confederation of Danish Employers (DA). The Confederation of Danish Employers estimates that 70 per cent of companies which could potentially have a cooperation committee have one.⁸

Representatives on the committees include members of staff and management and are chaired by a senior representative from management side with the deputy chair from the employee side. They meet at least six times a year, with the provision of having additional meetings if required.

The membership of the cooperation committee, as set out in the LO-DA agreement, is as follows²:

Number employed representatives	Number of employee
35-50	2
51-100	3
101-200	4
201-500	5
501-1,000	6
Above 1,000 – the numbers may be increased by agreement	

Cooperation committees - Promoting employee voice

Anders Levy believes that employee voice has been crucial to strengthening cooperation between social partners on various labour market issues: *"There has been this system [of employee voice] for many years because if there is some kind of issue in some company, instead of [employees] maybe carrying out strikes and so on, we have these forums where issues can be discussed and a solution can be found. We think that this is very important aspect in the Danish model. It is very much about cooperation between social partners."*

Cooperation committees operate as valuable channels for employee voice. They are the structures through which employers and employees reach agreements on a range of issues. They cannot operate in isolation from the rest of the workforce and must pass information on to employees. The management should inform cooperation committees on the financial position of the business,

⁷ Eurofound. Impact of the information and consultation directive on industrial relations. European foundation for the improvement of living and working conditions. 2008

⁸ <http://www.worker-participation.eu/National-Industrial-Relations/Countries/Denmark/Workplace-Representation>. Accessed on 21/10/2015

future mergers and acquisitions and implications on the workforce, production issues, human relations and personnel policy of the company, retraining employees if new technology is introduced and how the company uses employees' personal data.² However, committees cannot negotiate collective agreements on pay or other issues dealt with between the employers and union representatives.

The European picture

Most EU member states have strong information and consultation rights at work when compared with the UK. In addition, most also have stronger regulation around other forms of voice, whether that be on collective bargaining or employee representatives on boards.

In some countries like France and Germany, where robust information and consultation mechanisms

were already enshrined into existing statutory works councils systems, the directive didn't require any new legislation to be implemented. In other countries, like Denmark, amendments were required to strengthen existing regulation in order to comply with the EU directive.

In some countries including the UK and Ireland, the directive required major reform and the introduction of regulation on information and consultation for the first time. However, the intention of the directive was to set minimum standards of information and consultation and not 'harmonise national regimes'. This meant that there was considerable scope to tailor the implementation of the directive to existing national frameworks. The UK took full advantage of this, and transposed the regulations in a way which accorded with our liberal, voluntarist traditions.

10. ICE and the future

In retrospect, the ICE regulations seem to be a missed opportunity to promote consultation and voice in the UK. In this chapter we consider how the regulations could help better promote voice in the future. We consider both reforms to the regulations, and possible actions by non-government actors that could ensure better use of the regulations.

Reforming the ICE regulations at the EU level

In April 2015, the European Commission announced a review aimed at *'strengthening the coherence and effectiveness of the existing EU legislation on worker information and consultation at a national level'*. Social partners were consulted on the information and consultation directive, as well as those on collective redundancies and transfer of undertakings, with a view to a possible consolidation of the three directives and revising the definitions of the terms 'information' and 'consultation' (European Commission, 2015). The European Trade Unions Congress (ETUC) is supportive of strengthening the regulations but BusinessEurope (the recognised EU social partner which represents national business federations across Europe) is unlikely to support this.

Any changes in the directive might require a revision of the UK ICE regulations. However, as Hall and Purcell (2015) have argued, *'given the Commission's objective of 'consolidating' and 'simplifying' the three directives, few substantive revisions of the existing directives' provisions can be expected'*. This also comes against the backdrop of our attempt to renegotiate the terms of our membership of the EU, ahead of the proposed 'in/out' referendum. Again, within this context, significant changes to the directive that would require a strengthening of the ICE regulations seems extremely unlikely.

"The Government should simplify and amend the existing ICE regulations to give employees a stronger collective voice and to bring the UK more in line with other EU countries."

Smith Institute, 2014

Reforming the ICE regulations at the UK level

There are a number of ways in which the ICE regulations could be reformed on a national level in order to ensure they are better able to promote voice and consultation in the workplace.

First, as shown above, the 10 per cent trigger has

proven to be a significant barrier to the use of the regulations. If the regulations are to have an impact, this clearly needs to be significantly lowered. We should look to bring our regulations more into line with other EU member states by lowering the threshold, perhaps to 5 employees (as it is in Germany and as recommended by TUC) or 2 per cent of all employees, whichever is higher. However, even a lower trigger may prove to be a barrier if employees fear retribution for requesting the rights. Given that, the process could be made anonymous, perhaps managed through Acas or the CAC, so that employees feel able to request their rights to information and consultation without fear.

