

ONLINE CHAPTER A

INFORMATION, CONSULTATION, PARTICIPATION, AND INSOLVENCY

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A.1 AN INTRODUCTION TO PARTICIPATION, INFORMATION, CONSULTATION, AND INSOLVENCY

The purpose of this chapter is to assess the extent to which employment law facilitates worker participation in corporate decision-making and confers rights upon workers to be informed and consulted about developments in their employer's business and strategic operations, at both a cross-border and national level. The chapter will first assess the arguments advanced in favour of worker participation, before going on to note how the scope of application of workers' rights of participation, information, and consultation has expanded over the years—partially in response to the decline in collective bargaining and the power of the trade unions in the UK over the past 40 years or so. Finally, the rights of employees where their employer becomes **insolvent** or enters into an **insolvency process** will be examined. The analysis throughout the chapter will be conducted within the context of the requirements imposed on the UK by

the Recast European Works Councils Directive ('Recast EWC Directive'),¹ the Information and Consultation of Employees Directive ('I&C Directive'),² and the Insolvency Directive.³

A.1.1 Contextual analysis

Lying at the heart of worker representational participation is a desire on the part of the forces of labour to gain some measure of control over the managerial decision-making process:

S. Simitis, 'Workers' Participation in the Enterprise-Transcending Company Law?' (1975) 38 *Modern Law Review* 1, 6

All participation models have, notwithstanding their differences, a common task: they are means of control. . . Thus far workers' representation is always an attempted access to a decision-making process still considered by most laws as the exclusive domain of the entrepreneur.

A diverse range of worker representational participation models are encountered across the Member States of the EU. They can be analysed along structural and functional lines:

M. Biagi and M. Tiraboschi 'Forms of Employee Representational Participation' in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 8th edition (The Hague, Kluwer, 2004) 433, 434–435

Workplace representational participation can be analysed from two perspectives, structural and functional. An analysis from the structural perspective focuses upon the structures that operate in the workplace on behalf of the employees, by examining how they are composed and how their members are appointed, whereas a functional analysis focuses upon the type of activity carried out. The analysis will examine the following categories:

- a) bodies directly linked with the trade unions, either because they are associates (composed of trade union members) or because the selection of a trade union results from an electoral procedure. In this case, there is a **single-channel system of representation**;
- b) bodies which, although in some way linked or affiliated to trade union organisations, operate within a **dual channel system of representation**;
- c) unitary bodies, i.e. elected by unionised as well as non-unionised workers, and established by law, collective bargaining or practice, at least formally independent of trade unions, operating in the context of a dual-channel

¹ 2009/38/EC (OJ [2009] L122/28).

² 2002/14/EC (OJ [2002] L80/29).

³ 2008/94/EC (OJ [2008] L283/36).

- system; and
- d) joint bodies, for the most part not strongly regulated by law, with a combined presence of management and employee representatives.

Regarding the functions, i.e. the type of activity carried out, the analysis will proceed along the following lines:

- a) the right to share information;
- b) the right to be consulted;
- c) the right to co-determination;
- d) collective bargaining; and
- e) industrial conflict.

If we turn first to a structural analysis, the traditional approach in the UK was for worker representation to be arranged around the single channel model. However, commentators such as McGaughey have argued that this traditional narrative overlooks some of the nuances in the British position:

P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121, 121–122

Worker representation took place primarily through the voluntary recognition by employers of unions for the purposes of collective bargaining over terms and conditions of employment. Because there were no significant competing functions of worker representation, this was known as the single channel model. This model had two key characteristics. First, worker representation was not organised around a representation rule laid down in law; there was instead a social practice of worker representation. Second, the recognised union had a monopoly on worker representation. The UK did not, unlike many of its fellow Member States in the EU [such as Germany], develop a dual-channel model, in which worker representation functions were differentiated and then divided between separate worker representation structures, such as unions, on the one hand, and a works council, on the other. Nor did the UK, again unlike some other EU Member States [such as Germany], develop a third channel of worker representation by placing worker representatives on the boards of companies.⁴

⁴ Writer's annotations appear in square brackets throughout this chapter. The Bullock report on Industrial Democracy in 1977 (*Report of the committee of inquiry on industrial democracy* (1977) (Cmnd 6707)) recommended the adoption of a $2x + y$ formula, whereby equal numbers of employee and shareholder representatives would sit on the board of directors of large companies, with a third class of representatives to be co-opted onto the board by the mutual agreement of the employee and shareholder representatives. The theory was that this would serve to instill industrial harmony. However, commentators were not convinced (see O. Kahn-Freund, 'Industrial Democracy' (1977) 6 *Industrial Law Journal* 65 and P. Davies and Lord Wedderburn, 'The Land of Industrial Democracy' (1977) 6 *Industrial Law Journal* 197) and ultimately, the proposals were ditched when a Conservative Government was elected in the Spring of 1979, on which, see D. Sandbrook, *Seasons in the Sun—The Battle for Britain, 1974–1979* (London, Penguin Books, 2013) 319 and M. Hall and J. Purcell, *Consultation at Work* (Oxford, OUP, 2012) 68–70.

E. McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel'' (2018) 47 *Industrial Law Journal* 76, 76–106

The 'single channel' is a familiar narrative in UK labour law. It says that next to collective bargaining 'there were no significant competing functions' of worker representation. A 'second' channel of work councils, and a 'third' channel of votes for boards of directors did not exist because there were 'deep-rooted adversarial conceptions' in collective bargaining, which idealised an 'adversarial rather than a constitutional' conception of company law. This narrative had divided politicians and unions, because some said trade unions should remain the 'single channel', for boards of public bodies, on boards of large companies, or in other work councils. Today it is clear, binding rights to vote on specific issues and consultative work councils are spreading, and general proposals for worker votes for company boards have re-entered mainstream debate. But also, the view that Britain has always had an 'adversarial' and 'single channel' system is not so simple... history cautions against overplaying a single channel narrative. Through the 20th century votes at work operated on the ports, in gas, steel, post and buses, spanning private and public enterprises. The view that more codetermination has not yet emerged because of a commitment to an adversarial model of companies also seems overstated... The question remaining is, in light of the rich history of experiment and debate, are there any significant barriers to a coherent structure for votes at work in Britain?.. history shows there was a (supposedly) 'pro-union' argument against votes at work: that it might spell the death of trade unions, either because unionists get into bed with management, or codetermination would operate as a replacement for collective bargaining. These old speculations were always doubtful, because votes at work were themselves a collective bargaining objective: not a substitute but a complement. As general workplace participation laws spread across developed democratic countries, it seems increasingly likely that the labour movement will keep pushing [sic] pushing for collective agreements, and legal codification, to enshrine the right to vote in enterprise constitutions. This is technically simple. A percentage of employee votes can be reserved in annual general meetings, a minimum number of employee representatives can be reserved on a board of directors, or both. In the 21st century, the old voluntarist myth is dead, and the arguments for shareholder monopolisation and the 'single channel' have diminished. People want 'democracy and social justice.'

Pursuant to the single channel model, trade unions in the UK were afforded a monopoly in representing workers. Such representation was traditionally centred around functions (d) and (e) in the excerpt from Biagi and Tiraboschi, i.e. in relation to collective

bargaining with employers and employers' associations and industrial conflict.⁵ The UK had no domestic culture of worker representation in respect of functions (a), (b), and (c), i.e. rights to information, consultation, and co-determination. However, from the 1970s and 1980s, legislation at the domestic⁶ and European level began to recognize the information and consultation functions. In the domestic sphere, obligations were imposed on employers to consult with worker representatives in the context of occupational pensions,⁷ health and safety,⁸ and the training of workers.⁹ As for European developments,¹⁰ the effect of the identification by the EU of an information and consultation function in the original Collective Redundancies Directive 75/129 of 17 February 1975¹¹ ('the Original Collective Redundancies Directive') and the original Acquired Rights Directive 77/187/EEC of 14 February 1977¹² was to usher in a more general framework for employee representation and participation through (1) a form of pan-European information and consultation in the guise of the European Works Councils and (2) the exchange of information and consultation between management and workers' representatives at national level.

European Commission Consultation Document, June 1997, quoted in European Works Council Bulletin 10 (July/August 1997) 5

The absence of a general framework for information and consultation nationally results in the provisions of the [original Collective Redundancies Directive and the original Acquired Rights Directive] having a limited impact. The preventive approach on which they are based is difficult to implement in the context of information and consultation procedures that are isolated, fragmented and limited to cases of imminent collective redundancies and transfers of undertakings, and would be consolidated by the definition of more general and permanent information and consultation procedures.

Therefore, when the Original Collective Redundancies Directive was transposed into UK law by Part IV of the Employment Protection Act 1975 ('EPA 1975'), it was described as one which sought to promote collective procedures of consultation in a

⁵ See Chapters C and D on the Online Resource Centre.

⁶ See the discussion in P. Davies and M. Freedland, *Labour Law: Text and Materials*, 2nd edition (London, Weidenfeld and Nicholson, 1984) 230–237 and Lord Wedderburn, *The Worker and the Law: Text and Materials*, 3rd edition (London, Penguin Books, 1986) 291–294 and 303–306.

⁷ See the Occupational Pension (Contracting Out) Regulations 1996 (SI 1996/1172) and the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349).

⁸ See section 2(4) and (6) of the Health and Safety at Work etc. Act 1974 and regulation 4A of the Safety Representatives and Safety Committees Regulations 1977 (SI 1977/500).

⁹ See section 70B of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRCA 1992').

¹⁰ See C. Barnard, *EU Employment Law*, 4th edition (Oxford, OUP, 2012) 658–663.

¹¹ [1975] OJ L48/29. This was replaced by the Collective Redundancies Directive 98/59/EC (OJ [1998] L225/16) ('the Collective Redundancies Directive').

¹² OJ 1977 L 61/26. This was superseded by the Acquired Rights Directive 2001/23/EC of 12 March 2001 (OJ [2001] L82/16) ('the ARD').

way which amounted to ‘a completely new departure in British labour legislation’.¹³ The same could be said of the information and consultation obligations contained in the Transfer of Undertakings (Protection of Employment) Regulations 1981 (‘TUPE 1981’).¹⁴ The impact of these ad hoc issue-specific information and consultation requirements on the single channel model of worker representation was ultimately revealed in the decision of the European Court of Justice (‘ECJ’ or “CJEU”) in *Commission v UK*.¹⁵ By providing in the EPA 1975 and TUPE 1981 that the worker representation function was to be accorded to trade unions in line with their historical monopoly, the ECJ held that the UK was in breach of its duty to ensure that effective information and consultation could take place.¹⁶ The union monopoly on worker representation was problematic in the context of employers who refused to recognize trade unions since the UK legislation omitted machinery which would enable workers employed in non-unionized workplaces to appoint or elect their own non-union worker representatives. The UK Government reformed the law to comply with the ECJ’s ruling by bringing into force legislation which provided machinery for the election and appointment of employee representatives where there are no trade union representatives.¹⁷ This served to undercut the role and power of the trade unions in the context of workplace representational participation, which is a feature lamented by the union movement and explains its ambivalence towards mandatory consultation.¹⁸ The indecisive attitude of the trade unions to alternative and additional mechanisms for workplace representational participation is perhaps paradoxical in light of recent studies which show that their strength and power is generally speaking not diminished by the presence of such separate channels of representation: as such, the theory that trade unions would be “marginalized”¹⁹ has not been borne out by the evidence. In fact, the studies suggest that the presence of non-union workforce-wide representation has had the effect of injecting a shot in the

¹³ M. R. Freedland, ‘Employment Protection: Redundancy Procedures and the EEC’ (1976) 5 *Industrial Law Journal* 24, 34.

¹⁴ SI 1981/1794. This was superseded by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (‘TUPE’).

¹⁵ [1994] ECR I-2479; [1994] ICR 664, Case C-383/92.

¹⁶ See P. Davies, ‘A Challenge to Single Channel’ (1994) 23 *Industrial Law Journal* 272; M. Hall, ‘Beyond Recognition? Employee Representation and EU Law’ (1996) 25 *Industrial Law Journal* 15; and M. Weiss, ‘The Future of Workers’ Participation in the EU’ in C. Barnard, S. Deakin, and G. S. Morris (eds.), *Future of Labour Law. Liber Amicorum Sir Bob Hepple* (Oxford, Hart Publishing, 2004) 232.

¹⁷ See the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995 (SI 1995/2587). The relevant provisions are now found in TULRCA 1992 sections 188–198 and the Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246).

¹⁸ For an evaluation of this phenomenon in the context of the interaction between trade unions and works councils, as well as how this trade union suspicion to alternative methods of workplace participational representation can be combatted, see J. Rogers and W. Streeck, ‘The Study of Works Councils: Concepts and Problems’ in J. Rogers and W. Streeck (eds.), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (Chicago, University of Chicago Press, 1995) 11–16 and P. Davies and C. Kilpatrick, ‘UK Worker Representation After Single Channel’ (2004) 33 *Industrial Law Journal* 121.

¹⁹ J. Kelly, ‘Works Councils: Union Advance or Marginalization?’ in A. McColgan (ed.), *The Future of Labour Law* (London, Cassell, 1996) 46.

arm for the status and position of the trade unions and their representatives in such workplaces.²⁰

The significance afforded to consultation with workers' representatives at the EU level is demonstrated by Article 27 of the EU Charter of Fundamental Rights:²¹

Article 27 Workers' right to information and consultation within the undertaking

Workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Community law and national laws and practices.

What is intended by a right to information, i.e. function (a) in the extract from Biagi and Tiraboschi, poses few problems in terms of our understanding. Essentially, it entails the provision of information by management to workers or their representatives and is 'the least intense form of worker involvement [and] unilateral'.²² However, the respective distinctions between 'consultation', 'co-determination', and 'collective bargaining', i.e. functions (b), (c), and (d) demand more careful consideration. The expression 'co-determination' is defined by the European Industrial Relations Observatory in the following manner:

Extract from <http://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/co-determination>²³

Co-determination is a structure of decision-making within the enterprise whereby employees and their representatives exert influence on decisions, often at a senior level and at a relatively early stage of formulation. Co-determination may operate in parallel to, and complement, other industrial relations mechanisms of employee representation and influence. It does not substitute for other mechanisms of employee influence on management decision-making, such as collective bargaining. Co-determination is rooted in the industrial relations traditions of a number of EU Member States. For example, in Germany there are two distinct levels of co-determination: at establishment level via the works council, and at enterprise level, on the supervisory board of companies.

