

How are employers and unions responding to the Information and Consultation of Employees Regulations?

Mark Hall

WARWICK PAPERS IN INDUSTRIAL RELATIONS

NUMBER 77

April 2005

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

**Telephone: +44 (0)24 7652 4273
Email: mark.hall@warwick.ac.uk**

Editor's foreword

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

This paper is by Mark Hall, Principal Research Fellow within IRRU. In it he presents an initial assessment of the strategies being pursued by employers and trade unions in the context of the UK's new legal framework for employee consultation – the Information and Consultation of Employees Regulations 2004 – which came into effect on 6 April 2005. Rather than obliging all employers to inform and consult their employees, the legislation establishes a procedure whereby employees can 'trigger' negotiations with their employer about the establishment of information and consultation arrangements. Crucially, it also enables employers to reach pre-emptive 'pre-existing agreements', both before and after the entry into force of the Regulations. This is widely seen as the most flexible route to compliance. However, there has been little sign so far of a rush to institute pre-existing agreements. The 'slow start' to the implementation process discernible to date is explained in terms of the design of the legislation, particularly the absence of a set cut-off date for pre-existing agreements, and a seemingly cautious approach by employers and trade unions. Hall characterises the approach of the more proactive employers as one of 'risk assessment' rather than 'compliance', whereas union attitudes towards the new legislation are primarily defensive, reflecting concern that the Regulations could potentially threaten union-based arrangements.

Jim Arrowsmith

Author's acknowledgements

This paper draws on research undertaken as part of an internally-funded project on the impact of the EU information and consultation Directive on UK law and industrial relations practice. In particular, it uses evidence derived from detailed case studies of the establishment and functioning of information and consultation arrangements within four leading companies – Abbey National, BMW Hams Hall Motoren, BP Exploration and B&Q – and from an ongoing programme of interviews with officials and advisers from employer and trade union bodies, management consultancies and other advisory bodies about employer and trade union approaches to the new legislation. I wish to record my thanks to the interviewees who have generously given their time to assist me with this research and to those who provided helpful comments on an earlier draft of this paper.

Mark Hall

How are employers and unions responding to the Information and Consultation of Employees Regulations?

Mark Hall

Abstract

Transposition of the EU information and consultation Directive means that the UK now has, for the first time, a general statutory framework giving employees the right to be informed and consulted by their employers on a range of key business, employment and restructuring issues. A central aspect of the government's legislative strategy has been to maximise organisations' flexibility of response to the new Regulations and encourage the adoption of agreed, organisation-specific information and consultation arrangements. This paper reviews the options open to employers, trade unions and employees under the Regulations and assesses their potential take-up. Survey data indicate there has been a spread of information and consultation arrangements over recent years but there has been little sign to date of the extensive adoption of formal 'pre-existing agreements' which, under the Regulations, offer employers greater protection from employee pressure for new arrangements to be negotiated via the Regulations' statutory procedures. Even where employers are being proactive, the predominant approach seems to be one of 'risk assessment' rather than 'compliance'. For their part, trade unions have so far tended to take a defensive stance towards the new legislation, reflecting concern that the Regulations could potentially threaten union-based arrangements.

Introduction

The Information and Consultation of Employees (ICE) Regulations, which came into force in April 2005, establish for the first time in the UK a general statutory framework giving employees the right to insist on being informed and consulted by their employers on a range of key business, employment and restructuring issues. The ICE Regulations constitute a significant change in the context within which companies develop their information and consultation strategies. These will now have to take account of considerations of legal compliance and assessments of the prospect of employees initiating the new statutory procedures to enforce their rights to information and consultation. Trade unions regard the Regulations as somewhat double-edged. While indirectly offering unions new levers for strengthening their presence in both union-organised and unorganised workplaces, the Regulations are also seen as potentially threatening union-based arrangements in some circumstances.

The aim of this paper is to contribute to the debate about the impact of the ICE Regulations, intended to implement the 2002 EU information and consultation Directive, by analysing the

strategies being pursued by employers and trade unions in the context of the new statutory framework, and the likely patterns of implementation. It thus develops one of the two main strands of a paper presented at the July 2004 annual conference of the British Universities Industrial Relations Association (Hall, 2004b). The experience of both the UK's trade union recognition legislation and the 1999 Regulations that implement the European Works Councils (EWCs) Directive suggests that the main impact of the ICE Regulations may be a kind of 'legislatively-prompted voluntarism' (Hall and Terry, 2004), with the new legislation driving the diffusion of organisation-specific information and consultation arrangements. But key questions include the extent to which the Regulations will promote the spread of such arrangements, the nature and diversity of the mechanisms introduced and the procedures used for their introduction. These will reflect factors such as employer and union strategies in respect of the Regulations, employer perceptions of employee demand and the extent to which employees can successfully trigger the Regulations' statutory negotiating procedures in practice.

Against this background, the paper outlines the key provisions of the Regulations, identifies the range of options open to employers, trade unions and employees under the new legal framework and synthesises the available data on the spread of information and consultation arrangements to date. It then seeks to assess how companies and unions are responding to the advent of the Regulations, and the rationales underlying their strategies. The paper draws on research undertaken by the author as part of an internally-funded project on the impact of the EU information and consultation Directive on UK law and industrial relations practice. In particular, it uses evidence derived from detailed case studies of the establishment and functioning of information and consultation arrangements within four leading companies – Abbey National, BMW Hams Hall Motoren, BP Exploration and B&Q – and from an ongoing programme of interviews with officials and advisers from employer and trade union bodies, management consultancies and other advisory bodies about employer and trade union approaches to the new legislation. The paper concludes by drawing out some of the key issues concerning employer and union strategies for responding to the Regulations.

The main provisions of the ICE Regulations

The ICE Regulations are intended to implement the 2002 EU information and consultation Directive. The approach taken by the UK government reflects extensive consultation and an outline scheme agreed in discussions between ministers and the CBI and TUC in 2003. The latter provided the basis for key elements of the Regulations where the Directive allows flexibility in the application of its requirements by EU member states.

