Employee Participation.

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Introduction

Since the Maastricht treaty was agreed and entered into force in 1993 there has been a flurry of activity in the field of employee participation at the European level. Much of this activity has been the completion of unfinished business left over from previous attempts at directives, some of which stretch back into the 1970's. (EIRO, 2002)

This chapter will look at three main initiatives that have such a history and have been enacted since 1993 – namely the European Works Council Directive (hereafter EWC), the European Company Statute (ECS) and the more recent Information and Consultation of Employees Directive (ICE). All three of these directives represent important and major boosts for employee participation within Europe and the UK in particular. Indeed if we were to believe some of the hype surrounding the EWC and ICE introduction we are witnessing the advent of a truly European form of employee representation and participation. For some (Lecher, et al, 1999, 2002 & 2002) the three directives together make it possible to talk of a robust European model of participation backed by a platform of employee rights that begin to transcend the parochical national models and usher in institutions on a European scale:

> *"In many member states (the directives)…. represents the essential, and in some cases, the sole foundations for the employees rights to information and consultation, filling a gap in the law and paving the way for a higher degree of harmonisation of labour and industrial relations legislation in Europe". (ETUI 2007: 83)*

For the UK it is claimed that these directives together represent a potential sea-change in British industrial relations, for the first time there are legal rights to workplace consultation, there is the implantation of the Works Council model and the option through the ECS to adopt board level employee representation. For Keller (2002), and the ETUI, (2007) this presages a move from away from the voluntaristic tradition towards adoption of a 'Continental model':

> *"Insofar as the directive establishes a permanent structure worker representation throughout Europe, it constitutes a step in the definition of a continental model of labour relations within Europe, thereby entailing immediate impact on countries with a voluntaristic tradition such as the United Kingdom, Ireland and Malta. " (ETUI 2007: 83)*

Keller sees the three directives together addressing the thorny issue of divergent employee representation and the gaps that they have in practice; each of the different directives addresses differing levels for worker representation and participation. EWC and ICE deals with the enterprise issues relating to tactical and operational management dealt with by lower representation, whilst the ECS provides for higher level representation allowing access to those strategic decision-making functions of European-scale enterprises. Bercusson (2002) when discussing the ICE directive writes of the 'European Social Model coming to Britain' as its necessary processes will have profound implications for the structure of employee representation. Kluge (2004) in a similar fashion sees the past decade as a decisive one in the formation of a truly Social Europe:

> "*At the European level an additional reference system for a Europeanisation of labour relations involving the active inclusion of employees has been added to social dialogue in the last ten years with the three directives explicitly concerning workers' involvement ….. In the first place they set Europe-wide standards for the inclusion of employees, information and consultation as a codified European standard with consequences for national labour systems, and additional participation in cross-border companies and cooperatives. This represents an achievement for Social Europe." (Kluge. 2004:5)*

This chapter then will look in turn at each of these major directives to assess the substance of employee participation that they contain and identify if they are leading to substantive change contributing to a growing Europeanisation of participative structures. Equally important is the need to review available evidence on the importance and outcome of the three directives to assess the reality of such participation. This latter poses more difficulties as in the case of the SE and ICE directives their enactment is fairly recent and therefore the corporate and institutional impact is less embedded than for the EWC.

European Works Council Directive.

If the debate on Europeanisation of representation and participation is correct then the EWC Directive has a key role to play in the unfolding of that process, Lecher et al (1999) accord the directive much more importance than the macro social dialogue when it comes to the development of European participative structures, in many respects they paint a very determinist path towards this Social Europe,:

> *"actors have no choice but to widen their radius of action to international and supra-national level ….. as a consequence EWCs could prove to be more important in establishing the foundations of an enduring system of European industrial relations than the 'compensatory' Social Dialogue between umbrella organisation." (1999: 3)*

Waddington (2003) points to a somewhat different outcome. Optimistically one might see greater cross-border fertilisation and the growth of activity at the transnational level emanating from an adoption of the continental model. However, he equally sees cause for pessimism due to the fact that employers can effectively opt out of setting up councils and even where they are created he sees regulation as neo-voluntaristic at best. (2003, pp 304-5)

This chapter is not the place to look at the long and chequered history of the directive prior to enactment in 1994 see Falkner (1998) for that account. Briefly, previous attempts to get some form of consultation process were evident as early as the 1960s. Subsequently the Vredeling Proposal, or to give its official title the Draft Directive on Procedures for Informing and Consulting Employees, first put forward in 1980. This directive was specifically drawn up to establish procedures for enhanced consultation and information inside large multi-plant, and especially, multi-national enterprises. The period following the Maastricht Treaty saw intense debate between the social partners to define the provisions of transnational information and consultation arrangements. (see Waddington, 2003, Lecher et al. 1999, Hall , 1992) In 1991 the Commission launched a draft directive for works councils covering Community scale undertakings. The exchanges between the ETUC and UNICE saw the latter succeed in ensuring that the Directive excluded codetermination rights, rejected a formal role for trade union representatives and prioritised 'voluntary'

provisions. The employers also managed to raise the employment thresholds for undertakings included in the Directive (Falkner, 1998: 102–12).

The directive that came into force in 1994 did not invent EWCs as there were a number of voluntary councils in existence prior to that, however its statutory imperative did usher in a period of unprecedented growth and debate on the issue of transnational consultation. There is now over twelve years of EWC experience to draw on and this can enable one to take stock of its impact. We can ask what has been the main lessons for worker participation from the advent of this directive, what is the impact on decision-making, how is the impact being felt by the actors in the process and to what extent are the 'optimists' vindicated in their expectations of EWCs? I will first to look at the figures and the compliance rates before going onto discuss the impact upon worker influence in decision making.

