Implementing the Information and Consultation Directive in Great Britain: A New Voice at Work

Abstract: The Information and Consultation Directive and its transposition in Great Britain through the Information and Consultation of Employees Regulations 2004 will add a new facet to collective employment law in this country. This paper analyses the characteristics of the new voice given to employees and how it will fit with the existing legal framework. It aims to demonstrate that the government has adapted to the new Directive by undertaking a thorough process of preparation for the final regulatory norms. Nevertheless, the resulting ‘voice’ will not be revolutionary as it will not be based on a set of minimum requirements and will also lack strength to influence decision-making. The regulatory choices have given priority to flexibility at the expense of the universal right to information and consultation.

This paper explores further the ideas expressed in an earlier article on the potential impact of the Information and Consultation Directive in the United Kingdom, published in this journal in 2003.1

1. INTRODUCTION

The National Information and Consultation Directive\(^2\) was adopted in 2002. The purpose, set out in Article 1, is to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the Community. At the heart of the Directive is the necessity to set up permanent and regular systems of information and consultation on aspects that affect employees’ interests. It is the national sister of the European Works Council Directive\(^3\) which applied to Community-scale undertakings or groups of undertakings. In the United Kingdom, the new information and consultation Directive was significant because of the lack of permanent statutory system of information and consultation. It was therefore a challenge for the government to transpose this European instrument.

Nevertheless, the practical arrangements for information and consultation were left to Member States to define and implement in accordance with national law and industrial relations practice.\(^4\) The deadline for implementing these arrangements was March 2005, but an incremental implementation, until 2008, was authorised\(^5\) for countries, such as the United Kingdom, which did not already have permanent statutory systems of information and consultation.\(^6\)

In this context, this paper will look at three issues. First, it will analyse the implementation method applied by the government. Second, it will demonstrate that the transposition of the National Information and Consultation Directive will constitute a new facet to collective employment law. Effectively, ICER will allow employees to have a new voice at work. The regulations should provide them with new legal tools to participate in decision-making and possibly with new actors to be entrusted with this mission. An analysis of the characteristics of this new voice will be undertaken. Third, the paper considers how, legally, these new arrangements will sit with the traditional system of collective representation in Great Britain. By way of conclusion, the author aims to demonstrate that the new

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\(^4\) Art 1(2).
\(^5\) Art 10.
\(^6\) The rest of this paper will principally refer to the implementation of the Directive in Great Britain (i.e. England, Wales and Scotland, but not Northern Ireland) as there is separate set of regulations for Northern Ireland. See Employment Relations Act 2004, s.43 and Statutory Rule 2005 No. 47 The Information and Consultation of Employees Regulations (Northern Ireland) 2005.
Regulations are a welcome addition to the collective labour law landscape, but they are complex to put in place and to implement. A number of problems and limitations have appeared in the consultation stages and these aspects have not been fully addressed by the government. Further, regulatory choices have been made that could have damaging consequences for the stakeholders, whether employees, trade unions or employers, in particular because the government opted for a light-touch transposition.

2. Implementation Method

Between the enactment of the Directive and the deadline for implementation, the government was very active. Three rounds of consultation took place. In July 2002, ‘High Performance Workplaces: the role of employee involvement in a modern economy’7 aimed at consulting widely on existing best practice on employee involvement and at finding out what should be the key aspects of the transposing measures.8 In July 2003, ‘High Performance Workplaces: Informing and Consulting Employees’9 contained two important documents. First, a tripartite agreement between the national social partners, the Trade Union Congress (TUC) and the Confederation of British Industry (CBI), and the government, through the Department of Trade and Industry (DTI), explained the approach that should be taken towards implementation. This is an interesting development in its own right as it is not the tradition in Britain to have national agreements between the social partners and the government on labour law regulations. There have been similar instances of social partner involvement at national level under the Labour government, albeit in different forms.10 However, it is the first time it has occurred for the imple-

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7 See http://www.dti.gov.uk/er/consultation/informconsult.htm
8 For comments, see P. Lorber ‘National Works Councils: Opening the Door on a Whole New Era in United Kingdom Employment Relations’ (2003) 19 International Journal of Comparative Labour Law and Industrial Relations 297.
9 See http://www.dti.gov.uk/er/consultation/perf_work.htm.
mentation of a European measure. The second document was an initial set of draft regulations entitled the Information and Consultation of Employees Regulations 2004. A third stage of consultation started in July 2004. Updated draft regulations were published. The changes relate principally to details to reflect the views expressed during the last consultation exercise. Further, draft Guidance was published. This was promised in the second round of consultation in order the supplement the Regulations and answer some controversial questions. The consultation in the third round concerned only the Guidance and the consultation period terminated in October 2004.

The final regulations were laid before Parliament in December 2004 following the adoption of the Employment Relations Act 2004 which empowers the Secretary of State to make regulations for the transposition of the National Information and Consultation Directive.

The implementation method was meticulous. In addition to the consultation rounds, a number of interested actors made a great deal of information available to employers and employees. For instance, the DTI, in conjunction with the CBI and the TUC, organised workshops to explain the legislation and raise awareness. The Advisory, Conciliation and Arbitration Service (ACAS) produced an extensive information package on the subject for employers and employees. The social partners also engaged in intensive training for their members and have promised guidance. There has therefore been a real emphasis on preparing businesses, employee representatives and employees for the new set of regulations.