Therefore, 'co-determination' is a formalized system of decision-making which includes worker representative input and is embodied in the works council. This is a form of worker representational participation which is alien to the British system of industrial

²⁰ M. Hall, J. Purcell, M. Terry, S. Hutchinson and J. Parker, 'Trade Union Approaches towards the ICE Regulations: Defensive Realism or Missed Opportunity?' (2015) 53 *British Journal of Industrial Relations* 350, 370-371; For an assessment of the historical evidence for union hostility, see E. McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel'' (2018) 47 *Industrial Law Journal* 76, 93-103 and 106.

²¹ Pronounced on 7 December 2000 in Nice (OJ 2000 C 364, p.1) and a second time in Strasbourg on 12 December 2007 (OJ 2007 C 303, 1) and also published in OJ (2010) C 83/389.

²² C. Barnard, *EU Employment Law*, 4th edition (Oxford, OUP, 2012) 660.

²³ European Industrial Relations Observatory, last visited 1 April 2018.

relations.²⁴ For that reason, from the British perspective, the principal differentiation to be made is between ‘consultation’ and ‘collective bargaining’. The variances between these worker representation functions are expertly captured in the following extract from Davies and Freedland:

P. Davies and M. Freedland, *Labour Law: Text and Materials*, 2nd edition (London, Weidenfeld and Nicholson, 1984) 230

The essence of the distinction between consultation and negotiation (or bargaining) is that in the former case the employer is committed only to receiving representations from those he consults and making reasoned replies to them, whilst in the latter he is committed to dealing with the representatives with the aim of reaching agreement with them (though such agreement may not in fact be reached). In consultation the right to decide always remains formally with the employer; in negotiation the aim is a joint decision and the employer recovers the right to decide unilaterally only when negotiations have failed. Consequently, negotiation is a greater restriction upon managerial prerogative than consultation and hence has always been the objective of trade-union activity.²⁵

We evaluate the benefits and demerits of collective bargaining in Chapter C on the Online Resource Centre. But what are the advantages to be derived from the pursuit of consultation with worker representatives? Hall and Purcell identify three benefits:

M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 23–24

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... three dominant reasons for embarking on consultation can be identified. Employers tend to emphasize the effect on organizational and employee *efficiency* [which] can be positive. . .²⁶ Where trade unions and labour relations analysts on the political left have promoted consultation, they have done so often for reasons of *power-sharing*—a means of reducing or curbing the arbitrary power of employers to take decisions unilaterally

²⁴ The paradigm is the works council in Germany.

²⁵ See also M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 2–5.

²⁶ For a comprehensive assessment of the ‘efficiency’ benefits of consultation, works councils and other forms of workplace representational participation in the sense of the extent to which they drive down the costs of production of the employer-firm, or increase productivity, see P. Davies, ‘Efficiency Arguments for the Collective Representation of Workers: A Sketch’ in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl, *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015) 367, 369-371, 379 and 393-395, M. Moore, ‘Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance’ (2014) 43 *Industrial Law Journal* 398, 419-421; M. Moore and A. Rebérioux, ‘Revitalizing the Institutional Roots of Anglo-American Corporate Governance’ (2011) 40 *Economy and Society* 84, 102-104; and S. Mueller and J. Stegmaier, ‘The Dynamic Effects of Works Councils on Labour Productivity: First Evidence From Panel Data’ (2017) 55 *British Journal of Industrial Relations* 372.

without accounting for the interests of employees. Of course, a justification for this can be that it will result in better decisions and it may be more acceptable to promote power-sharing under the guise of efficiency. The third justification, more often, but not exclusively, used by governments, is that consultation is a *right* that employees should have in the modern world of employment; a right to be told and a right to express a view and for that opinion to be treated seriously. It is often portrayed, especially at the EU (European Union) level, as a ‘fundamental’ right implying it is indivisible and not something that can be qualified by circumstances. It is one thing to proclaim consultation as a fundamental right but quite another to give effect to that right through enforceable legislation. Yet again the justification for this right to information and consultation is often dressed up, or indeed camouflaged, by reference to the effect of efficiency especially in circumstances of major organizational change where to consult is to manage consent.

Other justifications are set out in the following extract from Weiss, which highlights the beneficial effects of worker voice on the enterprise and the economy as a whole:

M. Weiss, ‘Re-Inventing Labour Law’ in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 50–51

If the employee is not to be treated as a mere object it is also necessary that the democratic structure of modern society is reflected in the employment relationship. Therefore, it is necessary that the employee is not merely an object of management's decision making but participating—either directly or by representatives—in the decision-making process. Employee involvement in management's decision making is becoming more and more important. Even if its driving force is the idea of workplace democracy it should be seen that employees' involvement in management's decision making has also advantages for the respective companies and for the economy as a whole. The legitimacy of management's decision making is increased, implementation of decisions is facilitated and conflicts are absorbed. The permanent dialogue between management and employees or their representatives helps to build up trust and confidence on both sides. The need to justify the planned decisions towards employees or their representatives evidently leads to more careful and, therefore, better decision making. Since employees and their representatives tend to favour long-term strategies, the stability of the companies is supported. There is lots of empirical evidence for these positive effects.

Of the justifications in favour of consultation advanced in these extracts, its purported positive effects on economic efficiency are by far the most significant in policy circles. It is argued that efficiency gains²⁷ manifest themselves in a myriad of ways, including the

²⁷ For a discussion of the economic, corporate governance, productivity and other benefits of workplace participation generally (as opposed to mere information and consultation, see E. McGaughey, ‘Can Behavioural Psychology Inform Labour Law?’ in A. Ludlow and A. Blackham (eds.), *New Frontiers in Empirical Labour Law Research* (Oxford, Hart Publishing, 2015) 75, 87-90 and M. Gelter, ‘Employee Participation in Corporate Governance

access to top management afforded to employee representatives, improvements in the quality of managerial decisions,²⁸ the maintenance of trust in the workplace,²⁹ contribution to the management of change, promotion of participative management style, provision of an effective means of handling grievances and complaints, and improvements in employee engagement and commitment.³⁰ To these attributes, one might also add lower staff turnover rates, higher staff retention rates, increased productivity,³¹ and the achievement of higher levels of performance.³² Consider the following Hypothetical A:

Hypothetical A

Hugh Pearce, William Tomlinson, Jane Grant, Paul Stevens, Lee Ford, and Josephine Barr are employee representatives who have been elected by the entire Welsh workforce of Danny's Demolishers Plc ('DD'). They have been appointed for the purposes of engaging in information-sharing and consultation with the management of DD in accordance with DD's legal obligations. When DD consulted the employee representatives about its provisional decision to acquire the entire business and assets of Welsh Demolitions Plc, one of DD's main competitors in the demolition sector in Wales, there was some disquiet amongst the wider workforce of DD in Wales and the employee representatives. The workers were anxious about the wider implications of the takeover for their jobs as it was thought that some rationalization would be inevitable.

However, during the consultation process, DD intimated that it was keen to initiate greater integration of the amalgamated workforce of DD and Welsh Demolitions Plc. DD stressed that its goal was to consolidate the different cultures of the two

and Corporate Social Responsibility' in L Sacconi and G. Degli Antoni (eds.), *Handbook on the Economics of Social Responsibility: Individuals, Corporations and Institutions* (Cheltenham, UK, Edward Elgar, 2018) (forthcoming).

²⁸ For a theoretical account of the efficiencies generated by improved quality in decision-making, see R. B. Freeman and E. P. Lazear, 'An Economic Analysis of Works Councils' in J. Rogers and W. Streeck (eds.), *Works Councils* (Chicago and London, University of Chicago Press, 1995). Moreover, the Workplace Employment Relations Study 2011 identified that consultation on redundancies led to changed and improved decisions in 40% of workplaces: see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/336651/bis-14-1008-WERS-first-findings-report-fourth-edition-july-2014.pdf (last visited 1 April 2018)) at page 20.

²⁹ See TUC, *Collective Redundancy Consultation, 2012* at <https://www.tuc.org.uk/sites/default/files/tucfiles/callforevidencecollectiveredundancyconsultation.pdf> (last visited 1 April 2018) at page 7.

³⁰ See the discussion in M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 26–36.

³¹ See A. Bryson, A. Charlwood and J. Forth, 'Worker Voice, Managerial Response and Labour Productivity: An Empirical Investigation' (2006) 37 *Industrial Relations Journal* 438; S. Mueller, 'Works Councils and Labour Productivity: Looking Beyond the Mean' (2015) 53 *British Journal of Industrial Relations* 308; and S. Mueller and J. Stegmaier, 'The Dynamic Effects of Works Councils on Labour Productivity: First Evidence From Panel Data' (2017) 55 *British Journal of Industrial Relations* 372.

³² See DTI, *Fairness at Work* (Cm 3968, 1998) at p. 12, available at <http://webarchive.nationalarchives.gov.uk/+/http://www.berr.gov.uk/files/file24436.pdf> (last visited 1 April 2018) and D. MacLeod and N. Clarke, 'Engaging for success: enhancing performance through employee engagement—a report to Government' (July 2009, BIS/Pub 8859/07/09NP. URN09/1075) available at <http://engageforsuccess.org/wp-content/uploads/2015/08/file52215.pdf> (last visited 1 April 2018).

organizations, whilst keeping the staff motivated. Therefore, on the suggestion of the employee representatives, DD agreed to put in place new management development programmes, flexible rotas and working practices, enhanced development and learning opportunities, new employee recognition schemes, and performance management systems.

The outcome of these initiatives was an increase in the staff retention rate and more senior positions being filled from within, which has also reduced costs for recruitment. Moreover, the average working week has been reduced. These changes have led to steadily improving scores in employee satisfaction surveys, and sales and profit targets at each of DD's depots in Wales have been achieved for the last two years.³³

However, legally mandated information and consultation is subject to attacks from both the left and the right. On the left, the trade unions have not embraced legislation mandating compulsory information and consultation as warmly as one might expect.³⁴ Looked at in light of the decline in trade union membership and coverage in collective bargaining, one would think that a legislative focus on mandatory consultation would be welcomed by unions as one means of filling the patent representation gap in UK workplaces.³⁵ Indeed, the appointment of worker representatives for the purposes of consultation could be seen as a launch-pad to a higher degree of union recognition and formalized systems of collective bargaining which is the 'apex of worker representation mechanisms',³⁶ and, as such, 'promoting higher levels of union membership through the creation of worker representation mechanisms which incentivize and legitimate union membership'.³⁷ However, trade unions are suspicious of mandatory information and consultations rights, since there is the distinct feeling that they will always be inferior alternatives to the collective bargaining function and outflank the attempts of unions to colonize worker representational participation.

Lord McCarthy 'Representative Consultations with Specified Employees—or the Future of Rung Two' in H. Collins, P. Davies, and R. Rideout, *Legal Regulation of the Employment Relation* (London, Kluwer Law International, 2000) 532

³³ This hypothetical is largely based on D. MacLeod and N. Clarke, 'Engaging for success: enhancing performance through employee engagement—a report to Government' (July 2009, BIS/Pub 8859/07/09NP. URN09/1075) available at <http://engageforsuccess.org/wp-content/uploads/2015/08/file52215.pdf> (last visited 1 April 2018) 49.

³⁴ For explanations, see M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 5, 6–7, 9, and 21. For a contrary view, see E. McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the 'Single Channel'' (2018) 47 *Industrial Law Journal* 76, 93–103 and 106.

³⁵ See R. Welch and S. Williams, 'The Information & Consultation Regulations—Much ado about nothing?' (2005) 36 *Cambrian Law Review* 29.

³⁶ P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121, 129.

³⁷ P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121, 128. However, for the reasons why information-sharing and consultation rights have been unable to act as a catalyst for the promotion of collective bargaining, see P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121, 150.

... [employee] “reps” do not usually have to be trade unionists. They are not normally allowed to discuss, let alone negotiate, such matters as basic terms and conditions. Moreover, if trade unionists do get themselves elected as [employee] reps they are expected to represent the views and needs of non-unionists as well as trade unionists. British unions have traditionally feared this aspect of [employee] representation. Too often it has looked to them like a management device designed to undermine the value and relative worth of union membership *per se*. Without wanting to confine the benefits they negotiated to members only, they have wished to avoid situations in which non-members appeared to be able to enjoy the services available to members without the need to pay union dues. For these and other reasons most committed trade unionists still tend to take the view that [worker] representation is not to be compared with a properly constituted and recognised [process of collective bargaining]. In this way the jargon of Congress House rightly reflects the continuing values of British unions. Systems of representation are prized by the extent to which they make possible the joint regulation of such basic matters as pay, working hours and the content of jobs [, i.e. collective bargaining].

Another deficiency of consultation from the union perspective is that it does not necessarily result in the reaching of any agreement. This can be contrasted with collective bargaining and negotiation between trade unions and employers or employers’ associations. In the case of collective bargaining, trade unions can bring to bear their bargaining power to the negotiation table with employers and employers’ associations, backed up with the credible threat of lawful industrial action if the latter fail to engage meaningfully in the process or make concrete legal commitments but then dishonour them.

Meanwhile, on the right, there is the charge that mandatory consultation imposes unnecessary burdens on businesses. For example, costs are imposed on enterprises in establishing formalized information-sharing and consultation procedures. There are also the on-going expenses in maintaining these processes, and the lost management time involved in joint engagement. Another critique of consultation centres on the extent to which it enables employee representatives to extract concessions from employers in the guise of rents above the market rate, i.e. above what the market would otherwise bear. Furthermore, there is the argument that consultation fails to adhere to reality inasmuch as employee representatives engaged in information-sharing and consultation are wholly unequipped to understand the motivations and needs of the employer’s business.