In September 1994 when the EWC Directive was adopted, 46 companies had already voluntarily established EWCs, (Gold and Hall, 1992, 1994 provide an account of the pre-legislative EWCs), whereas by 2007 some 972 EWCs had been created and approximately 820 still had an existence in that year; mergers, closures and restructuring account for the difference between the two figures. The ETUI research group on EWCs provide the most comprehensive and up to date figures that show the overall rate of eligibility, creation and compliance rates as follows.

Growth of EWC's

	1995	*1998*	*2000*	*2002*	*2004*	*2006*	*2007*
Eligible	**1152**	**1205**	**1848**	**1874**	**2169**	**2204**	**2257**
Actual	**49**	**329**	**606**	**678**	**737**	**772**	**822**
Compliance	**4%**	**27%**	**33%**	**36%**	**34%**	**35%**	**36%**

(Source ETUI-REHS, April 2007)

Looking across the various countries affected by the directive now, we see the highest complier to be Belgium at 52%, with the UK and USA high (42% and 36%

respectively). Germany the country with the most 'community scale enterprises (over 250) has a modest compliance rate of 28%, whilst Spain and Portugal have the lowest rates at 16% and 12%. Looking at the figures for longevity nearly half of the EWC's have been in existence for 10 years.

Much of the research evidence one can draw upon stresses the variety and diversity of the EWCS and how country of origin effects lead to differentiation in terms of format, structure, personnel, frequency of meetings and employee influence. Lecher et al's three volume study described this heterogeneity with a fourfold typology of EWCs – *Symbolic*, *Service*, *Project-oriented* and *Participative*. Only the latter is held up as the potential forerunner for a Europeanised industrial relations where the councils have scope for negotiations, have cohesive internal structures, strong European links/exchanges and a supportive trade union structure. However, again we are told that only two of their 15 case study councils fulfil this classification and that 'many EWCs have not yet realised their potential… and several will not be able to do so over the longer term' (2001, Vol 2, p93) When they look at the content of EWC proceedings again there is little optimism that EWCs are developing a wider role than that specified in the Directive. The hope that these forums are precursors to European collective bargaining is hardly borne out. In the vast majority of their cases they share the analysis offered by Carley and Marginson (2000) that the function of the Councils do not extend beyond information disclosure; indeed negotiation is expressly forbidden in 10% of the cases they report. Other research reported by Mark Hall shows that only 2% of agreements allowed for negotiations on certain issues and only 4% of the EWC's could make recommendations and proposals of its own. More recent work by Leonard et al (2007) indicates that both cross-border bargaining initiatives and movements to transcend consultation have failed to happen in the vast majority of EWCs. Whilst Europeanisation and globalisation of business exerts greater pressure to move this way, the agenda appears to be restricted by internal management and the decisions they make about the extent of transnational consultation, "overall management remains the driving force behind the emergence of a cross-border dimension to company bargaining" (Leonard et al, 2007, p 62). In terms of negotiated texts and agreements little appears to have changed since Hall's earlier work, evidence using 2005 data shows 53 joint texts in 32 trans-national companies representing just over 4% of the total; closer inspection however shows

that 31 of the agreements emanated from just 10 companies the existence of a joint text did not automatically mean that bargaining of significance was taking place. (Leonard et al 2007: 63)

Part of the reason given for the lack of coherence and vitality within EWCs relates to ill-fitting and contrasting employee representational structures and the difficulty of them "making the leap from the local to the European level" (Lecher et al, Vol 3, p 169). This repeats Hyman's (2001) analysis regarding the national rootedness of labour institutions when compared with the internationalisation of capital; and the importance for collective bargaining at the local level where the crucial issues surrounding the effort bargain and work organisation are primarily decided.

Waddington's (2003) survey of 558 EWC participants within 222 MNCs provides cogent evidence to back up the diversity thesis. The survey finds that no single path of development is privileged – indeed the evidence underlines the effects of the contrasting three models of industrial relations, [Waddington describes the first as Voluntaristic, then Juridicial and finally Coordinated Bargaining 2003:307] and the consequent panoply of procedural and structural arrangements. The survey looks more qualitatively at the depth of the information and consultation on offer, its timing, its usefulness, appropriateness and the genuineness of the consultative process. Here certain deficiencies regarding the reality of participation are exposed, important issues that should have been included within the council's remit did not seem to be the subject of information and consultation. Items that have been central to European and national trade union actors were unlikely to appear on the EWC agendas, exceptions to this being items related to health and safety and environmental protection.