The final legal framework consists of the transposing set of Regulations which came into force on 6 April 2005 and updated DTI Guidance containing practical information, helping the parties to understand the terms of ICER. However, a serious doubt arises as to the legal value of this Guidance. If an employer refused to follow it, how would this instrument be regarded? A number of scenarios could be

11 Thereafter referred to as ICER 2004.
12 http://www.dti.gov.uk/er/consultation/draftregs.pdf
13 http://www.dti.gov.uk/er/consultation/draft_guidance/02.htm
15 S 42.
16 Good Practice Advice, Trainer’s Toolkit and an e-learning package, see http://www.acas.org.uk/services/ic.html
17 TUC representative talking at ‘DTI Information and Consultation of Employees Birmingham Masterclass’, 18 November 2004 and presentation by James Fothergill from the CBI at ‘Colloquium on the Draft Information and Consultation Regulations and their effect on industrial relations in the UK’, Leicester, 30 October 2004.
18 http://www.dti.gov.uk/er/consultation/i_c_regs_guidance.pdf
envisioned in the light of similar labour law instruments. First, the Guidance could be equivalent to Codes of Practice issued by the Secretary of State. In that case, it can be used in court as admissible evidence, although breach of the code does not render an individual liable to legal proceedings. Consequently, the Guidance would not be legally binding, but the breach of the code could influence the outcome of a case before the Central Arbitration Committee (CAC) or the Employment Appeal Tribunal (EAT), both in charge of enforcing the Regulations. Second, the Guidance could be similar to the ‘Guides’ produced by the DTI on subjects such as Working Time or Fixed-Term Work. These specify that they are general guidance that should not be regarded as a complete or authoritative statement of the law. They do not have statutory force. Third, is the DTI ‘Guidance’ a new informal employment law source? It certainly seems to be a mix of the above scenario. It specifies that it is ‘designed to provide a plain explanation of the Information and Consultation Regulations’ and it is ‘the DTI’s interpretation of the Information and Consultation Regulations and of the EC Directive’. It is advised that employees, their representatives and employers can bring provisions of the Guidance to the attention of the CAC, but the CAC is not bound to follow the Guidance. The legal status of this Guidance is crucial as it provides a detailed explanation of the law and greatly benefits employees and employers when establishing, operating or contesting information and consultation arrangements. However the document does not have statutory value, presumably to preserve flexibility. Its effect risks being limited in practice when it comes to dispute resolution.

3. A NEW VOICE AT WORK

The regulations require companies to have arrangements in place for the purpose of information and consultation of employees. Questions arise as to which companies are concerned, how to set up such arrangements, what is the content and process of the information and consultation obli-
gation, and who is informed and consulted. The regulations, together with the DTI guidance, answer most of these questions, at times in great detail, thus helping the relevant parties to establish the relevant mechanisms. However, the model put forward does not give all employees access to the right to information and consultation or to a collective voice and when it does, the exercise of the right is not homogeneous.

3.1 Scope

As authorised by the Directive, ICER apply incrementally, first concerning undertakings with over 150 employees in April 2005, then extending to undertakings with 100 employees in April 2007 and finally covering the undertakings with 50 employees in April 2008.27

The government chose to apply the regulations to undertakings of at least 50 employees rather than establishments of 20 employees. The rationale may be not to burden small businesses,28 but this choice clearly denies numerous employees of the right to information and consultation and deprives them and the employer of the advantages of information and consultation.29 Undertakings are defined in Regulation 2 as ‘a public or private undertaking carrying out an economic activity, whether or not operating for gain’. This definition is a replica of the one found in the Directive,30 and generally, the DTI understands this to mean ‘a separately incorporated legal entity… as distinct from say an organisational entity such as an establishment, division or business unit of a company’.31 However, the concept of ‘economic activity’ has serious implications for the public or semi-public sector, such as Universities, as it is not clear whether they would fulfil this criteria and therefore be covered by the Regulations. As the criterion of ‘carrying out an economic activity’ is also essential for triggering the application of the regulations dealing with transfer of undertakings,32 the government relies on what has been established by the case-law of the European Court of Justice (ECJ) and

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27 Reg 3.
29 As explained in the above document from para 2.10, for example, ‘having a greater say in how the business is run’ for employees and ‘improved communication; access to a wider pool of knowledge, experience and ideas’ for employers.
30 Art 2(a).
31 DTI Guidance para 5.
32 Transfer of Undertakings (Protection of Employment) Regulations 1981 (known as TUPE).
national courts on this subject. Consequently, strictly public entities, such as central and local governments, which carry out purely administrative functions will be excluded from the scope of the regulations. The government, nevertheless, has promised to draft a Code of Practice applying the principles of ICER to the central government departments. Local authorities are considered as not covered by ICER but are expected to adhere to its principles. Semi-public authorities, such as hospitals or schools, that have the potential to carry out economic activities, will only be covered if it is demonstrated that such activities are carried out. The final picture of who is covered in the public sector is therefore a complex one. It is suggested that in these cases, it might have been simpler and more logical simply to go beyond the definition of the Directive and to apply ICER to the public sector at large, since, in any case, the government believes that it should respect the principles of the Regulations.

3.2 What ‘arrangements’ are envisaged?

Originally, one could have thought that the Directive on National Information and Consultation would require the establishment of national works councils, thus mirroring the EWC Directive. However, this is not expressly the case and the Directive refers to information and consultation arrangements and leaves it the Member States to define what they are. Great Britain had a blank canvas to work from on this issue since there is no permanent and general statutory system of information and consultation.

The regulations offer a complex system of options, with no mention of works councils or equivalent, although the framework agreement between the TUC, CBI and DTI refers to information and consultation committees. The options offered reflect a number of concerns and priorities for the parties involved. First, the government has been keen to give priority to flexibility, encouraging negotiations and tailor-made agreements rather than imposing a given model. Second, both employers and trade unions were in favour of protecting the arrangements already in

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34 DTI Guidance para 5.
35 Ibid.
36 Art 1(2).
37 High Performance Workplaces, 9.
place in some companies.\textsuperscript{38} There is no statutory permanent system of information and consultation in Great Britain, but the Workplace Employee Relation Survey reported that over half of workplaces had a joint consultative committee even if their nature and functioning varied greatly.\textsuperscript{39} Third, the regulations had to ensure that an employer could not impose arrangements or modify them unilaterally. Fourth, and as a counterpart, employees had to show support when requesting the establishment of information and consultation arrangements or the modification of the arrangements in place. This reflects two tendencies already found in Great Britain. First, the necessity to have a trigger mechanism for the establishment of information and consultation arrangements. This was already the case in the Transnational Information and Consultation of Employees Regulations (TICER) 1999\textsuperscript{40} that transposed the EWC Directive. These arrangements are therefore not by themselves mandatory since they require the intervention of one party. Second, there are thresholds for employees to overcome before they can start negotiations or request the modification of pre-existing arrangements. As will be seen some of those are rather high. These support mechanisms are also found in the statutory recognition procedures.\textsuperscript{41} The final consideration when drafting the options available to employers and employees was cost. The government wanted to limit the financial impact of the regulations on business and the government.\textsuperscript{42} The above parameters are reflected in the four options available when the relevant parties wish to establish information and consultation arrangements.

