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**Reflexive Regulation and the Development of
Capabilities: The Impact of the 2002/14/EC
Directive on Information and Consultation of
Employees in the UK**

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**A thesis submitted in partial fulfillment of the requirements for
the degree of Doctor of Philosophy**

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List of abbreviations

ACAS	Advisory, Conciliation and Arbitration Service
Amicus GMP	Amicus Graphic, Media and Printing
BECTU	Broadcasting Entertainment Cinematograph and Theatre Union
BS1	Business Services Case Study 1
BS2	Business Services Case Study 2
BS3	Business Services Case Study 3
CA	Capability Approach
CAC	Central Arbitration Committee
CIPD	Chartered Institute of Personnel and Development
CIA	Chemical Industries Association
COO	Chief Operating Officer
CBI	Confederation of British Industry
DTI	Department of Trade and Industry
ECA	Electrical Contractors' Association
ER	Employee Relations
ERs	Employee Representatives
EAT	Employment Appeal Tribunal
ET	Employment Tribunal
EEF	Engineering Employers' Federation
EC	European Community
ECJ	European Court of Justice
ETUC	European Trade Union Confederation
EU	European Union
EWC	European Works Council
EWCD	European Works Council Directive
Fin1	Financial Services Case Study 1
Fin2	Financial Services Case Study 2
GMB	Britain's General Union
HPW	High Performance Workplaces
HR	Human Resources
ICE	Information and Consultation of Employees
ICED	Information and Consultation of Employees Directive
ICER	Information and Consultation of Employees Regulations
IIP	Investors In People
IPA	Involvement and Participation Association
JCC	Joint Consultative Committee
LFC	Labour Force Survey
LGE	Local Government Employers
MD	Managing Director
MNC	Multinational
OMC	Open Method of Coordination
PEA	Pre-Existing Agreement
RL	Reflexive Law
TUC	Trade Union Congress

TUPE	Transfer of Undertakings (Protection of Employment) Regulations
TICER	Transnational Information and Consultation of Employees Regulations
T&G	Transport and General Workers Union
UCU	University and College Union
USDAW	Union of Shop, Distributive and Allied Workers
WMERF	West Midlands Employment Relations Forum
WTD	Working Time Directive
WERS	Workplace Employment Research Survey

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Declaration

The thesis is the result of my own work and it has not been submitted for a degree in another university.

Abstract

The research evaluates the pattern of change in the field of employee representation in the UK as influenced by the transposition and implementation of the Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community and to relate this analysis to the impact of legislation in the field of labour law and industrial relations through the location of managerial and labour practice in implementing and handling the information and consultation arrangements. Theoretically, the thesis draws on the theory of reflexive law (Teubner, 1993; Barnard and Deakin, 2002) and on the capabilities approach (Sen, 1999), which has recently emerged in political economy. Empirically, it combines textual analysis, interviews with key actors, a questionnaire survey of companies and in-depth case studies in a few organizations in the business services and the financial sectors. The research aims to move beyond the traditional socio-legal concepts and methods to incorporate insights from the institutional and political economy frames of analysis commonly deployed in the field of industrial relations, and from its tradition of empirical enquiry rooted in field-based qualitative research methods.

In diverging from existing UK social norms and conventions a new role for the two sides of industry, CBI and TUC, was created that assisted in the development of the national legislation transposing the directive and led to a re-conceptualization of the EU-level norms, as stipulated by the directive, concerning information and consultation of employees. Whilst the introduction of national legislation drove to some extent the spread of voluntary arrangements, albeit at the instigation of management, there was not much evidence that the ‘standard provisions’ of the UK Regulations promoted institutional experimentation or to a new framework for a process of learning, participation and capabilities for voice. This was down to the nature of the legal obligations, the efficacy of the enforcement mechanisms and the degree to which extra-legal resources, mainly trade union organization, were utilized.

Chapter 1. Introduction: employee representation, reflexive law and the capabilities approach

The thesis sets out to evaluate the pattern of change in the field of employee representation in the UK as influenced by the transposition and implementation of the Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community¹ (ICED) and to relate this analysis to the impact of legislation in the field of labour law and industrial relations through the location of managerial and labour practice in implementing and handling the information and consultation arrangements. Informed by a reflexive law and capabilities approach theoretical framework and adopting a ‘double subsidiarity’ analytical and methodological approach, the study is based on empirical evidence gathered through the conduct of qualitative and quantitative research regarding the transposition of the ICED in the UK, and its implementation by management and labour at organizational level.

While in the great majority of the then EU countries at the time when the ICED was adopted, national legislation already met the requirements or needed only minor amendment (Broughton, 2005: 201), the transposition and implementation of the ICED in the UK and Ireland could have far reaching consequences for the way employers inform and consult employees over a wide range of issues. In more detail, the UK has been traditionally portrayed as having a distinctive voluntaristic ideology underpinning its unregulated collective bargaining (Dunlop, 1958, Kahn-Freund, 1954). Within this context, worker representation was based on the so-called ‘single channel’ model of representation through recognized unions² and ‘joint consultative committees’ (JCC)³ with the state supporting collective labour relations as its central regulatory method (Clark and Winchester, 1994: 714). As Barnard (2006: 65) notes, ‘the single channel model formed the centre-piece of the industrial pluralist model of worker representation which was informed by the idea of equality of arms and an acceptance of a conflictual relationship between employers and unions.’ The principle of ‘industrial autonomy’ (Kahn-Freund, 1954: 44) explains hence the historical absence of legislatively mandated works councils in the enterprise. Instead, the continental works council system had ‘its British equivalent in the functions of the shop stewards’, but ‘without – from the British point of view – the oppressively gigantic legal apparatus of the works council system.’ (Kahn-Freund, 1983: 8).

¹ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community, OJ 23.3.2002 L80/29.

² The single channel of representation had two characteristics: first, worker representation was not organized around a representation rule laid down in law but instead was based on a social practice of worker representation. Secondly, the recognized union had a monopoly on worker representation (Davies and Kilpatrick, 2004: 121).

³ The notion of JCCs refers to ‘committees of managers and employees that are primarily concerned with consultation rather than negotiation’ (Kersley *et al.*, 2005: 126).

Starting in 1975 with the legislation on collective redundancies, a piecemeal development of statutory requirements for consultation with employee representatives on a range of issues, which reflected legislative developments at EU-level, was evidenced. Under the original statutory requirements concerning consultation in respect of impending redundancies⁴ and transfers of undertakings⁵, introduced to transpose the relevant EU directives, the right to be consulted was confined to representatives of recognized trade unions. However, in Case C-383/92 *Commission v. UK*⁶ the European Court of Justice (ECJ) ruled that the UK had failed to fulfil its obligations under articles 2 and 3 of Directive 75/129/EEC on collective redundancies by not providing a mechanism for the designation of workers' representatives in an undertaking where the employer refused to recognize a trade union.⁷ The ECJ's decision led to the emergence of a 'modified single channel' of employee representation (Davies, 1994: 279), in which worker representation is primarily conducted by recognized trade unions but, in the absence of union representation, workers can be represented by elected representatives who negotiate a 'workforce agreement'.⁸ Importantly, the transposition of the European Works Councils (EWCs) 94/95/EC Directive⁹ in 1999 through the Transnational Information and Consultation of Employees Regulations (TICER)¹⁰ extended the range of issues on which employees have statutory information and consultation rights, including in key business, employment and restructuring issues. The Regulations provided, in effect, for the first time in Britain for the creation of a standing works council-type body, albeit of a transnational nature.

In February 2002, the European Parliament and Council of Ministers formally adopted the ICED. Its stated purpose is 'to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the European Community'.¹¹ The directive's

⁴ 75/129/EEC Directive providing information and consultation rights in the event of collective redundancies. The Directive was amended in 1992 by the 92/56/EC Directive, and both Directives were consolidated in the 98/59/EC Directive.

⁵ Directive 77/187/EEC providing information and consultation rights in the event of transfer of undertakings. The Directive was amended by the 98/50/EC Directive, and both Directives were consolidated in the 2001/23/EC Directive.

⁶ Case C-383/92 [1994] ECR I-2435.

⁷ A similar allegation was made by the Commission in Case C-383/92 *Commission v UK* [1994] ECR I-2479 in respect of Directive 77/187/EEC on transfers of undertakings. The ECJ reached a similar conclusion to that in the Case C-383/92. The ECJ rulings prompted also the introduction of the Health and Safety (Consultation with Employees) Regulations 1996, which require employers to consult employees who are not covered by safety representatives appointed by recognized unions under the Safety Representatives and Safety Committees Regulations 1977.

⁸ The 'workforce agreement' solution was later used in the transposition of the EU Directives concerning statutory requirements in working time, maternity and parental leave, and fixed-term work.

⁹ Directive 94/45/EC on the establishment of a European works council or a procedure in Community scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

¹⁰ Transnational Information and Consultation of Employees Regulations 1999.

¹¹ Art 1 (1).

requirements apply, according to the choice made by member states, to: undertakings employing at least 50 employees in any one member state or establishments employing at least 20 employees in any one member state.¹² ‘Information’ means transmission by the employer to the employees’ representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it and ‘consultation’ means the exchange of views and establishment of dialogue between the employees’ representatives and the employer.¹³ The right to information and consultation covers: 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 and on any anticipatory measures envisaged, in particular where there is a threat to employment; and information and consultation with a view to reaching an agreement on decisions likely to lead to substantial changes in work organization or in contractual relations.¹⁴ Member states may entrust management and labour with defining the practical arrangements for information and consultation freely and at any time through negotiated agreements, including at undertaking or establishment level.¹⁵ Such agreements, including those which predate the directive’s transposition deadline, may establish provisions that differ from those in art 4 of the directive while respecting the principles set out in art 1.¹⁶

The ICED represents an example of EU flexibility with regard to the form of the legislative instrument in two ways: first, in line with the notion of ‘framework directives’, the ICED lays down certain core standards but the detail of their operation is left to be determined by the member states and/or the social partners, and, secondly, it sets minimum standards which member states are free to improve upon.¹⁷ However, flexibility is not confined to the form of the legislative instrument. Increasing flexibility manifests itself within the ICED¹⁸ in the provision allowing member states more time to apply the national provisions implementing the ICED and in permitting the conclusion of ICE agreements with provisions that are different from those

¹² Art 3.

¹³ Art 2 (f) and (g).

¹⁴ Art 4.

¹⁵ Art 5.

¹⁶ According to Bercusson (2001: 209), the ICED requires a nine-stage process: ‘(1) transmission of information/data, (2) acquaintance with and examination of data, (3) conduct of an adequate study, (4) preparation for consultation, (5) formulation of an opinion, (6) meeting, (7) employer’s reasoned response to opinion, (8) ‘exchange of views and establishment of dialogue’, ‘discussion’ with a view to reaching an agreement on decisions’, and (9) ‘the employer and the employees’ representatives shall work in a spirit of cooperation and with due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.’

¹⁷ The Council Resolution on Certain Aspects for an EU Social Policy (1994) states: ‘minimum standards constitute an appropriate instrument for achieving economic and social convergence gradually while respecting the economic capabilities of the individual Member States. They also meet the expectations of workers in the EU and calm fears about social dismantling and social dumping in the Union.’

¹⁸ Barnard (2000: 84) describes this type of flexibility as a form of ‘internal flexibility’.

referred to art. 4. The latter aspect of 'internal flexibility' envisages simultaneously a greater role for the social partners. More specifically, the ICED provides that not only can the social partners transpose the directive, but according to art. 5 'member states may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees', providing thus a space in which the social partners can negotiate for improved standards and - contrary to the Continental legal tradition- for worse.¹⁹ Hence, the ICED is based on a notion of subsidiarity at two levels, otherwise 'double' subsidiarity, i.e. at first level it requires transposition into national law and at second level precedence is given to arrangements negotiated by the parties (Blanke, 1999; Marginson and Sisson, 2004: 291).

The consequence of the incorporation of the 'double subsidiarity' mechanism in the exercise of the ICE rights, as stipulated in the ICED, is as Bercusson (1994) has noted 'bargaining in the shadow of the law'. Aimed at regulating the area of employee representation, the ICED combines in effect, at the upper level, i.e. at European level, some general substantive ICE rules with rules of procedure which entrusts the detailed contents of the regulation to decentralized levels, agreed through negotiated and/or participative arrangements by management and labour (Chouraqui, 2003). The default procedure becomes applicable only when the negotiations at lower level fail or the employer fails to act in response to the employee request for the establishment/amendment of ICE arrangements. Within this context, the ICED moves also beyond the previous EU legislative approach of stipulating national-level ICE rights in *ad hoc* cases, e.g. collective redundancies, transfers of undertakings and health and safety. Hence its regulatory aim is not simply to impose mandatory restrictions on employers but to use this as a means to encourage management and labour to develop local-level solutions and to put into the centre of on-going social dialogue an expanded list of organizational issues including, among others, the representation and participation of employees in the management and anticipation of change (Commission, 2001: 20, Salais, 2000). In that way, it shifts the focus of the existing procedures from dealing with situations of crisis to offering an on-going and permanent means for integrating employee interests in organizational decision-making.

The ICED was transposed into UK law by the UK Information and Consultation of Employees Regulations 2004²⁰ (ICER) and will apply to almost all organizations with at least 50 employees by April 2008.²¹ An outline scheme was agreed between the

¹⁹ This is an example of 'controlled' or 'negotiated flexibility' (Barnard, 2006). This is also described as 'centrally-coordinated' regulation by Ferner and Hyman (1998: xvi).

²⁰ Statutory Instrument 2004 No. 3426. The Information and Consultation Regulations 2004.

²¹ Reg 3, sch 1.

Government, the CBI and the TUC that provided the broad basis for delineating the statutory requirements for employee participation (DTI, 2003a). In avoiding a ‘copy-out’ approach to the transposition of the ICED, the ICER provide a set of innovative provisions regarding the exercise of ICE rights. The key word associated with the ICER is ‘flexibility’. In rejecting a ‘one size fits all’ approach, the Regulations allow employers, trade unions and employees considerable flexibility of response, both procedurally and substantively (Hall, 2006). The most important elements of the Regulations are: the stipulation that employers need not act unless 10% of their employees trigger statutory procedures intended to lead to negotiated agreements;²² the possibility for effectively pre-empting the use of the Regulations’ procedures through the conclusion of voluntary, pre-existing agreements (PEAs), which can vary the nature of ICE arrangements that will apply;²³ and, finally, the possibility for providing direct forms of information and consultation in the cases of PEAs and negotiated agreements rather than informing and consulting indirectly through employee representatives.²⁴ In line with the ICED, the standard provisions become applicable only as a fallback in situations where the employer is obliged to initiate negotiations, but fails to do so, or where a negotiated agreement is not reached within the stipulated time period.²⁵ But even in the case of the standard provisions, the Regulations do not specify the establishment of a representative body as such, in other words a committee or council, nor the frequency of meetings or facilities for representatives (Hall, 2005).

The legislative change introduced by the ICED in the UK took place against a background of the decline of multi-employer, sectoral bargaining, which accelerated rapidly in the mid-1980s (Brown *et al.*, 2000: 614-616), declining trade union membership and influence, and decrease in the incidence of JCCs. The recent Workplace Employment Research Survey (WERS) 2004 findings indicated that only 34 per cent of all employees in workplaces with 10 or more employees were union members and 64 per cent of workplaces had no union members. Union members made up a majority of the workforce in only 18 per cent of all workplaces in the survey (Kersley *et al.*, 2006).²⁶ 42 per cent of all employees were in a workplace with a workplace-level JCC, compared with 46 per cent in 1998. The decline in site-specific JCCs was concentrated among smaller workplaces and within workplaces

²² Reg 7.

²³ Reg 8.

²⁴ Regs 8 (1) and 16 respectively.

²⁵ Reg 19 (1).

²⁶ The Labour Force Survey (LFS) 2006 further found that the rate of union membership (union density) for employees in the UK fell by 0.6 percentage points to 28.4 per cent in 2006, down from 29.0 per cent in 2005. This was the largest annual percentage point decline since 1998. Just one in six (16.6 per cent) private sector employees in the United Kingdom were union members in 2006 – down from 17.2 per cent in 2005. Collective agreements covered less than one in five (19.6 per cent) private sector employees. Almost three in every five (58.8 per cent) public sector employees in the United Kingdom were union members in 2006. Collective agreement coverage for the public sector was 69.0 per cent, more than three times that of coverage in the private sector (Grainger and Crowther, 2007).

that did not recognize trade unions, where the incidence of workplace-level JCCs fell from 14% in 1998 to 8% in 2004. The proportion of employees covered by any form of consultative arrangement also declined, from 46% to 42%. Alongside a further decline in union representation a 'growing heterogeneity of representational forms within British workplaces' came that include non-union structures and hybrid arrangements combining both union and non-union representation (Charlwood and Terry, 2007: 325). WERS 2004 found a shift in the mix of channels through which consultative voice is exercised, with a decline in the proportion of workplaces with a JCC or covered by a committee at a higher level in multi-site organizations, and an increase in the already high proportion of workplaces utilizing one or more forms of direct, two-way forms of employee involvement.

In contrast to continental business-coordinated economies, organized business is weak and plays a limited role in coordinating the institutional framework in the UK (Soskice, 1999; Hall, 1999). Instead, a rather unmediated interplay of market forces on the one side and external governmental regulation on the other side takes place. Within the context of a deregulated labour market, the UK industrial relations systems lacks arguably a 'social partnership' approach and effective employee representation at subnational levels is rather discouraged, especially in non-union organizations. Reflecting a liberal market economy, strong rights of employee consultation and representation in decision-making in the company are perceived as incompatible with the notion that a company's directors are solely accountable to their shareholders, not the employees, for the decisions they make (Deakin and Njoya, 2007: 20). Employers and trade unions have given distribution more importance than integration (Coats, 2004) and collective bargaining is mainly confined to wages, hours and terms and conditions of employment. As Edwards (2007: 39) notes, reflecting the assumption in the UK industrial relations system that the parties engage each other at arms' length, the mechanisms to support workplace justice have been relatively weak and an approach in terms of basic compliance, rather than using the law as a basis for improvement has been favoured. As a result, the 'institutional logic'²⁷ revolves around adversarialism, voluntarism and autonomy of industrial relations and collective bargaining from state intervention and external regulation. In recent years, the concept of partnership, which is directed at committing the partners, i.e. employers, management, employees and, where recognized, trade unions, to working together has been adopted by part of the British trade union movement and then by government and some employers (Terry, 2003). Trade union enthusiasm for partnership has largely been based on the proviso that unions are involved. However, this view has not been fully shared by the government, and even less so by employers (Hall *et al.*, 2002: 27).

²⁷ According to Scott, (2001: 139) institutional logics refer to the belief systems and related practices that predominate in an organizational field.

Against this background, the 2002/14/EC Directive with its emphasis on the development of consultation and on-going dialogue between management and labour, which stems from both the regulatory mode that adopts and the European vocabulary on collective relationships more generally (Terry, 2003)²⁸ represents a marked change in employee representation policy for the British system of industrial relations. Simultaneously, it extends legal regulatory norms into areas of the employment relationship, which were until hitherto largely a matter for voluntary determination. It is within this context that the thesis attempts to make a contribution to scholarship by firstly providing an original empirical study of the pattern of change in the field of employee representation in the UK, as influenced by the transposition and implementation of the ICED. The thesis also aims to contribute to learning by relating the empirical findings of the research to a theoretical framework that draws on the reflexive law theory and the capability approach. It is suggested that the adoption of a 'general framework' by the directive results in a number of provisions that have reflexive characteristics both in terms of its transposition and of its implementation. At the same time, the emphasis of the EU legislative instrument on the importance of deliberative and participative structures through the establishment of on-going employee representation structures has strong parallels with the capability approach, as developed by Amartya Sen (1999). Informed by these two theoretical approaches and based on the substantive results from the transposition and implementation of the directive in the UK, the thesis assesses the extent to which proceduralized or reflexive mechanisms established by law can play a role in implementing, at a micro level, the objectives of a rights-based agenda that is in line with the capability approach. Bearing in mind that it is not possible to presuppose a specific mode of evaluation, since in line with the reflexive law theory and the capability approach the systems generate their own modes of evaluation, the principal issues that are explored in the study are:

- The fate of the voluntarist elements of the ICED in the multi-level system as utilized by the UK government, the social actors at national level and lastly, management and labour at organizational level
- The extent, if any, to which the establishment and operation of employee consultation arrangements at organizational level, as influenced by the institutional design of the legislation, can promote the development of a learning process of participation and of developing capabilities for voice.²⁹

²⁸ With reference to the EC proposal on the ICED Wedderburn (1997: 11) also argued that 'voluntary 'information and deliberation' may become a substitute for legally mandated power-sharing, and governance by consultation now seems to be the preferred model' where the Community is unable to sustain co-determination rights.'

²⁹ The capability for voice is concerned in the socio-economic context with the integration of employee interests in the organization. 'Integration' implies the incorporation of employee voice directly into the decision-making structures of the firm (Deakin and Njoya, 2007).

The next section of the chapter provides an exposition of the theoretical framework of reflexive regulation and the capabilities approach. This provides an indication of how the transposition and implementation of the ICED relates to the suggested theoretical framework. The final section provides an outline of the structure of thesis.

1.1 Theoretical framework of the thesis

As a result of the ICED's multi-dimensional potential implications for different systems at various levels the study – located in a multi-disciplinary field, i.e. industrial relations – refines its conceptual tools by attempting to bridge disciplinary divisions. Hence, in order to provide an assessment of the institutional responses to changes concerning EU labour law norms on ICE rights the use of the reflexive law theory, which assists in sensitizing us to the need to cope with the dual autonomy – that of law and of the other social systems – is adopted. At the same time, the capability approach (CA), which is more attuned to empirical research at subnational level, helps in introducing a stronger substantive element in the study. Based on a perspective which links the social communication and interaction processes within ICE arrangements with an analysis of the structural framework conditions into which the internal interaction processes are embedded – those set by the legal and industrial relations systems – an integrated approach to the examination of the impact of the ICED is adopted. A pragmatic-eclectic combination of theories is utilized as the conceptual basis for such an approach, which aims to combine the analytical strengths of different disciplinary traditions, rather than viewing them mutually exclusive.

1.1.1. Reflexive law

Reflexive law (RL) theory represents an attempt to move beyond a straightforward dichotomy between 'instrumentalist' theories of regulation and 'deregulatory' theories that suggest the removal of all external regulatory controls (Teubner, 1993; Rogowski and Wilthagen, 1994). Its central tenet is that 'traditional' regulatory interventions, consisting of top-down uniform rules backed by sanctions, which seek to directly prescribe or impose particular substantive standards, will fail to achieve their objectives because of the nature of the interaction between the legal system and other systems, such as the economic, the political and the industrial relations system. Within the modern welfare state, Teubner (1983: 268) claims that 'social processes and economic arrangements are simply too dense, complex and potentially contradictory to be adequately accounted for in the kinds of interventionist control mechanisms that have been created'. As a consequence of the functional differentiation of systems within society, a regulatory trilemma might emerge: law may be irrelevant to the other systems and of no effect; through the legalization of the regulated field law may damage the other systems through inhibiting their capacity for self-reproduction; the self-reproductive capacity of the legal system may be damaged through the 'politicization of law' (Rogowski, 1994: 16; Teubner, 1993: 19-27).

Commenting on EU developments, Supiot (2003) remarks on a shift in the form of legal governance: ‘the law is relinquishing the job of establishing substantive rules, but is instead concentrating on affirming principles and laying down procedures.’³⁰ Teubner identifies this as RL, which is the solution that he offered to the regulatory trilemma. In essence, Teubner suggests that the solution to the regulatory trilemma lies in adopting a reflexive regulatory strategy which will aim to induce actions in the social systems rather than command them. Hence, the concept of RL is both positive and normative. In its positive sense, RL analyzes the mechanisms through which the legal system relates to other systems, including the industrial relations system. In its normative sense, it can be seen as promoting a multi-level approach to governance which depends for its effectiveness on decentralized forms of deliberation (Barnard *et al.*, 2005: 206-207).

In more detail, RL theory puts the emphasis on an approach of law which is flexible, strategic and contextual (Black, 1996: 51). Its central proposition is that rather than imposing mandatory substantive legal standards law should devolve rule-making powers by adopting a *procedural orientation* that encourages and structures processes of self-regulation. In that way, ‘law searches for ‘regulated autonomy’: it seeks to design self-regulating social systems through norms of organisation and procedure’ (Teubner, 1993: 254). RL shares with substantive law the notion that focused intervention in social processes is within the domain of the law but it retreats from taking full responsibility for substantive outcomes; in becoming reflexive the form of legal regulation changes from substantive to procedural law. Therefore, a strategy of reflexive legal intervention requires the proceduralization of regulation. In this vein, law operates as an ‘external constitution’ which can promote discursive decision making processes and consensus-oriented procedures of negotiation and decision (Teubner, 1983: 275), the objective being to structure decision processes and create the conditions for responsiveness without trying to control the substantive outcome of any decision (Black, 1996: 46). However, the adoption of a reflexive legal strategy necessitates not only a retreat from substantive to procedural regulation, but also the adaptation of the form of the regulatory instrument to the specific self-steering, or self-regulatory, mechanisms of the field that it seeks to regulate. Teubner (1992:

³⁰ Marginson and Sisson (2004: 87) suggest: ‘[f]ive main types of EU regulation may be identified, whose relative importance has changed over time. The first, ‘hard’ regulation, takes the form of ‘one-size-fits-all’ legislation such as the ‘daughter’ directives dealing with specific aspects of health and safety, and is reserved for the earlier period. The second type combines a ‘hard’ and ‘soft’ dimension. Examples include the European Works Council Directive (EWCD) and the Working Time Directive (WTD), both of which allow flexibility in implementation through collective agreements...With the third type, ‘framework agreements’, the balance shifts further in the direction of ‘softness’. ‘Framework agreements’ establish a broad principle whose purpose is to incite negotiations and/or legislation at national and/or lower level...the 2002 telework agreement is an example. The fourth category is softer still, and comprises the ‘joint declarations’ and ‘joint opinions’...these are at best advisory and implementation is not addressed. The fifth type is also softer...but represents a different point of departure. It takes the form of the ‘open method of coordination’ (OMC) of the EU’s employment strategy...’

1460) advocates that ‘the idea is to make law ‘responsive’ toward society by transforming social self-production processes into sources of law production’. Consequently, reflexive law exhibits elements of both *substantive* and *procedural* responsiveness: ‘it is substantively responsive in that it allows for substantive standards to be determined through self-regulatory processes and it is procedurally responsive in that the procedural framework that it lays out should reflect the processes and operations of the regulated arena’ (Hobbs, 2005).

Within the EU context, the notion of ‘reflexive harmonization’ is suggested as an alternative to the dilemma between regulation from the centre or regulatory competition between EU Member States. Barnard and Deakin (2002: 220) argue:

‘Reflexive harmonisation operates to induce individual states to enter into a ‘race to the top’ when they would have otherwise had an incentive to do nothing (the ‘reverse free rider effect’) or to compete on the basis of the withdrawal of protective standards (the ‘race to the bottom’). This is done by giving states a number of options for implementation as well as by allowing for the possibility that existing, self-regulatory mechanisms can be used to comply with EU-wide standards. In these ways, far from suppressing regulatory innovation, harmonization aims to stimulate it.’³¹

Regulatory learning through providing space for engagement, experimentation and standard-setting at national and sub-national level through granting collective actors the power to negotiate their own local agreements to meet the aims of EU policy, rather than promoting regulatory competition as an end in itself, becomes the objective (Barnard *et al*, 2001: 478).³² In establishing mechanisms that have the potential to help actors to internalize certain imperatives, previously externally imposed, law encourages them to reflect over selected considerations and to redefine at the same time their interests through a process of collective learning and discovery (De Schutter and Deakin, 2005). As a result of this process of learning and the installation of discursive decision-making procedures, aside from the legal norms that

³¹ In accounting for the emergence of ‘soft’ regulation at EU level, Sisson and Marginson (2001) also relate the concept of ‘regulated autonomy’ – as developed in the area of industrial relations – with the theory of reflexive regulation. In the context of private law, Teubner (1998: 31) has also argued for ‘a new interpretation of the subsidiarity principle, understood no longer in terms of political decentralization, but rather of respect for the autonomy of social, economic, and cultural sectors, devolution of rulemaking powers to social groups, and a reinterpretation of conflicts of law no longer in terms of national laws but of different production regimes.’

³² In their ‘democratic experimentalist’ regulatory proposals Dorf and Sabel (1998) stressed the importance of local experiments in the development of responses to social problems, which, when monitored and evaluated by a higher-level agency, yield a dynamic learning process that generates ongoing improvements in regulatory norms and mechanisms. However, as Deakin (2007) argues, ‘the deliberative polyarchy approach is silent on the role that minimum standards might play in shaping the process of transnational integration’ (2007: 8) and ‘...sees the EU as simply one case amid a larger set of emerging governance forms to be found at national, regional and global levels’ (2007: 10).

come into play, the development of a culture of on-going problem solution and of constant re-negotiation of norms and values between the social actors is promoted (Sisson and Marginson, 2001).

The starting point for emphasizing the need for procedural regulation to adapt simultaneously to the self-regulatory mechanism of the field that it seeks to regulate is the so-called 'autopoietic' nature of the social systems.³³ In essence, autopoiesis focuses on the analysis of the operation of horizontal social sub-systems, which are deemed as self-generating, self-reproductive and self-regulating, and their relationships with each other and with the general social environment. According to autopoiesis, sub-systems, such as the economic, political, religious and scientific, create their own internal norms and discourses and as such they are differentiated from one another by their specialized communicative characteristics. Each of the sub-systems is autonomous and is tied to its own specific binary code, e.g. payment/non payment (economic system), and governance/opposition (political system). In order to maintain their distinctive communicative elements, self-referential or autopoietic systems are characterized by organized processes of action and communication and are considered operationally closed. In this context, the legal system is also viewed as 'a closed autopoietic system operating in a world of closed autopoietic systems'. Its self-referential closure is found in the circular relation between legal decisions and normative rules: decisions refer to rules and rules to decisions and it is distinguished by the binary code of legal/illegal. The validity of legal norms is thus based solely on legal norms and is not dependent on the external norms of politics, economy or industrial relations. The industrial relations system is also viewed as a 'fully-fledged function system' whose role is to manage conflicts and provide channels for peaceful interactions between collective actors (Rogowski, 2000: 120) and its binary code is negotiable/non-negotiable. Structures and procedures for negotiation ensure the reflexivity of the system and its independence from other social systems. In this context, collective actors take up a particular institutional role inside the industrial relations and legal systems through the attribution to them of a specific identity by the respective systems.

While the specialized communicative characteristics create the autonomy of each system with regard to other social systems, they do not isolate the latter from their environment and from other systems. Teubner (1993: 86) suggests that autopoietic systems are operatively closed but cognitively open in that they can observe their environment and other sub-systems. The combination of cognitive openness and

³³ Autopoiesis is a term developed initially in biological sciences and is derived from Greek words, meaning auto (self)-creation" (from the Greek: *auto* - *αυτό* for self- and *poiesis* - *ποίησις* for creation or production). While Teubner's approach is premised on Luhmann's theory of autopoiesis, Luhmann's theory lies beyond the scope of this thesis. In the present context only those elements which are most immediately relevant, namely the fragmentation of society into differentiated functional systems and sub-systems and the nature of these systems, will be emphasized.

operative closure thus achieves a situation whereby systems communicate internally about their environment, or about communications deriving from other systems, but they do not communicate directly with their environment or with other systems (Hobbs, 2005). However, Teubner posits that there is still a possibility of real communicative contact between autopoietic social systems. The reason for this is that autopoietic systems use the same basic stuff, ‘meaning’, they develop their systems on the basis of communications and the forms of their specialized communication are always forms of general societal communications. Yet, he further suggests that as a result of the operative closure of autopoietic systems ‘the system can only deal with its own internal construct of the environment’ (Teubner, 1993: 74); hence the influence from one system on another can only be understood by the latter through a translation in the proper language of that system.

The autonomy emanating from the self-referentiality of autopoietic systems has negative repercussions for attempts at direct legal intervention through command and control regulation. According to Teubner (1993: 75), ‘it is not legislation which creates order in the social subsystems. It is the subsystems themselves which deal selectively with legislation and arbitrarily use it, to construct their own order’. In the industrial relations system, for instance, only industrial relations norms, and not legal norms, are recognized as valid and law cannot thus simply instruct the industrial relations system to act in the way that law demands. Legal norms are merely external noise, which the industrial relations system will reconstruct in accordance with its own rationality of efficiency and fairness (Cooney *et al.*, 2002).³⁴ The self-steering and self-referential communications of the system may also lead to the emergence of the regulatory trilemma, as described above.

Despite the fact that ‘law is a closed autopoietic system operating in a world of closed autopoietic systems’ (Teubner, 1993: 97), social regulation through law can be attained to a certain extent. Teubner suggests that this can be achieved when law becomes reflexive in the sense of recognizing that legal intervention is dependent on the self-production and self-steering mechanisms of the other systems and of encouraging other systems as well to consider their closure (Paterson, 2000: 65). In that way, RL initiates the so-called process of *structural coupling*, i.e. the process by which the legal system triggers the self-regulatory mechanisms of itself and another system so that the two run in parallel in a process of co-evolution (Black, 1996). The

³⁴ It is important to add here that although it is theoretically possible for each social system to reconstruct every other system according to its own procedures and to attribute its own meaning to that system, the relationship between social systems is not necessarily one of equality. Instead, insisting on the existence, albeit in a different form, of the concept of power in autopoiesis, King (1993: 231) suggests that those systems which are widely accepted as defining meanings for the whole of society, e.g. economics, politics, science and law in post-industrial Western societies, are in a much more powerful position than others. In this sense, it is hence possible to speak of ‘the enslavement’ of the knowledge of one meaning system by another (Teubner, 1989: 749) that may arise in situations when certain systems have acquired a more powerful position than others.

possibility of structural coupling comes about from the mechanisms of interference operating between systems and the ‘overlapping of events, structures and processes within and outside the law’ (Teubner, 1993: 65). The objective is to not only to ‘guarantee social autonomy in the area of substantive rule-making’ (1993: 97) but also to ‘foster mechanisms that systematically *further the development of reflexion structures within other social sub systems* (Teubner, 1983: 275, emphasis in original). Hence, RL is ‘regulation through decentralized mechanisms of self-regulation... [where]...the law of the state regulates only the contextual conditions’ (Teubner, 1993: 67).

In adopting a regulatory approach that is based on a combination of a hard and soft regulatory dimension (Sisson and Marginson, 2001), i.e. legally binding framework with a regime for its implementation via decentralized experimentation by management and labour at national and organizational level, the ICED represents an example of the current regulatory hybridity in the area of EU governance. Its form can be seen as an example of reflexive harmonization in that it is partly the outcome of recognition on the part of EU lawmakers that the self-production processes of the national industrial relations systems should be employed to achieve substantive standards of protection. Barnard *et al.* (2004) emphasize that the success of reflexive law and regulation strategy depends on its capacity to engender responses of a certain kind within the relevant sub-systems. From a socio-legal point of view, what is important is to confront the images of changes and developments in the legislation with regulatory practice and ‘law-in-action’ and assess how institutional responses to changes in the environment of EU labour law are formulated in other social systems.

It is important to stress here that a crucial aspect of reflexive regulation is that rather than simply attempting to delegate rule making authority to self-regulatory mechanisms, such as collective bargaining, it uses legal norms to ‘frame’ or ‘steer’ the process of self-regulation (Barnard *et al.*, 2004). The ‘general framework’ that the ICED follows together with the minimum standards set in the standard provisions can be seen as providing a ‘frame’ to steer rather than command the EU Member States and industrial relations actors at national and sub-national level (Hobbs and Njoya, 2005). But, in contrast to the more elaborate frame in the case, for example, of the WTD,³⁵ where a number of elements, such as the default rules and the procedural conditions attached to the derogations stipulated (Barnard *et al.*, 2004: 5), meant that its implementation was not entirely left to spontaneous forces (De Schutter and Deakin, 2005), this is not evident to the same extent in the ICED. Whilst there is an element of control of the substantive outcome through the establishment of a default procedure for the exercise of ICE rights and the latter have been recognized in the EU

³⁵ 93/104/EC Directive concerning certain aspects of the organisation of working time.

Charter of Fundamental Rights (art 27)³⁶ there is still considerable scope for flexibility both at national and enterprise-level in respect of the practical arrangements for the introduction and operation of ICE mechanisms.

As Barnard and Deakin (2000: 344) note, the use of RL in EU social policy has its limitations if used in isolation. One of the major criticisms leveled against RL theory is the presumption that the collective actors involved are able and even willing to participate in a process of social dialogue. More specifically, Chouraqi (2003) notes that while the development of arrangements for employee representation is at the core of the EU regulatory techniques that are based on the recognition of the ‘regulated autonomy’ of the systems, challenges exist ‘when some of the partners are too weak, when the balance of power in co-producing rules is too unbalanced or when the process of learning their new regulators’ roles takes too long.’ Furthermore, De Schutter and Deakin (2005) suggest that the emphasis of RL in self-regulation within subsystems raises the question ‘of which safeguards need to be imposed-not excluding the imposition from above of substantive standards-to limit the risk of abuse in power relationships.’ In light of these criticisms, the relevance of the capability approach will be explored in the thesis. The use of the RL theory is a potential problem in this regard. But even as Teubner (1993: 67) has stated: ‘substantive legal norms remain indispensable. It is only that the process of their production and justification has to give way to a socially adequate proceduralization.’ In this context, a capability-based approach assists through emphasizing the importance of substantive social rights in providing a stronger framework for the institutional frame of EU social policy initiatives. For that reason, it is believed that the relationship between RL and the CA can be fruitfully explored, at least for the purposes of the thesis.

1.1.2 The CA

A substantive recalibration of the content of labour rights has accompanied the shift in the regulatory form of EU law. As Fudge (2007: 37) notes, ‘social rights have conventionally been understood as claims to resources in the form of income, services or employment. Their role was distributive, and they conflicted with the logic of the market, and, to a certain extent, with civil rights.’ Based on the idea of a more dynamic notion of equality that focuses on capabilities the work of the economist and philosopher Amartya Sen (1999) has come in recent years to prominence as an alternative substantive basis for labour rights for the EU.³⁷ In asserting that different

³⁶ Article 27 reads: ‘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.’

³⁷ In endorsing the significant role of institutional frameworks in social and economic activity at EU level, the group of experts in the Supiot report (1999) advocated an update of the traditional social regulations to include new actors and the encouragement of greater collaboration in the workplace via the support of an appropriate legal framework. The underlying basis for the promotion of this renewed

people and societies usually differ in their capacity to convert resources and commodities into valuable achievements, the CA advocates that in evaluating the well-being of different people, it is not sufficient to look only at the commodities or resources each person can successfully command; the capability of individuals to achieve a range of functionings with the commodity or resource has to be considered as well (Sen, 1999).

In *Development as Freedom*, Sen (1999: 75) offers this set of definitions: ‘the concept of ‘functionings’, which had distinctly Aristotelian roots, reflects the various things a person may value doing or being. The valued functionings may vary from elementary ones, such as being adequately nourished and being free from avoidable disease, to very complex activities or personal states, such as being able to take part in the life of the community and having self-respect. A person’s capability refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is a kind of freedom: the substantive freedom to achieve alternative functioning combinations’. In considering the conversion of resources or commodities into capabilities so as to achieve a given functioning (doing or being), the CA identifies a range of ‘conversion factors’ that are necessary for capabilities to come into existence. These are described as the characteristics of an *individual’s* person, their *society* and their *environment* which together determine their capability to achieve a given range of functionings. Vital, therefore, to Sen’s CA is the idea of conversion factors that operate at multiple levels.

In the context of the institutional dimension of capabilities, Browne *et al.* (2002) suggest that social norms, legal rules and public policies are crucial, since they may affect the achievement of a given range of functioning by individuals. Linking Sen’s economic notion of capabilities with the juridical concept of social rights the attention is hence re-directed into ‘how social rights can be used to shape the institutional environment in such a way as to enable all individuals to convert endowments in the form of human and physical assets into positive outcomes and thereby achieve a higher level of economic functioning’ (Browne *et al.*, 2004: 210). Hence, social rights operate as conversion factors that seek to enhance the real choices of individuals. Browne *et al.* (2004: 211) also suggest that ‘the procedural orientation of social law, evident in the EU with the OMC and in the constitutional recognition of freedom of association and collective bargaining, forms a bridge to the idea of social choice procedure of the kind which Sen sees as providing the most appropriate basis for the achievement of equality of capability’. In this vein, a two-type conceptualization of social rights is advocated: firstly, social rights as claims to *resources*, such as social security payments, and, secondly, social rights as rights to take part in forms of

conceptual framework for the role of social policy not only at EU but also at national level was significantly based on the CA. See also Handler, (2004); Salais and Villeneuve (2004); Brown, Deakin and Wilkinson, (2002) and Deakin and Wilkinson (2005).

procedural or institutionalized interactions, such as those arising out of collective bargaining. The first category of social rights can be seen as claims to commodities that can be converted by individuals into functionings, such as sick and maternity pay. The second category of social rights acts as ‘social conversion factors’, that is, social or institutional settings which shape the set of possibilities open to individuals in terms of achieving their goals (Browne *et al.*, 2004: 212-213).

It is important to emphasize here that capabilities require that collective structures will be available. In the view of CA proponents, the development of capabilities should not be regarded in general as an individual affair and that even though Sen’s work is primarily focused on individual capability, individual capability – even in Sen’s meaning – cannot be operative, nor effective without due and adequate support by collective resources, rights, institutions, systems of governance; thus, the ‘conversion factors’ by which capabilities are enhanced should be primarily collective in nature (Deakin and Wilkinson, 2000).³⁸ In that way, the CA contrasts substantially with standard economic approaches to labour market regulation that rely on the idea of the self-equilibrating or self-regulatory market and the logic of social rights as capabilities rather than being contradictory to market processes constitutes the precondition of a functioning market order. Simultaneously, through providing a framework for locating social rights within a market setting it is advocated that a capabilities-inspired approach manages to transcend the conceptualization by T.H. Marshall of social rights as operating in tension with market relations (Browne *et al.*, 2004).

While the CA provides an essential step in a particular way of thinking about social rights with respect to market processes, Sen refuses to draw a definite list of specific valuable functionings and points to the necessity to contextualize the selection of valuable functionings (Sen, 1999). The efficiency of the systems is thus assessed, as Deakin and Wilkinson (2005: 352) suggest, through a context-dependent process of social learning, rather than being theoretically or dogmatically asserted: ‘[the capabilities approach] encourages and enables a debate over the precise meaning of ‘capabilities’ in different circumstances, thus enabling a *reflexive approach* to the content of social rights in different circumstances, including in different economic and social situations’ (emphasis added). Similar to the RL theory, the CA comes hence into sharp contrast with top-down approaches to regulation and identifies two main drawbacks of ‘command and control’ regulatory approaches: firstly they locate the whole decision-making power exclusively in the central government and secondly they shape cognitively the whole policy process in imposing a particular substantive economic programme or policy model, thereby forbidding the very possibility of reflexive law (Bonvin and Thelen, 2003: 8).

³⁸ See also Supiot (1999: 268).

In rejecting a top-down approach to policy-making, the CA puts into the centre of regulation design the setting-up of the so-called ‘situated public action’ at national and EU level, i.e. a public action located within established negotiation and decision-making of local actors, in territories, trades, networks or firms (Storper and Salais, 1997). In requiring that both types of regulation – central and decentralized – should collaborate to enhance peoples’ real freedoms, regulation should be a combination of a ‘controlling regulation’, designed by a central body, and an ‘autonomous regulation’, i.e. the situated interpretation of the rule set by the centre (Reynaud, 1989). In stressing the value of experimentalist and learning-based approaches to the realization of substantive economic freedoms, the CA intersects with the RL theory. This is not to suggest that RL is inevitably associated with the CA, or vice versa; simply that a reflexive orientation to law and regulation is one means, and perhaps a principal means, by which the CA might be operationalized in legal institutional terms (Deakin and Koukiadaki, 2007).

For Bonvin and Thelen (2003: 3), the emphasis that the CA puts on participation and deliberation in implementing effective freedom involves the development of a particular kind of capability, capability for voice, which they define as ‘the ability to express one’s opinions and thoughts and to make them count in the course of public discussion’. In emphasising the combination of *process*, i.e. valuable functionings defined through collective deliberation including all members of the group, and *opportunity*, i.e. necessary capabilities to achieve these functionings are made available to each and every member of society, they offer a way to resolve the criticism that the emergence of reflexive law by itself does not guarantee that the individual’s whole capability set will be improved (Bonvin and Thelen, 2003: 4). Inspired by the CA, De Munch and Ferreras (2004) further attempt to establish the link between collective deliberation and collective rights in the socio-economic sphere and suggest that second-generation collective rights, such as the right to strike, trade union representation and collective bargaining are the democratic means for opening up a public space of deliberation and citizenship at socio-economic level. This conceptualization of collective rights, they argue, may constitute simultaneously, an adequate response to the longstanding challenge of industrial democracy. In contrast to the theory of industrial democracy, which mandates the imposition by law of a detailed framework for worker participation, the application of the CA in the socio-economic context focuses on capacity as a central feature of the requirements of access to and influence in discursive decision-making processes and aims thus at opening up a space of contextualised deliberation, citizenship and voice, which is sensitive to the particularities of different social and economic contexts.

It is suggested that in seeking to promote the establishment and operation of employee representative arrangements the ICED has the potential to encourage the development of capabilities in terms of collective rights and procedures of participation and voice.

