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EU regulation and the UK employee consultation framework

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The major debates about industrial democracy in the UK in the 1970s, focussing on proposals for employee representation on company boards, were prompted by the European Commission's ultimately unsuccessful draft fifth company law Directive. More recent EU legislative initiatives that *have* reached the EU statute book have essentially focussed on the more limited objective of seeking to ensure employees are informed and consulted by their employers on major changes at work. These measures – and associated case law from the European Court of Justice – have strongly influenced developments in the statutory regulation of employee consultation in the UK. In doing so they have driven significant changes in the legal framework for employee representation in this country, traditionally based on trade union recognition by employers, to accommodate the universal, workforce-wide approach to employee information and consultation rights embodied in EU legislation. Within this process, however, key policy choices on the specifics of the UK's implementing legislation have reflected domestic industrial relations and political concerns, arguably limiting the extent to which these legislative developments have brought the UK closer to the European mainstream.

The main focus of this paper, reflecting research I am currently involved in, is on the factors affecting the design and practical impact to date of the UK's Information and Consultation of Employees Regulations 2004 – the ICE Regulations. These are intended to implement the requirements of the 2002 EU information and consultation Directive and they establish, for the first time in the UK, a general statutory framework giving employees of domestic undertakings the right to be informed and consulted by their employers on a range of key business, employment and restructuring issues.

But to put the ICE Regulations in context the paper first recalls the evolution of the UK's employee consultation legislation in the light of legislative developments at EU level, and the (mainly hostile) attitude adopted by successive UK governments to EU regulation in this area. It also highlights the critical issue of how UK law designates the employee representatives who are to be informed and consulted – in particular the extent to which existing trade union representatives may fulfil this role.

The evolution of UK consultation legislation

The ICE Regulations represent a radical development in the UK context. Historically, employee consultation has not generally been regulated by the law in the UK, reflecting its 'voluntarist' industrial relations traditions and the primacy given to collective bargaining. But since the mid-1970s, there has been a growth in statutory provisions requiring employers to inform and consult employee representatives, driven primarily by EU laws that have usually been adopted in the face of opposition from the UK government of the day.

In fact all the main UK statutory provisions on employee consultation (excluding those in the area of health and safety) emanated from EU Directives. The process began in 1975 with the Directive on collective redundancies. Requirements for consultation over impending redundancies were first introduced by the 1975 Employment Protection Act (now contained in sections 188-198 of the Trade Union and Labour Relations (Consolidation) Act 1992, as amended) and were intended to reflect the provisions of the collective redundancies Directive. Although the regulation of redundancies was already on the political agenda as a result of pressure from trade unions, the eventual redundancy consultation provisions of the Employment Protection Act reflected the approach of the Directive rather than more far-reaching proposals put forward by the TUC.

These were followed in 1981 by the Transfer of Undertakings (Protection of Employment) Regulations introduced (very reluctantly by the then Conservative government) in response to the 1977 EC Directive on employees' rights in business transfers. The Directive and the Regulations included requirements on both the transferor and transferee to inform and consult representatives of employees affected by the transfer.

These initial statutory interventions at European level were of course confined to requiring issue-specific information and consultation (I&C). The next wave of EU legislation, dating from 1994 onwards, included more general and systematic I&C obligations but applied on a transnational basis within companies operating in a number of EU countries. The European Works Councils Directive was eventually implemented in the UK, following the reversal of the UK's social policy opt-out, via the Transnational Information and Consultation of Employees (TICE) Regulations 1999. The European Company Statute (ECS) and the linked employee involvement Directive, finally adopted in 2001, led to the European Public Limited Liability Company Regulations 2004 in the UK.

The most recent and, from a domestic point of view, potentially the most far-reaching EU legislation in this area has been the 2002 information and consultation Directive, resulting in the ICE Regulations – the main focus of this paper.

Government attitudes to EU regulation

With the exception of the collective redundancies Directive, successive UK governments from both main political parties have tended to be sceptical about and often strongly opposed to these Directives. Governmental objections have reflected both industrial relations and wider political concerns. Proposals for mandatory I&C have been seen as alien to the UK tradition of voluntarism and incompatible with British companies' employee involvement practice which has increasingly taken individualised forms. In the case of Conservative governments, at least, there were concerns that EU regulation in this area could have the effect of bolstering collective representation at a time when union organisation was in decline. There are political considerations at both national and European level. Domestically, opposition to such measures by governments of both parties has been central to demonstrating their business-friendly credentials to employer groups and signalling 'Euroscepticism' more generally. At EU level, the stance taken by successive UK governments has been to emphasise the case for 'subsidiarity' on such issues as part of a wider case against an expanded EU social policy role.