The ICE Regulations will initially apply (from 6 April 2005) to undertakings with 150 or more employees but will be extended in two further stages to cover undertakings with at least 100 employees (from April 2007) and then those with at least 50 (from April 2008). An 'undertaking' is defined as 'a public or private undertaking carrying out an economic activity, whether or not operating for gain', a formula which will exclude some parts of the public sector. The government has been developing a code of practice with the civil service unions that will apply the principles of the new legislation to central government departments that do not constitute undertakings of the purposes of the Regulations.

The Regulations enable 10% of an undertaking's employees (subject to a minimum of 15 employees and a maximum of 2,500), or management themselves, to trigger negotiations on an information and consultation agreement, to be conducted according to statutory procedures.

However, if there is a pre-existing agreement (PEA) in place, and the request for negotiations is made by fewer than 40% of the workforce, the employer can ballot the workforce on whether they support the request for new negotiations. If the request is endorsed by at least 40% of the workforce, and the majority of those voting, negotiations must proceed. If not, no further action is necessary. This endorsement procedure will apply where one or more written agreements exist which cover all the employees of the undertaking, have been approved by the employees and set out 'how the employer is to give information to the employees or their representatives and to seek their views on such information'. Where a PEA covers employees in more than one undertaking, the employer(s) may hold a single ballot across the relevant undertakings.

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

Where the employer fails to initiate negotiations, or where the parties do not reach a negotiated agreement within six months, 'standard information and consultation provisions' specified by the Regulations will apply. These require that the employer must inform/consult elected employee 'information and consultation representatives' on business developments (information only), employment trends (information and consultation) and changes in work organisation or contractual relations, including redundancies and business transfers (information and consultation 'with a view to reaching agreement'). While the range of topics covered by these requirements are potentially very wide-ranging, the standard information and consultation provisions are extremely 'minimalist' in infrastructural terms, being confined to specifying the election arrangements for the information and consultation representatives and the number of such representatives to be elected (a sliding scale from two to 25 depending on the size of the workforce). Most notably, they do not specify the establishment of a representative body as such (i.e. a committee or council), the frequency of meetings, nor facilities for representatives.

The Regulations impose a three-year moratorium on the initiation of new negotiations from the date of a negotiated agreement (unless the agreement is terminated), the date on which the standard information and consultation provisions apply, and the date of an employee request which was the subject of a ballot in which the employees did not endorse the request.

The Regulations' enforcement and confidentiality provisions apply to negotiated agreements reached under the statutory procedure or where the standard information and consultation provisions are in operation, but not to PEAs. Enforcement of the terms of negotiated agreements or of the standard information and consultation provisions will be via complaints to the Central Arbitration Committee (CAC), which may order the employer to take the necessary steps to comply with the agreement/standard provisions. The Employment Appeal Tribunal (EAT) will hear appeals and is responsible for issuing penalty notices. The maximum penalty payable by employers for non-compliance is £75,000. As regards confidentiality, employee representatives must not disclose information or documents designated by the employer as confidential, and employers may withhold information or documents the disclosure of which could seriously harm or prejudice the undertaking. Disputes over employers' decisions to impose confidentiality restrictions or withhold information may be referred to the CAC.

The scope provided by the ICE Regulations for direct forms of information and consultation rather than informing and consulting indirectly through employee representatives is controversial. While the government has included such an option in response to employer lobbying, there would appear to be questions over its compatibility with the Directive, which defines information and consultation as processes involving employee representatives (Hall et al, 2002). Thus, to allow negotiated agreements reached under the statutory procedure to rely on direct means of information and consultation may not meet the requirements of the Directive. Relatedly, while there is nothing in the Directive to prevent PEAs which provide for direct forms of information and consultation, the fact that, under the Regulations, their existence then prompts the application of substantially higher thresholds of support for negotiations over new information and consultation arrangements to take place (40% of the employees and a majority of those voting in the ballot) could potentially be seen by the EU authorities as undermining the unconditional right to information and consultation, via representatives, which the Directive guarantees.

Options open to employers, employees and trade unions under the Regulations

Employers

Employers' groups have been strongly opposed to legal intervention in this area. The academic literature (reviewed by Marchington, 1994, and Hall and Terry, 2004) has traditionally identified a range of potential managerial rationales for the introduction and operation of employee consultation arrangements – among them union avoidance, the containment of workplace pressures on managerial control, and, more positively, the enhancement of employee engagement and organisational performance. But considerations of legal compliance have not hitherto been a significant factor influencing employer strategies. Other than in the area of EWCs, existing regulatory provision in the UK, again driven largely by EU law, has been piecemeal and issue-specific (e.g. the requirements to consult on impending redundancies and transfers) and has not resulted in widespread institutional innovation: consultation is via representatives of recognised unions, where appropriate, or elected employee representatives, who may be elected on an ad hoc basis. Now, however, the ICE Regulations will provide a legislative stimulus to the establishment of employee information and consultation arrangements, and the various routes to compliance with the new legal framework – or, at least, managerial perceptions of the likelihood that the requisite proportion of employees will act to trigger the statutory procedures – are likely to be central in shaping employer strategies.

A key government objective has been to maximise the flexibility available to employers in terms of responding to the Regulations. The main 'flexibilities' include the following.

