

Systems of Employee Representation at the Enterprise UK Report

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1. Employee Representation at Enterprise Level

(i) Introduction

In the case of the UK, there is no straightforward answer to the question of the existence of a legal framework for employee representation at enterprise level. For much of the twentieth century, worker representation was regulated in accordance with the principle of voluntarism or *collective laissez-faire*: successive governments supported the creation and maintenance of trade unions and collective bargaining machinery as the preferred means of regulating industrial relations, but, as a general rule, they did not attempt to regulate employment relations directly by means of legislation.¹ Consequently, workers had no legal right to be represented collectively, and employers had no legal duty to recognise trade unions, or to bargain with, consult or inform trade unions or any other worker representatives. The institution and organisation of enterprise worker representation was a matter for employers, trade unions and workers to decide without legal compulsion, and without the guidance of a comprehensive legal framework. Today the picture is rather more complicated. A number of different laws exist which require employers to inform and consult the workforce at enterprise or workplace level in respect of specified subject matter (e.g. health and safety), or on the occurrence of certain events (e.g. the sale of the business). A further law facilitates, but does not require, the institution of a works council or other arrangement for the periodic information and consultation of employees within undertakings.² Much of this ‘information and consultation’ (henceforth ‘I&C’) legislation was introduced in implementation of European Union Directives. Quite separately from that legislation, statutory provisions exist which, in defined circumstances, can require an employer to recognise a trade union at enterprise level for the purposes of collective bargaining. The application of these I&C and union recognition laws is not comprehensive, however, nor do the laws seek to regulate worker representation at enterprise level comprehensively. As a consequence, employers, trade unions and workers retain a significant measure of freedom to organise worker representation without legal restraint, unilaterally or through collective or other workplace agreements.³

It has never been attempted in the UK to legislate for a single, coherent system of

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¹ R Dukes, ‘Otto Kahn-Freund and Collective Laissez-Faire: An Edifice without a Keystone?’ 72(2) *Modern Law Review* 220-246.

² The Information and Consultation of Employees (‘ICE’) Regulations 2004 (SI 2004/3426) adopted in implementation of the European Directive 2002/14 (the ‘ICE Directive’).

³ By ‘workplace agreement’ is meant any agreement reached at workplace level between an employer and employee representatives (as opposed to a collective agreement reached between an employer and trade union or unions: Trade Union and Labour Relations Consolidation Act (‘TULRCA’) 1992, s. 178.).

worker representation. Separate, and in many respects different, provision has been made in the case of each of the European Directives dealing with I&C: the collective redundancies Directive, the transfers of undertakings Directive, the health and safety Directive, and the information and consultation of employees (ICE) Directive.⁴ Different provision, again, has been made for existing domestic law requirements to inform and/or consult with regard to collective bargaining,⁵ to offshore safety,⁶ and to occupational pension schemes.⁷ The end result is a confusion of legislative provisions requiring the information and consultation of employee representatives for a range of different purposes. Some of the legislation applies to all employers, some only to employers with a specified minimum number of employees. Some of the legislation requires to be ‘triggered’ before its provisions have application to a particular employer. Even where the legislation does apply, it does not always make detailed provision regarding the obligation to inform and consult, leaving some matters to be decided instead by the employer, acting unilaterally or in negotiation with employee representatives. Some of the legislation allows representatives to be appointed or elected on an ad hoc basis only; in other cases, the appointment or election of a standing representative body may be required. In some cases, the representatives of recognised trade unions have the right to act as the representatives of the employees for the purposes of I&C, in others they do not. And alongside this tangled web of I&C legislation sits the statutory procedure introduced in 2000 to facilitate the recognition of trade unions for the purposes of collective bargaining.

In light of the piecemeal nature of the UK legislation, it may be difficult, in what follows, to provide succinct answers and explanations to all of the questions raised. In the interests of clarity, trade union recognition at enterprise level is not referred to again in the remainder of part 1 of the report. The focus of part 1 lies instead with the I&C legislation and, in particular, with the statutory obligations to inform and consult that arise (i) in respect of health and safety, collective redundancies, and transfers of undertakings, and (ii) under the terms of the ICE Regulations.⁸ (The ICE Regulations, adopted in 2004 in implementation of the European ICE Directive, facilitate, but do not require, the institution of a works council or other arrangement for the periodic information and consultation of employees within undertakings.)

(ii) Historical development

Trade unions first emerged in the UK as local organisations.⁹ Many of the earliest unions were workplace-based: associations of workers employed in the same enterprise. As the unions grew, and became consolidated into national bodies, collective bargaining mechanisms were centralized. From the beginning of the twentieth century, negotiations

⁴ European Council Directives 98/59 (collective redundancies), 2001/23 (transfer of undertakings), 89/931 (health and safety) and 2002/14 (information and consultation of employees).

⁵ Contained originally in the Employment Protection Act 1975, ss. 17-21; now TULRCA 1992 ss. 181-185: provision of information to a recognised independent trade union for the purposes of collective bargaining.

⁶ Offshore Installations Safety Regulations 1989, SI 1989/971: consultation of elected employee representatives in all cases regardless of union presence.

⁷ Pension Schemes Act 1993 and the Occupational Pension Schemes (Contracting Out) Regulations 1996: consultation of union representatives where a union is recognised, and otherwise no consultation.

⁸ In other words, detailed explanations of the law are *not* provided in the case of the legal duties to provide information in respect of collective bargaining, and to inform and consult in respect of occupational pensions and offshore health and safety (see notes 4-6 above).

⁹ On the historical development of worker representation at enterprise level, see further R Dukes, ‘Voluntarism and the Single Channel: the Development of Single Channel Worker Representation in the UK’, (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 87.

between unions and employers or employers' associations took place increasingly at sectoral level. Following this development, few trade unions preserved any special organisation at workplace or enterprise level. Where trade unions made provision for the appointment of representatives at the workplace – shop stewards – prior to 1914, it seems that the vast majority of these had only very minor administrative functions, and no authority to bargain with the employer.¹⁰

During both the First and the Second World Wars, there was a huge increase in the number of shop stewards in existence, and in the importance of the stewards' role in industry. In many cases, stewards were routinely involved in consultations with the employer over, for example, production and discipline matters, and even in negotiations over pay and working conditions, and in the organization of industrial action. Because collective bargaining tended, throughout the first part of the twentieth century, to proceed primarily at industry level, this meant the existence of two levels of union organization in industry and two loci for collective bargaining, industrial action and other union/management communications.¹¹ In line with the British voluntarist approach to the regulation of industrial relations, however, it was never attempted to regulate workplace representative bodies by means of statute, or to legislate, more positively, for the institution of a 'second channel' of representation. The representation of workers at all levels of organization remained a matter for individual trade unions and employers to regulate, unilaterally or in negotiation with each other. It was unusual, too, for trade unions and employers' associations to regulate the stewards' role formally within trade union rules or industry-wide collective agreements.¹² As a result of the lack of any centralized regulation of shop stewards, their exact role, and their relationship with union officials, varied across time, and from union to union and enterprise to enterprise.