Thus, the initial proposals for the EWCs Directive were resisted by the Major-led Conservative government until the ratification of the Maastricht treaty on European Union. The UK's opt-out from the Maastricht social policy agreement then facilitated the Directive's adoption by removing its leading opponent from the decision-making process, which in any event was now based on qualified majority voting. The Directive was eventually extended to cover the UK following the reversal of the UK's social policy opt-out by the new Labour government in 1997.

The change of UK government, coinciding with the emergence (via the Davignon report) of a more flexible approach to the issue of employee involvement within European Companies, also meant a change in the UK's attitude to the ECS and the associated employee involvement Directive. Whereas its Conservative predecessor had opposed the ECS employee involvement Directive, the new Labour government favoured adoption and (unsuccessfully) sought political agreement on compromise proposals during its EU presidency in the first half of 1998.

In stark contrast, however, the stance taken by the new Labour government towards the European Commission's proposals, put forward in November 1998, for a Directive regulating I&C at national level was strongly negative. It argued that such a Directive would 'cut across existing practices in member states to no benefit' and was 'difficult to reconcile with subsidiarity'

(DTI 1998) and indicated that it had secured the support of the German government in seeking to block the proposal in the EU Council. The Anglo-German 'deal', which involved UK support for German concerns over aspects of the ECS, helped keep the draft Directive off the Council agenda until June 2000. But once political agreement had been reached on the ECS (in December 2000), it became clear that the German government would not continue its opposition to the Directive beyond the 2001 UK general election. Following its re-election, and faced with the disintegration of the 'blocking minority' (which had included Denmark and Ireland as well as Germany and the UK), the UK government was forced to abandon its opposition to the Directive, paving the way for final adoption in early 2002.

During the Council's discussion of the draft Directive, the UK government was active in promoting amendments intended to offer member states and the social partners greater flexibility in terms of implementation. Perhaps most notably, pressure from the UK and Ireland resulted in a late concession allowing member states without a 'general, permanent and statutory system' of I&C or employee representation at the workplace to phase-in the application of the Directive to smaller undertakings over a longer period.

As something of an 'aside', I still find the decision of the Blair-led 'new Labour' government not to embrace the Directive, nor to prioritise I&C among its domestic employment relations policy objectives, an intriguing one. On the face of it, the espousal of universal I&C rights – whether in addition to or, more radically, instead of the party's commitment to reintroducing a statutory union recognition procedure – would have been consistent with new Labour's modernising agenda and its emphasis on partnership at work. It would have established elementary representation rights for all employees irrespective of union membership and could also have been designed to build in a guaranteed role for recognised unions. Yet although Labour's front bench employment team were still considering a possible commitment to introduce consultation rights the year before the election, the eventual election manifesto was silent on the issue.

One factor was no doubt that the party's commitment to union recognition legislation was long-standing and effectively set in stone. Moreover, TUC debates in the mid 1990s about seeking extended statutory consultation rights demonstrated considerable union unease at the prospect of departing from the traditional pattern of single channel trade union representation (Hall 1996). Crucially, statutory consultation measures were strongly opposed by the CBI and, once in government, ministers' stand against the I&C Directive seemed designed to cement new Labour's 'business-friendly' positioning as well as signalling the limits of its commitment to embrace the EU social policy agenda, despite its reversal of the UK opt-out.

Employee representation and union involvement

Perhaps the central policy issue in UK legislation giving effect to successive EU I&C Directives has been how the law designates the employee representatives who are to be informed and consulted – in particular, the extent to which existing trade union representatives may fulfil this role.

The UK's original statutory requirements on consultation in respect of impending redundancies and transfers of undertakings, dating from 1975 and 1980 respectively, confined the right to be consulted to representatives of recognised trade unions. However, this approach was eventually challenged by the European Commission and, in two landmark rulings in 1994, the European Court of Justice (ECJ) ruled in 1994 that the UK was in breach of the collective redundancies and transfer of undertakings Directives by failing to provide for the designation of employee representatives for the purposes of the consultation required by the Directives where an employer did not recognise unions. Thus, for the purposes of implementing EU consultation requirements, the ECJ overturned UK law's traditional reliance on recognised trade unions as the sole channel of employee representation – some alternative or supplementary mechanisms had to be provided.