- First, rather than obliging all undertakings to conform to the requirements of the Directive, the Regulations incorporate a 'trigger mechanism' under which employers need not act unless 10% of their employees request negotiations on an information and consultation agreement. Employers may decide to adopt a policy of maintaining existing arrangements where they consider their current information and consultation machinery (or lack of it) is unlikely to be 'challenged' by employees via the Regulations' procedures. Conversely, some employers may see advantages in some circumstances in initiating the statutory negotiating procedure themselves.
- Second, the emphasis of the Regulations is firmly on promoting enterprise-specific agreements. Both before and after the Regulations come into force, employers will have the opportunity to put PEAs in place which comply with the Regulations' criteria. These can be

concluded at any point prior to the date a valid employee request to initiate negotiations is made under the Regulations. Subject to securing the necessary employee approval, the provision for PEAs enables employers to establish new information and consultation arrangements, adapt existing ones or underpin them by formal agreements, with the aim of effectively pre-empting the use of the Regulations' statutory procedure (significantly higher thresholds of employee support being required to trigger new negotiations where undertakings have PEAs in place).

- Third, even where the statutory negotiating procedure is invoked, the negotiators have a free hand in agreeing the nature of the information and consultation arrangements that will apply. The Regulations contain very little prescription concerning the contents of either PEAs or negotiated agreements reached via the Regulations' statutory procedures. There is scope for a wide variety of outcomes as regards the substantive provisions of agreements, including the 'company council' or joint consultative committee model; consultation at levels above or below that of the undertaking; union-based arrangements (supplemented by representation of non-union employees as necessary); different arrangements for different parts of the workforce; and the use of direct forms of information and consultation (or a mixture of direct and representative forms).

The main difference between the two types of agreement is procedural: PEAs offer slightly more flexibility in terms of the ways in which they can be reached and approved. Importantly, PEAs are also exempt from the Regulations' enforcement and confidentiality provisions. Where employees (or employers) trigger negotiations, the negotiating process will be governed by the Regulations' statutory procedures and will take place against the benchmark provided by the statutory default arrangements, which may ultimately be enforced on the undertaking in the event of a failure to agree.

The CBI's guide to the Regulations comments that 'important flexibilities have been delivered and it is vital for companies to utilise these'. PEAs are identified as 'the most flexible option' (CBI, 2004a). Acas (2004), the EEF (2005) and leading law firms have encouraged employers to be 'proactive' and to seek to reach PEAs. This might be expected to be a potentially attractive option particularly to companies whose information and consultations arrangements already meet the Regulations' universal coverage requirements or would do so with relatively minor modifications, and whose existing employee representation infrastructure would facilitate the uncomplicated approval of a PEA. Companies with a 'partnership' approach to employment relations – whether unionised or, more rarely, non-union – can also be expected to favour the early formalisation of compliant arrangements. Multinational companies with EWCs are a further group of possible 'early movers' where they do not already have UK subsidiary-wide consultation arrangements (Beaumont and Hunter, 2003).

Beyond these categories, however, it is not easy to predict with any confidence how proactive employers might be. In unionised organisations, the challenge for employers lies in the expectation that consultation will be extended beyond employees covered by union recognition to embrace all employees. Here, the Regulations may test the extent of employer support for union-based arrangements. In non-union firms, management's responses to the Regulations may be influenced by 'union avoidance' considerations, but specific strategies will depend on the prevailing employment relations culture. For example, firms with sophisticated HRM approaches might be expected to seek to rely on direct employee involvement practices in preference to the

introduction of representative-based arrangements. 'Bleak House' employers (Sisson, 1993), with limited personnel capability, are more likely to 'do nothing' (Hall and Terry, 2004).

In short, it remains to be seen whether many employers currently without formal information and consultation arrangements will actively seek to introduce them unprompted by employee demands.

Trade unions

On the trade union side of the equation, while the TUC strongly supported the adoption of the information and consultation Directive, there was relatively little discussion of its organisational implications for unions and the TUC's official position masked a degree of union ambivalence about the legislation. The priority for most unions was the development of statutory measures to support trade union recognition, introduced by the Employment Relations Act 1999 (on which see Poole, 2003).

Many unions have traditionally been concerned that a general right to information and consultation would undermine their position as the 'single channel' of employee representation (even though historically joint consultative committees have been much more prevalent in organisations with union recognition). However, in 1994, the European Court of Justice (ECJ) ruled in that UK legislation was in breach of the collective redundancies and transfer of undertakings Directives by confining the right to consultation to recognised unions and 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. During a major TUC consultative exercise on employee representation issues in 1994-5, unions accepted that the ECJ ruling meant that consultation with trade union representatives could no longer be regarded as the only available model for operationalising EU consultation rights. But they were unenthusiastic about pursuing a wider universal consultation rights strategy involving proposals for statutory employee representation committees in non-union workplaces (Hall, 1996). The resulting policy statement, *Your voice at work* (TUC, 1995), put forward a framework which included promoting *union-based* consultation machinery as the vehicle for a broader range of consultation rights.

The TUC exercise revealed considerable unease on the part of most major unions at the possibility of a radical departure from the traditional pattern of single channel trade union representation. This reflects not only ideological qualms but also uncertainty about whether a broader range of universal consultation rights, and the emergence of consultation structures in the absence of recognised unions, would be an effective vehicle for extending union influence and organisation (Hall, 1996; see also McCarthy 2000). Academic opinion has also been divided as to whether the potential organisational opportunities that statutory support for works council-type structures might offer trade unions outweigh the potential risks (see, for example, the debate between Hyman (1996) and Kelly (1996)).

The Regulations do not accord any specific statutory rights to trade unions. Indeed, unions have been 'written out of the script' as far as the standard information and consultation provisions are concerned (under which the information and consultation representatives must be directly elected by workforce ballot). Elsewhere, however, the Regulations do offer unions or union members a range of potential roles or opportunities to intervene. These include negotiating and approving PEAs (though a collective agreement confined to a particular bargaining unit would need to be supplemented by other agreed provision covering the remaining employees in the undertaking), collecting names for an employee request for a negotiated agreement, acting as negotiating

representatives (at the employer's discretion) and providing expert advice to employee representatives on information and consultation bodies. In the case of both PEAs and negotiated agreements, it is open to the parties to agree that union representatives, and potentially even external full-time officials, can represent unionised sections of the workforce in the information and consultation process. Possible methods include information and consultation via recognised unions with separate, supplementary arrangements for non-union groups, and 'hybrid' consultation bodies involving both union nominees and representatives elected by non-union groups.