> *"the issue of trade union rights, was reported as not raised by almost three quarters of EWC representative, suggesting that there has been only limited progress in developing the EWC - trade union links - even though Euro-optimists considered this linkage central to the future development of EWCs."* (Waddington 2003: 313)

Indeed, the flexibility written into the constitution of EWCs has, to Waddington's mind, allowed management to exert undue influence on the agenda. This echoes work done by Hancké (2000) on European Works Councils in the automotive sector. Here the EWCs signally failed to halt competitive restructuring and had not enabled

better or more cooperative union interchange on vital issues such as job losses and changes to working conditions:

> " *European works councils have failed to become a pan-European vehicle for trade union coordination, as optimists had hoped, precisely when this was most needed …….. Not only are European works councils, relatively unimportant in building up international trade union strength; local trade unionists seem to use the European works councils to do the opposite: obtain information that can be used in the competition for productive capacity with other plants in the same company.*" (Hancke 2000: 55)

Whilst EWCs are important because of their potentiality to strengthen employees and trade unions legal rights to get information and to be consulted, that potential has yet, it seems, to be fully realised. The trade unions and worker representatives might be treated as legitimate groups in the process of enterprise consultation model but myriad institutional and attitudinal problems interpose themselves to prevent a healthy consensus developing. From the available evidence the EWC process has not proved to be the watershed in terms of the representation of staff, nor in the forging of new and powerful relationships with overseas trade unions that establish real rights to consult and bargain on a transnational basis. On the basis of Swedish case study evidence, Huzzard and Docherty (2005) neatly encapsulate this disappointment when they say:

> *"although EWCs appear to provide useful opportunities for transnational trade union networking, these cases indicate that they do not function as a means for labour to significantly check the power of multinational capital. From a critical perspective, the EWCs can plausibly be seen as a management tool for legitimizing and facilitating rationalization and restructuring in manufacturing and as a tool for 'engineering' corporate culture in services (including retailing). There is little evidence, moreover, to suggest the evolution of transnational bargaining structures through EWCs or the integration of EWC procedures into either formal corporate or HR decision-making." (2005: 543)*

Employee involvement in the European Company

In similar fashion to the EWC Directive the debate on the European Company has more than a 40 years history. (Gold & Schwimbersky. 2008) The topic was first discussed in the early 1960s but it was in 1965 when the idea was formalised by the French government who proposed in a note to set-up legislation on a European Company through a treaty between the EC Member States. (Lenoir, 2007 puts the first

mention of this even earlier in discussions that pre-dated the setting up of the EEC) The Commission published a first proposal on the statute for a European Company in 1970 with an obligatory two-tier structure of a *Societie Europeanne* (SE) an administrative and supervisory board on which the representation of employees could be acheived. In that proposal there was also a provision for concluding (European) collective agreements on working conditions in the SE between the management and the represented trade unions. (SEEurope Network, 2007) The deadlock of 25 years that followed this was finally overcome when the Commission convened a 'high level expert group on workers involvement', the so called Davignon Group (1997). They concluded in their final report that the national systems on workers' involvement were too diverse, the report proposed instead that priority should be given "to a negotiated solution tailored to cultural differences and taking account of the diversity of situations" (Davignon Report 1997: Paragraph 94c)and importantly they suggested a default arrangement that if negotiations failed then standard rules should apply. At the EU Council in Nice (2000) the Regulation on the ECS and the Directive on workers' involvement in the SE were finally adopted and the Directive was enacted in October 2001. The latter prescribes prior negotiations on information, consultation arrangements and (board level) participation. This to be undertaken by the competent managerial actors within the participating companies and a Special Negotiating Body (composed by employees' representatives from the different countries involved). Negotiations come to an end six months after the first meeting of the SNB (renewable once). Negotiations can result in a number of possible outcomes:

- a written agreement is indeed concluded at this time and the registered SE incorporates the social dimension in this agreement;
- the SNB decides on the contrary (by a two-thirds majority) to conclude negotiations before the end of this period, or even not to begin negotiations, deeming the system of worker involvement organised by national legislation or by framework agreements concerning the group on a national scale to be satisfactory;
- negotiations are unsuccessful and the subsidiary rules of the 2001 directive, referred to as "standard" are therefore adopted. (Lenoir 2007: 64)

Once again flexibility to appease differing social models was introduced that gave member states the possibility not to apply the standard rules for (board level) participation in the case of an SE inauguration following a merger, this **"**opt-out-clause" was introduced following robust demands by Spain (Keller, 2002) supported by the UK government amongst others. The timetable for transposition was agreed as October 2004 and so far 25 of the 27 countries achieved this prior to 2007 with Bulgaria and Romania doing so during that year.

One of the important elements that the SE addresses is the very definition of what employee participation is and how it can be differentiated, whilst the EWC has information and consultation rights built in, the SE goes further and offers specific distinctions between the corporate provision of *information and consultation* and *participation:*

> *"involvement …..according to the 2001 directive, (is) "any… mechanism through which employees may exercise an influence on decisions to be taken within the company". Information and consultation refer to identified social laws that are the subject of European harmonisation" (Lenoir, 2007: 63)*

However following the discussion within the Davignon group, *participation* is something more:

> *"the 2001 directive defines participation as the right to recommend or oppose the appointment of members to the supervisory or administrative boards, or as the right to elect or appoint these representatives. Reference is made here to the highest level of participation, since all members of the supervisory or administrative board – elected, appointed or recommended by the employees' representatives – are full members. They have the right to vote, contrary to the provisions of the French Labour Code for representatives of Work Councils called upon to participate in these councils in an advisory role." (Ibid: 63)*

Keller (2002) in his detailed dissection of the SE provisions stresses that the essential importance of this move lies in its potential for extending both the scope and the levels of participation. European enterprises may now have trade union representation and Works Councils providing information, consultation and negotiation at the workplace or plant level now this can be supplemented by genuine employee participation in board level decision making. This point is echoed by Gold and Schwimbersky:

> *"The Directive governs provisions for two levels of transnational employee*

representation within the SE: employee information and consultation through a 'representative body' (or equivalent procedures) and arrangements for board-level representation, referred to as 'participation' with safeguards to prevent the dilution or abolition of existing systems" (Gold & Schwimbersky 2008: 56)

These multiple formats allow for the first time across the EU the potential for coordinated and influential structures of participation. However, Keller also warns us to look at the past practice and the possible set of constraints that will shape actual decision-making inside the new enterprises. Because the formation of a European Company – or SE – remains purely voluntary and supplementary to national forms of company legislation this does have important effects and these for Keller could constrain the take-up of SEs;

" voluntary participation arrangements are of a different quality than obligatory ones, as firms enter into them only if they promise to be pro-competitive" (Keller 2002: 441)

Only the 'before and after principle' which guarantees the acquired rights of workers to participation in the European company to ensure that they are never eroded or eliminated as a result of its creation (Blanquet, 2002. quoted in Gold & Schwimbersky: 55) means that countries with existing strong participation provisions (such as Germany) are restricted in their options.