After the Second World War, workplace organization continued to be a very important feature of UK industrial relations. At the end of the war, the first majority Labour Party Government, headed by Clement Attlee, considered the possibility of legislating to make workplace worker representation mandatory. The Government's efforts, at that time, were concentrated on nationalizing industry, and questions of worker representation were discussed primarily within the context of the nationalization plans. Ultimately, the Government decided not to legislate in this area, preferring to leave the matter of workplace consultation to be decided by trade unions and employers on an industry-to-industry or site-to-site basis.¹³ Viewed within a comparative context, it is striking that with its advocacy of joint consultation at the workplace and its continued support of voluntary collective bargaining, the Attlee Government promoted a system of industrial relations which was rather similar to the 'dual channel' systems that emerged in other European countries during the same period. The crucial difference between the UK and these other countries was, of course, the lack of any regulatory framework underpinning the workplace

¹⁰ G D H Cole, *Workshop Organisation* (London, 1973). 6- 9.

¹¹ H A Clegg, A Fox, A F Thompson, *A History of British Trade Unions since 1889, Vol.2, 1911-1933*, (Oxford, 1985). 16-20, 550-552; B. C. Roberts *Trade Union Government and Administration in Great Britain*. (London 1956)

¹² Engineering was unusual in this respect: in 1917 and 1919, the Engineering and National Employers' Federation concluded 'shop steward and works committee agreements' with a number of trade unions. Even these agreements, however, contained only very minimal provisions: A Marsh and E Coker, 'Shop Steward Organization in Engineering' (1963) 1 *British Journal of Industrial Relations* 170.

¹³ Provision was made in the nationalization legislation for consultation between management boards and trade unions as to the conclusion of agreements providing for the establishment and maintenance of joint machinery for collective bargaining regarding terms and conditions of employment, and consultation on *inter alia* safety, health and welfare issues. But the conclusion of such agreements was not rendered mandatory. Coal Industry Nationalisation Act 1946 s. 46; Civil Aviation Act 1946 s. 19; Transport Act 1947 s. 95; Electricity Act 1947 s. 53; Gas Act 1948 s. 57; Iron and Steel Act 1949 s. 39.

consultative committees.

In the period following the end of the War, an ‘unofficial’ shop steward system continued to grow on an ad hoc basis, without legal or other formal circumscription.¹⁴ By the mid-1960s, there was a growing perception in the UK that the economy was in crisis and that undisciplined shop stewards were at least partly to blame. In particular, there was concern regarding rising levels of unofficial strikes (strikes organized by shop stewards), wage inflation and reports of economically damaging ‘restrictive practices’. In 1965, the Government set up a Royal Commission under Lord Donovan (the ‘Donovan Commission’) ‘to consider relations between managements and employees and the role of trade unions and employers’ associations in promoting the interests of their members and in accelerating the social and economic advance of the nation, with particular reference to the Law affecting the activities of these bodies’.¹⁵ The recommendations of the Donovan Commission for the improvement of industrial relations involved, in essence, the endorsement of a move from sectoral to single-enterprise collective bargaining. Advocating, at the same time, a continued role for industry level collective agreements, laying down procedural rules and substantive minima, the Donovan Commission envisaged that trade unions should continue to operate at industry *and* at enterprise level. Importantly, however, it did not recommend that legislation should be used to regulate the relation between industry level and single-enterprise bargaining. This should continue to develop, within each industry and enterprise, as the parties wished, and the circumstances dictated.

In the years following the Report of the Donovan Commission, legislation and government policy reflected the Commission’s recommendations for an increased role for single-enterprise collective bargaining combined with a continued role for sectoral level negotiation. No attempt was made by government to regulate the relationship between the different levels of worker representation – for example, to establish a hierarchy between the industry, enterprise and workplace levels, or to demarcate the type of subject matter that should be negotiated at each level.

Beginning in the 1970s, legal duties to consult with representatives of the workforce in connection with specific matters were introduced in the UK, both pursuant to European Community legislation and in implementation of domestic policy.¹⁶ From 1978, British employers were required to consult workplace ‘health and safety’ representatives, appointed by a recognised trade-union,¹⁷ on arrangements for promoting and developing health and safety measures.¹⁸ From 1975, employers had to inform and consult trade union representatives in the event of collective redundancies, and from 1980, they had also to inform and consult such representatives wherever an undertaking or part thereof was transferred.¹⁹ In 1992, a decision of the European Court of Justice (CJEU) required amendments to the UK legislation which transposed the European Directives, so that in cases where no trade union was recognised by an employer, provision was made for the

¹⁴ ‘Unofficial’ because not sanctioned or regulated by ‘sector-level collective agreement.

¹⁵ Report of the Royal Commission on Trade Unions and Employers’ Associations 1965-1968.

¹⁶ Council Directives 75/129 (collective redundancies) and 77/187 (transfers of undertakings). The health and safety provisions were not, originally, the result of European legislation.

¹⁷ i.e. a trade union which has been recognised by the employer for the purposes of collective bargaining.

¹⁸ Provisions contained originally in the Health and Safety at Work etc Act (‘HSWA’) 1974 and the Safety Representatives and Safety Committees (‘Safety Reps’) Regulations, SI 1977/500; amended following the adoption of the European Council Directive 89/391: the Health and Safety Regulations, SI 1996/1513,

¹⁹ Employment Protection Act 1975 (now TULRCA 1992); Transfer of Undertakings (Protection of Employment) (‘TUPE’) Regulations 1980 (now TUPE Regulations 2006, SI 2006/246).

appointment or election of alternative employee representatives.²⁰ For the first time ever in the UK, legislation existed from 1995 which provided for employee representatives to be elected by the workforce.²¹ In accordance with that legislation, it was possible for representatives to be elected on an ad hoc basis, as and when the obligation to inform and consult arose. In other words, there was no obligation on the employer to organize the election of a works council or other standing body and no right, on the part of the employees, to demand the creation of such a body.²²

In 2002, a further European Directive was adopted (EC Directive 2002/14), which sought to encourage the institution of standing mechanisms or arrangements for the information and consultation of the workforce. The Directive was implemented in the UK in the form of the ICE Regulations 2004. Notwithstanding the terms of the Directive, the Regulations do *not* serve to introduce a comprehensive system of enterprise level worker representation in the UK. Though they apply, on the face of them, to all enterprises ('undertakings') with at least 50 employees, the Regulations have a number of features which render the creation of standing I&C mechanisms or arrangements in all or even the majority of such enterprises highly unlikely. Chief among these features is the requirement that the Regulations be 'triggered' either by the employer itself or at the request of a high percentage (between 10% and 30%) of employees. Unless and until the application of the Regulations is triggered, the employer is not required to do *anything*. If there is a successful trigger, the employer comes under an obligation to make arrangements for employees to appoint or elect representatives who must then negotiate, with the employer, an agreement to establish an I&C procedure. Only if there is a successful trigger, followed by a failure to appoint representatives, or to reach agreement, will 'standard provisions', prescribed within the Regulations, apply. The standard provisions regulate in some detail the election of employee representatives for the purposes of information and consultation, the manner in which those representatives must be informed and consulted, and the question of *what* they must be informed and consulted about.²³

An exception to the general scheme of the regulations is made for businesses in which a 'pre-existing agreement' (PEA) on I&C is in place on the date when a trigger occurs. According to the terms of the Regulations, a PEA may be instituted unilaterally by the employer, without the agreement of union or employee representatives, provided it is later 'endorsed' by the employees.²⁴ Nonetheless, the Regulations provide that the existence of a PEA may defeat a trigger: the PEA may be allowed to continue in existence without the bilateral negotiation of a new I&C agreement.