The overall picture is that companies that have information and consultation mechanisms, prior to an employees’ request to establish such mechanisms, will be outside the regulatory framework. For undertakings that are not in this situation, negotiations can take place to reach an agreement on the provisions of information and consultation. If negotiations fail, a statutory model is imposed. This is a well-know triptych which was found in the EWC Directive. The detail of the scheme is now considered in order to demonstrate the great amount of flexibility left to employers and employees and their representatives.

\textsuperscript{38} CBI Response to ‘High Performance Workplaces – Informing and Consulting Employees’ paras 6 and 12, and S. Veale ‘TUC Briefing’ at the Institute of Employment Rights seminar Information and Consultation: Towards a no Surprise Culture, 28 April 2004.
\textsuperscript{40} SI1999/3323, Reg 9.
\textsuperscript{41} For example, when applying for recognition, ten per cent of the bargaining unit has to be members of the trade union, TULRCA 1992, Sched A1 para 36.
\textsuperscript{42} High Performance Workplaces, Annex C ‘Regulatory Impact Assessment’, 82.
Scenario 1
This is the ‘opt-out’ scenario. Companies who already have a system of information and consultation in place, not by the time the Regulations come into force, but by the time employees make a request for information and consultation arrangements, will not have to apply ICER. However, undertakings with such pre-existing agreements will only be allowed to escape ICER if certain criteria of validity are fulfilled. According to Regulation 8(1), the agreement must be in writing, cover all employees in the undertaking, have been approved by the employees and must set out how employees or their representatives are to be informed and consulted. Companies that already have joint consultative committees or information and consultation provisions of some kind are likely to scrutinise their arrangements in order to see if they are in line with Regulation 8 and the Guidance. Similarly pre-existing agreements are likely to be attractive for employers who do not want to be subject to ICER. In the end, scenario 1 is likely to be a popular option and may account for the greatest number of arrangements for information and consultation. This prediction could also be supported by an analogy with Article 13 of the EWC Directive which offered a similar option under the EWC Directive. This available opt-out for which very little was required was used by the greatest number of companies at EU level. The criticisms that were raised for Article 13 agreements can also be applied to the ‘pre-existing’ route offered under ICER. For example, there is no definition of information and consultation, no provision on who should be informed and consulted, and there are no legal mechanisms of enforcement of these agreements. As a result, it is foreseeable that a majority of companies will operate outside the legal framework, which could lead to abuses.

Scenario 2
If there is no pre-existing agreement, once the regulations are in force employees or employers have the possibility to negotiate their own agreements. Such negotiations can be triggered by employees on written request, provided they represent 10 per cent of the workforce. The employer can also prompt the negotiations via notification. Compared to TICER 1999, there is no room for representatives of the employees to request the initiation of negotiations. This can be criticised for three

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43 P. Kerckhofs, European Works Councils – facts and figures (Brussels: ETUI, 2002).
44 This is subject to a minimum of 15 employees and a maximum of 2500. Reg 7(2) and (3).
45 Reg 11.
46 Reg 9(1)(a).
reasons. First, it does not give experienced and organised employees the right to kick-start the proceedings, thus denying trade unions an important role. Second, it is less likely that individual employees would be aware of the right to request the establishment of information and consultation arrangements, and even if they were, they may not feel as confident or well-equipped to approach an employer to request the initiating of the negotiations. Ultimately the whole workforce could lose out. Third, it is difficult to see why there is a difference of regime between the transnational and national regulations.

Once a request has been expressed or a notification given by the employer, the employer must arrange for negotiating parties to be appointed/elected. The employer and the negotiating representatives must reach an agreement within six months. However, the employer and a majority of the negotiating representatives can extend, without limit, the length of the negotiations. Such a fluid deadline could be counter-productive and not conducive to reaching an agreement. The content of the agreement on information and consultation is left to the negotiating parties. The regulations simply specify that agreements must be in writing and dated, cover all employees and set out the circumstances in which the employees will be informed and consulted. The Regulations also indicate who should be the recipient of information and the parties who will be consulted, a point that will be addressed later. Finally, agreements must be endorsed by the employer and the employees. On behalf of the employees, approval will be deemed effective if an agreement is signed by all the negotiating representatives. Alternatively, an agreement can be signed by a majority of the negotiating representatives only, but in addition it has to be approved either in writing by the majority of the workforce or through a ballot by 50 per cent of voting employees.

The emphasis here is therefore on procedure and legitimacy while a good deal of freedom is left to the parties in respect of the content and process of the information and consultation arrangement.