Hence, the ICED with its emphasis on employee representation on an on-going basis represents a shift towards the view of rights as organizing the socio-economic relations and allowing thus the utilization of the legal institutional framework as the basis for the realization of substantive freedoms. Informed by the CA, as developed by Sen (1999), and based on the elaboration of the link between the economic notion of capabilities and the juridical concept of social rights (Browne *et al.*, 2004), the ICED could hence be understood as a ‘social conversion factor’ for the development of capabilities for voice through the establishment and effective operation of discursive decision-making processes at sub-national level. Without explicitly adopting a capabilities-based approach, Lecher *et al.*, (1999, 2001) suggest that in the case of EWCs the relations of the employee-side EWC with management, the internal communication networks between the employee representatives, the relations between the latter and the national representatives as well as the potential cooperation with trade unions endowed EWC with their specific shape and provide a starting point for assessing whether those arrangements can develop a ‘capacity to act’. In a similar vein, the relations between the main actors involved in ICE arrangements, i.e. the employee-side ICE arrangements, management, trade unions, employees, as influenced by the application of the legislation, may indicate the status and prospects of the arrangements promoted by the ICED within the overall framework of a capabilities-inspired approach.

1.1.3 An integrated approach to examining the impact of the ICED

A review of the two theoretical approaches that will be utilized in the examination of the impact of the ICED in the UK industrial relations system was presented in the previous section. The overlap, albeit based on distinct grounds, between the RL and CA concepts, evident in the common emphasis on rejecting aspects of the neo-liberal critique, on criticizing hierarchical command and control intervention on substantive issues in a context of a ‘social permanent dynamic complexity’ (Chouraqui, 2003), on recognizing a certain autonomy of social systems and suggesting decentralized regulatory models through attempting at ‘steering’ and promoting ‘reflection’ and ‘deliberation’ has been illustrated. As suggested, a dual emphasis at EU-level social policy in recent years can be observed. Firstly, increasing emphasis has been placed on more flexible and decentralized forms of regulation, which necessitate the involvement of social actors in elaborating and transforming the standards set centrally. Secondly, the need for institutional learning, as promoted in a capabilities-based approach, redirects existing EU approaches to development and stresses the important role that social rights play in the realization of substantive freedoms. In this context, the ICED, with its emphasis on encouraging decentralized deliberation among individuals and reflection among subsystems within a multi-level institutional set provides a useful framework for testing how theory understands such shifts in the regulatory and substantive orientations of EU social policy.

In more detail, RL theory with its emphasis on self-referential autonomous social systems provides an interesting theoretical basis for the assessment of the institutional design of the ICED. The ICED could be a reflexive regulatory instrument with a rationale of regulating self-regulation and as such lends itself to an analysis conducted on the basis of a RL framework. Building on an analysis of the closed, autopoietic forces underlying the different social systems it becomes feasible to illuminate the sophisticated processes involved in the open transformational relations between EU law and the social systems involved. In that way, RL offers first an alternative approach for tracing the relationship that evolves between law and the social systems. Secondly, in aiming at the assessment of the institutional responses to changes in the environment of labour law it goes beyond analytical models that have been based, for instance, on rational choice institutionalism or Marxism. Thirdly, RL theory may be fruitful for the thesis as it opens up the question of how actors, as located within the systems, at different levels interacted and responded to the EU legal ‘prompt’.³⁹ The ICED could therefore be a reflexive regulatory instrument with a rationale of regulating self-regulation and as such it lends itself to an analysis conducted on the basis of a reflexive theoretical framework; it presents hence the opportunity for an examination of how reflexive legal instruments that emanate at EU-level are transposed and implemented at national and sub-national levels.

Simultaneously, the significance that the institutionalization of ICE rights has acquired at EU level for the development of an on-going dialogue between management and labour requires that attention should be given to the development – in terms of collective rights and procedures – of a learning process of participation and voice. In advocating an update of the traditional social regulations so as to encourage greater collaboration in the socio-economic sphere the ICED has the potential to provide a basis for ‘real freedom of choice’ in relation to labour market participation (Supiot, 1999). By relating the empirical study of the regulation of the representative-based employee consultation in the UK to a theoretical framework of RL and the CA, the thesis attempts to contribute to a greater understanding of the practicalities associated with the advocacy of a reflexive approach to labour market regulation and the prospects of such regulatory techniques to potentially support – apart from the imposition of restrictions on behaviour – the development of institutional experimentation and a new framework for participation and learning, in line with a capabilities-based approach.

³⁹ RL theory has been widely used as an analytical framework for the assessment of legislative initiatives in the area of labour market regulation (see, for example, Rogowski and Wilthagen, 1994). Rogowski explicitly makes the point when he states: ‘the concept of reflexive law, which I propose to develop along the lines with the autopoietic systems theory of law, assumes that the social systems of ‘industrial relations’ and ‘law’ are both operationally closed systems of communication. This theoretical design...directs attention to the important relationship between modes of regulation and processes of self-regulation’ (1994: 53). The concept of reflexive law has also been used for the evaluation of the impact of the WTD in the UK system of industrial relations (see, for example, Barnard *et al.*, 2004; Hobbs and Njoya, 2005).

1.2 The structure of the thesis

Having explained the broad theoretical basis of the thesis, chapter two proceeds to a presentation of the specific analytical and methodological approach adopted for the purpose of analysis of the empirical findings. In opting for a RL and CA theoretical framework, the analytical framework is particularly concerned with the participation of the social actors in framing the national legislation and in turn implementing it at subnational level. To address the research objectives, a multi-method methodological approach is employed, which highlights in more detail the role that social actors – viewed as located within the systems they operate – can play in translating and transforming at the same time the objectives pursued at higher levels of policy-making.

Chapter three proceeds to a critical evaluation of the process for the legal transposition of the ICED in the UK. In the context of the theory of reflexive regulation, the examination of the development of the legal norms designed to ‘frame’ or ‘steer’ the process of self-regulation (Barnard *et al.*, 2004) is crucial. The question under discussion is the extent to which the EU-level norms, as prescribed in the ICED, were re-contextualized in the transposing legislation. The analysis provides a narrative on the consultation process leading to the DTI/CBI/TUC outline scheme and the final UK legislation. The fate of the voluntarist elements of the ICED in the multi-level system as utilized by the UK government and the social partners is also examined and assessed. It is suggested that whilst a consensus was reached – albeit on distinct grounds – the underlying principles and objectives of the ICED underwent significant alteration which could have an impact on the extent to which opportunities for learning and participation at the level of the application of the ICER could develop.

Chapter four goes then to examine the impact of the legislation on the UK system of industrial relations through the location of employers’ associations’ and trade unions’ responses to the EU ‘legal prompt’. Based on primary and secondary evidence, the chapter examines the extent to which the options provided by the ICER were taken up. The analysis proceeds from the basis that the statutory provisions were designed as reflexive legal instruments to promote regulation through self-regulation. The evidence suggests that it was predominantly employers’ attitudes and strategies that have shaped the extent to which the rights stipulated by the new legislation were realized; only in limited cases did unions adopt a proactive approach to the application of the ICER. In this context, the enforcement regime of the ICER may act as a further means of coupling between the legal and the industrial relations system and as such it is examined as well; the focus is on the extent and type of enforcement action.

In the context of the implementation of the ICED, the set of responses operates predominantly at organizational level. Bearing in mind the characteristics of the ICER institutional design, chapter five examines case study evidence regarding the

establishment/amendment of ICE arrangements and critically assesses the impact of legislation on the development of participation at organizational level. An analysis of the processes for the establishment/amendment of the ICE arrangements firstly takes place. In line with the evidence presented in chapter four, proactive managerial approach to the introduction of the ICER is observed. However, there is limited scope for collective organization between management and labour concerning the drafting of the ICE agreements. An analysis of the specific provisions of the ICE agreements secondly takes place, which facilitates the identification of the structural and operational aspects of the agreements and assists in the evaluation of the 'nominal rights' stipulated in the agreements.

Based on an analytical framework that views the overall process of the establishment and development of ICE mechanisms as a product of a dynamic interaction between 'external' influences, i.e. ICED, and 'internal conditions', i.e. interaction between the protagonists (Lecher *et al.*, 2001) chapter seven then examines the actual operation of ICE arrangements. The focus is on four fields of communication and interaction; these are: ICE arrangements and management, those internal to ICE arrangements, ICE arrangements and the workforce, and ICE arrangements and trade unions. Such analysis constitutes the further step where the CA substantially grounds up and opens up more with a view to evaluating the development of ICE arrangements, as situated within the wider legal and institutional framework. The analysis is presented as thematically-based so as to assist the systematic cross-case comparison of the issues raised in line with the analytical framework.

Based on the analysis of the four fields of interaction, chapter eight then proceeds to an assessment of the case study evidence with a view to evaluating the extent to which the operation of ICE arrangements induced the development of institutional experimentation and a new framework for a process of learning and the development of capabilities for voice. In this context, the chapter firstly probes whether the ICE arrangements reflect subgroups or categories of general cases and secondly accounts for the variation in the capability for voice observed between the ICE arrangements under study. It is posited that whilst the form and content of the legal prescription made a difference to the quality of the ICE arrangements so did the approaches adopted by the actors involved in the operation of the ICE arrangements. Not all ICE arrangements were able to translate the 'nominal' rights stipulated in the ICE agreements into 'real' rights in line with a capability-based approach.

Having provided an evaluation of each of the stages of the 'life' of the ICED i.e. transposition and implementation, the final chapter attempts to synthesize the above areas of analysis and placing them upon a broader analytical canvas seeks to offer a conclusion about the extent to which reflexive regulation can be a principal means for the operationalization of a capability for voice in a socio-economic context. The

argument of the thesis is that whilst the legal strategy for regulating employee representation arrangements in the UK should maintain its reflexive regulation approach UK law should revisit the conditions attached to the selection of different compliance options. The study concludes with an evaluation of the analytical framework utilized for the analysis of the empirical findings and some suggestions for further research.

Chapter 2. Analytical and methodological framework of the study

In light of the theoretical framework explained in chapter one this chapter presents the analytical and methodological framework adopted in the study. In suggesting that a notion of ‘double subsidiarity’ underpins the institutional design of the ICED the empirical enquiry is centred on the two levels of the ‘life’ of the ICED: firstly, its transposition and application in the UK system of industrial relations, and, secondly, its implementation at organizational level. The study is in line with the traditional conceptualization of the employment relationship as ‘the study of the rules governing employment’ (Clegg, 1979: 1), where however ‘rules’ are understood to embrace a complex and shifting set of expectations and norms involving the use of power and influences from outside the employment relationship that shape the rule-making process (Edwards, 2005: 266). This conceptualization has two advantages. In viewing the employment relationship as situated within supra-national and national regimes the analysis goes beyond the existing focus of industrial relations research on concrete events at micro level and incorporates an examination of the wider structural conditions that shape behaviour (Purcell, 1983). Secondly, while the study is concentrated on the impact of a single directive in one EU member-state, by tackling implementation and operation in the analysis, it goes beyond the existing mainstream research on the impact of EU law that has been largely focused on issues of legal transposition, thereby fusing an understanding of the nature of EU law with the questions asked by industrial relations scholars.

2.1 Analytical framework

2.1.1 The operation of the ‘double subsidiarity’ mechanism in the transposition of the ICED

The impact of EU social policy directives at organizational level is significantly mediated through a number of institutional influences, including the legal system and industrial relations (IR) system of the relevant member state (Deakin, 2006). In order to proceed to an assessment of the impact of the ICED at organizational level, it is thus crucial to establish firstly how the EU-level norms, as stipulated in the ICED, were reformulated in the context of the ICED’s transposition and application⁴⁰ into the UK legal and IR systems.

Deakin (2007: 6) suggests that ‘reflexive forms of governance, involving a division of labour between EU institutions and the member states and commitment to experimentalism based on diversity of practices, were part of the EU’s regulatory architecture from the outset.’ Hence, the preference for the adoption of directives, instead of regulations, as a tool for harmonization of the national labour markets can be seen as constituting a prime example of the use of reflexive techniques in EU

⁴⁰ By ‘application’, the study refers here to the monitoring and enforcement of the ICED at subnational levels.

governance. In light of the RL theoretical framework, the quality of the transposition and application of EU directives is contingent on the links between law and the social processes being regulated (Teubner, 1998). In locating the ICED as a key tool in allowing EU law to become embedded in the national legal and industrial relations systems, the ICED acts as an irritant of a co-evolutionary process of separate trajectories: on the legal side, the EU-level norms can be re-contextualized in the new network of legal distinctions, and on the social side, the legal impulse, if it will be recognised, will create perturbations in the industrial relations system that has responsibility for the establishment and operation of ICE arrangements, altering finally the existing configuration of law and its coupling to the social processes associated with the UK industrial relations system (Teubner, 1998: 21).

The process of the transposition of the ICED into UK law involved the participation of the ‘two sides of industry’, i.e. CBI and TUC, in the drafting of the transposing legislation. Relying on the first level of the ‘double subsidiarity mechanism’, the thesis will firstly elucidate how the relationship of interdependence between the legal and IR systems evolved in the case of the legal transposition of the ICED in the UK. Existing UK social norms and conventions are not in favour of the involvement and agreement between the ‘two sides of industry’ at national level regarding labour market regulation. There have been recent limited instances of social partner involvement at national level under the Labour government, albeit in different forms. Firstly, for the establishment of the National Minimum Wage in 1998, a Low Pay Commission composed of members representing the interests of trade unions, employers, employees and the independent community was established (Metcalf, 1999: 171). Secondly, in 2001 the CBI and TUC worked together to produce the productivity reports which made a number of suggestions to government regarding how to improve productivity levels through initiatives in diverse areas. Thirdly, for the statutory trade union recognition procedure, an attempt for involvement similar to the one in the case of minimum wage was made. However, the social partners were unable to resolve their differences and a formal statement was issued by the TUC and the CBI highlighting the areas of continued disagreement between them, which the government was left to resolve (Novitz and Skidmore, 2001: 72-73).⁴¹

As Hobbs and Njoya (2005: 308) suggest in the context of the European Employment Strategy, ‘the very fact that the UK lacks institutional arrangements for national-level social dialogue and established structures of ‘social partnership’ arguably increases the potential of the reflexive governance mechanisms of EU social policy to be an important dynamic in UK industrial relations practice.’ In this context, the reflexive

⁴¹ One month after the agreement on the ‘outline scheme’ in the case of the ICED, the CBI, TUC and CEEP UK agreed (August 2003) on a Code of Practice for the implementation of the EU Framework Agreement on Telework. Whilst the DTI participated in the discussions, it was not signatory to the agreement. A further agreement on a code of practice for the implementation of the EU Framework Agreement on Work-related Stress was concluded later (see Prosser, 2007).

elements of the ICED have the potential to promote co-operation between the UK government, unions and employers in the development of statutory legislation in the case of the ICED. Against this background, the objective of the analysis is two-fold: firstly, to analyze how national IR actors, viewed as parts of the IR system, structurally and strategically addressed the challenges and opportunities posed by the ICED during its transposition into UK law; and, secondly, to examine what was the fate of the voluntarist elements of the ICED in the resulting legislation. With regard to the latter and whilst employing a different theoretical approach, the study by Falkner *et al.* (2004) found that the UK belonged to a ‘world of domestic politics’ when it came to the transposition and implementation of EU social policy directives that combine a ‘hard’ and ‘soft’ regulatory dimension. In effect, the procedural pattern of the UK both under Conservatism and Labour governments was one based on domestic political considerations rather than on a culture of dutifulness vis-à-vis EU law. Specifically, the fate of non-binding or soft law recommendations typically depended on the extent to which they fitted with the agendas of important political actors at the domestic level. From a RL perspective, the priorities of the political and industrial relations systems can bring about a fundamental reconstruction of the notion of employee representation and as such they have the potential to produce results at variance to the ICED.

2.1.2. The operation of the ‘double subsidiarity’ mechanism in the monitoring and enforcement of the ICED

The involvement of the social actors, as situated within the UK IR system, is not confined to the transposition of the ICED. Instead, their role, as stipulated in both the ICED and the ICER, is significantly greater in the application and enforcement of the resulting new legislative framework. In providing for alternative methods of complying to the legislation, the latter give a major role to the social actors in modifying statutory provisions which, as a consequence, took on the character of a ‘default rule’. In principle, the scope provided to the social actors for application of the legislation opens up a new space for the exercise of collective voice, or ‘capability for voice’. Nevertheless, this is significantly dependent on the ways in which the new institutional framework is perceived by the ‘binding arrangements’ of the UK IR system (Teubner, 1998). The design of the reflexive framework is thus of fundamental importance, as it does not only seek to stimulate autonomous policy responses but also to provide a structure or a constraint within which the process of self-regulatory process occurs. Within the RL context, as Godard (2002: 259) suggests, ‘state attempts to regulate employer practice and human resource management are likely to be more effective not only in the extent to which they are consistent with pre-existing cognitive/normative rules but also in the extent that they are designed and implemented in conjunction with processes conducive to these rules and accompanied by a deliberate strategy to reshape them. Under such conditions, the law may function as much through its implications for expectations and norms as for

the specific rights and regulations it embodies.’ The question then is not so much if the UK industrial relations system will reject or integrate ICE rights. Rather, it is what kind of transformations of meaning will the term undergo, how will its role differ, once it is reconstructed anew in the UK system.

Specific reflexive strategies advocated by Teubner and RL proponents that can assist in securing structural coupling are suggested. One way is ‘*coupling through optional regulation*.’ Teubner (1993: 94-95) posits that unlike ‘command and control’ regulation, law can increase its regulatory interference by developing an ‘option policy’ based on the knowledge of the regulated system in its capacity as an outside observer. Rather than seeking to impose substantive standards, law should present the regulated arena with legal options, which can be used as those concerned see fit. The consequence of this flexible legal policy that can be adapted to a variety of situations is that the law is used only when it meets social needs, otherwise not.⁴² A second potential reflexive legal strategy advocated by Teubner (1993: 95) and a significant number of RL proponents is ‘*coupling through collective organization*’. For instance, Rogowski and Wilthagen (1994) have pointed to a model of reflexive labour market regulation where ‘the establishment of standards of protection is left to mechanisms of interest coordination, such as collective bargaining... [and] labour law provides the procedural framework in which coordination can take place.’ The preference for collective organization as a reflexive legal strategy is particularly advocated in the context of EU regulation. For instance, Deakin (1999: 245) suggests that “the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, *in particular by supporting mechanisms of group representation and participation*” (emphasis added). Finally, another reflexive strategy advocated is through ‘*establishing a communication link*’ (Teubner, 1993: 91) between law and other social systems. This takes place through the use of moral pressure, persuasion as to the rightness of law or even sanctions. As Hobbs (2005) notes, this strategy is different from structural coupling in that it does not lead in the transformation of social self-production processes into sources of law production. As a result, the implementation of the ICED may contribute to filling the representation gap (Towers, 1997) through a variety of means, including the introduction/amendment of existing consultative arrangements in non-unionized organizations and the expansion of collective agreements to incorporate ICE rights in unionized organizations and transcend in this way the narrowly defined scope of existing collective bargaining structures. In that way, the new statutory requirements may provide new opportunities for the development of social dialogue procedures that

⁴² While suggesting the development of an ‘option policy’ as a regulatory means, Teubner stresses that conditions should be applied in order to limit the possibilities that the law is merely preserving the status quo or enables those who are already powerful to become more so. Mechanisms of intervention in optional regulation could include the offer of various regulatory options with the attached stipulation that one of the alternatives must be chosen and the linkage of certain options with attractive entitlements, such as privileges or incentives (Teubner, 1993: 94-95).

will assist in integrating employee interests in socio-economic decisions, in line with a capability-based approach.

However, the novelty of the legal framework needs to be set against certain limitations that may constrain such developments. The relative absence of a tradition of cooperation between employers and employees at workplace and company level may create unfavourable conditions for the conclusion of ICE agreements. For instance, there is little or no tradition of using collective bargaining to vary the terms of legislative labour standards in the UK, and very little evidence of employers and unions seeking to bargain their way around the default rules on parental leave and fixed-term employment. Nor is there much evidence of 'workforce' agreements being entered into, in cases where no collective agreement is in force (Deakin, 2006). Relatedly, as a result of the collapse of sectoral-level bargaining, the continental European division of responsibilities on the basis of the structure of collective bargaining, with negotiation being primarily the responsibility of employers' organizations and trade unions outside the workplace, and consultation taking place by works councils or their equivalent inside, is not possible (Sisson, 2002: 15-16). Against this background, it is questionable the extent to which the so-called 'second generation of bargained adjustments' (Davies and Kilpatrick, 2004: 125)⁴³ that stems from the regulatory model that is followed by the ICED and usually take place at sectoral level in other member states, will be taken up in the case of the UK.

Whilst under the ICED and the ICER it is employees who are endowed with ICE rights, the importance of managerial behaviour in assessing the likely impact of the legislation is crucial (Hall and Terry, 2004: 221). Gumbrell-McCormick and Hyman (2006: 488) also note that 'the high degree of uncoordinated decentralization in British industrial relations over the past three decades provides employers with far greater autonomy than in other European countries in tailoring these arrangements to their own preferences, and conversely poses a far greater challenge to trade unions if they are to utilize them to their own institutional advantage.'⁴⁴ The academic

⁴³ Davies and Kilpatrick (2004: 125) further specify that bargained agreements are called 'adjustments' because the effect of the bargained agreement is to adjust, to a greater or lesser degree within constraints fixed by statute, a statutory standard which would otherwise apply. The 'first', i.e. UK, bargained adjustments are subject to the interposition of a ministerial discretion: Government must agree that the agreement provides adequate substitute protection for the statutory regime it wishes to replace. The 'second generation' of bargained adjustments derive from EC law and provide that a bargained agreement can set or derogate from a wide range of legislative standards in the directives which are otherwise applicable. In their UK transposition, no ministerial approval is required; moreover, they can set a standard which is worse than the statutory standard.

⁴⁴ The advantage of management in this case lies in the fact that for some time they have unilaterally made most decisions on work matters and that in some cases they have established more sophisticated human resources policies securing already employee involvement (Gospel and Wilman, 2005). On the other side, Sisson (2002) suggests that there are very good reasons for management to take the initiative and establish ICE arrangements. Not only does this mean that they will be in a better position to shape the arrangements to suit their needs, but also reap the benefits, in terms of employee morale and commitment, which are likely to come from demonstrating a positive approach.

literature, reviewed by Marchington (1994) and Hall and Terry (2004), has identified a range of potential managerial rationales for the introduction and operation of consultative arrangements – among them union avoidance (Ramsay, 1980),⁴⁵ the containment of workplace pressures on managerial control (Butler, 2005), and more positively, the enhancement of employee engagement and organizational performance (Dundon *et al.*, 2004).⁴⁶ The considerable variation in the rationale and objectives of consultative arrangements is the result of the attitudes and policies of management (Hall and Terry, 2004) and the organization-specific context (Marchington, 1994; Beaumont and Hunter, 2003).

Within the context of the new statutory framework organizational responses may be significantly influenced by the nature of the legal obligations and specifically by the employers' assessment of employee demand for the establishment/amendment of ICE arrangements, the risk of the legislation's negotiating procedure being successfully invoked (Hall, 2005), the efficacy of the mechanisms of enforcement and union presence (Hyman, 1996). However, the experience of similar legislation, i.e. the statutory trade union recognition procedure and TICER, suggests that there were relatively few cases where the 'standard provisions' were imposed on organizations. Concerning the former, existing research suggests that the direct effect of the law regarding union recognition achieved through use of the legislation was less important than the 'shadow of law' and symbolic effect (Dickens and Hall, 2005: 16-17). Concerning the latter, the bulk of the existing EWCs in UK-based companies were established on the basis of 'Article 13' agreements ahead of the directive's implementation date. Relatively few were based on 'Article 6' agreements under the legislation's 'special negotiating body' procedure. In no known case was a fallback 'statutory model' EWC imposed on a UK-based company. However, Hall and Terry (2004: 212) report that most agreements have been strongly influenced by the Directive's subsidiary requirements: virtually all provide for a EWC-type body rather than any alternative form of transnational ICE procedure, and, in many cases, particularly art 6 agreements, their provisions are modeled closely on the subsidiary requirements.

On the trade union side, the level and distribution of existing membership and recognition arrangements must be expected to impact on the extent to which they can make effective use of the opportunities arising out of the implementation of the

⁴⁵ The incidence of non-union employee representation in sectors with 'structural' characteristics associated with unionization, as Terry (1999) notes, meant that it was presumed to be an arrangement initiated by management principally for the purpose of union avoidance.

⁴⁶ Hall and Terry (2004: 216) suggest that while union avoidance and business case rationales for the establishment of consultative arrangements may not be mutually exclusive, they do suggest differences of emphasis, approach and agenda. In effect, when a 'business case' rationale is adopted, 'the dominance of a managerial agenda and the emphasis on employee output suggests a highly constrained form of participation with little if any space for the expression of employees' collective interests' (Hall and Terry, 2004: 216).

ICED. As the latest WERS and LFS report, the central feature of the existing pattern is uneven incidence and wide variations exist between different sectors of the labour force. While in the case where trade unions have a high level of membership and bargaining coverage, they may use the legislation to expand the scope and level of consultation and bargaining, it is in situations where there is partial trade union presence, i.e. at some levels or in some parts of an undertaking, that unions may confront challenges (Gospel and Wilman, 2005: 142). In areas of total union absence, i.e. workplaces where there is no union presence such as in parts of the service sector, unions can do little to promote ICE arrangements. Further, the implementation of the ICED could create a difficult situation for trade unions, threatening the UK system of single channel representation by giving non-union employees access to representation structures, threatening the unions' representative monopoly. These arrangements would either exist alongside existing traditional negotiation structures, which might narrow the range of issues currently determined by unions via collective bargaining, or even worse for unions, they might be established as a substitute for union recognition (Kelly, 1996). At the same time, should unions grasp this new instrument it could serve to strengthen their foothold within companies (Hyman, 1996) and extend their representation to include white-collar employees.

2.1.3 The operation of the 'double subsidiarity' mechanism at organizational level: conceptualization of the dynamics of ICE arrangements

Employee voice is a term that refers to the processes by which employees are able to contribute to or influence managerial decisions, either directly or through their representatives (Boxall and Purcell, 2003).⁴⁷ Milward *et al.* (2000: 135) saw voice as comprising three different channels: first, via trade union membership, recognition and representation; secondly, via indirect or representative participation mechanisms such as joint consultation; and, thirdly, via direct employee involvement. As Charlwood notes, (2006: 303), 'over the course of the twentieth century, voice arrangements in British workplaces changed from a position where no voice was the norm, with union voice practiced by a minority of employers (Gospel, 1992: 35) to a situation where only a minority of workplaces had no voice.'

The implementation of the ICER at organizational level has invigorated the debate on the forms and substance of employee representation in the UK system of industrial relations. Until hitherto, there were only a few studies of consultative arrangements, notably in the area of non-union employee representation (e.g. Broad, 1994; Cressey *et al.*, 1985; Gollan, 2001, 2002, 2003; Kirkbridge, 1986a, b; Lloyd, 2001; Watling

⁴⁷ The modern conception of 'voice' originated with Hirschman (1970) who envisaged consumer collective action as a form of voice that, under certain circumstances, generates benefits for the firm in terms of a reversal of product quality decline. Applying Hirschman's concept to employment relations, Freeman and Medoff (1984) viewed voice as one of two faces of union activity in which the benefits of voice (for employers) are contingent on the returns to unionization exceeding the costs of the monopoly face of union activities.

and Snook, 2003). As Gollan (2005) notes, the debates resulting from these studies focused on the ability of such forms of representation to match or exceed the effectiveness of trade unions as conduits of employee voice and interest. In light of the transposition of the ICED in the UK and adopting a RL and CA theoretical framework, the present study departs from the established research approaches to the issue of employee representation. The study is concerned not only with the rationale, objectives and design of the ICE arrangements in light of the ICER but also with ‘the quality of employee representation, as manifested in a mosaic of substance and process’ (Gollan and Wilkinson, 2007: 1157). Based on the similarities in the rationale, regulatory form and substance of the ICED and the EWCD, albeit the latter applies in large, multinational companies, the operationalization of the theoretical framework at organizational level is significantly based on the analytical framework adopted by Lecher *et al.* (2001) for their examination of EWCs, as amended in light of the UK context and the view of the ICED as a ‘social conversion factor’ for the development of capabilities for employee voice.

In effect, the focus is on the four dimensions of communication and interaction which have the potential to determine the development, character and capability for employee voice of ICE arrangements and in turn also may affect each other. Following Lecher *et al.* (2001), these are: ICE arrangements and management, those internal to ICE arrangements (formal and informal co-operation between ICE members), ICE arrangements and the workforce, and ICE arrangements and trade unions.⁴⁸ Whilst the analytical approach focuses on the role of agency, it acknowledges the interdependent relationship between structure and agency, which shapes the constitution of consultative arrangements. In this context, the overall process of the establishment and development of ICE arrangements is hence seen as a product of a dynamic interaction between ‘external’ influences, i.e. the regulatory environment in the form of the ICER, and ‘internal conditions’, i.e. interests and interactions between the protagonists (Lecher *et al.*, 2001).

Hence, besides the rationale, processes and strategies adopted in light of the ICER and the formal arrangements set out by the ICE agreements, the structures and processes of communication and patterns of internal interaction are examined. Within this context, the development of interaction across the four fields endow the ICE arrangements with their specific shape and provide a starting point for evaluating the extent to which the newly established/amended consultative arrangements can open up opportunities for the mobilization of information and consultation rights by the social actors so as to develop capabilities for voice in terms of collective rights and

⁴⁸ The strength of this approach is, as Müller and Hoffman (2001) note, is that it takes into account the investigation of the case-specific perceptions and motivations of the individual actors involved and links this with research into their structural context. This goes beyond the level of a mere snapshot analysis by capturing the processual character of the development and potential implications of EWCs.

procedures of participation. The starting point regarding the impact of the ICED is that the greater the degree of the institutionalization of capabilities under the UK legislation, the greater the latter will be taken in the manner anticipated by the directive, i.e. to promote the development of capabilities in terms of procedures of participation and collective employee voice rights. In more detail, the analysis will seek to determine the extent to which the UK legislation provides a basis for the development of a capability for voice across the four fields of interaction. In this context, emphasis will be placed firstly on the capability of employee representatives (ERs) to form a view on management decisions, mainly through the provision of regular and adequate information; secondly, on the capability to express these views and establish a process of dialogue with management, principally through the occurrence of meetings and exchange of views, and finally; on the capability to have an impact on management decision-making either in the form of process, substance or implementation. For that purpose it is assumed here that in any system of employee representation, capabilities of employees may vary according to the existing level of capabilities of ERs.⁴⁹

2.1.3.1 Establishment of ICE arrangements

The examination of ICE arrangements at organizational level shares the same analytical approach adopted for the examination of the application of the ICED, as described in section 2.2.2. Whilst the latter provides a ‘bird’s eye view’ on the extent of change and response of the main actors involved in the ICED to the stimulus of the ICER, the former aims to substantiate these findings with the results from organizational-level activity. More importantly, the analysis will establish clearer linkages between the rationale, objectives, and processes for the establishment and amendment of ICE arrangements and will address in more detail the involvement of trade unions and employees in the constitution of ICE mechanisms. In order to do that, some further points need to be brought into the discussion. Apart from the factors outlined above, others that are more amenable to research at organizational level include organizational size, HR capacity, management style and organization, union presence (Hall, 2005), company structure (Marginson *et al.* 2004) and the nature of the pre-existing employee relations culture in the organization (Boxall and Purcell, 2003).⁵⁰ In light of the discourses that were developed at policy level by the DTI, the potential recognition of the interrelationship between ICE arrangements and high organizational performance will be also explored when examining the rationales for

⁴⁹ It is beyond the purposes of the thesis to examine and assess the extent to which the ICED can act as ‘social conversion factor’ for the development of capabilities in terms of individual career trajectories and opportunities. However, it could be suggested that where capability for employee voice is present, the capabilities of individual workers may be enhanced. But it has to be recognised that this is not always straightforward.

⁵⁰ Company structure and management organization may have important implications for the level(s) at which consultation takes place. Beaumont and Hunter (2003) also emphasize the importance of aligning the consultative arrangements with the decision-making structures of the organization, and the need for a hierarchy of consultative arrangements in larger organizations.

the establishment of ICE arrangements. Are employers unwilling to visualize the establishment/amendment of arrangements under the new legislation as an instrument for improving efficiency, and instead see it an instance of external governmental interference that should be resisted on grounds of flexibility?

In the context of the establishment/amendment of ICE arrangements, the text of the ICE agreements constitute a further research issue. In effect, ICE agreements delineate the 'nominal' rights of the new consultative arrangements and as such may influence the latter's operation. In concluding ICE agreements, the literature based on EWCs agreements suggests that apart from any possible 'statutory model effect', there are likely to be other sources of influence operating on management and perhaps less, due to the methods of approval of the agreements, on the employee-side negotiators (Gilman and Marginson, 2002). These include company-specific factors, such as company structure, nature of business, and industrial relations arrangements and traditions. In the ICER context, these include the type of institutional arrangements for collective bargaining and consultation in the case of unionized workplaces, i.e. whether organizations have separate or combined arrangements for collective bargaining and consultation (Hall, 2004)⁵¹. Another source of influence is the experience with previous ICE arrangements. While these sources may influence specific issues, it has to be acknowledged here that there maybe an overlap of different influences in the structural and operational features of the ICE agreements.

2.1.3.2 Operation of ICE arrangements

Whilst the examination of the issues outlined above is closely linked with the CA, the assessment of the operation of ICE arrangements constitutes, in effect, the further step where the CA substantially grounds and opens up more with the view to evaluating the development of ICE arrangements, as situated within the wider legal and institutional framework. In examining the actual operation of the arrangements, it will be possible to address the distinction between nominal/formal rights, as stipulated in the agreements, and effective rights.

Concerning the first field of interaction (table 2.1), the significant issue to consider is the extent to which management grant ICE arrangements, voluntarily or as a concession, firstly scope to operate and secondly scope to participate (Lecher *et al.*, 2001).⁵² Existing research suggests that the actual operation of consultative

⁵¹ In non-union situations, this functional distinction will not apply, but the question there is whether non-union representation structures deal with pay and conditions issues (Hall, 2004).

⁵² Lecher *et al.*, (2001) suggest the following typology: a. '*deficient*' information exchange (management provision of information is poor and the forum refrains from demanding information), b. '*satisfactory*' information exchange (sufficient level of information provision), c. '*information plus*' (the forum has scope for participation vis-à-vis management beyond the receipt of information-participation in management's information process, e.g. inclusion in the decision-making process in the form of a formalized consultation procedure (=where the stage of the decision-making where

arrangements and the handling of management decision-making remain within parameters that are largely defined by management (Hall and Terry, 2004).⁵³ In the case of non-union arrangements, the findings map out the difficulties inherent in the maintenance of in-house representatives structures. Non-union arrangements are seen as considerably incapable of modifying the managerial agenda, or proactively pursuing specifically employee interests (Butler, 2005: 274). Based on these findings, Butler (2005: 285) argues that in light of the implementation of the ICED 'it would be naïve to assume that non-union employers will necessarily be willing to cede their traditional prerogative to decide the future strategic dimension of their businesses, or their right to unilaterally determine key issues.' Additionally, from the perspective of ERs and those whom they represent, the operation of non-union arrangements indicates that systems are usually seen to lack effectiveness compared to unionized workplaces, principally as a consequence of managerial control of process and content, of ERs' inexperience and inadequate training and, in particular, of the absence of any recourse to sanction or effective pressure (Hall and Terry, 2004; Terry, 1999).

Whilst the non-union arrangements examined were operating in a vacuum of legal intervention, evidence from the operation of EWCs in UK-based multinationals paints a similar picture. Research conducted prior to the application of the EWC Directive in the UK found that British companies tended to take a restrictive approach to the content of EWC agreements (Marginson *et al.*, 1998). Wills' (1999) survey of British managerial opinion of EWCs also found that managers saw the benefits of EWCs primarily in terms of reinforcing corporate communications rather than their wider consultative or representative role. Only a minority of respondents associated EWCs with the more concrete outcomes of 'aiding organizational change' and 'enhancing productivity through employee involvement'.⁵⁴ More recent case study research suggests that a range of factors are likely to influence the effectiveness of consultative arrangements, including the 'fit' between the consultative infrastructure and the key level(s) of management, the broader industrial relations context, including the presence/absence of trade unions, management policy towards the role of the arrangements, and the organization/cohesiveness of the employee side (Marginson *et al.*, 2004). On the employee side, research into representatives' experience of EWCs suggested that the provision of 'useful' information by management and the occurrence of consultation were less widespread amongst UK- and US-based

consultation takes place is established and consultation can postpone a decision), up to negotiations and agreements with management) (emphasis in original).

⁵³ Similarly, the evidence on 'partnership' arrangements suggests that these often, but not always, entail engagement with agendas defined by management (Edwards, 2007: 18; see also Upchurch *et al.*, 2006).

⁵⁴ A DTI survey (Weber *et al.*, 2000) of managers in 10 companies with EWCs, six of them UK-based companies, produced similar results. Eight saw EWCs primarily as having a 'symbolic value' and half the companies said that their EWCs had been beneficial in enabling them to exchange information with employee representatives and to involve employees more closely in the business.

multinationals than those headquartered in continental Europe (Waddington, 2003). British EWC representatives tended not to 'punch their weight' within EWCs, attributed to their lack of familiarity with works council-type structures and consultation with senior management, and their limited infrastructural support at the workplace (Hall *et al.*, 2003: 91).⁵⁵ Informed by these findings, the study will seek to assess the extent to which the operation of ICE arrangements has the capacity to advance a learning process of participation and capability for voice, as originally envisaged by the ICED. The implementation of the ICED with its emphasis on consultation may result in the communication of norms of information and consultation to the workplace environment. The research focus is on the dynamics for social dialogue, as developed and formalized between management and the employee-side within ICE arrangements, and the extent to which such arrangements may induce management to consider employee interests on a par with other stakeholders. In this context, the extent to which the arrangements develop beyond a purely consultative role to actually negotiate on the behalf of the workforce will be explored as well.

Structural conditions, such as the external market context, may further shape the interaction between management and labour. In order to illustrate this point, the study will also examine the role of ICE arrangements in restructuring instances. Existing evidence suggests that many organizations do not formally involve employees until the later stages of change, once management has clearly established how the new initiatives will be implemented (see for example, Terry, 1999; Gollan, 2000; Millward *et al.*, 2000). More specifically, in the case of collective redundancies, research by Hall and Edwards (1999) indicates an approach in terms of basic compliance, rather than using the law to improve employment relations within the firms. Decisions to proceed to collective redundancies were made by management; consultation with the ERs and trade unions took place with regard to the process of handling job losses and not on the wider collective redundancies' principles. However, influence on the implementation of management decisions and the means to communicate them to employees was evident in some cases and a greatest level of clarity and transparency was attained than would be otherwise the case.⁵⁶ A similar picture was reported in relation to transfers of undertakings (Sargeant, 2002).⁵⁷

⁵⁵ Similar findings were reported by Wills (2000). In a study of an EWC in a company formed by an Anglo-French-American merger it was reported that although the UK and France had the same number of EWC members, the employee-side tended to be 'dominated' by the French representatives due to their greater experience of consultation at national level in France.

⁵⁶ In a survey of 24 UK, US and Japanese multinationals (a third of which were UK-based companies) (ORC, 2003) it was found that while 20 of the companies said they had informed and consulted their EWC over instances of corporate restructuring, and most regarded this as beneficial, its impact on the 'content of the decision' was generally described as 'low to non-existent.'

⁵⁷ A 1998 survey on the specific issue of compulsory competitive tendering in local authorities also reported that only in 20 per cent of the transfers surveyed were employee informed on the economic consequences of the transfers, such as new job and salary structures, and even fewer were told about the consequences for existing collective agreements (Painter and Hardy, 1998).

Against this background, ICE rights under the ICED can be seen as a means to integrate employee interests in restructuring. The transposition of the ICED in the UK constitutes a break from previous practice for handling such difficult workplace change in three ways. Firstly, through promoting the establishment of permanent employee representation structures, it goes beyond the hitherto practice of ad hoc arrangements for employee representation in collective redundancies and transfers of undertakings and provides instead a vehicle for dealing with such issues as and when they arise. Secondly, through extending the statutory requirements to inform and consult on matters such as changes in work organization and company structure, the ICED promotes the development of an overall organizational approach to staffing arrangements. Finally, through its ‘universal’ application, it stipulates ICE rights irrespective of trade union recognition or membership.

Regarding the second field of interaction (table 2.2), that is the internal ICE arrangements, the key dimensions are their internal capacity and cohesion (Lecher *et al.*, 2001). As Lecher *et al.*, 2001 note, internal capacity presupposes internal structures, procedures and individuals as well as a definition of fields of activity. Marginson *et al.*, (2004: 214) further suggest, ‘organization and cohesiveness is likely, in turn, to be shaped by several considerations.’ Within the context of the ICER, these may include: the nature of the employee-side organization – whether it is, in Lamers’s (1998) terms, an ‘agenda’ committee, whose activity is confined to meeting preparation, or an ‘executive’ committee, which has ongoing liaison between members and with the wider employee side and ongoing contact with management and acts as a first point of contact for the provision of information and dialogue (Marginson *et al.*, 2004: 214); the pattern or relationships between ERs and lines of cleavage along issues such as business units/divisions/bands or else the extent to which ‘interest aggregation’ can be achieved (Lecher *et al.*, 2001: 49); the existence of effective means of communication (Marginson *et al.*, 2004: 214); the propensity of the employee side to engage in networking activity (Marginson *et al.*, 2004: 214). All these aspects may shape the extent to which ICE arrangements will develop a capability for employee voice.

The third field of interaction (table 2.3), namely that between ERs and the workforce, embraces the capacity of the arrangements to engage with the workforce and their legitimacy. The capacity to engage with the workforce is concerned with the extent of employee coverage in practice, the time allocated to ERs to meet with their constituents and the provision and use of facilities to develop communication links and receive feedback from the workforce. Concerning legitimacy, Hege and Dufour (1995: 85) have suggested that ‘local representatives derived their legitimacy first and foremost from their day-to-day activity on the job, at the level of the employees’ immediate needs in the workplace; legitimacy is founded on the ways in which representatives maintain their links with the workforce and are able to express the

identity of the workgroup in their dealings with management.’ Further, Terry (1999) has suggested that visible process of consultation with management can confer legitimacy on accredited ERs. Against this two-fold definition of legitimacy, the study will explore the capacity of ERs to develop and maintain a sense of legitimacy in the eyes of the employees.

The relationship between ICE arrangements and trade unions constitutes the fourth field of interaction (table 2.4) and is especially relevant for the examination of the development of employee capabilities for collective action. However, this relationship cannot be judged solely by the degree to which trade unions are formally included in the structures or in the process of information exchange, or by the degree to which trade unions directly support these structures, either with expertise or through offering a strategic focus. Another equally important factor is whether and to what extent ICE arrangements and trade unions, irrespective of whether they act independently of each other, co-ordinate their actions and their interests and lend each other indirect support and in particular, whether and to what extent ICE structures pursue policies which relate to trade union priorities and the extent to which trade unions use ICE structures to foster the expansion of trade union work (Lecher *et al.*, 2001: 52). In this context, the extent to which the nature of the trade union’s role alters as a result of their participation in the ICE arrangements will be explored as well. However, the elements constituting the fourth field of interaction have to be placed within the parameters of the UK context, as outlined in section 2.1.2.

Table 2.1 Interaction between the ICE arrangements and management (Lecher et al., 2001: 49)

Dimensions	Indicators
<i>Operation</i>	
Money	Own budget and financing
Time	Pre- and post-meetings, independent forum meetings, scope for forum work
Infrastructure	Office, administrative staff, communication, training, provision of external experts
Control of meetings	Setting the agenda, chairing, deciding on time and place of meetings
Protection	Protection and guarantees for ERs when performing their duties (unfair dismissal, detriment)
Resolution of disputes	Internal procedures, external-independent third party
<i>Participation</i>	
Information	Degree of detail, timeliness, whether provided in writing, continuity, type and relevance of issues, method, operation of confidentiality clauses
Consultation	Scope, method, type, relevance of issues, frequency, timing and subject-matter

Table 2.2 Internal ICE arrangements (Lecher et al., 2001: 50)

Dimensions	Indicators
<i>Capacity</i>	
Structures	Operating structure, communication structure, informal structures
Procedures	For information exchange, for agreeing and coordinating interests
Actors	Engagement, numbers
Fields of activity	Type and relevance
<i>Cohesion</i>	
Trade union dominance	Composition, leadership and decision-making structures, division of function between trade union and forum representatives
Interest groups	For example, by business division/band
Inter trade union competition	Ideological differences, impacts on the forum

Table 2.3 ICE arrangements and employees (Hege and Dufour, 1995; Terry, 1999)

Dimensions	Indicators
<i>Capacity</i> Employee representation	Coverage of all employees in the undertaking, composition of the forum (inclusion of part-timers, agency workers...)
Time	Time-off for meetings and communication with employees
Infrastructure	Means of communications with employees and receipt of feedback (emails, newsletters...), access to workplaces
<i>Legitimacy</i> Maintenance of links with the workforce	Employee surveys, level of employee participation in the forum elections
Visible processes of consultation	Consultation exercises with employees on management and forum's proposals, dissemination of information about consultation with management

Table 2.4 ICE arrangements and trade unions (Lecher *et al.*, 2001: 52)

Dimension	Indicators
Formal integration	Full membership, guest status
Specialist and policy support	Organizational assistance, training, advice, focus, provision of experts
Resource supplementation and concentration	Mutual recognition, agreement of interests and co-ordination, transfer of knowledge and information

2.2 Methodological framework of the study

The adoption of the ‘double subsidiarity’ mechanism as the guide for the research acts as an analytical means to complement the theoretical power of the reflexive regulation approach and the view of ICE rights as part of the process of ‘institutionalizing capabilities’. In opting for such a framework, it is possible to offer a critical assessment of the role of social actors’ participation and the development of a reflexive approach to the content of ICE rights in the development of capabilities for employee voice. Based on this suggestion, this section turns to examine the methodological approach adopted in the study. Given the nature of the statutory framework, the research methods are expected to be of a multi-method nature.