(iii) Unit of representation

With regard to the unit of representation, there is little consistency across the various I&C provisions. I&C is required in some circumstances at workplace level and in others at enterprise level. The health and safety provisions refer to health and safety within the

²⁰ *Commission of the European Community v UK* Cases C-382/92 and C-383/92 [1994] ICR 664.

²¹ The legislation was amended in 1995 (Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, SI 1995/2587) and again in 1999 (Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations, SI 1999/1925).

²² A limited exception to this general rule existed in respect of the health and safety legislation: if at least two health and safety representatives so requested, employers were obliged to establish a 'safety committee' with the function of 'keeping under review the measures taken to ensure the health and safety at work of [the] employees and such other functions as may be prescribed'. HSWA 1974, s2(7); Safety Repts Regulations, reg 9.

²³ ICE Regulations, regs 19 and 20.

²⁴ ICE Regulations, regs 2 and 8.

‘workplace’ and to the election of representatives by ‘groups’ of employees.²⁵ ‘Workplace’ is defined as: ‘in relation to an employee, any place or places where that employee is likely to work or which he is likely to frequent in the course of his employment or incidentally to it...’.²⁶ The collective redundancies legislation refers to redundancies within ‘establishments’ and to the election of representatives by the ‘affected employees’.²⁷ The term ‘establishment’ is taken from European Union law and has been defined by the Court of Justice to mean, broadly speaking, a workplace rather than an enterprise.²⁸ The transfer of undertakings legislation refers to the transfer of ‘an undertaking, business or part of an undertaking’, and again to the election of representatives by the ‘affected employees’.²⁹ ‘Undertaking’ is, again, a European law term, defined by the CJEU to mean, broadly, enterprise rather than workplace.³⁰ The ICE Regulations refer to the negotiation of information and consultation agreements within ‘undertakings’ and require that any negotiated agreement cover all employees in the undertaking.³¹

(iv) Role and power of the representative body

The I&C legislation makes provision for the information and consultation of employees directly and/or through their representatives. Employee representatives elected or appointed under the legislation have rights to be informed and consulted in respect of specified subject matters or on the occurrence of a specified event. Under the health and safety legislation, employers are legally required to consult representatives on specified matters including the introduction of measures which may substantially affect the health and safety of employees.³² Under the transfer of undertakings legislation, employers must inform and consult the representatives of any affected employees whenever an undertaking is transferred, on *inter alia* the measures which they intend to take in connection with the transfer.³³ Under the collective redundancies legislation, employers must inform and consult the representatives of any affected employees whenever they propose to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less.³⁴ They must consult, in such cases, on *inter alia* the possibility of avoiding dismissals or mitigating the consequences of the dismissals.³⁵

Where an employer implements some standing mechanism for the information and consultation of employees, either voluntarily, or under the terms of the ICE Regulations, provision may be made for information and consultation regarding a wide – or narrow – range of subjects. Where a mechanism is introduced voluntarily, or pursuant to a ‘negotiated agreement’ reached under the ICE Regulations, there are no legal restrictions as

²⁵ Health and Safety Regulations.

²⁶ Health and Safety Regulations, reg 2.

²⁷ TULRCA 1992, ss. 188 and 188A.

²⁸ The term ‘establishment’ is taken in this context from Directive 98/59. It has been defined by the CJEU as follows: ‘the unit to which the workers made redundant are assigned to carry out their duties. It is not essential, in order for there to be an establishment, for the unit in question to be endowed with a management which can independently effect collective redundancies.’ *Rockfon*: Case C-449/93 (1995).

²⁹ TUPE Regulations 2006 2006, regs 3, 13.

³⁰ See eg *Dr Sophie Redmond Stichting v Bartol* Case C-29/91 (1992); *Henke v Gemeinde Schierke und Verwaltungsgemeinschaft ‘Brocken’* Case C-298/94 (1996).

³¹ ICE Regulations 2004, reg 16. ‘Undertaking’ is defined in reg 2 as: ‘a public or private undertaking carrying out an economic activity, whether or not operating for gain’.

³² Health and Safety Regulations.

³³ TUPE Regulations 2006, reg 13.

³⁴ TULRCA s. 188 (1).

³⁵ TULRCA s. 188 (2).

to the subject matter which can or must be covered.³⁶ Where a mechanism is introduced under the ‘standard provisions’ of the ICE Regulations, provision is made for a minimum range of subjects which information and consultation must cover.³⁷ Under the terms of the standard provisions, an employer must provide the employee representatives with information on the recent and probable development of the undertaking’s activities and economic situation. It must inform and consult the representatives regarding 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. It must also inform and consult on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those referred to in the collective redundancies and transfer of undertakings regulations.

Neither ‘information’ nor ‘consultation’ are terms of art in the UK. It follows that unless otherwise defined within the legislation or in case law, they can be understood to have their normal dictionary meaning. Generally speaking, ‘information’ is used in the legislation to refer to the one-way transmission of data by the employer to the employees or employee representatives.³⁸ ‘Consultation’ is used to imply a two-way process, whereby the employer not only transmits data but also considers responses to that data. In some circumstances, employers are required by the legislation to ‘consult with a view to reaching agreement’.³⁹ Use of this phrase is intended to emphasise that consultation should entail an effort on the part of the employer to take account of employee concerns. It should mean more, in other words, than simply giving notice of certain information and listening to the responses of the employee representatives. ‘Consultation with a view to reaching agreement’ does not amount to a right to negotiation. It differs from a right to negotiation in that it leaves managerial prerogative intact – decision making power lies ultimately with the employer and is not shared with the employee representatives.⁴⁰

(v) Formation of the representative body

In the case of *collective redundancies* and *transfers of undertakings*, the obligation to inform and consult is mandatory. It does not follow, however, that the creation of a workers’ representative body is mandatory. If the relevant employees are employees in respect of whom the employer recognises a trade union for the purposes of collective bargaining, the employer is required to inform and consult ‘representative of the trade union’.⁴¹ No special workplace representatives need be designated. If there is no such recognised trade union, the employer can choose to inform and consult either: (a) any existing employee representatives; or (b) employee representatives elected especially. In the latter case, the employer comes under an obligation to arrange for the election of employee representatives by the relevant employees for the purposes of information and consultation.⁴² The election may proceed in an ad hoc manner, as and when the obligation to inform and consult arises. Where the employer invites the employees to elect representatives and the employees fail, within a ‘reasonable time’, to do so, the legislation

³⁶ ICE Regulations 2004, reg. 16.

³⁷ ICE Regulations 2004, reg 20.

³⁸ ‘Information’ is defined in reg 2, ICE Regulations 2004, as: data transmitted by the employer to the representatives or directly to the employees.

³⁹ TULRCA 1992, s. 188(2); TUPE Regulations 2006, reg 13(6); ICE Regulations 2004, reg 20(4)(d).