Scenario 3
There is a pre-existing system of information and consultation, but employees can still request the opening of negotiations in line with sce-
nario 2 if they wish to modify the current arrangements. This is only possible if employees show that a significant part of the workforce is in favour of renegotiating existing arrangements. Complex mechanisms have been put in place in order to satisfy this condition. The negotiations can only be triggered if the employees’ request represents more than 40 per cent of the workforce. If the request represents less than 40 per cent, the employer is allowed to organise a ballot in order to seek employees’ support for the request.52 Keith Ewing53 has pointed to a number of legal difficulties and shortcomings with the ballot procedure as found in Regulation 8. For example, this ballot is not subject to safeguards such as the involvement of an independent qualified person. This could lead to intimidation by the employer in the course of the ballot. This type of behaviour has been reported in the context of ballot for recognition54 and all necessary measures should therefore be taken for ICER. Employees will be deemed to have endorsed the request if at least 40 per cent of the employees employed in the undertaking and the majority of the employees who vote in the ballot endorse the request. If the ballot is successful for the employees, the employer must follow the procedure described in Scenario 2.55 However, if the request is not sufficiently supported, the employer can keep the existing arrangements and requests are not allowed for three years.56 This measure is to avoid frivolous requests, but conversely once an agreement is in place, the employer cannot reopen negotiations unilaterally for three years.57

Scenario 4
The final scenario is where negotiations do not start following the employees’ request or employer’s notification or where the negotiations fail. In this case ‘standard provisions’ apply.58 They impose on the employer and the employees the method of selection for information and consultation representatives59 and the process of information and consultation.60 Both these aspects will be considered in subsequent sections.

52 Reg 8.
54 For example, Case TUR1/111/1(2001), 18 January 2002, Transport and General Workers Union (TGWU) and King Asia Foods Ltd.
55 Reg 8(5)(b).
56 Reg 8(5)(c) and 12(1)(c).
57 Reg 12(1)(a).
58 Reg 18.
59 Reg 19.
60 Reg 20.
The resulting scheme of scenarios is primarily designed to permit flexibility within the parameters identified earlier. It nevertheless presents a number of pitfalls. First, this is a rather complex mechanism. This is understandable and justifiable considering the novelty of the overall system. It is also similar to the TICER 1999 method of setting up EWC. Second, the system does not provide for minimum rights of information and consultation. By leaving so much freedom to the negotiating parties, ICER (and the Directive) do not ensure that the standard provisions constitute the minimum to be put in place. When agreements are negotiated, the parties are expressly advised that ‘they are free to agree quite different arrangements from those set out in the standard I&C rules in regulation 20 if they wish, though these can be used as a guide’. Negotiations should have been aimed at securing higher standards than those found in the fallback position, and not about opting out of the obligation. This method of permitting parties within a company to lower what should be minimum legal standards is open to criticism because it fails to give employees guaranteed minimum rights. The third criticism of this overall scheme relates to the trigger mechanism. The exercise and implementation of the right to information and consultation is left to the employers’ will and the employees’ knowledge and motivation. It would have been much more desirable to go beyond what the Directive proposes and to make the establishment of information and consultation arrangements mandatory, without necessarily losing flexibility and tailor-made arrangements. Parties could have had a period to negotiate agreements, but had an agreement not been reached by the deadline, all companies covered would have had to apply the standard provisions.

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61 As seen in table 1 below. Inspired from DTI Guidance table p. 11.
62 For example protection of existing agreements, impossibility for employers to impose arrangements unilaterally etc.
63 DTI Guidance, para 37.
64 Which is also found in other pieces of legislation and regulations transposing European Directives. For example in the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, Reg 8(5) which allows collective or workforce agreement to apply a different formula than the statutory one to prevent abuse arising from the use of successive fixed-term contracts.
Table 1. Methods available to set up information and consultation arrangements under ICER 2004

Information and consultation obligation: content and process
How information and consultation operate in practice depends upon the kind of arrangements in place. As indicated above, if the arrangements are part of a pre-existing agreement or if the agreement is negotiated under scenario 2, it is up to the relevant parties to decide on the process, timing and nature of information and consultation. However, the government has been helpful in providing guidance on the content of such agreements. It is clearly stated that these are simply suggestions which are ‘not intended to be prescriptive. Employers and employees or their representatives are free to agree whatever arrangements they wish as to the method, frequency, timing and subject-matter of information and consultation, according
to the specific circumstances of their own organisation’. The suggestions are therefore not about how many times information and consultation should take place, or on which subjects, but consist of a checklist of issues that the relevant parties should think of when considering new or existing pre-existing agreements or when negotiating an ICER agreement. For example, employer and employee representatives should consider coverage of the agreement, methods of information and consultation, frequency and timing of information and consultation, subjects of information and consultation, disputes, duration of the agreement, etc.

In order to find what the obligation to inform and consult could entail, one has to turn to the standard provisions. Regulation 20 is a copy of Article 4 of the Directive. It therefore gives the skeleton of the obligation. It indicates, in general terms, the kind of information that needs to be disclosed, the subject matter of consultation but also how consultation should take place. As a complement to the backbones of the Regulations, the Guidance explains, in detail, what the government regards as best practice for this obligation. First, the content of information and consultation will be considered, before turning to the process itself. In both cases, the regulations and guidance will be analysed.

Under the standard provisions, Regulation 20(1) requires management to inform the workforce on three broad topics. Additionally, Regulation 20(3) indicates that for topics (b) and (c), consultation should also take place. The three categories are:

(a) the recent and probable development of the undertaking’s activities and economic situation;
(b) the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular where there is a threat to employment; and
(c) decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies and transfer of undertakings.

These broad topics have been analysed by the DTI which has given its view on the type of information that could be disclosed and the kind of items that could be discussed under this listing. There is a proviso that this is simply the DTI view that is neither ‘prescriptive nor comprehensive’.

65 DTI Guidance, Annex 1: Suggestions for contents of pre-existing or negotiated agreements.
66 Draft Guidance, para 52.
The result is however fairly substantial in terms of guidance produced on this subject alone. The DTI clearly made an effort to interpret all the terms listed in (a)-(c), with references to the Directive as a first port of call. In order to illustrate this effort, one can look a little further in the guidance. Taking category (a), it is first acknowledged that a wide variety of topics could fall within that category, but that information provided under (a) will concern the context in which the company operates and the context relevant to categories (b) and (c). The DTI then suggests a list of topics that could come under ‘undertaking’s activities’ (for example, launch of new products, development in technology, changes to the undertaking’s aims, vision, etc.) and under ‘undertaking’s economic situation’ (e.g. competitive environment, outlook for the sector, undertaking’s financial situation, etc.). It also analyses the meaning of ‘recent and probable’ in a broad sense. Similar scrutiny is found in the Guidance for category (b) which deals with the employment situation of the undertaking and category (c) that focuses on changes in work organisation and contractual relations.