F. A. Hayek, *The Constitution of Liberty* (London and New York, Routledge Classics, 2006) 75–76

An entirely different matter. . . is the claim of unions to participation in the conduct of business. Under the name of “industrial democracy”. . . this has acquired considerable

popularity, especially in Germany and to a lesser degree in Britain. It represents a curious recrudescence of the ideas of the syndicalist branch of nineteenth-century socialism, the least-thought-out and most impractical form of that doctrine. Though these ideas have a superficial appeal, they reveal inherent contradictions when examined. A plant or industry cannot be conducted in the interest of some permanent distinct body of workers if it is at the same time to serve the interests of consumers. Moreover, effective participation in the direction of an enterprise is a full-time job, and anybody so engaged soon ceases to have the outlook and interest of an employee. It is not only from the point of view of the employers, therefore, that such a plan should be rejected; there are very good reasons why in the United States union leaders have emphatically refused to assume any responsibility in the conduct of business.

Reflection Points

1. In an influential monograph written in 1997, commenting on the incremental diminution in the role of collective bargaining and trade union penetration in UK and US private sector workplaces, Brian Towers identified a growing 'representation gap'. In your opinion, is the European focus on workplace information-sharing and consultation the best way of responding to this vacuum? Give reasons for your answer.
2. Do you prefer the single or dual channel models of workplace representational participation? Give reasons for your answer.

Additional reading on participation, information, and consultation

1. S. Simitis, 'Workers' Participation in the Enterprise-Transcending Company Law?' (1975) 38 *Modern Law Review* 1.
2. P. Davies and M. Freedland, *Labour Law: Text and Materials*, 2nd edition (London, Weidenfeld and Nicholson, 1984) 230–237.
3. Lord Wedderburn, *The Worker and the Law: Text and Materials*, 3rd edition (London, Penguin Books, 1986) 291–294 and 303–306.
4. P. Davies, 'A Challenge to Single Channel' (1994) 23 *Industrial Law Journal* 272.
5. R. B. Freeman and E. P. Lazear, 'An Economic Analysis of Works Councils' in J. Rogers and W. Streeck (eds.), *Works Councils* (Chicago and London, University of Chicago Press, 1995).
6. M. Hall, 'Beyond Recognition? Employee Representation and EU Law' (1996) 25 *Industrial Law Journal* 15.
7. B. Towers, *The Representation Gap: Change and Reform in the British and American Workplace*, (Oxford, OUP, 1997).
8. Lord McCarthy '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* (London, Kluwer Law International, 2000).
9. P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121.

10. M. Weiss, 'The Future of Workers' Participation in the EU' in C. Barnard, S. Deakin, and G. S. Morris (eds), *Future of Labour Law. Liber Amicorum Sir Bob Hepple* (Oxford, Hart Publishing, 2004) 232.
11. M. Biagi and M. Tiraboschi 'Forms of Employee Representational Participation' in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 8th edition (The Hague, Kluwer, 2004) 433.
12. R. Welch and S. Williams, 'The Information & Consultation Regulations—Much ado about nothing?' (2005) 36 *Cambrian Law Review* 29.
13. A. Bryson, A. Charlwood, and J. Forth, 'Worker Voice, Managerial Response and Labour Productivity: An Empirical Investigation' (2006) 37 *Industrial Relations Journal* 438.
14. M. Weiss, 'Re-Inventing Labour Law' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford, OUP, 2011) 43–56.
15. M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) -chapters 1 and 2.
16. C. Barnard, *EU Employment Law*, 4th edition (Oxford, OUP, 2012), -chapter 15.
17. M. Moore, 'Reconstituting Labour Market Freedom: Corporate Governance and Collective Worker Counterbalance' (2014) 43 *Industrial Law Journal* 398.
18. P. Davies, 'Efficiency Arguments for the Collective Representation of Workers: A Sketch' in A. Bogg, C. Costello, A.C.L. Davies and J. Prassl, *The Autonomy of Labour Law* (Oxford, Hart Publishing, 2015) 367.
19. E. McGaughey, 'Votes at Work in Britain: Shareholder Monopolisation and the "Single Channel"' (2018) 47 *Industrial Law Journal* 76, 93-103 and 106.

A.2 CROSS-BORDER WORKER PARTICIPATION: EUROPEAN WORKS COUNCILS

We have noted how the initial European forays into the regulation of mandatory information-sharing and consultation were all subject to defined limits and confined to certain issue-specific circumstances, e.g. collective redundancies and the transfer of businesses and undertakings. Trade unions were hostile to the introduction of European legislation providing for national information and consultation on the basis that it might serve to undermine their authority in respect of workplace representational participation. However, the transnational dimension of information and consultation was less contentious, particularly where it complemented national structures. Taking on board best practice in respect of information and consultation developed and implemented voluntarily by French and German multinational enterprises such as Nestlé and Mercedes-Benz, the EU brought into force the European Works Council Directive in 1994 ('the Original EWC Directive').³⁸ This legislation was a social measure designed to generalize the consultation function at a transnational level. The principal

³⁸ 94/45/EC (OJ [1994] L254/64). The Original EWC Directive was replaced by the Recast EWC Directive 2009/38/EC (OJ [2009] L122/28).

objectives of the Original EWC Directive were to:

- (1) enhance industrial democracy by democratizing undertakings having European-wide operations so 'that employees should be adequately involved when decisions which affected their interests were taken in another Member State';³⁹
- (2) ensure the proper functioning of the European internal market by combatting distortions in labour markets;⁴⁰ and
- (3) prevent the disparate treatment of employees in different Member States of the EU where those employees work for multinational companies.

With these aims behind the establishment of European Works Councils ('EWCs') in mind, we now turn to consider the British transposition of the Recast EWC Directive in the Transnational Information and Consultation of Employees Regulations 1999 ('TICE Regs').⁴¹

A.2.1 Introduction to the TICE Regs

The TICE Regs, which transpose the Recast EWC Directive, adopt the same degree of flexibility afforded by the latter instrument in two particular ways:

- (1) The TICE Regs are by no means prescriptive about the structure of the information-sharing and consultation function inasmuch as they fail to 'impose one view of industrial relations and labour law [and instead] allow... the traditions of each Member State, and each undertaking within the Member States, to preserve their own traditions of industrial relations'.⁴² As such, a Member State is entitled to customize many of the provisions in the Recast EWC Directive pursuant to the transposition process in order to fit in with their own system of industrial relations, e.g. in respect of the rules for the selection of the members of the 'special negotiating body' ('SNB') involved in negotiations with central management of multinational companies subject to the TICE Regs for the purposes of establishing a mutually agreed EWC.⁴³
- (2) The TICE Regs establish a default regime known as the 'subsidiary requirements' which function to create a statutory EWC (rather than a mutually agreed EWC) and are set out in the Annex to the Recast EWC Directive and the Schedule to the

³⁹ P. Lorber, 'Reviewing the European Works Councils Directive: European Progress and United Kingdom Perspective' (2004) 33 *Industrial Law Journal* 191, 192. See also C. McGlynn, 'European Works Councils: Towards Industrial Democracy' (1995) 24 *Industrial Law Journal* 78, 78 and H. Ramsey, 'Fool's Gold? European Works Councils and Workplace Democracy' (1997) 28 *Industrial Relations Journal* 314, 320.

⁴⁰ See Recital (9) to the Original EWC Directive, Recital (10) to the Recast EWC Directive and C. McGlynn, 'European Works Councils: Towards Industrial Democracy' (1995) 24 *Industrial Law Journal* 78, 78.

⁴¹ SI 1999/3323.

⁴² C. McGlynn, 'European Works Councils: Towards Industrial Democracy' (1995) 24 *Industrial Law Journal* 78, 83.

⁴³ See Article 5(2)(a) of the Recast EWC Directive and M. Carley and M. Hall, 'The Implementation of the European Works Councils Directive' (2000) 29 *Industrial Law Journal* 103, 106.

TICE Regs.⁴⁴ This default model for the establishment of a statutory EWC will only apply where:

- (a) central management and the SNB agree that it should apply;
- (b) central management refuses to commence negotiations within six months of the triggering of a valid request for the negotiation of such an agreement by management or at least 100 employees or employees' representatives; or
- (c) the SNB and central management are unable to agree on a customized EWC for information and consultation purposes within three years of such a valid request having been made.⁴⁵

The existence of this default constitution in the subsidiary requirements gives the lie to the so-called 'mandatory' nature of the transnational information-sharing and consultation obligation.

P. Davies and M. Freedland *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford, OUP, 2007) 141–142

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The other [significant feature of the Recast EWC Directive and the TICE Regs] was the transformation of the consultation rule from a mandatory rule (as it had been in the earlier Directives) into a default rule, i.e., a rule capable of being displaced by alternative arrangements agreed between the management of the company and the employee representatives or, in some cases, adopted by the employee representatives unilaterally, which arrangements might even include a decision by the employee representatives to have no special consultation arrangements at multinational level at all. Of course, the default rules (called 'subsidiary requirements' and set out in an Annex to the [Recast EWC] Directive) substantially constrain the negotiations for alternative arrangements, since each side has an incentive to come to an agreement only if, overall, the agreement is viewed as more favourable to it than the default rules. In short, this is an example of bargaining 'in the shadow of the law'. In the [Recast] EWC Directive displacement of the default rules was provided at two stages. In the period after the [Recast EWC] Directive was adopted at Community level, but before it was transposed into national law (in principle some two years later), management was given a very wide freedom by Article 13 of the [Original EWC] Directive⁴⁶ to reach an agreement 'covering the entire workforce, providing for transnational information and consultation of employees'. Article 13 [of the Original EWC Directive⁴⁷] was widely criticised for it seemed to permit the employer to reach this agreement with any interlocutor, no matter that it was not an effective representative of the employees, and the agreement

⁴⁴ See regulation 18 of the TICE Regs.

⁴⁵ See regulation 18 of the TICE Regs.

⁴⁶ See now Article 14 of the Recast EWC Directive.

⁴⁷ See now Article 14 of the Recast EWC Directive.

to contain any form of information and consultation arrangement. Nevertheless, it was highly effective in producing action and some three-quarters of the EWC agreements in force today are 'Article 13' agreements. . . [Secondly,] a group of 100 employees or their representatives may at any time trigger the process for the creation of an EWC, the first stage of which is the establishment of a . . . SNB, of representatives from each Member State in which the company has employees, whose role is to explore the possibility of agreeing with the employer an alternative to the default rules. Here, the transposing national law is required to specify how the members of the SNB are to be chosen (so that the employer no longer has a free choice of interlocutor), different selection methods thus being quite likely to operate in different Member States. Assuming the SNB does not decide to reject the whole notion of mandatory consultation under the [Recast EWC] Directive, it and the management have a wide discretion as to the arrangements they negotiate, including a consultation procedure rather than an EWC, but the minimum structural and procedural matters that must be covered in an EWC agreement are specified. These are the so-called 'Article 6' agreements.

This passage makes the point that the Recast EWC Directive and the TICE Regs do not necessarily lead to the establishment of a statutory EWC via the fall-back regime laid down in the subsidiary requirements. Instead, alternative information and consultation procedures may be set up by agreement between management and workers' representatives under Articles 14 or 6 of the Recast EWC Directive which are tailored to their needs. Indeed, there is evidence to suggest that these Article 6 arrangements struck between the SNB and management pursuant to negotiations are the norm—rather than statutory EWCs established under the subsidiary requirements in regulation 18 of, and the Schedule to, the TICE Regs. As noted by Laulom, '[p]ractice has shown that in the immense majority of cases, negotiations [between the SNB and central management] have been successful and it is extremely rare for the default provisions in the [Schedule to the TICE Regs] to apply'.⁴⁸

A.2.2 Applicability of the TICE Regs

In a layperson's terms, the TICE Regs apply to multinational companies employing at least 1,000 employees in the European Union with at least 150 employees in each of at least two Member States. Regulation 4 specifically directs that the TICE Regs are engaged in the case of a 'Community-scale undertaking' or a 'Community-scale group of undertakings', where the central management of the same is situated in the UK. The expressions 'Community-scale undertaking' and 'Community-scale group of undertakings' are in turn defined in regulation 2(1) of the TICE Regs:

Regulation 2 Interpretation

(1) In these Regulations—

⁴⁸ S. Laulom, 'The Flawed Revision of the European Works Council Directive' (2010) 39 *Industrial Law Journal* 202, 205.

“Community-scale undertaking” means an undertaking with at least 1000 employees within the Member States and at least 150 employees in each of at least two Member States;

“Community-scale group of undertakings” means a group of undertakings which has—

- (a) at least 1000 employees within the Member States,
- (b) at least two group undertakings in different Member States, and
- (c) at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State;

Where the central management of the community-scale undertaking or community-scale group of undertakings is situated in the UK, regulation 5 provides that it is responsible for the creation of the conditions and means necessary for the establishment of a EWC or an information and consultation procedure in that undertaking or undertakings.

According to regulation 9 of the TICE Regs, unless the central management does so on its own initiative,⁴⁹ the central management must initiate negotiations for the creation of an agreed EWC or statutory EWC under the subsidiary requirements once a request has been made by at least 100 employees, or employees’ representatives representing at least that number, in at least two undertakings or establishments in at least two different Member States. The requirement for 100 employees to sign such a request has been subjected to a degree of criticism from commentators.

P. Davies and C. Kilpatrick, ‘UK Worker Representation After Single Channel’ (2004) 33 *Industrial Law Journal* 191, 196

For 100 employees to sign a request across two countries relies upon some kind of connection and communication between the workforces. If no trade union exists this is a difficult hurdle to overcome. Options to rectify this situation could be to take away the transnational aspect of the request. This might encourage more negotiations and subsequently more EWCs.