Since then the government has essentially adopted one of two alternative policies. The first is that of the current redundancies and transfers legislation, as amended in 1999. Here the law prioritises consultation via the representatives of independent trade unions where they are recognised by employers, and otherwise provides that consultation should take place with appropriate existing elected employee representatives (for example a consultative committee) or representatives specially elected by employees under regulated balloting procedures. This 'union priority' (Davies and Freedland 2007: 147) or 'supplemented single channel' approach is also reflected in a range of other existing provisions in UK legislation (e.g. the restriction of the scope for 'workforce agreements' under the working time and other regulations to groups of employees not represented by recognised unions).

The alternative policy is the direct election of all employee representatives by workforce ballot irrespective of existing union structures. This is effectively what is required by the TICE Regulations for the election of UK representatives on special negotiating bodies (SNBs) and statutory EWCs and by the European Public Limited Liability Company Regulations 2004 for the election of UK members of SNBs, except where there are existing representative arrangements covering all UK employees that could make the nominations. While the TUC would have preferred the 'union priority' or 'supplemented single channel' approach to be maintained for

these pieces of legislation, there was a strong employer lobby – and a government preference – for the principle of all-employee ballots and keeping consultation arrangements structurally separate from trade union recognition and collective bargaining where the legislation is directly applicable to employers.

Crucially, the government maintained this latter, ‘direct election’ approach for the ICE Regulations too, specifying that, under the default ‘standard information and consultation requirements’, I&C representatives must be elected by employees in a ballot, irrespective of any existing trade union structures within the undertaking. However, this approach contradicts mainstream practice in terms of employee representation on existing consultative committees in unionised or partially unionised workplaces. According to the 2004 Workplace Employment Relations Survey (WERS 2004), in workplaces where at least some union representatives were present on site, 52 per cent of consultative committees were ‘mixed constituency’ or ‘hybrid’ bodies involving both union and non-union representatives, compared to 25 per cent comprised wholly of union representatives and 23 per cent that were wholly non-union (Kersley et al 2006: 131).

UK implementation of the I&C Directive

It is important to recall that the Directive established only a ‘general framework’ for informing and consulting employees and was restricted by the treaty to specifying ‘minimum requirements’. Consequently it was drafted in fairly broad terms and allows member states considerable flexibility regarding the practical arrangements for implementing its provisions. This extends to the mechanism through which I&C should take place – it is up to member states to designate the employee representatives who are to be informed and consulted – and the choice of whether to enable ‘management and labour’ to negotiate I&C arrangements which differ from the provisions of the Directive. Thus the approach taken by national transposition measures would be crucial in determining the impact of the Directive.

As well as the normal public consultation exercises, the process of developing domestic legislation to implement the Directive involved – unusually – agreement between the government, the CBI and the TUC on a broad framework for the UK Regulations. During the first half of 2003, the DTI invited representatives of the CBI and TUC to take part in discussions with ministers about how the UK should implement the requirements of the Directive ‘within parameters set by the government’. Among the latter were that ‘there should be no single, static model for information and consultation’, and that the legislative framework should ‘create room

for the wide diversity of practices that have built over the years, combining both representative and direct forms of participation' (DTI 2003).

The outcome was an agreed 'outline scheme' setting out a framework for Regulations to implement the Directive. This provided the basis for key elements of the subsequent draft Regulations in areas left by the Directive to national determination. For example, it set out proposals for negotiations on I&C procedures to be triggered by employee request and for endorsement ballots where pre-existing agreements were in place. It also outlined statutory provisions, applicable where no negotiated agreement was reached, involving an 'I&C committee' (though the actual Regulations do not specify a representative *body* as such) with representatives elected by employee ballot.

The agreed framework for the Regulations was significant procedurally in that the UK had not in the past approached the implementation of EU employment law Directives in this way. The joint CBI/TUC statement that preceded the trade union recognition proposals in the 1999 white paper *Fairness at work* was perhaps the nearest precedent. The TUC in particular saw important political benefits in achieving a national 'social partner'-style framework agreement as the basis for the UK's transposition legislation.

In substantive terms, the aspect of the framework shaped most by the concerns of the CBI and TUC appears to have been the provisions on triggering negotiations where there are pre-existing agreements. The CBI's main objective was to protect existing company practice. The TUC too did not want to expose existing arrangements, which could potentially include union agreements, to 'easy challenge' but argued that arrangements that are not based on genuine agreement with the workforce must be capable of being overturned.