The same detail is provided for the process of information and consultation. First, Regulation 20(2) states that information must be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to conduct an adequate study, and, where necessary, prepare for consultation. In this context, the Guidance reminds employers that the information provided must be in a format understandable to the recipients. Second, consultation is defined as the exchange of views and establishment of dialogue between the employer and the employees’ representatives or the employees. The DTI clearly gives a reminder of how consultation is understood, in particular by comparison to existing consultation obligations in collective redundancies or TICER situations. Consultation is not negotiation, bargaining or co-decision, even when there is requirement to consult with a view to reaching an agreement. The parties must demonstrate that consultation took place in good faith, following the relevant procedure but ultimately the decision remains with the employer. Third, the process of consultation entails that after analysis of the information provided, the representatives

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67 Ibid. p. 40-41.
68 Ibid.
69 Ibid. p. 41-44.
70 Ibid.
71 Reg 2.
72 DTI Guidance p. 45.
73 as is the case for category (c) of information and consultation.
74 DTI Guidance p. 44-45.
formulate an opinion and then meet the employer at the relevant level –
one that could change the decision – in order to discuss the information
and opinion. The employer must also give a reasoned response to the
ideas expressed by the representatives. Fourth, the timing of the process
must be appropriate. This relates to two aspects: the frequency of the
consultation process and the immediate timing of it when decisions have
to be made. The Guidance is helpful and positive on both counts. With
regard to frequency, it takes inspiration from the preamble of the
Directive and states that the information and consultation should be on-
going and regular and not event-based only. An annual meeting is there-
fore suggested as a minimum requirement but additional meetings are
necessary when decisions are to be made on category (c). As far as tim-
ing is concerned, the government takes a promising step in that it states
that consultation should take place prior to a decision being made in
order for the process to be meaningful and to avoid employees’ cyni-
cism. This requirement was not found in the Directive and this is
therefore a welcome analysis, even if this interpretation is only found in
the Guidance.

There are restrictions on the disclosure of information and consulta-
tion on some subject matters. Regulations 25 and 26 give employers
two prerogatives in order to protect sensitive information. First, if
employers disclose information labelled as confidential, the people
entrusted with such documents or information are not allowed to divulge
it to third parties. Employers can only treat as confidential information
the disclosure of which would harm the legitimate interest of the undertak-
ing. Second, employers can refuse to disclose information or consult
on subject matters that they view as potentially harmful to their business
or prejudicial to it. Here too, useful guidance has been provided to help
the parties understand what should be taken into consideration when
assessing what is confidential and how to treat it in relation to the obli-
gation to inform and consult. For example, employers should consider
UK listing Rules or the City Code on Takeovers and Mergers when it
comes to price-sensitive information. However, neither of these rules or
codes prevents the disclosure of information to representatives. It is

75 Reg 20(4).
76 Reg 20(4)(a).
77 DTI Guidance p. 46.
78 Ibid. p. 47.
79 See P. Lorber n 1 above, 302.
80 Reproducing Art 6 of the Directive.
81 DTI Guidance p. 53.
anticipated by the government that the scenario of total withholding of
information should be rare and the fact that information is price-sensitive
could not be a justified reason to refuse its disclosure.82 The CAC will be
the body in charge of scrutinising whether the information should be
labelled as sensitive or should not be disclosed at all.83 The TUC is
encouraging members to test out CAC managerial decisions to keep
information confidential.84

The obligation to inform and consult is at the heart of the
Regulations. It should be clear to all relevant parties what this obligation
consists of. While the government gives important and helpful guidance
on what is understood to be the content and the process of this obligation,
it only applies to standard provisions. This is limiting in three respects.
First, the standard provisions only apply if negotiations have failed. If one
considers the EWC Directive and TICER 1999, which have similar pro-
visions on when to apply standard provisions, it is not clear how many
EWCs have been set up under the fallback scenario. However, the over-
whelming majority of EWCs are the result of negotiation. It may there-
fore be that ICER standard provisions are rarely used. They still have a
value in helping parties to negotiate the kind of information they will dis-
lose and how they will conduct consultation. The government also
encourages the parties to use that model for the pre-existing and negoti-
atated arrangements. Nonetheless, it does not go any further. Second, as
discussed earlier, the legal value of the Guidance is currently vague. As a
result, if an employer refuses to follow the Guidance, this may be of lim-
ited consequence. Third, the standard provisions are not the minimum
requirements for information and consultation. As a result, the optimistic
view is to expect that employers and employees will use the Guidance on
standard provisions as the template for negotiations and that breach of the
Guidance will carry some weight in judicial debates. The pessimistic
slant is to envisage employees deprived of relevant information and
meaningful consultation due to employers’ liberal interpretation of very
flexible regulations and Guidance.

Who is talking?
Who should management disclose information to and consult with? This
is a fundamental aspect which had been expected to give rise to debate.
The identity of employee representatives in a situation of information and

82 Ibid. p. 55.
83 Regs 25(6) and 26(2).
84 S. Veale n 38 above.
consultation has always been contentious. The question was whether recognised trade unions would be given an automatic role, as is the case for some information and consultation obligations or whether the government would prefer what it regards as the more democratic option of elected representatives, and which is more consistent with some of the TICER requirements.

The Regulations have gone for a complex system that does really fit with previous patterns and does not give trade unions any mention as employee representatives. Two types of employee representatives have to be considered: information and consultation representatives and negotiating representatives who intervene to set up arrangements under scenario 2 discussed above. Starting with information and consultation representatives, the employees will be selected differently depending on the arrangements in place. Under the standard provisions, information and consultation representatives are to be elected, with one representative per 50 employees and a minimum of two representatives. Two types of employee representatives have to be considered: information and consultation representatives and negotiating representatives.