Regulations 6, 7, and 18A of the TICE Regs apply for the purposes of calculating the number of employees in the undertaking or undertakings and to ensure that adequate information is provided to enable employees or employees’ representatives to ascertain whether the 100-employees threshold has been met, the size and scope of the undertaking or undertakings, and whether an establishment is part of such an undertaking or undertakings. These information provisions in regulations 7 and 18A of

⁴⁹ Regulation 9(5) of the TICE Regs.

the TICE Regs⁵⁰ are designed to address problems experienced by employees and employees' representatives in cases such as *Bofrost*,⁵¹ *Kuhne*,⁵² and *Anker*.⁵³ Here, the central management or local management of undertakings situated outside the EU refused to disclose information for the aforementioned purposes.⁵⁴ In terms of regulation 9(3) of the TICE Regs, the request made by the employees or employees' representatives must be set out in writing and sent to the central management or the local management of the undertaking or undertakings, specify the date on which it was sent and where appropriate, be made after the expiry of a two-year period, commencing on the date of a decision made by the SNB not to open negotiations with central management or to terminate negotiations with the latter. If central management considers that a request did not satisfy these requirements, it may apply to the Central Arbitration Committee ('CAC') for a declaration as to whether the request satisfied the requirement within three months of the date the request was made.⁵⁵

The next step in the process towards the creation of an agreed EWC or statutory EWC involves the establishment of an SNB. The SNB's role is to 'determin[e], with the central management, by written agreement, the scope, composition, functions, and term of office of a EWC or the arrangements for implementing an information and consultation procedure',⁵⁶ as well as inform central management, local management, and the European social partner organizations of its composition, together with the date they propose to commence negotiations. The composition of the SNB is as follows:

Regulation 12 Composition of the special negotiating body. . .

(2) In each Member State in which employees of a Community-scale undertaking or Community-scale group of undertakings are employed to work, those employees shall elect or appoint one member of the [SNB] for each 10% (or fraction of 10%) which those employees represent of the total number of employees of the Community-scale undertaking or Community-scale group of undertakings employed in those Member States. . .

The terms of regulation 12(2) suggest that the maximum number of members of the SNB is ten and its application is illustrated in Hypothetical B:

⁵⁰ See *Agyemang-Prempeh v Facilicom* [2017] IRLR 688 for the quality, nature and content of the information to be provided by the employer.

⁵¹ [2001] ECR I-2579.

⁵² [2004] ECR I-787.

⁵³ [2004] ECR I-6803.

⁵⁴ See Article 4(4) of the Recast EWC Directive, P. Lorber, 'Reviewing the European Works Councils Directive: European Progress and United Kingdom Perspective' (2004) 33 *Industrial law Journal* 191, 196 and S. Laulom, 'The Flawed Revision of the European Works Council Directive' (2010) 39 *Industrial law Journal* 202, 205.

⁵⁵ Regulation 10 of the TICE Regs.

⁵⁶ Regulation 11 of the TICE Regs.

Hypothetical B

Danny's Demolishers Plc ('DD') employs 5,000 employees in total in various EU Member States. Of those employees 2,500 are based in the UK and pursuant to an expansion into Italy, the remaining 2,500 are situated in Milan: DD recently acquired an Italian company called ZAB SpA. In such circumstances, the SNB would consist of five members from Italy and another five members from the UK.

However, it is provided in regulation 12(2) that 'a fraction of 10%' is taken into account, which means that it is possible for the SNB to consist of more than ten members.

Hypothetical C

Danny's Demolishers Plc ('DD') employs 4,000 employees in total in EU Member States, 2,000 of which are based in the UK, 1,920 in Italy, and 80 in the Netherlands. The SNB would consist of five members from the UK and Italy and one member from the Netherlands.

The requirements in respect of the selection or appointment of the UK members of the SNB are a matter deferred by the Recast EWC Directive to Member States.⁵⁷ In regulation 13 of the TICE Regs, the default position is that those UK members must be elected by a ballot of the UK employees,⁵⁸ which the central management must arrange.⁵⁹ The exception is where there already exists a consultative committee elected by a ballot of all of the UK employees, whose normal functions include or comprise the carrying out of an information and consultation function⁶⁰ as a representative of all of the UK employees, which is able to carry out its information and consultation function without interference from the UK management or from the central management.⁶¹ In such a case, the consultative committee has the right to select from its number the UK members of the SNB.⁶² The thinking here is that such a committee would have an appropriate mandate to represent the UK workforce, rendering it unnecessary to go to the trouble of organizing a ballot, although it is recognized that '[s]uch group-wide consultative committees are likely to be rare. . .'.⁶³

⁵⁷ Article 5(2)(a) of the Recast EWC Directive.

⁵⁸ Regulation 13(1) and (3) of the TICE Regs.

⁵⁹ Regulations 13(2) and 14 of the TICE Regs.

⁶⁰ Regulation 15(5) provides that this entails (a) the receiving, on behalf of all the UK employees, information which may significantly affect the interests of the UK employees, but excluding information which is relevant only to a specific aspect of the interests of the employees, such as health and safety or collective redundancies; and (b) being consulted by the UK management or the central management (where it is not also the UK management) on the information referred to in sub-paragraph (a).

⁶¹ Regulation 14 of the TICE Regs.

⁶² Regulation 15(1)(b) of the TICE Regs.

⁶³ M. Carley and M. Hall, 'The Implementation of the European Works Councils Directive' (2000) 29 *Industrial law Journal* 103, 115.

The arrangements for a ballot are prescribed as follows:

Regulation 13 Composition of the [SNB]. . .

(3) The requirements referred to in paragraph (2) are that—

(a) the ballot of the UK employees must comprise a single ballot but may instead, if the UK management so decides, comprise separate ballots of employees in such constituencies as the UK management may determine where—

(i) the number of UK members of the [SNB] to be elected is more than one, and
(ii) the UK management considers that if separate ballots were held for those constituencies, the UK members of the [SNB] to be elected would better reflect the interests of the UK employees as a whole than if a single ballot were held;

(b) a UK employee who is an employee of the Community-scale undertaking or the Community-scale group of undertakings on the day on which votes may be cast in the ballot, or if the votes may be cast on more than one day, on the first day of those days, is entitled to vote in the ballot of the UK employees;

(c) any UK employee, or UK employees' representative, who is an employee of, or an employees' representative in, the Community-scale undertaking or Community-scale group of undertakings immediately before the latest time at which a person may become a candidate in the ballot, is entitled to stand in the ballot of the UK employees as a candidate for election as a UK member of the [SNB];

(d) the UK management must, in accordance with paragraph (7), appoint an independent ballot supervisor to supervise the conduct of the ballot of the UK employees but may instead, where there are to be separate ballots, appoint more than one independent ballot supervisor in accordance with that paragraph, each of whom is to supervise such of the separate ballots as the UK management may determine, provided that each separate ballot is supervised by a supervisor;

(e) after the UK management has formulated proposals as to the arrangements for the ballot of the UK employees and before it has published the final arrangements under sub-paragraph (f) it must, so far as reasonably practicable, consult with the UK employees' representatives on the proposed arrangements for the ballot of the UK employees;

(f) the UK management must publish the final arrangements for the ballot of the UK employees in such manner as to bring them to the attention of, so far as reasonably practicable, the UK employees and the UK employees' representatives.

A.2.3 Negotiating, and the content of, an EWC agreement

Once the SNB has been established, the central management must convene a meeting with the SNB with a view to concluding an EWC agreement pursuant to regulation 17 of

the TICE Regs and also inform local management accordingly.⁶⁴ Within a reasonable time both before and after any such meeting with central management, the SNB is afforded the right to meet without central management or its representatives being present. Regulation 16(2) directs that the SNB must take decisions by a majority of the votes cast by its members and each member of the SNB is to have one vote. Moreover, the SNB may be assisted by experts of its choice, including representatives of European trade union organizations, who may attend meetings with central management in an advisory capacity.⁶⁵

Regulation 17 governs the content and scope of an EWC agreement struck between the SNB and central management and an information and consultation procedure. It is provided that the central management and the SNB are bound to negotiate in a spirit of cooperation with a view to reaching a written agreement on the establishment of an information and consultation procedure or an EWC.⁶⁶ If the parties agree to create an EWC, the agreement must cover the following:

Regulation 17 Content and scope of a [EWC] agreement and information and consultation procedure. . .

(4) . . .

- (a) the undertakings of the Community-scale group of undertakings or the establishments of the Community-scale undertaking which are covered by the agreement;
- (b) the composition of the [EWC], the number of members, the allocation of seats and the term of office of the members;
- (c) the functions and the procedure for information and consultation of the [EWC] and arrangements to link information and consultation of the [EWC] with information and consultation of national employee representation bodies;
- (d) the venue, frequency and duration of meetings of the [EWC];
- (dd) where the parties decide that it is necessary to establish a select committee, the composition of the select committee, the procedure for appointing its members, the functions and the procedural rules;
- (e) the financial and material resources to be allocated to the [EWC]; and
- (f) the date of entry into force of the agreement and its duration, the arrangements for amending or terminating the agreement, the circumstances in which the agreement is to be renegotiated including where the structure of the Community-scale undertaking or Community-scale group of undertakings changes and the procedure for renegotiation of the agreement.

However, if the SNB and central management decide to establish an information and

⁶⁴ Regulation 16(1) of the TICE Regs.

⁶⁵ Regulation 16(5) of the TICE Regs.

⁶⁶ Regulation 17(1) and (3) of the TICE Regs.

consultation procedure instead of an EWC, the agreement must lay down a method by which the information and consultation representatives are to enjoy the right to meet to discuss the information conveyed to them.⁶⁷ It should be stressed that such agreements establishing an agreed EWC or an information and consultation procedure are legally enforceable, since regulation 21(1), (1A), and (1B) of the TICE Regs enables a party to present a complaint to the CAC seeking a remedy where non-compliance is alleged.⁶⁸

A.2.4 Composition, competence, and entitlements of an EWC

In the following circumstances, regulation 18 of the TICE Regs directs that the subsidiary requirements in the schedule to the TICE Regs will apply to constitute a statutory EWC:

- (1) where the SNB and the central management agree;
- (2) where central management refuses to commence negotiations within the period of six months beginning on the date on which a valid request triggering the operation of the TICE Regs is made under regulation 9; or
- (3) the SNB and central management are unable to conclude an agreement establishing an agreed EWC or information and consultation procedure under regulation 17 within three years of such a valid request.

The composition of the statutory EWC is governed by paragraphs 2–5 of the schedule to the TICE Regs and follows the same format involved in the selection of representatives on to the SNB. Therefore, we find that it is stipulated that in each Member State in which employees of a Community-scale undertaking or Community-scale group of undertakings are employed to work, those employees are entitled to elect or appoint one member of the EWC for each 10 per cent (or fraction of 10 per cent) which those employees represent of the total number of employees of the Community-scale undertaking or Community-scale group of undertakings employed in those Member States.⁶⁹

Paragraph 7(1) of the schedule to the TICE Regs prescribes the frequency of meetings between the statutory EWC and the central management as once a year.⁷⁰ This is subject to exceptional circumstances affecting the interests of employees to a considerable extent, where an additional meeting will be required, e.g. in the case of relocations, the closure of establishments or undertakings, or collective redundancies.⁷¹ At such meetings, information is to be exchanged. Rather unhelpfully, there is no

⁶⁷ Regulation 17(5) of the TICE Regs.

⁶⁸ See the discussion in M. Carley and M. Hall, 'The Implementation of the European Works Councils Directive' (2000) 29 *Industrial Law Journal* 103, 120.

⁶⁹ Paragraph 2(2) of the schedule to the TICE Regs.

⁷⁰ Described by Hall and Purcell as a 'ritual annual meeting': M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 54.

⁷¹ Paragraph 8 of the schedule to the TICE Regs.

specific definition of ‘information’ in the TICE Regs, but it is provided in regulation 18A(3) and (5) that the content of the information, the time when, and manner in which, it is given, must be such as to enable the members of the EWC to acquaint themselves with and examine its subject matter, undertake a detailed assessment of its possible impact, and prepare for consultation. The information must also be furnished in such a manner that the EWC is able to express an opinion on the basis of the information provided to them.

Regulation 2(1) of the TICE Regs defines ‘consultation’ as an ‘exchange of views and establishment of dialogue between members of a [EWC] in the context of a [EWC], or information and consultation representatives in the context of an information and consultation procedure, and central management or any more appropriate level of management’. In accordance with Article 1(4) of the Recast EWC Directive, regulations 2(4A) and 18A(7) of, and paragraph 6 of the schedule to, the TICE Regs also clarify that information and consultation between the EWC and central management is limited to transnational matters, that is to say issues concerning (a) the community-scale undertaking or community-scale group of undertakings as a whole, or (b) at least two undertakings or establishments of the community-scale undertaking or community-scale group of undertakings situated in two different Member States. This has been criticized on the ground that it displaces the protections in the TICE Regs where a matter is purely national in scope, e.g. where a decision is taken which prejudices the future of an establishment in one of the Member States in which the community-scale undertaking is situated. Furthermore, there is an argument that the preamble to the Recast EWC Directive does not limit the role of the EWC to information and consultation on transnational issues:

S. Laulom ‘The Flawed Revision of the European Works Council Directive’ (2010) 39 *Industrial Law Journal* 202, 207

The [Recast EWC Directive] limits the EWC’s competence to transnational issues defined as those concerning all the group of undertakings or at least two undertakings in the group based in two different Member States (Article 1(4)). On this issue the [Recast EWC Directive] is a backwards step from the [Original EWC Directive] which only imposed such a limit on those EWCs created without agreement. . . However, the [Recast EWC Directive]’s preamble indicates a less restrictive approach. It provides that ‘The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States’ (Recital 16). This recital appears to include within the EWC’s competence matters affecting only one site of the group,

though this appears to be excluded by Article 1(4).⁷²

However, other commentators are more sanguine and treat the restriction of the EWC's role to transnational information and consultation as a positive feature. Such a structure is said to offer the potential for the enhancement of coordination and solidarity between pan-European and purely national information and consultation institutions.⁷³

The nature of the information to be divulged by central management to the EWC and the matters for consideration at the information and consultation meeting are governed by paragraph 7 of the schedule to the TICE Regs:

Paragraph 7 Information and consultation meetings. . .

(3) The information provided to the [EWC] shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales of the Community-scale undertaking or Community-scale group of undertakings.

(4) The information and consultation meeting shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods of production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts of such undertakings or establishments, and collective redundancies.