⁴⁰ M. Hall and M. Edwards, ‘Reforming the Statutory Redundancy Consultation Procedure’ (1999) 28 *Industrial Law Journal* 299.

⁴¹ TULRCA 1992, s. 188 (1B); TUPE Regulations 2006, reg 13(3).

⁴² TULRCA 1992 s.188A, TUPE Regulations 2006, reg 14.

also makes provision for the direct information of individual employees.⁴³

In respect of the *health and safety* legislation, the obligation to consult is mandatory.⁴⁴ If the employer recognises a trade union for the purposes of collective bargaining, the ‘recognised trade union’ has a right to appoint ‘safety representatives from amongst the employees’ for the purposes of consultation.⁴⁵ If at least two safety representatives so request, the employer is then obliged to establish a ‘safety committee’ with the function of ‘keeping under review the measures taken to ensure the health and safety at work of [the] employees and such other functions as may be prescribed’.⁴⁶ If the employer does not recognise a trade union, it can choose either to consult employees directly, or, to consult any representatives of the group of employees ‘who were elected, by the employees in that group at the time of the election, to represent that group for the purposes of [health and safety] consultation’.⁴⁷ In the case of health and safety, then, application of the information and consultation provisions might result in the formation of a standing ‘safety committee’ or, alternatively, in the institution of mechanisms for the direct information and consultation of employees, without the appointment or election of employee representatives.

The ICE Regulations work rather differently. No obligations fall to an employer under the Regulations unless and until their application is triggered.⁴⁸ Following a successful trigger, the employer comes under two obligations: first, to arrange the appointment or election of employee representatives, and second, to enter into negotiations with those representatives regarding the institution of a mechanism for informing and consulting employees.⁴⁹ (Note that employee representatives must be appointed or elected in this context regardless of whether or not a trade union is recognised for the purposes of collective bargaining.) In deciding on the nature and detail of such a mechanism, the employer and employees representatives enjoy a very large measure of freedom.⁵⁰ They are free, for example, to agree that information and consultation should proceed directly i.e. without employee representatives.⁵¹ While it may become necessary, then, following a successful trigger, to arrange the appointment or election of employee representatives to undertake the task of negotiating an agreement on the institution of a new I&C procedure, it may not be necessary, according to the terms of that new procedure, to designate employee representatives to be informed and consulted. In other words, the employee representatives are free to negotiate themselves out of a job! ‘Pre-Existing Agreements’ may also provide for direct information and consultation only, without the need for employee representatives.

(vi) Election of the representatives

Health and safety: Under the health and safety legislation, safety representatives may be appointed by a recognised trade union⁵² or, where there is no recognised union, they may be elected by the employees.⁵³ No procedures are stipulated for the appointment

⁴³ TULRCA 1992, s. 188 (7B); TUPE Regulations 2006, reg 13(11).

⁴⁴ HSWA 1974, s. 2(6); Health and Safety Regulations, regs 3 and 4.

⁴⁵ HSWA 1974, s. 2(4); Safety Reps Regulations, reg 3.

⁴⁶ HSWA 1974, s2(7); Safety Reps Regulations, reg 9.

⁴⁷ Health and Safety Regulations, reg 4(1)(b).

⁴⁸ ICE Regulations 2004, reg 7.

⁴⁹ ICE Regulations 2004, regs 7 and 14.

⁵⁰ ICE Regulations 2004, reg 16.

⁵¹ ICE Regulations 2004, reg 16(1)(f)(ii).

⁵² HSWA 1974, s. 2(4); Safety Reps Regulations, reg 3.

⁵³ Health and Safety Regulations, reg 4(1)(b).

of representatives by trade unions, though the legislation does direct that any such representative ought ‘so far as is reasonably practicable either [to] have been employed by his employer throughout the preceding two years or [to] have had at least two years experience in similar employment’.⁵⁴ No procedures are stipulated for the election of representatives by the employees. Where the representatives are appointed by a recognised trade union, the question of the duration of mandate is left to the union.⁵⁵ Where representatives are elected, the legislation does not stipulate a particular period of mandate but does provide that a person shall cease to be a representative where either: she notifies the employer that she does not intend to represent the employees; she ceases to be employed in the group of employees which she represents; or the period for which she was elected has expired without that person being re-elected.⁵⁶

Collective redundancies and transfers of undertakings: Under the collective redundancies and transfers of undertakings legislation, an employer may choose to consult representatives elected especially for that purpose. The legislation makes fairly detailed provision regarding the election of such representatives. It stipulates that candidates for election must be ‘affected employees’ and, further, that no affected employee may be ‘unreasonably excluded’ from standing.⁵⁷ It directs that the employer must determine the number of representatives, so that there are sufficient representatives to represent the interests of all affected employees having regard to their number and class.⁵⁸ It gives the employer a right to choose whether employees should be represented by representatives of all affected employees or of particular classes.⁵⁹ It rules that all affected employees must be entitled to vote in the election, and that the election must be conducted so as to secure that those voting do so in secret, and that the votes are accurately counted.⁶⁰ Finally, it places the employer under a general duty to ‘make such arrangements as are reasonably practical to ensure that the election is fair’.⁶¹ As for the elected representatives’ duration of mandate, the collective redundancies and transfer of undertakings legislation provides that, prior to the election, the employer must prescribe the employee representatives’ term of office, ensuring that it is of sufficient length to enable the consultative process to be completed.⁶²

ICE Regulations: The ICE Regulations refer to the appointment or election of two different types of employee representative: those who represent the employees during the course of the negotiation of an I&C agreement (the ‘negotiating representatives’); and those who are informed and consulted on behalf of the employees under the terms of a negotiated agreement, or, alternatively, as provided for in the standard provisions (the ‘information and consultation representatives’). Different provision is made within the Regulations regarding each type of representative.

It is the duty of the employer to arrange the appointment or election of ‘negotiating representatives’. The manner of appointment or election is not specified within the Regulations, except insofar as it is provided that, ‘all employees of the undertaking must be entitled to take part in the appointment or election of the representatives’ and that ‘the

⁵⁴ Safety Repts Regulations, reg 3(4).

⁵⁵ Safety Repts Regulations, reg 3(3).

⁵⁶ Health and Safety Regulations, reg 4.

⁵⁷ TULRCA 1992, s 188A(1)(e) and (f); TUPE Regulations 2006, reg 14(1)(e) and (f).

⁵⁸ TULRCA 1992, s. 188A(1)(b); TUPE Regulations 2006, reg 14(1)(b).

⁵⁹ TULRCA 1992, s. 188A(1)(c); TUPE Regulations 2006, reg 14(1)(c).

⁶⁰ TULRCA 1992, s. 188A(1)(g), (h), (i); TUPE Regulations 2006 2006.

⁶¹ TULRCA 1992, s. 188A(1)(a); TUPE Regulations 2006 2006, reg 14(1)(a).