Key characteristics of the ICE Regulations

In transposing the Directive into UK law, the government made maximum use of the flexibility options in the Directive with the objective, in turn, of maximising the flexibility available to organisations in responding to the Regulations. The intention therefore is to encourage the adoption of organisation-specific I&C arrangements, enabling the parties, for example, to develop agreed arrangements tailored to their particular circumstances, maintain existing arrangements, or even rely on direct forms of I&C where these have the support of employees (an option included in the legislation in response to employer lobbying). The Regulations are a prime example of 'reflexive' employment law in that 'the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment' by the parties to the employment relationship themselves (Barnard and Deakin 2000: 341).

Crucially, the Regulations do not impose a mandatory requirement on employer to inform and consult: employers need not act at all unless 10 per cent of their employees trigger statutory procedures intended to lead to negotiated agreements on I&C. If there is already a voluntary, pre-existing agreement (PEA) in place and employees still try to trigger the Regulations' procedures, a higher threshold of 40% support for new arrangements is needed to overturn the existing arrangements. Both PEAs and 'negotiated agreements' reached via the Regulations' procedures offer employers and employees considerable latitude to agree organisation-specific I&C arrangements. Only in the event that the Regulations' procedures are triggered but no agreement is reached are default standard I&C provisions enforceable and even these are minimally prescriptive – essentially, employers would need to arrange for the election of employee representatives and inform and consult them on specified issues.

Indeed, the government has pursued a 'minimalist' approach to UK implementation more generally, reflecting sustained pressure from UK companies and employers' organisations against any 'gold-plating' of the Directive's provisions that may impose additional regulation on businesses. In a number of areas, including the default I&C requirements and confidentiality provisions, the government has essentially adopted a 'copy-out' approach, reproducing the wording of the Directive in the ICE Regulations.

Finally, significant parts of the Regulations have been modelled on the provisions of the 1999 TICE Regulations, including those concerning ballots to elect statutory I&C representatives (see previous section), employee rights and protections, and enforcement and sanctions. (Indeed, an underlying government concern in developing the TICE Regulations was to avoid setting any potentially awkward precedents for future UK legislation to implement the then draft Directive on national I&C rules (Carley and Hall 2000).)

The Regulations have attracted several criticisms, among them that, although a trigger mechanism is ostensibly allowed by recital 15 of the Directive, the threshold of 10 per cent of the workforce for requesting statutory negotiations on I&C arrangements is likely to prove a tough standard to meet, especially in organisations where there is no union presence. Consequently relatively few employers expect their employees to trigger negotiations (a point borne out in several surveys of employers – see Hall 2006), and the pressure on them to adopt agreed I&C procedures may not be very strong in practice. It is also the case that the Regulations do not accord any specific statutory rights to trade unions as such. Writing unions out of the script is likely to have contributed to unions' ambivalence, even hostility, towards the legislation.

It has also been argued that allowing PEAs or negotiated agreements to provide for direct forms of I&C only is incompatible with the Directive, which defines information and consultation as processes involving employee representatives and stipulates (recital 16) that employees must 'always [be] free to exercise the right to be informed and consulted through their representatives'. Another concern is that, while PEAs enable employers effectively to pre-empt the application of the Regulations' statutory procedures, they are exempt from the Regulations' enforcement provisions and are unenforceable unless they provide voluntarily for legal enforceability or other dispute resolution procedures. There are hints in the European Commission's (2008) review of the application of the Directive that the ICE Regulations' provisions in respect of direct forms of I&C and the definition and enforceability of PEAs are potentially problematic areas in terms of compliance with the Directive which the Commission intends to examine more closely.

Some commentators (e.g. Taylor et al 2007) have called into question the adequacy and effectiveness of the government's approach more generally, arguing that the Regulations' minimalist and 'employer friendly' design are intended to dilute the impact of the Directive in the UK context.

Impact of the ICE Regulations

Despite an apparently widespread view that, in practice, the ICE Regulations have been something of a 'damp squib', to date there has been little systematic evidence on how employers, employees and trade unions are responding to the changed legal environment – and what there is provides a mixed picture (Hall 2006).

Against some people's expectations, WERS 2004 showed that the then imminent prospect of the ICE Regulations had not resulted in an upturn in the proportion of workplaces covered by consultative committees. On the contrary, the previous downward trend had continued. The headline WERS finding that two-fifths of workplaces were covered by workplace or higher-level consultative committees will be the benchmark or baseline for assessing whether the Regulations drive the wider diffusion of I&C arrangements over time.