Two points can be made about the range of matters that the EWC must focus upon pursuant to paragraph 7:

- (1) There is a degree of overlap with the role of other information and consultation representatives, e.g. employee representatives elected or appointed under section 188 of the TULRCA 1992 for the purposes of information and consultation concerning collective redundancies⁷⁴ or regulations 13–16 of TUPE in the context of the transfer of businesses and undertakings.⁷⁵
- (2) The language employed is rather abstract in places and devoid of sufficiently precise content to act as an adequate guide to management and the EWC as to what is to be addressed at consultative meetings. The somewhat woolly nature of the topics to be considered at meetings is borne out by empirical research regarding the quality of the information and consultation in relation to EWCs, which indicates that paragraph 7 is a difficult provision to operationalize in

⁷² See also P. Lorber, 'Reviewing the European Works Councils Directive: European Progress and United Kingdom Perspective' (2004) 33 *Industrial law Journal* 191, 194.

⁷³ S. Sciarra, 'Notions of Solidarity in Times of Economic Uncertainty' (2010) 39 *Industrial law Journal* 223, 234.

⁷⁴ See Chapter 20, sections 20.4.1 and 20.4.2.

⁷⁵ See Chapter 19, section 19.4.1.

practice.

J. Waddington 'European works councils: the challenge for labour' (2011) 42 *Industrial Relations Journal* 508, 513–526

The formal purpose of EWCs is the provision of information and consultation. The absence of a definition of information, no mention of the form in which information should be provided, the lack of specificity regarding the timeliness of information and consultation and the imprecise definition of consultation in the [Recast EWC] Directive ensure that the quality of information and consultation at EWCs is contested. . . It is immediately apparent from [the empirical research we have undertaken] that most EWC representatives rate information and, in particular, consultation to be of modest quality. There is not a single agenda item on which 30 per cent of EWC representatives thought that useful information and consultation had taken place. Furthermore, several of the agenda items with their origins in the Subsidiary Requirements [in the schedule to the TICE Regs] do not even appear on the agenda of many EWCs. For example, about one-third of EWC representatives report 'employment forecasts' and 'transfers/relocation' as items that had not appeared on the agenda at their EWCs. . . Two principal points emerge from the findings presented here, each of which has implications for the manner in which labour organises vis-à-vis EWCs. First, the quality of information and consultation at EWCs is poor. At best, the majority of EWCs are institutions at which managers disclose information. . . Information and consultation practices often do not match the standards set by EWC founding agreements. In particular, EWC agreements specify agenda items that subsequently are not raised at the plenary meeting, and consultation is a minority phenomenon.

Another point of concern is the lack of specificity in the TICE Regs or the Recast EWC Directive about the timing of consultation. For instance, Regulation 18A(6) and (7) of the TICE Regs iterates that the content of the consultation, the time when, and manner in which, it takes place, must be such as to enable an EWC or information and consultation representatives to express an opinion on the basis of the information provided to them 'and, having regard to the responsibilities of management to take decisions effectively, may be taken into account by the central management or any more appropriate level of management'. From that language, it remains unclear whether there is an absolute requirement imposed on central management to consult before it takes any concrete decision in relation to any of the matters prescribed in paragraph 7 of the schedule to the TICE Regs.

S. Laulom 'The Flawed Revision of the European Works Council Directive' (2010) 39 *Industrial Law Journal* 202, 207–208

The definition of information and consultation is critical in determining when they will take place. The key question is whether they will occur before the decisions which are the object of information and consultation are made. This is a central issue which

crystallizes different views from the social partners. The [Original EWC] Directive chose not to say anything about this issue leaving the way open to these differing views. . . in stating, for example, that information and consultation must be carried out ‘without calling into question the ability of undertakings to adapt’ (Recital 14) or that information must be provided ‘without slowing down the decision-making process in the undertaking’ (recital 22), the [Recast EWC D]irective sows some seeds of doubt about the timing of information and consultation. Nonetheless, the emphasis placed on the need to implement information and consultation so as to ‘ensure their effectiveness’ and to ensure the *effet utile* of the provisions of the [Recast EWC D]irective makes it possible to conclude that information and consultation must occur before the relevant decisions are taken as not to do so would be to deprive information and consultation of its *effet utile*. . .⁷⁶

As for the effectiveness and number of EWCs, Hall and Purcell offer the following observations:

M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 53–93

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The extensive body of research into EWCs indicates that their role and influence vary considerably between companies. Practice ranges from ‘symbolic’ EWCs whose activity is largely confined to a ritual annual meeting, through more active bodies involving ongoing networking between employee representatives and regular liaison with management, to those (still relatively few) that exert a measure of influence over management decisions or even engage in the negotiation of agreements or joint texts with management. . . it is still the case that, more than fifteen years after the implementation date of the [Original EWC D]irective, EWCs have been established in only a minority (38 per cent) of all multinationals covered by the legislation. The proportion of UK-based multinationals with EWCs is about the same at 39 per cent. Hall and Terry expected that the take-up rate of information and consultation arrangements under the [Information and Consultation R]egulations was likely to be ‘significantly lower than for EWCs, which have been established in large enterprises, in the great majority of cases with an active trade union presence to articulate and develop the rights available’.⁷⁷

A.2.5 Enforcement

The SNB, or if none exists, an employee, employees’ representative, or person who was

⁷⁶ See also P. Lorber, ‘Reviewing the European Works Councils Directive: European Progress and United Kingdom Perspective’ (2004) 33 *Industrial Law Journal* 191, 193–194.

⁷⁷ See also M. Weiss, ‘The Future of Workers’ Participation in the EU’ in C. Barnard, S. Deakin, and G. S. Morris (eds), *Future of Labour Law. Liber Amicorum Sir Bob Hepple* (Oxford, Hart Publishing, 2004) 236–238.

previously a member of the SNB (if one existed previously)—referred to as a ‘relevant applicant’—may present a complaint to the CAC in terms of regulation 20(1) and (3) of the TICE Regs. Such a complaint will narrate the following:

- that such a ‘relevant applicant’ considers that the SNB and central management have reached agreement on the establishment of a EWC or an information and consultation procedure; or
- that the Subsidiary Requirements in the schedule to the TICE Regs apply pursuant to regulation 18; and
- that, because of a failure of the central management, the EWC or an information and consultation procedure has not been established at all, or has not been established fully in accordance with the terms of the agreement under regulation 17 or, as the case may be, in accordance with the provisions of the Subsidiary Requirements in the schedule to the TICE Regs.

If the CAC finds the complaint to be well-founded, it must make a decision to that effect and may make an order requiring the central management to take such steps as are necessary to establish the EWC or an information and consultation procedure in accordance with the terms of the agreement reached under regulation 17 of the TICE Regs, or the Subsidiary Requirements in the schedule to the TICE Regs.⁷⁸ Any order made by the CAC must set out the steps which the central management must take, the date of the failure of the central management, and the period for compliance with the order.⁷⁹ The relevant applicant has a period of three months from the date of the CAC’s decision to apply for a penalty notice to be issued, whereupon the CAC must issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure.⁸⁰ Regulation 22(2) directs that the level of such a penalty notice may not exceed £100,000. It should be stressed that this financial penalty must be paid to the UK Treasury, rather than the ‘relevant applicant’.

A relevant applicant may also present a complaint to the CAC where an EWC or information and consultation procedure has been established under regulation 17 of the TICE Regs or a statutory EWC has been set up in accordance with the Subsidiary Requirements in the schedule to the TICE Regs.⁸¹ Such a complaint applies, however, where the relevant applicant considers that, because of the failure of a defaulter, there has been *non-compliance* with:

- (1) the terms of the agreement struck under regulation 17;
- (2) the Subsidiary Requirements; or

⁷⁸ Regulation 20(4) of the TICE Regs.

⁷⁹ Regulation 20(6) of the TICE Regs.

⁸⁰ Regulation 20(7) and (7A) of the TICE Regs.

⁸¹ Regulation 21(1) of the TICE Regs.

(3) the requirements to produce information under regulation 18A of the TICE Regs.⁸²

Such a complaint must be brought before the CAC within a period of six months beginning with the date of the alleged failure or non-compliance.⁸³ Once again, if the CAC finds the complaint to be well-founded, it must make a decision to that effect and may make an order specifying the steps which the defaulter is required to take to comply with the agreement concluded under regulation 17 or the Subsidiary Requirements, the date of the failure and the period for compliance.⁸⁴ On an application within three months of the CAC's decision, the relevant applicant may apply for a penalty notice to be issued, whereupon the CAC must issue a written penalty notice to the central management requiring it to pay a penalty to the Secretary of State in respect of the failure.⁸⁵

There are parallel provisions for a relevant applicant to present a complaint to the CAC where it is alleged that there have been various failures on the part of central management.⁸⁶ These operate in a similar fashion to the enforcement mechanisms in place under:

- regulation 20 of the TICE Regs in connection with a failure on the part of central management to establish an EWC, statutory EWC or information and consultation procedure; and
- regulation 21 of the TICE Regs relating to the failure on the part of central management to comply with the terms of any agreement struck under regulation 17, the Subsidiary Requirements, or the requirements to produce information under regulation 18A of the TICE Regs.

Reflection Points

1. In light of the provisions of the TICE Regs discussed, identify the various difficulties which may be encountered by employees of community-scale undertakings and community-scale group of undertakings in establishing EWCs.
2. To what extent have the European provisions on cross-border information and consultation procedures via EWCs been successful to date? Give reasons for your answer.

Additional reading on cross-border worker participation

1. F. Carlin, 'The European Works Councils Directive' (1995) 20 *European Law Review* 96.

⁸² Regulation 21(1A) of the TICE Regs.

⁸³ Regulation 21(1B) of the TICE Regs.

⁸⁴ Regulation 21(4) and (5) of the TICE Regs.

⁸⁵ Regulation 21(6) and (6A) of the TICE Regs. For more discussion of the provisions for enforcement of the TICE Regs, see M. Carley & M. Hall, 'The Implementation of the European Works Councils Directive' (2000) 29 *Industrial Law Journal* 103, 116–118 and 120–121.

⁸⁶ See Regulation 21A of the TICE Regs.

2. C. McGlynn, 'European Works Councils: Towards Industrial Democracy' (1995) 24 *Industrial law Journal* 78.
3. T. Colaianni, *European Works Councils* (London, Sweet and Maxwell, 1996).
4. H. Ramsey, 'Fool's Gold? European Works Councils and Workplace Democracy' (1997) 28 *Industrial Relations Journal* 314.
5. M. Carley and M. Hall, 'The Implementation of the European Works Councils Directive' (2000) 29 *Industrial law Journal* 103.
6. B. Bercusson, 'The European Social Model Comes to Britain' (2002) 31 *Industrial law Journal* 209.
7. P. Lorber, 'National Works Councils: Opening the Door on a New Whole Era in United Kingdom Employment Relations?' (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 297.
8. M. Weiss, 'The Future of Workers' Participation in the EU' in C. Barnard, S. Deakin, and G. S. Morris (eds), *Future of Labour Law. Liber Amicorum Sir Bob Hepple* (Oxford, Hart Publishing, 2004) 233–239.
9. P. Lorber, 'Reviewing the European Works Councils Directive: European Progress and United Kingdom Perspective' (2004) 33 *Industrial law Journal* 191.
10. P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford, OUP, 2007) 134–150.
11. S. Laulom, 'The Flawed Revision of the European Works Council Directive' (2010) 39 *Industrial law Journal* 202.
12. S. Sciarra, 'Notions of Solidarity in Times of Economic Uncertainty' (2010) 39 *Industrial law Journal* 223, 233–235.
13. J. Waddington 'European Works Councils: The Challenge for Labour' (2011) 42 *Industrial Relations Journal* 508.
14. C. Barnard, *EU Employment Law*, 4th edition (Oxford, OUP, 2012) 663–673.
15. M. Hall and J. Purcell, *Consultation at Work* (Oxford, OUP, 2012) 51–54 and 93–94.
16. D. Hann, M. Hauptmeier and J. Waddington, "European Works Councils After Two Decades" (2017) 23 *European Journal of Industrial Relations* 209.
17. S. Mueller and J. Stegmaier, 'The Dynamic Effects of Works Councils on Labour Productivity: First Evidence From Panel Data' (2017) 55 *British Journal of Industrial Relations* 372.

A.3 WORKPLACE INFORMATION AND CONSULTATION AT NATIONAL LEVEL

Buoyed by its ability to reach agreement on the introduction of transnational information and consultation mechanisms in the Original EWC Directive, the EU adopted the I&C Directive in 2002. This European instrument brought into force a mandatory scheme for general information and consultation in relation to certain undertakings situated in a single Member State. To that extent, it also built upon the ad hoc issue-specific information and consultation requirements imposed by the EU under

the original Collective Redundancies Directive 75/129 of 17 February 1975⁸⁷ and the original Acquired Rights Directive 77/187/EEC of 14 February 1977⁸⁸ concerning collective redundancies and business reorganizations and transfers.

In this section, we review the provisions and operation of the I&C Directive by focusing on the UK's transposition of that measure via the Information and Consultation of Employees Regulations 2004 ('I&C Regs').⁸⁹ As we noted earlier, the traditional approach in the UK was to shun legally imposed obligations to inform and consult, which can be traced back to its heritage of 'collective laissez-faire', 'abstentionism', and 'voluntarism' towards industrial relations.⁹⁰ Various attempts and proposals to introduce legislation to that effect had hit the buffers in the 1940s and 1970s.⁹¹ Therefore, when the I&C Regs came into force and compelled employers to inform and consult worker representatives on a broad range of general workplace matters, including key employment, business, and restructuring issues, this signalled a sea-change in the industrial relations culture and structures of collective representation in the UK.⁹² It is because of this 'lack of fit' that the I&C Regs are a prime candidate for repeal once the UK finally leaves the European Union. The same point can be made about the TICE Regs.

A basic illustration of the central provisions contained in the I&C Regs is set out in this extract from Hall and Purcell:

M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 80–81

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Key Provisions of the [I&C] Regulations Coverage and commencement

The regulations came into effect on 6 April 2005, and initially applied to undertakings with at least 150 employees. Undertakings with at least 100 employees were covered from April 2007, and 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

⁸⁷ [1975] OJ L48/29. This was replaced by the Collective Redundancies Directive 98/59/EC (OJ [1998] L225/16) ('the Collective Redundancies Directive').

⁸⁸ OJ 1977 L 61/26. This was superseded by the Acquired Rights Directive 2001/23/EC of 12 March 2001 (OJ [2001] L82/16) ('the ARD').

⁸⁹ SI 2004/3426.