Starting with information and consultation representatives, the employees will be selected differently depending on the arrangements in place. Under the standard provisions, information and consultation representatives are to be elected, with one representative per 50 employees and a minimum of two representatives. The election process is regulated by Schedule 2. It contains rules on ballot arrangements and conduct, including a number of guarantees such as the appointment of an independent ballot supervisor. For negotiated agreements, Regulation 16(1)(f) states that the agreement should provide either for the appointment or election of information and consultation representatives or that the employer must provide information directly to the employees and consult the employees directly. The first possibility is not very explicit about how to appoint the representatives but this is a matter for negotiation. The second possibility involves the election of representatives, but this process is not subject to Schedule 2, which is illogical and regrettable for reasons stated earlier. The third possibility of involving employees directly is clearly in contradiction with the Directive, which refers to the information and consultation of employee representatives throughout its text. Furthermore, recital 16 of the preamble reads ‘This Directive is without prejudice to those systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives’. The explanation for the third option is employers’ pressure for protecting existing systems of direct representation which are quite

85 See P. Lorber n 1 above, from 315.
86 For collective redundancies, transfer of undertakings and health and safety.
88 Reg 19.
89 See above, section on ballot of workforce under Scenario 3.
developed and preferred by some companies.\textsuperscript{90} There are no requirements for information and consultation representatives in pre-existing agreements as they are outside the regulations.

Negotiating representatives will also play a crucial role in negotiating agreements to set up information and consultation arrangements. According to Regulation 14(1) these representatives must be elected or appointed by employees. There are two requirements associated with the selection of negotiating representatives: all employees must be able to take part in the election or appointment process and all employees must be represented by the negotiating representatives. Again, the election process is not the same as that applying to elected information and consultation representatives under the standard provision since it is not subject to Schedule 2. Interestingly, the framework agreement between the TUC, CBI and DTI talks about ‘genuine employee representatives’ involved in the negotiating of agreements and subsequently adds that ‘Guidance will elaborate who might be considered as “genuine”’.\textsuperscript{91} In this respect the Guidance clarifies that the representatives can never be selected by management,\textsuperscript{92} but otherwise leaves great flexibility to each undertaking. There is no preference for appointment, election or volunteers. Trade unions are mentioned in order to clarify that, according to the regulations, they have no automatic role to become negotiating representatives (even when they are recognised), but that they would be well qualified to play that role.\textsuperscript{93} There is an important proviso that trade union representatives can only be negotiating representatives if they can claim that they represent the whole workforce, which is rarely the case.

The choice of worker representation in ICER is most regrettable. First, direct participation is promoted which is contrary to the Directive. This is also disappointing for employees as it is clear that individuals are less likely to challenge managerial decisions on their own, especially if the communication comes via newsletter or e-mail.\textsuperscript{94} Second, the regulations do not give any explicit role or direct voice to trade unions. They therefore go against the traditional national industrial relations system that gives priority to the trade unions to speak collectively when they are recognised. This is even more of a puzzling choice when one considers TICER. These Regulations acknowledged the role of recognised trade

\begin{thebibliography}{9}
\bibitem{90} High Performance Workplaces para 2.6.
\bibitem{91} \textit{Ibid.} 9.
\bibitem{92} DTI Guidance p. 30.
\bibitem{93} \textit{Ibid.}
\end{thebibliography}
unions. They allowed unions to sit on statutory EWCs\textsuperscript{95} and to trigger the mechanism for negotiating EWC.\textsuperscript{96} There is therefore an illogical difference between transnational and national systems of information and consultation. Arguably, the ICER system of election for information and consultation representatives and negotiating representatives allows unions to put forward candidates. In addition, one could imagine that recognised trade unions could have a right to appoint employee representatives. They are therefore not excluded but not recognised as such in the regulations as the immediate and automatic counterpart to management in these situations. This is open to criticism, considering the advantages of having trade unions representing the workforce in these instances. As Davies and Kilpatrick explain clearly, trade unions are independent from the employer, organised, experienced, trained and specialised.\textsuperscript{97} As an alternative to the system introduced by ICER, it would have been more judicious to apply the model put forward by Davies and Kilpatrick. Trade unions should have been given preference when they are recognised. If there is no recognition, ‘a sufficiently representative union should be the worker representative structure’.\textsuperscript{98} Only if there is no such presence, should elections take place, as representation should exist. Direct representation should therefore never be an option. In addition, if elections are to take place, they should systematically be subject to the same process that guarantees minimum safeguards.

\textit{Enforcement and remedies}

The enforcement of the regulations has been entrusted to two bodies, one of which already deals with collective matters: the CAC\textsuperscript{99} and the EAT.\textsuperscript{100} By a complex system, the CAC would be first approached if either of the parties were in breach of their obligations when it comes to the negotiation or the operation of the arrangements. If the CAC finds an employer in default, it can make an order to rectify the situation (e.g. order to disclose information or to re-organise elections), but additionally the appli-
cant may make an application to the EAT for a penalty notice to be issued. The employer may be asked to pay a fine to the Secretary of State, which cannot exceed a maximum of £75,000. The penalty here does not go towards compensation of employees as a protective award does, for example, in the case of collective redundancies.101 Nevertheless, it does sanction the bad employer, which is to be welcomed.