⁶² TULRCA 1992, s. 188A(1)(d); TUPE Regulations 2006 2006, reg 14(1)(d).

election or appointment of the representatives must be arranged in such a way that, following their election or appointment, all employees of the undertaking are represented by a representative'.⁶³ It follows that all union members and union representatives who are also employees of the undertaking are entitled to stand for election, while union members and officials who are not employees of the undertaking have no right to stand for election. With the agreement of the employer, it is possible that union representatives could act as the negotiating representatives for unionized sections of the workforce, however, since the legislation does not guarantee this as a right, it is essentially at the discretion of the employer. No provision is made for trade union involvement in the appointment or election of the representatives – for example, there is no union right to access the workplace in the period before the election for the purposes of campaigning, and no right to influence the choice of candidates. As for the duration of mandate of negotiating representatives, the Regulations appear to envisage that they shall continue to act as negotiating representatives until an agreement has been negotiated.⁶⁴

'Information and consultation representatives' may be appointed or elected in two ways: (a) under the terms of a negotiated agreement; or (b) where the 'standard provisions' apply, according to terms set out in the Regulations.⁶⁵ Where an employer and negotiating representatives agree the manner of appointment or election of I&C representatives as part of a 'negotiated agreement', they are entirely unrestricted as to the provision they make.⁶⁶ Again, they may agree that union representatives should act as I&C representatives, but they are under no obligation to do so, even where a union is recognised within the undertaking. Under the standard provisions, the 'relevant number' of I&C representatives must be elected in a ballot of the employees, the relevant number being one representative per fifty employees, up to a maximum of 25 representatives. The ballot must be arranged by the employer in accordance with Schedule 2 to the Regulations, which requires the employer to appoint an independent ballot supervisor and, having formulated proposals as to the ballot arrangements, to consult on those proposals, insofar as is reasonably practicable, with the employees' representatives, or the employees themselves. Under Schedule 2, all 'employees of the undertaking' are entitled to stand for election. The wording of the Schedule appears to leave open the possibility that union and other employee representatives who are not themselves employees might also stand, with the agreement of the employer.⁶⁷

As to the duration of mandate of information and consultation representatives, the legislation is silent. Where such representatives are elected under the terms of a negotiated I&C agreement, the duration of mandate will be decided in accordance with that agreement. Where they are elected in conformity with the standard provisions, the question of the duration of mandate will be for the employer and employees' representatives to decide.

Protection against employer interference in election process?

In the case of elections held in connection with *collective redundancies* and *transfers of undertakings*, employers have a general duty to 'make such arrangements as are

⁶³ ICE Regulations 2004, reg 14. 'Negotiating representative' is defined under Regulation 2 as 'a person appointed or elected under regulation 14'.

⁶⁴ ICE Regulations 2004, reg 14.

⁶⁵ ICE Regulations 2004, regs 2, 19.

⁶⁶ ICE Regulations 2004, regs 16.

⁶⁷ ICE Regulations 2004, Schedule 2, 2 (d): 'any employee who is an employee of the undertaking at the latest time at which a person may become a candidate in the ballot is entitled to stand in the ballot as a candidate as an information and consultation representative'.

reasonably practical to ensure that the election is fair'.⁶⁸ There is no requirement in the case of such elections for employers to employ an independent person to conduct the election, and there is no rule to prohibit the employer or third parties attempting to put pressure on employees to vote in a certain way. It is unclear whether conduct of this nature (ie conduct aimed at pressuring the employees to vote in a certain way) would violate the duty to make 'arrangements' to ensure that the election is fair.

Under the *health and safety* legislation, as noted above, no procedures are stipulated for the appointment of representatives by unions or for the election of representatives by the employees.

Where an election is held under the standard provisions of the *ICE Regulations*, the employer falls under an obligation to appoint an independent ballot supervisor and, having formulated proposals as to the ballot arrangements, to consult on those proposals, insofar as is reasonably practicable, with the employees' representatives, or the employees themselves.⁶⁹ Again, there is no rule which expressly prohibits the employer or third parties from attempting to put pressure on employees to vote in a certain way.

Involvement of non-standard employees?

The I&C legislation varies, again, in respect of the provision made for the involvement of non-standard employees in the election procedures. All of the legislation refers to 'employees'. Since 'employee' is then defined as someone who works under a contract of employment,⁷⁰ the term must be taken to exclude many types of 'atypical' worker, including apprentices.⁷¹ It does not exclude workers on probation unless they are undergoing training to the extent that they do not qualify as employees.⁷² As a general rule, part-time employees are not excluded and are counted in the same way as full-time employees. The exception to this rule is contained in the *ICE Regulations* which direct that part-time employees should be counted as half persons for the purposes of calculating the total number of employees of the employer.⁷³ In respect of collective redundancies, fixed-term employees working under a contract for a fixed term of three months or less (or under a contract made in contemplation of the performance of a specific task which is not expected to last for more than three months) are expressly excluded from the application of the provisions.⁷⁴

The health and safety, collective redundancies and transfer of undertakings legislation does not explicitly require that employees involved in elections should be employed by any particular employer. This would seem to leave open the possibility that dispatched temporary workers and workers of contractors etc might be appointed or elected as representatives and might be allowed to vote in an election of representatives, provided that they fell under the definition of 'employees'. The wording of the *ICE Regulations* is rather narrower. With regard to the election of 'negotiating representatives', it is provided that, 'all employees of the undertaking must be entitled to take part in the appointment or election of the representatives' and that 'the election or appointment of the representatives must be arranged in such a way that, following their election or appointment, all employees of the undertaking are represented by a representative'.⁷⁵ Reference to 'employees of the

⁶⁸ TULRCA 1992, s. 188A (1)(a); TUPE Regulations, reg 14 (1)(a).

⁶⁹ *ICE Regulations*, reg 19 and Schedule 2.

⁷⁰ TULRCA 1992, s. 295; HSWA 1974 s 53 (1); TUPE Regulations 2006 2006 reg 2; *ICE Regulations*, reg 2.

⁷¹ See e.g. *Dunk v George Waller & Sons Ltd* [1970] 2 QB 163.

⁷² *Daley v Allies Suppliers Ltd* [1983] IRLR 14.

⁷³ *ICE Regulations*, reg 4(3).

⁷⁴ TULRCA 1992, s. 282(1).

⁷⁵ *ICE Regulations* 2004, reg 14.

undertaking' would seem to exclude dispatched temporary workers (employees) and employees of contractors etc. It is possible that with the agreement of the employer, such workers could nonetheless take part in the election of employee representatives. With regard to the election of information and consultation representatives under the standard provisions, the ICE Regulations refer to 'a ballot of [the employer's] employees'⁷⁶ and direct that any employee 'of the undertaking' may stand as a candidate.⁷⁷ Again, this would seem to exclude dispatched temporary workers and workers of contractors etc.

(vii) *Deliberation and decision-making of the representative body*

The manner of deliberation and decision-making of the representative body tends not to be regulated within the legislation but is left to the employee representatives to decide among themselves, or in negotiation with the employer.

(viii) *Protection for activities of the representatives*

Employee representatives (whether officials of a trade union or not) have the right not to be unfairly dismissed, selected for redundancy, or subjected to any 'detriment' by reason either of their participation in an election, or their performance of the functions and activities of such representatives.⁷⁸

(ix) *Bearer of the cost*

As a general rule, employers bear the cost of information and consultation. They must finance elections, allow employee representatives time off with pay,⁷⁹ and provide facilities such as office space.⁸⁰ The ICE Regulations constitute a partial exception in this respect since they do not confer any obligation upon the employer to provide facilities or accommodation to the employee representatives.