⁹⁰ See Chapter 1, section 1.2.1 and K. Ewing and G. M. Truter 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626.

⁹¹ See R. Dukes, 'Voluntarism and the Single Channel: The Development of Single-channel Worker Representation in the UK' (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 87 on the UK Government's rejection of the Whitley Committee's recommendations regarding joint production committees and works committees and also see M. Hall and J. Purcell, *Consultation at Work* (Oxford, OUP, 2012) 68–70 on the rejection of the Bullock Report and its legacy.

⁹² P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation since the 1990s* (Oxford, OUP, 2007) 132.

operating for gain'. The regulations apply to Great Britain. Separate but similar regulations apply in Northern Ireland. However, the employment thresholds specified relate to the United Kingdom as a whole.

Initiating negotiations

Regulation 7 enables 10 per cent of an undertaking's employees (subject to a minimum of 15 employees and a maximum of 2,500), to trigger negotiations with their employer on an information and consultation agreement, to be conducted according to statutory procedures (see below). Employers may themselves initiate the negotiation process on their own initiative by issuing written notification to employees.

Pre-existing agreements

Where a request for negotiations is made by fewer than 40 per cent of the employees and there is a [pre-existing agreement 'PEA'] in place, the employer can ballot the workforce on whether they support the request for new negotiations. If the request is endorsed by at least 40 per cent of the workforce, and the majority of those who vote, negotiations on a new agreement must proceed. If not, no further action is necessary. PEAs are defined as written agreements that 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' (Regulation 8).

Negotiated agreements

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 (Regulation 14). 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 (Regulation 16).

Standard information and consultation provisions

Where the employer fails to initiate negotiations following a valid employee request, or where the parties do not reach a negotiated agreement within six months, 'standard information and consultation provisions' specified by the regulations will apply (Regulations 18–20). These require that the employer must inform/consult 'information and consultation representatives' on:

- (a) 'the recent and probable development of the undertaking's activities and economic situation' (information only);
- (b) 'the situation, structure and probable development of employment within the undertaking and any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking' (information and consultation); and
- (c) 'decisions likely to lead to substantial changes in work organization or in contractual relations', including decisions covered by the legislation on collective redundancies and transfers of undertakings (information and consultation 'with a view to reaching agreement').

However, as regards category (c), where employers come under a duty to consult trade union or employee representatives under the existing legislation on collective redundancies and transfers of undertakings, they are not also obliged to consult information and consultation representatives under the I&C regulations provided they notify them accordingly on each occasion.

The standard provisions specify that there should be one information and consultation representative for every fifty employees or part thereof, with a minimum of two representatives and a maximum of twenty-five. Representatives are to be directly elected by workforce-wide secret ballot.

Enforcement and sanctions

Enforcement of negotiated agreements reached under the statutory procedure, or of the standard information and consultation provisions where they apply, is 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 (Regulation 22).

The Employment Appeal Tribunal will hear appeals and is responsible for issuing penalty notices. The maximum penalty payable by employers for non-compliance is £75,000 (Regulation 23). Where necessary, enforcement of CAC orders may be pursued through the courts....

A.3.1 Applicability of the I&C Regs

With effect from 6 April 2008,⁹³ the I&C Regs apply to public or private undertakings whose registered office, head office, or principal place of business is situated in Great Britain who are carrying out an economic activity, whether or not operating for gain, who employ 50 employees or more in the UK.⁹⁴ Therefore, the I&C Regs apply at the level of the enterprise, i.e. impact upon undertakings, rather than groups of undertakings, or parts of an undertaking situated at a particular location/establishment. For example, in *Lee v Cofely Workplace Ltd.*,⁹⁵ the EAT adopted a restrictive approach to the definition of an 'undertaking', holding that it must be equated with a legal entity, i.e. the employer. In this way, it is not possible for a single employer to have two or more undertakings comprised within it, e.g. where a group of employees are working for the employer as an identifiable team or unit on one contract with a third party. Additional guidance on the meaning of the concept of an 'undertaking' was provided by the CAC in *PCS v ACAS*,⁹⁶ namely that it will constitute any 'economic entity organised on a stable basis, whatever its legal status and method of financing...' For that reason,

⁹³ Schedule 1 to the I&C Regs provided for a phased implementation, by reference to undertakings with 150 employees between 6 April 2005 and 5 April 2007 and 100 employees from 6 April 2007 to 5 April 2008.

⁹⁴ See Regulations 2, 3(1) of, and Schedule 1 to, the I&C Regs.

⁹⁵ [2015] IRLR 879.

⁹⁶ [2017] IRLR 680.

the fact that ACAS was a public body, largely financed by the public purse, not operating for gain or profit, and not engaged in any commercial activity, did not preclude it from being an ‘undertaking’. The key issue was whether it was providing a service to a customer in return for remuneration.

In order to determine whether 50 ‘employees’ or more are employed by the undertaking, an ‘employee’ is defined as ‘an individual who has entered into or works under a contract of employment’⁹⁷ and the average number of employees employed in the previous twelve months are taken as the relevant standard.⁹⁸ In *Association de médiation sociale v Union local des syndicats CGT*,⁹⁹ the CJEU had cause to interpret the definition of ‘employee’ in Article 3(1) of the I&C Directive, namely ‘any person which, in the Member State concerned, is protected as an employee under national employment law and in accordance with national practice.’ The CJEU held that this phraseology was broad enough to include apprentices and other persons being re-integrated into the labour market via atypical contracts. The former category of individual, i.e. apprentices, are explicitly covered by the domestic definition of the ‘contract of employment’ in regulation 2 of the I&C Regulations, but it is less obvious that the latter category are, which leaves open the possibility that the domestic transposition of the I&C Directive is in non-conformance with the CJEU’s construction in *Union local*. It is also particularly noteworthy that for these purposes, the domestic definition of ‘employee’ in regulation 2 of the I&C Regs counts any agency worker towards the 50 threshold, i.e. an individual who has a contract—not being a contract of employment—with a temporary work agency is to be treated as an employee of that temporary work agency for the duration of that agency worker’s assignment with the employer.¹⁰⁰ Therefore, a limited class of atypical worker is counted towards the 50-employee threshold where the employer is a temporary work agency. Ewing and Truter have subjected the restricted scope of application of the I&C Regs to a cutting analysis:

K. Ewing and G. M. Truter ‘The Information and Consultation of Employees Regulations: Voluntarism’s Bitter Legacy’ (2005) 68 *Modern Law Review* 626, 627–629

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Problems are encountered immediately in the application questions: what is an undertaking, to undertakings of what size do the [I&C Regs] apply, and who is to be counted in determining whether or not the latter threshold has been met? So far as the first of these questions is concerned, we see a total abdication of responsibility by the

⁹⁷ Regulation 2 of the I&C Regs. Therefore, the key issue is whether the individual is engaged on the basis of a contract of employment, on which, see Chapter 3, section 3.2.1.

⁹⁸ Regulation 4(1) and (2) of the I&C Regs.

⁹⁹ [2014] IRLR 310.

¹⁰⁰ Regulation 3A of the I&C Regs. The relevant definitions here are those featured in the Agency Workers Regulations 2010 (SI 2010/93), on which, see Chapter 4, section 4.3.2. For a discussion, see A. C. L. Davies: ‘Half a Person’: A Legal Perspective on Organizing and Representing ‘Non-Standard’ Workers’ in A. Bogg and T. Novitz (eds), *Voices at Work* (Oxford, OUP, 2014) 131-136.

government to the courts. The question of what is an undertaking is at the heart of the [I&C Regs]: if there is no undertaking, there is no obligation to comply with information and consultation obligations. Yet the definition of an 'undertaking', copied out from the I&C Directive, gives little away. Thus an undertaking is 'a public or private undertaking carrying out an economic activity, whether or not operating for gain'. There are thus two key elements of the definition. One is the term 'undertaking' which is not made any clearer by the definition. The other is the requirement that it carry out an 'economic activity'. This latter is clearly a limitation in the sense that not all undertakings will carry out an economic activity. Some indication of the government's thinking is given in Guidance issued by the DTI where it is stated that an undertaking means a legal entity, such as an individually incorporated company. It is also revealed that what is an economic activity is largely a matter for the courts to determine. The possibility that the definition may exclude much of the civil service and local government is met with a suggestion that a voluntary code of practice for the civil service and local government will be introduced. There is, however, no obligation to exclude those employers even though they are not formally covered by the [I&C] Directive. . . Turning to the third 'application' question, here we find that the scope of the [I&C Regs] is restricted still further by applying only to undertakings with 50. . . 'employees.' An employee is narrowly defined as 'an individual who has entered into or works under a contract of employment', thereby excluding many of those engaged in so-called 'atypical' work. Again, this can be contrasted with the statutory recognition procedure [in Schedule A1 to the TULRCA 1992], which applies to 'workers' (but not with the provisions on collective redundancies and the transfer of undertakings). Otherwise, a most remarkable feature of the [I&C Regs] is the treatment of part-time workers, who the employer may regard as a half rather than a whole person. This means, for example, that a company with 30 full-time staff and 28 part-time staff will not be required to comply with the [I&C Regs]. This in turn gives rise to a number of concerns. First, it devalues, diminishes and discriminates against part-time workers. In so doing it makes a mockery of the purported attempt to deal with discrimination against such workers in the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Secondly, it does so in a manner that discriminates against women. It seems that the government has learned nothing from the lessons in *R v Secretary of State for Employment, ex parte EOC* [[1994] 1 All ER 910]. It was held in that case that the denial of employment protection rights to those working less than 16 hours a week constituted unlawful discrimination against women. The law had to be changed as a result. In reaching this decision the House of Lords pointed out that it was 'common ground' that 'the great majority of those who worked for less than 16 hours a week are women, so that the provisions in question result in an indirect discrimination against women'. The threshold in the [I&C Regs] is 75 hours a month. It may be that the labour market has changed since 1994, and that the higher threshold of 75 hours a month will be less discriminatory than 16 hours a week. But it seems unlikely.¹⁰¹

¹⁰¹ For similar and additional criticisms, see A. C. L. Davies: 'Half a Person': A Legal Perspective on Organizing and

As a means of enabling employees and employees' representatives to ascertain whether the 50-employee threshold has been met, regulation 5(1) and (2) of the I&C Regs empowers them to request data from the employer by serving a dated written notice. On receipt of such a request, the employer is obliged to furnish the employee or employees' representatives with data sufficient to enable him/her to calculate the number of employees. An employee or employee representative may challenge any failure on the part of the employer to provide such information or where the employer furnishes incomplete or inaccurate data in a material particular by presenting a complaint to the CAC.¹⁰²

A.3.2 Triggering the process for the negotiation of an information and consultation agreement and the effect of pre-existing agreements

Like the TICE Regs, the principal concern of the I&C Regs is to foster flexibility by:

- encouraging the formation of voluntary information and consultation agreements at the enterprise level between management and labour in terms of regulation 16 of the I&C Regs; or
- enabling pre-existing organization-specific information and consultation agreements ('PEA') struck between management and labour prior to the making of a valid employee request under regulation 7 of the I&C Regs¹⁰³ to be treated as satisfying the requirements of the legislation.

Only where there is a failure to reach such agreements do the fall-back provisions in the standard information and consultation procedure laid down in regulations 18–20 of, and Schedule 2 to, the I&C Regs ('standard information and consultation procedure') apply. As such, in contrast with the measures in sections 188 of the TULRCA 1992 for the purposes of information and consultation concerning collective redundancies¹⁰⁴ or TUPE in the context of the transfer of businesses and undertakings, there is no provision for mandatory information and consultation under the I&C Regs. Instead, akin to the TICE Regs, there is a clear process for the statutory procedures laid down in the I&C Regs to be activated, consisting of a requirement imposed on management to negotiate with negotiating worker representatives on the formation of an information and consultation agreement. The I&C Regs envisage that this procedure can only be triggered in two situations:

- (1) where the employer voluntarily starts the negotiation process by issuing a written

Representing 'Non-Standard' Workers' in A. Bogg and T. Novitz (eds), *Voices at Work* (Oxford, OUP, 2014) 131-136.

¹⁰² Regulation 6(1) of the I&C Regs.

¹⁰³ See the definition of a pre-existing agreement in regulation 2 of the I&C Regs.

¹⁰⁴ See Chapter 20, sections 20.4.1 and 20.4.2.

- notification satisfying certain prescribed requirements;¹⁰⁵ and
- (2) where a valid employee request is made by at least 10 per cent of the employees in the undertaking.¹⁰⁶

To be valid, the request must be in writing, sent to the CAC or the registered office, head office or principal place of business of the employer and specify the names of the employees making it and the date on which it is sent.¹⁰⁷ Although it is not competent for a trade union to trigger the process,¹⁰⁸ it is common for them to make arrangements for the request to be made to the CAC on behalf of the workers.¹⁰⁹ However, where there is no union presence, Hall has argued the following:

M. Hall 'A Cool Response to the [I&C Regs]? Employer and trade union approaches to the new legal framework for information and consultation' (2006) 37 *Industrial Relations Journal* 456, 461

... the 10 per cent threshold of workforce support required by the [I&C Regs] to trigger the process of negotiations with an employer looks likely to prove a tough standard to meet 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 [I&C Regs] 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 by union ambivalence towards the new legislation.¹¹⁰

One should stress that the 10 per cent threshold is by no means uniformly applied. Instead, it is provided that there must be a minimum of 15 employees and a maximum of 2,500 employees who make the request to activate the process.¹¹¹ In order to enable the employees or employee representatives to ascertain whether the 10 per cent, 15, or 2,500 employee thresholds have been met, regulation 5 of the I&C Regs empowers them to request data from the employer by serving a dated written notice.

The statutory machinery in the I&C Regs incentivizes management to strike a PEA. A PEA is an agreement which is in writing, covers all of the employees of the

¹⁰⁵ Regulation 11 of the I&C Regs.

¹⁰⁶ Regulation 7(1) of the I&C Regs.

¹⁰⁷ Regulation 7(1), (2) and (4) of the I&C Regs.

¹⁰⁸ See K. Ewing and G. M. Truter 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626, 630.

¹⁰⁹ For example, see *Amicus v MacMillan Publishers Ltd.* [2007] IRLR 885, 886 per Mr J Elias (P).