The Directive clearly indicates that sanctions must be ‘effective, proportionate and dissuasive’.102 In this respect, orders by the CAC should be effective and a fine should theoretically be dissuasive. However, there are still limitations to these two mechanisms. Starting with the CAC power to make orders, in a situation where the information and consultation obligation is breached, it could still be argued that the most effective sanction would be for the decision to be suspended until the process of information and consultation is adequately conducted. This would be the most deterrent sanction. This was the intention in the draft Directive, but was deleted from the final text.103 The government makes it explicit that the Regulations must not be interpreted as allowing the CAC to delay or suspend managerial decisions. Regulation 22(9) stipulates that ‘no order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the employer or of preventing or delaying any act or agreement which the employer proposes to do or to make’. This certainly strengthens the employer’s position and weakens the right to information and consultation as an order from the CAC cannot have any effect on management decisions. Taking this to its extreme, this means that the employer can be ordered to inform and consult retrospectively, but this will not make any difference to the decision. However, in that type of situation, the availability of the fine is an additional weapon which can be seen as a disincentive for employers’ disregard of the regulations. Nevertheless, two factors must be taken into consideration when gauging the effectiveness of the fine. First, the £75,000 is a ceiling and when assessing the amount of the penalty the EAT must take a number of factors into consideration, such as the seriousness of the failure, the reason for the failure, the number of employees affected by the failure, etc.104 This will help to meet the requirement that the sanction be proportionate, but it is hoped that the courts will adopt the test recently given by the Court of Appeal when

101 TULRCA 1992, s 189.
102 Art 8(2).
103 P. Lorber n 1 above, 303.
104 Reg 23(3).
assessing the amount of the protective award in collective redundancies.\textsuperscript{105} It is suggested that where there has been no consultation, the amount for the employer to pay should be the maximum and it would only be reduced if there were mitigating circumstances justifying a reduction.\textsuperscript{106} Second, the employer has at his disposal a defence. Regulation 22(7) indicates that the employer will not be liable to pay the fine if ‘the failure resulted from a reason beyond the employer’s control or that he has some other reasonable excuse for his failure’. The formula used is rather broad and vague. As this defence is not available in the Directive, it should be construed narrowly, as is the case for collective redundancies and transfer of undertakings when there is failure to inform and consult.\textsuperscript{107}

ICER does give employees a new voice at work. However, the characteristics of the new channel show that its effectiveness maybe limited in particular because of the flexibility given to the parties and the effort of the government to prevent managerial decision from being affected. Another crucial question was how the new voice would fit with the current legal framework.

\section*{The Integration of the New Voice in the Existing Framework}

The difficulty faced by the legislator is that the new information and consultation arrangements will be grafted onto a system of collective relations historically and traditionally based on collective bargaining, industrial action and a flavour of conflict between the two main protagonists (employer and trade unions). The defence of workers’ interests has been through the medium of collective bargaining and industrial action, trade unions being the representatives of the workforce. There was a focus on the market function of collective representation, as opposed to the industrial democracy function.\textsuperscript{108} This traditional system has evolved with a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{105} Susie Radin Ltd (appellants) v. GMB and others (respondents) [2004] IRLR 400, CA.
\item \textsuperscript{106} Ibid. para 45.
\item \textsuperscript{107} TULRCA 1992, s 188(7) and TUPE 1981, Reg 10(7) give the following defence to the employer: if s/he can prove that special circumstances rendered the process not reasonably practicable the lack of consultation can be justified. Defence restrictively construed in Clark’s of Hove v Bakers’ Union [1978] ICR 1076, CA.
\end{itemize}
\end{footnotesize}
strong decentralisation of collective bargaining towards company level, combined with a reduction of union membership and collective bargaining coverage, specifically in the private sector.109 The introduction of a new collective voice could therefore mean competition at undertaking level, between collective bargaining arrangements through trade unions and information and consultation mechanisms through other forms of representation.110 To complicate the picture, European law has slowly inserted information and consultation obligations on specific matters.111 These have been transposed on an ad hoc basis, thus creating a puzzle of provisions.112 The government recognised that it had to deal with the issues of integrating ICER113 in the collective employment law landscape. In the final regulations and the Guidance, a number of questions are answered about the relationship between information and consultation arrangements and collective bargaining on the one hand and between ICER and other information and consultation obligations on the other. Once again, parties are left with great flexibility and in these situations, this is likely to equate with uncertainty.

Information and consultation arrangements and collective bargaining arrangements

Primarily, two questions had to be resolved by the regulatory scheme.114 One is linked to the coverage of collective bargaining and the information and consultation obligation. The second concerns the relationship between information and consultation arrangements and collective agreements.

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109 See Davies and Kilpatrick n 95 above, 126.
110 For a discussion on this subject, see G.M. Truter Implementing the Information and Consultation Directive in the UK: Lessons from Germany (London: IER, 2003).
113 High Performance Workplaces 38-39.
114 The TUC identifies others which are not discussed here, such as whether an information and consultation body could be deemed to be a trade union and therefore undertake collective bargaining. See ‘High Performance Workplaces – Informing and Consulting Employees: TUC Response’. Para 10.1.
First, there could be an overlap between the coverage of collective bargaining and the topics that could be discussed under the information and consultation arrangements: work organisation and contractual obligations are listed as subjects that can be discussed under the standard provisions of ICER. This potential overlap has two important consequences. First, the employer would have to decide who to talk to in such situations, namely a proposed change in work organisation or terms and conditions. There would be a need to negotiate with the recognised trade unions. Information and consultation representatives or all employees would possibly also have to be informed and consulted on the matter, depending on the kind of arrangements in place. This may be burdensome for the employer and confusing for the employees and their representatives, as in practice a number of questions would be raised, such as: who should be talked to first? What would be the weight of the various parties’ views? The second consequence of this overlap relates to the sanctions attached to unsuccessful negotiations or breach of agreement on the overlapping topics. If an employer and the recognised trade unions fail to agree on new terms and conditions or if the employer breaches the collective agreement, the only sanction is industrial conflict since collective agreements are not legally enforceable. If the employer does not inform or consult on terms and conditions under the standard provisions, the sanction could be an order of the CAC and a fine to the employer.

This would be relevant to an employer if there was a conflict of views between the trade union representatives and the information and consultation representatives. Admittedly this type of scenario should not occur often, as standard provisions may not be widespread. Trade unions do not appear worried either as there are already situations in companies where collective agreements co-exist with information and consultation arrangements. The government’s approach to these situations is to recommend in the Guidance that if an undertaking has a collective agreement with a trade union, pre-existing or negotiated agreements should indicate what the relationship is between the collective agreement and information and consultation arrangements. However, there is no guid-

115 Reg 20(1)(c).
116 TULRCA 1992, s 178: collective bargaining covers terms and conditions of employment, or the physical conditions in which any workers are required to work; allocation of work or the duties of employment between workers or groups of workers; etc.
117 TULRCA 1992, s 179.
118 Regs 22 and 23.
119 N 114 above, para 11.1.
120 DTI Guidance, Annex 1.
ance on how to deal with this issue when it comes to the standard provisions which is where overlap and conflict could arise.