2.2.1. Research methods for the examination of the transposition and implementation of the ICED at national level

Within this context, the research objective is to critically assess the use that was made of the reflexive elements of the ICED when proceeding to the transposition and implementation of the ICED at meso-level in the UK. In order to do that, a multi-method research strategy is adopted that allows for the provision of different insights for the systems and actors operating at each stage of the ‘life’ of the ICED. Firstly, the attention given to the specific legal and institutional framework for information and consultation rights calls for a documentary analysis, which focuses on those produced by the UK actors regarding the transposition of the ICED. This analysis provides contextual understanding of the emergence of the ICED as it tracks the discussions both prior to the transposition of the ICED and with respect to the ongoing legislative activities in its wake between the main parties involved in the process, that is the DTI, employers’ associations, especially the CBI, and trade unions, mainly the TUC.⁵⁸ The material is in the form of public, unsolicited, i.e. not produced for the research, documents. The latter are conceptualized as having a use value, since they were created for a particular audience and purpose within the context of the transposition of the ICED.

In conjunction with a documentary analysis of the debate and the proceedings that took place with regard to the transposition of the ICED in the UK, semi-structured interviews were conducted with a range of EU and UK officials who had responsibility for information and consultation of employees’ arrangements and were involved in consultation with the UK administration regarding the legal transposition of the ICED. Interviews with these individuals provided a substantial amount of background information needed to understand the discussions which were developed in drafting the UK legislation. The combined documentary and interview data were used as a means to examine the same dimension of the research problem and cross-

⁵⁸ Within this context, research included also an examination of the relevant debates in the UK Parliament.

validate the findings. This reflects a form of ‘triangulation’ (Webb *et al.*, 1966)⁵⁹ and allows for an assessment of both the outcomes (as depicted by the documents) but also the processes involved in the transposition of the ICED.

A second group of interviews was carried out with a range of organizations representing employers, employees and consultancy organizations involved in ICE arrangements. Relevant policy and guidance material with regard to the subject-matter of information and consultation arrangements issued by these organizations was also collected. The objective was to assess the response of the main industrial relations actors to the institutional design adopted by the ICER and the use they intended and actually made of the ICER at meso-level. The questions were in semi-structured form and hence allowed considerable scope for the interviewees to focus on issues that were not dealt with in the interview guides. Overall, the officials interviewed were from the following organizations alphabetically:

- Advisory, Conciliation and Arbitration Service (ACAS)
- Amicus Graphic, Media and Printing (GMP)⁶⁰
- Britain’s General Union (GMB)
- Broadcasting Entertainment Cinematograph and Theatre Union (BECTU)⁶¹
- Central Arbitration Committee (CAC)
- Chartered Institute of Personnel and Development (CIPD)
- Chemical Industries Association (CIA)
- Confederation of British Industry (CBI)⁶²
- Department of Trade and Industry (DTI)
- Electrical Contractors’ Association (ECA)
- Engineering Employers’ Federation (EEF)
- European Commission⁶³

⁵⁹ Triangulation is broadly defined by Denzin (1978: 291) as ‘the combination of methodologies in the study of same phenomenon.’

⁶⁰ In 2007, Amicus merged with the Transport and General Workers Union (T&G) to form Unite the Union. As most part of the research was conducted before the merger the thesis continues to refer to the separate unions during the analysis of the findings.

⁶¹ The Union of Shop, Distributive and Allied Workers (USDAW) and the T&G were contacted for their views but were not interviewed. In addition, secondary data from e.g. press releases, company information, conference/workshop presentations, and information from trade unions, consultancy and research organizations with regard to the establishment and/or amendment of existing ICE arrangements in organizations operating in the UK covering the period before and after the transposition of the ICED in the UK was assembled and analyzed.

⁶² A CBI official was interviewed in October 2004. In January 2007 a further interview with a different CBI official was carried out. The second interview was part of the project ‘The Capability Approach and the Implementation of EU Social Policy Directives’ that was carried out in the Centre for Business Research of the University of Cambridge under the supervision of Simon Deakin. Two interviews also took place in the case of the TUC, CIA, EOs and IPA.

⁶³ The first informant was responsible during the period of the adoption of the ICED; the second informant was responsible for the EU policy on information and consultation after the ICED was adopted. In all the other cases, where further interviews were conducted, these took place with the same individuals – the only exception being the IPA.

- European Trade Union Confederation (ETUC)
- Involvement and Participation Association (IPA)
- Local Government Employers (LGE)
- Trade Union Congress (TUC)
- University and College Union (UCU)

Third, a survey was commissioned by the CIA and conducted between April and May 2006. The objective of the survey was two-fold. Firstly, as is generally accepted, the WERS series constitutes the most representative national account of the state of employment relations and working life inside British workplaces. However, since the introduction of the ICER took place in April 2005 – that was after the completion of the WERS 2004 fieldwork – it is possible that at the time of the survey the parties at most workplaces had not begun to contemplate the implications of the ICER.⁶⁴ Thus, a survey at a stage when the ICER had already begun to apply and which additionally concentrated on a specific sector is possibly capable of providing a more accurate – albeit limited – picture of the approach that organizations were taking in response to the introduction of the ICER.

The second reason for the conduct of the CIA survey was the active strategy pursued by the CIA with regard to industrial relations at sectoral level. In contrast with the situation in most UK economic sectors where the instances of sector-level regulation of employment relations has been in decline over the last two decades, the chemical sector constitutes arguably an exception.⁶⁵ More particularly, as part of the CIA's vision for a sustainable chemical industry, member-organizations have been encouraged to embrace the goal of employee participation 'through having in place processes for informing and consulting employees on matters that affect their working lives' (CIA, 2004). Further, the pharmaceutical segment of the industry is one of the few sectors in the UK which has been successful in competing in high-value-added markets (see also Temple, 1994; Earl-Slater, 1998). As a result of greater resources and higher profit margins, Lloyd and Newell (2001: 358) note that pharmaceutical organizations may have the potential to think more long term about managing employees than in other major industries in the UK. Because of the CIA's active policy, it is interesting to assess the extent to which a kind of residual 'associational governance' influenced organizational responses to the introduction of the ICER. In terms of design, the CIA survey took the form of a brief questionnaire aimed at collecting information on existing patterns of ICE arrangements in the chemical

⁶⁴ The sixth survey in the WERS series, due towards the end of this decade, will undoubtedly provide an authoritative and representative evaluation of the quantitative impact of the Regulations in terms of the establishment and operation of information and consultation arrangements in organisations operating in Great Britain.

⁶⁵ Other active employer' association at sectoral level include the EEF and ECA; interviews took place with representatives of these associations.

industry and examining simultaneously the approach that CIA member-organizations were taking in response to the introduction of the ICER (see appendix A).⁶⁶

The survey questionnaire was distributed to approximately 120 CIA member organizations and 38 returns were received – a 32% response rate. Concerning the number of workers employed the majority of respondents – 60.5% or 23 organizations – fell into the 150+ size bracket, i.e. they were organizations that were already subject to the ICER. A further 34.2% (13 organizations) had between 50 and 149 employees, so they would be in the second or third wave of organizations covered by the Regulations in 2007 or 2008. 5.3% (2 organizations) had fewer than 50 employees and therefore would not become subject to the legislation. The characteristics of the respondent organizations to the CIA survey concerning employment size are broadly in line with the relevant characteristics of the CIA membership provided by the CIA economic advisor. According to 2006 CIA statistics concerning employment size in UK individual sites,⁶⁷ 88 sites employed less than 100 employees, 89 sites employed from 101 to 500 employees, 14 sites had from 501 to 1000 employees, and, finally, 6 sites had more than 1000 employees. While the CIA data provides the employment size of individual sites in the UK it still indicates the diversity – found also in the CIA survey – concerning the employment size of the CIA member organizations. Hence, in line with the CIA statistics, most of the organizations that responded to the CIA survey employed more than 150 employees; however, there were a significant number of organizations responding to the CIA survey that employed less than 100 employees.

Regarding the activity distribution of the respondent organizations, the majority of respondents fell into the chemical activity (89.5% or 34 organizations), with the remaining 10.5% (4 organizations) coming from pharmaceutical and plastic manufacturing. 63.2% (24 organizations) were organized across multiple sites and 36.8% (14 organizations) operated in a single site. The CIA survey respondents' characteristics concerning main activity are very similar to the data given by the CIA Economic Advisor. In terms of the sectors covered in the CIA membership, the majority of the companies operating in the UK are involved in the chemical activity (87%); 11% of the CIA members are involved in pharmaceutical activity and 2% are involved in plastic manufacturing.

⁶⁶ A very similar questionnaire had been used for a survey on information and consultation practices that was commissioned by the West Midlands Employment Relations Forum (Hall *et al.*, 2004). On the basis of the analysis of the findings of this survey, the text of the CIA questionnaire was subsequently altered in order to incorporate the feedback received and the particularities of the chemical sector. In that way it was possible to enhance the construct validity of the organizing concepts of the CIA questionnaire and increase the extent to which it could elicit responses which could constitute meaningful indicators of phenomena which are of real significance (Yin, 1994: 34-5).

⁶⁷ The data on individual sites was the only readily available data provided by the CIA; it is compiled each year as part of the industry's 'Responsible Care' programme.

Lastly, for the purpose of assessing the impact of the enforcement regime of the ICER, in conjunction with interviews conducted with specialists in the field, documentary material was collected and assessed. This involved the use of primary, e.g. Employment Appeal Tribunal (EAT) and CAC case law, and secondary, e.g. texts and articles, legal sources relevant to the particular legal issue. However the analysis aimed at going beyond legal formalism and the exegesis of legal doctrine and provides instead evaluative research (Hepple and Brown, 1981) in the sense of examining the impact of legal norms on the operation of the enforcement regime of the ICER.

2.2.2 Research methods for the examination of the implementation of the ICED at organizational level

Regarding the impact of the ICED at organizational level, the study is concerned with three core themes: the establishment/amendment of ICE arrangements, the structural and operational aspects of the ICE agreements, and the operation of the ICE arrangements based on four fields of interaction. As provided in the analytical framework, the focus on the factors influencing the introduction, text of the ICE agreements and operation of ICE arrangements highlights the importance of organizational context. In turn, this requires a rigorous qualitative case study methodological approach designed to facilitate an understanding of the importance of contextual factors influencing the approach to information and consultation adopted by each organization.

Darke *et al.* (1998) suggest that the use of case study in research is useful in newer less well-developed research areas particularly when examination of the context and the dynamics of a situation are important. Whilst there is evidence of growing research interest in employee representation structures, the introduction of the ICER constitutes a new key influence in the structure and processes of employee representation at organizational level. Hence, questions of ‘how’ and ‘why’ become prominent when attempting to explore the processes triggered by the need to implement the ICER and the latter’s impact at organizational level. By allowing the researcher to engage immediately with social processes, the case study technique promises a detailed exploration of the causal mechanisms underlying the associations between the various social phenomena observed as these influences operate within the boundaries of the unit of analysis (Edwards *et al.*, 1994: 9). Moreover, the conduct of case studies offers a means for the detailed examination of management/labour relations at organizational level, which is more amenable to an assessment of the daily experience of employment relations. Hence, case work may play a role in this context by allowing the study of the ‘real dynamics of micro relations’ (Ramsay, 1993). In more detail, case study allows the investigation of actual as opposed to espoused practice, the assessment of the more diffuse, indirect impacts of legislation and the identification and assessment of the role of mediating factors, such as market context,

social relations within the firm, the presence and role of trade unions, management style, that influence the extent to which the ICED can act as a 'social conversion factor' for the development of capabilities for voice.

Based on the above-mentioned issues, an in-depth case study approach was adopted in the study. According to Yin (1994: 13), 'a case study is an empirical enquiry that investigates a contemporary phenomenon within its real life context especially when the boundaries between phenomenon and context are not clearly evident.' In order to identify and assess the role of the ICED case studies were conducted in five organizations in the UK that had assessed and/or established/amended ICE arrangements in light of the new statutory requirements. Reflecting the phased implementation of the ICER and conditioned by the time of the research and the organizations interested in participating in the study, the case studies were conducted in large, i.e. employing more than 150 employees, undertakings. Whilst it has been suggested that the impact of the ICER would be greater in smaller organizations (Hall and Terry, 2004) an analysis of the ICE arrangements in larger organizations is still of significant interest. Firstly, those organizations that agreed to participate in the study may be examples of good or better practice in this area and in people management in general. Based on this, it is important to examine the impact of the ICER in those contexts, as it is arguably there the new legislation has the greater potential to act as a means to enhance the capability for employee voice. Secondly, as has been reported in successive WERS, it is arguably the case that in larger organizations a plurality of employee involvement mechanisms, both in the form of employee representation, i.e. through trade unions, and in the form of direct forms of information and consultation, is in existence. This is significant from the point of view of examining the challenging interaction between such existing forms of representation and the newly established/amended arrangements in light of the ICER.

The overarching concern regarding case study research relates to threats to 'external validity, i.e. 'the extent to which the research findings can be extrapolated beyond the immediate research sample' (Johnson and Duberley, 2000: 46). While the number of case studies conducted for the study is relatively small, the selection of the organizations is intended to reflect the different pressures and conditions operating on organizations and to provide a range of contexts in which ICE arrangements were developed. The study follows thus a 'multiple case logic' (Eisenhardt, 1989). According to Eisenhardt (1991: 620), 'multiple cases are a powerful means to create theory because they permit replication and extension among individual cases' and they are consequently viewed as analogous to multiple experiments. Furthermore, multiple case studies are seen in this context as able to produce 'grand' theory since

they offer an accumulation of both theory-building and theory-testing empirical studies (Eisenhardt, 1989: 546).⁶⁸

Hence, the research sets out to provide a qualitative picture of the impact of the new employment legislation on ICE arrangements at organizational level; it does not aim to provide survey estimates of the impact of the legislation. Instead, acknowledging that the objects of science are not primarily empirical regularities, but structures and mechanisms, the purpose of the study is to examine and assess the likely patterns of the implementation of the ICER, the processes through which ICE arrangements were established or amended and to explore the extent to which the institutionalization of ICE rights can act as a 'social conversion factor' for the development of capabilities for participation and voice at organizational level. In that way, the study is concerned with 'analytical' not 'statistical' generalization, the objective being to generalize theories 'rather than enumerate frequencies' (Yin, 1994: 10). As Mitchell (1983: 203) also notes, the extent to which generalization may be made from case studies depends upon the adequacy of the underlying theory and the whole corpus of related knowledge of which the case is analyzed rather than on the particular instance itself. Whilst the selection of organizations is largely pragmatic, the aim for a theoretical rather than random sampling conditioned significantly the choices made. According to Eisenhardt (1989: 537), 'the goal of theoretical sampling is to choose cases which are likely to replicate or extend the emergent theory.' The five case studies cover a variety of circumstances, which also constitute the selection criteria, including: sector of economic activity, history of presence/recognition of trade unions, history of other employee representative structures, and formal competence of the ICE arrangements (table 2.5).

⁶⁸ Regarding construct validity, the use of multiple case studies is argued to have the ability to generate theory with less researcher bias than theory built from one case study (Eisenhardt, 1989: 546).

Table 2.5 Case studies' details

Company name	Sector of activity*	UK workforce size	Single-multi site operation	History of unionization	History of other employee participation mechanisms	Formal competence of ICE arrangements
Fin1	Insurance	6,800	Multi-site	High membership; recognized union in all but one sites	Inherited forum in one site; EWC	Information and consultation (including on collective redundancies and transfers of undertakings)
Fin2	Online commercial banking	2,700	Multi-site	Low membership; no recognition (active campaign)	Existence of a forum	Information and consultation (including on collective redundancies and transfers of undertakings)
BS1	Management of real estate	1,400	Multi-site	Very low; recognition only in part of the organization ⁶⁹	No previous forum	Information and consultation (excluding collective redundancies and transfers of undertakings)
BS2	Business and management consultancy	3,500	Multi-site	Circa 40% in parts of the workforce; recognition in parts of the organization	No previous forum	Information and consultation (including on collective redundancies and transfers of undertakings)
BS3	Hardware and software consultancy	10,300	Multi-site	Union membership varies by workplace; union recognition in parts of the organization	Existence of a forum; EWC	Information and consultation (including on collective redundancies and transfers of undertakings) ⁷⁰

* The classification is based on the NACE system.

⁶⁹ Two unions were recognized in one of the two business units of the organization. The case study was conducted in the non-union business unit of the organization.

⁷⁰ Information and consultation on collective redundancies and transfers of undertakings must take place in more than one site.

The primary selection criteria are the presence/recognition of trade unions and the formal competence of the ICE arrangements in order to show five extreme ‘case study’ situations that may vary on the aforementioned aspects (Maylor and Blackmon, 2005: 249). Regarding trade union presence the picture is varied. Fin1 has a long established union recognition agreement in all but one workplace sites. In BS3 there is evidence of site-level employment relations as two unions are recognized in some sites as a result of acquisitions or the application of TUPE. Similarly, in BS1 TUPE acted as a catalyst to the introduction of two unions in one of BS1’s units. Whilst the unions were recognized during the process for the establishment of the ICE arrangements, the actual operation of the consultative arrangements has taken place in a non-union environment. Lastly, Fin2 is a non-union organization, although attempts had been made several times by a union to actively organize in one site (see Appendix B for the organizational context of the case studies).

Concerning the formal competence of the forums, there is some variation in the range of issues the forums may deal with. Whilst in the cases of Fin1, Fin2 and BS2 the forums are entitled to consultation regarding collective redundancies and transfers of undertakings, BS1 excludes consultation on these issues and in BS3 consultation with the forum on such issues depends on the number of affected sites. In turn, the differences in the formal competence of the forums may have implications for the development of discursive decision-making processes between management and labour involvement especially in market contexts where restructuring instances are more likely. Against such instances, the introduction of a regulatory framework that institutionalizes employee representation rights can act as a platform for the expansion of capabilities for participation and voice in organizational decision-making. In order to examine this hypothesis, the study concentrates on organizations operating in the financial and business services sectors.⁷¹ Both sectors have experienced significant restructuring recently, fuelled by a combination of legislative reform, the expansion of production range, the opening of global markets, technological innovation and economic recession.

Regarding banking and insurance activities, the change in the legislative and regulatory framework through the Financial Services and Building Society Acts of 1986 collapsed the hitherto sharp distinctions between the discrete banking, insurance and mortgage markets (Taylor *et al.*, 2007: 31). The impact of these market shifts have been and remain the emergence of intense competition and marked trends towards mergers and

⁷¹ According to the ‘Classification of Economic Activities in the European Community’ (NACE) system, the financial intermediation sector comprises both financial intermediation in the form of monetary and other intermediation but also insurance and pension funding. The business services sector comprises real estate, renting and business activities.

acquisitions (Morris *et al.*, 2001). As a result of technical innovations, the financial services sector has been very active in respect of the migration, mainly to India, of both telecentre services and back office processes (Taylor and Bain, 2003; 2006). Concerning the business sector, it has become during the recent years one of the fastest developing in the UK. Total UK employment grew by 14% or 3.6 million jobs between 1984 and 2001. Business services accounted for over half of that growth (Abramovsky *et al.*, 2004: 6). The rapid growth in the sector reflects the vast economies of scale that business service providers make available to companies in other sectors of the economy through the outsourcing of the latter's activities. IT is by far the most outsourced business function and the fastest growing. As a result of the outsourcing activity, the composition of the workforce and terms and conditions of employment may become more diverse.

Whilst both sectors face significant challenges as a result of offshoring and outsourcing activity, a marked difference exists concerning trade union presence and recognition. The financial intermediation sector has had a long tradition of non-union staff representation or representation by dependent staff associations (Upchurch *et al.*, 2006: 395). This is in addition to sections of trade union representation. Whilst in the past the independent unions representing the sector recorded low levels of militancy, in the 1990s, Gall, (1999) recorded a change in bank workers' attitudes towards a more collective and pro-union orientation driven by work intensification and regimentation.⁷² In contrast to the situation in the finance sector, the business services sector has been traditionally characterized by a low union membership rate and incidence of recognition.

The case studies, conducted from September 2005 to May 2006, involved personal interviews with the key-actors such as management, trade unions – where existing – and ERs, in conjunction with non-participant observation of meetings between management and labour – where possible⁷³ – and collection of relevant documentary material, such as the constitution of the ICE arrangements, minutes of the meetings and company policies with regard to employee participation. The case studies were conducted on the basis of a common template covering the general IR background and other indirect and direct methods of employee representation, the origins, agreements, functioning and impact of the ICE arrangements. Their depth varied according to the level of access granted by the participant organizations and the complexity of the organizations. Within the context of the case studies, a checklist for ICE agreements was developed and utilized (see

⁷² At the same time, the finance sector showed an above-average incidence of new partnership agreements from the late 1990s (Gall, 2000). However, the common theme has been employers' interest in gaining legitimacy for HRM regimes supportive of current business priorities (Terry, 2003: 469).

⁷³ In three organisations, i.e. Fin1, BS1 and BS2, non-participant observation of the ICE meetings took place.

Appendix C) so as to examine the actual texts of the ICE agreements as set against the requirements stipulated in the ICER for the PEAs and the standard information and consultation procedure. The aim was to provide a micro-level analysis of the structural and operational aspects outlined by the agreements. The structural aspects concern, among others, the ICE arrangements' composition, geographical scope and the business structure covered, while the operational aspects include issues such as the role and competence of the ICE arrangements as stipulated in the agreements, the processes of agenda setting and reporting back, the issues the ICE arrangements are supposed to deal with, the availability of training, confidentiality provisions and the role of experts.

The number of interviews varied between minimum six (6) interviews and maximum fifteen (15) interviews. In each case, the management representatives interviewed included the senior manager with co-ordination responsibility for the ICE arrangements and other senior, i.e. business and HR, managers regularly involved in ICE meetings. On the employee side, in each case representatives who were members of the ICE arrangements were interviewed and, where recognized, trade union officials and trade union representatives that acted or not as ICE representatives as well. The semi-structured interviews had predetermined questions but the order was modified based upon the interviewer's perception of what seemed most appropriate. In that way they enabled the study to focus not only on the meaning of particular phenomena, such as the interaction between the various protagonists in the establishment and operation of the ICE arrangements, but also on the historical accounts of how these phenomena developed across a specific period of time. The case study visits took place over an extended period of time, around six months, allowing for an assessment of the development of the ICE arrangements. Repeat interviews were also conducted in some cases when the company reports were submitted.

Concerning the analysis of case study findings, a 'within case analysis' (Eisenhardt, 1989: 540) was followed. As Eisenhardt (1989: 533) suggests, such practice both helps the researcher to reduce an enormous volume of data and similarly 'gives investigators a rich familiarity with each case which, in turn, accelerates cross-case comparison.' In essence, the approach adopted is perhaps best described as pragmatic grounded theory of the form outlined by Miles and Huberman (1994). Their methods are inductive and their analytical techniques tend towards the orderly and formal. The general approach focuses on data reduction, display and interpretation to make sense of substantial bodies of unedited text. The process was as follows. Firstly, all the interviews were fully

transcribed. Subsequently, specific themes were identified within the interview data.⁷⁴ An attempt was then made to establish links between the themes and discover relationships and to interrogate the data from the perspective of the present analytical framework and research focus. Following this, an account for each case study, in which the main essence of the establishment and operation of the ICE arrangements was depicted, was constructed. Regarding the presentation of the case study findings, the part of the thesis that deals with the latter is presented as thematically-based chapters rather than individual case studies, i.e. it moves in a ‘cross case’ logic/analysis. This assists in the attainment of both analytical and theoretical clarity and facilitates the systematic cross-case comparison of the various issues raised in line with the analytical framework. As a result of the analysis, a typology of ICE arrangements is developed, based on the previous typologies advanced in the case of EWCs by Marginson *et al.* (1998) and Lecher *et al.* (2001).⁷⁵ However, overall the research objective is not just to make comparisons between the case studies but also to provide an analysis of the interaction between the actors as developed within the context of the new arrangements across the sample as a whole.

2.2.3 Conclusion

In this chapter, the analytical and methodological framework of the study was presented. Without a better view on how the hybrid institutional design of the ICED is transposed and more importantly implemented, i.e. how organizations are actually responding to reflexive regulation, there can hardly be a satisfying evaluation of the linkages between the changing regulatory approach of EU labour law and policy scene and the development of a learning process of participation and of developing capabilities. Before proceeding to an assessment of the changes ‘on the ground’ the thesis will turn to examine how the indirect and reflective forms of norms-making were developed, monitored and enforced during the respective processes, i.e. transposition, monitoring and enforcement. Whilst the following chapter deals with the process and participation of the CBI and the TUC in the transposition of the ICED, chapter four deals with the application of the legislation at meso-level and the operation of its enforcement mechanism.

⁷⁴ A theme is defined as a way to get out a meaning and describe it, as a means to give shape and form to meaning, and is always a reduction from it (Van Manen, 1990: 88).

⁷⁵ Similarly, Hyman (2000: 6) has called for the development of the so-called ‘classificatory instruments’, which will explain variation in behaviour and implications of consultative arrangements in the case of the EWCD.

Chapter 3. The operation of the double subsidiarity mechanism at national level: the transposition of the ICED in the UK

Viewing the ICED as a key tool in allowing EU law to become embedded in the national legal and IR systems, the present chapter examines the process for the re-contextualization of EU-level norms, as stipulated in the ICED, in the new network of legal distinctions, as developed during the process for its transposition in the UK. The analysis proceeds on the basis that the participation of the CBI and TUC in the drafting of the legislation led to the development of a relationship of interdependence between the EU legal system and the UK social systems. This is evident in the way a range of difficult issues whose resolution was, in effect, relegated by the ICED to the national level were transplanted in the national legal system through the involvement of the two sides of industry and the mediation of political priorities, as delineated by the DTI. It has to be stressed here that the chapter is not concerned with a legal analysis of the ICED's requirements;⁷⁶ instead, the focus is on the involvement of the 'two sides of industry', as located within the UK IR system, as well as the UK government's policy and priorities that led to the re-contextualization of the EU-level norms concerning employee representation.

3.1 The process of the transposition of the ICED in the UK and the position of the main parties

The negative stance of the UK government to the adoption of the ICED is well documented.⁷⁷ In essence, the UK government argued against the European Commission's proposal on the basis that a directive on ICE procedures applicable at national level would 'cut across existing practices in member states to no benefit' and that it 'was difficult to reconcile it with subsidiarity'.⁷⁸ Following the collapse of an Anglo-German 'deal' that involved UK support for German concerns regarding the European Company Statute and the re-election of the Labour government in 2001, the latter was forced to withdraw its opposition. When the ICED was finally adopted, the UK government attempted to promote the transposition of the ICED through emphasizing the possibilities for flexible compliance. In July 2002 the DTI published the discussion paper 'High Performance Workplaces: The Role of Employee Involvement in a Modern Economy' that prefigured the transposition and outlined the arguments concerning establishing statutory ICE rights. As stated in the document, the objective was 'to respect and build on' existing information and consultation practice in the UK, including direct

⁷⁶ For a legal analysis of the compatibility of the ICED with the existing legal framework and issues of compliance of the ICED see, for example, Davies and Kilpatrick (2004), Hall (2005), Ewing and Truter (2005), and Welch (2006).

⁷⁷ See, for example, Hall *et al.*, (2002) and Bercusson (2001).

⁷⁸ DTI, Memorandum to House of Commons Trade and Industry Committee (19 November 1998).

forms of employee involvement. The transposing legislation would ‘not be imposed on workforces, but will give those who want it the right to information and consultation’ (DTI, 2002: 4). A ‘one size fits all’ approach was rejected. Instead, the scope for flexibility, which was claimed to be partly a success of the UK government lobbying during the process for the adoption of the ICED, was reiterated through the emphasis, firstly, on the staged transposition of the ICED, and, secondly, the significant leeway that the ICED provided regarding the conclusion of ICE agreements between management and labour. However, where agreements could not be reached, there would be a ‘statutory minimum requirement for formal information and consultation procedures consistent with the arrangements laid out in the Directive’ (DTI, 2002: 10).

Building on an initial round of consultation with a range of individual businesses and their representatives, unions and employment experts, the government held discussions with the CBI, the TUC and a range of other organizations about the details of implementation. During the first half of 2003, the DTI invited CBI and TUC representatives to take part in discussions with ministers about how the UK should transpose the ICED within a structure set by the government. The structure revolved around the avoidance of a ‘single, static model for information and consultation, and that the legislation should ‘create room for wide diversity of practices that have built over the years, combining both representative and direct forms of participation’ (DTI, 2003a: 5). A DTI official involved in the drafting of the legislation gave the following explanation for the involvement of the two sides of industry in the transposition of the ICED:

‘Primarily, to build a consensus so we could say we had listened to what a lot of people have said in terms of the general thinking behind the way we should introduce the legislation. We have now sat down with the CBI and TUC to produce an outline framework so it is clear that we have a broad consensus...Secondly, this should make it easier to go on and develop the legislation. When we went out to further consultation, because it was clear that we had talked to a lot of people by that time, we had support for it. And this was a good way to do it. It fits with the maximizing potential in the workplace objective as well; we can build a good story around it.’
(DTI official)

It is important to outline here the position of the two sides of industry, i.e. TUC and CBI, regarding the introduction of the ‘rung two’ form of representation (TUC, 1995).⁷⁹ Originally, statutory ICE requirements, irrespective of trade union membership, were not welcomed by trade unions as they were perceived as inconsistent with the spirit of

⁷⁹ ‘Rung two’ refers to legally based forms of information exchange and consultation between management and employee representatives (McCarthy, 2000: 530).

voluntarism. Any proposal for the introduction of ‘works councils’ for the purpose of information and consultation was further considered as a risk either to ‘duplicate existing structures’ which would have been ‘superfluous’, or ‘to supersede existing trade union arrangements’ (TUC 1973: para 94). In opting for an effective base for trade union growth – both in terms of membership and influence – the TUC’s position was in line with the Donovan Commission’s view that voluntary collective bargaining backed by a wide ranging immunity from the civil law was all that the union movement needed. Trade union attitudes changed in the 1990s, in a period when union membership fell below a third of the workforce and collective bargaining coverage below a half. Recognizing that the previous regime did not help substantially the union movement in organizing in sectors where the threat of industrial action was not potent, the 1995 ‘Your Voice at Work’ included consideration of other forms of employee representation. During the process of the adoption of the ICED, the alignment of the UK Government’s position and discourse with that of the CBI was particularly criticized.⁸⁰ Overall, the final text of the ICED was described by a TUC official as a ‘*rather radical but weak piece of legislation*’. Whilst it filled the legislative vacuum concerns were expressed regarding certain issues: the absence of a formal role for ‘external’ trade union organizations in the ICE procedure; the weak sanctions available; the possibility that the translation of the notion of ‘management and labour’ would allow the CBI to interpret this so as to argue for the inclusion in the definition of non-union bodies and finally the lack of clarity in the provisions dealing with the substance, timing and issues for consultation and use of experts.

In contrast, from the employers’ side, mainly the CBI, the introduction of statutory requirements for ICE rights have been traditionally resisted on the basis that such legislation would increase ‘red tape’ and delay organizational decision-making (CBI interviewee). Concerning specifically the EC proposal, the CBI strongly opposed it and argued that it breached the principle of subsidiarity. It further suggested that the proposal would damage small and medium enterprises and that although effective employee involvement is critical to business success, it cannot not be legislated; instead the development of consultative arrangements should be a matter for the parties involved, i.e. management and employees, to decide. When the ICED was adopted, the CBI (2002a) issued a statement saying that it was ‘deeply disappointed by the agreement of this dossier. Nonetheless, the current text contains some useful flexibilities that will help limit its damaging impact. We will want to make full use of these in the implementation process.’

⁸⁰ The CBI interviewee also noted that there was no time when there were differing opinions between the government and the CBI during the opposition to the adoption of the directive.

Both industrial relations actors accepted the invitation for discussion from the DTI.⁸¹ The TUC official involved in the process stressed that the TUC saw particular political benefits in achieving a national social partner style framework agreement as the basis for the UK's transposition of the legislation. Whilst seeing the ICED as 'the bedrock for the extension of effective partnership working in the UK' (Monks, 2002), a major concern identified was ensuring that the legislation would not only provide new rights of information and consultation but would do so in a way which '*would mesh effectively with existing union recognition and bargaining arrangements and provide a platform for, not an obstacle to, the further spread of union recognition.*' (TUC interviewee) Subsequently, the TUC's priorities were to secure trade union representatives' role and rights on issues subject to bargaining, and to establish permanent, negotiated information and consultation procedures.⁸² In 2002, the TUC made the following recommendations: legislation should be based on the principle that information and consultation should be via union representatives where unions are recognized, and otherwise via independent representatives elected by employees; flexibility should be allowed in the nature of information and consultation arrangements by agreement with trade unions; in the absence of agreed arrangements, recognized unions or employees should be able to trigger negotiations with management about the establishment of the necessary information and consultation arrangements and a statutory scheme should be prescribed as a fallback; a 10% threshold applied across a nationwide undertaking could be impossible to meet; legislation should be clear and sufficiently detailed to ensure that employers, unions and employees know what is expected of them, despite pressure for a 'light-touch' approach to regulation; the ICED's requirements in terms of the timing and subject matter and of information and consultation should be clarified; speedy and accessible mechanisms should be provided for resolving disputes about the application of the legislation, with effective sanctions to ensure proper compliance; provisions should be put into place to ensure that the new legislation does not cut across recognized unions' existing consultation rights in respect of redundancies and transfers, nor inhibits unions' use of the statutory recognition procedure (Monks, 2002).

On the employers' side, the CBI adopted a more pragmatic stance and attempted to ensure that the transposing legislation would '*not have that much of an impact on UK businesses or that much of the adverse impact*' (CBI interviewee). The general suggestion of CBI was that the government should take a 'light touch' approach to transposing the

⁸¹ The TUC interviewee emphasized that the CBI was initially reluctant to enter into discussions.

⁸² Other key issues that were identified by the TUC interviewee included the following: the range of subjects to be included in the list for information and consultation; the situation in companies with mixed constituencies; the legal enforceability of the information and consultation agreements; the overlap with TUPE and the Collective Redundancies Regulations; the supervision of ballots; and, finally, the position of part-timers.

ICED, preserving as much scope for flexibility and diversity of arrangements as possible (CBI, 2002a). The main concerns for the CBI were to retain the spirit of voluntarism in the ICE arrangements through protecting pre-existing arrangements, to promote the establishment of a trigger mechanism in order to avoid a minority of employees challenging arrangements that were already in place, to render possible to have pre-existing and negotiated agreements covering more than one undertaking, and to provide for direct forms of information and consultation as a means of complying with the legislation (CBI interviewee).

In July 2003 an agreed framework for implementing the legislation, the so-called 'outline scheme', was published together with draft legislation in the DTI's 'High Performance Workplaces-Informing and Consulting Employees' discussion document.⁸³ The outline scheme, which was agreed between the DTI, the CBI and TUC, constituted, in effect, the foundation for the transposition of the 'soft' elements of the directive. The government invited again comments about how the proposed legislation would work in practice and information about the nature and scope of guidance and support. In 7 July 2004, the DTI published a revised draft of the ICER⁸⁴ and consultative guidance on their implementation together with a document detailing the response to the various comments received for the 2003 discussion document from employers, unions and other interested parties. ACAS produced in collaboration with the DTI, CBI and TUC a good practice advice guide in order to help employers, employees and ERs to reach agreements in the light of the ICER. On the 2nd of November 2004, the DTI published the government's response to the public consultation on the draft DTI guidance that was issued in July of the same year and a summary guidance to the new legislation. The final form of the ICER was published in December 2004.⁸⁵ It has to be added here that primary powers based on Employment Relations Acts were given to transpose the ICED. More specifically, clause

⁸³ Outstanding issues, for which the DTI invited comments and suggestions, were the following: the level of consultation, the interface of ICE arrangements with existing information and consultation requirements and the relationship of ICE arrangements to collective agreements with trade unions.

⁸⁴ The main changes to the draft ICER included: allowing ICE agreements that cover more than one undertaking; clarifying that collective agreements with trade unions may constitute valid PEAs, but that EWC agreements are excluded; requiring that, where employees request new negotiations despite there being a PEA, the request must be endorsed in a ballot not only by 40% of the employees in the undertaking but also by the majority of those voting; extending the time limit for starting negotiations following an employee request from one to three months; providing that, where the 'standard information and consultation provisions' apply, there will be a minimum of two information and consultation representatives; amending the standard ICE provisions to provide that, where employers are obliged to inform and consult under the legislation on redundancies and transfers, they need not additionally consult information and consultation representatives under the ICER; and bringing the ICER into force on April 6 2005, not the deadline of 23 March 2005 specified by the ICED.

⁸⁵ Under Schedule 1, the ICE Regulations apply initially (from 6 April 2005) to undertakings with 150 or more employees, but will be extended in two further stages to cover undertakings with at least 100 employees (from April 2007) and then those with at least 50 (from April 2008).

42 of the ERA 2004 conferred a power on the Secretary of State to make regulations about employees' rights to be informed or consulted by the employer in Britain. The decision was made on the basis that the powers under section 2(2) of the European Communities Act 1972, which are usually used to implement EU Directives, were not sufficiently wide to cover aspects of the proposed Regulations (DTI, 2004b).

3.2 Examination of key issues

This section analyzes the position adopted by the DTI and the 'two sides of industry' during the process for the transposition of the ICED with regard to the key features of the ICER, as identified by the parties involved in the process for the agreement on the outline scheme and the final ICER. It has to be stressed here that the aspects of the ICED that were left to be determined by member states were the following: whether to apply the ICED at undertaking- or establishment-level; whether to enable negotiated information and consultation arrangements which may differ from the provisions of the directive; the designation of the 'employees' representatives' who are to be informed and consulted; the conditions under which management may withhold confidential information from ERs and; the enforcement mechanisms and sanctions that will be available in case of non-compliance with the ICED. In turn, the outline scheme included proposals for negotiations on ICE procedures to be triggered by employee request and for endorsement ballots where PEAs were in place. It outlined statutory provisions, applicable where no negotiated agreement was reached, involving an 'I&C committee' (though the ICER do not specify a representative *body* as such) with representatives elected by employee ballot as well and compliance and enforcement provisions. As Hall (2005: 110) also suggests, while the agreement made no explicit reference to enabling direct ICE forms it did state that 'the parties to a negotiated agreement will be able to agree the information and consultation arrangements that best suit their needs and circumstances. The government will provide guidance and greater clarity on this'.⁸⁶ It has to be noted here that once the outline scheme was agreed with the CBI and the TUC, there would be no changes to that (DTI interviewee).

3.2.1 Nature of the agreements and the trigger mechanism

A key DTI objective was that the establishment of ICE arrangements should conform to the encouragement of 'partnership and flexibility' and the promotion of high organizational performance, as promoted in the national agenda (DTI interviewee). In line with this and reflecting the results from the 2002 public consultation the following issues were identified as crucial by the DTI: a rigid 'one size fits all' approach should not

⁸⁶ Whilst the examination of the specific issues stresses mostly the outcomes from the discussions held between the DTI, CBI and TUC concerning the outline scheme, the analysis also addresses issues that were dealt after the conclusion of the outline scheme.

be followed; agreements should be voluntary; pre-existing arrangements should not be eroded; ICE arrangements should be allowed for establishments and groups of companies and; finally, the arrangements should be driven by employee demand (DTI interviewee). In terms of its institutional design, the DTI wished to reject a 'copy-out' approach to the transposition of the ICED and to take full advantage of the flexibilities provided in the final text of the ICED so as to allow compliance via PEAs or negotiated agreements. The DTI interviewee noted that the general model favoured for the legislative framework was that of the TICER.

Concerning the nature of the agreements, both the CBI and the TUC stressed that the establishment of ICE arrangements should mesh effectively with the spirit of voluntarism that had until hitherto been the guiding principle regarding employee representation. The CBI urged the government to provide businesses with the maximum amount of freedom to find the ICE mechanisms that work for them, rather than having them imposed by the legislation (CBI interviewee). In this context, the DTI should make maximum use of the flexibility allowed in art. 5 of the ICED so that employers could opt out of art. 4 of the ICED and instead, with employee support, implement requirements more suited to the companies' needs. This included allowing flexibility for companies to turn existing arrangements into agreements and flexibility to negotiate different agreements after the ICED had come into force. On the TUC side, in its response to the DTI consultation it was stated 'the TUC is not recommending a highly prescriptive approach to UK implementation, i.e. establishing a single statutory information and consultation framework which would apply in every undertaking. This would be widely seen as incompatible with the UK's 'voluntarist' industrial relations traditions' (TUC, 2002, para 7.6). A combination of flexibility with minimum standards was suggested by: establishing a general duty on employers to carry out the necessary ICE procedures as required by the ICED, where required by employees; allowing employers and employees to determine the practical ICE arrangements via negotiated agreements; in the absence of agreed ICE arrangements, enabling employees to seek the establishment of the necessary arrangements via some form of trigger mechanism; and making provision for a statutory fallback framework to be enforced on employers who are unwilling to introduce the necessary ICE arrangements by agreement. Whilst the potential for compliance through PEAs and negotiated agreements was welcomed, particular importance was given to the need that the agreements should not be *foisted upon* employees. Instead, there should be parameters on what could qualify as PEAs and that the process for negotiating and agreeing agreements where the trigger had been pulled would provide a genuine agreement (TUC interviewee). The DTI welcomed the fact that both sides agreed with the

scope for transposition delineated by the government (DTI interviewee).⁸⁷ There was further no disagreement concerning the possibility for concluding PEAs even after the coming into force of the Regulations, as long as the agreements would satisfy specific criteria for the issue of employee approval.⁸⁸

In contrast to the approach adopted for the transposition of the other ‘soft’ provisions of the ICED, the transposition of the ‘standard provisions’ for information and consultation, as stipulated in art. 5 of the ICED, were largely ‘copied out’ in the outline scheme and the final ICER.⁸⁹ According to the DTI official, the intention was the ‘standard provisions’ model to act both as a ‘last resort’ mechanism, but also to influence the way negotiations would take place in the development of PEAs and negotiated agreements and limit the extent to which employees would agree substandard provisions on information and consultation. Whilst the copy-out approach was favoured by the CBI, weaknesses concerning the provisions on substantial issues, such as information and consultation matters, timing of consultation and access to experts were identified by the TUC not only in the ‘standard provisions’ but also in the PEAs and negotiated agreements options. The TUC interviewee expressed concerns that the provisions run short of ensuring that the required procedures are effective and would not be treated as a ‘*cosmetic device*’ by employers. In the TUC’s view, the weaknesses in the final ICER reflected not only similar weaknesses of the ICED but also the successful attempts by the CBI during and after the conclusion of the outline scheme to persuade the DTI to avoid the ‘gold-plating’ of the ICER.

In the context of agreeing different types of ICE arrangements, the establishment of a trigger mechanism constituted an essential factor in ensuring political consensus and

⁸⁷ According to the DTI official, divergence of views was reported concerning the extent to which it would be possible to allow for PEAs and negotiated agreements to operate at a level other than that of undertaking. The CBI was keen for companies to be allowed to set up different arrangements at different levels (CBI, 2003, para 12). Whilst this was not included in the outline scheme, this is the way the final ICER have been framed concerning PEAs and negotiated agreements. Moreover, regarding the calculation of employee numbers for determining the application of the ICER, the TUC was strongly against the proposals to count a part-time worker as half a person for this purpose. The final ICER stipulate that it is up to the employer to decide whether to regard part-time employees as half rather than a whole person (reg 4 (3)).

⁸⁸ With reference to this option – that a PEA can be agreed at any time provided it has been implemented by the date the trigger occurs, as stipulated in reg 2 – it could be suggested that the ICER may not comply with the ICED requirements regarding timing since the ICER require only that a PEA is in place at the time of a trigger, and not on the date when the ICED came into force (Ewing and Truter, 2005: 631).

⁸⁹ Under the ‘other provisions’ section of the outline scheme, confidential information, protection of I&C representatives, appointment of I&C representatives in the absence of a negotiated agreement, and election ballot arrangements, would be modelled on those in the TICER. It is important to stress here that as a result of the modelling of the ICER on the TICER, there is no provision in the ICER for the right of employee representatives to time off for training.

support by the main policy actors to the ICER.⁹⁰ Whilst the ICED does not provide for a trigger mechanism as such (Davies and Kilpatrick, 2004: 149-150; Sisson, 2002) recital 15 states: ‘This Directive is without prejudice to national systems regarding the exercise of this right in practice where those entitled to exercise it are required to indicate their wish collectively.’ The implication of referring to the ‘right’ to information and consultation in the ICED is that employees may not necessarily exercise it and that employers need not be obliged to inform and consult where this is the case (Hall *et al.*, 2002: 9). In the 2002 DTI paper information and consultation were described as a right for those who want it and it was further suggested that arrangements should not be imposed, but triggered by the relevant parties. The DTI interviewee justified the preference for a trigger mechanism by the necessity to show there is a degree of support for ICE arrangements and by the message coming out of the 2002 consultation that legislation should not do away with effective pre-existing arrangements.

On the industrial relations actors’ side, both the TUC and the CBI interviewees noted that the imposition of a trigger mechanism was one of the first areas to be resolved in the discussions with the DTI. For the TUC, the establishment of a trigger mechanism would ensure that if there is a challenge to an existing system that is union supported or a union agreement, it would have to be endorsed by a minimum of 10% of employees. This should prevent firstly challenges by individual employees who are disgruntled with a union for some reason. Secondly, in a non-recognized workplace, it would ensure that the union had sufficient support to allow it to negotiate a lasting and workable system (Veale, 2005). In that respect, the trigger mechanism was described by a TUC official as the ‘*flexible friend of unions*’. The CBI wished equally to protect existing arrangements so that its members would not have to face disruption in the ways the arrangements operated and supported the introduction of a trigger mechanism in the ICER.⁹¹

An ‘opt-in-approach’ was adopted in the outline scheme and the final ICER so that employers are required to act only when a request for ICE mechanisms is made by a certain proportion of the workforce. There was reportedly disagreement regarding the

⁹⁰ The outline scheme stipulated that subject to the existence of valid pre-existing agreements, the employer must establish ICE procedures where a valid request has been made by employees. The request must be made in writing by 10% of the employees in the undertaking, subject to a minimum of 15 employees and a maximum of 2,500 employees. Where an employee request is made but there is already a pre-existing agreement with employees in place the employer would have the option to organize a ballot of all the employees in the undertaking so employees have the opportunity to endorse or reject the initial request made by the 10%.