There are now over three years of SE development to draw upon and we can use this to tentatively estimate to what extent Keller is right in his prediction of involvement being dependent upon market dependent management strategies resulting in a low level of compliance.

Outcomes so far

According to April 2007 data, seventy SEs had been created across Europe and another thirteen are in the process of being created. One can see from table X that the vast bulk of these SEs are based in Germany, Austria and Benelux (49) with the majority of those in the planning stage also headquartered there. Since the Directive was enacted in 2004 many States have delayed incorporating the SE statute into their

national law (Lenoir 2007: 85) and this explains both the low figures and the absence of some key member states, notably Italy, Spain and Poland.

European Companies: Established and Planned

Ger	Aut	Neth	Bel	Swe	Fra	UK	Hun	Nor	Lat	Est	Slo	Lux	Fin	Cyp
26	**8**	**6**	**7**	**5**	**2**	**3**	**2**	**2**	**2**	**1**	**2**	**2**	**1**	**1**
4	-	-	-	*1*	*2*	-	-	-	-	*1*	-	-	-	-

Those in italics are in planning (Source Seeuropenetwork.org. 2007)

When one looks at the numbers of employees covered by the new structures they are somewhat meagre, the database records just over 176,000 employees in the established SEs and just seven of those account for 175,000 staff. The corollary of this is that ten SEs report workforce numbers to be below 350 employees, we see twenty four established SE's report zero employees and there a further thirty that do not give any employee information at all. With only three years of legal existence there is scant evidence about the likely trajectory of growth of the SEs, the Seeurope database has tried to collect figures for potential SEs, and if these were factored in we could see coverage of staff more than double by 2008. Of the eight SEs in development half are German, two French, one Swedish ands one Estonian. Overall this will extend SEs to an extra 350,000 workers as three of the companies are very large employers – BASF (German), Fresenius (German) and Suez (French) between the three of them they account for 345,000 of the total. The two German companies are planning to have information, consultation *and* participation arrangements.

Hence the ETUI designates only twelve SEs as 'normal',[1] the others are seen as shelf or empty companies that have either no employees or in some cases no operations and exist on a 'just in case' basis. It is only in those SEs designated 'normal' that we can ascertain whether the fuller participative mechanisms apply. In the twelve cases there are four where there is both information/consultation instruments and 'participation' at the board level; in seven cases there are information/consultation mechanisms alone and one has neither

information/consultation nor 'participation'. Of the four SEs with employee participation on the board two are German and the other two are Austrian, representing countries with pre-existing legislation on board participation. Looking more closely at the actual provision of employee representation Allianz the German insurance giant gives 50% of the seats to worker delegates as does the other German enterprise MAN Diesel. Strabag an Austrian construction company provides for one third representation whilst Plansee an Austrian metal working firm moved to a single board structure and actually increased worker representation on that board from 33% to 40%.

On the basis of these rather modest achievements the ETUI states that:

> *"The worker side can be rather satisfied with the results……in none of the companies where participation rights existed before has the percentage of employee delegates amongst the board members been reduced." (ETUI 2007: 93)*

I find this statement perplexing, premature and rather negative: based as it is on such small numbers and secondly in celebrating the mere retention of employee rights to board-level representation in a small number of European enterprises that have a 'continental format' already in place. Looking critically at the situation one might conclude that European industry and commerce see little positive value in SEs and because of this their importance in participation terms will be either symbolic or marginal. Keller is particularly critical of the weakness of the participation that this directive ushers in. Not just that in the vast majority range of member states there is little evidence that the SE format will be adopted by enterprises now or in the future; but also that the 'power relationship' that currently exists across Europe 'will not be seriously challenged by SEs'. (Keller 2002: 442) Future compliance may indeed change but so far it does look like Keller's pessimism about the prospects for enhanced and European scale 'participation' was well-founded.

Information and Consultation Directive

During the 1990s, Europe saw numerous high profile closures of businesses in different EU countries. At the same time there had been clamour by various social actors to do something about the issue of redundancies related to social dumping within the EU. The Hoover closure in Scotland in 1993 and the 1998 Renault closure of its Vilvoorde plant in Belgium catapulted these debates on to the European scene with frantic activity between the peak organisations to address and mitigate the impacts of such incidents. The Hoover case sped on the enactment of the EWC directive that sought to enable employee consultation in *transnational* organisations. In 1995 talks began between the social partners on a community instrument on *domestic* consultation and information procedures. The Vilvoorde closure highlighted the significant weaknesses within the consultative practices inside EU countries when important and substantial issues affecting employees were decided. Following the failure of the European level social actors to deal with this issue through the 'negotiation track' (see Carley this volume) a proposal for a Council Directive establishing a general framework for informing and consulting employees was proposed by the Commission. This framework did not simply concentrate upon harmonisation of national law but sought 'essential changes to the existing legal framework ... appropriate for the new European context' (Bercusson, 2002, 217) For the UK and Ireland where there was no prior legislation this signalled a more fundamental departure than elsewhere in continental Europe.