Since then, a number of (much less comprehensive) surveys have suggested that the Regulations have prompted both increases in the incidence of formal I&C arrangements and modifications to existing arrangements. For example, the CBI's annual employment trends surveys showed an increase in employers reporting permanent mechanisms for informing and consulting employees from 35% in 2002 to 57% in 2006 (CBI 2006). An IRS survey (2006) found that around one-third of respondents had made changes to their I&C arrangements in the past

two years, mostly in response to the new legal framework. In an LRD (2006) survey of union reps, one-thirds of respondents reported having I&C arrangements that had been drawn up, amended or reviewed in the light of the Regulations. And a recent survey of UK operations of multinational companies (Edwards et al 2007) suggested that the ICE Regulations had prompted substantial recent change in arrangements for employee consultation with around 40% reporting new or modified I&C arrangements over the previous three years.

However, there is currently no quantitative data on the incidence of 'pre-existing agreements' or 'negotiated agreements' as defined by the Regulations. Most commentators seem to agree that there has not been a rush to put formal PEAs in place, despite the protection they offer against the Regulations' statutory procedures being invoked by employees – perhaps because very few expect their employees to trigger the Regulations' procedures. Negotiated agreements appear to have been extremely rare.

There has also been little litigation as yet under the Regulations, with only a handful of cases reaching the CAC, even though the leading case, *Amicus and Macmillan Publishers Ltd*, arguably demonstrates the scope for employees and unions to use the law effectively against defaulting employers.

One factor behind this picture is that, with some exceptions, trade unions have not actively sought to use the Regulations. Their generally defensive approach to the legislation appears to reflect concern that the introduction of workforce-wide I&C arrangements have little to offer unions and could potentially undermine or marginalise union recognition where it exists.

Organisational responses to the ICE Regulations

Findings from case studies conducted as part of a Warwick-based research project (Hall et al 2007) provide some insights into whether the ICE Regulations have been influential in the introduction (or in two cases the relaunch) of I&C arrangements in 13 organisations with 150+ employees, and are also relevant to some of the design issues identified above.

In every case, the initiative to establish or reform the I&C body was management's alone. In no case was the 'trigger mechanism' utilised by employees – nor was this considered to be a realistic possibility by management except in one case – and there was no evidence of employee pressure for new I&C arrangements more generally. Moreover, in none of the eight cases where unions were recognised did the unions push for the establishment of an I&C body (though at one organisation a union did write to enquire about the company's likely attitude to the Regulations).

Relatedly, in most cases the decision to introduce or reform the I&C body could not be described as compliance-driven either. The Regulations were seen as having a 'critical' impact by only two organisations. Elsewhere, most organisations saw the regulations more as a 'catalyst' – that is to say there was already a felt need, for a variety of reasons, to do something in the area of I&C and the Regulations helped shape the initiative or provide external validation (e.g. providing the basis for gaining top management commitment to act). In the remaining cases the Regulations were of 'background' importance only.

More broadly the key organisation-specific drivers included a commitment to good citizenship or social responsibility, particularly where the organisations were foreign-owned/controlled or not-for-profit. The experience of major change or crisis, such as rapid growth, acquisitions, moving out of the public sector and audit failure, also prompted moves to reform employment relations and improve engagement with employees. In a majority of cases, newly appointed managers were influential in driving the introduction of the I&C arrangements.

Union avoidance was a factor in four non-union organisations. In two of these, the I&C bodies were explicitly intended as an alternative to union recognition (in one case with the outcome that the I&C structure became strongly 'colonised' by union members). In two others, there had not been sustained union recruitment activity but the introduction of the I&C body was seen as helping maintain the organisations' non-union status. In three other, unionised organisations, while maintaining collective bargaining arrangements, management was seeking to broaden out from a union-based employment relations culture. Workforce-wide I&C arrangements were seen as being inclusive and as a means of overcoming the 'disenfranchisement' of non-union employees.

Turning to the basis or status of the I&C arrangements introduced, eight organisations had obtained the written agreement of employee representatives. In some cases management regarded the agreement explicitly as a 'pre-existing agreement' under the terms of the ICE Regulations – though relatively few of these organisations placed a particularly strong emphasis on meeting the statutory criteria for PEAs. In four cases, management had not sought employee representatives' agreement to the I&C arrangements and these can be categorised as having been introduced unilaterally by management. But in practice the picture was less tidy than that. In some cases the terms of the PEA were very much drafted by management, with only limited input from employee representatives, whereas employees arguably had more influence on the design of some of the I&C bodies which were not formally agreed. (Our subsequent case studies

in smaller organisations with 100-150 employees, still being written up, found even less managerial concern to achieve PEA status.)