⁹¹ However, as suggested by Davies and Kilpatrick (2004: 149) UK law positively excludes representation in the case of the trigger mechanism. In other words, whilst in the TICER the trigger allows either 100 employees or employee representatives representing that number of employees to request a EWC the ICER require that only the employees themselves (10% of employees, and a minimum of 15) can make a valid request.

level of workplace support that should be required for the initiation of the process for establishing ICE arrangements under the ICER. Initially, the TUC had argued for 2-3 per cent while the CBI had opted for 20 per cent. A compromise was finally reached between the parties and both the outline scheme and the ICER require 10% of employees, and a minimum of 15 employees, to make a valid request to the employer for the establishment of ICE arrangements. Further, as stipulated by the final ICER, where 10% of the workforce wants to hold negotiations on new arrangements, qualifying existing arrangements can be maintained unless a majority of those who vote in it, as well as at least 40% of the workforce endorses the request for new negotiations in a ballot.⁹² There was reportedly divergence over this form of ‘double trigger’ as well with the TUC arguing initially for a lower level while the CBI supported 40 per cent threshold. However, it was later accepted that anything less onerous would have exposed existing agreements (including trade union agreements) to ‘*easy challenge*’ (TUC official).⁹³

3.2.2 Employee representation

With its company-based collective bargaining system, a potential difficulty in the UK is that where ICE arrangements are established alongside bargaining arrangements, competition can arise between the two bodies. There is already a problem of, as Ewing (2001) puts it, ‘institutional incoherence’ in the system of collective representation, a problem which, as Bercusson (2001) points out, is compounded by the ‘multitude of representational possibilities’ in the 1999 TICER. Notwithstanding the fact that the ICED does not require ICE arrangements to take place with union representatives and in spite of the concerns in certain unions that the ICER could dilute existing collective bargaining arrangements or lead to the creation of rival non-union structures within the workplace, the TUC largely welcomed the opportunities offered by the ICER. In the discussions held between the parties, the TUC argued that the ICER should provide that in workplaces where there is a recognized trade union, the representatives should be representatives of the trade unions and in workplaces without a recognized trade union, the representatives should be elected by all employees in accordance with a clear statutory procedure. According to the TUC interviewee, such a system would not only avert the development of competition between the ICE arrangements and the unions and secure the

⁹² The first draft ICER stated that ‘40% of employees in the undertaking endorse the employee request (reg 8 (5) (b)). According to the policy actors’ interviews, the insertion of the ‘majority of those who vote’ was a result of the insistence of the CBI (see also, CBI, 2003, para 14).

⁹³ Agreement on the criteria for the protection of PEAs was also reached. According to this, PEAs ‘must cover all the employees in the undertaking, must be in writing so that everyone is clear what is involved, and not consist of arrangements unilaterally imposed by management without any discussion with employees and where employees have had no opportunity to signify their approval.’ The final ICER provide in reg 8(1) that the PEA must be in writing, cover all employees in the undertaking, has been approved by the employees and must set out how employees or their representatives are to be informed and consulted.

independence of ERs, but would also act as a means for access to strategic, financial and organizational information that would be useful when engaging in collective bargaining with the employer.

On the CBI's side, concerns were expressed that the 2002 DTI consultation document overemphasized 'partnership' with reference to trade union involvement and as such it did not support a commitment to 'real flexibility'. In suggesting that the government should not conflate information and consultation with trade union involvement, 'partnership' should be seen in a wider context and the government should ensure that the legislation would be flexible enough for firms to introduce innovative partnership mechanisms that did not necessarily involve trade unions. According to the CBI, all-employee bodies would also be in accordance with recent developments in terms of employee representation in the UK that entailed different mechanisms for different purposes, including non-union arrangements for permanent or ad hoc consultation and direct forms of information and consultation.

In the DTI's view, all-employee bodies were preferred. Specific reasons advanced for this preference included the absence of a special position afforded to trade unions in the ICED, the latter's 'universal' application, the limited extent – due to the steady decline of union membership – of unions representing effectively the whole UK workforce, the absence of strong TUC pressure on the issue, and finally that all-employee bodies would be consistent with the model set out by the TICER, which informed the ICER's institutional design (DTI interviewee). In line with the DTI considerations on the issue, the ICER reject the priority for recognized trade union model, as in the case of collective redundancies and transfers of undertakings, and instead adopt the model of employee representation that was followed in the TICER. No priority is thus given to recognized unions; instead, representatives are to be elected in the case of the standard provisions by the entire workforce in a statutory ballot procedure scrutinized by an 'independent ballot supervisor'.⁹⁴

3.2.3 Direct forms of information and consultation

Already in the 2002 DTI document it was stressed that in considering how to best implement the ICED, 'we should build on UK experience and create room for the wide

⁹⁴ A related issue concerned the interface with existing UK legislation on redundancies and transfers, where it is specified that the necessary information and consultation on these issues, with a view to reaching an agreement, should be with representatives of recognized unions where they represent the employees affected. As this issue was not addressed in the outline scheme or the first draft ICER it was resolved at the second round of consultations. The TUC was in favour of ring-fencing the existing role of recognised unions in relation to redundancies and transfers. The DTI decided to keep the various regulations and legislation separate.

diversity of practices that have built up over the years, combining both *representative* and *direct* forms of participation' (emphasis added); the rationale being that increased flexibility was a key ingredient of high performance workplaces. Further, according to the DTI interviewee, the feedback received from the 2002 consultation stressed particularly the importance of direct forms of information and consultation especially in undertakings employing between 50 and 100 employees. However, such a compliance option should be possible only where the employees agree to it and should not remove their right to be informed and consulted via representatives when they decide so. The agreed 'outline scheme' made no explicit provision for direct forms of information and consultation. However, as already noted, there was one phrase in the 'outline scheme', where the parties seemed to have left open the possibility for the DTI to include in the ICER the possibility for direct forms of information and consultation as a means of complying with the statutory requirements (Hall, 2005).

This was strongly advanced by the CBI.⁹⁵ The underlying logic for the inclusion of direct ICE forms rested on two grounds: first, the need to allow employers to tailor the arrangements in line with the needs of the organizations, and secondly, empirical evidence suggesting that direct involvement plays a key role in bringing about a high performance and committed workforce, with indirect involvement at most playing a supportive role (CBI, 2002b: para 11). In contrast, the TUC official stressed that the organization raised major concerns during the discussions regarding the possibility for compliance through direct ICE forms. From a legal perspective, the TUC believed that a potential use by employers of direct ICE forms would not be compliant with the ICED as the latter laid emphasis on consultation with workforce representatives. From a practical perspective, the possibility for compliance through direct ICE forms would not be efficient, as the inability of individual employees, either as a result of lack of knowledge or fear of victimization, would weaken the process and substance of consultation.

However, it was acknowledged that '*this was one of the points we [the TUC] lost in negotiating*' (Veale, 2005). Although not present at the discussions that took place between the Minister, the TUC and the CBI, the DTI interviewee suggested that the DTI did not act on its own when it included this controversial provision in the draft ICER. The CBI interviewee also noted:

'The TUC completely opposed any sort of mention of direct only and still believe that it is a misinterpretation of the directive... They accepted it in the end as we accepted

⁹⁵ In contrast, the EEF interviewee noted that direct ICE methods was not the biggest issue for them, the reason being that it was not expected that many companies in the engineering sector would want to use it exclusively.

*the Central Arbitration Committee, if you like. It was a concession they had to make because they had other elements of the framework agreement they wanted in place. So, technically, it was accepted.*⁹⁶

The fact that the inclusion of direct ICE forms was implicitly stipulated in the ‘outline scheme’ did not allow the TUC to challenge this once the draft ICER were published:

‘It was difficult for us to go on pushing it because the minute we tried the CBI would come back and say ‘Oh, well, we did not want the CAC’ and the whole agreement would fall to bits, and we felt it was important that didn’t happen.’ (TUC interviewee)⁹⁷

As a result, the final ICER provide for compliance through direct ICE methods in the case of PEAs and negotiated agreements. Apart from this and the fact that, as stipulated in the final ICER, there has to be agreement with the employees that they wanted individual consultation, it is plausible that the TUC hopes that the provision for direct ICE forms, even though it was based on the outline scheme concluded by the two main industrial relations actors, can still face challenges before the ECJ. As suggested by a number of commentators, whilst direct consultation can constitute a legal means of complying with the ICER when employees so choose under the PEA option, the fact that, under the ICER, their existence prompts the application of substantially higher thresholds of support for negotiations over new ICE arrangements to take place (40% of the employees and a majority of those voting in a ballot) could potentially be seen by the EC as undermining the unconditional right to information and consultation, via representatives, as envisaged by the ICED (Deakin and Morris, 2005; Hall, 2005).

3.2.4 Enforcement and remedies

From the outset, the TUC favoured enforcement procedures similar to those set out in the TICER, involving: complaints to a specialist industrial relations court; provisions for orders requiring defaulting employers to take specified steps to comply with the terms of

⁹⁶ The possibility that there was a trade-off between the CBI and TUC regarding the provisions concerning the enforcement regime and the possibility for direct ICE forms was also raised by the IPA interviewee: *‘You could say that the issue to do with how disputes should be handled and the other issue about direct and indirect was the main trade-off. So the CBI had to give way on the CAC and the TUC probably had to give way on the direct.’*

⁹⁷ On the CBI side, it was also explicitly stated that the framework agreed by the DTI, CBI and TUC allows employers and employees to decide for themselves what is appropriate for the individual business including direct methods (CBI, 2003, para 7).

an agreement/the standard provisions; and financial sanctions.⁹⁸ Within this context, the TUC argued strongly for the appointment of the CAC as the primary enforcement mechanism. The committee was described as '*a body with a good understanding of collective procedures in the workplace and a fair executor of its role*' (TUC interviewee). In a similar vein, the CAC was reportedly anxious to ensure that the EAT would remain an appellate body, and that it would not have to take first instance decisions (Burton, 2004). According to the CAC Chairman (2004), 'the CAC is the proper court of first instance. It has both practical experience of the world of work and legal experience of applying legislation in the area of collective relations. It also has many years of expertise in the area of disclosing information for collective bargaining purposes.' In contrast, employers' associations resisted the appointment of the CAC on the basis of concerns over the general approach of the CAC, the absence of rules of procedure and the lack of appeal mechanisms associated with the CAC procedures (CBI interviewee).⁹⁹

While the DTI was in favour of the CAC dealing with complaints about the trigger or the nature of agreements, they initially proposed that the EAT should be responsible for dealing with complaints about failure to consult, rather than the CAC, the rationale being that the TICER stipulate a similar procedure. However, concerns were expressed by the EAT. It was suggested that firstly the EAT's responsibility concerning the TICER constituted an exception to the usual responsibilities of the court and secondly that it would increase the already overwhelming workload of the EAT. Finally, a compromise between CBI, TUC, DTI and Sir Michael Burton, President of the EAT and Chair of the CAC, was reached. It was decided that complaints relating to failure to inform or consult under the terms of an agreement reached under the Directive, or the default procedure, would be made to the CAC, which would also be the body responsible for complaints about the trigger or about the nature of agreements on procedures.¹⁰⁰ Further, in line with the TICER, the DTI also decided that the enforcement mechanisms should be applicable

⁹⁸ The TUC was also in favour of providing for injunctive relief, so that employers who fail to inform and consult properly, whether under agreed arrangements or statutory fallback arrangements, can be made to revert to the *status quo ante*.

⁹⁹ Overell (2005) noted that the CAC's record in union recognition cases led some UK business organizations to fear its expansion into information and consultation. Neil Bentley from the CBI was reported as saying: 'Our experience of the CAC is that it has been too union-friendly. Modern employment relations use both direct and indirect communication with the workforce. But the skills pool of the CAC seems to draw on out-of date industrial relations experience, where only representative structures are deemed to constitute valid consultation.' The EEF and CIA echoed similar criticisms (EEF and CIA interviewees).

¹⁰⁰ In the view of the TUC General Council (TUC, 2003) 'there was an important advantage to having one body, the CAC, dealing with both types of complaint, as there may in some cases be complaints on both procedural and substantive matters running concurrently.'

only where a negotiated agreement is reached under the ‘negotiated agreement’ route, or the standard provisions apply, and not in respect of PEAs.¹⁰¹

The appointment of the CAC as the primary mechanism for resolving the disputes in the operation of the ICER was clearly stipulated in the outline scheme. In the latter, under the heading ‘compliance and enforcement’, it was stated that ‘where an agreement has been negotiated following an employee request or employer notification, or the statutory provisions apply, disputes about the operation of the procedures may be brought before the CAC.’ Despite the reference of the CAC in the outline scheme, the CBI continued objecting to the CAC’s appointment even after the publication of the outline scheme. In the CBI submission in November 2003 (CBI, 2003, para 3) it was stated: ‘This response to the draft regulations does not seek to reopen matters of principle which were agreed under the framework... This response also comments on two key issues that were not subject to the framework agreement. Firstly, the CBI believes that primary responsibility for enforcement of the new regulations should be given to employment tribunals rather than the CAC as the Government has suggested.’ Further, it was stressed: ‘The CBI is supportive of the framework for implementing the Directive, however, as the Government and the TUC will accept, the CBI did not agree to the enforcement of the Information and Consultation regulations being given to the CAC’ (para 5)¹⁰² The CBI interviewee explained that even though the outline scheme mentioned the CAC ‘*the option to lobby was still there.*’ In light of the comments received from the employers’ organizations, the DTI agreed to hold a recruitment exercise to appoint a limited number of additional CAC members with wider experience than just collective bargaining.¹⁰³ As a result of the suggested changes, the CBI and other employers’ associations were finally forced to accept the appointment of the CAC in the final ICER.

Finally, regarding the remedies provided in cases of employers’ failure to establish ICE arrangements, under the ‘standard provisions’, where required to do so, and failure to inform and/or consult under the ‘negotiated agreements’ or the ‘standard provisions’ options, the ICER followed the precedent set out in the TICER and stipulate that the EAT has the responsibility for the provision of remedies.¹⁰⁴ This was in line with the CAC preference for not having the responsibility for imposing sanctions for breach of its

¹⁰¹ The TUC had preferred applying the ICER’s enforcement procedures to PEAs or requiring legal enforceability (TUC interviewee).

¹⁰² The DTI official noted in the interview that the DTI had made clear that once an agreement was reached with the social partners on the framework there would be no subsequent changes.

¹⁰³ Advertisements for new appointments to the CAC released in 2005 stated: ‘In order to achieve a balance of experience on the committee, it is desirable for some members to have experience in a non-union environment’ (Overell, 2005).

¹⁰⁴ The original proposals for the structure envisaged that the CAC would also impose sanctions for breach of its orders.

orders. Stressing the alignment of the CAC with the spirit of fostering ‘partnership at work’, the CAC Chairman (Burton, 2004: 2) explained that ‘we do not have and do not wish the sanction of contempt of court...We have and wish for no such sanctions.’ Further, as in the case of the TICER, only sanctions in the form of financial penalties are stipulated.¹⁰⁵ Unlike redundancy consultation, there is no provision for compensating employees in respect of whom a failure to consult has occurred and the financial penalty is payable to the Treasury.¹⁰⁶ The maximum penalty was set at £75,000 in the outline scheme and has been retained in the final ICER. During the negotiations with the CBI and the DTI, the TUC argued that the upper limit should increase according to the size of the undertaking; otherwise larger undertakings would not regard the penalty as a serious deterrent (TUC interviewee). However, neither the Government nor the CBI were prepared to support increased penalties beyond the £75,000 upper limit, and the outline scheme and the final Regulations incorporate this limit.¹⁰⁷

3.3 Evaluation of the process for the transposition of the ICED

The steps finally taken for the transposition of the ICED through the involvement of the CBI and TUC are nothing like what can be found at EU level, where employers’ associations and trade unions are formally incorporated into the legislative process, or in some member states where EU policy initiatives may be implemented by the social partners performing a legislative function in collective agreements. However, the transposition of the ICED via an agreement between the DTI, TUC and CBI demonstrated how reflexive regulation mechanisms, as promoted by the ICED, provide a framework to support dialogue and negotiation between industrial relations actors in the development of legislation at national level. In diverging from a ‘consultation countries’ type (Falkner *et al.*, 2005), where social partners are only consulted and there is no negotiation and no common decision-making process between the state and the two sides of industry in the transposition of EU social policy directives, the discussions between the TUC, the CBI and the DTI could be effectively described as ‘tripartite meetings’ for the development of national legislation. Whilst the DTI was ultimately responsible for the

¹⁰⁵ The CAC Chairman, Sir Michael Burton (2004) stated: ‘I am happy that, after discussions, the Regulations made no provision for the CAC to apply sanctions, and assigned the responsibility for the imposition of sanctions to the ETA.’ Also, against the preference of the TUC, reg 22(9) now expressly provides that no order of the CAC may have the effect of ‘suspending or altering the effect of any act done or of any agreement made by the employer or of preventing or delaying any act or agreement which the employer proposes to do or make.’

¹⁰⁶ Reg 22 (7).

¹⁰⁷ Concerning the cap to the financial penalty, the then DTI secretary, Gerry Sutcliffe (2004) commented: ‘the £75,000 is meaningless, but if we start with penalties then we lose the battle.’ The enforcement regime has come under criticism by a number of commentators (see for instance, Ewing and Truter, 2005; Hall, 2005). In essence, it is suggested that it is open to question whether the enforcement regime is enough, and whether these provisions are sufficiently ‘effective, proportionate and dissuasive’ in line with art. 8 (2) of the ICED.

introduction of the legislation, the involvement of the CBI and TUC had a significant impact on the form and content of the final text of the ICER. As such, the transposition of the ICED was in accordance with the underlying spirit of the ICED, which stresses the participation of social actors in the designing of national social policy.¹⁰⁸ This point was also recognized by the EC official involved in the adoption of the ICED:

'The directive can be described as forward-looking as it can play an important role in developing social dialogue, not only at company level, but also at other levels since it requires that employers and trade unions organize themselves, like in the case of the UK where it led to the outline scheme at national level.'

On the part of the DTI, whilst the transposition of the ICED was justified on the grounds of fair treatment of workers, partnership, employee involvement promotion, and high performance workplaces (DTI, 2002: 4) the potential contribution of the ICED to the latter, i.e. high performance workplaces, and, in turn, to an improvement of UK's productivity was particularly emphasized.¹⁰⁹ The ICED's transposition was explicitly presented as part of achieving 'a high skill, high productivity economy...through high performance workplaces, where employers and employees work together in partnership (DTI, 2002). Applying an autopoietic analysis, it is suggested that maintaining a 'voluntary' approach to employee representation was the objective of the UK political system and that this was reformulated at national level into the objective of high performance workplaces. Although recent EU discourse increasingly stresses the importance of information and consultation of employees in the context of economic efficiency, EU communications expressly related to the ICED did not straightforwardly assert that establishing ICE arrangements would increase productivity. Instead, in the

¹⁰⁸ As Ewing (2003) suggests, on this occasion though the discussions took place in the shadow of obligations imposed by European law, with the threat of litigation before the ECJ lurking in the background to exercise the mind of government.

¹⁰⁹ The study does not intend here to offer a critical evaluation of the impact of employee participation schemes on company performance. It is suffice to note here that the basic argument of HPW proponents is that the use of high performance work practices, including comprehensive employee recruitment and selection procedures, incentive compensation and performance management systems, and extensive employee involvement and training, can improve the knowledge, skills and abilities of a company's current and potential employees, increase their motivation, reduce shirking, and enhance retention of quality employees while encouraging non-performers to leave the company (Jones and Wright, 1992; Huselid, 1998). However, there is increasing evidence that the linkages between voice and performance are problematic not only for performance outcomes but also for workers and unions (see for example, Godard and Delaney, 2000; Godard, 2004; Edwards and Wajcman, J., 2005). Several reasons have been advanced: 'firstly, there is the problem of benchmarking, of assessing the date at which to start making 'before and after' comparisons...a second reason to be cautious...is that it is virtually impossible to isolate the impact of just one aspect of management practice (e.g. giving employees a voice) from other contextual factors that can influence behaviour at work...finally, there is the issue of evaluation and on whose terms' (Dundon *et al.*, 2004: 1167).

explanatory memorandum accompanying the Commission's proposal (1998) four key rationales for the adoption of the ICED were identified and discussed: the political context, intra-Union socio-economic considerations on managing and anticipating change, the lessons of earlier EC employee representative participation initiatives, and the lack of established structure for the exercise of ICE rights in certain Member States.¹¹⁰ In contrast, the discourse emanating from the DTI linked in a straightforward way the potential contribution of ICE arrangements to improving UK's productivity.

It is suggested here that in adopting an explicit high performance workplaces (HPW) discourse, a two-way solution to the conundrum created as a result of the UK's opposition to the ICED and the subsequent need to transpose the ICED into national law was found. Firstly, the HPW discourse constituted a means of justifying the government's change of approach to the ICED and engage support from the business community which had been particularly dissatisfied with the government's earlier failure to block the adoption of the ICED. The linkage of the ICER to the HPW discourse was identified by consultancy organizations, such as the IPA, as a means to make the transposition of the ICED '*more palatable*' to the employers. Other interviewees also described it as '*a cover for the retreat*' of the UK government when its opposition to the ICED was overcome. Interestingly, the association of the HPW discourse was not reportedly done initially by the DTI but by the No 10 Strategy Unit and the DTI then utilized it so as to maintain a strong positive role and promote within the government their role in the regulation of the workplace and the debate on skills. In this context, Sisson (2004) also saw no practical value in the link of the ICER to the HPW debate: 'this was a political construct – a way of getting the workplace on the political agenda.'

Secondly, the adoption of the HPW discourse allowed the DTI to successfully promote a significant margin of flexibility in the regulatory framework of the ICER. A clear linkage between the HPW concept and the flexibility stipulated in the ICER was provided in the Regulatory Impact Assessment (2003b: 151) conducted prior to the introduction of the ICER when it was stated:

'[T]here will be substantial economic and social benefits from the legislation over time...Employers should see gains from a better informed, more motivated and

¹¹⁰ The most prominent features of the political, economic, social and legal context described were: the increased importance attached by citizens to the social dimension in Europe, globalization of the economy, completion and further development of the internal market, the new conditions imposed or prompted by the single currency and the European Employment Strategy and the weaknesses of Community and national law.

committed workforce... These benefits are more likely to be felt under option 4¹¹¹ as they allow for a more flexible approach, taking the individual characteristics of the undertakings into account and allowing existing practices that are working well to continue uninterrupted.’¹¹²

The influence of the HPW discourse was exemplified in the treatment of three significant for the regulatory framework issues: firstly, substantial flexibility in terms of the form and content of ICE arrangements was introduced; secondly, relying on the implicit reference to direct ICE forms in the outline scheme, such methods were considered as satisfying an employer’s obligation to consult (DTI, 2004a: 17); finally, no formal role was provided to trade union representation in achieving the policy goals of the legislation. Falkner *et al.* (2005) have suggested that the fate of EU non-binding or soft law recommendations in the UK typically depended on the extent to which they fitted the domestic political agendas. In a similar vein, the study found that the design of the key features of the ICED that were left to be determined by member states was partially a result of the domestic political system, as reformulated through the adoption by the DTI of a HPW discourse. Overall, the UK political system’s discourse can be thus interpreted as being concerned with the aims of avoiding a ‘one size fits all’ approach and of maintaining organizational flexibility with the DTI espousing the argument that employee representation through voluntary flexible agreements would increase productivity.

In conjunction with the impact of the DTI discourse on the institutional design of the legislation the role of the two sides of industry to the development of the legislation via the conclusion of the outline scheme was vital. The process for the transposition of the ICED illustrated the changing nature of the relationship between the TUC and CBI and the DTI (Barnard, 2006). Not only did the CBI and the TUC accept the invitation by the DTI to participate in the drafting of the legislation but they also reached agreement, which became the basis for the development of the legislation. The process for the transposition of the ICED approximated the process of ‘situated public action’ (Salais and Villeneuve, 2004: 8), as advocated in the context of a capability-based approach. The main interest parties, CBI and TUC, participated in the transposition of the ICED that was publicly agreed upon and their role as interlocutors of government potentially

¹¹¹ Under Option 4, the legislation would only impact on undertakings where there is some employee demand for information and consultation, but it also allows for the use of pre-existing agreements adapted to the individual circumstances of the undertaking concerned, or gives employers and employees the opportunity to draw up new agreements.

¹¹² Whilst the government, based on specific criteria, calculated tens of millions of pounds worth of start-up and annual costs, it was unable to put a figure on the benefits. Positive though it was, the government simply stated that it estimated the benefits to be ‘in the order of magnitude of hundreds of millions over a ten-year period’ (DTI, 2003b: 151).

enhanced their organizations' legitimacy and status. In that way, the organizations were able to express their opinions about the way to comply with the EU statutory requirements and to make them count in the course of public discussion (Bonvin and Thelen, 2003). Whilst a compromise deal was struck in some cases, e.g. trigger mechanism, in others a trade-off took place, e.g. in the case of the enforcement regime and the provision for direct ICE methods.

In exploring potential factors for variations in the impact of labour legislation Dickens and Hall (2006: 348) suggest that whilst the involvement of social partners can impact on the degree of acceptance and compliance a danger exists that 'public policy legislative intentions may be translated inadequately into law to secure acceptance, and issues such as whom 'the partners' actually represent can arise.' The present study found that the involvement of the CBI and the TUC enabled the DTI to depoliticize the issue of employee representation, reduced the possibilities that employers would continue to criticize the ICER, built a consensus between the CBI and the TUC on the way the legislation should be introduced and eased the process for the development of the statutory requirements (DTI interviewee). However, while the consultation process involved participation by diverse organizations, concerns were expressed that the scope for drawing up the agreed document was narrow and that the DTI should consult widely.¹¹³ More particularly, some interviewees suggested that the emphasis in the discussions on large organizations that had already existing consultative arrangements reflected the interests of employers represented by the CBI and failed to take into account the situation in medium-sized enterprises where there is limited evidence of pre-existing arrangements with or without the participation of unions. Nonetheless, the involvement of other parties was seen as likely to reduce the possibilities for reaching an agreement. In limiting participation to key actors the DTI managed to find a means for taking difficult issues 'off the table' and for reaching a compromise.

The CBI interviewee held that whilst they were against the adoption of the ICED they were largely supportive of the final text of the ICER.¹¹⁴ Two reasons identified with the change of approach were the CBI's involvement in the drafting of the ICER and, the flexibilities stipulated in the final ICER, including the compliance options that were secured, the inclusion of direct forms of information and consultation of employees and the imposition of an upper limit of £75,000 in the penalties for breaching the ICER. On

¹¹³ Whilst welcoming the participation of the CBI and the TUC to the drafting of the legislation organizations that expressed simultaneously a preference for a wider consultation were the British Chamber of Commerce, ACAS, EEF and CIA.

¹¹⁴ In November 2004 the FT (Jaggi, 2004: 4) reported that the DTI had bowed to pressure from employers and granted more flexibility in what was expected to be the final version of the ICER.

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TUC part, while it was acknowledged that ‘the agreement did not contain all the elements which the TUC had wanted’ the General Council stated that ‘the agreement succeeded in providing protection for pre-existing collective agreements on information consultation as well as generating new opportunities for unions to extend union influence in unorganised workplaces and to extend collective bargaining scope, as long as they have sufficient support within the undertaking’ (TUC, 2004). Concerning the final agreement, the TUC (2006) remained concerned about certain aspects of the ICER: the provision that part-time employees only count as ‘half people’ for the purposes of calculating whether an undertaking fell within the scope of the ICER; the £75,000 upper limit for awards against employers who fail to comply with the ICER; the lack of the ICER application to undertakings employing fewer than 50 employees; the lack of coverage of ‘workers’; the possibility of employers to establish systems for direct ICE arrangements not via trade unions or elected representatives; the lack of training and workforce development in the list of issues which were to be the subject for information and consultation.¹¹⁵

Most important the extent to which the agreement between the CBI and the TUC constituted a change of direction concerning national employment policy is still uncertain. From the TUC perspective, the outline scheme has been described as a ‘social partnership agreement’ (TUC, 2006: 11), illustrating possibly TUC aspirations for developing national dialogue at national level. In commenting on the agreement, the TUC general secretary Brendan Barber (TUC, 2003) stated: ‘in bringing us together with the CBI the government has done the right thing. We have always said that social partnership of this kind is the best way to draw up the details of implementation, particularly when there’s a mutual logic requirement or government policy that both of us understand is non-negotiable.’ This view can be contrasted with that of the CBI. In an interview to *The Economist* (Elliott, 2006) Digby Jones, the then Director-General, commented that trade unions had become irrelevant to the CBI: ‘we have no formal meetings with the TUC. I have meetings with NGOs, but I don’t meet the unions. They are an irrelevance. They are backward looking and not on today’s agenda.’

Equally but equally importantly, the involvement of the two sides of industry in the transposition of the ICED led to a re-contextualization of the EU norms stipulated in the Directive. The quality of transposition was hence dependent on the social processes, as

¹¹⁵ In relation to changes made to the draft ICER, the TUC 2006 General Report mentioned two issues where the DTI made improvements: first, the final ICER does not undermine established rights for organized trade unions to be consulted over proposed collective redundancies and transfers of undertakings; secondly, the final ICER made clear that part-time employees were to be treated as ‘whole time’ for the purposes of assessing support for a trigger requesting for ICE arrangements.

developed by the two sides of industry, which shaped and refracted, in turn, the EU norms on information and consultation rights so as to minimize the destabilization of the existing industrial relations networks (Teubner, 1998: 19).¹¹⁶ As explained in section 3.2.1, a main focus of the outline scheme concerned the procedure for triggering negotiations over ICE arrangements. There was general consensus that voluntary agreements in the form of PEAs were preferable to negotiated agreements and more importantly than the application of the ‘standard provisions’. In emphasizing the primacy of voluntary agreements and in rejecting an increased role for the legal system in providing for effective ICE arrangements the involvement of the CBI and the TUC in the framing of the legislation led to the maintenance of the voluntarist tradition albeit within a statutory framework.

Applying a reflexive regulation approach, the mediation of the ICED’s external noise within the paradigm of meaning in the UK industrial relations allowed for the transformation of the EU-level norms that were envisaged in the directive. Although such transformation is formally envisaged under the regulatory means of directives (Maher, 1998, Deakin, 2007) the scope for transformation was significantly shaped by the existing linkages between the national legal system and the industrial relations system in the area of employee representation. In relying on a strict separation of legal regulation from forms of employee representation and especially collective bargaining a form of ‘tight coupling’ (Teubner, 1998: 18) between the UK legal system and the industrial relations system has been sustained. As Teubner (1998: 19) stresses ‘while in the loosely coupled areas of law a transfer is comparably easy to accomplish, the resistance to change is high when law is tightly coupled in binding arrangements to other social processes.’ The tight coupling between the UK legal system and the industrial relations system in conjunction with the formal involvement of the two sides of industry in the framing of the national legislation had the effect that the transfer of norms from another source of law, in this case EU law, was refracted and shaped so as to secure a response that would accommodate the new legal links within the existing social processes.

However, such an outcome may create a tension between the desire to encourage the preservation of existing approaches and a concern that only voluntary arrangements of a certain quality should be given statutory endorsement. This is reflected in the fact that the conclusion of a PEA renders the possibility for a ‘negotiated’ agreement much more challenging. Hence, in aiming to protect existing agreements and reduce the

¹¹⁶ In essence, there were two iterations of consultation and subsequently two instances of impact of the two sides of industry to the institutional design of the ICER: firstly, impact was reported via the agreement on the outline scheme; secondly, impact was also reported on the issues that were left to be resolved once the draft ICER were published in July 2003.

possibilities that new arrangements would displace such agreements, the participation of the CBI and the TUC in the framing of the legislation went halfway in attaining the objective of the ICED. The underlying principle behind the ICED was to add a new component to collective labour law as it allows employees to have a new voice at work through the establishment or amendment of existing representative arrangements for information and consultation of employees. In that way, the ICED aimed to fill the representation gap, create opportunities for meaningful participation and improve the quality of working life in line with a capability-based perspective. These principles were somewhat neglected in the ICER as a result of the importance attached not only by the DTI but also the CBI and the TUC to the protection of the existing framework.

3.4 Conclusion

The development of capabilities and the effectiveness of consultative arrangements require a favourable legal framework. Since the Labour government was willing to involve employers and unions in the process for the transposition of the ICED differences between the two sides of industry became critical. Whilst concerns of domestic policies, as exemplified by the emphasis on HPW, were still dominant interest group politics were developed on the part of the CBI and the TUC (see also Falkner's *et al.* (2005: 334). From a reflexive regulation point of view, despite the fact that it was expected that the transposition of the ICED would bring about a reconstruction of the notion of employee representation, the fact that this was achieved through the coupling of the transposition of the ICED with a discourse on flexibility may arguably not provide the foundations for a paradigm that, in line with a capability-based perspective, could support more substantive reforms that would nonetheless be compatible with broader UK institutional arrangements. In effect, the preference for organizational flexibility as a result of the emphasis on HPW runs in contrast to the establishment of legally mandated works councils, underpinned by strong information and consultation rights. This is evident in the hierarchy of regulatory techniques set out in the legislation. Surprisingly, this corresponds to a progressive dilution of the consultative duty, with the least onerous formulation taking priority in the regulatory scheme (Bogg, 2006: 12). The shift has hence repercussions in terms of the nature of capabilities that could be developed so as to attain the objectives of public intervention, as defined in the ICED, since the implementation of the ICED becomes dependent on management considerations and only a limited role is provided to trade unions, representatives and individual employees.

The attempt of the UK government to combine social protection and economic efficiency objectives lays the ICER open to contrasting and competing interpretations. From one standpoint, the ICER can be seen as one of the main achievements in creating a flexible, decentralized regulatory model stressing the importance of participation. However, the

risk when adopting a flexible institutional approach is that too many and too extensive possibilities for compliance, whether or not under the pretext of ‘participation’, will undermine the very notion of a standard *per se*. In that sense, it is plausible to identify the ICER with what Streeck (1995: 45) has characterized as an emerging social policy regime of ‘neo-voluntarism’ that is notable for its limited capacity ‘to impose binding obligations on market participants’ (see Moffat, 1998 for the same issue in the case of the WTD). On the other hand, the ICER attempt to build on a history of voluntary employee representation with only weak ICE rights while encouraging employers, employees, and unions to negotiate their own arrangements. In that way, the new legal framework can be seen as consistent with pre-existing cognitive/normative rules whilst at the same time its implementation is in conjunction with processes conducive to these rules and is accompanied by a strategy to reshape them. This approach may be of value because it allows for the dynamic interplay between legal rules and cognitive and normative ones and attempts to shape both (Godard, 2002: 259). The question then becomes: will it be possible for the legal system to induce the IR system to modify the existing paradigms through the implementation of the ICER in a way that builds on yet allows for a change in established norms? In order to provide an answer to this, the next chapter turns to examine empirical evidence regarding the response of employers, trade unions and employees to the application of the ICER. In context of examining the extent to which the ICER tilted the regulatory outcome away from that which could be arrived at by private social actors in self-regulating markets, the chapter provides also an evaluation of an interrelated issue, that of the enforcement regime of the ICER.

Chapter 4. The response of the UK system of industrial relations to the reflexive design of the ICER

As a consequence of the dependence of the ICED on the principle of double subsidiarity and the attempt to allow for flexibility that can accommodate but also assist in the evolution of national IR systems and practices, the ICED not only stipulates a crucial role to national legislation in transposing its provisions but also gives solutions negotiated at organizational level priority over statutorily prescribed ways of establishing ICE arrangements. As already seen, the ICER allow employers, trade unions and employees considerable flexibility of response, both procedurally and substantively (Hall, 2006). From the perspective of reflexive regulation the most important elements of the ICER are:¹¹⁷ firstly, the stipulation that employers need not act unless 10% of their employees trigger statutory procedures intended to lead to negotiated agreements;¹¹⁸ and secondly, the possibility for effectively pre-empting the use of the ICER procedures through the conclusion of PEAs which can vary the nature of ICE arrangements that will apply. Further, the ICER importantly include the possibility for providing for direct ICE forms in the cases of PEAs and negotiated agreements rather than informing and consulting indirectly through representatives.¹¹⁹ In line with the ICED, the standard provisions become applicable only as a fallback in situations where the employer is obliged to initiate negotiations, but fails to do so, or where a negotiated agreement is not reached within the stipulated time period.¹²⁰

Drawing on the institutional design of the ICER, the chapter presents an evaluation of the impact of the provisions in the establishment/amendment of ICE arrangements. The analysis proceeds from the basis that the ICER provisions were designed as reflexive legal instruments to promote regulation through self-regulation. The wider attitude of trade unions and employers' associations on the issue of the implementation of the ICER and the underlying rationales for the specific strategies followed by the actors are analyzed in the first section. An examination of how the implementation of the ICER stimulated actors' choices and collective organization on the establishment and/or amendment of existing ICE arrangements follows that is based on primary and secondary evidence on the incidence of ICE arrangements, employers', trade unions' and employees responses to the legislation, and the results of a questionnaire survey of companies

¹¹⁷ It has to be stressed here that these options, as seen in the previous chapter, do not apply in the case where there is no undertaking, i.e. 'a public or private undertaking carrying out an economic activity, whether or not operating for gain' (reg 2). Further, they do not apply in the case of undertaking that employ less than 50 employees.

¹¹⁸ Reg 7.

¹¹⁹ Reg 8 (1) and reg 16 respectively.

¹²⁰ Reg 19 (1).

operating in the chemical sector. The chapter concludes with an analysis and assessment of the enforcement regime of the ICER.

4.1 The compliance strategies recommended by employers' associations and the approach of the trade unions

On the employer side, the 2004 CBI Guidance to the Regulations stressed that 'important flexibilities have been delivered and it is vital for companies to utilize them' (CBI, 2004a). The Guidance encouraged organizations to consider their options in view of the statutory requirements and it was geared towards encouraging employers 'to go about and review the consultation arrangements that have in place now to ensure the Regulations have a minimum impact on the companies.' The CIA guidance also emphasized the importance of such a pro-active strategy of reviewing and making changes when necessary in order to comply with the ICER requirements. In this context, making use of the flexibilities that the legislation offered and opting for the significant leeway that PEAs or negotiated agreements permit instead of the prescriptive approach of the 'standard provisions' constituted significant underlying themes. Law firms and management consultancies also drew attention to the flexible options provided by the legislation and specifically the benefits of concluding PEAs before and after the legislation came into force in April 2005.¹²¹ While employers' associations emphasized the benefit for reviewing and concluding, where necessary, PEAs, attention was also drawn to the importance of maintaining the distinction between consultation and collective bargaining. The Head of Employment Policy at EEF, for example, stressed that it was important for a clear distinction to be drawn between ICE arrangements and any negotiations that take place between the company and trade union, the reason being the decentralized nature of the UK's pay bargaining system (Yeandle, 2005). In a similar vein, the CIA advised member-organizations to restrict negotiations with the unions to terms and conditions, pay, hours and holiday, and let ICE arrangements deal with the wider agenda (CIA interviewee). Further, the CIA guidance stressed the unique opportunity provided under the ICER to employers to set the agenda for information and consultation so as not to get 'caught' by workforce demands.

As already seen, trade unions have been denied a preferential role since the ICER stipulate that the representatives must be directly elected by workforce ballot. However, the legislation does offer elsewhere unions or union members a range of potential roles or opportunities to intervene (Hall, 2005). These include negotiating and approving PEAs –

¹²¹ For instance, the Chairman of the Employment Lawyers Association (ELA) and head of employment at law firm Linklaters pointed out: 'it is a good idea to get something in place before April and those who want but not yet have a PEA are rapidly running out of time. The Government's solution combines all models and is a bit of straight-jacket for employers who might want different arrangements for different groups' (Hall, 2005).

though a collective agreement confined to a particular bargaining unit would need to be supplemented by other agreed provisions covering the remaining employees in the undertaking – collecting names for an employee request for a negotiated agreement, acting as negotiating representatives – albeit at the employer’s discretion – and providing expert advice to representatives on ICE arrangements.¹²² In the case of both PEAs and negotiated agreements, it is open to the parties to agree that union representatives, and potentially even external full-time officials, can represent unionized sections of the workforce in the ICE process. Possible methods include information and consultation via recognized unions with separate, supplementary arrangements for non-union groups, and ‘hybrid’ consultation bodies involving both union nominees and representatives elected by non-union groups (Hall, 2005). In terms of trade union recognition, it is possible that under the legislation if a trade union is to make a judgment that it is unlikely to gain formal recognition through a ballot, it may decide to use the Regulations to secure a representation role in the workplace via the election of individual representatives loyal to the union. Depending on the issues and arrangements for consultation, such a role could arguably secure an influential role for the union, albeit falling short of formal recognition (Veale, 2005).

A number of issues concerning the impact of the legislation on the trade unions were emphasized in the guidance published by the TUC and individual trade unions. According to a TUC interviewee:

‘The twin objectives when the Regulations came into force were to protect firstly the existing arrangements with trade unions and secondly, to use, if possible, the legislation as an organizing opportunity.’

Issues that were identified were the ‘meshing’ of new consultation provisions with collective redundancies and transfers regulations, the preservation of single- and dual-channel systems, and the debate on the difference between negotiating and consulting (TUC interviewee). Drawing the boundaries between consultation and negotiation was considered as a key challenge for the TUC. Trade union officials were concerned that employers could set up alternative mechanisms to inform and consult with employees, even where there are already existing arrangements with the unions. Accordingly, the TUC advised unions to ensure that ‘the distinction between collective bargaining and consultation remains, so that where employers set up new ICE arrangements, they do not result in the dissolution or reduction in collective bargaining’ (Veale, 2005). The insistence on the distinction between consultation and negotiation was further

¹²² The DTI advised employers that union representatives ‘are likely to be well placed’ to fulfill the negotiator’s role for the conclusion of an ICE agreement.

complicated by two other factors. Firstly, in contrast to other national systems of industrial relations, multi-employer bargaining in Britain, as already seen, has been in decline with the division of responsibilities between bargaining and consultation being more challenging at company level (Sisson, 2002). Secondly, the Regulations' requirement that consultation should be 'with a view to reaching an agreement' in the case of 'decisions likely to lead to substantial changes in work organization or in contractual relations' can further blur the boundaries between the two concepts (Barnard, 2006: 76).

While individual trade unions expressed a generally supportive attitude towards the new legislation, the guidance issued to their members suggests that they had simultaneously significant concerns about the actual operation of the legislation. UNIFI (later merged with Amicus) adopted a generally supportive attitude toward the new regulations and while it started developing organizing strategies on a sector-specific basis it also expressed concerns about the effect that the legislation might have on undertakings where union-based ICE procedures were already in place. Amicus focused mainly on union recognition in workplaces but reportedly 'took information and consultation seriously as well and suggested to its members that where an agreement existed it was best to slot in a clause on information and consultation' (TUC, 2004). Concerns were expressed on issues such as the balloting arrangements, the provision for direct ICE forms and the potential for the legislation to cut across existing rights. The T&G expressed a generally cautious approach and suggested that the Regulations' impact and importance would only be established through case law.¹²³ The GMB was also concerned about some of the legislation's shortcomings, particularly in relation to the balloting arrangements. USDAW did not see the Regulations as a threat to existing agreements while PCS was concerned that many of its members in the Civil Service would not be covered. GPMU stated there were a number of agreements in the pipeline and UCU was wary of the potential for the legislation to cut across existing rights but believed that since in many universities the union had negotiating as well as consultation rights, the legislation would not make any big difference (TUC, 2004).

4.2 The extent and nature of responses to the ICER

The section proceeds to a two-fold analysis of the actors' response of employers, trade unions and employees to the implementation of the ICER. Firstly, based on survey evidence the general impact of the ICER is analyzed. Secondly, an attempt is made to

¹²³ The policy of T&G included the following issues: improve the quality and timing of consultation; protecting union representation; extending trade union presence; expanding the bargaining agenda; establishing high standards for the scope and procedure of information and consultation and; maximizing the enforcement potential of CAC and EAT.

identify specific sectors, organizations, and trade unions where the ICER had more impact and to identify the actors' preferred modes of response.

4.2.1 The extent and nature of employers' responses to the implementation of the ICED

During the process for the transposition of the ICED, lack of a pro-active management response was reported in a number of surveys. For instance, an IRS survey of 106 medium-sized organizations carried out in June 2004 reported that more than two-thirds were unaware of the ICED. It also uncovered 'a lot of antipathy' and concerns were expressed that the establishment of ICE arrangements would allow unions to rebuild their presence.¹²⁴ A DLA mini-survey of over 100 employers found that in only 25% of cases had employers reported instituting such a forum (Bradley and Leach, 2004) and a 2004 IPA survey of 84 companies reported that 79% had not yet made any changes. Evidence of an increase in the level of awareness of the ICER and in the assessment of existing arrangements was later observed. A survey of client companies by management consultants ORC Worldwide and law firm Baker & McKenzie published in May 2005¹²⁵ found that the majority of organizations (84.6%) had assessed the legislation for the impact on their business and employees. But, only 15.6% had put in place arrangements to meet the statutory requirements, 4.7% had overhauled their arrangements in light of the legislation and 3.1% considered that their existing arrangements fulfilled the statutory requirements for PEAs. Most organizations were reportedly relying either on preserving the *status quo* of existing consultative arrangements or on a lack of interest on the part of employees in triggering negotiations under the ICER.

However, a survey carried out in September/October 2005 for the West Midlands Employment Relations Forum (WMERF), provided evidence of active employers' responses (Hall *et al.* 2005). 37% of respondents said they had already made modifications to existing arrangements, 7% intended to introduce new ICE arrangements and another 20% planned to review their current arrangements soon. Successive employers' surveys conducted by the CBI also revealed a substantial increase in the number of organizations having permanent mechanisms for employee consultation. Interestingly, unionized organizations were proportionately more likely than non-union organizations to have modified their ICE arrangements (38% compared with 33%), and

¹²⁴ Another survey that was carried out in 2004 on behalf of the European Study Group reported that the level of awareness of the ICER amongst managers was considered very low. A survey of 99 organizations that was carried out in 2005 also reported that 14% of the respondents were not aware of the ICER despite the fact that two thirds of the respondents would be affected by the ICER in the first wave of the ICER application (Trident Communication, 2005).