Even where the Regulations result in the introduction of a consultation body elected by all employees – the most common selection practice for existing joint consultative committees, according to the 1998 Workplace Employee Relations Survey (WERS) (Cully et al, 1999) – this arguably still offers unions the opportunity of strengthening their presence in workplaces where they are not recognised, and raises the prospect of union members becoming representatives with the right to be consulted on a range of key issues, irrespective of union recognition. Establishing a role for union members within the consultation committees that the legislation is likely to promote could be an easier proposition than recruiting the numbers of individual members required for recognition, and could provide a platform for building union influence and membership and for eventually securing union recognition.

At the same time, the Regulations offer potential benefits for organised workplaces. WERS 1998 showed that the scope of bargaining/consultation associated with union recognition is often very narrow (Brown et al, 2000). The introduction of new statutory consultation rights covering a wide range of issues could in many workplaces enable recognised unions to address a substantially broader agenda than is currently the case, as well as securing better information about the organisation's business plans.

More pessimistically, there are concerns within the trade unions that the Regulations could serve to undermine union-based arrangements in certain circumstances. The Regulations could prompt some employers to reassess existing union recognition arrangements, particularly if they apply to only a narrow section of the workforce or if union membership is low. Unions may also fear that their presence could be diluted or marginalised by the introduction of more broadly-based consultation arrangements, and in some cases may be reluctant or may even refuse to take part in consultation bodies alongside non-union employee representatives.

Employees

As far as undertakings with no union presence are concerned, the 10% threshold of active support required by the Regulations to trigger the process of negotiations with the employer looks like a high hurdle to clear in practice (except where significant in-company events, such as redundancies, provide the catalyst). In many cases it may prove difficult to find employees prepared or able to take the lead in articulating the case for employee consultation/ representation and in organising an employee request. More generally, the extent to which employees actively seek to trigger the introduction of information and consultation arrangements under the Regulations may well be limited by low awareness of their new statutory rights, procedural hurdles and employer hostility, especially in smaller undertakings and those with no tradition of representation, as well as union ambivalence towards the new legislation (Hall and Terry, 2004). However, non-union employee representatives, where they exist (e.g. employee members of EWCs), could perhaps play a role in seeking to trigger negotiations.

Coverage of the Regulations and extent of existing arrangements

In terms of the assessing the volume of negotiating activity potentially prompted by the new legislation, official data (DTI, 2004) show that there are approaching 37,000 enterprises across the UK that meet the Regulations' employment thresholds. There are around 13,000 enterprises with 150 or more full-time equivalent employees and some 5,700 enterprises with 100 to 149 employees. Enterprises with 50 to 99 employees are the largest group covered by the Regulations: almost 18,000 enterprises fall within this category, constituting nearly half of all enterprises with 50 or more employees. About 75% of UK employees will ultimately be covered. At the time of WERS 1998, 64% of large enterprises (with 150 or more employees) had joint consultative committees (JCCs) in place, whereas the same was true of only 39% of medium-sized enterprises (with 50-149 employees). These figures suggest that the most significant potential impact of the Regulations in both quantitative and qualitative terms is likely to be on medium sized companies affected by the second and third phases of the roll-out of the legislation: firms with 50-149 employees are both more numerous and much less likely to have existing consultative arrangements. Moreover, management in such companies may be less likely than in larger companies to develop a proactive approach to the Regulations.

Although JCCs and direct forms of employee involvement are widespread, WERS 1998 found that 35% of employees rated the way management involved employees as either poor or very poor. The DTI's assessment is that there will be a 'significant demand' amongst such employees to introduce or change information and consultation arrangements in their workplaces, but that 'not all [employees] will be able to organise themselves to put a valid request to management' (DTI, 2004: 11).

Based on the proportion of companies covered by the EWCs Directive which have established EWCs (35%), the DTI estimates that 20-35% of enterprises without PEAs are likely to face requests from at least 10% of their workforce for the establishment of information and consultation arrangements. The DTI also estimates that ballots showing majority and at least 40% overall workforce support for changing a valid PEA are likely to arise in only 1-3% of enterprises with JCCs already in place.

In terms of the eventual incidence of information and consultation arrangements, the experience of other European countries may provide another possible benchmark. In Germany, for example, where the establishment of works councils is not mandatory but dependant on an employee request, 47% of companies with 50-100 employees have works councils, as do 68% with 100-200 employees, rising to 91% of companies with over 500 employees (IAB, 2004).

The spread/revision of information and consultation arrangements

What is known about the overall picture in terms of the spread or revision of information and consultation arrangements ahead of the introduction of the Regulations? There are indications that some companies have been putting information and consultation arrangements in place in anticipation of the new legislation, though the available research presents a mixed picture.

According to the CBI's most recent employment trends survey, in May 2004 almost half (49%) of respondent companies reported they had permanent mechanisms for informing and consulting employees, typically a staff council, compared with 47% in 2003 and 35% in the 2002 survey. (These figures refer to the existence of such arrangements, and not whether they meet the criteria for PEAs.) A further 20% said they intended to introduce such a structure over the next year. The CBI attributes this increase largely to the prospect of the new legal framework. Again, larger

companies were more likely to have such arrangements or the intention to introduce them (CBI, 2004).

The CBI survey suggested that, after declining over a number of years, reported trade union involvement in companies' information and consultation structures had increased somewhat in the year to May 2004 but remained a minority practice overall at 43% (though union involvement was much more likely in larger organisations). The CBI thinks that this increase may be due to trade unions 'making a concerted effort to raise their profile with regard to information and consultation' (CBI 2004: 23).

Data from the TUC on voluntary union recognition agreements from November 2002 to October 2003 show that 79% included information and consultation rights over a range of issues – a 'significant improvement' on the 59% which did so over the previous year (TUC, 2004: 12).