(x) *Rate of adoption in reality*

The best information regarding information and consultation in practice dates from the 2004 Workplace Employment Relations Survey.⁸¹ According to that information, the legislation dealing with health and safety, collective redundancies and transfers of undertakings appears to have a pretty high success rate in terms of the number of employers who inform and consult their employees. That said, consultation appears to proceed in a high number of cases *directly* with employees rather than through a representative. In 2004, employers consulted with employees or their representatives about proposed redundancies in 75% of all enterprises where redundancies had been proposed.⁸² Consultation was less likely where no union was recognised.⁸³ Where

⁷⁶ ICE Regulations, reg 19.

⁷⁷ Schedule 2, para 2(d).

⁷⁸ Employment Rights Act 1996, ss 103, 105, 128, 120, 47; ICE Regulations, regs 30-33.

⁷⁹ ERA 1996, s 61; Health and Safety Regulations, reg 7; ICE Regulations, regs 27 and 28.

⁸⁰ TULRCA 1992, s 188 (5A); Health and Safety Regulations, reg 7.

⁸¹ B. Kersely, C. Alpin, J. Forth, A. Bryson, H. Bewley, G. Dix, S. Oxenbridge, *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (London and New York 2006) ('WERS 2004'). The Workplace Employment Relations Study is the flagship survey of employment relations in Britain. It collects data from employers, employee representatives and employees in a representative sample of workplaces. It has been undertaken five times in 1980, 1984, 1990, 1998 and 2004. Fieldwork for the sixth WERS is now underway and is scheduled to be completed by mid 2012.

⁸² *Ibid.* 202.

⁸³ In workplaces without a recognized union there was consultation in 74% of workplaces; in workplaces with a

consultation did occur in non-unionized workplaces, it was usually direct with the employees concerned, rather than through elected representatives.⁸⁴ In the case of *health and safety*, only 1% of workplaces had no arrangement for consultation regarding health and safety in 2004.⁸⁵ Since the health and safety legislation was amended in 1996 to allow for direct consultation with employees, however, consultation through representative channels has declined markedly, while direct consultation has become much more prevalent.⁸⁶

In terms of the incidence of information and consultation, it seems that the ICE Regulations have not been as successful. As yet, no evidence has been collated regarding the total number of agreements negotiated and implemented pursuant to the legislation.⁸⁷ The limited data available suggests that the Regulations have prompted some increase in the incidence of I&C mechanisms within UK companies. But it also suggests that the creation of such mechanisms has been almost wholly employer-led: there is very little evidence of employees or trade unions acting to pull the ‘trigger’ in order to require the bi-partite negotiation of an I&C agreement. Moreover, a recent qualitative study has found that I&C mechanisms in the UK tend to be used almost exclusively for one-way communication (information) rather than for the meaningful consultation of employee representatives.⁸⁸

(xi) Employee representation on corporate boards

There is no legal provision for employee representation on the corporate boards of UK companies. Provision is made, in implementation of European law, for employee representation on the boards of European Companies.⁸⁹

2. Relationship with Collective Bargaining

(i) Unionization and collective bargaining today

Since the 1980s, trade union membership levels have decreased very significantly and the coverage of collective agreements has contracted.⁹⁰ In 1980 65% of workers were union members; by 2010 that figure had fallen to 26.6%. In 1980 about 70% of employees’ wages were determined by collective agreement; by 2010 this had fallen to around 30%. These overall figures obscure a clear division between the private sector of the economy, where unionisation is at a remarkably low ebb, and the (now reduced) public sector where unionisation has declined more slowly. In 2005, it was argued in an influential article that trade unions have changed not only in terms of their size and

recognized union, there was consultation in 86% of workplaces.

⁸⁴ In workplaces without a recognized union, consultation took place through a union rep in 4% of cases, a joint committee in 7% of cases, an alternative non-union rep in 6 % of cases and directly in 71% of cases.

⁸⁵ WERS 2004, 203-5.

⁸⁶ In 2004, employers consulted directly with employees regarding health and safety in 57% of workplaces, and with joint committees or individual representatives in only 42% of cases. In workplaces with a recognised trade union, consultation proceeded through a representative in 63% of cases, and directly in 37% of workplaces.

⁸⁷ M Hall, ‘EU Regulation and the UK Employee Consultation Framework’ (2010) 31(4) *Economic and Industrial Democracy* 55-69.

⁸⁸ M Hall, S Hutchinson, J Purcell, M Terry and J Parker, ‘Promoting Effective Consultation? Assessing the Impact of the ICE Regulations’ *British Journal of Industrial Relations* (published online 28.06.2011).

⁸⁹ EU Council Directive 2001/86; SI 2004/2326. See P Davies, ‘Workers on the Board of the European Company?’ (2003) 32 *Industrial Law Journal* 75-96.

⁹⁰ WERS 2004; Department for Business, Innovation and Skills, Trade Union Membership 2010 (National Statistics 2010).

strength but also in terms of their *function*.⁹¹ Increasingly, since the 1980s, trade unions are characterised less by their engagement in representation and regulation and more by their provision of services to union members: legal services, commercial services, social services. Where collective bargaining does still occur, it is often a rather impoverished version of its former self, with employers and unions meeting only infrequently to agree a narrow core of terms and conditions of employment which may *not* include rates of pay.

(ii) Trade unions and non-union employee representatives

It is perfectly possible in the UK for trade unions to be recognised for the purposes of collective bargaining at the level of the enterprise, and for workers to be represented at the enterprise by the trade union engaging in collective bargaining.⁹² Sectoral collective agreements are unusual but still exist in the public sector and in a few isolated pockets of the private sector.⁹³ It is much more common for collective bargaining arrangements to be instituted between single employers and trade unions. Under the statutory recognition procedure introduced in 2000, a legal obligation to recognise a trade union may be imposed upon a single employer in certain specified situations.⁹⁴ It is perfectly possible, therefore, for employees in the UK to be represented at enterprise level by a trade union *and* by non-union employee representatives elected for the purposes of information and consultation. Where that is the case, relations between the two are not regulated by law. There is no legislative provision which seeks to ensure that I&C and collective bargaining proceed at separate levels of industry, and no rule which establishes a regulatory hierarchy between the two. Where dealt with in statute, collective bargaining and consultation are divided with respect to the appropriate subject matter of each and regulated in separation.

Notwithstanding the passing of a whole range of information and consultation legislation in past decades, it remains perfectly possible for trade unions and employers to regulate aspects of enterprise level worker representation within a collective agreement. For example, a collective agreement could be reached which provided for the institution of works councils or shop stewards committees within a particular organisation. As mentioned above, it is also quite possible for a trade union to be recognised by an employer in relation to a single enterprise and, thus, for workers to be represented at that enterprise by the trade union engaging in collective bargaining. Less formally, trade unions that are recognised at an organizational level higher than the individual enterprise might have unofficial, lay representatives (shop stewards) within the enterprise.⁹⁵ Such workplace representatives might perform a variety of roles including bargaining collectively in respect of terms and conditions of employment and representing individual workers in disputes with the employer.⁹⁶ The role of the shop steward is purely a matter for the relevant trade union and employer to decide and is not regulated by law.⁹⁷ Alternatively, or indeed additionally, an employer might act unilaterally to institute some mechanism for employee representation at work, be it through the appointment of a non-union employee representative or the creation of some kind of representative committee.⁹⁸

⁹¹ KD Ewing, 'The Function of Trade Unions' (2005) 34 Industrial Law Journal 1-22.