¹²⁵ Out of the 66 respondents, 63 were in the private sector and 3 in the public sector; the majority of the respondents (69.2%) did not recognize unions. Interestingly, only two organizations indicated in their replies that their then consultation arrangements met all the requirements for PEAs.

were more likely to intend to introduce new arrangements (10% compared to 0%). Non-union organizations were more likely to say that they were not planning any action in response to the Regulations (44% compared with 33%). Respondents without any current arrangements but who were not planning to take any action were also more likely to be non-union organizations. These figures suggested an association between union recognition and active compliance strategies on the part of employers. Finally, all but one of the respondents said that they did not expect their employees to request negotiations under the legislation.

The most recent CBI Employment Trends Survey, conducted in 2006, found that 57% of respondents reported that they had permanent mechanisms for informing and consulting employees, compared with 35% in 2002, 47% in 2003, 49% in 2004 and 47% in 2005. A further 12% of employers stated that they intended to introduce such a structure. Employers with 5,000 or more employees were most likely to have introduced such mechanisms (85%), compared with 51% of those with 50–199 staff. The latest Industrial Relations Services (IRS) survey of 134 HR practitioners reported that 55% of respondents operated one or more permanent consultative bodies, such as employee forums or works councils (Welfare, 2006). This was down from the 2005 IRS survey – when 74% of employers stated that they had a permanent consultation body – and closer to the 49% level reported in the 2004 IRS survey. The report stated that employers continued to establish such structures, however, with 18% having set up since 2003, and 5% stating that they plan to do so within the next two years.

Interviewees from employers' associations stressed that the most common response by employers was to undertake reviews of their existing arrangements in the light of the legislation and to assess the prospects of their employees seeking to trigger the procedure for the conclusion of 'negotiated agreements'. As a result of reviews, instances of formalization of existing arrangements were reported. In more detail, the CBI interviewee stressed that the ICED was '*a catalyst, a stimulant to review, renewal and formalization*' of already existing arrangements. The Head of the EEF Employment Policy also noted that it was common to come across a '*tightening up*' of existing arrangements, especially in larger organizations, as a response to the legislation. In the chemical sector, the CIA Head of Employment Affairs noted that reflecting the already substantial degree of employee representation in the sector employers had largely sought agreement from their workforce on their existing ICE arrangements. However, as suggested by the interviewees, there was a significant number of employers who saw no need to establish PEAs as they perceived their existing arrangements as compliant to the ICER requirements and/or that employees would not trigger the process for 'negotiated agreements' (see also Hall, 2006). For instance, in sectors such as local government and

further and higher education, interviewees stressed that due to the already substantial degree of consultation taking place in the sectors and employers' perceptions about the low risk of employees triggering the process for negotiated ICE agreements there was no evidence of employers establishing/amending existing ICE arrangements or employees triggering the process for the negotiation of ICE agreements. Similarly, in the engineering sector, the EEF interviewee noted the lack of pro-active employer response; this was reportedly due to a moderate level of organizational interest in complying with the ICER, the low awareness of the legislation by employees and the apprehension of certain trade unions in initiating such procedures and in sitting with non-union employees in consultative forums.

Interviewees from employers' associations and the CBI stressed that proactive employer responses were more frequent in organizations with existing consultative arrangements or unionized workforces. With respect to the pre-existing structures of employee representation, the IPA interviewee mentioned that union recognition arrangements existed in 25 per cent of organizations where ICE agreements were established/amended in light of the legislation. The rest of the organizations either had communication forums or a different form of employee voice, which could not possibly qualify as an effective means for information and consultation. In unionized organizations, PEAs were established, amongst others, in Prudential (Luckhurst, 2005), Northern Food (EWCB, 2006), SCA Hygiene Products, Rhodia, Robinson Brothers, Goodrich Engine Control Systems, Westinghouse Rail Systems (DTI, 2007), Electronic Data Systems (DTI, 2007), Accenture (DTI, 2007), Coors Brewers (DTI, 2007), ITV (DTI, 2007), Pindar Set (DTI, 2007), Xansa, Fujitsu Services, Bombardier Transportation, Corus, Keogh Solicitors (Hall, 2006), BAA, Crown House and Twyford Bathrooms (Welfare, 2005). According to the IPA interviewee, a considerable number of ICE arrangements were also established in financial services and utilities organizations; in such cases, union recognition agreements existed and union membership was between 20% and 30%.

While, according to CBI and EEF officials, there was limited evidence that employers were using deliberately the legislation so as to marginalize existing trade unions there was evidence that consultative arrangements were established in non-union organizations so as to prevent union organizing activities. Examples of non-unionized organizations where PEAs were reportedly established include Marks and Spencer, Schrader Electronics, Hewlett Packard, ARM (IDS, 2005), Grass Roots Group (DTI, 2007) and Land Securities.¹²⁶ The IPA interviewee also noted that in the voluntary sector, where

¹²⁶ However, there is no evidence to suggest that the arrangements in these cases were introduced in order to prevent union organizing activities.

collective bargaining arrangements have been traditionally absent, the introduction of the ICER led frequently to the establishment of consultative arrangements.

However, lack of clarity in terms of whether ICE agreements were approved by or on behalf of employees was reported in a number of cases. Whilst the CBI interviewee noted that most employers had sought approval of the arrangements by workforce ballot, survey evidence suggested that in some cases the arrangements were not designed in consultation with employees; instead, the overriding majority was designed and signed off by management (ESG, 2004). The IRS survey in 2004 also reported that only 24% of employers had sought the agreement of employees (Welfare, 2004); this figure rose to 32% of the sample in 2005 (Welfare, 2005) and in 2006 it stood at 25% (Welfare, 2006).¹²⁷ Similar concerns were also expressed by the CIA interviewee, who suggested that, if tested, a considerable number of these would not satisfy the ICER criteria. Such testing could arise when organizations faced instances of major restructuring and re-organization, including potentially collective redundancies. In a number of arrangements that were reported it was uncertain whether the agreements were approved by or on behalf of employees; such arrangements include, amongst others, the ones in Telewest Global (Pickard, 2005), UBS, Citigroup, Ernst and Young, BSkyB, Amlin, Coca Cola Enterprises (IDS, 2005), United Co-op Travel Group (IDS, 2005), AMEC, Aviva, OCS, Gallaher, DHL Express, Safeway, and Babcock International Group. Further, surveys drew attention to the fact that a significant number of arrangements did not cover the entire workforce (Welfare, 2004) and that the arrangements were not in writing (Welfare, 2006).¹²⁸

There was evidence that the requirements for an agreement and the increased scope for flexibility was a source of uncertainty among employers. According to the ACAS interviewee, despite the CBI's emphasis on maintaining a flexible approach to the application of the legislation, the flexible institutional design of the ICER did not appeal to many employers:

'What we have forgotten is that the great tradition of voluntarism in the UK, meaning reaching agreements, is 20 or 30 years out of date. So what was seen politically – for the government, for the CBI and the TUC – as a bonus, that is flexibility 'you can do your own thing', the response by lots of employers was: 'can you just tell us what we have to do?' You tell them all about the flexibility and they say 'well, it is all very unclear'. So I say 'look if the only thing you are interested in is complying, just put

¹²⁷ The 2006 CBI survey also reported that 25% of organizations had sought the agreement of their workforce to the effect that these arrangements were satisfactory.

¹²⁸ The 2006 CBI survey also reported that 49% of employers had ICE arrangements set out in writing.

the standard provisions in.’ But I’ve been told the standard provisions are terrible...Again, we forget that in many companies as union membership and bargaining are down there is no management experience of negotiating. So, actually being told the way to implement the regulations, is via an agreement, causes all sorts of problems in some places.’ (ACAS interviewee)

This view was shared by the IPA interviewee, who noted that another source of employer confusion concerned the extent to which PEAs could be established after the coming into force of the legislation.

In terms of the nature of the newly established arrangements, the IPA interviewee suggested that arrangements in the financial sector were introduced alongside existing union negotiation rights. According to the IPA and CIA interviewees, in both the finance and the chemical sectors a rigid distinction between consultation and negotiation was maintained. This view was shared by the CBI official, who stressed that whilst different mechanisms were set up for different purposes employers did not want to upset existing arrangements and excluded hence issues, such as pensions, that were already the subject of discussion with unions. According to the IPA, in almost all the cases where ICE arrangements were introduced in organizations with existing recognition agreements in the financial sector unions, even senior officials, were provided with designated seats in the consultative forums. Similar findings were reported in the chemical sector, where traditionally a significant number of organizations recognize trade unions.¹²⁹

In line with the evidence reported in employers’ surveys, while there was a flurry of activity and interest in organizations that wanted to put in place PEAs from April 2003 up to March 2005, the interest seemed to fall away almost immediately after the implementation of the legislation. The picture was similar when the ICER were extended in 2007 to cover companies employing 100-150 employees. According to the IPA interviewee, there was very limited interest and little take up of the legislation in such organizations. The paucity of cases of establishment or amendment of ICE arrangements was mainly attributed to lack of awareness of the legislation, especially in smaller

¹²⁹ The 2005 IRS survey reported that in 37% of employers who had employee representatives the latter were a mixture of union and non-union members. A further 27% said that all their consultation representatives were union members; slightly more – 32% – thought that none of their employee representatives were members of a trade union (Welfare, 2005). However, caution needs to be exercised as the sample had a high level of trade union recognition, with 61% of respondents saying that they recognized a trade union. The 2006 IRS survey also reported that 38% of organizations that had employee representatives said employee representatives were a mixture of trade union members and non-members. 29% thought that none of their representatives were union members; and a further 30% said that all their employee representatives were members of a trade union (Welfare, 2006). Again, trade unions were recognized at 57% of organizations.

organizations, where the absence of dedicated HR departments limited the extent of awareness, and the ambiguity regarding the possibility for concluding PEAs after the introduction of the legislation. While interviewees reported the incidence of the establishment of ICE arrangements through negotiated agreements the number was much lower than the reported number of concluded PEAs. Moreover, there was very little evidence of ICE arrangements introduced as a result of the application of the standard provisions; only the CIA interviewee noted that the standard ICE provisions had been applied in some organizations in the chemical industry.

Lastly, in terms of direct forms of ICE, there was very limited evidence of employers using this option in order to comply with the requirements of the legislation. Hall (2006: 466) reported that some organizations had introduced or formalized direct ICE methods for certain groups of employees, e.g. head office or managerial staff, not previously covered by existing consultative arrangements. According to the TUC interviewee, there were not many examples of direct systems that were formally set up and covered all employees. Only Yellow Pages (Amicus interviewee) and mobile operator 3 (Personnel Today, 2005) were reported to have used direct ICE methods so as to comply with the legislation. The IPA interviewee also noted that two smaller organizations had used direct ICE forms to comply with the ICER. The limited use of direct ICE methods to meet the statutory requirements comes in sharp contrast with the steady increase of the use of direct employee engagement methods, as evidenced in successive WERS. A possible reason for the limited use of direct ICE forms maybe the fact that until the time of the research the ICER were applicable to undertakings employing more than 150 employees, where direct ICE methods are frequently complemented by indirect employee representation mechanisms, through union recognition agreements or other consultative arrangements. Moreover, consulting with representatives was perceived by employers' associations, such as the EEF, and reportedly some large organizations, such as KPMG and Astrazeneca, as not only beneficial for the organizations in terms of the skills and experience of the representatives and trust built up between management and ERs, but also as a way to ensure that adequate consultation through representatives took place when required by the law, such as in cases of collective redundancies and transfers of undertakings (Clegg, 2005). Further, the possibility that direct ICE forms may be challenged by trade unions before the ECJ has arguably influenced the advice provided by employers' associations. Even in the case of the CIPD, which was strongly supportive of direct information and consultation the CIPD interviewee noted that the use of such ICE forms may be questionable when perceived as sufficient on their own in meeting the objectives of the legislation. Similar concerns were raised by the EEF; in its guide to the legislation (EEF, 2005: 66), it is stated that direct ICE methods may be 'difficult to organise and operate effectively, except in the smallest undertaking.'

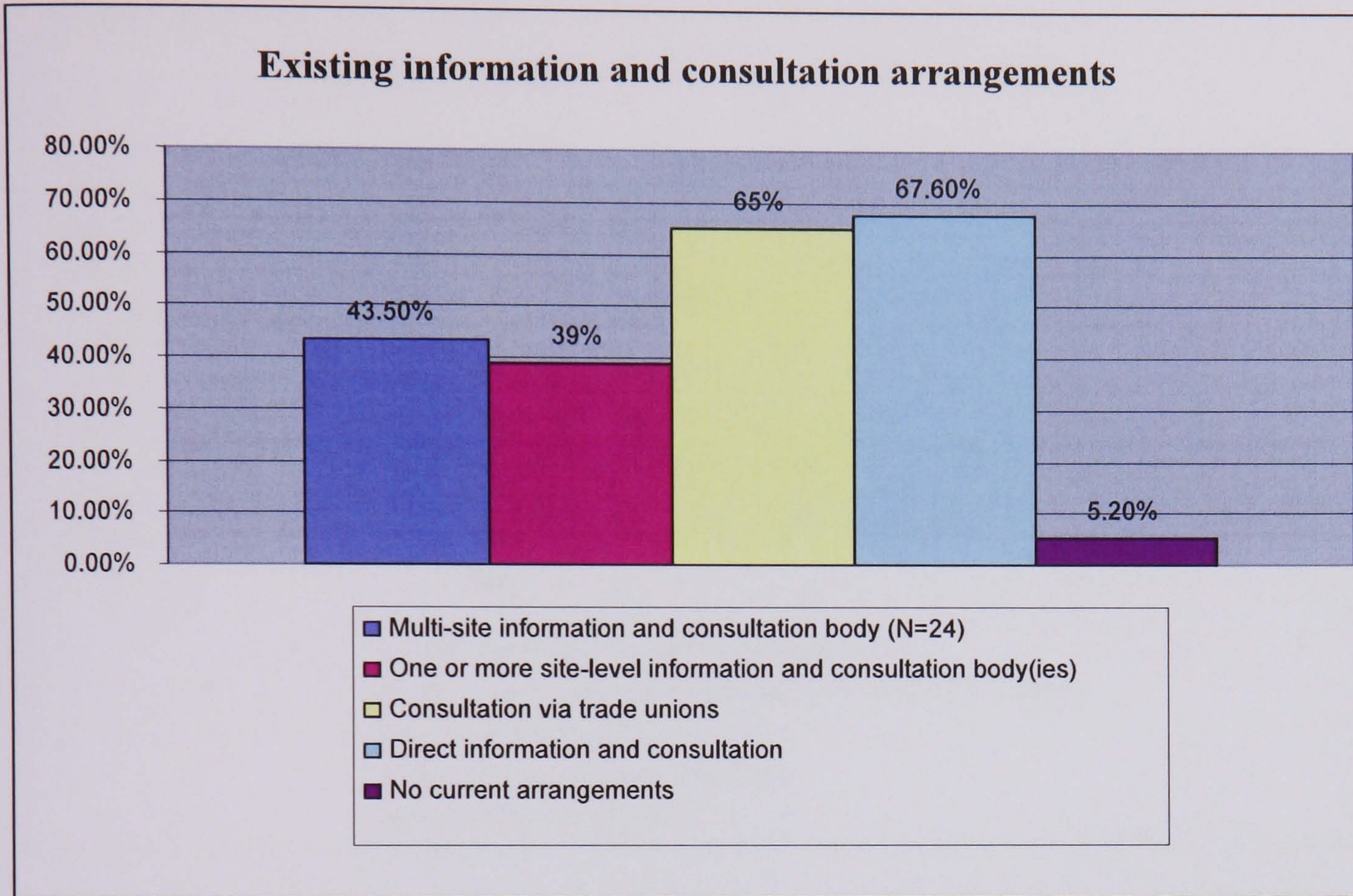
4.2.2 The CIA survey

The chemical industry provides an interesting example, as it is one of the few sectors in the UK where there is evidence that the sector goes against the trend in liberal market economies. The CIA, as suggested in chapter two, constitutes an active employers' association. It brings together businesses of all sizes, across all chemical activities. At the time of the research, it comprised over 140 members, based at 200 manufacturing sites nationwide. The combined breadth and strength of its membership enables the CIA to be not only the largest but also the most influential, supportive and progressive association to represent chemistry-using companies in the UK today. As part of the CIA's vision for a sustainable chemical industry, member-organizations have been encouraged to embrace the goal of employee participation through having in place processes for informing and consulting employees on matters that affect their working lives.

The survey, conducted for the purpose of the thesis, took the form of a brief questionnaire designed to collect information on employers' arrangements for informing and consulting their employees and their responses to the ICER. 78.4% (29 organizations) recognized trade unions for at least some employees while 21.6% (8 organizations) did not. The survey asked what types of information and consultation arrangements existed (figure 1). A total of 43.5% (10 organizations) out of those operating at multi-site level (24 organizations)¹³⁰ reported they had a multi-site information and consultation body or employee forum and 39% (14 organizations) had one or more site-level bodies. 65% (24 organizations) of the total sample informed and consulted via recognized trade unions. The slightly more popular practice of information and consultation directly with employees took place in 67.6% (25 organizations). In 5.2% (2 organizations) there were no ICE arrangements. The majority of the organizations (24 or 66.6%) reported using more than one method, including two organizations where all four methods employees were in operation.

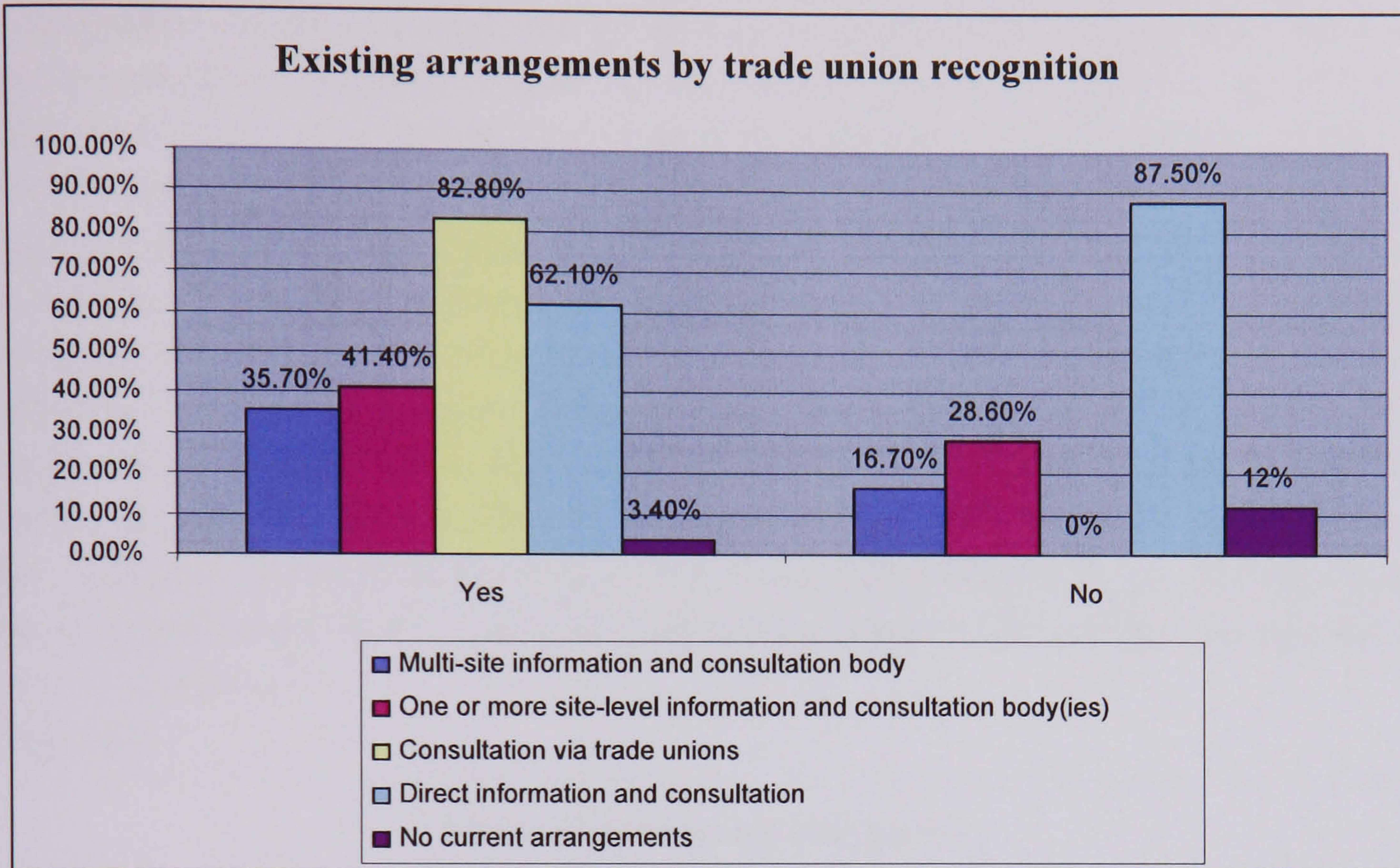
¹³⁰ There is one missing value.

Figure 1



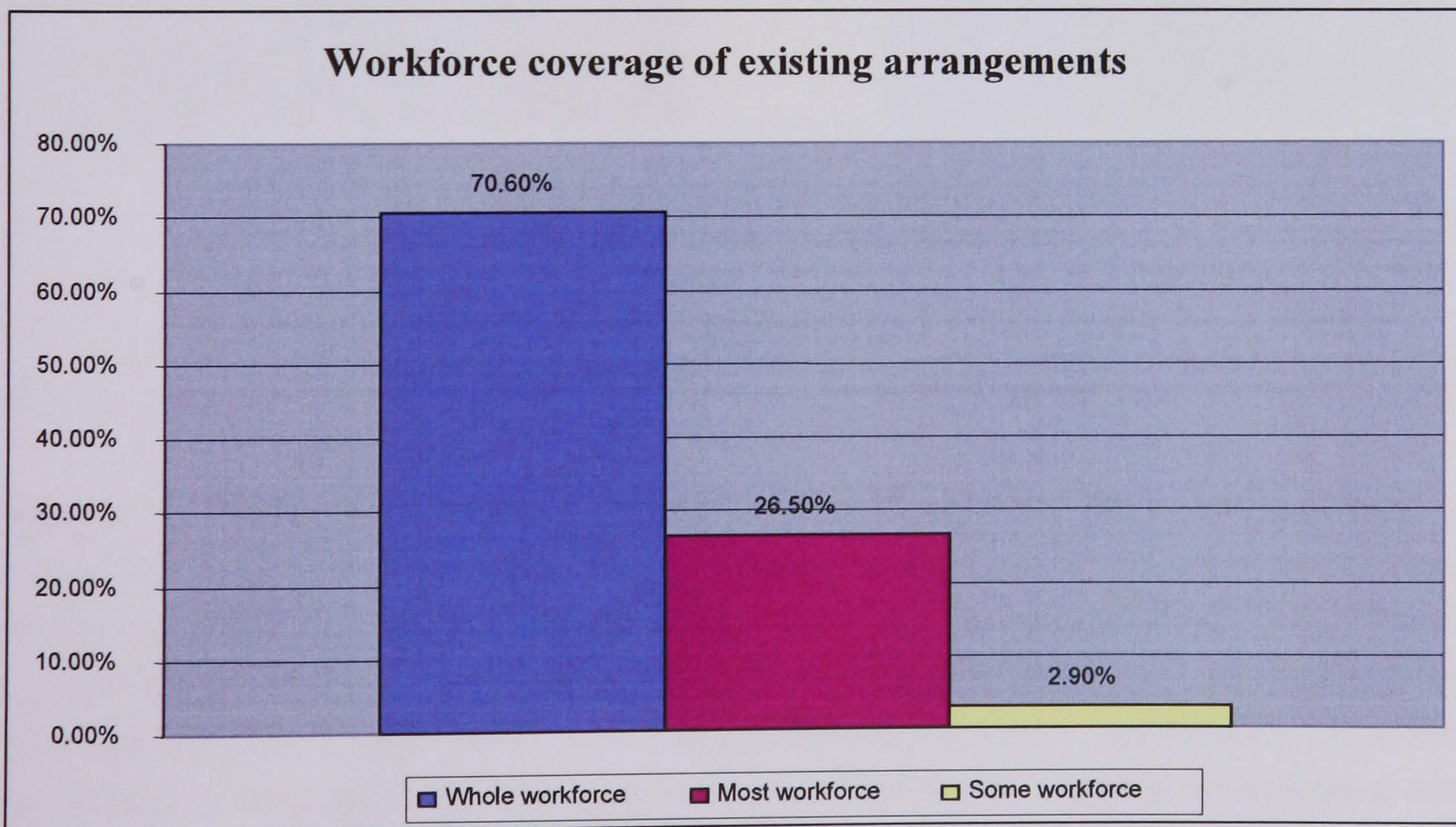
Information and consultation via recognized unions was the most common practice among unionized organizations, reported by over three-quarters of the unionized respondents (figure 2). Direct information and consultation took place in 18 out of 29 of unionized organizations (62.1%). Ten unionized organizations (35.7%) had multi-site arrangements while 12 (41.4%) had one or more site-level ICE bodies. Only one unionized organization (3.4%) replied that they had no current ICE arrangements. Among the non-union organizations, direct information and consultation was the most popular practice, reported by 87.5% of respondents (7 of 8). There was a multi-site ICE body in one organization (16.7%) and two organizations (28.6%) reported having one or site-level ICE arrangements while one organization (12%) said they had no current ICE arrangements. Hence, non-union organizations were much more likely than unionized organizations to inform and consult directly and less likely to have ICE bodies.

Figure 2



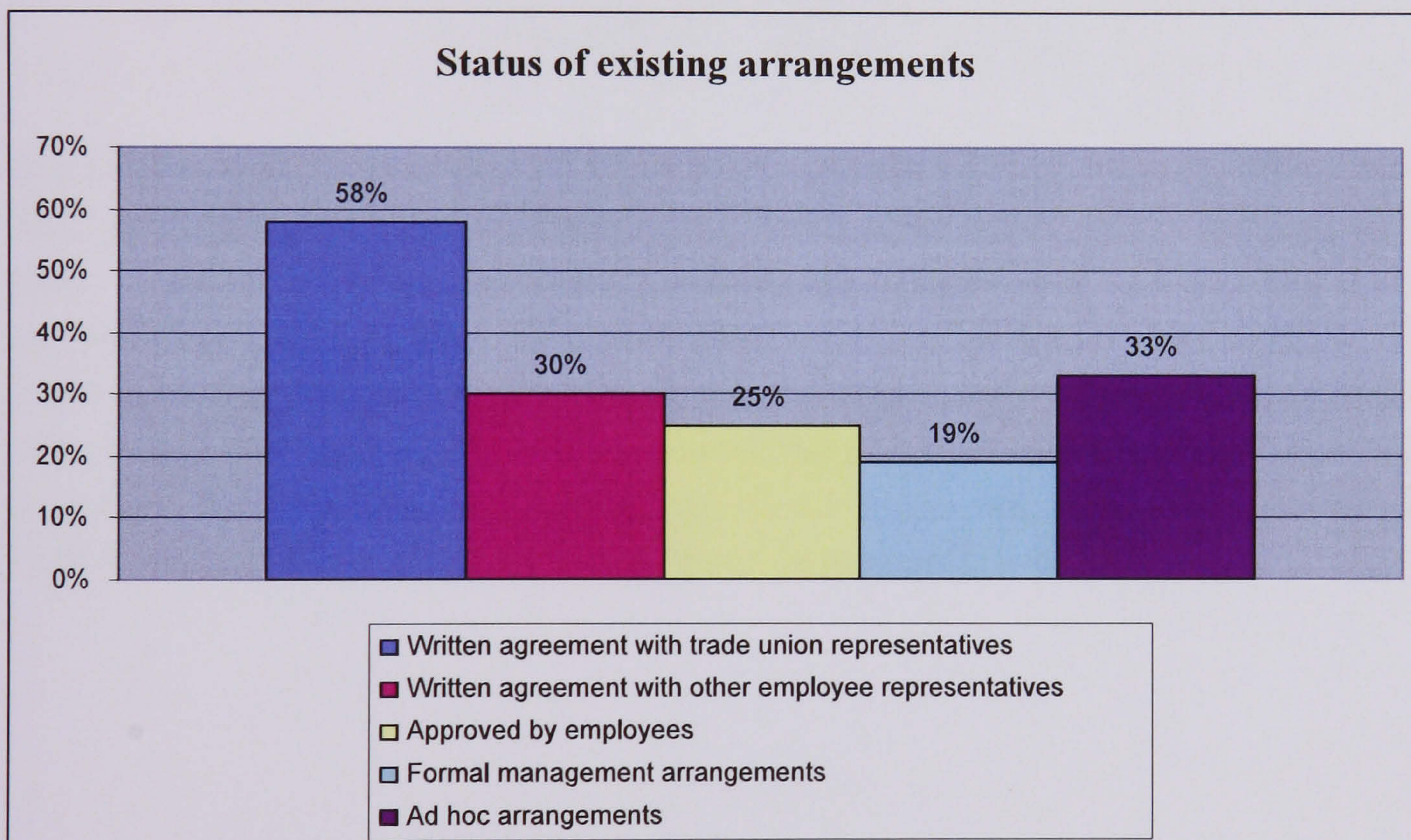
In the majority of the organizations (70.6% or 24 organizations) where ICE arrangements were in place, they covered the whole workforce, while 26.5% (9 organizations) replied that the arrangements covered most of the workforce and 2.9% (1 organization) reported that the arrangements covered some of the workforce (figure 3)

Figure 3



In light of the significance that the ICER put on ICE arrangements agreed between management and ERs or approved by employees, organizations were further asked to provide details on the status of their information and consultation practices, i.e. whether they were based on a written agreement with trade union representatives, whether a written agreement with other ERs was concluded or approved by employees (e.g. in a ballot); whether they were formal arrangements introduced by management acting alone; or finally whether they were ad hoc arrangements, such as in the cases of collective redundancies and transfers of undertakings (figure 4). Of the 36 respondents who had information and consultation arrangements, 21 respondents (58%) had written agreements with trade union representatives and 11 (30%) had arrangements based on written agreement with other ERs. In nine cases (25%) the arrangements were approved by employees. In seven organizations (19%) there were formal arrangements introduced by management and in 12 cases (33%) respondents reported that 'ad hoc arrangements' were in operation.

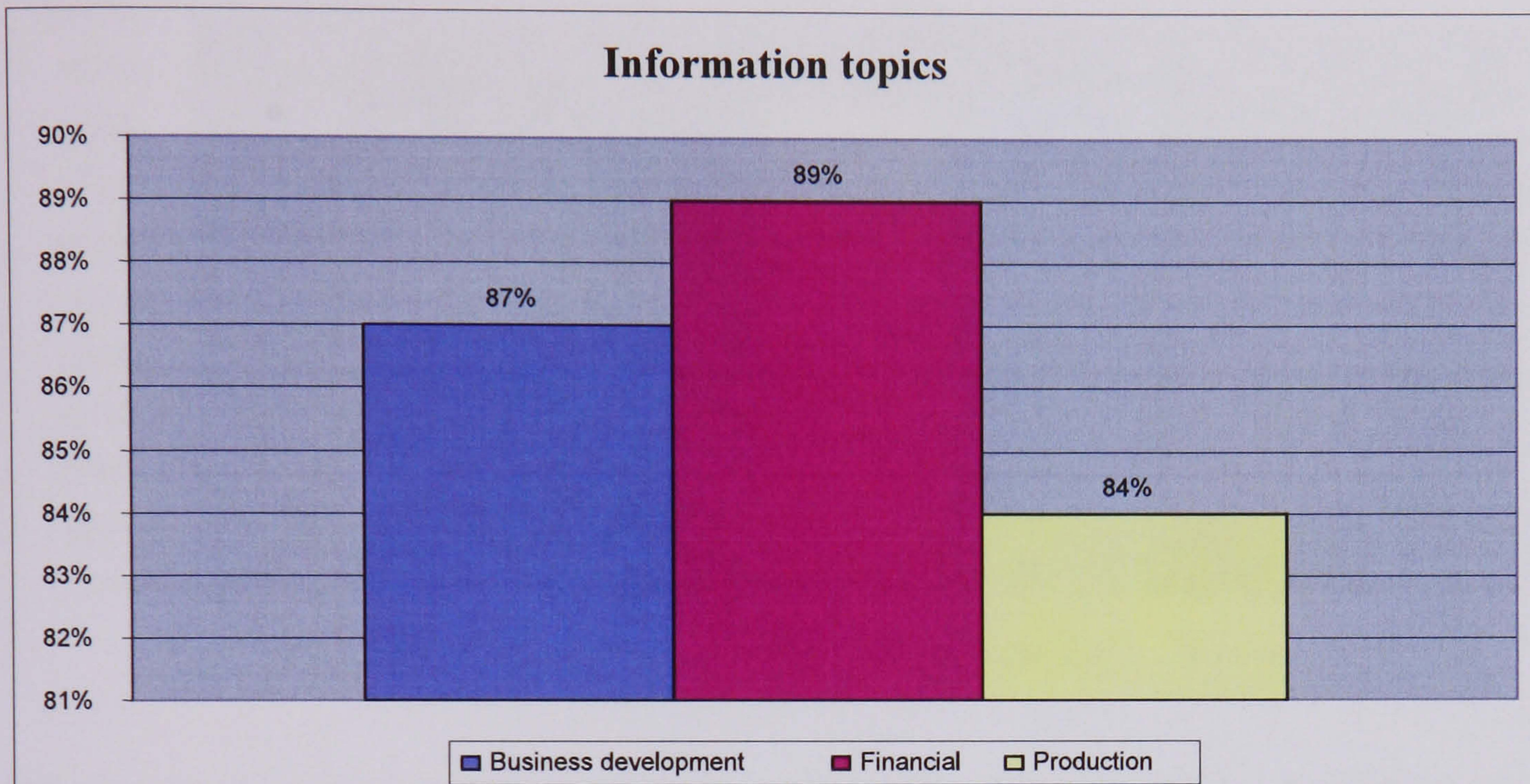
Figure 4



Regarding information and consultation topics (figure 5), the great majority of organizations (87% or 33 organizations of 36 respondents) reported that they informed employees and/or ERs on business development issues, e.g. strategic objectives. 89% (34 organizations) informed employees and/or ERs on financial issues, e.g. performance and financial outlook, while 84% (31 organizations) provided information regarding production issues, such as level of production of sales. In contrast, consultation with regard to these issues, i.e. business, financial and production, appeared a minority

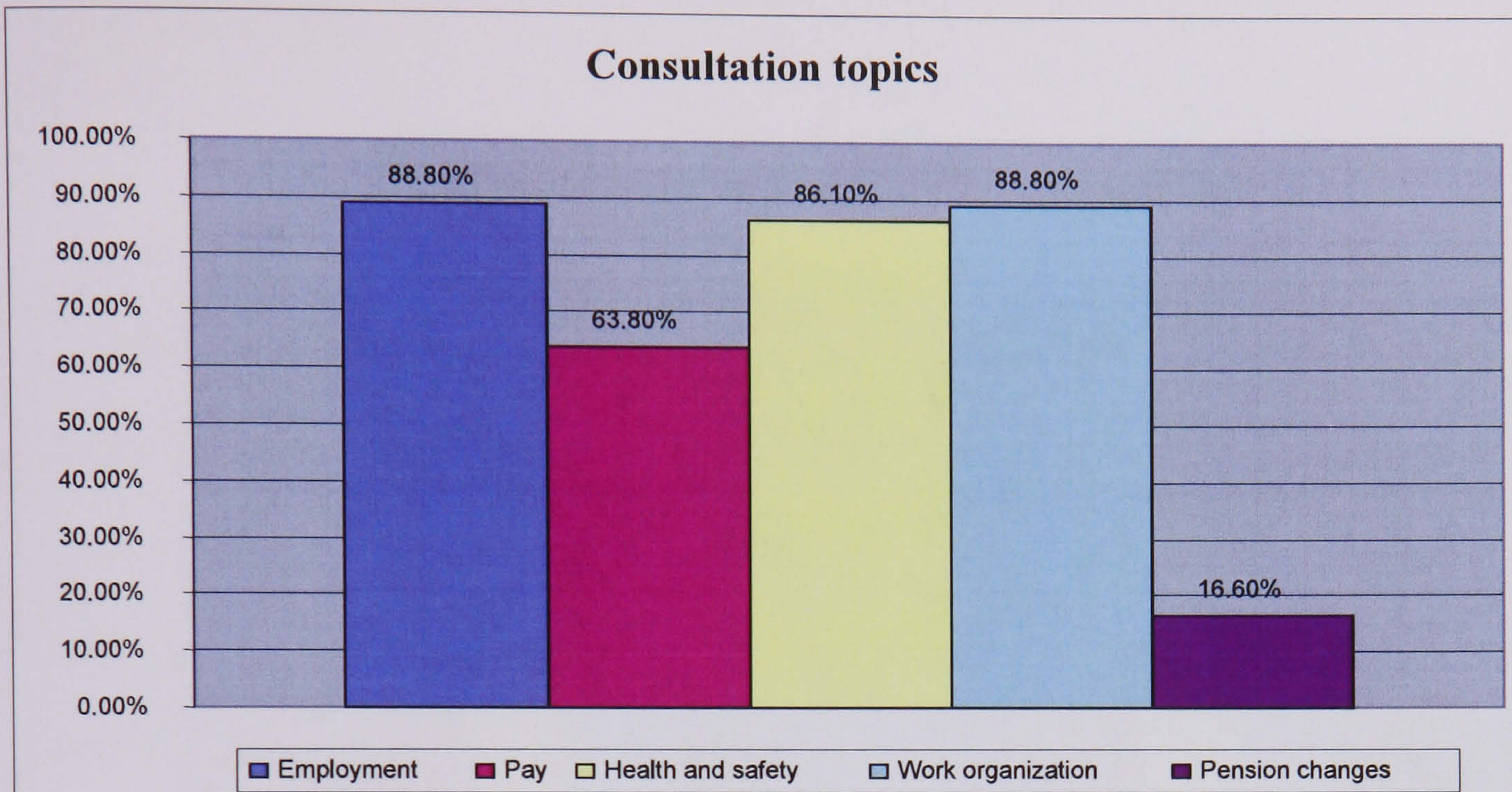
phenomenon. 2 organizations (5.5%) consulted on business issues, one (2.7%) consulted in financial and four (11.1%) consulted in production issues.

Figure 5



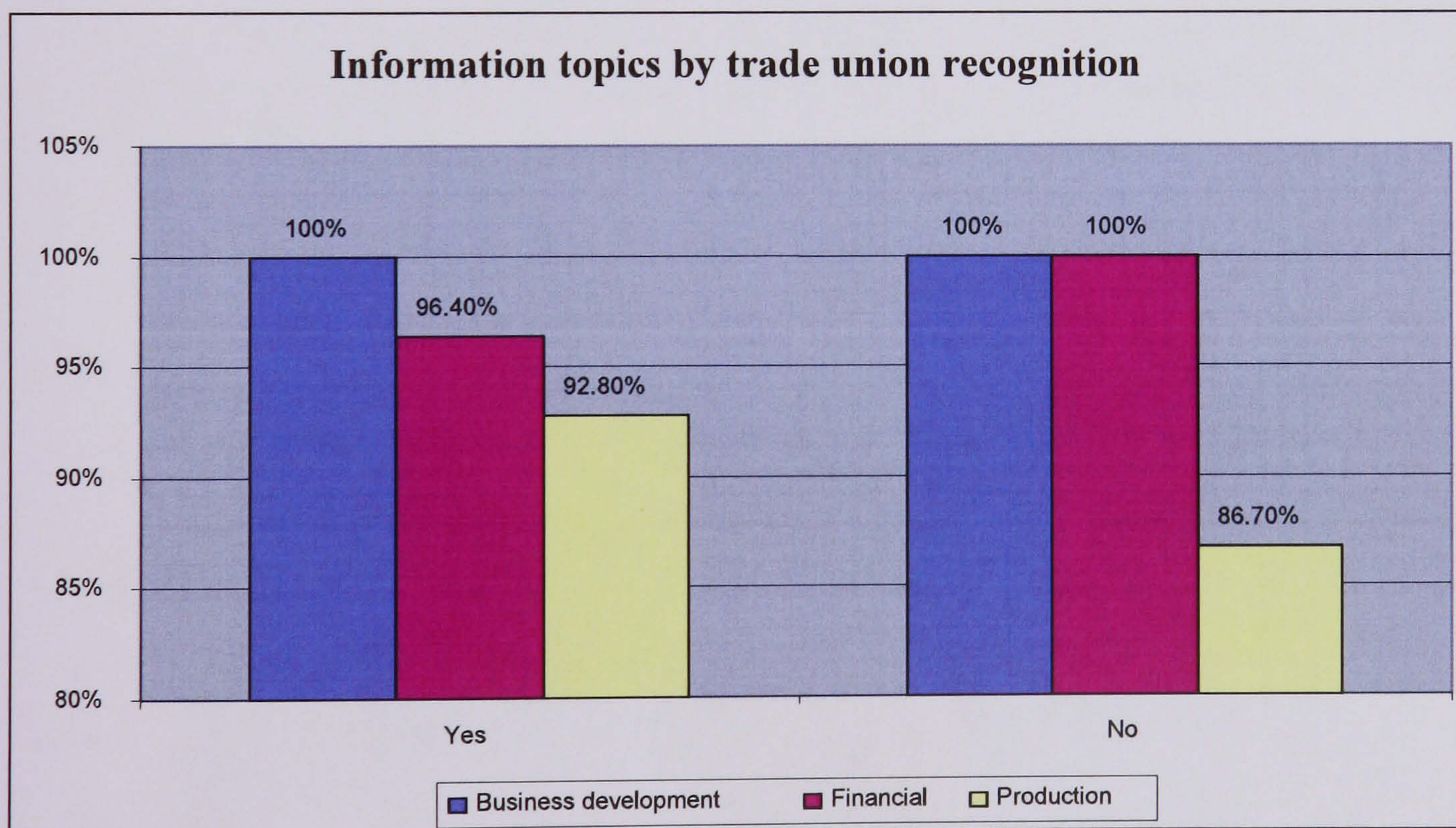
However, a significant number of respondents reported that they consulted ERs and/or employees with regard to employment, pay, health and safety and work organization issues (figure 6). More specifically, regarding employment issues, 88.8% (32 organizations) replied that they consulted on employment issues, 63.8% (23 organizations) consulted on pay issues, 86.1% (31 organizations) consulted on health and safety issues, and finally 88.8% (32 organizations) consulted on work organization, such as changes to working methods and working time arrangements. It was further found that 16.6% (6 organizations) consulted on pension schemes issues.

Figure 6



When analyzing these findings by trade union recognition (figure 7), it is shown that information on business and financial issues was provided to a fairly similar extent within unionized and non-unionized organizations.