The second problem was raised by the trade unions and relates to the content and status of collective agreements. Some collective agreements contain provisions on information and consultation. One question was therefore whether such collective agreements could constitute pre-existing agreements. This would allow agreed arrangements with trade unions to remain in place. This suggestion was accepted by the government and inserted in the Regulation provided that the conditions of the pre-existing agreement are fulfilled. Yet, one of the conditions for a pre-existing agreement to be valid is that it covers all employees. Collective agreements do not always cover the whole workforce, but they could remain pre-existing agreements if other arrangements exist for categories of employees not covered by the collective agreement. This is a welcome success for machinery negotiated by trade unions.

Overlap between the information and consultation arrangements and specific obligations to inform and consult

The standard provisions of the Regulations stipulate, in accordance with the Directive, that there is an obligation to consult on substantial changes in work organisation or in contractual relations including collective redundancies and transfer of undertakings. This created uncertainty about the law applicable in situations of redundancies or transfer. Would it be ICER or the legislation dealing with collective redundancies and transfer of undertakings or both? This was fundamental because the recipients of information, the content of the obligation and the sanctions for breach are different.

An overall solution would have been to amalgamate collective redundancies and transfer representatives with the information and consultation representatives, and to integrate the requirements of TULRCA and TUPE on information and consultation into ICER for these specific situations. Clearly, this would have meant a total revision and consolidation of the current system on information and consultation. While this is

121 N 114 above, para 11.2.
122 Reg 2
123 Reg 20(3).
124 Article 4.
125 TULRCA 1992, s 188-192.
advocated by some, the government chose to keep the various regulations and legislation separate. Where collective redundancies or transfer occur, the employer is relieved from its obligation to inform and consult under ICER in order to inform and consult under the relevant provisions, namely TULRCA 1992 and TUPE. Employers must nevertheless inform the information and consultation representatives in writing of this situation. This system is applicable for standard provisions only, but the government recommends that pre-existing agreements and negotiated agreements implement a similar system. The solution adopted responds to the employers’ concern which was to avoid having to consult several bodies. It also secures recognised trade unions’ priorities in situations of crisis and change because they are automatic partners for information and consultation on redundancies and transfers. The relationship between ICER and the two other predominant information and consultation obligations is therefore relatively clear and simple at first sight. However, the regulations do not deal with the practical issue of knowing when the employer stops talking to ICER representatives about the employment situation of the undertaking and when s/he starts talking about the threat to employment to collective redundancies representatives. Further, by statutorily recommending the separation of ICER obligations from other specific obligations to inform and consult, there is a risk of diminishing the impact and influence of the new voice. The solution adopted could limit the role of information and consultation representatives if they are not associated with the most important decisions that affect the workforce.

There has been an effort to consider how information and consultation mechanisms could fit within the existing legal framework and similarly to respond to some of the concerns voiced by the social partners. The practicalities of the proposed system may appear more complex than anticipated by the Regulations and Guidance. The operation and development of the regulatory framework will therefore be of great interest as it may change the dynamic of the relationships between employers, trade unions, other representatives and the workforce as a whole.

129 N 127 above, para 22.
130 TULRCA 1992, s 188(1B) and TUPE 1981, Reg 10(2A).
CONCLUSION

As a new feature of collective employment law, permanent systems of information and consultation are a welcome addition to the current legal framework. They will inject elements of industrial democracy, allowing a greater number of employees to have access to more information than before and to be heard on new issues on a regular basis. In introducing a new component into the legal landscape, the government had the option of creating its own model adapted to the national labour law tradition. This enterprise was seriously considered in view of the time devoted to consultation and the number of steps taken to ensure that relevant and complete information was available. Additionally, national social partners have enjoyed an unusually high level of involvement, coming to an agreement on how best to implement the Directive. Useful Guidance has been produced to strengthen the skeleton of the regulations. It gives important advice on the interpretation of the Regulations. It also fills in the gaps in many areas, notably on the setting up of arrangements, the content of the obligation to inform and consult, the relationship between the new information and consultation arrangements and the existing collective legal framework. The method applied to implementation of the Directive could therefore be described as thorough and legitimate.

The new voice at work is, however, on paper not a powerful one. This is the result of regulatory choice and is evident in four ways. First, while the Guidance is a valuable instrument for all parties concerned, there are doubts about its legal status. If it has no real force, it may not be as significant. Second, the extent of the right to information and consultation will vary for employees concerned. The fact that agreements (whether prior to ICER or negotiated under ICER) will regulate the type of information disclosed and how consultation is conducted is not negative in itself, but the absence of minimum standards on which negotiation can build may dilute the right. There is therefore no common denominator for information and consultation. Flexibility became synonymous with variety at the expense of minimum rights. Third, ICER should have permitted the development of a new collective voice at work, allowing employees to make a new and meaningful contribution to decision-making via their representatives. This could have been done through trade unions, most notably because of their experience and organisation. In situations without a strong union presence, elected representatives would have provided an alternative route. This option would still have given unions the chance to increase their presence in workplaces. Instead, trade unions have not been given any explicit role. Representatives of employees are to be appointed or elected. Direct participation by employees is also permitted. As a result, the voice of the employees may not be as forceful or
as positive in terms of its contribution to decision-making. Finally, the enforcement mechanisms do not constitute a powerful means for employees considering their complexities and weaknesses. There is therefore an ineluctable feeling of disappointment as the new voice risks being sacrificed on the altar of flexibility and uncertainty, leaving all stakeholders disenchanted with the process.