⁹² This is much more likely in the case of large workplaces: WERS 2004, 118.

⁹³ e.g. in the printing, clothing, and motor vehicle retail and repair sectors.

⁹⁴ TULRCA 1992, Schedule A1. The Schedule came into force in June 2000.

⁹⁵ WERS 2004, 123-4.

⁹⁶ WERS 2004, 150.

⁹⁷ Though shop stewards do have legal rights to paid time off for carrying out union duties and for training: TULRCA 1992 ss. 168-169.

⁹⁸ WERS 2004, 125-132.

Again, these non-union representatives and representative committees might perform a variety of roles within the workplace, and again the nature of the roles performed is not regulated by law.⁹⁹ In cases where representative committees are created, some allowance might be made for a measure of trade union involvement in the committee.¹⁰⁰

Only a trade union can bargain collectively with an employer,¹⁰¹ and only an independent trade union can make an application for recognition under the statutory recognition procedure.¹⁰²

In some cases, the representatives of recognised trade unions have the right to act as the representatives of the employees for the purposes of I&C, in others they do not. (Specifically: the *collective redundancies* and *transfer of undertakings* legislation provides that in cases where the relevant employees are employees in respect of whom the employer recognises a trade union for the purposes of collective bargaining, the employer *must* inform and consult ‘representative of the trade union’. The *health and safety* legislation provides that where the employer recognises a trade union for the purposes of collective bargaining, the ‘recognised trade union’ has a right to appoint ‘safety representatives’ for the purposes of consultation.) No rights are accorded, in any of the legislation, to trade unions which have a presence in the enterprise but are not recognised for the purposes of collective bargaining. Where employee representatives are to be elected by the workforce, no attempt is made to link the elected representatives to union-based structures. Trade unions are not accorded any right, for example, to select the candidates for elections, or to enter the workplace for the purposes of campaigning, or to attend meetings of the elected representatives.

3. Function and Dysfunction of the Employee Representation System

(i) *Main Functions of the Representatives*

As should be clear from the foregoing, employees in the UK may be represented at enterprise level by a variety of individuals and office holders: by trade union officials and by union shop stewards; by ‘representatives’ elected or appointed for the purposes of information and consultation in connection with collective redundancies, transfers of undertakings or health and safety; by ‘representatives’ elected or appointed under the ICE Regulations to be informed and consulted regularly by the employer in connection with a range of matters; by uni-partite or bi-partite staff committees instituted unilaterally by the employer. The main functions of the representatives vary in accordance with their identity. Trade union officials and shop stewards might perform a variety of roles including bargaining collectively in respect of terms and conditions of employment, being consulted in respect of work organisation and the management of the enterprise, and representing individual workers in disputes with the employer (see further below). Employee representatives elected or appointed for the purposes of information and consultation will act principally to be informed and consulted under the terms of the relevant legislation.

⁹⁹ WERS 2004, 150.

¹⁰⁰ WERS 2004, 126.

¹⁰¹ TULRCA 1992, s. 178.

¹⁰² TULRCA 1992, Sch A1, para 6. ‘Independent union’ is defined *ibid.* s. 2.

(ii) Dismissals

Trade unions and other employee representatives have no legal rights to be informed or consulted in respect of the dismissal of employees, except in the case of collective redundancies as outlined above. Dismissal is thus a matter which falls squarely within the managerial prerogative, except insofar as that prerogative is limited by the employees' individual rights not to be unfairly dismissed.

In disciplinary meetings between employers and individual workers, including meetings held in contemplation of the dismissal of the worker, workers have a right to be accompanied.¹⁰³ Specifically, a worker has the right to be accompanied by a trade union official employed by the union itself; by any official of the union (including lay officials or shop stewards) whom the union has reasonably certified as having experience of or training in acting as a worker's companion for these purposes; or by any other worker of the employer. During the course of the disciplinary meeting, the union official or other companion of the worker must be permitted to speak in order to put the worker's case, to sum up that case, and to respond on the worker's behalf to any view expressed at the meeting. The companion must also be permitted to confer with the worker during the meeting.

(iii) Defects of the Current Employee Representation System

Two principal criticisms may be made of the current system of employee representation in the UK. The first is that the legal framework is complex and not unitary, making different provision for I&C in a variety of contexts and different provision again for trade union recognition, with no legal regulation of the interaction or integration of different types of representation and representative. The second criticism is that the current system leaves a very significant percentage of British employees without any means of collective representation at work whatsoever. Each of these criticisms is returned to in part 4 below.

With respect more specifically to the I&C legislation, the legal regulation of employee representation in the enterprise can be criticised along three lines. First, the legislation provides only for rights to information and consultation, and not to negotiation or codetermination. Second, except in those cases where a trade union is recognised for the purposes of collective bargaining, the legislation does little to ensure the involvement of trade unions in I&C procedures. In many instances, it allows for I&C to proceed with representatives appointed or elected on an ad hoc basis specifically for that purpose. This raises concerns regarding the fitness of such representatives to represent their colleagues effectively: they may have little or no training and experience, and little access to financial and other resources including legal advice.

The third main criticism of the I&C legislation arises in respect of the sanctions that may be applied to employers who fail to comply with their legal obligations. (This criticism does not extend to the health and safety legislation, where non-compliance with the duty to consult may constitute a criminal offence.¹⁰⁴) In the case of the *collective redundancies* and *transfers of undertakings* legislation, the sanction takes the form of a payment to each individual employee who is dismissed without proper information and consultation of her representatives.¹⁰⁵ The key difficulty here is that such payment is

¹⁰³ Employment Relations Act 1999, ss 10-5.

¹⁰⁴ Health and Safety at Work Act 1974.

¹⁰⁵ TULRCA 1992, ss. 188 and 9.

dependent upon the employee representatives, who must first take the matter of non-information or consultation to an employment tribunal. There is no mechanism whereby an individual employee can force a representative to make a claim before the tribunal. In the case of the ICE Regulations, non-compliance by the employer may result in a claim before the Employment Appeals Tribunal and the imposition of a financial penalty up to £75,000, depending on the seriousness of the breach.¹⁰⁶ As a financial penalty, any such sum will be paid to the UK Treasury and not to the affected employees. That being the case, the question arises whether employees or employees' representatives will always feel motivated to raise a claim before the Tribunal, since they will have nothing to gain in material terms from doing so. The question arises too, whether the threat of a fine of even £75,000 will be sufficient to persuade a large employer that it must comply with the terms of the Regulations.