¹¹⁰ See also the criticisms in M. Hall, J. Purcell and D. Adam, 'Reforming the ICE regulations – what chance now?' 3-5, available at <https://warwick.ac.uk/fac/soc/wbs/research/irru/wp/irru/wp102.pdf> (last visited 11 April 2018).

¹¹¹ Regulation 7(3) of the I&C Regs.

undertaking,¹¹² has been approved by the employees, and sets out how the employer is to give information to the employees or their representatives and seek their views on such information.¹¹³ The incentive to conclude a PEA prior to the making of a valid employee request under regulation 7 of the I&C Regs lies in the fact that:

- (1) the level of worker protection set out in the PEA need not be as exacting as that contained in the standard information and consultation procedure;¹¹⁴
- (2) there is no need for the PEA to oblige the employer to engage in dialogue with worker representatives with a view to reaching agreement on the matters prescribed in the PEA;¹¹⁵ and
- (3) the PEA 'may provide either for representative-based or direct means of information and consultation [of the employees without the intermediation of representatives]', the latter being recognized as 'almost inevitably... of [an] exceptionally poor quality... constitut[ing] a wholly insufficient representation structure'.¹¹⁶

The intention here in facilitating PEAs was to reflect the concern 'on the part of both employers and trade unions to protect existing arrangements from unnecessary disruption'.¹¹⁷ In order to displace a PEA, a 'double trigger' edifice is erected in the I&C Regs. This requires a level of support amongst the employees which is higher than the standard 10 per cent in order to initiate the statutory procedures for the negotiation of an information and consultation agreement in terms of regulation 16 of the I&C Regs. The mechanics of this 'double trigger' are set out in regulation 8 of the I&C Regs and explored in the following extract from Dukes:

R. Dukes 'The ICE Regulations: Pre-Existing Agreements and Standard provisions: a Warning to Employers' (2007) 36 *Industrial Law Journal* 329, 331–332

Provided that the employee trigger is made by less than 40% of employees, the existence of a PEA means that the employer need not necessarily negotiate a new I&C agreement. Instead, it can hold a ballot in order to see if the trigger is 'endorsed' by a majority of the workforce. If less than 40% of the employees in the undertaking (and a majority of those taking part in the ballot) vote in favour of the trigger, the trigger is not

¹¹² Where there is more than one agreement concluded which covers different sections of the workforce, so long as the cumulative effect is that all of the employees of the undertaking are covered, this criteria for the existence of a PEA will be met: *Moray Council v Stewart* [2006] ICR 1253, 1263E per Mr Justice Elias (P).

¹¹³ Regulation 8(1)(a), (b), (c), and (d) of the I&C Regs.

¹¹⁴ Mark Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34 *Industrial law Journal* 103, 114.

¹¹⁵ Contrast this with the standard information and consultation procedure where regulation 20(4)(d) of the I&C Regs enjoins the employer to consult with information and consultation representatives with a view to reaching agreement.

¹¹⁶ P. Davies and C. Kilpatrick, 'UK Worker Representation After Single Channel' (2004) 33 *Industrial Law Journal* 121, 134. See also S. Deakin and A. Koukiadaki, 'Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from UK Case Studies' (2012) 33 *Comparative Labor Law and Policy Journal* 427, 453.

¹¹⁷ M. Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34 *Industrial law Journal* 103, 113.

endorsed, no further action is required, and a three year moratorium begins which prevents further challenges to the PEA during that period. If the employer chooses not to hold a ballot, or holds a ballot in which the trigger *is* endorsed, it comes under the two obligations: to arrange the election or appointment of negotiating representatives, and to initiate obligations with those representatives.

Apart from marshalling 40 per cent opposition to the PEA in order to force the employer to enter into negotiations for a fresh information and consultation agreement in terms of regulation 16 of the I&C Regs, another means of challenging the employer's assertion that an agreement or series of agreements constitute a PEA is to allege that it, or they, does or do not satisfy the criteria for a PEA which are stipulated in regulation 8(1). A good example of this alternative means of challenge is presented by the facts of *Moray Council v Stewart*,¹¹⁸ where the matter for decision was whether a number of agreements:

- had been approved by the employees; and
- laid down how the employer was to give information to the employees or their representatives and seek their views on such information, e.g. in accordance with the terms of regulation 8(1)(c) and (d) of the I&C Regs.

Here, the EAT held that the words 'approved by the employees' in regulation 8(1)(c) ought to be construed as the approval of the agreements by the majority of the employees. As such, where trade union members amount to a majority of the employees covered by the agreement, this will be sufficient to establish the necessary degree of approval.¹¹⁹ As for regulation 8(1)(d) of the I&C Regs, it was held that the agreements did not meet this criterion on the ground that one of the agreements did not prescribe how the employer would give information to the employees or their representatives or seek their views on that information.¹²⁰

A.3.3 Negotiating, and the content of, an information and consultation agreement

Once a valid employee request has been made under regulations 7 or 8, or the employer has decided to kick-start the process voluntarily under regulation 11 of the I&C Regs, our attention turns to regulations 14 and 16 of the I&C Regs. These provisions govern the procedures for the negotiation of an information and consultation agreement. Regulation 14(1) directs that the employer must as soon as reasonably practicable:

- make arrangements for the employees to elect or appoint negotiating

¹¹⁸ [2006] ICR 1253.

¹¹⁹ [2006] ICR 1253, 1264H–1266C per Mr Justice Elias (P).

¹²⁰ [2006] ICR 1253, 1264H–1264B per Mr Justice Elias (P).

- representatives;
- inform the employees in writing of the identity of those representatives; and
 - invite those representatives to enter into negotiations.

In *University of London v Morrissey*,¹²¹ the EAT ruled that it is essential that all employees – as opposed to the recognised trade unions only – are afforded the opportunity to nominate the individuals to stand for appointment. Otherwise, the process will have failed to comply with regulation 14(1) and will be defective. As such, the process for the election or appointment of those negotiating representatives must be organized such that all of the employees of the undertaking are represented by one or more of those representatives.¹²² Further, that process must ensure that all of the employees of the undertaking are entitled to participate in the ballot.¹²³ In terms of regulation 14(3) of the I&C Regs, the negotiations between the negotiating representatives and the undertaking will last for a period not exceeding six months commencing at the end of the period of three months beginning with the date on which the valid employee request was made or the valid employer notification was issued under regulation 11. In *Darnton v Bournemouth University*,¹²⁴ the EAT decided that regulation 14(3) does not impose a duty on the employer to initiate negotiations with the negotiating representatives within three months of the valid request or notification at the latest. Instead, all that is required of the employer is to take the requisite steps envisaged as soon as reasonably practicable. As such, the employer and the negotiating representatives are afforded a period of nine months to reach an information and consultation agreement.

Regulation 16 of the I&C Regs governs the coverage of the information and consultation agreement, as well as its form. For example, it is provided that it must cover all of the employees of the undertaking and set out the circumstances in which the employer must inform and consult the employees to which it relates.¹²⁵ It must be in writing, dated, approved in accordance with a prescribed procedure, signed on behalf of the employer, stipulate suitable information relating to the use of agency workers in the undertaking, and provide for the appointment or election of information and consultation representatives to whom the employer must provide the information and whom the employer must consult or confirm the identity of the employees with whom it must directly inform and consult.¹²⁶ The process for approval envisages the agreement being signed by all of the negotiating representatives or a majority of the same and either approved in writing by at least 50 per cent of the employees in the undertaking or a ballot of those employees in which at least 50 per

¹²¹ [2016] IRLR 487.

¹²² Regulation 14(2)(a) of the I&C Regs.

¹²³ Regulation 14(2)(b) of the I&C Regs.

¹²⁴ [2010] ICR 524.

¹²⁵ Regulation 16(1)(a) of the I&C Regs.

¹²⁶ Regulation 16(1)(b)–(g) of the I&C Regs.

cent of the employees voting, voted in favour of approval.¹²⁷

A.3.4 The standard information and consultation procedure

If the parties agree, or if they are unable to reach, an information and consultation agreement under regulation 16 of the I&C Regs, regulation 18 directs that the standard information and consultation procedure will operate as a default regime. Regulation 19 imposes a duty on the employer to organize the holding of a ballot of its employees to elect the relevant number of information and consultation representatives. The detailed procedures for the ballot are set out in schedule 2 to the I&C Regs, which stipulate that there must be a minimum of two representatives and a maximum of 25, with one representative per 50 employees or part thereof.¹²⁸ If the employer fails to arrange such a ballot, a complaint may be presented to the CAC by an employee or employee representative.¹²⁹

The matters on which the employer must provide information to the elected information and consultation representatives are laid down in regulation 20(1), namely:

- (1) the recent and probable development of the employer's activities and economic situation;
- (2) the situation, structure, and probable development of employment within the employer and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the employer; and
- (3) subject to regulation 20(5), decisions likely to lead to substantial changes in work organization or in contractual relations, including collective redundancies and transfers of business and outsourcing situations.

The employer must give such information at such time, in such fashion and with such content as appropriate to enable, in particular, the information and consultation representatives to conduct an adequate study and, where necessary, to prepare for consultation. In the context of the standard information and consultation procedure, 'consultation' is defined in regulation 2 of the I&C Regs as the exchange of views and establishment of a dialogue between information and consultation representatives and the employer. Such consultation must concern the matters listed at (2) and (3) earlier and be conducted:

- (1) in a manner that ensures that the timing, method, and content of the consultation are appropriate;
- (2) on the basis of the information supplied by the employer to the information and consultation representatives and of any opinion which those representatives

¹²⁷ Regulation 16(3) of the I&C Regs.

¹²⁸ Regulation 19(3) of the I&C Regs.

¹²⁹ See regulation 19(4) of the I&C Regs and *Amicus v Macmillan Publishers Ltd.* [2007] IRLR 885.

- express to the employer;
- (3) in such a way as to enable the information and consultation representatives to meet the employer at the relevant level of management depending on the subject under discussion and to obtain a reasoned response from the employer to any such opinion; and
 - (4) in relation to matters falling within (3), with a view to reaching agreement on decisions within the scope of the employer's powers.

In exchanging such information and conducting such consultation, regulation 21 requires the parties to work in a spirit of co-operation and with due regard for their reciprocal rights and obligations, taking into account the interests of both the employer and the employees. A final point to note is that the employer's information and consultation obligations under the standard information and consultation procedure cease to apply when the information and consultation provisions under sections 188 of the TULRCA 1992 apply for the purposes of information and consultation concerning collective redundancies.¹³⁰ The same point applies where regulations 13–16 of TUPE are applicable in the context of the transfer of businesses and undertakings.¹³¹

Although regulation 20 supplies a degree of clarity regarding the purpose of the information and consultation function in the standard information and consultation procedure, a certain unease about its scope remains. For example, Hall expresses the following reservations:

**M. Hall 'Assessing the Information and Consultation of Employees Regulations' (2005)
34 *Industrial Law Journal* 103, 115**

The [I&C Regs'] fallback provisions are extremely 'minimalist' in infrastructural terms, being confined to specifying the election arrangements for the information and consultation representatives (Schedule 2) 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 (ie a committee or council), the [timing or] frequency of meetings, nor facilities for representatives.

The misgivings about the effectiveness of the I&C Regs stem directly from the approach of the UK government to the transposition of the I&C Directive: this has been described by Hall and Purcell as 'half-hearted' and 'minimalist'. For this reason, the release of the UK Parliament from its European obligations after Brexit (or any post-Brexit transitional period) is likely to translate into the eventual repeal of the I&C Regs at some point post-Brexit:

¹³⁰ See Chapter 20, sections 20.4.1 and 20.4.2.

¹³¹ See Chapter 19, section 19.4.1.

M. Hall and J. Purcell, *Consultation at Work: Regulation and Practice* (Oxford, OUP, 2012) 23–24

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... key policy choices on the specifics of the United Kingdom's legislative response to EU requirements have been shaped by domestic employment relations and political concerns, arguably limiting the extent to which these changes have brought the United Kingdom closer to the European mainstream. The result has been a 'half-hearted' approach to regulating for employee consultation on the part of governments of both main political parties, reflecting among other things entrenched employer opposition to—and trade union ambivalence about—legislative intervention in this area... the United Kingdom's more recent legislation has been 'minimalist' in character and arguably also of doubtful compliance with EU requirements.

1.3.5 Enforcement

The provisions for enforcement of the I&C Regs adopt the same formula found in the TICE Regs. Therefore, regulation 22 of the I&C Regs provides that a complaint may be presented to the CAC by an information and consultation representative or an employee or employee representative alleging that there has been a breach of a negotiated information and consultation agreement or the standard information and consultation procedure.¹³² As such, the enforcement mechanisms do not apply in the case of PEAs, in which case, whether the PEA is legally enforceable will depend on its own terms. If the CAC finds the complaint to be well-founded, it must make a declaration to that effect and may make an order requiring the employer to take such steps to comply with the relevant terms or provisions, including the period within which the order must be complied with.¹³³ Moreover, the information and consultation representative or an employee or employee representative may within the period of three months beginning with the date on which the CAC's declaration is made, make an application to the EAT for a financial penalty notice of up to £75,000 to be issued, which the EAT must then issue. Hall has lamented the failure of the I&C Directive and I&C Regs to provide for injunctive relief.¹³⁴ Moreover, there are no means in the I&C Regs to challenge actual management decisions or cast doubt on the legality of any managerial decision taken in breach of the duty to inform and consult.¹³⁵ All of this adds up to what Ewing and Truter have described as a 'weak'¹³⁶ measure of enforcement and there is some evidence that the tepid sanctions in the I&C Regs are a source of concern amongst

¹³² Regulation 22(1) and (3) of the I&C Regs.

¹³³ Regulation 22(4) and (5) of the I&C Regs.

¹³⁴ M. Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34 *Industrial Law Journal* 103, 118.

¹³⁵ Regulation 22(9) of the I&C Regs.