> *"The ICE regulations represent a radical development in the UK context. Historically, employee consultation has not generally been regulated by the law in the UK reflecting its voluntaristic industrial relations tradition. " (Hall 2005: 104)*

Both Bercussen (2002) and Hall (2005) indicate that the UK government took a particularly negative stance regarding the introduction of this directive. The UK sought to oppose any proposal that would cut across existing practices and would harm the traditional format of employee relations in the UK. During a period of consultation, the UK managed to water down the draft in two key areas. The first was excising the need for information and consultation *prior* to a decision being taken, the second being the watering down of sanctions in the event that management violated

the requirements. (Hall 2005:108) Employer lobbying also gained a longer introduction time for the Directive and the phased process whereby the only firms above 150 employees would be immediately affected followed by firms with 100+ in 2007 and 50+ in 2008. Official data (DTI, 2004) showed that in the UK approaching 37,000 enterprises would meet the Regulations' employment thresholds.

> "*There are around 13,000 enterprises with 150 or more full-time equivalent employees and some 5,700 enterprises with 100–149 employees. Enterprises with 50–99 employees are the largest group covered by the Regulations: almost 18,000 enterprises fall within this category, constituting nearly half of all enterprises with 50 or more employees. "* (Hall 2005: 119)

About 75 per cent of UK employees will ultimately be covered by the Regulations.

From the time that the UK government signalled its intent to transpose the directive UK companies have had to consider how they comply with the legal requirements and provide acceptable 'information and consultation' rights. They can be forced to act if a 10% vote of the workforce triggers negotiations so that an 'Information and Consultation' arrangement has to be made. Once a vote is triggered the employer can then establish an arrangement covering all employees at the workplace or the request may go to a ballot of employees. If a ballot is called, then a 40 per cent plus majority of those voting must endorse the request. If successful, the employer is obliged to reach a negotiated agreement with employee representatives. As Bercusson (2002) indicates where 10% of employees make such request then the employer *must* implement the 'standard provisions' of legislation if negotiations to reach an agreement fail.

However, flexibility written in during transposition of the Directive allows the possibility for employers and employee representatives to negotiate their own information and consultation arrangements, known as pre-existing agreements (PEAs) when in compliance with the general principles of the directive. As long as the arrangements provide for the following items:

- information on the recent and probable development of the undertaking's or the establishment's activities and economic situation;

- information and consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;
- information and consultation on decisions that can lead to substantial changes in work organisation or in contractual relations.

The scope of the directive is therefore wide and includes providing information on mergers and acquisitions and business reorganisations, as well as changes in terms and conditions of employment. (European Commission, 2006: 59) So how are the provisions of the Directive being applied in the UK?

UK Experience of ICE

The introduction for the first time of a statutory right to information and consultation has been hailed by the ETUC and British trade unions as a momentous step. The transposition arrangements involving the TUC, CBI and government enabled an introduction of the directive on the 6th April 2005, with much interest across these social partners and academics about the outcomes and impact on British industrial relations. Many questions were raised given the flexibility written into the directive about the likely models and take up that would result. Gollan and Wilkinson (2007) argue, that whist the regulations can potentially affect and improve the British Industrial Relations, the current way of implementing the regulations still allow a scope of maintaining the voluntarist tradition albeit within a statutory framework. There were questions also about the role and strength of union representation given that "unions have been "*written out of the script*" as far as the standard information and consultation provisions are concerned" (Hall, 2006: 460)

The period prior to the enactment of the directive had been closely watched to see if any voluntary movement in anticipation of the directive was in evidence. WERs data was inconclusive in terms of an upsurge in information and consultation mechanisms, for instance Charlwood and Terry have used WERS 2004 results and argue that:

> *"…over 80% of workplaces have no form of indirect representation, confirming that, to this point at least, few, if any, employers had been stimulated by the imminent enactment of the ICE Regulations to take pre-emptive action by*

> *introducing representative consultation where none existed before. However, that does not mean that nothing in happening…"*. (2007: 335)

However, an IDS survey (2005) undertaken two years before enactment did show an increase in some form of consultation up from 49% to 68% with the ICE regulations cited as a motivating factor in this. Against this Hall (2006) quotes an ORC survey of 66 companies in 2004 where some 55% of companies indicated their intention to do nothing in regard to the Directive even though only 50% of them had any appropriate mechanisms in place. Summarising the available evidence Hall sees the run up to enforcement and its immediate aftermath as something of a damp squib, with cautious management and uncertain union responses.