"The UK's approach to the implementation of the ICE regulations must be refreshed to make meaningful information and consultation a widespread reality."

TUC, 2014

Others have argued that the trigger should be abandoned altogether (Hall and Purcell, 2015 and TUC, 2014). This would mean that JCCs would be mandatory in all employers with over 50 staff, as is the case in France. However, with smaller employers, there may not necessarily be demand for formal consultative forums. An automatic requirement to establish one might lead either to unnecessary burden on the employer and the establishment of poorly-used forums, or to non-compliance. There is however a stronger case for a universal requirement in larger employers with more than 500 or 1,000 employees where there is likely to be both a stronger HR function, and more of a demand among employees for representative structures.

Furthermore, recognised trade unions and perhaps other non-union representatives should have a right to request the establishment of information and consultation at their workplaces. By giving them a stake in the system, unions may be more willing to engage with and use the regulations. This could help broaden and strengthen the quality of debate at information and consultation forums, given union reps are more likely to have access to training and support.

In addition to reducing the number of employees required to request information and consultation, the trigger should apply also to business units or establishments rather than just at the undertaking level. This would make the regulations both easier to

trigger, and more effective locally (TUC, 2014). This should apply only to business units of a certain size – perhaps 50 as with the minimum size of undertakings affected by the regulations.

To enforce these changes and to give the regulations ‘teeth’ there should be stronger sanctions for employers who do not comply with the legislation. TUC have suggested protective awards that would go to employees, as happens in employers who do not adequately consult over collective redundancies (TUC, 2014).

In order to make information and consultation worthwhile, employee representatives need to be well-trained. There is evidence of a gap in terms of capacity of non-union reps who are half as likely to have had external support as union reps (Charlwood et al, 2014). The regulations allow employee representatives the right to paid time off for their duties, although this doesn’t apply to pre existing agreements (PEAs). In order to improve the quality of information and consultation forum, consideration could be given to ensuring representatives have a limited amount of protected paid time for training, as happens in Germany and France for example. Employee representatives consulting on redundancies are allowed time off for training, those on ICE forums should have the same rights.

The scope of consultation is important too. With consultation at JCCs increasingly being limited to the preferred option of management, the regulations could be strengthened to ensure that ICE forums have a minimum level of rights, including allowing them to discuss alternative options. We could also look to expand and codify the issues on which consultation should take place – as has happened in France – and include HR policies for example, as they do in Denmark, as well as training and other significant issues. This could include setting out a basic minimum level constitution for JCCs that could be improved on, but not watered down. This would still leave the final decision to management, but a more open consultation process could improve decision-making and perceptions of voice.

However, it is clear that under the current Government, significant reforms to strengthen the ICE regulations are not likely. The regulations were opposed by the Conservatives in opposition and Sajid Javid MP, the Secretary of State for Business Innovation and Skills, has committed to ‘sweeping away burdensome red tape’ and reducing regulation on British employers.

Given there is unlikely to be any such reforms to bolster the ICE regulations in the coming years, it is worth considering what other actors might be able to do.

Making the case to employers

One of the key barriers to the success of the ICE regulations in the UK was the reaction of employers. Changing the attitudes of employers towards consultation is vital if we are to promote greater consultation in the absence of government action. As we showed at the start of the report, consultation and employee voice has been shown to have extensive benefits for employers and for employees.

There are some key organisations that could serve to promote this information and encourage employers to better consult their workforce:

BIS could examine best practice in information and consultation, and share this with employers, encouraging them to make better use of employee forums for consultation.

Acas play an important role in looking at how information and consultation could promote good employment relations in the UK. They could work to better promote the benefits of information and consultation to employers, including highlighting the regulations.

CIPD represents HR professionals in the UK. They could promote the benefits of information and consultation to this key audience.

Engage for Success is a practitioner-led organisation that grew out of David MacLeod and Nita Clarke’s work on employee engagement. It could establish a subgroup to look at information and consultation, and highlight good practice in the UK.

Employers who do have JCCs should ensure that they are operating in line with best practice. This means consulting on a wide variety of issues and always aiming to consult on a variety of options, rather than a preferred option. This allows for a more open discussion and greater employee involvement, which can improve both the outcomes and process of decision-making.