A 2004 Labour Research Department survey (LRD, 2004) of workplace trade union representatives found that information and consultation arrangements, both formal and informal, were widespread, and that the extent to which unions were informed and consulted on a range of issues had increased since a similar survey in 2002. The survey also found a 'sharp increase' in the reported incidence of information and consultation bodies involving employees who were not union members – from 11% of responses in 2002 to 25% in 2004 – and that over a quarter of these had been set up recently (in 2002 or later). The existence of written agreements on information and consultation was reported by 43% of respondents. However, as the LRD itself acknowledges, this survey relates to practice in unionised workplaces rather than the economy as a whole.

In a survey of employers by IRS in 2004, 66% believed that their information and consultation arrangements were adequate to fulfil the requirements of the legislation, although some said this was reliant on certain adjustments being made (Welfare, 2004). Nearly a quarter of respondents said they had made changes to their arrangements over the previous 12 months, and 34% were planning changes over the following year. Only half the respondents said their current information and consultation arrangements were set out in writing, and only a quarter had sought the agreement of employees. A large majority of the companies concerned (84%) said they were not expecting a request from employees to negotiate new information and consultation arrangements.

Employer and trade union approaches to the Regulations

Interviews undertaken by the author with leading players from employer and trade union organisations, management consultancies and other advisory bodies (see Appendix 1) suggest that there has been a steady stream of requests for advice and information on how to respond to the Regulations, but not a significant upsurge. In particular, only low numbers of PEAs – whether new or revised agreements – have been reported so far.

Employer strategies

Some larger companies with existing information and consultation arrangements are reported to be undertaking reviews or audits of their current practices in the light of the Regulations, and assessing the prospects of their employees seeking to trigger the statutory procedures. It seems that, while in some cases making 'tidying up' adjustments in the light of the new legislation, many companies are confident that their existing arrangements are such that employee

'challenges' under the Regulations are unlikely, making formal PEAs unnecessary, at least at this stage. In other words, their approach is one of 'risk assessment' rather than 'compliance'.

Some other companies – but apparently relatively few – are reported to have put PEAs in place – among them some 'partnership' companies and others with established information and consultation arrangements. Few companies with PEAs appear to have 'started from scratch'. Companies with PEAs include computer company HP (Hewlett Packard), whose UK Consultative Forum was introduced in 2003 (Dobbins, 2003; Fox, 2003), digital technology company ARM, which formalised the arrangements for its Consultation Forum, first set up in 2002, in a PEA 'signed off' by employee representatives at the end of 2004 (IDS, 2005). Schrader Electronics reached an agreement with elected employee representatives on the establishment of an Information and Consultation Forum in late 2004 (Welfare, 2004). But it is often not clear whether new or revamped information and consultation arrangements, such as those at Coca-Cola Enterprises and the United Co-operatives Travel Group (IDS, 2005), are the subject of formal PEAs approved by or on behalf of the employees.

Proactive management strategies are reported to be rarer in companies without existing consultative arrangements or unionised workforces. There is some suggestion of a lack of awareness of the implications of the Regulations on the part of management, and, according to one employers' organisation official, the legislation is 'not even on the radar screen' of most companies with under 150 employees.

While many companies already operate a range of direct forms of employee involvement, there is reported to be little employer interest in adapting them as the basis for compliance strategies under the Regulations. This may reflect a concern to avoid the 'juridification' of 'business-driven' employee communications initiatives, or worries that such an approach might provoke an adverse reaction from employees or that PEAs providing for direct information and consultation may prove harder to 'defend' if employees seek to trigger the Regulations' procedures. In some cases, direct methods of information and consultation may be appropriate for certain groups of employees (e.g. head office or managerial staff) who may not currently be included in existing consultative arrangements. But it appears that, in larger companies at least, reliance solely on the use of direct methods of information and consultation is unlikely to be considered a realistic or desirable means of meeting the Regulations' requirements.

Significantly, perhaps, among US-headquartered non-union companies widely perceived as being hostile to collective representation, HP, one of the first US companies to move on the issue, has chosen not to go down the 'direct information and consultation' route. Its UK Consultative Forum involves elected employee representatives from the various parts of the business, who have a range of consultative functions, and operates alongside established direct forms of employee involvement within the company. It is notable too that the EEF's guide to the Regulations includes a model agreement for an 'information and consultation committee', and comments that the alternative approach 'based on direct information and consultation with all employees' may be 'difficult to organise and operate effectively, except in the smallest undertaking' (EEF, 2005).

Union strategies

Trade union approaches to the Regulations remain uncertain, and in practice the attitude of local union officials and workplace representatives to the legislation seems ambivalent at best. Indeed, anecdotal evidence suggests that union representatives regard the Regulations' workforce-wide

approach to information and consultation as a threat to single channel, union-based representation arrangements where they exist.

Predictably, unions' emphasis is on retaining union-based arrangements as far as possible. Amicus's approach to this issue is to seek to 'slot in' a clause on information and consultation into existing recognition agreements (TUC, 2004a). One employers' representative reports some union reluctance to co-operate in reaching agreements on company-wide information and consultation arrangements where significant parts of the workforce are unorganised. This reflects union apprehension that existing collective bargaining arrangements could be marginalised or undermined, or, in some cases, an unwillingness to become involved in the same forum as non-members. As noted above, however, there remains scope under the Regulations for agreed arrangements which maintain union-based consultation in respect of groups of workers for which a union has recognition.

In its guide for members to the Regulations, Amicus (2004) warns that some employers seeking PEAs 'may try to negotiate more employer-friendly terms' than the Regulations' 'default' provisions. The union advises that, if negotiations do take place in their organisation, Amicus representatives should 'negotiate for the inclusion in recognition and collective agreements' of minimum standards of information and consultation' which at least comply with the Regulations' default provisions. The TUC (2005) offers similar advice. 'Above all', Amicus has told its representatives not to sign negotiate or sign any agreement without 'talking it through with [their] national or regional officer first'. A particular concern for unions is the scope under the Regulations for agreements to provide for direct means of information and consultation. The TUC guide to the Regulations states that 'Unions will not wish to agree consultation arrangements which rely solely on direct methods' (TUC, 2005).