> *"The available evidence suggests considerable employer-led activity in terms of reviewing, modifying and introducing information and consultation arrangements but a relative paucity of formal 'pre-existing agreements', despite the protection they offer against the Regulations' statutory procedures being invoked by employees. This picture is consistent with a 'risk assessment' rather than a 'compliance' approach by management, facilitated by union ambivalence towards the legislation and low use of its provisions by employees." (Hall, 2006: 456)*

It is difficult to give a true picture of the situation after only two years of operation as only now are detailed studies emerging that given some quantitative and qualitative picture of what is going on. One such study commissioned by the new Department for Business, Enterprise and Regulatory Reform that replaced the DTI and undertaken by Hall, Hutchinson, Parker Purcell and Terry (2007) looks at thirteen detailed cases following the enactment of the Directive. This study reports on the first stage of a qualitative longitudinal study. Here they tentatively offer some early evidence, regarding amongst other things, the strategic usage of I&C in enterprises, the role and activity of the unions and the representatives, the meaningfulness of the forums in terms of issues and significance of the debates, and assess the importance of the mechanisms. Whilst the authors admit that the13 cases were in no way representative, they do give a glimpse at the underlying reality, in terms of formation of arrangements, the there was only one incidence of an agreement being made between the management and unions. In the remaining twelve, eight of them had PEAs and four were instances where management introduced arrangements on an informal basis. Virtually all of the running in the cases was taken by management and there were no trigger votes or used of the formal statutory mechanisms. In line with earlier

research on the setting up of EWCs the information and consultation arrangements fitted to some extent with the existing human resource strategies of management and were seen as useful adjuncts to other people development policies.

> *"There is clear evidence that in all of the organisations the approach to I&C was strategic in the sense that it was part of a wider attempt to develop effective people management. The most obvious indicator of this is the near universal adoption of both downward and upward direct methods of involvement, seen in a wide array of approaches." (Hall et al 2007: 70)*

In these cases management did not see the arrangements as trivial nor did they adopt a passive role, however there were cases where union avoidance was uppermost. As far as the representatives were concerned unions did play some role but not a predominant one, against this the majority of representatives were voted in by secret ballot rather than being mere appointees. Some difficulties were observed in getting replacement representatives (Ibid: 72) and the authors also noted an overall lack of support resources for representatives across the cases. But it emerges that whilst the unions were active they were not using the directive and its provisions to establish a 'bridgehead' for greater recognition and power in collective bargaining; *"there is little evidence of union members 'colonising' the I&C bodies."* Iibid :73) The authors indicate that the more worrying aspects from the report is the lack of efforts to build an effective network of representatives and the indifference of the rank and file employees: when asked if the forums were effective between 38% and 68% of them said 'what forum?' (Ibid :73) Summing up this early evidence on the ICE regulations the researchers are guarded in their evaluation counselling that the criteria for judging the cases should not be set high. They are also tentative in their overall conclusions:

> *"What we can say is that they (the information and consultation arrangements), are in the main, not trivial; they are taken seriously by management and the employee representatives; they are becoming more accepted by trade unions on the ground; and are likely to evolve over time.(Ibid:75)*

With a paucity of available information as to the reality on the ground these and other case studies are the best indicators of the current situation regarding ICE. What they show so far is that the regulations have not resulted in the seismic shift envisaged by some observers; Hall (2005) sees the ICE regulations as having less impact than EWCs in the UK for two reasons, firstly they do not demand new structures as there are already mechanisms in place that actors can use; secondly the 'minimalism' of the fall back provisions and the lack of a compelling template. (Hall 2005: 123) So for

many observers the impact ICE may come but will be built upon the foundations that are only now being put into place.

Discussion

Following the Maastricht Treaty and the agreement to allow majority voting in regard to the social agenda the log jam surrounding worker participation reforms was broken. We have seen how three major Directives were developed each with significant structural similarities that allowed for variation in forms of participation and flexibility of implementation. All three place great emphasis upon a negotiation process that might allow the principles in the directives to be better suited to local arrangements; they all provide for employee representatives or special negotiating bodies to be centrally involved in the process and specify statutory fall-back arrangements that may be used in the event of disagreement or breakdown of negotiations. It would seem then, from this flurry of activity surrounding worker consultation and participation, that this has been a period of widening and deepening of worker rights in Europe. One cannot demur from the fact that there have been stunning developments in worker involvement that are in advance of anything to be found outside of Europe. However, one must see beyond the surface activity and the de jure level to ask if these initiatives have indeed embedded new and more effective forms of de facto employee involvement. This all too brief look at the three cardinal initiatives of the past decade offer something of a mixed picture: with some academics and social partners making large claims about the importance of the advance they represent, whilst other being highly sceptical if not downright critical of the overall project.

Out of all this, one can I think detect at least three, if not more, approaches to the recent developments.

The first sees these three directives as agents in building the European platform for extensive worker participation the European Commission, ETUI and the work of Lecher et al certainly fall into this category. The ICE directive complements and completes a project for the harmonisation of employee rights started back in the 1960s. There is now a framework in place that provides legal rights to transnational

and domestic information and consultation as well as an option to provide worker participation on the boards of European companies. Taken together with the social dialogue mechanisms at peak and sectoral level and the developments in international framework agreements/negotiated agreements through EWCs we can truly speak for the first time about a working European Social model and European industrial relations area.

A second group sees the potential of these initiatives but are hesitant about the achievements that have come as a result. Many of the participants here stress cogent reasons why that advance has been so slow and halting – Marginson (2005) refers us to the structural complexity of European industrial relations and the 'hole in the middle' where we see 'an absence or weakness of sector level actors and institutions'. (2005: 537) Much of the research emphasises the diversity and differing trajectories of employee participation even in the same country, highlighting also the enduring effects of industrial relations models, traditions and institutions and their seeming imperiousness to change. (Hall. 2006, 2005, Hall et al 2007) Such points act as reminders that a strong European space and European institutions for worker participation cannot be built overnight, and how the Commission and the social actors are involved in a complex process involving the simultaneous creation *and* legitimisation of new forms of consensual dialogue. Often unwilling participants amongst the social partners have to be persuaded into the rightness of the path as one cannot impose participation by fiat on heterogeneous national systems and actors.