¹³⁶ K. Ewing and G.M. Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626, 635. See also M. Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34 *Industrial Law Journal* 103, 117–118.

employees and their employee representatives.¹³⁷

Reflection Points

1. In your opinion, does the power of an employer to agree a PEA deprive the I&C Regs of the ‘teeth’ it needs to be effective? Give reasons for your answer.
2. To what extent are the standard information and consultation procedures in the I&C Regs an effective means of subjecting the managerial prerogative to a measure of constraint? Give reasons for your answer.
3. In 2013, the European Commission conducted a ‘fitness check’ on the I&C Directive, the Collective Redundancies Directive and the ARD and found them to be fit for purpose in terms of ‘relevance, effectiveness, efficiency and coherence’. In October 2015, the European Commission indicated that it proposed to simplify, rationalise and consolidate the provisions on ‘information’ and ‘consultation’ found in these three Directives: see ec.europa.eu/social/BlobServlet?docId=14537&langId=en. In your opinion, does the consolidation and streamlining of these provisions across the three Directives strike you as a good idea?

Additional reading on workplace information and consultation at national level

1. B. Bercusson, ‘The European Social Model Comes to Britain’ (2002) 31 *Industrial Law Journal* 209.
2. M. Weiss, ‘The Future of Workers’ Participation in the EU’ in C. Barnard, S. Deakin, and G. S. Morris (eds), *Future of Labour Law. Liber Amicorum Sir Bob Hepple* (Oxford, Hart Publishing, 2004) 244–251.
3. K. Ewing and G. M. Truter, ‘The Information and Consultation of Employees Regulations: Voluntarism’s Bitter Legacy’ (2005) 68 *Modern Law Review* 626.
4. M. Hall, ‘Assessing the Information and Consultation of Employees Regulations’ (2005) 34 *Industrial Law Journal* 103.
5. R. Welch and S. Williams, ‘The Information & Consultation Regulations—Much ado about nothing?’ (2005) 36 *Cambrian Law Review* 29.
6. P. Lorber, ‘Implementing the Information and Consultation Directive in Great Britain: A New Voice at Work’ (2006) 22 *International Journal of Comparative Labour Law and Industrial Relations* 231.
7. M. Hall ‘A Cool Response to the [I&C Regs]? Employer and trade union approaches to the new legal framework for information and consultation’ (2006) 37 *Industrial Relations Journal* 456.
8. R. Dukes, ‘The ICE Regulations: Pre-Existing Agreements and Standard Provisions: A Warning to Employers’ (2007) 36 *Industrial Law Journal* 329.
9. P. Davies and M. Freedland, *Towards a Flexible Labour Market: Labour Legislation and Regulation Since the 1990s* (Oxford, OUP, 2007) 130–162.

¹³⁷ S. Deakin and A. Koukiadaki, ‘Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from UK Case Studies’ (2012) 33 *Comparative Labor Law and Policy Journal* 427, 452.

10. R. Dukes, 'Voluntarism and the Single Channel: The Development of Single-channel Worker Representation in the UK' (2008) 24 *International Journal of Comparative Labour Law and Industrial Relations* 87.
11. P. Taylor, C. Baldry, A. Danford, and P. Stewart, 'Corporate Restructuring, Redundancy and the Effectiveness of the ISE Regulations' (2009) 65 *Relations Industrielles/Industrial Relations* 27.
12. M. Hall, S. Hutchinson, J. Purcell, M. Terry, and J. Parker, 'Information and Consultation under the ICE Regulations: Evidence from Longitudinal Case Studies', Employment Relations Research Series No. 117 (Department for Business, Innovation and Skills), December 2010, available at <https://www.gov.uk/government/publications/impact-of-the-information-and-consultation-of-employees-regulations-2004-final-report> (last visited 9 April 2018).
13. S. Deakin and A. Koukiadaki, 'Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from UK Case Studies' (2012) 33 *Comparative Labor Law and Policy Journal* 427.
14. C. Barnard, *EU Employment Law*, 4th edition (Oxford, OUP, 2012) 685–691.
15. P. Lorber and T. Novitz, *Industrial Relations Law in the UK* (Cambridge, Intersentia, 2012).
16. M. Hall and J. Purcell, *Consultation at Work* (Oxford, OUP, 2012) -chapters 3–5.
17. M. Hall, S. Hutchinson, J. Purcell, M. Terry and J. Parker, 'Promoting Effective Consultation? Assessing the Impact of the ICE Regulations' (2013) 51 *British Journal of Industrial Relations* 355.
18. M. Hall, J. Purcell, M. Terry, S. Hutchinson, and J. Parker, 'Trade Union Approaches towards the ICE Regulations: Defensive Realism or Missed Opportunity?' (2015) 53 *British Journal of Industrial Relations* 350.

A.4 THE PROTECTION OF EMPLOYEES IN INSOLVENCY

In the final section of this book, we look at the legislation protecting employees in the event of the insolvency of their employers. Two sources of regulation apply here to afford a degree of assistance to employees:

- (1) the rules on preferential creditors in sections 386–387 of the Insolvency Act 1986 are of significance; and
- (2) employees may present claims to the National Insurance Fund for the payment of certain prescribed sums when their employer enters into an insolvency process.

A.4.1 Employees as preferential creditors

If the employer is a company and enters into liquidation or receivership, or the employer is adjudged bankrupt,¹³⁸ employees are treated as preferential creditors in the insolvency of the company pursuant to sections 386–387 of, and paragraphs 9–13

¹³⁸ See paragraph 14 of Schedule 6 to the Insolvency Act 1986.

of Schedule 6 to, the Insolvency Act 1986. However, there are limits:

- (1) The employees are preferred in respect of certain monetary payments only, namely sums constituting:
 - arrears of wages and salary, subject to a maximum of four months;
 - statutory guarantee pay under Part III of the ERA;¹³⁹
 - various payments in respect of statutory rights to time off, e.g. for ante-natal care or trade union duties;
 - **protective awards** under section 189 of the TULRCA 1992 for a failure of the employer to undertake consultation on collective redundancies under section 188 of the TULRCA 1992; and
 - accrued holiday remuneration.
- (2) The regime is restricted insofar as the employees are preferred in respect of arrears of wages or salaries only up to the value of £800.¹⁴⁰ The employee will then rank as an ordinary unsecured creditor for any excess of wages or salary.
- (3) The final limitation is the fact that although the employees are preferred creditors, this does not ensure that they are the first to be paid out in the insolvency of the employer. Instead, sums owing to fixed creditors will take priority over the preferred creditors and it is often the case that the debts of fixed charge-holders will swallow up all of the moneys available for distribution.

A.4.2 Claims against the National Insurance Fund ('NIF')

Two rationales may be advanced for the EU imposing a restricted form of state guarantee of wages pursuant to the Insolvency Directive:¹⁴¹

- (1) The first justification is to ensure that employees are not exploited by multinational enterprises engaging in unequal treatment. For example, where an employer has employees in more than one EU Member State, incorporates itself in the Member State with the lowest level of protection for employees in respect of the guarantee of wages in insolvency, and sets up branches in the other Member States in which it trades, the establishment of pan-European minimum standards enables an employee working in one of the branch Member States to claim against the guarantee institution set up by the State where he/she works or habitually works without having to claim in the Member State in which the employer is incorporated.¹⁴² As such, it short-circuits what would otherwise

¹³⁹ See Chapter 8, section 8.2.2.

¹⁴⁰ See Article 4 of the Insolvency Proceedings (Monetary Limits) Order 1986 (SI 1986/1996). This has been the case since 1976, i.e. there has been no uprating since 1976.

¹⁴¹ 2008/94/EC (OJ [2008] L283/36), (repealing 80/987/EEC (OJ [1980] L283/23)). See C. Barnard, *EC Employment Law*, 3rd edition (Oxford, OUP, 2006) 685–697.

¹⁴² See *Everson v Secretary of State for Trade and Industry* [2000] ICR 525 and M. Sargent 'Protecting Employees with Insolvent Employers' (2003) 32 *Industrial Law Journal* 53, 57–59. See also *Svenska Staten* [2008] IRLR 970.

be a convoluted process for the employee by creating parity across the Member States of the EU.

(2) This feeds into the second justification for the measures contained in the Insolvency Directive, namely that it contributes towards the establishment of a single internal market in the EU, e.g. by precluding the emergence of a ‘race to the bottom’ in respect of state guarantee institutions.

The Insolvency Directive was transposed in the UK by sections:

- 166–170 in respect of the recovery of redundancy payments; and
- 182–190 of the ERA, as regards various prescribed debts payable to employees. This includes eight weeks’ arrears of wages/salary, including commission, overtime, bonuses, contractual maternity or sick pay, statutory guarantee payments under Part III of the ERA, and notice pay, along with six weeks’ arrears of accrued holiday pay which will include contractual-based commission,¹⁴³ the basic award for unfair dismissal (not the compensatory award), and any protective award under section 189 of the TULRCA 1992 for a failure to inform and consult on the occurrence of collective redundancies.¹⁴⁴

These provisions enable employees to make a claim against the NIF administered by the UK Government in relation to these prescribed payments. This regime applies in the event of the employer’s insolvency.¹⁴⁵ This is defined in sections 166 and 183 of the Insolvency Act 1986 as including the winding-up/liquidation, administration, receivership or bankruptcy of the employer, including a company voluntary arrangement under Part I of the Insolvency Act 1986 (‘CVA’). The Secretary of State will meet the payment of the relevant debts if he/she is satisfied that the employer is insolvent, the employee’s employment has been terminated, and the employee had a right to be paid the debt at the appropriate date.¹⁴⁶ Where the Secretary of State pays such sums out of the NIF, then he/she is subrogated to the employee’s claim against the employer in the insolvency of the latter. The amounts payable in respect of such debts are subject to a cap of £508 per week¹⁴⁷ in terms of section 186. Consider the following illustration in Hypothetical D:

¹⁴³ See <https://www.gov.uk/your-rights-if-your-employer-is-insolvent> (last visited 9 April 2018).

¹⁴⁴ See section 184 of the ERA. As for the legal position in relation to pension payments, see Article 8 of the Insolvency Directive, *Hogan v Minister for Social and Family Affairs* [2013] IRLR 668 and *Robins v Secretary of State for Work and Pensions* [2007] 2 CMLR 13. The Secretary of State for Business, Energy and Industrial Strategy will not be liable for post-TUPE transfer debts, since these debts would never be owed by the transferor and so the Secretary of State could never have been responsible for them: *BIS v Dobrucki* [2015] All ER (D) 30 (Apr).

¹⁴⁵ Section 185 of the ERA.

¹⁴⁶ Section 182 of the ERA. In the case of a CVA, the appropriate date will entail a single event of insolvency: *Secretary of State for Business, Innovation and Skills v McDonagh* [2013] ICR 1177.

¹⁴⁷ With effect from 6 April 2018: Schedule 1 to the Employment Rights (Increase of Limits) Order 2018/194.

Hypothetical D

Danny's Demolishers Plc's ('DD') expansion into Italy via the acquisition of the Italian company called ZAB SpA turns out to be a catastrophic error of commercial judgment. The Italian side of the business has been leaking large amounts of money for six months. The court in the UK makes a winding-up order for the liquidation of DD. Warwick Carney ('WC') is one of the 340 employees of DD whose contract of employment has been terminated by DD's liquidator. He is paid £27,000 gross per calendar month and when he was dismissed he had not been paid for nine weeks and he had one week of holiday left in the leave year. WC's written contract of employment provides that he is entitled to four weeks' prior written notice of termination of his employment. In accordance with the relevant statutory provisions, WC would be entitled to:

(1) Arrears of Wages/salary: 8 (cap of eight weeks' pay) × £508 (one week's pay capped at £508, since a weeks' pay for WC = approximately £519, i.e. £27,000 divided by 52 = £519) = £4,064;

(2) Arrears of Holiday Pay: 1 (cap of one weeks' holiday pay) × £508 = £508; and

(3) Notice Period: 4 × £508 = £2,032.

Therefore, the total WC may claim against the NIF is £6,604. Of course, if the liquidator had failed to inform and consult about the collective redundancies, a protective award would also be payable.

This cap of £508 per week has been subjected to criticism on the ground that it falls foul of Article 4(3) of the Insolvency Directive. Article 4(3) provides that although Member States may set caps on the payments made by their guarantee institutions, they must not fall below a rate that is consistent with the social objectives behind the Insolvency Directive.

M. Sargent 'Protecting Employees with Insolvent Employers' (2003) 32 *Industrial Law Journal* 53, 56

It will be interesting to learn whether the United Kingdom can justify its limits in terms of ensuring that the policy is socially compatible with the social aims of the [Insolvency Directive]. The [Insolvency Directive's] main social aim is, according to the Commission. . . 'to safeguard employees' outstanding pay claims in the event of the employer becoming insolvent'. Instinct might suggest that a [£508] ceiling is unlikely to satisfy this aim, but some statistical research might be necessary to establish the true position (see generally Case C-125/97 *Regeling v Bestuur van de Bedrijfsvereniging* [1998] ECR-I 4493 where the [ECJ] referred to the social purpose of the [Insolvency Directive] as guaranteeing all employees a minimum level of protection).

The end result is that the protection afforded to employees in the case of the employer's insolvency is palpably underwhelming and modest at best, which is a point stressed in the following comparative article:

F. M. Mucciarelli 'Employee Insolvency Priorities and Employment Protection in France, Germany, and the United Kingdom' (2017) 44 *Journal of Law and Society* 255, 274-275

The comparative analysis undertaken...reveals that France, Germany and the United Kingdom provide for social security schemes that protect employees' claims for due wages and contributions. Their strategies, by contrast, diverge significantly regarding the question whether employees also should be protected through insolvency priorities... The English regime combines a priority and a social security scheme, but the employee priority is not as effective as their French counterparts: employees' claims are only prioritized over unsecured claims and floating charges, and their priority is capped at a low amount (£800)...In the [United Kingdom], the nominal value of the priority has never been adjusted to inflation and currency devaluations, so that its real value in 1976 was roughly six times what it is today...

Additional reading on the protection of employees in insolvency

1. M. Sargent 'Protecting Employees with Insolvent Employers' (2003) 32 *Industrial Law Journal* 53.
2. C. Barnard, *EC Employment Law*, 3rd edition (Oxford, OUP, 2006) 685–697.
3. F. M. Mucciarelli 'Employee Insolvency Priorities and Employment Protection in France, Germany, and the United Kingdom' (2017) 44 *Journal of Law and Society* 255.