There is little sign to date that unions are preparing to use the Regulations strategically as part of their organising campaigns. However, some unions have only recently begun developing detailed strategies for responding to the legislation following the finalisation of the Regulations and the DTI guidance at the end of 2004. Amicus, for example, is in the process of drawing up more strategic guidance for full-time officers. It is possible too that in some cases unions may see negotiated agreements under the statutory procedures as preferable to PEAs, particularly in terms of enforcement. Whether unions actively seek to trigger the Regulations' provisions for organising purposes remains to be seen and is likely to be dependent on the particular circumstances within a given enterprise. Some union officials point to the potential opportunities for unions to increase their influence and boost recruitment that may stem from involvement in workforce-wide consultative forums: non-union representatives are thought likely to look for leadership from experienced union representatives and may join the union for support in carrying out their role (Milsome, forthcoming). But it is clear that achieving union recognition remains the priority for trade unions, and any union-initiated moves to trigger the Regulations' procedures are most likely to be made as part of a longer-term strategy for gaining union recognition. More generally, if the new circumstances created by the Regulations are to be exploited effectively by trade unions, they will need to commit the necessary resources in terms of training activists and representatives and providing full-time officer support.

Case study evidence

More detailed evidence from case studies undertaken at B&Q, BMW Hams Hall Motoren, BP Exploration and Abbey National (Hall, 2003, 2003a, 2004 and 2004a; see also Appendix 1) bears out this emerging picture.

The 'Grass Roots' multi-tiered information and consultation framework within the non-union home improvements chain B&Q dates from 1998 and was revamped in 2002. The plant council at the BMW Hams Hall engine plant, devised in consultation with the workforce and formally agreed with recognised trade unions, came into operation in late 2000. Within BP Exploration, which has a largely non-unionised workforce, Employee Communications and Consultation Forums were set up at business unit and UK level in 1999 and subsequently restructured in 2002 and 2003. At the Abbey National financial services company, consultative structures at national and business-area level are based on a long-standing recognition/partnership agreement with the Abbey National Group Union (ANGU), updated in 2003, which covers all employees except the company's most senior executives.

In three of the four cases, management's motivation in establishing or revising company-wide information and consultation machinery was at least in part to adapt to the emerging legal framework. Thus, at B&Q, the imminent adoption of the Directive was, along with employee feedback, a factor behind the review of the Grass Roots framework which led to its 2002 revamp. Moreover, during the past two years, B&Q management has increasingly consulted the Grass Roots representatives more formally and on a wider range of upcoming business changes, reflecting the objectives of the legislation. At BP Exploration, the consultation arrangements introduced in 1999 were prompted by the merger between BP and Amoco and mirrored the principles of the EWCs Directive, though more recent adjustments to the consultation infrastructure have been made 'with an eye on the new legislation' and formal ratification of the current consultation model by the employee representatives is seen by management as the most appropriate route towards compliance with the Regulations. At BMW Hams Hall, the plant council was primarily intended to break with traditional employee representation arrangements within the UK automotive sector (and the former Rover Group's reputation for poor industrial relations). While anticipating the Directive (then still in draft form) was reportedly not a particularly influential factor behind the move, management were aware that the plant council model would enable the company to meet future legislative requirements.

In each of these three cases, the approaches taken represent considered forward planning on the part of management to position the company to manage the implications of the new statutory framework. Moreover, both B&Q and BP Exploration, whose information and consultation structures were not introduced on the basis of agreements with unions/employees, are now moving towards the establishment of PEAs over the next few months to underpin current arrangements. In BP Exploration's case, this is part of a company-wide 'assurance exercise' designed to review the information and consultation arrangements operating across BP and represents 'good house-keeping'. Management will ask employee representatives to 'rubber stamp' existing practice. At B&Q, the company is confident that the 'threat' to its current consultation framework is 'minimal' but aims to 'bolster' it by seeking employee approval of the constitutional arrangements.

The fourth company, Abbey National, is planning to continue to rely on its existing union-based consultation procedures, although some 65-70% of the employees are not ANGU members. This

reflects ANGU's opposition to separate representation for non-members and concern on the part of both management and ANGU leaders that opening up the consultation machinery to non-ANGU representatives could provide an organisational foothold for rival unions in the financial services sector. Whether or not the current arrangements formally constitute a PEA, both parties believe it unlikely that the requisite proportions of Abbey's workforce will seek to trigger negotiations about new arrangements under the ICE Regulations.

The Abbey case highlights the implications for companies that currently consult via recognised unions of the Directive's and the Regulations' policy of universal, workforce-wide information and consultation rights. Trade unions are generally likely to favour the retention of union-based consultation arrangements, where they exist, and to oppose the inclusion of non-union representatives. But only rarely will unions be recognised as representing the whole workforce, as at Abbey; elsewhere, employers may feel under greater pressure to introduce consultation arrangements that specifically cover non-union employees or groups. The plant council at BMW Hams Hall, elected by all employees, irrespective of union status, represents one possible way forward.

None of the four companies sought to pursue compliance strategies based on direct forms of information and consultation rather than informing and consulting via representatives, even though all operate a variety of direct employee involvement initiatives alongside their collective consultation mechanisms. However, in each case their introduction of representative-based information and consultation arrangements predated the publication of the draft UK Regulations which included the 'direct information and consultation' option.