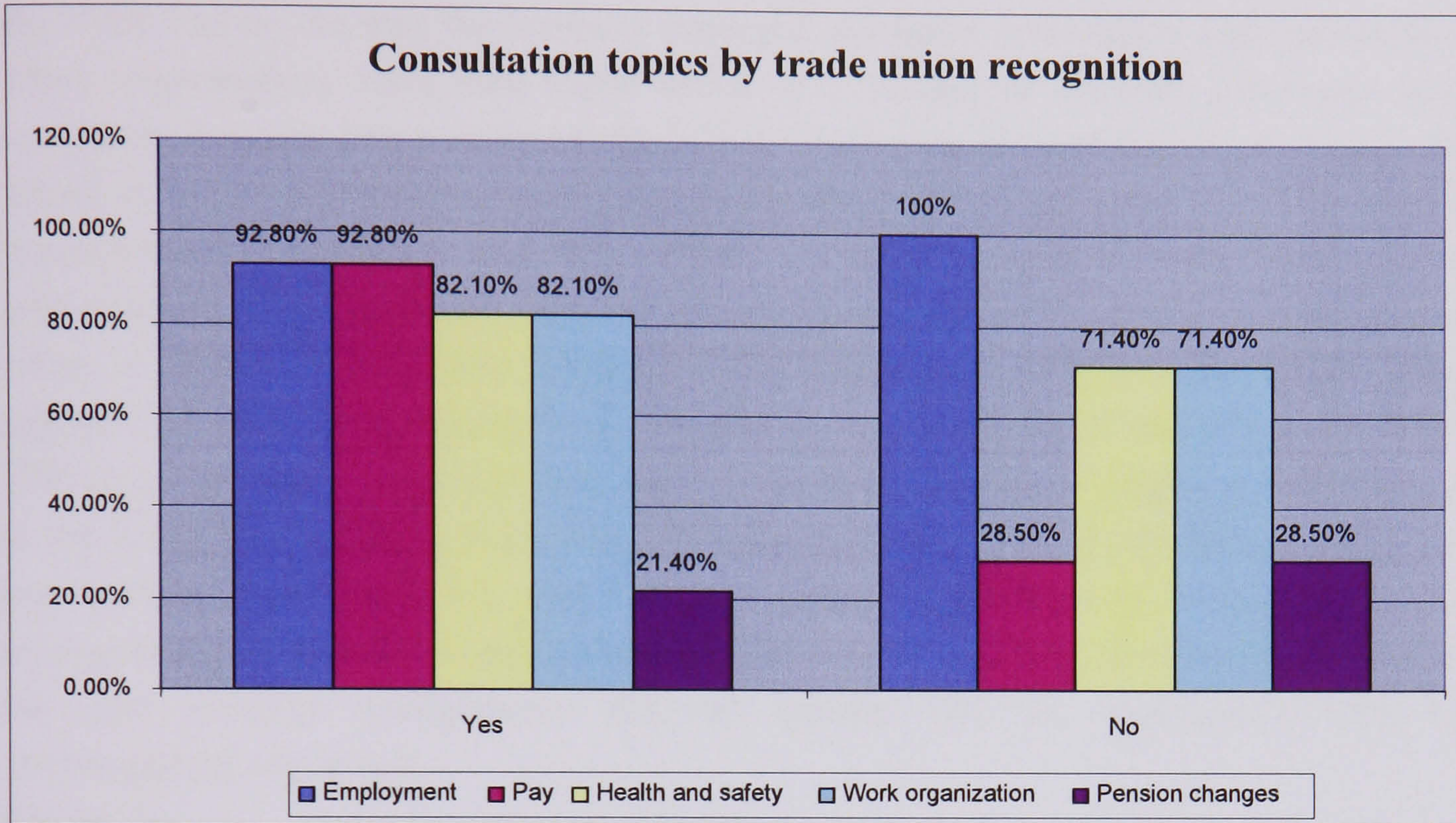
Figure 7



However, regarding consultation (figure 8), organizations where trade unions were recognized tend to consult more than non-unionized organizations on pay (82.1% compared to 28.5%), health and safety (82.1% compared to 71.4%) and work organization issues (85.7% compared to 71.4%). In the case of pensions' changes non-

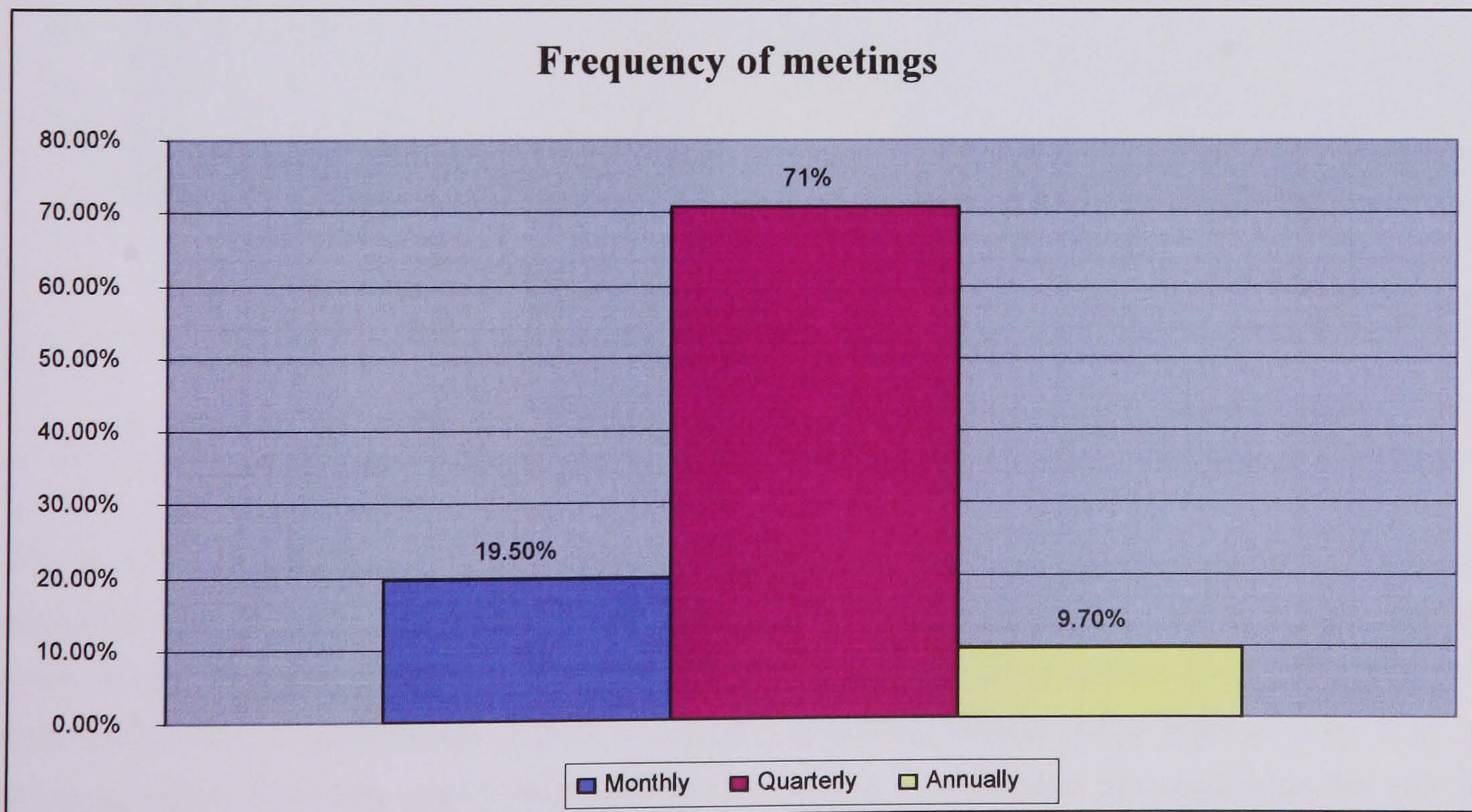
unionized organizations seemed to consult more than unionized organizations (28.5% compared to 21.4%).

Figure 8



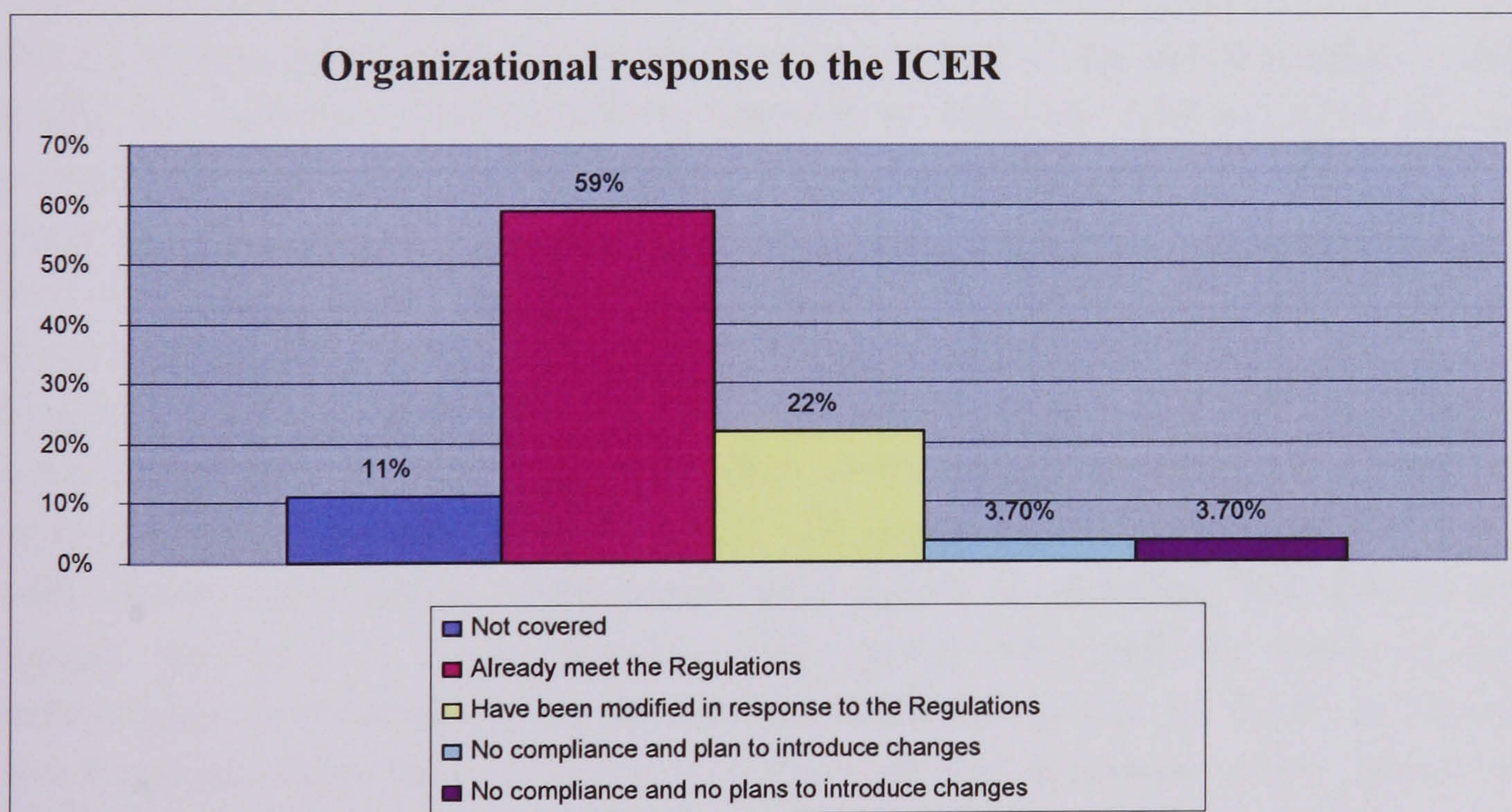
Concerning the frequency of meetings (figure 9), the greatest number of respondents (71% or 22 organizations out of 31) reported that they held meetings with ERs at least quarterly. 19.5% (6 organizations) held monthly meetings and only 9.7% (3 organizations) met annually with ERs. Out of the 22 organizations that met at least quarterly with ERs, 77% (17 organizations) recognized trade unions.

Figure 9



The most significant findings from the survey constitute arguably the ones measuring the impact, if any, of the ICER on organizations' ICE arrangements (figure 10). 71% (27 organizations) responded that they had made an assessment of the possible impact that the ICER had on the way the business managed employee information and consultation. These organizations were then asked which of a number of different statements most accurately describe their response to the ICER. The results presented in figure 10 give the details of the 27 organizations that had assessed the potential impact of the ICER. 11% (3 organizations) responded that they were not then covered by the ICER (those organizations employed fewer than 150 employees but would be covered at a later stage, either in 2007 or 2008). The majority of the respondents (59% or 16 organizations) replied that their arrangements were already in compliance with the ICER. However, 22% (6 organizations) said that they had already modified their arrangements in response to the ICER. Furthermore, there was only one organization where the arrangements did not comply with the ICER and the organization was planning to introduce new arrangements or amend the existing ones. Finally, there was only one organization where the then existing arrangements did not comply but the organization was not contemplating any action.

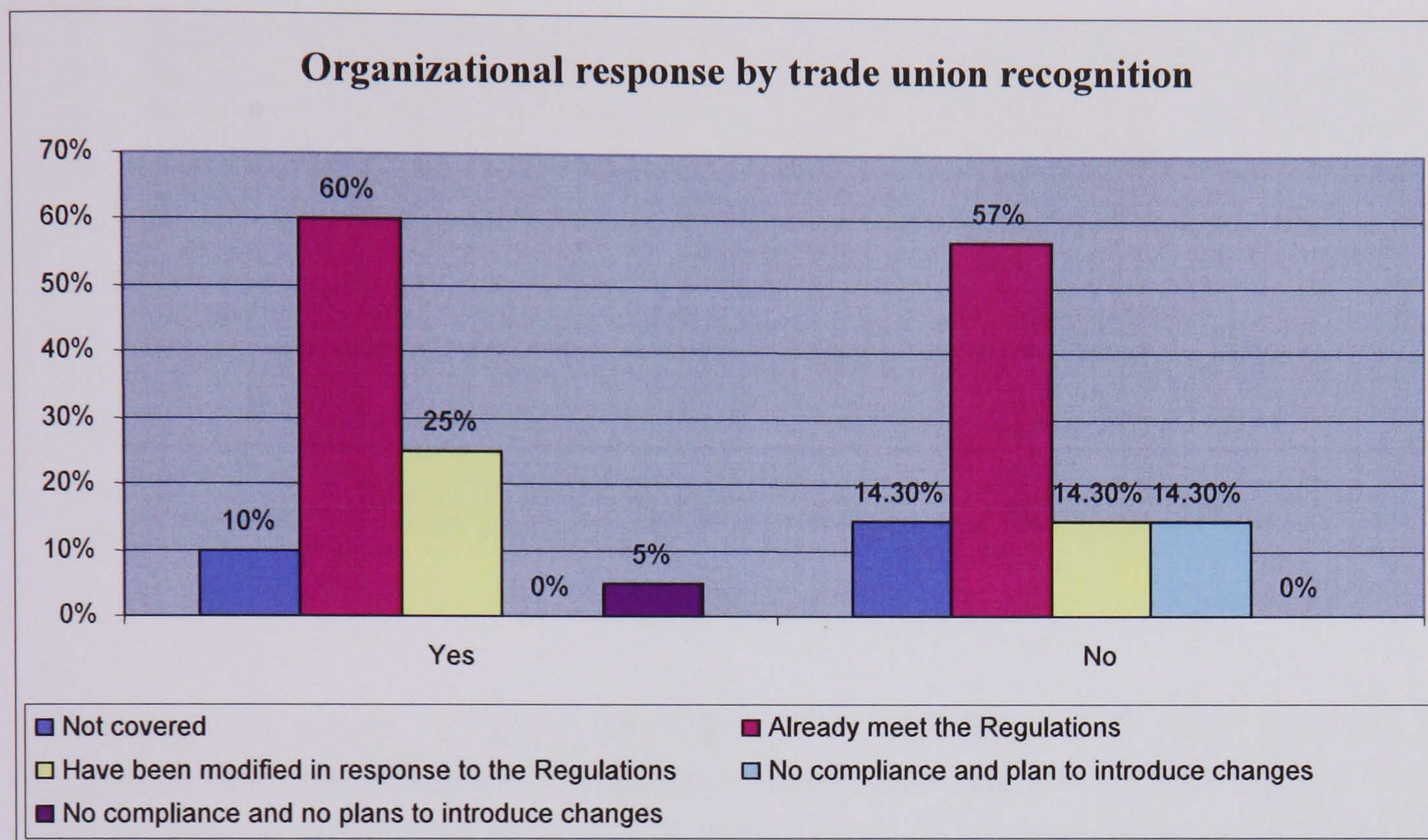
Figure 10



When the responses of unionized organizations are compared with non-union organizations (figure 11), it is evident that unionized organizations were proportionately more likely to have already modified their arrangements in response to the Regulations than non-union organizations (25% compared to 14%). While these figures may suggest an association between union recognition and active compliance strategies on the part of employers, it is important to add here that the only case where the arrangements were

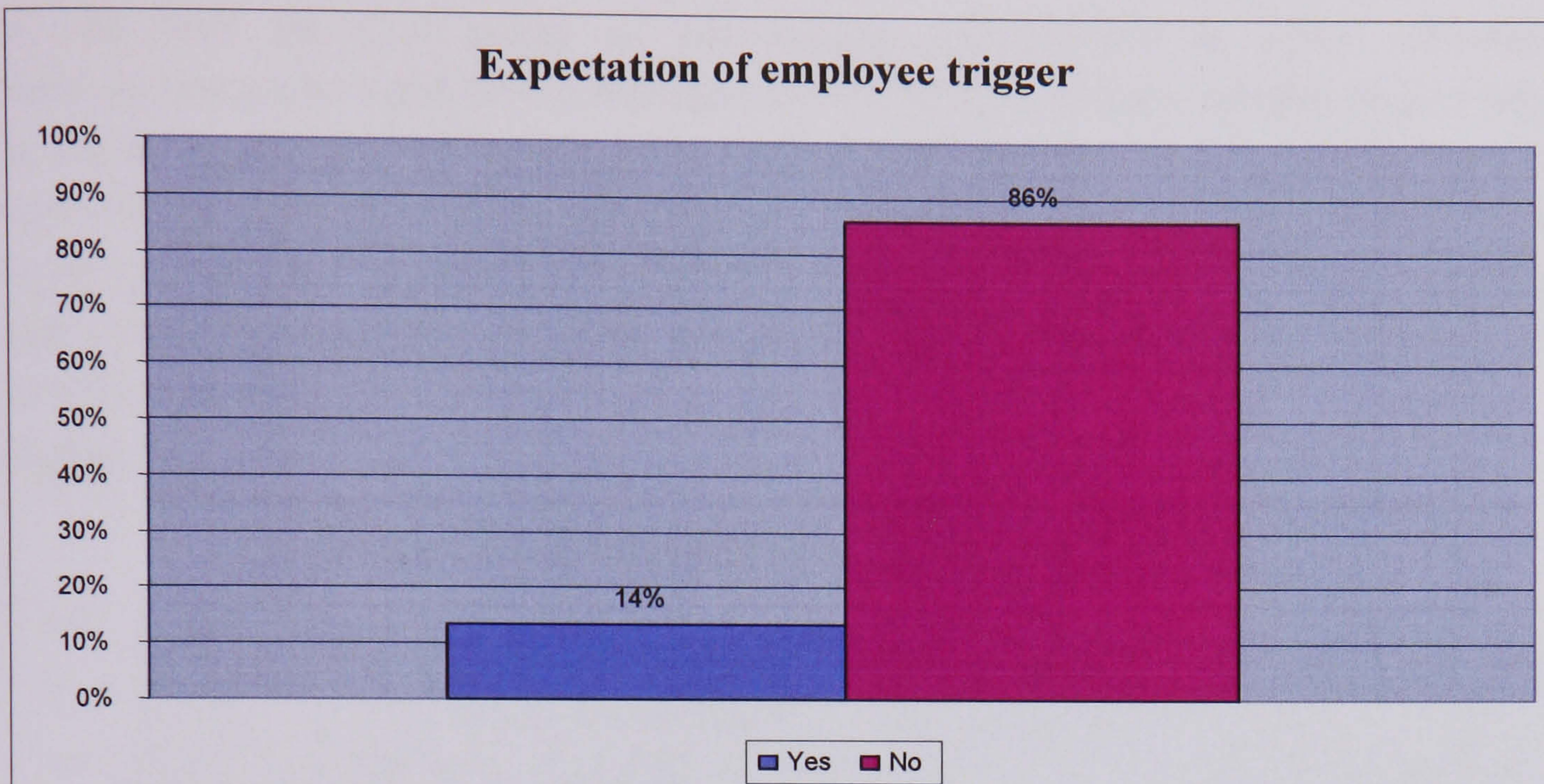
considered as not complying with the ICER but the organization was not planning any action was a unionized organization.

Figure 11



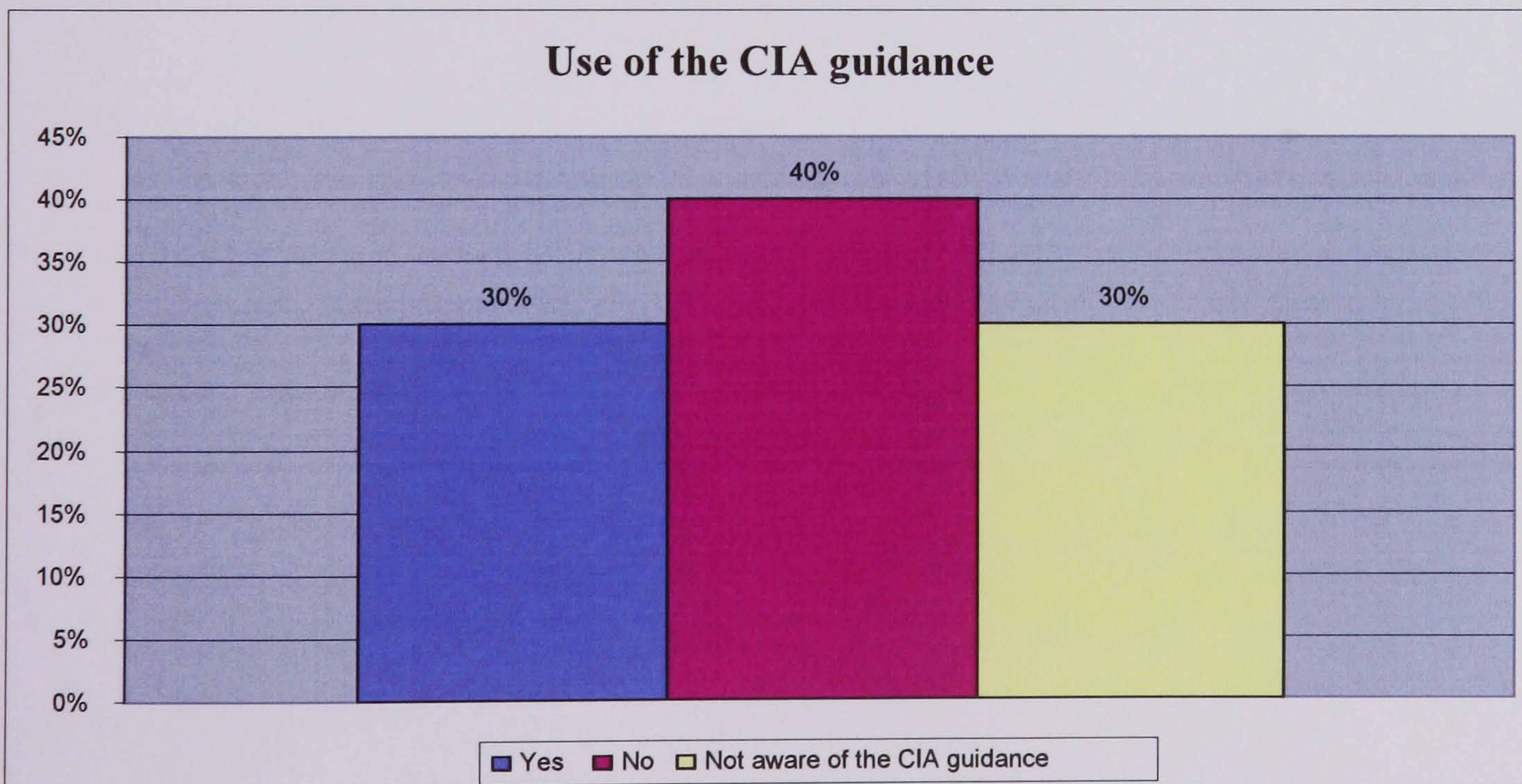
Out of 11 respondents that did not make an assessment of the possible impact of the ICER, the majority, 7 organizations, intended to make an assessment of the ICE arrangements within the next two years. A further interesting result is with regard to the possibility of employees requesting negotiations under the ICER on the establishment of new ICE arrangements (figure 12). In this case, the majority of organizations (32 organizations or 86% of the total sample) reported that they did not expect such a request. However, there were five organizations (24%) that did expect one. These had not yet assessed the possible impact of the ICER. Interestingly, in three out of the five organizations that did expect such a request, ICE arrangements based on agreements with trade unions and/or ad-hoc arrangements were already in operation. This finding may suggest that in such cases employees/trade unions perceived the status of these arrangements as not adequate for the purpose of complying with the ICER. In the only non-unionized organization where it was expected that employees might request the negotiation of an information and consultation agreement, there were then no ICE arrangements.

Figure 12



Concerning the extent to which employers took account of the CIA guidance on information and consultation of employees when assessing the possible impact of the ICER in their organizations (figure 13), 30% (8 out of 27 organizations) reported that they drew on the CIA guidance while 30% (8 organizations) were not aware. A slightly greater number (40% or 11 organizations) reported that while they were aware of the guidance they did not draw on it.

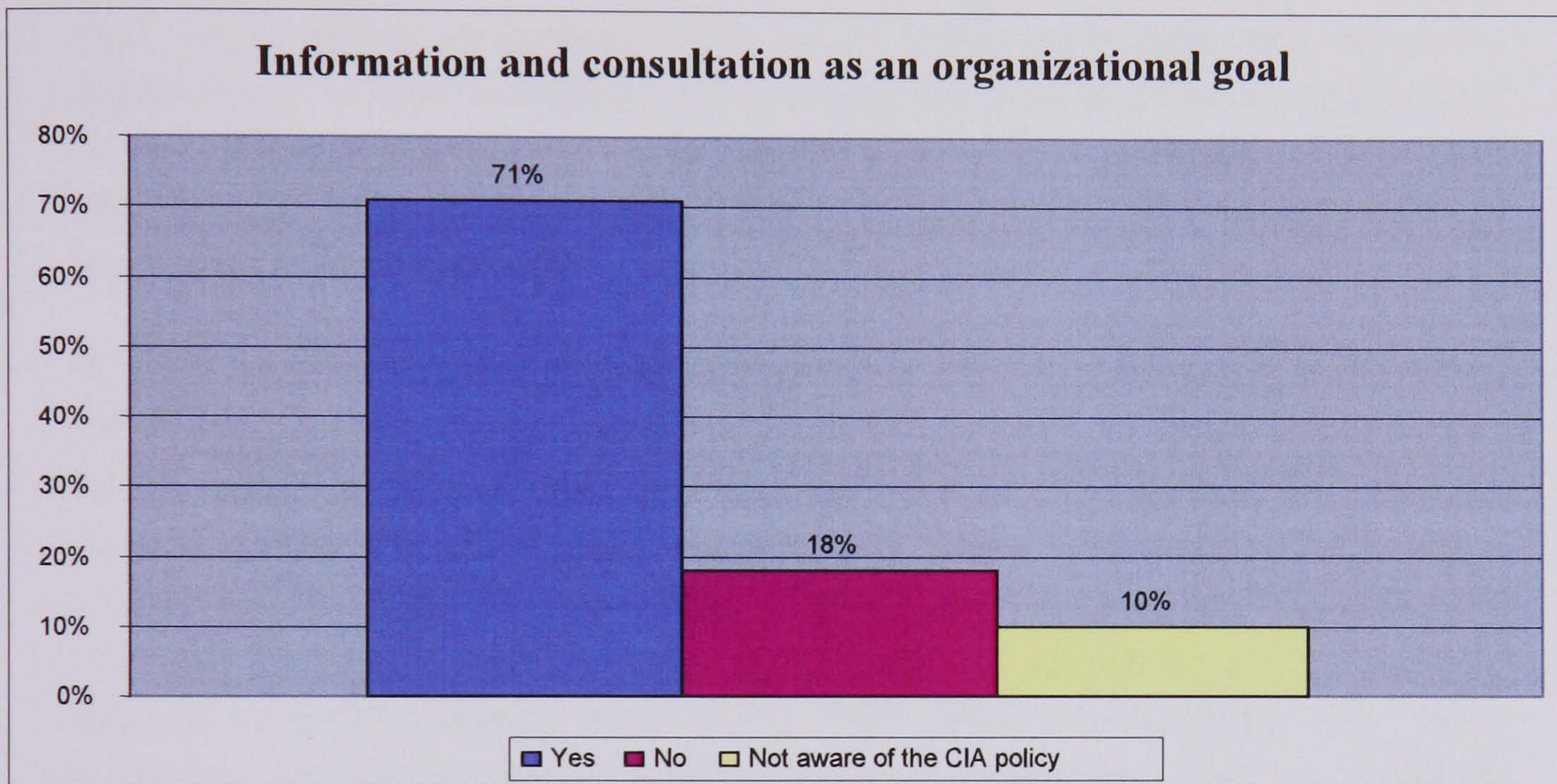
Figure 13



Finally, an interesting result comes from the question regarding information and consultation of employees constitutes an organizational goal (figure 14). The great

majority of the respondents (27 organizations or 71% out of the total sample) replied that in line with the CIA policy of encouraging organizations to adopt sustainable development goals, it did. Seven organizations (18%) replied that it was not considered as an organizational goal while four (10%) said that they were not aware of the CIA policy. Interestingly, 64% of the organizations where information and consultation constituted an organizational goal employed more than 150 employees, while where it did not constitute part of the organization's objectives the majority of the respondents (66.7%) employed 50-149 employees.

Figure 14



Overall, the survey provides information on organizational practice in CIA member-organizations. In line with the CIA policy, the survey indicated that prompted by the introduction of the ICER most CIA member-organizations (71%) had reviewed their existing ICE arrangements. This picture is consistent with a 'risk assessment' approach, as described by Hall (2006), since many organizations arguably took the view that their existing arrangements were broadly consistent with the aims of the legislation, and/or that employee 'challenges' under the ICER were unlikely, making PEAs unnecessary. However, in terms of organizational response to the ICER, the survey recorded a considerable minority of organizations (22%) actively responding to the legislation by establishing new ICE arrangements or modifying their existing ones. Organizations recognizing trade unions were more likely than non-union organizations: to have established ICE arrangements involving ERs, to consult more on pay, health and safety and work organization issues and, finally to have been actively responding to the new legislation by establishing new arrangements or modifying their existing ones.

4.2.3 The extent and nature of trade unions' responses to the implementation of the ICED

Survey findings ahead of and after the implementation of the ICER presented a positive attitude towards the new legislation and active involvement on the part of trade unions. A DLA Industrial Relations Survey carried out between July 2002 and July 2003 found that 70% of union officials regarded legislation providing for this right as essential (Bradley and Leach, 2003). When asked about trade union exclusivity for the purposes of implementing the legislation, where a recognition agreement already existed, a slight majority of respondents said that it was important but not a priority (53%) in contrast to 32% who believed that it was essential. In terms of the establishment of ICE arrangements, 68% of respondents said they would sit alongside non-trade union representatives in relation to all issues for discussion. This view was confirmed in the 2004 DLA survey in which trade union officials perceived the legislation as the single greatest opportunity to increase membership and influence in the work place (Bradley and Leach, 2004). In the same survey, trade unions saw themselves as the natural negotiators to establish works councils within the workplace, which in turn would facilitate consultation on strategy and policy. Evidence of a 'concerted effort' to raise their profile regarding ICE arrangements was also found in the CBI 2004 survey where it was reported that less than half of existing bodies included trade union representatives (CBI, 2004b).¹³¹

The results of a 2004 Labour Research Department (LRD) survey of trade union representatives further suggested that the extent to which unions were informed and

¹³¹ The CBI survey also found that fewer companies reported no trade union involvement in their formal ICE structures than did in 2003; 57% of companies did not have trade union involvement, compared to 67% in 2003 (CBI, 2004b).

consulted on a range of issues had increased since the 2002 LRD survey (LRD, 2004). The survey indicated a 'sharp increase' in the reported incidence of ICE bodies involving employees who were not union members as well, from 11% of responses in 2002 to 25% in 2004, and found that over a quarter of these had been set up recently (in 2002 or later). In more than half of these bodies, unions had an organized presence: in 57% of the cases unions appointed at least some of the members, 20% said that an entirely non-union body was used and a further 23% reported that individual union members were elected in the body rather than being selected by the union. The survey further found that in 30% of cases the union side had discussed the Regulations internally, and in 32% that the issue had been discussed with the employer. When discussed with the employers, the unions appeared to have taken the initiative on raising the Regulations' issue and only in 6% of those cases did the respondents say that it had been raised by the employer, although many more (29%) said that the employer had come forward with proposals on information and consultation generally in the last two years. The existence of written ICE agreements was reported by 43% of respondents and a further 4% responded that the employers claimed that there was an agreement but this was disputed. In more than a quarter of cases (27%) where the respondent specified a date, the written agreement was reached or amended since 1999.

A 2006 LRD survey reported that a significant number of unions had effectively used the legislation in order to improve or consolidate their influence in the workplace. Well over two-thirds of respondents said that formal ICE arrangements were in place at their workplace, with almost half of these reporting that their arrangements were drawn up, amended or reviewed in the light of the legislation. 22 respondents reported new formal ICE arrangements taking account of the Regulations had been set up since 2004, and in 15 of these the initiative came from the employers. But 11 of those 15 employers had then negotiated a formal agreement with the union(s) (and sometimes other representatives) with the result that no respondents said they thought their union's position was weakened as a result of the new arrangements. However, 4 respondents stated that their employer had not only suggested setting up formal ICE arrangements but also had imposed them without negotiation: in all cases, this involved information and consultation via staff councils with few or no places set aside for unions. In the other 7 workplaces where new, formal ICE arrangements were set up taking the Regulations into account, the initiative came from the union. The arrangements in four of these workplaces were negotiated with the union alone and provided for ICE through the union alone; two of the other workplaces with union-inspired ICE arrangements set up staff councils with at least 50% union membership.¹³² Among the 27 respondents who reported that their existing formal ICE arrangements at workplace level were reviewed and/or revised in the light of the

¹³² In the last case the medium for consultation was still under negotiation when the survey was carried out.

legislation, satisfaction was generally high. Of those who had not used the Regulations to review their existing arrangements, nearly 100% were happy with those arrangements, suggesting that where union representatives were not satisfied with their existing ICE mechanisms, they had used the legislation to do something about it. However, the significantly positive perception and activity by trade union officials/representatives regarding the legislation recorded in these surveys should not be taken as synonymous with the state of arrangements on the ground. Firstly, the LRD surveys, as acknowledged also by their authors, concerned the situation in unionized organizations rather than organizations in general. Secondly, it is likely that many arrangements reviewed under the Regulations would not have qualified as PEAs, given the tightly defined legal meaning ascribed to these agreements by the Regulations. Still, it is interesting that a significant percentage of workplace representatives reported that the legislation has been useful to them.

The possibility that the existing surveys of trade union officials provided a more positive union stance rather than the one actually adopted was confirmed to some extent in the interviews carried out and in the accounts provided by national and local union officers. The latter suggested that in practice unions would appear to have adopted differing and ad hoc approaches to the legislation, with differences apparent within individual unions and by regions. The majority of union interviewees reported that the Regulations were perceived as *'of no effect'* for the unions and that pro-active trade union activity with regard to the Regulations' application was limited. While recognizing the possibilities for using the legislation in organizations where trade union density was around 30-40% the TUC official commented:

'Most of the arrangements were employer-led and trade unions did not use the legislation in order to promote their role within the workplace...at the early stage of the Regulations' application, employers saw the legislation as an opportunity to diminish the role of the unions and the latter were predominantly interested in collective bargaining.'

Drawing on the limited evidence of ICE arrangements being established and/or amended at organizational level, a TUC official suggested elsewhere that the legislation had hence proven to be *'a dog that has not barked'* (Veale, 2007). The lack of union activity was much more evident in non-union workplaces where there were reportedly no examples of unions using the legislation. Trade unions preferred to focus on reaching the requisite threshold for trade union recognition, suggesting thus that achieving union recognition remained the priority for them. Even in cases where union recognition agreements were already in place, as in further and higher education, there was no attempt by the unions to use the legislation to promote further employee interests. However, in some cases existing union agreements were

revamped in order to meet the requirements for PEAs.¹³³ Apart from maintaining their long-standing priorities, the high thresholds required by the legislation for the establishment of ICE agreements acted as further constraints on the development of a pro-active approach. According to the TUC official:

'Part of the problem is with the way the agreement [outline scheme] is framed, you do have to put pressure on, certainly the upper and lower limit. This will particularly be the case when the smaller companies come in...The thresholds have done what they were supposed to do to an extent [assist in preserving existing agreements with unions] but the one big problem with them, which I think none of us foresaw, was that if you are out there in the workplace organizing you have got a threshold to meet. In a sense if you think you have got adequate support for ICE, why not hang a bit longer and go for recognition?'

Where ICE agreements were concluded with the participation of the unions, 'hybrid' consultation bodies involving both unionists and non-union representatives were often set up. However, the issue of trade union representatives sitting at the table with the so-called 'noners', i.e. non-union ERs, was mentioned by both unions and employers as constituting a complicated dimension in the application of the legislation in organizations with partial union recognition. This was reportedly the case in some companies in the engineering and chemical sectors. The CIPD interviewee also noted: *'We know that the T&G has sworn in blood not to sit down with non-union people.'* The negative union stance was attributed by the IPA to confusion around the distinction between consultation and negotiation and concern that bargaining arrangements could be undermined. The IPA interviewee also drew attention to the reluctance of unions to use the legislation as a means to extend consultation to strategic issues:

'All the ones I have been involved even upfront or in the back of their minds they [unions] see it as either a threat or an unnecessary inconvenience...Do they see this [the Regulations] as a route into more strategic relationship with the organization? All the evidence is no, they have not seen this as a possibility.'

While the adoption of a pro-active approach to the establishment/amendment of ICE arrangements was not evident, some unions reported that they adopted a less indifferent approach to the legislation. For example, BECTU believed that the legislation gave the union opportunities for consultation in areas where they had members but no recognition agreements. While initially the union perceived the legislation as a potential threat in cases where union recognition existed, as in the

¹³³ Such action was taken in the following organizations: Sheffield Hallam University, University of Salford, Sussex University, University of Hertfordshire, University of Wales Swansea, University of Oxford, University of Exeter.

BBC and ITV and major theatre suppliers, there was agreement with management that where there was a requirement to consult under the Regulations the union would undertake the consultation and would invite non-members to participate as well. The conclusion of the outline scheme between the DTI, TUC and CBI had assisted, according to the CIA, in the adoption of a more positive approach of the unions towards the introduction of ICE arrangements in the chemical sector as well. The TUC interviewee also noted that GMB, Unison, and the National Union of Rail, Maritime and Transport Workers (RMT)¹³⁴ had either extended and refreshed their existing union agreements or negotiated an ICE agreement that maintained the collective agreement for the required bargaining unit.

Among the trade unions that had adopted a clear pro-active approach in promoting the promulgation of the legislation at organizational level was Amicus. In delineating its priorities at the time of the passage of the Regulations, the union acknowledged that ‘there could be a point where we would devote energies to securing ICE agreements as a first step toward securing recognition agreements where they do not already exist’ (TUC, 2004). In its 2004 guide to the legislation, Amicus warned that, if negotiations do take place in organizations, union representatives should negotiate for the inclusion of ICE requirements that at least comply with the standard provisions. The union also suggested to its representatives not to negotiate any agreement without ‘talking it through with the national or regional officer first’, and that all agreements must be forwarded to the union’s legal department for approval before being signed (Amicus, 2004: 16).

Evidence of the pro-active strategy pursued by Amicus was particularly clear in the paper, print and publishing sector where the union tested the legislation through applications to the CAC and through negotiations with management for the conclusion of negotiated ICE agreements.¹³⁵ According to the Amicus GMP assistant general secretary:

‘High levels of collective bargaining in the sector mean that the legislation presented both threats and opportunities: employers may seek to use the Regulations to weaken trade unions’ position by claiming that they cannot represent non union employees in consultation, but unions prepared to put in the effort may be able to increase activity and membership through new ICE agreements’.

¹³⁴ In the case of RMT, a PEA was concluded in Carillion Rail.

¹³⁵ Apart from the case of Amicus activity in the finance and paper, print and publishing sectors, evidence of a pro-active strategy in other sectors was arguably non-existent. For example, according to the Electrical Contractors’ Association interviewee, Amicus never raised the issue of application of the ICER in the sector.

Amicus developed model ICE agreements with the British Printing Industries Federation (BPIF), the Scottish Printing Employers Federation and the Confederation of Paper Industries. The Sector Partnership Agreement and Code of Practice as developed by the BPIF/Amicus GPM Sector Partnership at Work Joint Review Body, which took effect from November 2005, included a Model Information and Consultation Agreement for use in the industry. According to the Amicus assistant general secretary: 'the model agreement manages to resolve some of the important concerns unions had raised about the Regulations, including: the definition of information and consultation, the subject-matter available for discussion, the nomination and election of union and non-union representatives, meeting arrangements, confidentiality, facilities and the use of external union officers and other experts' (Stevens, 2006).

Amicus was also in discussions with a number of organizations in the media, printing and paper industries. Importantly, the union was in favour of the 'negotiated agreement' compliance option as this would secure that the enforcement provisions would be applicable. This stands in contrast to the stance adopted by other unions; the LRD reported that the unions were advising representatives that it was best to take the informal approach and reach an agreement, i.e. a PEA, under conditions that suit them rather than having to follow the procedure for the negotiated agreements set out in the ICER (LRD, 2004: 15). Amicus successfully negotiated agreements at company level,¹³⁶ organized training sessions for the representatives and intended to appoint full-time officials that would be responsible for approaching companies with more than 100 employees in order to trigger the process for the conclusion of negotiated agreements. The assistant general secretary described the union's approach as:

'...both re-active, i.e. in terms of blocking employers from introducing agreements from the back door, and pro-active, i.e. in the sense of actually approaching employers for the conclusion/amendment of existing arrangements in order to comply with the Regulations'.

In line with its approach to challenge legally the conclusion of agreements that provide for '*substandard ICE arrangements, which undermine the whole spirit of the new Regulations*' requests were made by Amicus GMP to the CAC (see section 4.4). However, the union official stressed that '*all the way through the legislation the employees are massively disadvantaged compared to the employer.*' Significant challenges that were attributed to the institutional design of the ICER and hindered trade unions, and perhaps even more individual employees, from using the legislation included: the ambiguity of the notion of 'undertaking'; the need to identify the exact number of employees in the organization for the purpose of triggering the process for

¹³⁶ Individual ICE agreements were concluded in a number of companies operating, such as in Trinity Mirror, DS Smith Packaging and de la Rue.

the negotiation of ICE agreements; management discretion over the nature of constituencies in the case of negotiating and ICE representatives; and the limitations inherent in PEAs, such as the lack of sanctions, the methods of employee approval used by employers in some cases such as email in the case of Yellow Pages, and the possibility for concluding PEAs after the introduction of the legislation. Another union concern was the significant amount of time and resources that was needed on the part of the union in order to pursue such a pro-active strategy.

Another trade union that adopted a proactive stance towards the new legislation was Prospect. The general secretary of the union, which represents professionals, viewed information and consultation as a key instrument in the union's approach to membership and recognition: 'it is an opportunity for trade unions to strengthen their role in the workplace, by developing an influential role in the workplace and an influential role in the formative stages of the decision-making process' (Stevens, 2006: 6). At the time of the research, Prospect had already addressed or was in the process of addressing employee consultation by establishing ICE mechanisms in the private sector. Examples included the agreement at Diamond Light Source, where the union - whilst it enjoys 10% membership - secured 50% of the seats on a new committee, Ofcom where the union was working alongside non-union representatives, and Drax where a collective agreement covering consultation on transfers of undertakings was concluded.

In this context, it is important to briefly assess existing evidence concerning the response of individual employees to the application of the ICER. A survey of 790 employees employed in companies with 150 employees or more that was conducted by Croner just before the coming into force of the legislation found that almost three-quarters (74%) of employees were not aware of their new rights.¹³⁷ This percentage was lower (33%) where the respondents were employed in a nationalized industry or public corporation. Employers were reportedly not doing enough to make employees aware of their legal rights under the Regulations (Croner, 2005). A further study of 1,000 workers - mostly employed in larger companies - that was conducted by consultancy CHA in August 2005 showed that more than 80% had not heard of the Directive. Around the same number (88%) had not been told about the Directive by their employer, and almost all (94%) had not been told by their trade union. Just 13% of the employees surveyed by CHA were aware that the Directive gave them the right to ask management about future business direction. The findings suggested that both

¹³⁷ An employee survey that was published just after the implementation of the ICED reported that one in three UK employees (29%) said that they were never consulted when major change occurred in their organizations. This contrasted with the employees' opinion on consultation, with as many as nine out of ten (87%) saying that they wanted to be informed and consulted, particularly on issues that could affect them and their peers directly (Talking People, 2005). The survey was undertaken by YouGov for Talking People among a representative sample of 2,000 UK employees about their specific views on information and consultation in the workplace.

employers and unions had done little to keep workers informed about the changes. Further, representatives from employers' associations suggested that the level of employee awareness of the legislation was predominantly limited and there was thus little employee demand for the establishment/amendment of arrangements. Significantly, there was very limited evidence suggesting that employees were proactive in terms of triggering the process for the conclusion of negotiated agreements. For instance, the 2006 IRS survey revealed a lack of pressure from employees. Just two employers in the survey had received a request to negotiate new arrangements under the ICE Regulations.

4.2.4 Assessment of the impact of the application of the ICED

As noted in the beginning of the chapter, the flexibility in the ICER provisions presented employers, trade unions and employees with specific options in light of the establishment and/or amendment of ICE arrangements. The existence of different compliance options is in line with one of the main reflexive legal strategies that Teubner had advocated as a means of structural coupling, namely coupling through optional regulation. As analyzed in chapter two, Teubner (1993: 94) suggests that instead of law intervening by imposing particular distributive outcomes it could merely produce 'optional regulation, which those concerned could use or not, as they saw fit'. In the context of the ICER, options included were doing nothing, preempting the use of the ICER procedures through the conclusion of PEAs, proceeding to the conclusion of 'negotiated agreements' or to the application of the 'standard provisions'. In turn, should employers, trade unions and employees decide to proceed to the establishment/amendment of ICE arrangements in order to comply with the legislation, opportunities for autonomous processes of adjustment through collective organization arise, which constitute another form of structural coupling suggested by Teubner and a significant number of RL proponents (see for instance Deakin, 1999). Hence, the responses of the social actors to the implementation of the ICER provided an opportunity to study the operation, in practice, of legislation which incorporates these 'reflexive' techniques.

First of all, the research found that despite the focus of the ICER on employee rights, it was predominantly employers' attitudes and strategies that have shaped the extent to which the rights stipulated by the new legislation were realized. As evident from the ORC/Baker & McKenzie, IRS, WMERF, CBI and CIA surveys, the implementation of the ICER acted as a stimulus to the management review of existing ICE arrangements in a significant number of organizations; such activity was also in line with the advice of the majority of employers' associations, such as the CBI, CIA, EEF and CIPD. More importantly, the legislation induced in some cases the formalization of existing consultative arrangements through the review of existing mechanisms as well, suggesting that employee representation structures, albeit not in the form of union recognition and not formalized as the ICED envisaged, were

already a significant feature of organizational practice in Britain. As reported in interviews, the introduction of the Regulations acted further as a catalyst for the institutionalization of ICE arrangements in organizations where previously collective representation through the unions was absent, e.g. voluntary sector. While a considerable number of PEAs was concluded before and just after the introduction of the legislation in 2005, there was, as seen, the standard provisions were rarely applied. Hence, the ‘shadow’ effect of the standard provisions – prompting voluntary ICE agreements before and slightly after the introduction of the legislation – proved more important than its direct impact, that is, the application of the standard provisions. An additional reading would be that the possibility for concluding PEAs even after the coming into force of the Regulations limited the rate of negotiated agreements concluded in light of the legislation and the application of the standard provisions.