4. Evaluation and Trends

With respect to the evolution of the regulation of worker representation at enterprise level in the UK over the past two or three decades, there are a number of trends to note. The first of these is falling trade union membership and falling coverage of collective agreements. In 2010, as we have seen, 26.6% of UK workers were union members, down from 65 % in 1980. In 2010, around 30% of employees had their pay and conditions determined by collective agreement, down from around 70% of the workforce in 1980. The second trend is a decline in recent years in the incidence of worker representation at workplace or enterprise level. In 1998, 20% of workplaces had a consultative committee, while in 2004, only 14% of workplaces had such a committee. In 1998, 55% of workplaces with recognized trade unions had an on-site representative (shop steward) from at least one of those unions; in 2004, the equivalent figure was 45%. Moreover, in 2004, only 5% of workplaces had a 'stand-alone' non-union worker representative (i.e. an individual representative as opposed to a consultative committee). It may be concluded from these figures that a high percentage of UK employees are *not* represented collectively at work, either by a trade union, a consultative committee or a stand-alone non-union representative. Whether the ICE Regulations have the potential to buck this trend is far from clear.

In terms of the legislative regulation of workplace worker representation, there has been a general trend, since the 1970s, to ever more legislation. Much of the legislation has its origins in the European Union and represents the transposition, in the UK, of European Directives. Because of the continued reticence of successive UK governments to legislate for a single, coherent system of employee information and consultation, the transposition of each European Directive has meant the addition of a further layer of complexity to the law in this area. Amendments to the original Directives or decisions of the CJEU have from time to time necessitated amendment of the UK legislation in a way that has resulted – inadvertently – in further complexity.

As to the nature of the legislation in question, there has been a clear trend in recent years towards keeping legislation 'light' and encouraging businesses and employees to negotiate arrangements of their own – or, at least, to decide much of the detail of information and consultation arrangements on their own. With the adoption of the European Works Council Directive in 1992, there was a decisive change of tactic within

¹⁰⁶ ICE Regulations, regs 22 and 23.

the European Union in respect of regulating information and consultation. In the 1970s and 1980s, efforts were focused on the harmonization of laws in the different Member States through the application, throughout the Union, of detailed rights to be informed and consulted. By reason of resistance to such harmonizing legislation on the part of some Member States (notably the UK), it proved, however, very difficult to have legislation of this type adopted. From the 1990s, legislative innovations in this area have been directed at creating 'frameworks' rather than detailed rules. The idea behind the creation of regulatory frameworks is that different Member States should be free to make different provision for rights to information and consultation in line with their existing laws and practices. The ICE Directive 2002/14 provides a clear example of this framework approach.

The change of approach within the European Union to legislating for information and consultation rights has coincided with a growing preference, on the part of UK governments, for keeping regulation light with the aim of maximizing flexibility. Since the time of the Thatcher administration, but also under John Major and Tony Blair, UK legislation in the area of information and consultation has been characterized by the 'minimalist approach' taken to transposition of the European Directives. In an effort to appear business-friendly, governments have tended to do the very least that they understand themselves to be required to do in order to comply with the terms of the Directives. The result, arguably, has been the passing of complicated pieces of legislation that don't always provide very effective or useful rights for workers. Ironically, the legislation taken as a whole is not even particularly business-friendly: reticence to legislate for a single, coherent system of information and consultation, combined with a minimalist approach to transposition of the EC Directives has meant very frequent amendments to the law in this area, piecemeal change, and a great deal of complexity of legislative provisions.

A further important factor that has impacted on the nature of the I&C legislation and its impact in practice has been the attitude of trade unions thereto. Dating back to the time of the First World War, any discussion of the merits of using legislation to regulate worker representation has tended to be strongly influenced by the suggestion that such legislation might support the institution and bargaining position of *non-union* worker representatives.¹⁰⁷ Generally speaking, trade unionists have tended to be hostile to the idea of legislating to regulate workplace worker representation for that very reason. A partially defensive approach to the use of legislation in this area was discernible in the unions' reaction to the adoption of the ICE Directive in 2002. There would appear to be concern, still, among trade unionists that the introduction of workforce-wide information and consultation arrangements might undermine or marginalise union recognition. In contrast to these views, some commentators have highlighted the potential of information and consultation legislation to act as a support to trade union organization, providing them with a 'foot in the door' of non-unionized workplaces, and allowing them the opportunity to show their worth as worker representatives. Reference has been made to German experience, which shows that the successful operation of a works council can stimulate trade union organisation, and to British experience during and after the Second World War, when the existence of consultative committees appears to have prompted workers in some cases to join trade unions.

Whether trade union organisation has, in practice, benefited from or been hindered by the I&C legislation is not altogether clear. Evidence collected prior to 2004 does not

¹⁰⁷ R. Dukes, 'Voluntarism and the Single Channel: the Development of Single Channel Worker Representation in the UK', (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 87.

support the idea of information and consultation machinery acting as a springboard for union recognition, insofar as union membership and influence in British workplaces has continued to decline despite the increase in the range of I&C legislation.¹⁰⁸ Nor does it show unambiguously that non-union representation methods are replacing union representation and bargaining structures. Consultative committees have been found to exist both as a complement to, and as a substitute for, union representation. The proportion of workplaces with a recognized trade union which have a consultative committee is notable higher than the proportion of workplaces without a recognized union which have a consultative committee. That said, consultative committees also constitute the most common form of representative body in workplaces where there are no union members.¹⁰⁹ Overall, both non-union and union representation are in decline.¹¹⁰ What has increased, particularly during the 1990s, is the prevalence of direct methods of communication, such as regular meetings between senior management and the workforce, or between junior management and the workers for which they are responsible.¹¹¹ This suggests a growing employer preference for direct methods of communication over representative methods.

As for the ICE Regulations, it is still too early to tell whether they have been and will be used to marginalize trade unions. By reason of the way that the Regulations have been drafted (with no guarantee of union participation in I&C arrangements, and many decisions left in the hands of employers), they certainly have the potential to be used in that way. And there is some very limited evidence that they have been so used in the seven years since the Regulations came into force.¹¹² That said, the ICE Regulations also have the potential to be used more positively by trade unions. For example, a union which was recognised with regard to only a very narrow range of matters might be able to use the ICE Regulations to secure rights to be informed and consulted over additional matters. Where a trade union wished to be recognised but did not yet have the support of a majority of the relevant employees, it might be in a position to arrange an employee trigger and have its representatives elected as negotiating and/or I&C representatives. That done, the union may find itself better placed to recruit new members and to make a successful bid for recognition.¹¹³ Of course, the likelihood that union involvement in I&C procedures might facilitate recruitment will be undermined where those procedures amount to only infrequent meetings about a limited range of issues.¹¹⁴ To date, existing evidence suggests that, with some few exceptions, trade unions have *not* actively sought to use the Regulations in positive ways.¹¹⁵

¹⁰⁸ WERS 2004, chapter 5.

¹⁰⁹ WERS 2004, 126.

¹¹⁰ See above, part 3.1.2.

¹¹¹ J. Forth and N. Millward, *The Growth of Direct Communication* (London, 2002); WERS 2004, 134-9

¹¹² M. Hall, 'A cool response to the ICE Regulations? Employer and trade union approaches to the new legal framework for information and consultation' (2006) 37 *Industrial Relations Journal* 456, 466.

¹¹³ These opportunities have been recognised by the TUC: S. Veale 'Your Voice at Work' (2005)

¹¹⁴ K. Ewing and G. Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626, 641.

¹¹⁵ M. Hall, 'EU regulation and the UK employee consultation framework'. Unpublished paper given at the LSE workshop on economic democracy, 22-23 May 2008.