The experience of analogous legislation

As suggested at the outset, possible pointers to the likely patterns of implementation of the Regulations can be derived from the operation of the EWCs and trade union recognition legislation. Both pieces of legislation have resulted in 'legislatively-prompted voluntarism', and neither have led to the extensive imposition of 'standard model' EWCs or methods of collective bargaining on defaulting employers. Under the EWCs legislation, the majority of the 700+ EWC agreements in existence worldwide were Article 13 agreements, reached voluntarily before the Directive's implementation date, with the remainder being Article 6 agreements reached under the statutory negotiating procedure. There is no known case either in the UK or any other national jurisdiction in which a statutory EWC has been imposed on a company in line with the 'subsidiary requirements'. Similarly, under the UK's trade union recognition legislation, the indirect or 'shadow' effect of the statutory procedure – prompting voluntary recognition agreements – has been much more significant than its direct impact – i.e. union claims to the CAC resulting in recognition (Gall, 2004). Moreover, only a handful of cases (eight to March 2004) have reached the final stage whereby the CAC has had to determine the method of collective bargaining to be followed because of a failure to agree by the parties.

However, although there are close similarities between the ICE Regulations and the EWCs legislation, there are also some important differences which seem likely to be reflected in divergent patterns of implementation. While the design of the EWCs legislation drove the conclusion of a substantial number of voluntary Article 13 agreements ahead of the Directive's implementation date, the absence of a single cut-off date in the ICE Regulations for PEAs (which can be concluded at any point prior to the date an employee request to initiate negotiations is made under the Regulations) may be one reason why there is no sign of a similar upsurge in new

or revised agreements coinciding with the introduction of the ICE Regulations. Further considerations are that the level of employee demand necessary to trigger negotiations under the ICE Regulations is arguably comparatively more onerous (under the EWCs legislation the statutory process can be triggered by employee representatives on behalf of their constituents), and that, whereas EWCs were a novel departure for most companies concerned, driven ‘artificially’ by the legislation itself, the existence of some form of consultative arrangement is widespread amongst enterprises with 150 or more employees. Together, these factors may explain why relatively few companies appear to have gone down the route of putting in place legally watertight PEAs that meet the ICE Regulations’ criteria.

A further contrast with the experience of the EWCs legislation is likely to concern the extent to which the statutory fallback model provides the template for voluntary and negotiated agreements. Despite considerable variation in the detailed provisions of EWC agreements, the EWCs Directive’s ‘subsidiary requirements’ have exerted a strong influence on the main constitutional and operational aspects of negotiated agreements (Carley and Marginson, 2000). However, the ICE Regulations’ ‘standard information and consultation provisions’ seem highly unlikely to have the same normative impact – for two main reasons. First, unlike EWCs, information and consultation arrangements do not constitute a new phenomenon and there is already a wide range of precedents and examples on which negotiators will be able to draw. Secondly, as already noted, the ICE Regulations’ fallback provisions are extremely ‘minimalist’ in infrastructural terms, and offer little by way of an operational template. The implication is that there will be greater variation in the information and consultation arrangements that stem from the ICE Regulations than amongst EWCs.

Conclusion

The ICE Regulations are unquestionably a major development in UK employment law. They extend statutory regulation to a key area of industrial relations which hitherto has remained largely a matter for voluntary determination, and represent a significant extension of the range of issues on which employees have statutory rights to be informed and consulted, introducing a comprehensive legal framework for information and consultation for the first time. At the same time, the Regulations offer employers a high degree of flexibility of response to the new legislation. Not only do the Regulations provide scope for the introduction or continuation of agreed, organisation-specific information and consultation arrangements, but employers need not act unless 10% of their workforce triggers negotiations under the legislation.

It would be foolhardy to attempt to make firm predictions about the likely patterns of implementation of the Regulations. There has been little sign so far of a rush to institute pre-existing agreements. The ‘slow start’ to the implementation process discernible to date can be explained in terms of the design of the legislation, particularly the absence of a set cut-off date for PEAs, and a seemingly cautious approach by employers and unions. While the Regulations can be expected to prompt the voluntary introduction or reform of organisation-specific information and consultation agreements, the extent to which this happens is likely to depend on employers’ assessment of employee demand and the risk of the Regulations’ negotiating procedure being successfully invoked. For the moment, at least, trade union approaches to the Regulations appear primarily to be defensive rather than proactive.

Employer responses will also be influenced by other factors, including organisation size, HR capacity, management style, union presence and the broader employment relations context. For

example, while the introduction and refinement of the workforce-wide consultation machinery at B&Q, BMW Hams Hall and BP Exploration represents a 'proactive' managerial response to the emerging legal framework, the three companies concerned are, of course, large, high-profile organisations with well-resourced HR functions including HR planning capacity. While the WERS 1998 data suggest that a much lower proportion of companies in the 100-150 employee and 50-100 employee size brackets have existing consultation bodies, management in such companies may be significantly less likely to develop proactive strategies ahead of their eventual coverage by the legislation in the second and third phases of its introduction.

Other key questions include whether the Regulations' emphasis on negotiated, organisation-specific arrangements will result in a diverse range of outcomes or whether the 'company council' or 'joint consultative committee' model will predominate – and whether the Regulations will bring UK practice closer to the 'European social model' or whether the flexibility built into the Regulations will prove to be a vehicle for continued British 'exceptionalism' (Bercusson, 2002). How widely employers will seek to rely on direct forms of information and consultation rather than informing and consulting via representatives remains to be seen. However, there are already suggestions that the scope under the Regulations for doing so may prove more symbolic than practical, and the questionable compatibility of this aspect of the Regulations with the Directive may threaten the long-term viability of employer compliance strategies based on direct methods.

A final caveat is that, unlike the experience of EWCs, where the size and high profile of the companies concerned meant that negotiations and agreements attracted publicity, what is happening on the ground in relation to the ICE Regulations is likely to be much less visible. Research will be needed to monitor the incidence of agreements and the diversity of arrangements adopted, and beyond that to evaluate the quality of the consultative relationships that ensue. The findings of WERS 2004 will provide a baseline for assessing the subsequent impact of the legislation. The ICE Regulations will promote the spread of information and consultation arrangements within UK enterprises, but it remains to be seen to what extent, in what forms and with what results.