Employers should also consider the capacity and capability of their employee representatives. There is a big gap between union and non-union representatives in terms of access to external support; with the former being twice as likely to have external support (Charlwood et al., 2014). In order to ensure that consultation is effective, there needs to be an informed employee voice that is able to address the

key business issues and engage in constructive dialogue. Employers should consider providing training for representatives, particularly non-union representatives – through Acas, the IPA or others.

Making the case to trade unions

The reluctance of the trade union movement to embrace the ICE regulations can be seen as a missed opportunity. As has been shown above, union membership has consistently declined since 1979, with the trend only slowing in the last decade. Coverage of collective bargaining has also declined substantially. This has left an increasing number of working people without sufficient voice at work.

The ICE regulations have been embraced by trade unions in Europe, providing them with the opportunity to strengthen their position and complement collective bargaining (TUC, 2014). And with the scope of collective bargaining often being relatively narrow, the ICE regulations provide the opportunity for recognised unions to broaden the agenda and have dialogue on a wider range of

issues (Hall, 2005). Trade unions in the UK could do so too. By making better use of the ICE regulations in workplaces where they have a presence, they could strengthen their role, broaden the issues on which they have dialogue, and bolster collective bargaining.

The TUC and others such as Unions 21 could help promote the potential of the ICE regulations among trade unions. This might involve identifying best practice and sharing this among other unions.

Raising awareness of ICE

Finally, the lack of awareness of the ICE regulations among employees has clearly been a barrier to their success. BIS, Acas, CIPD, IPA and others could address this among employers, promoting awareness of the regulations. Trade unions could also promote awareness among their officers and reps, and through them to the workforce as a whole, so that employees are aware of the opportunities offered by the regulations.

11. Conclusion

Many had high hopes for the Information and Consultation of Employees Regulations. They were seen as offering the opportunity to transform employment relations and promote a more robust collective voice. But looking back at them ten years on – it is clear that they have not lived up to these expectations.

‘Although risk of marginalization might exist, strengthened information and consultation regulations would support unions and underpin their role in collective bargaining, rather than undermine them. If information and consultation was the norm, rather than the exception, unions would react accordingly, training their reps to use provisions and taking the opportunity of improved consultation to work with employers to secure and strengthen collective agreements.’

TUC, 2014

The regulations were not a complete failure. There does seem to have been an impact on smaller employers affected by the regulations, and they do seem to have helped stabilise – but not reverse – the decline in workplace consultative bodies. Not a damp squib, but not an explosive success.

“If you want the regulations to be effective, the trade unions need to play a constructive role. Everywhere else in continental Europe, where works councils are established, the unions play a major role in making them work – by training representatives, facilitating expert advice.”

David Coats

Their failure to transform employment relations was in large part due to the attitudes of the social partners. The Labour Government was ambivalent on the regulations, and was unwilling to upset the business community who were opposed to what they saw as an additional unnecessary and unwelcome regulation. This meant the implementation represented a weak compromise, leaving the regulations without teeth and without the chance of making much of a difference. Phillip Sack, the Civil Servant in charge of their

implementation, explained that *‘the government’s objective at that time was really to limit the impact and where possible to promote voluntarism and that was reflected in the design of the regulations.’* In that sense, the regulations didn’t fail. Or at least, they were designed to.

The trade union movement – with the honorable exception of the TUC – were luke-warm on the regulations. They were perhaps understandably reticent – given the lack of a formal role for them – and were wary that they regulations might be used to promote non-union voice at the expense of their role. This limited their willingness to engage with and use the regulations, as many of their counterparts in Europe have done.

This was all conditioned by the UK’s employment and industrial relations culture. Our liberal and voluntarist tradition tends to minimize regulation and maximize management discretion. Our adversarial industrial relations tends to prevent the consensual social dialogue common in much of Europe. This can be seen as a missed opportunity. The UK suffers from a voice deficit when compared to European neighbours such as France, Germany and Denmark. We also suffer from a productivity deficit. These two are perhaps not unrelated.

Some would argue that regulation is inevitably a blunt tool to affect workplace practice, particularly if it goes against the grain of the dominant workplace culture. But exhortation alone may not be enough to change behaviour. There is surely a place for non-burdensome common-sense rules to give people a say at work.

The ICE regulations could form part of the solution to the UK’s voice deficit. We’ve outlined a number of ways in which the regulations could be reformed in order to better promote a collective employee voice at work. Such changes are unlikely to come about for the foreseeable future. But if we want a workplace culture that respects and values people and that gets the best out of them, they are certainly changes we should consider.

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