It was further evident from the study that the opportunities for the establishment/amendment of consultative arrangements in light of the ICER were conditioned firstly by the assessment of their existing arrangements as compliant to the ICER requirements and/or the perception that employees would not trigger the process for ‘negotiated agreements’. Concerning the former, there was widespread perception that existing arrangements were compliant with the ICER requirements on PEAs. According to reg 8 (1) PEAs need to have been approved by the employees. Whereas the outline scheme, as agreed by the TUC, CBI and DTI, stipulated that PEAs should ‘not consist of arrangements unilaterally imposed by management without any discussion with employees and where employees have had no opportunity to signify their approval, the DTI Guidance only suggests that employee approval can be demonstrated by a simple majority of those voting in a ballot of the workforce; by the support of the majority of the workforce expressed through signatures; or through the agreement of employee representatives, representing a majority of the workforce (DTI, 2006: 20).¹³⁸ It was found that in a considerable number of cases employee approval was sought for the establishment or amendment of existing arrangements in order to qualify as PEAs. However, the means by which such approval was secured, e.g. through email, were brought into attention by trade unions who claimed that such methods did not necessarily mean that genuine employee approval existed in such ICE arrangements. Based on these findings, it could be suggested that the procedural conditions attached to these options were rather weak. In contrast to Teubner’s suggestion (1993: 94) that reflexive optional regulation should not ‘enabl[e] those who are already powerful to become more so’, it was not certain in a number of cases whether the agreements in question were genuinely approved by employees or were unilaterally imposed by management.

¹³⁸ As Davies and Kilpatrick (2004: 149) suggest, although the requirement for employee approval does not exclude representation of employees, it certainly does not require it. However, it is questionable the extent to which approval for instance by email can be considered as adequate for the purpose of the ICER.

Concerning the trigger mechanism, the generally low expectation on the part of employers (3% in the WMERF survey and 14% in the CIA survey) that their employees would request negotiations under the new legislation on the establishment of negotiated ICE arrangements and the limited take-up rate of negotiated agreements (only two reported in the IRS 2006 survey) clearly indicate the constraining impact of the threshold in the take-up of the ICER. This was perhaps more clearly illustrated in the finding that very few ICE arrangements ‘started from scratch’, i.e. in organizations without existing consultative arrangements or unionized workforces. As a result of the institutional design of the ICER the new requirements for statutory employee representation were simply avoided in many workplaces, limiting in turn the extent to which opportunities for the integration of employee interests in the organizations could arise. The requirement for employee support of this kind may be particularly onerous in organizations with no existing union recognition, membership or other consultative arrangements. It may be even more challenging in cases where employers have rushed to introduce arrangements, which may not though constitute valid PEAs for the purpose of the legislation, constraining thus the possibilities for employees to overturn such agreements. This is all the more important if evaluated against one of the aims of the Directive, that is, to provide statutory information and consultation rights that apply irrespective of union recognition or activity. The operation of these factors limited the extent to which the implementation of the directive could take place through collective organization between management and the unions.

Regarding the compliance option through direct ICE methods, the research indicates that this was not considered as being responsive to the characteristics of the British system of industrial relations. Employers did not see this as an inexpensive and simple to manage mechanism to avoid the establishment of indirect ICE arrangements. However, as suggested earlier, such assessment may be restricted to organizations employing a large number of employees; it is plausible to suggest that in the case of firms employing fewer than 150 employees, direct ICE methods maybe perceived as an adequate compliance option.

On the trade union side, the evidence presented in this chapter suggests that despite the rather positive union stance at policy level and the encouraging results from union officials/representatives surveys, unions did not (with few exceptions) challenge existing practices or act proactively to negotiate ICE arrangements under either compliance route, i.e. PEAs, ‘negotiated agreements’, application of the ‘standard provisions’. The lack of a pro-active union approach reflected clearly the doubts and concerns regarding the impact of the legislation on union organization and recognition. As a result of the absence of any formal role to unions in the ICER and of decentralized forms of collective bargaining, there is no natural regulatory space within the firm which consultative structures may occupy (Davies and Kilpatrick,

2004: 127); competing forms of employee representation, if created, exist thus side-by-side in UK workplaces and companies. In line with TUC advice on protecting firstly existing union arrangements and using only secondly the ICER to extend union organizing activities TUC affiliated members adopted a predominantly reactive strategy to the introduction of the ICER and sought almost invariably to safeguard existing agreements. In situations where unions had a high level of membership and bargaining coverage, trade unions regarded their existing structures as sufficient for the purposes of the legislation; in some cases, clauses on information and consultation were inserted in collective agreements. In situations where there was partial trade union presence, which is also where challenges for unions may exist, there was no significant evidence that unions made effective use of the organizing opportunities arising out of the implementation of the ICER. The same held true even more in the case of workplaces with no union presence, where there was almost no evidence of unions using the ICER to get a foothold in the organization.

Nonetheless, there was some evidence of collective organization providing the basis for the establishment/amendment of ICE arrangements in light of the ICER. More particularly, the evidence from existing surveys, for example those of WMERF and the CIA, and of the interviews, for example with Amicus, and the CIA, suggests an association between active compliance strategies on the part of employers, union recognition and sectoral/regional associations. In the case of the CIA, it could be suggested that the existence of shared norms of behaviour among actors within the chemical industry acted as a stimulus for a more proactive approach to the implementation of the ICER. In the case of Amicus GMP, the union importantly followed a different strategy and pressed for the conclusion of negotiated agreements instead of PEAs, as advocated by the majority of unions, the rationale being that 'negotiated agreements' enjoy more substantive provisions such as stronger ICE rights and the application of the enforcement mechanism. Further, there were instances where unions, such as BECTU, used the ICER to address a greater number of employees and increase their level of influence in the organizations. In exploring potential factors for variations in the impact of labour law legislation Dickens and Hall (2006: 348) have suggested that 'the involvement of social partners and other actors in the formulation of legislation can affect the degree of acceptance and thus likely compliance – in part through bestowing legitimacy on the legislation, de-politicizing it and securing 'buy-in', and in part through ensuring a better fit with existing practice.' In this case, there was some evidence that the conclusion of the outline scheme between the CBI and the TUC influenced the review and sometimes establishment/amendment of existing arrangements to comply with the ICE.

Lastly but equally importantly, there was some move in companies away from a traditional single channel to a dual channel system with recognized trade unions and collective bargaining on the one hand, and ICE procedures, on the other hand. Apart

from establishing supplementary arrangements for non-union groups of employees in cases where unions were recognized or establishing ICE arrangements for which elections were held for all cases, it was reportedly more common to proceed to the establishment of 'hybrid' (Hall and Terry, 2004) arrangements made up of representatives from unionized groups appointed by recognized unions and elected representatives from other, non-union groups; there was hence an increase in ICE arrangements in unionized organizations where non-union employees also participated. However, there was no evidence of the division between issues for negotiation and consultation being blurred. Distributional issues continued to be channeled into collective bargaining with the unions; it was discussions between employers and employees over production, employee welfare and personnel that were channeled into information and consultation with the newly established/amended arrangements.

4.3 The enforcement regime of the ICER

As clarified in chapter two, Teubner suggests that power-based sanctions constitute a form of coupling and interference between different social sub-systems. In that way a communication link is established (1993: 91). In light of this Teubnerian thesis, this section examines the enforcement regime of the ICER. After providing an analysis of the characteristics of the enforcement regime with particular emphasis on the role of the CAC the study then proceeds to examine and finally assess the empirical evidence concerning the extent and type of enforcement action that had been taken at the time of the research.

4.3.1 Characteristics of the enforcement regime

The Regulations' enforcement regime is applicable only where a negotiated agreement is reached under the Regulations' procedures, or the standard information and consultation procedures apply, and not in respect of PEAs. In the latter case, any dispute about the operation of the arrangements would need to be dealt with in accordance with any dispute resolution procedures the agreement itself provides for, or by voluntary reference to ACAS's conciliation services.¹³⁹ The institutional design of the legislation distinguishes between disputes related to the rights of ICE representatives, which are determined by Employment Tribunals (ETs), and other disputes concerning the establishment and operation of negotiated and standard ICE arrangements, which are determined by the CAC, the EAT and the Civil Courts.¹⁴⁰ Where a negotiated agreement has been reached under the statutory procedure, or the

¹³⁹ The dispute may be thus brought before the courts if the agreement provided for legal enforceability.

¹⁴⁰ In brief, the ETs deal with complaints from individuals over an employer's failure to grant time off to ICE representatives and complaints of unfair dismissal and/or detriment. The Civil Courts are able to award compensation where representatives disclose information given to them in confidence and finally the EAT is charged with determining a penalty notice when complaints under regs 19 (4) and 22 (1) are successful before the CAC. There is also a right of appeal to the EAT on any question of law arising from any declaration or order of, or arising in any proceedings before, the CAC under the ICER.

'standard' ICE requirements apply, employees/representatives may complain to the CAC if the terms of the agreement or the standard provisions have not been complied with. Bases of complaint could include a failure on the employer's side to establish the agreed or required procedure, or, having established it, a failure to inform and consult in line with the agreement or the standard provisions. The CAC's role is to facilitate to try to direct that the parties take steps to implement the legislative requirements. Within this context, the CAC takes a problem-solving approach and helps the parties, where possible, to reach voluntary agreements outside the statutory process.¹⁴¹ While this process bears similarities with the statutory trade union recognition process, as stipulated in the 1999 Employment Relations Act, two important differences are worth highlighting here. Firstly, in contrast to the statutory trade union recognition procedure, where recognition claims can only be submitted by trade unions, in the case of information and consultation claims can be submitted by trade unions acting as ERs, ERs, groups of employees or individual employees. Secondly, the ICER do not provide for a continuous process; instead, the CAC can intervene at different stages, and then return the matter back to the parties.

In more detail, the CAC's role under the ICER is both *administrative* and *determinative*. In terms of administration, the CAC has a role as an independent third party to whom employees of an undertaking can submit a request for negotiating an ICE arrangement if they prefer not to issue such request direct to the undertaking itself. In this way, the anonymity of the employees is preserved. In its role as a determinative body, the CAC is empowered to adjudicate on a broad range of different grounds of application or complaint under the ICER. There are four areas for CAC intervention in the case of the establishment and operation of negotiated agreements and statutory provisions: disputes about whether a valid request has been made to initiate negotiations about establishing ICE arrangements, complaints about ballots, disputes over a failure to establish an ICE procedure or the operation of a negotiated agreement/statutory provisions (including the election of representatives) and finally disputes about withholding information or whether it was reasonable for the employer to impose a confidentiality restriction. More specifically, there are 14 different applications or complaints that can be made. These concern the employer's obligation to provide information on numbers,¹⁴² the PEAs,¹⁴³ the validity of request,¹⁴⁴ the validity of employer notification,¹⁴⁵ the appointment or election of negotiating representatives,¹⁴⁶ the ballot to approve a negotiated agreement,¹⁴⁷ the

¹⁴¹ The CAC is also under a duty to establish if it is reasonably likely that the application or complaint could be settled by conciliation through ACAS.

¹⁴² Reg 6(1)

¹⁴³ Reg 8 (7) and (8), reg 10(1) and (2).

¹⁴⁴ Reg 13 (1).

¹⁴⁵ Reg 13 (2).

¹⁴⁶ Reg 15 (1).

¹⁴⁷ Reg 17 (1).

ballot to elect ICE representatives,¹⁴⁸ the employer's failure to comply with the agreement/provisions,¹⁴⁹ the requirement to hold information in confidence¹⁵⁰ and finally, whether information should be disclosed.¹⁵¹

In the case of successful complaints under Regulations 19 (4) and 22 (1) the CAC is obliged only to issue a declaration and thereafter the relevant applicant may proceed in a separate application to the EAT, which is empowered to impose a financial penalty of up to £75,000 on the employer, depending on the seriousness of the breach. Hence, only sanctions in the form of financial penalties are provided.¹⁵² Even if a financial penalty is imposed as a result of an application by individual employees, trade unions or employees' representatives, the penalty is payable to the Secretary of State for Trade and Industry.¹⁵³ Unlike redundancy consultation, there is hence no provision for compensating employees in respect of whom a failure to consult has occurred.¹⁵⁴

4.3.2 Evidence on the extent of enforcement

The early publicity to the ICER by the DTI and ACAS concentrated on the benefits of establishing ICE arrangements and did not give any prominence to enforcement and the CAC in particular. At the time of the research, the CAC interviewee noted that the CAC secretariat had received a low number of enquiries about different aspects of the Regulations. The inquiries, which predominantly came from employers and individual employees, were concentrated on the form the request should be in and the requirements for PEAs, including methods of approval.

Concerning the number of requests from employees regarding the establishment of ICE arrangements, the CAC Annual Report (2006) stated that the CAC had received such requests in respect of six employers. The CAC interpreted this responsibility as an 'administrative' role for the secretariat, since it involved no decision by a CAC Panel. According to the CAC Report the employer provided in every case the names of those employed in the undertaking to enable the secretariat to report accurately to them on the number of employees making a request.¹⁵⁵ Interestingly, in three out of these six applications requests were organized by trade unions acting as ERs; four requests came from the private sector and two from the public while the majority of

¹⁴⁸ Reg 19 (4) and para 3 of Sch 2.

¹⁴⁹ Reg 22 (1).

¹⁵⁰ Reg 25 (6).

¹⁵¹ Reg 26 (2).

¹⁵² Reg 22 (9) expressly provides that no order of the CAC may have the effect of 'suspending or altering the effect of any act done or of any agreement made by the employer or of preventing or delaying any act or agreement which the employer proposes to do or make'.

¹⁵³ Reg 22 (7).

¹⁵⁴ Based on this aspect of the ICER, the CAC enforcement regime was described as 'a form of privatization of law enforcement of a most cynical nature' (Ewing and Truter, 2005: 636).

¹⁵⁵ According to the CAC interviewee's opinion all of the requests probably led to the conclusion of ICE arrangements.

those requests were concerned with fairly large undertakings. The significance of the size of the organization was highlighted by the CAC interviewee:

'I suppose the bigger the employer the more likely a trade union is likely to be interested. Because the trade union will get more out of it, they can get more people signed in I would have thought...Also as an employee you are going to be less exposed than you would in a small undertaking.'

Additionally, the CAC received sixteen applications for decisions on issues arising under the Regulations. A significant number of the applications, i.e. five, were made with regard to reg. 19(4), i.e. in the case where arrangements for a ballot to elect ICE representatives have not been arranged. Interestingly, seven applications were made by Amicus acting as employee representatives.¹⁵⁶ The potential difficulties for individual employees to bring complaints before the CAC were brought to attention by the CAC interviewee:

'In a big company that is spread out around the country, for example, that is going to be a huge problem. In a smaller company where you are all on one site then the chances are that you are going to be even more exposed...It is not easy for individual employees to go round and to find the time and the inclination to get people to sign up. They are not used to it; union officials are more suited to that sort of thing.'

Out of the total sixteen applications, seven were withdrawn, one remained unresolved and five decisions were issued. The analysis here concentrates on the two most significant cases for the purpose of clarifying specific statutory provisions.¹⁵⁷ The first decision related to an application made against the Moray Council and was the subject of an appeal and cross-appeal to the EAT. The *Stewart v. Moray Council*¹⁵⁸ case raised the issue regarding to what extent a prior collective agreement with a trade union meets the requirements for a PEA under the Regulations. In factual terms, Mr. Stewart, an employee of Moray Council, lodged a petition with the council in which over 500 employees requested the council to initiate negotiations to reach a negotiated agreement under the legislation.¹⁵⁹ The council's view was that there were PEAs in

¹⁵⁶ The rest of the applications, i.e. nine, were made by individuals. However, four were made by the same person (*Moray Council* case) whilst one application was made against Watt Gilchrist, a printing company, which was probably organised by Amicus GMP.

¹⁵⁷ The CAC issued decisions on three further cases: *Partnerships in Care Limited* (IC/3/(2005)), *Newsquest (Worcester Ltd)* (IC/12/(2007)), and *Bournemouth University* (IC/14/(2007)).

¹⁵⁸ IC/3/(2005). The appeal and cross-appeal to the EAT meant that no action could be taken on two further applications against Moray Council, under regs 6 (1) and 19 (4) until the EAT judgment had been issued.

¹⁵⁹ The request was opposed by the local branch of public services union UNISON, since the council already had union-negotiated arrangements in place. In particular, according to the union, the two council employees (and former UNISON officers) who organized the request 'exploited the unrest

place covering all the council's employees and therefore, as provided by the Regulations, the Council was entitled to hold a ballot to ascertain whether the wider workforce endorsed the employees' request. More specifically, the council contended that three documents, i.e. the framework local recognition and procedure agreement covering teachers and related staff, the council officer trade union group constitution and the protocol for consultation with trade unions, constituted valid PEAs for the purposes of the Regulations, and covered all employees regardless of whether they were trade union members. However, in Mr. Stewart's view, these three documents represented agreements with trade unions and provided only for consultation with unions with no provision for informing and consulting non-members.

In its decision the CAC ruled that the agreements related to negotiation and consultation for council employees without differentiating between union members and non-members and that they did in fact cover all employees. The CAC panel also decided that the agreements' approval by trade union representatives and the fact that a majority of the workforce belonged to the unions constituted approval by the employees under the ICER. However, the CAC held that the agreements within the Moray Council did not, when considered together, satisfy the criteria laid down in the Regulations. More particularly, the CAC held that one of the three agreements, i.e. the framework local recognition and procedure agreement covering teachers and related staff, was insufficiently detailed about how the council was to give information to the employees or their representatives and seek their views on it, and therefore did not fulfill the requirements of reg 8 (1) (d).

Regarding this case that there was then some comment that the CAC had attempted to set a standard which was higher than that expected by the legislation (CAC, 2006). However, at EAT level both the appeal and cross-appeal were dismissed, confirming the CAC decision. In detail, the EAT's view was that the agreement, i.e. the framework local recognition and procedure agreement covering teachers and related staff, '...does not engage with those detailed requirements [information and consultation] in any way.' Furthermore, and significantly from the point of view of organizations with previously negotiated trade union agreements, the EAT, noting that the Regulations do not prescribe any particular way in which employee approval needs to be demonstrated and making though no reference to the DTI's guidance on this point, also supported the CAC decision that approval for PEAs could be inferred where a majority of employees in an undertaking were union members. It did however state that, when considering the question of the approval of a PEA consisting of two or more agreements, the CAC should consider separately whether each agreement had

caused by single status and gave the impression that a new consultative group would be able to offer improved negotiating arrangements for employees', despite the fact that any such group would 'give less power to staff in determining their own future than the set-up that already exists' (LRD, 2006: 16). Later, UNISON supported Moray Council's appeal against the CAC ruling.

been approved by the group of employees it covered. Where there are a number of agreements, the necessary approval exists only if each of the agreements has been approved by the employees covered by this agreement.

The main conclusions that can be drawn from the decision are the following. Firstly, the case indicated that against widely held thoughts that only unions would ever had the ability to organize formal employee requests for a new ICE agreement this was not true; instead, a single employee was able to bring successfully a request before the CAC. Secondly and importantly, the decision could be seen as a notice for trade unions and employers that believe that their existing arrangements for consultation provide them with protection against being the Regulations. As seen from the first section, a significant reason for the lack of a proactive approach in the case of unionized organizations has been the belief on the part of both employers and trade unions that there is no need to amend existing union arrangements in light of the ICER. However, many existing arrangements with unions are somewhat vague as to what exactly the employer undertakes to do, and how the ICE process will be conducted and could hence be vulnerable to potential complaints brought before the CAC. The decision was also important as it emphasized that the CAC and EAT were prepared to accept as valid PEAs agreements approved by trade union representatives where a majority of unions belonged to a union. Finally, the decision of the EAT that the question of employee approval is one of fact for the CAC is important as it demonstrates that the CAC should be willing to consider all available evidence as to whether or not a PEA has been approved, limiting potentially the extent to which management could unilaterally impose ICE arrangements.

The second CAC decision, i.e. *Amicus (as employees' representatives) v. Macmillan Publishers*,¹⁶⁰ was with respect to an employer providing information to allow employees to calculate the threshold they had to achieve to make a valid request. In August 2005 employees of Macmillan Publishers submitted an 'employee request' with a view to initiating negotiations to reach a negotiated ICE agreement. The employee request was submitted with a letter from Amicus requesting data on the number of employees employed within the undertaking. Following the failure of the employer to identify the establishment, sites and/or plants that they consider make up the undertaking and the number of employees within each of these, Amicus, in the capacity of an employees' representative, submitted a complaint to the CAC in November 2005 and complained that data that had been provided by Macmillan Publishers for the purpose of reg 5 was incomplete in a material particular.¹⁶¹ In its

¹⁶⁰ IC/4/(2005) Macmillan Publishers.

¹⁶¹ The union based its complaint on three arguments: a. that, against the background of the fragmented nature of the Macmillan group, the employer's failure to disclose the whereabouts of the relevant establishments and employee numbers made it impossible for employees to exercise their legal rights under the Regulations; b. that neither employees nor their representatives could verify the figures disclosed by the employer in respect of the total number of employees in the undertaking or the number

decision the CAC Panel upheld the application and ordered the employer to disclose data consisting of the establishments, sites and/or plants that the employer considers make up the undertaking, and the number of employees within each of those establishments, sites and/or plants. While it is possible to suggest that the disclosure of information on the establishments and number of employees employed would not be difficult for employers, the case highlighted that the CAC was able to resolve such a difficulty when necessary. The decision was also important for trade unions, as the disclosure of such information may be useful to unions attempting to extend their influence in organizations.

A further development regarding this time the application of the standard provisions took place in February 2007. In an application brought again by Amicus against MacMillan, that is *Amicus (as employees' representatives) v. Macmillan Publishers*,¹⁶² the union complained that the employer had not arranged for the holding of a ballot for the election of ICE representatives, as required by reg 19 (1). MacMillan sought to rely on pre-existing agreements; however, the CAC found that only one agreement pre-dated the employee's request. Others post-dated it and another had not even been concluded. Nor was there any evidence that Macmillan had planned to hold a ballot to seek endorsement of the purported pre-existing agreements. For these reasons, the CAC upheld Amicus' complaint and ordered the company to arrange for the holding of a ballot of its employees to elect the relevant number of ICE representatives for the application of the standard provisions. The union went to apply to the EAT for a penalty notice and, on 24 July 2007, the EAT made an award of £55,000,¹⁶³ declining to award the maximum penalty of £75,000 on the grounds that this was 'not the most serious' breach that might be envisaged by the legislation.

4.3.3 Assessment of the enforcement regime

According to the CAC Report 'the level of activity to date has given few clues about the long term impact on the CAC of these Regulations; there is a great deal of uncharted water'. Issues recognized by the CAC as providing potentially fertile ground for future litigation and challenges for the CAC itself involve the definition of the various terms, such as 'undertaking', for the purpose of the application of the Regulations, the relationship between collective agreements and ICE arrangements and the disclosure of confidential information. It could be suggested that the low number of applications to the CAC reflects the recent adoption of the ICER and the relative absence of concerns on the part of employers, unions and employees alike regarding the existing situation with regard to ICE arrangements at organizational

required to reach the 10% threshold to make a valid employee request; c. that regs 5 and 6 had to be read in the context of the legislation as a whole. Against Amicus claims, the employer argued in main that it was not required by the legislation to provide such information.

¹⁶² Case Number: IC/8 (2006).

¹⁶³ *Amicus (as employees' representatives) v. Macmillan Publishers*, UKEAT 0185/07.

level. However, in light of the nature of the enforcement regime of the Regulations one should be cautious of such a conclusion.

As suggested by various interviewees representing employers' associations, trade unions, and the CAC the enforcement regime posed significant challenges for those contemplating bringing an application. While information and consultation rights have been conceived at EU level as collective rights, the enforcement mechanism, as stipulated in the Regulations, provides that the exercise of such rights is dependent on claims made by individual employees. To that direction, the *Moray Council* case highlighted the possibility that applications can be brought before the CAC by individual employees. However, this case may be the exception to the rule. It is plausible to believe that individual employees, irrespective of the size of their organization, may not feel they have sufficient time, resources and confidence to bring individual claims. Related to this, the involvement of a variety of different institutions and mechanisms, e.g. CAC, EAT, ETs, in the enforcement of the Regulations in conjunction with the complexity of the legislation and the operation of the trigger mechanism could further impact on the extent to which applications can be brought by individual employees, representatives or even trade unions.

Moreover, the Regulations do put a considerable onus on individual employees to advance the procedures. Hence, unlike the case of statutory trade union recognition procedure where the CAC supervises the process there is no provision for a continuous role for the CAC in the case of applications concerning the ICER. While the argument for the adoption of a non-interventionist stance in the case of the Regulations is that the parties are more suited to find a solution tailored to their needs the need for the CAC to get more closely involved with the process under the ICER is all the more apparent in view of the individual character of the claims in this case. In addition, the lack of the power of the CAC to question the legality of any decision taken in breach of the duty to inform and consult in conjunction with the fact that the financial penalty of £75,000,¹⁶⁴ if imposed, is payable to the Treasury, may further discourage individual employees and representatives from lodging a complaint to the CAC. This will be particularly the case in collective redundancies, where employees may alternatively seek recourse to the ET in order to be able to request compensation where a failure to consult has occurred. Lastly, the fact that the possibility exists for the conclusion of PEAs after the introduction of the ICER can raise further potential issues with regard to the Regulations' compliance with the ICED and specifically art 8, which applies irrespective of the nature of the ICE agreements, i.e. whether they were pre-existing or not, especially if these agreements have been made as result of the ICED. While such PEAs can be overturned by employee requests the hurdle of the 10% trigger mechanism provided by the legislation may dishearten employees from

¹⁶⁴ The level of the financial penalty is also a potentially challenging issue, as it may be suggested that for larger organizations the £75,000 cap would not be considered as a major hurdle.

challenging arrangements that have been concluded via the PEA option, especially in non-union settings where provision of time, resources and experience regarding collective representation issues is arguably absent.

Based on the above mentioned elements of the enforcement regime, the present study found that, as Ewing and Truter (2005: 641) have suggested, the ICER enforcement regime provides ‘very little incentive to employers to comply with the statutory requirements since any penalty is conditional on private parties, employees or their representatives, taking enforcement proceedings initially at their own expense, with no compensation being recoverable for the losses they have suffered as a result of the employers’ breach’. In light of these considerations and within the context of RL theory, while the enforcement mechanism of the ICER places significant responsibilities to the parties involved, the nature of the power-based sanctions applicable in case of breach of the Regulations do not seem sufficient to constitute an adequate form of communication link through which the legal and industrial relations systems can be coupled.

4.4 Conclusion

In the preceding sections, the impact of the ICED in the UK system of industrial relations has been evaluated through a critical examination of the industrial relations actors’ response to the new statutory framework and of the operation of the enforcement regime. While there was considerable activity in terms of organizations reviewing their existing arrangements in light of the ICER, the evidence suggests that the implementation of the ICER in the UK did not lead to significant developments in the institutionalization of ICE arrangements more generally, as envisaged by the ICED. More specifically, due to the institutional design of the ICER, in particular the existence of a trigger mechanism, the possibility for concluding PEAs even after the transposition of the ICED, and limited sanctions in terms of enforcement, there was limited organizational activity in terms of establishing/amending ICE arrangements in light of the legislation. Apart from the review of existing arrangements and the conclusion of a limited number of PEAs, especially before the coming into force of the ICER, there was no significant evidence of negotiated agreements or agreements based on the standard provisions. Importantly, the extent of the take-up of the legislation was particularly limited in cases where consultative arrangements of the type promoted by the ICED have been traditionally absent, that is, non-union workplaces.

Under such circumstances, it is not surprising that trade unions and individual employees did not develop a significantly proactive approach to the introduction of the ICER. For their part, trade unions appeared wary of the potential impact of the legislation on union-based arrangements. On the other hand, individual employees lacked awareness of the details and even in some cases the existence of the legislation.

However, in light of the limited span of the Regulations' life, these conclusions must be necessarily provisional. Positive signs in terms of union strategies, in the cases of Amicus and Prospect, have been evident and potential further case law developments that will deal with the actual operation of ICE arrangements may induce a different response by the industrial relations system.

The examination of the operation of the flexible institutional design of the ICER assisted in illuminating how the reflexive elements of the ICER impacted on the British system of industrial relations. It provided a 'bird's eye' view on the extent of change and response of the main actors involved, i.e. employers and trade unions, to the stimulus of the ICER. Bearing in mind the particular characteristics of the legislative design, the next chapters turn to examine case study evidence regarding the establishment/amendment and operation of ICE arrangements at organizational level. In that way, the thesis aims firstly to substantiate these findings with the results from activity at organizational level and to address in more detail management strategies and trade union and employee involvement in the establishment and operation of the ICE arrangements. Secondly, such analysis opens up further space for examining the extent to which the regulatory approach adopted by the ICER impacted on the development of a capability for employee voice in organizational decision-making.

Chapter 5. The operation of the double subsidiarity mechanism at organizational level: the review and/or establishment/amendment of ICE arrangements

The flexibility in the UK Regulations but also its standard provisions can have a marked influence both on the dynamic with which consultative arrangements are concluded and the structural and operational aspects of the agreements. In light of the analytical framework adopted in the study, the objective of the chapter is two-fold. Firstly, the chapter aims to highlight how the significant scope for management and labour to agree tailor-made, organization-specific arrangements was utilized in the organizations under study. As a result of the renewed institutional emphasis on consultation, a central question is how managerial approaches to employee representation change and what the response of trade unions and employees is. The examination of management rationales and strategies for the establishment/amendment of consultative arrangements illustrates the extent of the impact of the UK Regulations on organizational considerations and the objectives behind the introduction/amendment of consultative arrangements. On the employee side, the examination of the approach of trade unions – where existing – and employees to the introduction/amendment of consultative arrangements is equally important as it indicates the level of union support for such arrangements, and demonstrates the extent to which there was collective organization between management and labour concerning the framing of the consultative structures.

Secondly, the chapter aims to assess to what extent the content of the resulting ICE agreements concluded between management and labour provided ‘nominal rights’ for the development of a learning process of participation and of developing capabilities. While the number of case studies does not allow a wider comparison to be made between the text of pre-existing agreements, negotiated agreements and statutory arrangements in the context of the overall impact of the legislation, a descriptive analysis of the PEAs concluded in the organizations under study is still significant for the following reasons: firstly, as evident from chapter four, the option of concluding PEAs has been preferred at organizational level to a greater extent than the other legislative options; and secondly, taking into account the greater scope for flexibility provided in the case of PEAs it is worth exploring how the kind of flexibility inherent in the PEA option was used at organizational level.

The chapter opens with an examination of the organizational responses to the introduction of the ICER (see table 5.1 for the organizational background). Within this context, key considerations influencing organizational approaches to the application of the legislation are considered, including the potential impact of the Regulations but also other issues such as business and employee strategies. Particular emphasis is then placed on the guiding principles that informed the parties involved in the delineation of the structure and remit of the consultative arrangements. In the second part, the relevant legal provisions with regard to the content of consultative

agreements are outlined and a comparison is made between the ones relating to PEAs, negotiated agreements and the 'standard provisions'. The intention is to provide a basis for assessing the features of the arrangements under study. A breakdown of the elements of the consultative agreements, in the form of detailed tables, follows. In light of the theoretical approach adopted in the study, a critical assessment of the main features of the agreements is offered in the final section of the chapter.

Table 5.1 Case studies' organizational background

Company name	Sector of activity*	UK workforce size	Single-multi site operation	History of unionization	History of other employee participation mechanisms	Existing management-trade unions/employees approach
Fin1	Insurance	6,800	Multi-site	High membership; recognized union in all but one sites	Inherited forum in one site; EWC	Cooperative relationship with the recognized union Employee involvement and commitment approach
Fin2	Online commercial banking	2,700	Multi-site	Low membership; no recognition (active campaign)	Existence of a forum	Union avoidance stance Employee involvement and commitment approach
BS1	Management of real estate	1,400	Multi-site	Very low; recognition only in part of the organization ¹⁶⁵	No previous forum	Neutral approach to trade unions Employee involvement and commitment approach
BS2	Business and management consultancy	3,500	Multi-site	Circa 40% in parts of the workforce; recognition in parts of the organization	No previous forum	Adversarial relationship with most trade unions 'Command and control' employee approach
BS3	Hardware and software consultancy	10,300	Multi-site	Union membership varies by workplace; union recognition in parts of the organization	Existence of a forum; EWC	Adversarial relationship with the biggest trade union Employee involvement and commitment approach but not always implemented at lower levels

* The classification is based on the NACE system.

¹⁶⁵ Two unions were recognized in one of the two business units of the organization. The case study was conducted in the non-union business unit of the organization.

5.1 The establishment/amendment of ICE arrangements

5.1.1 Fin1

During 2004 Fin1 reviewed its employee consultative arrangements with a view to improving their effectiveness. This decision was attributed to several factors. Firstly, major organizational change over the past years, combined with the acquisition of two organizations, moved Fin1 from a number of autonomous divisions to a single integrated business. As such, there was a need to bring together the disparate approaches to employee participation. Secondly, the review was given substantial impetus by the impending directive on information and consultation. The operation of the European Works Council at Fin1 had increased management awareness of EU law and it was deemed important to take a pro-active approach so as to tailor the legislation to the organizational specifics. The recognition that the establishment of representative structures would ensure that Fin1 maintains its commitment to be a leader in respect to human resource policies and a positive reputation relating to the treatment of employees acted as further stimuli. The recognition of an intermediary relationship between employee voice mechanisms and organizational impact rather than a direct causal link with improved performance *per se* (Dundon *et al*, 2004: 1163) was also emphasized by the manager responsible for employee relations.

While the general flexibility provided by the legislation in the form of PEAs and negotiated agreements was perceived as positive the employee relations manager still described the trigger mechanism as *'high potential impact but low risk'* and suggested that significant benefits would be secured if management acted in advance of an employee request such as the ability to tailor the arrangements to the organizational needs. Whilst stressing that the establishment of a PEA would *'stop a small number of people upsetting something that a very significant number of employees are comfortable with'* there was reportedly no management expectation that employees or the trade union would trigger negotiations for the establishment of consultative arrangements. Management drew also attention to the market and industrial relations context as a further factor facilitating the establishment of the forum suggesting that the good employee relations climate in financial services organizations facilitated the establishment and effective operation of consultative arrangements. Based on these considerations the ER manager got executive approval from the board to set up the forum.

The project was initiated and managed by the HR team. Management's intention was to introduce a consultative forum, with a clear remit for information and consultation, not negotiation. The nature of the workforce in the finance sector, i.e. highly educated people with no interest in collectivism, was emphasized as a factor influencing the decision to proceed with the establishment of an all-employee forum instead of

extending existing union arrangements to cover all employees. However, HR management was keen to emphasize that there was no intention for the forum to impact on the collective agreement concluded with the union. Management consulted with the union and the then existing staff site-forum on the proposed arrangements as they would cover all employees. Whilst there was initial union concern regarding the potential impact of the arrangements on union activity the good relationship between management and the union and the fact that the former was keen to clarify that the existing agreements with the union would continue to operate and to distinguish simultaneously between negotiation, through collective bargaining, and consultation, limited the union's worry that the forum would crossover or affect its work. Union resistance was also overcome by the fact that management insisted that the bigger issues such as re-organizations would still be dealt with the union. During the discussions, the issue of specified union seats came up but there was no union interest. Union's unwillingness to secure seats in the forum was attributed to the high union membership density, the 'universal' character of the forum, its inability to deal with major issues where unions are normally involved, and the desire to avoid undermining the commitments made with management regarding the preservation of existing agreements.

Management's guiding principles when promoting the ICE agreement included the coverage by business areas and grades. Despite the fact that management was aware of the option for direct ICE so as to comply with the ICER, this was considered inadequate for the organization. The ER manager explained that they saw no need in replicating the existing provision of direct ICE forms and that in light of the organizational context it would not secure a credible form of employee communication. Once the basic structure of the forum was agreed, communication means were used to increase employee awareness and encourage those interested to nominate themselves for election. Non-union ERs highlighted the fact that during the election period the union encouraged their members to vote for union representatives. However, they also encountered a significant number of employees commenting that they would vote for the non-union candidates on the basis that it would ensure the full representation of all employees.

The first group of ERs was elected in late 2004. ERs included seven union representatives and two representatives coming from the forum in the non-union site. The percentage of employees that voted for their election was around 52-53%.¹⁶⁶ Having received training by the IPA on the differences between consultation and negotiation and the ways ERs could meet the demands of their roles ERs were called to discuss with management the conclusion of the ICE agreement. Within this context, the possibility for an employee ballot for the approval of the ICE agreement was

¹⁶⁶ There were some constituencies where elections were not held due to the fact that there was only one person nominated and one vacancy.

considered as inadequate by management as it would run against the organizational commitments to social dialogue with the representatives. In the initial meeting, five work streams were identified and representatives' teams were created that would be responsible for developing certain issues including: the forum's constitution; how it would communicate; how it would measure success; its operating principles and, personal development. Whilst the constitution went through at least ten version changes before it was ratified, the input by ERs to the drafting of the actual text of the agreement was to a large extent limited with ERs being able to make changes only in terms of details concerning, for example, the wording of specific provisions. Having signed the ICE agreement, the forum was formally launched in April 2005.

5.2.2 Fin2

An employee forum, with the purpose of 'listening to the views of employees and helping to communicate the vision and direction of Fin2' was established in 2000. The decision was based on management desire to create an environment where organizational change could be facilitated, alignment about what can be achieved could be developed and contact with employees during the organic expansion of Fin2 would be maintained. Within this context, the CEO stressed that it was also important to have an environment where people can prosper: *'it is a human rights issue.'* Management's concerns to avoid independent union influence were also evident as that time, the union that was recognized by the then majority owner of Fin2 attempted to gain influence in Fin2.

During the early period of the forum's operation, problems associated with the effectiveness of the forum were identified by employee representatives. The latter were concerned about the lack of significant impact of the forum on organizational decision-making. In their view, the forum was rather preoccupied with 'tea and toilet' issues and tended to take a re-active approach to management decisions. On more significant issues, such as reorganization, the forum tended to be consulted in the decision making process at a late stage and as such its operation was constrained to the implementation of decisions that had already been taken and with providing support to the affected employees. Due to the limited involvement of the forum on a wider range of issues and its re-active approach the ERs were concerned that the forum might be seen as *'the management's lap dog.'* Notwithstanding the drawbacks from the operation of the forum between 2000 and 2002 it still enjoyed the support of senior management, and especially the CEO. The latter, having joined the organization in 2000, was questioning the value that the forum was bringing to the organization but was also keen to see the forum developing a more strategic role within Fin2.

Driven by the perceived inefficiency of the forum a transformation took place in 2003, which was initiated by the employee representatives with the support of the

CEO. In the period between July and September 2002, a team comprised of two ERs met with the CEO and discussed their concerns about the forum and its future direction. In a presentation by the ERs an agreement was reached on the need to change the profile and remit of the forum. In order to attain a level of independence the CEO suggested the affiliation of the forum to a third party. The October meeting was followed by a series of discussions during early 2003 where the parties agreed to IPA affiliation. They also discussed how the forum could move forward with the union, which during the earlier months had increased its attempts to recruit members. In January 2003 a second presentation by employee representatives was made to the CEO and senior management, where they emphasized the crucial role in developing a new mandate for the forum and the resources needed to start *'playing it big, meaning greater involvement and influence in management decision-making.'*

In July 2003 the CEO and the board of executives agreed a package of changes including new elections to appoint three full-time representatives, an annual budget of £20,000 to be managed by the forum, membership of the IPA, guaranteed paid time off for part-time representatives and the adoption of an 'options-based' consultation approach, as advocated by the IPA. An important point to emphasize here is that the forum was not institutionalized in the form of a written agreement. Instead a series of 'commitments' to employees and the organization were in place. These commitments identified the forum as the only mechanism through which employees were informed and consulted on strategic and operational issues. Significantly, the lack of a formal agreement arguably indicated the deliberate avoidance of a strategy to put in place a binding procedural constitution, as it is usually the case in unionized organizations. The employee chair explained:

'The absence of a formal constitution reflects the flexible and informal way in which Fin2 and the forum operates. However, we appreciate the concerns some might have about not having our terms of reference laid down in one document and we keep the matter under continuous review.'

Despite the fact that the amendment of the consultative arrangements was not directly linked to the ICER both management and ERs held conversations with the IPA, employment law solicitors and their legal department and undertook an assessment of the application of the Regulations at the organization. While the absence of a written agreement outlining a specific framework for informing and consulting employees prohibited the agreement from being considered as a valid PEA, management and ERs saw no perceived need to amend the forum structure in light of the legislation and no potential threat in terms of employee *'pulling the trigger'* for the conclusion of a negotiated agreement. In their views, the arrangements went, in essence, beyond the statutory requirements. The HR director noted:

'Everyone stamped the fact that we fully complied with the pre-existing agreement requirements, and why would we want to alter anything because it's really working well, the forum at that time had got absolute visibility in the business, lots of awareness and even indeed when we went out to survey our people we got, well why would we want anyone else, you are our forum, you are our consultation body, we do not want anybody else, why should we?'

5.2.3 BS1

When the ICER became applicable, HR management recognized that there was an opportunity to work proactively within the legislative framework, embrace it and put in place a forum that would form part of the existing employee communication plan. In view of the anticipated business growth, it was also considered important to ensure a two-way communication between employees and management. Further, identifying itself as a market leader and *'employer of choice'* management at BS1 wished to establish a consistent group-wide approach to employee consultation. Moreover, the nature of the business activities of the organization was recognized as an important incentive for the establishment of consultative arrangements. As BS1 competed at a public sector level for outsourcing contracts, management was keen to be able to point out various initiatives that exhibited the forward thinking, innovatory and inclusive aspects of its approach as an employer.

In March 2004, the HR Group Director submitted a proposal for the establishment of an ICE forum based on a PEA. Management believed that the adoption of a proactive strategy enabled the organization to agree on the format and manage the process according to business needs, rather than being possibly later legally enforced to comply with the more onerous requirements stipulated in the 'standard provisions'. Within this context, the improbability of employees overturning the agreement was mentioned as another reason for opting for a PEA. However, owing to employee satisfaction with existing employee engagement structures the chances of employees triggering the process for the establishment of an employee forum were considered minimal. Discussions were held internally for the introduction of an overarching forum at BS1 group level but management finally opted for three district forums: one at group level and one in each of two BS1 business units, the main reason being that different forums would allow the organization to focus on each business unit's issues specifically. The implications for the interaction of the arrangements with the existing trade unions in one of the BS1 business units, particularly in respect of collective agreements and also in respect of potentially group-wide challenges for unions to extend their influence and launch recruitment activity, acted as further factors influencing this decision.

Management informed the union leaders of their plan, including the way they were planning to establish the forum and its scope; there was no request for specified seats

to be provided to the trade union representatives. Whilst the DTI guidance was considered unhelpful, advice was provided by the in-house lawyer and an employment relations consultant. The underlying management logic was to avoid a type of collective bargaining body but keep it simultaneously meaningful. To that direction, the use of the flexibility, as stipulated by the ICER, in designing the framework, was deemed vital. However, there was no consideration of compliance with the ICER through opting for direct ICE forms. In the view of the HR director, direct ICE forms would be impersonal and impractical since they would require a significant amount of time spent in communicating with each individual employee.

Having the draft framework ready the Chief Operating Officer (COO) was involved so as to approve the structure of the forum. An additional consideration leading to the involvement of senior management was the desire to present the establishment of the forum as a business-led rather than an HR initiative. According to the HR management, the involvement of the COO and his proactive strategy assisted in getting buy-in from line management. Having acquired the approval of the COO and management for the draft framework and for the purpose of getting the approval from the employees, management turned it into a Q&A document and put it for approval via email by the workforce. The decision to proceed through this way was made intentionally as management did not wish to enter into negotiations with the ERs over the content of the ICE agreement as this would *'set an inappropriate tone for a forum that is supposed to be about consultation not negotiation'* (ER manager).

Over 50% of the workforce approved the framework document and the nominations for the election of the ERs then followed. Around 50 employees stood as candidates for the 26 positions. ERs held a meeting with management where having discussed the implementation of the agreement they acted as signatories of the agreement. However, the lack of discussion between management and ERs on the substance of the agreement was strongly criticized:

'A lot of ERs felt that in a way it was something that was imposed, the remit wasn't actually agreed by us. It was agreed by us because we had to agree to it but actually it was something that had been discussed with senior management but not with the individuals who were going to be on the forum.' (ER)

5.2.4 BS2

Following a major restructuring process in 2002 and several acquisitions, an internal review took place in early 2003 concerning the management of employee relations. This review was attributed to a set of reasons. Management was concerned about the disparate approach to employee relations as large numbers of employees had joined the organization as a result of TUPE bringing along a number of unions that operated in pockets of BS2. Further, it was recognized that the organizational culture should

evolve from a *'command and control'* approach towards a more participative ethos. In light of the expansion of organizational activities and the nature of the market context, the introduction of a forum was seen as a way to assist with the attainment of such an ethos and would further secure successful change management. However, the MD did not expect that the operation of the forum would assist in increasing organizational performance *per se*. The need to satisfy the ICER regulatory requirements and act proactively in light of the legislation acted as a further stimulus. Within this context, management was concerned that trade unions would have the right to initiate the process for the conclusion of a 'negotiated agreement'. For that reason, it was deemed best if the forum could be established in advance of the ICER so as to have time to develop a level of effectiveness that would then act as a buffer against union attempts to negotiate an ICE agreement. While the ER manager noted that the forum was not set up specifically for the purpose of trade union containment the possibility that the operation of the forum could substitute the unions, which were at that time increasing their influence, was recognized.

In response to the management decision to proceed to the establishment of the forum union officials criticized the lack of consultation on the management's plans. Having expressed their concerns to management, the latter assured the unions that the forum would not supplant the unions' role and that they valued the existing relationship with the unions. However, requests by unions to have specified seats on the forum were reportedly refused by management on the basis that the unions represented specific parts of the organization and as such lacked the ability to represent all employees and that the lack of cooperation between management and the unions contrasted to the integrative nature and purpose of the forum. Prompted by these issues and the potential ineffectiveness of the forum due to its limited rights, trade union officials kept their distance from the forum during its establishment.