References

Advisory, Conciliation and Arbitration Service (Acas) (2004), *Information and consultation: good practice advice*, http://www.acas.org.uk/info_consult/consultation.html.

Amicus (2004), *Information and consultation at work: an Amicus guide for members*.

P Beaumont and L Hunter (2003), *Information and consultation: from compliance to performance*, Chartered Institute of Personnel and Development.

B Bercusson (2002), 'The European social model comes to Britain', *Industrial Law Journal* 31, 209-244.

W Brown, S Deakin, D Nash and S Oxenbridge (2000), 'The employment contract: from collective procedures to individual rights', *British Journal of Industrial Relations* 38, 299-316.

M Carley and P Marginson (2000), *Negotiating European Works Councils: a comparative study of Article 6 and Article 13 agreements*, European Foundation for the Improvement of Living and Working Conditions.

Confederation of British Industry (CBI) (2004), *Employment trends survey 2004*.

CBI (2004a), *Employers' guide to the law on informing and consulting employees*.

M Cully, S Woodland, A O'Reilly and G Dix (1999), *Britain at work*, Routledge.

Department of Trade and Industry (DTI) (2004), *Final regulatory impact assessment*.

T Dobbins (2003), 'Worker participation: Hewlett Packard rolls out new consultative forum in UK', *Industrial Relations News* 30.

Engineering Employers' Federation (EEF) (2005), *Information and consultation: a practical guide to the law*.

A Fox (2003), 'To consult and inform', *HR Magazine* (October).

G Gall (2004), 'Trade union recognition in Britain, 1995-2002: turning a corner?', *Industrial Relations Journal*, 35, 249-270.

M Hall (1996), 'Beyond recognition? Employee representation and EU law', *Industrial Law Journal* 25, 15-27.

M Hall (2003), *Informing and consulting your workforce: B&Q – listening to the Grass Roots*, Involvement and Participation Association (IPA) case study, no. 3, series 4.

M Hall (2003a), *Informing and consulting your workforce: the BMW Hams Hall plant council*, IPA case study, no. 4, series 4.

M Hall (2004), *Informing and consulting your workforce: handling restructuring at BP Exploration*, IPA case study, no. 5, series 4.

M Hall (2004a), *Informing and consulting your workforce: union-based arrangements at Abbey*, IPA case study, no. 6, series 4.

M Hall (2004b), *Anticipating the information and consultation Regulations: evidence from four companies*, paper presented at British Universities Industrial Relations Association annual conference.

- M Hall, A Broughton, M Carley and K Sisson (2002), *Works councils for the UK? Assessing the impact of the EU employee consultation Directive*, Eclipse.
- M Hall and M Terry (2004), 'The emerging system of statutory worker representation', in G Healy, E Heery, P Taylor and W Brown (eds), *The future of worker representation*, Palgrave, 207-228.
- R Hyman (1996), 'Is there a case for statutory works councils in Britain?' in A McColgan (ed) *The future of labour law*, Pinter, 64-84.
- Incomes Data Services (IDS) (2005), 'Information and consultation arrangements', *IDS HR Study* 790.
- Institut für Arbeitsmarkt- und Berufsforschung (IAB) (2004), 'Betriebsrat und andere Formen der Mitarbeitervertretung 2003', *Ergebnisse aus dem Betriebspanel*, http://doku.iab.de/betriebspanel/ergebnisse/2004_11_03_05_betriebsrat_2003.pdf.
- J Kelly, 'Works councils: union advance or marginalisation?' in A McColgan (ed) *The future of labour law*, Pinter, 46-63.
- Labour Research Department (LRD) (2004), *Workplace report* (May).
- M Marchington (1994), 'The dynamics of joint consultation', in K Sisson (ed), *Personnel management* (2nd ed), Blackwell, 662-693
- S Milsome (forthcoming), 'Threat or opportunity? Unions' responses to the I&C Regulations', *IRS Employment Review*.
- W McCarthy (2000), 'Representative consultations with specified employees – or the future of rung two', in H Collins, P Davies and R Rideout (eds), *Legal regulation of the employment relation*, Kluwer, 529-556.
- R Poole (2003), 'Agreed or imposed? A study of employers' responses to statutory recognition applications', *Warwick Papers in Industrial Relations* 71, http://users.wbs.ac.uk/cms_attachment_handler.cfm?f=1026a285-94cc-11d7-a728-0060086f6c77&t=wpir71.pdf.
- K Sisson (1993), 'In search of HRM', *British Journal of Industrial Relations*, 31, 201-210.
- Trades Union Congress (TUC) (1995), *Your voice at work*.
- TUC (2004), *Trade union trends: focus on recognition*.
- TUC (2004a), *Informed, consulted, organised*.
- TUC (2005), *TUC guide to the Information and Consultation of Employees Regulations 2004*.
- S Welfare (2004), 'Learning to talk the hard way', *IRS Employment Review* 809, 11-17.

Appendix 1: Methodological note

The case studies drawn on by this paper – Abbey National, BMW Hams Hall Motoren, BP Exploration and B&Q – were identified in discussion with the Involvement and Participation Association (IPA). The research entailed interviews with key managerial and employee-side players, the examination of relevant documentation (constitutional arrangements of information and consultation bodies, minutes etc) and, in two cases (BP Exploration and B&Q), observation of meetings of the consultation bodies concerned. The case studies were carried out during 2003 at B&Q and BMW and during 2003-4 in the two other cases, and published by the IPA, but this paper includes updated information to March 2005.

The paper's discussion of wider employer and trade union approaches to the Regulations draws on an ongoing programme of informal interviews with officials and advisers from employer and trade union bodies, management consultancies and other advisory bodies, carried out in the first three months of 2005. Respondents to date include officials from the CBI, EEF, TUC, Amicus, Acas, IPA and management consultancies ORC Worldwide and PRC.