The third approach sees is much more sceptical about the prospects for further advance in European worker participation. Since the Lisbon the European agenda has shifted decisively away from establishing and embedding worker rights and towards an agenda based on employment at any costs (Cressey, et al 2000). Indeed, these three directives could be seen to represent the completion of an old discredited pluralist agenda, (Weinz, 2006) one which modern social actors, especially employers, had little time or enthusiasm for. But the realisation of this 'pluralism' has been watered down, the experience of EWC implementation and the deficiencies highlighted by Waddington (2003|), Huzzard & Docherty (2005), and Hancké (2000) relate to the underlying weakness of the employees representatives consequent on the form of

legislation marked by a strong reliance on what Sako called *"employers' goodwill"* (1998:12).

In answering the question posed at the outset – has there been substantive change contributing to a growing Europeanisation of participative structures. Keller (2002) forcefully concludes that the move towards weak forms of regulation will not neutralise market influence, will not enable universal rights nor will it inhibit national idiosyncracies. Indeed:

> *"a variety of voluntaristic, tailor–made, enterprise-specific rules will be the result of the above mentioned proceduralisation of regulation." (2002: 442)*

Such developments seem to chime in with the trend towards more direct participation (European Foundation, 1997) in enterprises that fulfil operational and market led needs. The decline in the relative importance of indirect forms of representation when coupled with the shift towards a European form of managerialism through flexible regulatory mechanisms does not augur well for the creation of strong forms of worker participation common across member states. Instead I would tend to concur with the more sceptical viewpoint that indicates not only that participation is not being embedded across the EU but the very model that we sought is being questioned and replaced by a model of participation that is functional, voluntary and unitarist in outlook.

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European Works Council Directive. Trans-national information and consultation rights in community scale undertakings. 94/45/EC (UK 97/74/EC) Entry into force - 09/1996 (12/999 UK)

The UK's "opt-out" from the social chapter was formally ended when the new Amsterdam Treaty, incorporating the Social Chapter, entered into force on 1 May 1999. As a result of this the original directive was extended to cover the UK in December 1999.

- The EWC directive sets out requirements for informing and consulting employees at the European level in undertakings or groups of undertakings with at least 1000 employees across the Member States of the European Economic Area (EEA)3 and at least 150 employees in each of two or more of those Member States.

- The purpose of the directive is to establish mechanisms for informing and consulting employees where the undertaking is so requested in writing by at least 100 employees or their representatives in two or more Member States, or on the management's own initiative. This will entail the setting up of a European Works Council (or some other form of transnational information and consultation procedure). Where no request is received or where management does not initiate the process, there is no obligation to start negotiations or to set up an EWC.

- After a request has been made (or at the management's initiative) a negotiating body must be established – the "special negotiating body" (SNB). The SNB consists of representatives of all the employees in the EEA Member States in which the undertaking has operations. It is the SNB's responsibility to negotiate an agreement for an EWC with the central management of the undertaking (or groups of undertakings). An agreement reached under this procedure is known as an Article 6 agreement.

- Central management and the SNB must determine the composition of the EWC in terms of the number of members etc; the functions and procedure for information and consultation; the venue, frequency and duration of EWC meetings; the financial and material resources to be allocated to the EWC; and the duration of the agreement and the procedure for its renegotiation.

- If management refuses to negotiate within six months of receiving a request for an EWC, or if the parties fail to conclude an agreement within three years, an EWC must be set up in accordance with the statutory model set out in the Annex to the directive. This lays out requirements concerning the size, establishment and operation of a European Works Council.

- An annex lists topics on which the European Works Council has the right to be informed and consulted
  The economic and financial situation of the business;
  Its likely development;
  Probable employment trends;

The introduction of new working methods;
Substantial organisational changes

- The Directive provides for two kinds of EWC agreement, Article 6 agreements as referred to above, and Article 13 agreements. The latter agreements are exempt from the provisions of the EWC directive if they provide for transnational information and consultation of the employees across the entire workforce in the EEA.

The Transnational Information and Consultation of Employees Regulations 1999

The UK i regulations are based closely on the Directive. The main features of the UK legislation are:

- Employees or their representatives must make a valid request to management to negotiate an EWC.
- A Special Negotiating Body representative of all employees must be set up to negotiate with management.
- Management has 6 months from the request to commence negotiations. If it fails to do so, the provisions of the Schedule (which sets out the statutory model) apply.
- The parties have 3 years from the request to conclude a written agreement establishing an EWC or alternative information and consultation procedures. If they fail, the provisions of the Schedule apply. The agreement must cover all European Economic Area establishments at least.
- The Schedule, which applies in the absence of an agreement, sets out the composition of the EWC and how members are to be appointed, and provides for annual meetings plus exceptional meetings where required.
- Complaints about a failure to establish an EWC or Information and Consultation procedure, or about the operation of an EWC or Information and Consultation procedure, are made to the Employment Appeal Tribunal(EAT).
- Breaches of an Article 6 agreement or of the standard rules are liable to apenalty of up to £75,000.
- Management may withhold confidential information from employee representatives or require them to hold it in confidence.
- Where the CAC or EAT considers an application or complaint could be settled by conciliation, it must refer the dispute to ACAS which must try to promote a settlement.
- The employees and SNB/EWC members are given statutory protections when claiming their rights or performing duties under the Regulations.
- The Regulations do not apply to agreements that were drawn up before the legislation came into effect and which cover the entire EEA workforce and provide for transnational Information and Consultation.
  Source.(BERR. 2003)
  http://www.berr.gov.uk/files/file20023.pdf

Directive on employee involvement in the European Company, obligatory employee involvement: information consultation and participation rights. SE 2001/86/EC Entry into force 10/2004.