In addition, one organisation's draft agreement is intended to have the status of a 'negotiated agreement' reached via the Regulations' statutory procedures. Here, broad agreement had been reached on what was initially going to be a PEA but the union insisted on it being a negotiated agreement to ensure its enforceability via the CAC. However, although new company level I&C arrangements have been introduced, the agreement remains unsigned.

In terms of the different types of I&C body introduced, there are two principal categories. Eight organisations operated I&C bodies representing – and elected by – all employees, including all five which do not recognise unions. Six of the eight unionised companies operated 'hybrid' I&C bodies, involving both union representatives and elected representatives of non-union employees. A further unionised company carried out I&C via the recognised union at one unionised plant and via an I&C body elected by all employees as a second, non-union plant. Only one unionised company denied a recognised union direct representation on its I&C body, insisting that union members should take their chances in workforce-wide elections. (In two of the organisations there were site-based variations in approach.)

Despite some initial union concerns, little tension was reported to have arisen from overlap between the roles of I&C bodies and established collective bargaining arrangements. In two cases where management had sought to integrate union-based collective bargaining and workforce-wide I&C via a single representative body, the provision that I&C representatives would leave the meeting when 'negotiating' issues were discussed was reportedly little used in practice and union representatives did not feel that their role had been adversely affected.

A final pointer to the impact of the Regulations is that, despite the largely free hand given by the legislation to PEAs and negotiated agreements, let alone unilateral management I&C initiatives, the Regulations exerted a considerable influence on the agreements and constitutions underpinning the I&C arrangements in our 13 larger case study organisations. This was most notable in terms of the subject matter identified for information and consultation, which in seven cases was modelled to a greater or lesser extent on the wording of the default 'standard information and consultation provisions' in the Regulations. The influence of the Regulations was less clear-cut in terms of the nature and extent of the consultation process. Five organisations used the statutory definition of consultation as 'the exchange of views and establishment of dialogue' or used very similar terminology. Another five, not always the same

organisations, followed the Regulations in describing consultation as being ‘with a view to reaching agreement’.

Conclusion

It is highly unlikely that the government would have introduced a general statutory framework for I&C without being required to do so by the Directive. That the government has made maximum use of the substantial flexibilities incorporated in the Directive was to be expected, given its own opposition to the measure, pressure from employers and the fact that I&C has hitherto remained largely a matter for voluntary determination. Ireland has adopted a similar approach in similar circumstances. Whether the government is found to have overstepped the mark in terms of compliance with the Directive, time and the ECJ will tell.

We do not yet have a clear picture of the patterns of implementation emerging in the light of the legislation’s ‘reflexive’ design. The available survey data suggests that there has been considerable activity in terms of reviewing, modifying and introducing I&C arrangements, but, drawing on the findings of our case study research, the suspicion must be that this is largely employer-led. Beyond the Moray Council and Macmillan cases dealt with by the CAC, there have been very few if any reported instances of the trigger mechanism being utilised by employees. This may also explain why negotiated agreements appear to have been extremely rare, and also the apparently limited interest of employers in PEAs. Although the emphasis of the Directive and the Regulations is on agreed I&C arrangements or adherence to regulated minimum standards, if employees are reluctant to pull the trigger, the scope for unilateral management action – or for doing nothing – remains wide.

Key aspects of the UK’s customisation of the Directive’s provisions may be acting as barriers to the effective implementation of the Regulations. One is the required support of 10 per cent of the workforce to trigger statutory negotiations which, as suggested earlier, would appear to be a high hurdle to jump in order to secure what is supposed to be the fundamental, unconditional right to I&C. Specifying a lower number of employees and enabling recognised unions and other existing employee representatives to initiate statutory negotiations might be feasible reforms here. The other, notwithstanding the TUC’s agreement to the outline scheme underpinning the Regulations, is the absence of a guaranteed role for recognised unions in the Regulations’ procedures and in the default I&C arrangements. Reverting to a ‘union priority’ or ‘supplemented single channel’ approach instead of requiring all-employee ballots for the election of I&C representatives under the default provisions would not only be consistent with the WERS findings – as well as those of our case study research – that ‘hybrid’ union/non-union I&C

arrangements constitute the mainstream format for I&C in unionised organisations. Along with other appropriate amendments, it would also ensure that recognised unions are fully integrated into the legal framework for I&C. By doing this the government might go some way to overcoming union ambivalence or hostility towards – and lack of engagement with – the ICE Regulations.

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