The main provisions on worker involvement in European Companies are as follows.

- SEs may be set up by two or more EU-based companies from different Member States (or with operations in another Member State, in some cases) by merger, or by creation of a joint holding company or subsidiary. A single EU-based company may transform itself into an SE, if for at least two years it has had a subsidiary governed by the law of another Member State. A company based outside the EU may (if individual Member States so decide) participate in the formation of an SE, provided that it is formed under the law of a Member State, has its registered office in that Member State and has 'a real and continuous link' with a Member State's economy.
- Employee involvement arrangements – information and consultation, along with board-level employee participation in some circumstances – must generally apply in all types of SE (though some aspects differ according to the way the SE was created).
- Companies participating in the formation of an SE must hold negotiations over the employee involvement arrangements with a special negotiating body (SNB) made up of employee representatives. The SNB is composed of elected or appointed members, with seats allocated in proportion to the number of employees employed in each Member State by the participating companies. The basic rule is that Member States have one seat for every 10%, or fraction thereof, of the total EU workforce of the participating companies employed there.
- The negotiations should lead to a written agreement on the employee involvement arrangements. If these arrangements involve a reduction of existing board-level participation rights which cover a certain proportion of employees (25% of the total workforce of the participating companies in the case of SEs established by merger, and 50% in the case of SEs established by creating a holding company or subsidiary), this must be approved by a special two-thirds majority of SNB members (from at least two Member States).

- The SNB may decide (again by a special two-thirds majority) not to open talks, or to terminate talks in progress – in which case existing national information and consultation rules (including those transposing the European Works Councils Directive (94/45/EC) will apply.
- Where the SNB and management reach an agreement, this should essentially set up a 'representative body' (RB) similar to a European Works Council (EWC) or an information and consultation procedure. If the parties so decide (and compulsorily in some cases), the agreement may also set out the rules for board-level participation. In SEs established by transformation, the agreement must provide for at least the same level of all elements of employee involvement as existing within the company to be transformed.
- SNB negotiations must be completed within six months, which may be extended to a total of one year by agreement. If no agreement is reached, or the parties so decide, a statutory set of 'standard rules' will apply, providing for a standard RB – similar to the statutory EWC laid down in the EWCs Directive's subsidiary requirements. The standard rules also provide for board-level participation in certain circumstances where this existed in the participating companies.
- The Directive also lays down rules on issues such as confidentiality, protection of employee representatives, its relationship with other provisions and compliance. *(Source EIRO 2002)*

Information and Consultation Directive. National minimum standards for information and consultation rights of employees. 2002/14/EC - entry into force 04/2005.

- ICE Regulations apply initially to undertakings with 150 or more employees, but will be extended in two further stages to cover undertakings with at least 100 employees (from April 2007) and then those with at least 50 (from April 2008).
- An 'undertaking' is defined (Regulation 2) as 'a public or private undertaking carrying out an economic activity, whether or not operating for gain', a formula which excludes some parts of the public sector.
- Employees' rights to information and consultation under the legislation do not apply automatically. Regulation 7 enables 10 per cent of an undertaking' employees (subject to a minimum of 15 employees and a maximum of 2,500) to trigger negotiations on an information and consultation agreement, to be conducted according to statutory procedures. Management too may start the negotiation process on its own initiative (Regulation 11).
- If there is a Previously Existing Arrangement (PEA) in place, and a request for negotiations is made by fewer than 40 per cent of the workforce, the employer can ballot the workforce on whether they support the request for new negotiations. If the request is endorsed by at least 40 per cent of the workforce, and the majority of those voting, negotiations must proceed. 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).
- Where a PEA covers employees in more than one undertaking, the employer(s) may hold a single ballot across the relevant undertakings (Regulation 9).
- 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).

- Where the employer fails to enter into negotiations, or where the parties do not reach a negotiated agreement within six months, standard information and Interim assessment of the ICE Regulations 459 consultation provisions specified by the Regulations will apply (Regulations 18–20).
- These require the employer to inform/consult elected employee 'information and consultation representatives' on business developments (information only), employment trends (information and consultation) and changes in work organisation or contractual relations, including redundancies and business transfers (information and consultation 'with a view to reaching agreement'). The standard information and consultation provisions are confined to specifying the election arrangements for the information and consultation representatives and the number of such representatives to be elected (a sliding scale from 2 to 25 depending on the size of the workforce).
- The Regulations' enforcement and confidentiality provisions apply to negotiated agreements reached under the statutory procedure or where the standard information and consultation provisions are in operation, but not to PEAs. Enforcement of the terms of negotiated agreements or of the standard information and consultation provisions will be via complaints to the Central Arbitration Committee (CAC), which may order the employer to take the necessary steps to comply with the agreement/ standard provisions (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).
- Employee representatives must not disclose information or documents designated by the employer as confidential, and employers may withhold information or documents the disclosure of which could seriously harm or prejudice the undertaking. Disputes over employers' decisions to impose confidentiality restrictions or withhold information may be referred to the CAC (Regulations 25 and 26).

  (Source Hall 2006)

[1] They also use the categories devised by the SEEUROPE network with four categories of SE:

‘normal’ SEs- ave both operations and employees, ‘empty’ SEs- with operations but no employee, ‘shelf’ SEs - with neither operations nor employees and unidentifiable or ‘UFO’ SEs.