In preparation for the launch of the forum, BS2 consulted with the IPA on the development, scope and purpose of the representative body. Elections were held in late 2003. While ERs that did not belong to a trade union emphasized the apprehension of trade unions when the forum was first established they hinted that the unions supported strategically certain candidates for elections in the forum. Three union representatives were elected in the forum. Management held discussions with the ERs on the framing of the agreement. However, the ICE agreement was largely drafted by management and ERs' input was minimal:

'We were very naïve then. Nothing was negotiated, bear in mind we had half a say training to start up, part of which told us what the difference was between negotiation and consultation... To be fair, the agreement was dictated to us' (ER)

Despite the lack of discussion on the substance of the agreement, ERs reported that they influenced some of the details of the ICE agreement, such as the wording of some provisions. Nonetheless, with regard to the substance of the final ICE agreement there was a concern among the ERs that it was ambiguous. An ER explained:

'I don't think the agreement is defined enough. Now, in a way that's been to our advantage because it doesn't preclude our involvement in anything, we've been able to argue that it doesn't preclude anything, but I think it would be better for a forum, when it's set up, to have a clear, well defined agreement. I would always argue to include things like pay and reward, every aspect of terms and conditions, but it should be clear regardless of what's included.'

When the ICER came into force, having discussed within the forum as to whether the agreement complied with the statutory requirements, management and ERs agreed that there was no need for an amendment of the agreement in light of the ICER.

5.2.5 BS3

An employee forum was first established in 2000. Perceiving employee involvement and consultation as a means to bring business benefits through better buy-in from employees and positive attitude to change were cited as reasons for the introduction of the forum. Other considerations included the need to link the existing EWC structures at group-wide level with the UK and the desire for BS3 to be recognized as an *'employer of choice'*. More particularly, in view of the business activity of the organization, e.g. bidding for government services' contracts, management perceived the establishment of the forum as a supplementary means to retain the *'Investors in People'* (IIP) accreditation.¹⁶⁷ Taking into account BS3's business strategy, management also held that in contrast to a union an all-elected forum could be a more suitable means for employee representation as it would represent the whole workforce.

During the period leading to the introduction of the ICER management started contemplating on the need to amend the agreement. Complying with the legislation but also going beyond the legislative requirements was emphasized by the Group HR Director: *'we certainly wanted to comply and I think we would like to lead by it and we are a good example for our practice.'* Management also emphasized their concerns over the influence of trade unions. The HR manager commented:

'We were keen to ensure that we were in line with the legislation because our relationship with a union at the time was not as good as it could be and we felt there was potentially a threat if we did not have the documentation all signed up

¹⁶⁷ One of the key standards in the IIP is the company's ability to consult with employees.

by all representatives that one of the unions could bring a claim under the legislation to set up a forum which they would feel they had more control over it than we wanted them to have.'

While management believed that the biggest union could trigger the process for the conclusion of a 'negotiated agreement' they did not consider that individual employees without the support of a union would have the ability to do that. This was attributed to the nature of the industry, where pay, pension and promotion are significantly based on personal performance and contribution, the indifference of employees to the value of a union style consultation, and the feeling of apathy among individual employees.

In 2004 management proposed amending the agreement at one of the forum meetings and suggested the establishment of an employee sub-group that would work with management on the details of the agreement. An external advisor was invited to contribute to the discussion and management and ERs worked in separate groups in order to come up with specific proposals. While management described the DTI guidance as '*too cumbersome*', the CBI workshops were considered useful in terms of exchanging information about practical issues regarding the establishment and operation of such structures. The operation of the EWC acted also as a source of influence in terms of the principles applied. In terms of priorities, management was keen to comply with the PEA requirements, as stipulated in the ICER, and to ensure the amount of time-off for ERs was not excessive. Management did consider the possibility of consulting directly but decided not to proceed with such action, the rationales being:

'Direct ICE forms would have been seen by employees as a backward step as we had already set up a consultation forum with ERs and we would have had questions about why we were taking it away. It may also have been perceived as a threat to our unions as the idea of direct consultation is something that they would strongly oppose. If a matter was of significant importance we would apply both type of consultation - probably starting with talking to the reps and communicating directly with people and collecting feedback through ERs.' (HR manager)

Whilst there was discussion on allocating specified seats to the unions there was reportedly no union interest. The unions felt that they had sufficient support to be able to be elected in their own right and believed that having specified seats could limit them in areas where they had already recognition. ERs developed a proactive role during the discussions. Their guiding principles included the following: the need to ensure that the constitution was unambiguous as possible in terms of the scope of the forum and the subjects to be discussed; that it enabled ERs to communicate with each

other and with employees; that management would commit to bring important topics to the forum; and, finally, that ERs would be able to publish any documents regarding the development of the forum without being hindered by management. As a result of their pre-active approach a number of provisions were inserted or amended in line with the ERs' recommendations. Specifically, more comprehensive provisions on the timing and conduct of information and consultation were stipulated. A more detailed definition of consultation was inserted and provisions on the formation of a select committee among ERs so that they can act collectively or take decisions were introduced. The provisions on the method of selection of representatives were further elaborated in an attempt to reflect the organizational structure and the provisions on the locally-elected representatives for the purpose of statutory consultation were amended so that the forum had a say in the issue. Work was also done on refining the division of geographical constituencies so as to facilitate greater communication between the representatives and the employees. The conditions for electing ERs, such as vacancies and arrangement of elections were clarified and the inclusion of the CAC in case of disagreement on confidentiality was inserted as a result of the ICER requirements. ERs also pressed for the inclusion of a *'freedom of speech'* clause that management successfully resisted. Lastly but importantly, management succeeded to exclude from the remit of the forum any issues that would affect one constituency, including collective redundancies and transfers of undertakings. While the unions acknowledged that the amended ICE agreement was *'inevitably imperfect'* they expressed their content that it was a substantial improvement of the previous agreement and stressed that the agreement was, in effect, negotiated with management. This reflected three different sources of influence: the ICER, practices imported from the company-wide EWC, and the experience of five years of the UK forum.

At the time of the elections, due to the perceived apathy of the workforce and the concern on the potential predominance of the unions in the forum, management was keen to promote the forum across the workforce so as to increase interest for nominations and participation in the elections from employees in non-union workplaces. As evident from the independent unions' communications to the workforce, both unions actively encouraged their employees to vote in the forum elections for union representatives on the basis of the unions' experience in employee representation, access to advice, support and training for the representatives. Around 34% voted in the elections. Out of the 18 forum seats, 8 were won by the biggest union, three by the second recognized union and one by another union member. Having elected the ERs, the ICE agreement was signed by management and ERs.

5.2 Assessment of the approaches adopted by the industrial relations actors in the establishment/amendment of ICE arrangements

Based on a synthesis of the empirical findings in the previous section, the present section provides a critical evaluation of the establishment/amendment of the ICE arrangements within the analytical framework adopted for the purposes of the study. Table 5.2 gives a synopsis of the main characteristics of the ICE arrangements in each case study.

Table 5.2 Organizational and ICE arrangements' details

Name (ICE arrangements start/ amendment date)	Initiative	Trade union approach	Factors influencing introduction and aspects of the ICE arrangements	Drafting of the agreement/ involvement of ERs	Approval of the ICE agreement
Fin1 (April 2005)	Establishment: management only	Neutral to positive union response	Emphasis on employee involvement; growth by acquisition; proactive legal compliance; ICER	Workshops held with the ERs; very limited impact of the ERs on the substance of the agreement (i.e. only wording)	Approval of the agreement by the ERs
Fin2 (July 2003)	Review: management in conjunction with the ERs	Not available	Emphasis on employee involvement; rapid growth, union recognition attempts, ICER	Workshops held with the ERs; substantial impact of the ERs' input on the substance of the arrangements (e.g. full-time ERs, option-based consultation)	Approval of the agreement by the ERs
BS1 (April 2005)	Establishment: management only	Neutral union response	Emphasis on employee involvement, expansion and acquisitions; pro-active legal compliance; constraints on unions; ICER	Management only; very limited impact of ERs on the substance of the agreement (i.e. only wording)	Approval of the agreements by the workforce (by email)
BS2 (December 2003)	Establishment: management only	Apprehensive stance by most of the unions	Emphasis on increasing employee involvement; legal compliance; rapid growth and acquisitions; market context; union avoidance; ICER	Management only; limited impact of the ERs on the substance of the agreement (i.e. only wording)	Approval of the agreement by the ERs
BS3 (May 2005)	Amendment: management only	Supportive approach by the trade unions	Emphasis on employee involvement; legal compliance; rapid growth and acquisitions; market context; union avoidance; ICER	Workshops held with the ERs; substantial impact of the ERs' input on the substance of the agreement (e.g. definition of information and consultation items, consultation with a view to reaching to an agreement)	Approval of the agreement by the ERs

5.2.1 Organizational responses to the ICER

All organizations established/amended existing arrangements that represented and were elected by all employees. In three cases (Fin1, BS1 and BS2) consultative arrangements that covered all employees were established for the first time. In Fin2 and BS3 pre-existing procedures for employee representation were in operation, either in the form of informal mechanisms, such as in the case of Fin2, or formalized, such as in the case of BS3. The date of the agreements varied. In the case of consultative arrangements established for the first time, two of the organizations proceeded to the agreements on April 2005 (Fin1 and BS1) while BS2 acted at an earlier stage, i.e. November 2003. In the cases of amended arrangements (Fin2 and BS3) the amendment took place in mid-2003 in the former and in May 2005 in the latter. Pre-existing employee representative participation structures at European-level, i.e. EWCs, were provided in the cases of the two organizations operating at European level, i.e. in Fin1 and BS3.

As suggested in chapter four, despite the fact that the Regulations offer to all actors involved in the arrangements, that is management, trade unions – where existent – and employees, a leeway regarding how to respond to the legislation, the institutional design of the legislation may favour a management-led approach to the introduction/amendment of existing arrangements. In line with the findings concerning the impact of the legislation on the system of industrial relations, the arrangements established or amended in the organizations under study constituted predominantly the result of a pro-active approach by management alone in light of the ICER. In Fin1, BS1, BS2 and BS3 the initiative to review and introduce or amend the existing consultative structures came solely from management. Management was keen to make use of the flexible institutional design of the legislation and present themselves as adopting a pro-active approach when dealing with employee relations issues. Only in Fin2, did both the amendment of the arrangements and their review later in light of the ICER take place at the instigation of both management and employee representatives.¹⁶⁸

The introduction/amendment of consultative arrangements reflected a matrix of a number of organizational considerations. Firstly, operational and strategic issues were identified in all cases. These included the need to bed down significant organizational changes or restructuring, and acquisitions such as in BS2, or to move to integrated organizational activities such as in Fin1. Within this context, considerations of potential expansion of the organizations acted as further stimuli in Fin2, BS1 and BS2. Importantly, the nature of the business activities of the organizations – competing for attracting outsourcing contracts from the public sector – such as in

¹⁶⁸ However, even in this case, management were keen to appear proactive in the provision of employee representative structures.

BS1, BS2 and BS3, was emphasized as a further key management consideration. Whilst this organizational consideration was closely interlinked with the more general priority of adhering to the compliance with law and being an 'employer of choice', evidence of the latter was also provided in the other cases, i.e. Fin1 and Fin2. As suggested in chapter three, as the process for the transposition of the ICED developed different discourses were utilized. In essence, the discourse on employee participation oriented towards the integration of employees in the socio-economic context of management decision-making was transformed at the UK level into a discourse associating the ICER with a high performance rationale rationale. Notwithstanding the emphasis of the DTI on economic efficiency arguments as a means to induce organizations to comply with the legislation there was no evidence, apart from Fin1, of such a rationale. Management pointed out that no such expectations were considered as driving forces for complying with the new statutory requirements. However, there was no evidence either of management considering the legislation as an instance of external governmental interference, which should be resisted on grounds of flexibility.

In conjunction with the operation of the above-mentioned organizational and strategic considerations, evidence of the impact of the Regulations was also reported. The impact of the legislation was not confined to an assessment of any existing consultative arrangements but also led to decisions aimed at introducing or amending existing arrangements in order to comply with the legislation in Fin1, BS1, BS2, and BS3. Even in Fin2 where the arrangements were introduced and amended before the application of the legislation, management were keen to proceed to an assessment of the arrangements in the period leading to the introduction of the legislation. Based on these findings, evidence of two channels through which the new statutory requirements could affect arrangements at organizational level was evidenced. In line with Edwards *et al.* (2003) typology of legislative impact, indirect influence, i.e. through the establishment/amendment of arrangements in light of the ICER, was apparent in Fin1, BS1, BS2, and BS3. In Fin2, a broader affinity between the organization's approach and the direction of public policy, i.e. legislative framework on information and consultation rights, was demonstrated.¹⁶⁹

In practical terms, the projects were initiated by the human resource departments of the organizations. Significantly, all HR managers and directors showed considerable awareness of the statutory requirements. This finding is possibly linked to the large size of the organizations under study and the already established sophisticated human resources policies. Despite the fact that the projects were initiated by the HR

¹⁶⁹ According to the authors (Edwards *et al.*, 2003), in this case there need be no specific direct or indirect effect of the latter on the former; an example is when an organization may be doing something, which is consistent with legal developments with there being virtually no specific causal processes or where organizations decide to do something, which they might have done but to which the law acts as an encouragement.

departments, evidence of substantial support provided by senior management such as the CEO in Fin1 and Fin2, and the COO in BS1 was reported. The involvement of senior management aimed both at securing lower management's support for the operation of ICE arrangements and at ensuring that the arrangements would be seen as effective means for consultation by the workforce and not merely 'window-dressing' activities that would fade out. All organizations employed a wide variety of direct forms of employee involvement for a number of years. Despite having the possibility to establish direct ICE forms, as stipulated in the ICER, none proceeded to the establishment of such forms. The main considerations suggested by management were that such forms would not be beneficial to the organizational context, either because of the large number of employees and the time needed for such forms to be implemented or because of the already existing direct forms of employee involvement.

In the majority of the cases management sought the formal protection provided by having PEAs in place. This finding is in line with the evidence provided in chapter four. Facilitated by the adoption of an 'option policy' by the ICER, employers were able to choose among a variety of legal options, which could be used as they saw fit (Teubner, 1993: 93-94). At present, the main incentives for choosing the PEA option rather than opt for a negotiated agreement or the application of the 'standard provisions' stemmed from the opportunity given by the PEA option to take account both of the management structure of the organizations and of existing approaches and structures of industrial relations within the organizations. Evidence of avoiding the statutory requirements in the form of the standard provisions or even the provisions applicable in the case of negotiated agreements was also reported. Acting as a 'frame' to steer rather than 'command' management, these provisions actually had the effect of steering management away from the application of the negotiated agreements or the 'standard provisions' due to concerns about the stringency of the statutory requirements in these cases.

Despite the fact that the trigger mechanism provided in the ICER was generally seen by management as '*a sting in the tail*' for employees and trade unions, there was absence of clear evidence that the latter would actually use the ICER to request the establishment of ICE arrangements. Such considerations were only clearly expressed in BS1 and BS3, where management viewed as plausible the chance that unions would use the ICER so as to extend their activity. However, evidence from BS2 suggests that management considered this as a possible threat, precipitating arguably a proactive response to the introduction of the ICER; whilst management did not expect that unions could trigger the process for negotiated agreements concerns were expressed that they would be able to use the ICER as a way to extend their presence. Even in Fin2 the amendment of the consultative arrangements and review of the latter against the legislation took place against union organising activities.

As Hall and Terry (2004: 223) note, in unionized workplaces the challenge for employers lies in the requirement to extend consultation beyond those categories of employees that enjoy representation through trade union recognition into a system of universal representation. Regardless of the existence and recognition of trade unions in parts of three organizations, i.e. Fin1, BS1, BS2 and BS3, there was no management support for union-based arrangements; neither did unions seem to expressly request these. Instead of incorporating ICE provisions in the existing collective agreements with the unions or introduce supplementary arrangements for non-union groups of employees, the unionized organizations opted for an all-employee forum, where trade union representatives could be elected by workforce ballot. An explanation that emerged from the interviews with management for opting for all-employee forums was the perception that employee involvement encompassing the whole workforce was needed. For example, in Fin1 management treated employee involvement as a holistic project – drawing together elements of employee representation, collective consultation, individual grievance procedures and trade union recognition – to form a ‘grand plan’ for how the organization could approach management-employee relations. In Fin2 and BS1 the emphasis was on the need to maintain co-operative relations with employees and was seen as a ‘human rights’ issue by the CEO in Fin2. The reference to the nature of the workforce, i.e. knowledge-based employees whose interests may not necessarily align with those of unions, was used as a further justification for introducing all-employee bodies. As a result, across the unionized organizations the ICE arrangements were established in parallel with established collective bargaining arrangements.

5.2.2 Was there any scope for collective organization?

Whilst the ICER give great leeway to management regarding how to respond to the legislation they also present trade unions and employees and their ERs with choices as to the existence and form and structure of ICE arrangements. Reflecting the *ad hoc* and differing approaches by the unions to the implementation of the ICER, as evidenced in the previous chapter, significant variety of responses to the management initiatives to introduce/amend ICE arrangements was evident. The unions adopted a re-active approach to the management initiatives and there was no case where the review and establishment/amendment of the arrangements was at the instigation of the unions. In some cases, union officials were even unaware of the details of the ICER and in a significant number of cases individual employees were largely unaware of the provisions stipulated in the ICER. Out of the four unionized organizations, unions responded with clear apprehension to the introduction of the ICER only in BS2. Their negative stance possibly reflected the fragile nature of their existence in the organization and the adversarial relationship developed between them and management. In contrast, in Fin1, where the union enjoyed significant support by the workforce and there was no perceived challenge of its legitimacy by management, the union’s approach was positive. The same held in the case of the amendment of the

arrangements in BS3: whilst there the relationship between management and the biggest union was adversarial, the fact that the unions enjoyed already a close alignment of interests with the existing forum allowed them to adopt a clearly positive approach to its amendment so as to comply with the ICER. Lastly, in the case of BS1, where two unions were recognized, their reaction to the management-led introduction of the arrangements was neutral, showing no signs of apprehension or support to the introduction of the arrangements.

As already seen, a significant finding regarding the process for the establishment/amendment of ICE agreements was that in almost all the cases the process – drafting of the agreements, selection of methods of approval and details of the final agreements – was predominantly management-led. This was the case even when employees were already represented by elected ERs in the forum such as in Fin1, BS1 and BS2. The most striking example of absence of discussion between management and ERs over the form and substance of the agreement was provided in BS1, where management intentionally secured employee approval of the ICE agreement before the conduct of the ERs' elections so as to avoid potential negotiations over its text. Even in cases where management expressed their interest in co-producing the text of the agreement such as in Fin1, there was no evidence of joint drafting of the agreement. Hence, while workshops were held with the participation of management and the elected ERs with the aim of delineating the structural and operational features of the agreement, the final arrangements were predominantly determined by management. Similarly, the agreement at BS2 was solely drafted by management and there was very limited input by ERs to the framing of the agreement, leading to criticisms by a number of ERs.

Influence over the substance of the agreement was reported only in cases where established structures had already been in operation, i.e. Fin2 and BS3. In both cases, there was evidence of collective organization, as advocated by reflexive regulation theorists (Barnard and Deakin, 2002). In Fin2, ERs were successful in expanding the resources of the forum, i.e. budget and provision of full-time ERs, and the scope of the forum, including 'option-based' consultation. In BS3, based on the experience from the operation of the forum, the EWC and the ICER requirements, ERs were able to participate and actually negotiate the substance of the agreement. Such a finding confirms the potential for the evolution and learning that such arrangements allow for. However, evidence of a kind of 'reverse learning effect' was also provided in BS3, where management successfully excluded from the scope of the forum issues that affect one constituency. Hence, while a process of learning based on implementation and experience took place this was conditioned not only on the experience acquired during the operation of the arrangements but also on the parties' principles and priorities in specific contexts when discussing the amendment of the agreements.

Overall, the absence of participation of employees in the framing of the agreements is in line with the research findings presented in chapter four. Hence, the extent to which the establishment/amendment of existing arrangement was subject to collective organization between management and employees or trade unions was limited. In turn, the absence of genuine employee participation in the framing of the agreements may have repercussions in terms of advancing a capability for voice, as envisaged by the legislation. Presuming that the arrangements were mainly designed in order to advance organizational aims and priorities, the extent to which employees' interests can be promoted through the operation of such arrangements may be constrained. In contrast to the intention of the ICED to transcend the unilateral character of employee involvement initiatives and provide scope for participation to the employee side the ICER served surprisingly as guidelines for the legitimization of the management as the party responsible for the drafting of the agreements and for the composition of the ICE arrangements. As such, while the ICER and the 'standard provisions' shaped management priorities and set some limits to the diversity of the ICE structures and modus operandi they induced only in limited cases the development of social dialogue between management and labour for the conclusion of the agreements.

5.3 Evaluation of the content of the ICE agreements

While the actual practice of ICE arrangements may be rather different from what is laid down in an agreement (Gilman and Marginson, 2002: 37; Ramsay, 1997: 316) there is still a relationship between the provisions negotiated/concluded in an agreement and the practice which subsequently develops. As Gilman and Marginson (2002: 37) note in the case of EWCs, 'agreements can be more or less supportive of EWCs developing activity and influence: in certain respects, they can seek to prohibit...or in others to promote.' Within this context, the ICE agreements can operate in similar ways. Whilst they do not predetermine the actual operation of the arrangements, they stipulate 'nominal rights' and hence provide a framework within which the ICE arrangements will function.

5.3.1 The relevant legal provisions

As already seen, the ICER envisage a three-staged process for the conclusion of ICE agreements between management and ERs, i.e. PEAs, negotiated agreements or the application of the 'standard provisions'; with at each successive stage, negotiations become increasingly regulated by the ICER in terms of both the procedure and the substance of the agreements.¹⁷⁰ The structure and content of PEAs and negotiated agreements are largely determined by the primacy of the voluntary agreement. Regarding the selection of ERs, in the case of PEAs, the selection method, where

¹⁷⁰ Regarding the coverage of ICE agreements, the ICER (reg 2) use the notion of 'employee', which is narrowly defined as 'an individual who has entered into or works under a contract of employment', thereby excluding many of those engaged in 'atypical work', e.g. agency and casual workers. The ICED also refers to employees.

applicable, is determined by the agreement.¹⁷¹ Methods by which employee approval of PEAs can be demonstrated includes support indicated by: a simple majority among those voting in a ballot of the workforce; a majority of the workforce expressing support through signatures; the agreement of representatives of employees who represent a majority of the workforce. This includes officials of independent trade unions in workplaces with a recognized union and other appropriate representatives of employees (DTI, 2006: 20).¹⁷²

Concerning the content of ICE agreements, a PEA must simply 'set out how the employer is to give information to employees or their representatives and seek their views on such information.'¹⁷³ The ICER do not specify what information is to be provided under such agreements, nor does the seeking of views equate to the definition of consultation, as provided in reg 2, i.e. 'establishment of dialogue'. Negotiated agreements must set out the circumstances in which the employer must inform and consult its employees and cover all employees in the undertaking.¹⁷⁴ However, the parties are free to negotiate regarding the content of information and consultation, which although higher than PEAs is lower than the standard provisions, i.e. there is no provision of consultation 'with a view to reaching an agreement'. Under both PEAs and negotiated agreements there is the option for direct ICE methods.¹⁷⁵ When negotiating or implementing a negotiated agreement, the parties are under a duty to work in a spirit of cooperation, taking into account the interests of both the undertaking and the employees.¹⁷⁶ In terms of enforcement, there is, as already seen, no enforcement mechanism stipulated in the case of PEAs.¹⁷⁷ Any dispute about the operation of a PEA would need to be dealt with in accordance with any dispute resolution procedures the agreement itself stipulated, or by voluntary reference to ACAS's conciliation services (Hall, 2005: 117). Based on the presumption that ICE agreements should not be treated as collective agreements, Ewing and Truter (2005: 637-638) have suggested that the former have legal status

¹⁷¹ In the case of negotiated agreements, the ICER provide that 'any information and consultation representatives' would need to be appointed or elected, but the parties are free to decide how (reg 14 (1)-(2)). In the case of negotiating representatives, these may be elected in a ballot of employees, or simply appointed by the employees directly without an election, and it for the employer to decide which (DTI, 2006: 35-36).

¹⁷² Employee approval of negotiated agreement should be provided by either (a) signature by all the negotiating representatives or (b) signature by a majority of the negotiating representatives and approval either in writing by at least 50% of the employees in the undertaking(s) or by 50% of employees who vote in a ballot of all employees in the undertaking (reg 16).

¹⁷³ Reg 8 (1)(d).

¹⁷⁴ Reg 16 (1)(a)-(c)(e).

¹⁷⁵ Reg 16 (1)(f).

¹⁷⁶ Reg 21.

¹⁷⁷ Reg 22 (1), (3). However, the ICED does not distinguish in terms of enforcement between PEAs and other agreements deriving from its application (art 8).

and as such they can be enforceable in contractual proceedings where they were negotiated by employees or non-union representatives but not trade unions.¹⁷⁸

In contrast to the PEAs and negotiated agreements, the standard provisions apply at the undertaking level. Where the standard provisions apply, in terms of infrastructure, the ICER only specify that the ballot arrangements are arranged by the employer, who also determines the ballot constituencies, and appoints an ‘independent ballot supervisor’, whose costs are to be met by the employer, as are the costs relating to the holding of the ballot.¹⁷⁹ Representatives are to be elected by workforce ballot of all employees, irrespective of union structures. There must be one representative for every 50 employees or part thereof, although this is subject to a minimum of 2 and maximum of 25.¹⁸⁰ However, the ICER do not specify the establishment of a representative body as such, i.e. a committee or council, nor facilities for representatives (Hall, 2005: 115).¹⁸¹ The ICER do not contain either specific requirements as to the frequency and timing of information and consultation and the level of management involved. Regarding the former, the ICER provide that the relevant information must be provided at an ‘appropriate time’, in particular to enable the ICE representatives to conduct a study and, where necessary, prepare for consultation. Consultation must take place in such a way as to ensure that the timing, method and content of the consultation are appropriate;¹⁸² on the basis of information provided by the employer and any opinion expressed by the representatives;¹⁸³ and in such a way as to allow the representatives to meet with the employer at the relevant level and obtain a reasoned response from the employer to any such opinion.¹⁸⁴ In terms of the latter, i.e. level of management, the DTI Guidance (2006: 54) notes that the level of management relevant to the subject under discussion implies a level of management with the authority to change the decision being consulted about.

Concerning the subject-matter of information and consultation, the employer is required to provide the ICE representatives with information on the following matters: the recent and probable development of the undertaking’s activities and economic situation; the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is

¹⁷⁸ On the other hand, Hall suggests that the terms of a PEA would only be enforceable through the courts if the agreement explicitly provides for legal enforceability and refers to the TUC advice to unions to ensure that appropriate and effective means of ensuring of compliance are included in the PEAs they negotiate (2005: 117).

¹⁷⁹ Sch 2, para 15.

¹⁸⁰ Reg 19(3). The obligation to work in a spirit of co-operation also applies in the context of the ‘standard provisions’ (reg 21).

¹⁸¹ The Guidance only suggests that ‘at least one meeting per year would seem to be a minimum requirement’, although ‘one or more additional meetings’ might be necessary in relation to the probable development of employment within the undertaking (DTI, 2006: 46 (box)).

¹⁸² Reg 20 (4)(a).

¹⁸³ Reg 20 (4)(b).

¹⁸⁴ Reg 20 (4)(c).

a threat to employment within the undertaking; and, decisions likely to lead to substantial changes in work organization or in contractual relations, including in cases of collective redundancies and transfers of undertakings.¹⁸⁵ The employer must consult on the second and third of the matters in respect of which information is to be provided.¹⁸⁶ In case of a statutory duty to inform and consult in terms of the provisions referred to above on collective redundancies and transfers of undertakings, the employer is released from the obligation to inform and consult on decisions likely to lead to substantial changes in work organization or in contractual relations under the ICER.¹⁸⁷ Further, consultation concerning decisions likely to lead to substantial changes in work organization or in contractual relations must take place with a view to reaching agreement.¹⁸⁸ While the range of topics covered by the ICER are potentially wide-ranging (DTI, 2006: 38-44), the DTI Guidance (2006: 43) also notes that ICE rights on pay or benefits that have a monetary value are excluded and information and consultation ‘on the recruitment, terms and conditions, redundancy, dismissal etc of an individual employee or of a small number of employees’ is not required.¹⁸⁹ There is no specific obligation in the standard provisions for ICE representatives to report back to the employees they represent, or to obtain their views.¹⁹⁰

Regarding confidentiality, employers who have a negotiated agreement, or who are subject to the standard provisions may, on confidentiality grounds: restrict any information or document they provide to ICE representatives¹⁹¹ or others and may withhold information or documents, where their disclosure would seriously harm the functioning of the undertaking or would be prejudicial to it.¹⁹² In the case of PEAs,

¹⁸⁵ Reg 20(1). For restrictions relating to the disclosure of confidential information, see regs 25 and 26.

¹⁸⁶ Reg (20)3.

¹⁸⁷ Reg 20 (5). The DTI Guidance (2006:57) notes that where there are affected employees who are not represented by a recognized union, the employer must inform and consult other appropriate representatives of those employees. These may be either new representatives elected for the purpose, or existing representatives provided that their remit and method of election or appointment gives them suitable authority from the employees concerned. ICE representatives elected or appointed under the ICER would be appropriate representatives for this purpose, although the employer would still be free to consult to consult other appropriate representatives or arrange for new ones to be specially elected for the purpose. In contrast, in the cases of PEAs and negotiated agreements if the parties to such agreements want to adopt a similar approach they must include such a provision in their agreement.

¹⁸⁸ Reg 4 (4)(d). The DTI Guidance (2006: 53) states if those decisions are within the scope of the employer’s powers, then the employer must aim to reach agreement with the I&C representatives on such decisions, though sometimes agreement may not be possible.

¹⁸⁹ ACAS (2003) has suggested that ‘depending on the arrangements for collective bargaining, it may be sensible to exclude pay and conditions of employment from the subject matter of consultation.’

¹⁹⁰ McCarthy (2000: 553) described the absence of similar provisions in the TICER as a ‘conscious or unconscious self-defeating gap’.

¹⁹¹ Reg 25.

¹⁹² Reg 26. There is ambiguity as to what information might be ‘prejudicial’ or ‘seriously harmful’ to the functioning of the undertaking and it is also unclear on what grounds information would be deemed to have such an effect on the functioning of the undertaking or establishment. Despite the frequently cited by management reason for not informing employee representatives ahead of public announcements it is significant that the DTI Guidance (2006) stresses that neither the UK listing rules,

where the provisions do not apply, employers and employees or their representatives are free to agree whatever confidentiality provisions they wish (DTI, 2006).¹⁹³ Lastly, in terms of protection, facilities and resources for ERs, the ICER provide that a negotiating representative or an ICE representative is entitled to 'reasonable time off' in order to 'perform his function as such a representative',¹⁹⁴ and to be paid for this time; PEAs representatives are excluded from such facilities. Certain categories of employees are also protected against unfair dismissal or detriment by their employer when acting as representatives of employees under a negotiated agreement or under the standard provisions. Despite the stipulation of a right to time off to undergo training in legislation requiring consultation over collective redundancies and transfers of undertakings the ICER do not include such a provision.

While the scope for the structural and operational aspects of the PEAs is significantly flexible, the ICER may have, as in the case of EWCs, a 'statutory model effect', i.e. the impact of the terms of the ICER themselves, including the standard provisions, on the content of ICE agreements (Gilman and Marginson, 2002: 37). Issues potentially susceptible to the 'statutory model effect' comprise provisions on the following matters: coverage of all employees in the undertaking; methods by which employee approval of PEAs is demonstrated; selection and number of ERs; information and consultation topics, including in cases of collective redundancies and transfers of undertakings; provision for direct ICE methods; protection of ERs and provision of time-off to perform their duties; and lastly, enforcement and confidentiality obligations. In contrast, the ICER make no reference to the following potential aspects of ICE agreements, which, hence, depend on the discussions between the parties to an ICE agreement: nature of the ICE arrangements, i.e. joint management employee structure or only employee-side bodies; methods for distribution of seats; period of office, eligibility criteria and termination of office for representatives; attendance of non-forum members by right or invitation; chairing of meetings; notice of meetings and agenda items and setting; timing and method of information and consultation; preparation of minutes/report of the meetings; provisions for feedback of information from the meetings; number of ordinary meetings per year; facilities for extraordinary meetings; facilities for pre- and post forum meetings for ERs; access to external experts, including trade union officials; provision of full-time representatives; provision of other management funding and communication with employees.

5.3.2 The structural and operational aspects of the agreements

The descriptive analysis focuses on both structural and operational aspects as outlined by the agreements. Structural factors include the ICE arrangements' composition,

nor the city code on takeovers and mergers, nor similar US rules prevent companies from sharing price sensitive information with employee/union representatives, in confidence, before it is publicly announced.

¹⁹³ However, in this case disputes would not be resolved by the CAC.

¹⁹⁴ Reg 27 (1).

scope and business structure and employees covered. Operational aspects cover issues related to the role and competence of the ICE arrangements, the organization of the ICE arrangements and meetings, provisions on facilities and experts and clauses that ensure protection for the ERs, confidentiality provisions and, finally, resolution of disputes and amendment and termination of the ICE agreements. The presentation of the details of the agreements is in the form of tables, i.e. 5.3-5.11, which are broken down into their different aspects.

Table 5.3 The ICE agreement

Name	ICER 'standard provisions'	Fin1	Fin2 ¹⁹⁵	BS1	BS2	BS3
Date of agreement	n/a	April 2005	July 2003 ¹⁹⁶	April 2005	December 2003	May 2005 ¹⁹⁷
Employee-side signatories	ERs	ERs	ERs	ERs	ERs	ERs
Method of approval	n/a	Majority of ERs	Majority of ERs	Approved by employees in an email ballot	Majority of ERs	Majority of ERs
Number of agreements	Single	Single	Single	Two ¹⁹⁸	Single	Single
Legal status of the agreement	n/a	No legal status of the agreement	Not specified	Legal status of the agreement	Not specified	Not specified
Participation and co-operation principles	Duty of cooperation ¹⁹⁹	Cooperation and good will; recognition of shared interests in the success of the business and in good employee relations	Joint commitment	Cooperation	Participation and cooperation; avoidance of confrontation and conflict; achievement of outcomes through consensual management	Cooperation and trust

¹⁹⁵ It has to be noted that in the case of Fin2 there is no written ICE agreement as such. Instead, a so-called 'commitments' document¹⁹⁷ outlines the main elements of the arrangements and this provides here the basis for the analysis of the structural and operational aspects of the arrangements.

¹⁹⁶ The July 2003 arrangements replaced the 2000 arrangements. Accordingly, the tables here provide details of the 2003 arrangements, which were in place when the research took place.

¹⁹⁷ The May 2005 agreement replaced the 2000 UK consultative forum agreement. The tables here provide details on the 2005 agreement, which was in place when the research took place.

¹⁹⁸ Agreements were concluded for each of the two business units of BS1. The research focused on the operation of the ICE agreement in the non-union business unit and, as a result, the details presented here concern only the agreement in this business unit.

Name	ICER 'standard provisions'	Fin1	Fin2 ¹⁹⁵	BS1	BS2	BS3
Corporate alignment principles	n/a	Impact of the operation of the forum on increased engagement between the company and its employees in the running of the business	Operation of the forum within the overall context of Fin2's strategy, support that strategy and contribute to Fin2's game; forum's role to 'represent the voice of all Fin2 people, to make working life great and held drive superior business results'	The forum is a means through which the company's management and the employees can each better understand the challenges facing the business and their impact, including on the workforce.	Agreement of the forum to help the business achieve its targets while at the same time recognizing that the needs of the business and employees will not always accord, to help the business adapt to changing circumstances so as to retain a competitive market position.	Facilitation of the evolution of BS3 to achieve growth and prosperity for the company and employees; facilitation of innovation, job satisfaction, and the acceptance of positive change

Table 5.4 Nature and name of the ICE body

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Nature of body	n/a	Joint management/employee structure	Joint management/employee structure	Joint management/employee structure	Joint management/employee structure	Joint management/employee structure
ICE agreement set up as a:	n/a	Establishment of PEA to pre-empt the ICER	Establishment of PEA not intended to pre-empt the ICER	Establishment of PEA to pre-empt the ICER	Establishment of PEA to pre-empt the ICER	Amendment of PEA to pre-empt the ICER

¹⁹⁹ Reg 21.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Name of the body	n/a	Fin1 UK employee forum	Fin2 People Forum	Business exchange forum	Exchange forum	UK consultative forum
Business structure covered	Undertaking level	Undertaking	Undertaking	Undertaking	Undertaking	Undertaking
Employee coverage	All employees ²⁰⁰	Permanent employees, including managers up to and including direct reports to the UK CEO	No coverage specified	All employees ²⁰¹	No coverage specified ²⁰²	No coverage specified ²⁰³
Relation to, where existing, collective bargaining/direct communication	n/a	The forum is not a collective bargaining/negotiating forum nor does it substitute for normal communication with individual employees. Items discussed at the forum do not supersede collective bargaining agreements in place	No relation specified	The forum is not intended to be a collective bargaining/joint-decision forum. It will not replace any existing collective bargaining arrangements	No relation specified ²⁰⁴	Collective agreements or other arrangements for consultation or negotiation are not affected by the operation of the forum. Where appropriate, consultation will take place concurrently through the forum and the other arrangements. The forum's role in consultation, not negotiation

²⁰⁰ Reg 2.

²⁰¹ The HR manager noted that employees that are not on the payroll, such as agency and temporary workers are though not covered by the agreement.

²⁰² The supporting documents stipulate that the forum covers everyone on a UK contract of employment.

²⁰³ The HR manager clarified that all employees included in the payroll are covered by the ICE agreement, including part-timers. However, individuals that are not on the payroll, i.e. contractors, are not covered by the agreement.

²⁰⁴ The supporting documents stipulate that 'the forum does not in any way replace the relationship employees have with their managers nor the relationship BS1 has with its recognized trade unions.'

Table 5.5 Role

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Stated role of body	Information and consultation	Information and consultation	Individual and collective representation of employees	Information and consultation	Information and consultation; making recommendations; offering suggestions and input	Information exchange and consultation; formal consultation on some issues; communication and helping to involve employees in subjects affecting them
Definition of information	Data transmitted by the employer in order to enable representatives/ employees to examine and to acquaint themselves with the subject matter of the data ²⁰⁵	Where the company representatives provide information to the ERs about matters of a general nature relating to its progress and plans and about specific issues	Not definition specified	Not definition specified	Not definition specified	Not definition specified
Timing/method of information	At such time, in such fashion and with such content as are appropriate to enable, in particular, the information and consultation representatives to conduct an adequate	On a regular basis	No timing/method specified	No timing/method specified	No timing/method specified	Information given at such time, in such fashion and with such content as is appropriate to enable ERs to conduct an adequate study, and, where necessary, to prepare for consultation.

²⁰⁵ Reg 2.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
	study and, where necessary, to prepare for consultation ²⁰⁶					
Definition of consultation	'Consultation' means the exchange of views and establishment of a dialogue ²⁰⁷	'Dialogue and exchange of views and a debate undertaken in good faith'	'Both parties' views are stated and heard, before a decision is made. The perspective of each party is understood by the other, not necessarily agreed between them.'	Exchange of views and establishment of a dialogue between management and the ERs	'Exchange of ideas and/or advice with a view to reaching a consensual understanding or decision, where applicable. Merely providing information does not constitute consultation' ²⁰⁸	No definition provided
Timing/method of consultation	In such a way as to ensure that the timing, method and content of the consultation are appropriate; on the basis of the information supplied by the employer to the information and consultation representatives and of any opinion which those representatives express	No timing/method specified ²¹⁰	No timing/method specified ²¹¹	No timing/method specified	Timely and effective way of consultation	Consultation at the earliest practicable opportunity, to allow all parties to give due consideration to the proposals and associated responses; company commitment to respond to ERs suggestions by providing commentary behind any subsequent decisions; in statutory consultation with a view to

²⁰⁶ Reg 20 (2).

²⁰⁷ Reg 2.

²⁰⁸ The agreement also provides the definition of consultation, as advocated by IPA. IPA defines consultation as 'seeking the views of employees through representation before decisions are taken, and taking them into account when the decision is reached.'

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
	to the employer; 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 (d) in relation to matters falling within paragraph (1)(c), with a view to reaching agreement on decisions within the scope of the employer's powers. ²⁰⁹					reaching an agreement, consultation will be conducted: in such a way as to ensure that the timing, method, and content are appropriate; on the basis of the information supplied to ERs, and of any opinion which those ERs relay to the company; in such a way as to enable the ERs to meet appropriate managers, depending on the subject under discussion, and to obtain a reasoned response from the company to any such action
Issues dealt by the ICE body	Information on: (a) the recent and probable development of the undertaking's activities and economic situation;	Information and consultation on: ²¹⁴ collective issues; transfers of undertakings;	Information and consultation on: ²¹⁵ business issues; issues of interest to Fin2 people	Information and consultation: ²¹⁶ financial performance, organizational	Information and consultation on: ²¹⁷ organizational structure; introduction of new	Information topics: matters subject to consultation; recent and probable developments in company's activities and economic

²⁰⁹ Reg 20 (4).

²¹⁰ While there is no definition of timing for the purpose of consultation, elsewhere the agreement states that: 'The forum also recognizes that it may sometimes be necessary for decisions to be implemented before consultation has taken place.'

²¹¹ In the supporting documents, it is stated that the Fin2 forum follows the IPA 'option-based consultation' model. According to this model, the forum becomes involved in the identification of different options as soon as the business objective is identified; consultation then starts and further options can be identified by either the ERs or management before a decision is taken.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
	<p>(b) the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking; and (c) subject to paragraph (5), decisions likely to lead to substantial changes in work organisation or in contractual relations, including those referred to in -(i) sections 188 to 192 of the Trade Union and Labour Relations (Consolidation) Act 1992; and (ii) regs 10 to 12 of the</p>	<p>collective redundancies</p>	<p>brought to the forum by ERs; individual issues brought to an ER by an employee; safety of Fin2 employees; facilitation and promotion of communication between Fin2 and employees</p>	<p>performance and customer service/satisfaction; investment plans; significant organizational changes; legislation; report against balanced scorecard; employee survey; corporate social responsibility; talent management and training; topics within the forum's remit suggested by ERs and accepted by the management chair</p>	<p>technology; strategic business direction and focus; changes to people policy and practice; health and safety issues; office relocations; changes or amendments to the standard working hours; learning and development; any HR policies; practices or guidelines introduced/amended</p>	<p>situation; company's future plans and strategies; mergers, acquisitions, or divestments; employment situation and trends; overview of pension-related matters</p> <p>Consultation topics: situation, structure and probable development of employment within the company, and on any anticipatory measures envisaged, in particular where there is a threat to employment; decisions likely to lead to substantial changes in work organization or contractual relations, including collective redundancies and</p>

²¹² Reg 20 (1).

²¹³ Reg 20 (3).

²¹⁴ There is no distinction between topics for information and topics for consultation.

²¹⁵ There is no distinction between topics for information and topics for consultation.

²¹⁶ There is no distinction between topics for information and topics for consultation.

²¹⁷ There is no distinction between topics for information and topics for consultation.

²¹⁸ Except where the number of employees affected is small or where the effect falls exclusively within a collective bargaining unit. In the former, the forum will normally agree to consultation through locally-elected representatives; in the latter, the forum will normally leave consultation to the union(s) involved.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
	<p>Transfer of Undertakings (Protection of Employment) Regulations 1981.²¹²</p> <p>Consultation on the matters referred to above (b) and (c)²¹³</p>					<p>transfers of undertakings;²¹⁸ major organizational changes affecting the UK; changes to working arrangements, or terms and conditions; changes in work processes; health and safety, except where covered by more specific arrangements; equal opportunities; training and development; any other subject where the company wishes to take into account the views of employees</p>
<p>Issues excluded from the remit of the ICE body</p>	<p>n/a</p>	<p>Individual issues, individual grievances, pay and remuneration issues²¹⁹</p>	<p>No issues specified</p>	<p>Remuneration and benefits, terms and conditions, health and safety, individual or collective grievances, TUPE and collective redundancies, information</p>	<p>Individual issues²²⁰</p>	<p>Individual grievances</p>

²¹⁹ The agreement further provides that: 'If the company chooses to discuss matters which are outside the scope of the forum on occasions, this will not mean that such matters will always be discussed.'

²²⁰ Whilst pay and reward issues were not mentioned in the agreement management held that these were excluded in effect from the remit of the forum.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
				which is 'super-confidential'		
Workforce-size threshold for ICE issues	n/a	Issues within the scope of the forum and affect a group of 10 or more employees or 10% of the employee population	No threshold specified	Any issues which affects more than 20 employees	No threshold specified	Items affecting more than one constituency

Table 5.6 Composition

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Number of ERs	One representative per fifty employees or part thereof, provided that that number is at least 2 and does not exceed 25 ²²¹	27 ERs: business area representatives (23 plus 4 business area chairs)	No number specified	13 ERs ²²²	No number specified	At least 10 and not more than 20 ERs
Management-side	Not provided for	Company nominated representatives	Four company representatives ²²³	Two company nominated	Four company nominated	Company nominated representatives

²²¹ Reg 19 (3).

²²² The agreement also provides the election of an equal number of deputy ERs that will act as substitute to the ERs who cannot, for good reason, attend a forum meeting.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
representatives				representatives	representatives	
Distribution of seats	n/a	By business area, location and grades	By geographical location	By business area and location	By operational roles and job bands	By geographical location
Selection methods of ERs	Election ²²⁴	Direct election for business area ERs by workforce (only method); direct election for business area chairs by business area ERs (only method)	Direct elections by workforce (only method)	Direct election (only method)	Direct election by workforce (only method)	Direct election by workforce (only method)
Organization of elections	Appointment by the employer of an independent ballot supervisor ²²⁵	At the discretion of the HR	By independent body	No method specified	Not method specified	Arrangements made by the company
Period of office	n/a	Two years	Three years	Three years	Two years	Three years
Eligibility criteria	n/a	Minimum length of service (one year); disciplinary record; ability to complete a full term	Minimum length of service (one year); permanent contract; disciplinary record; employment within the constituency he/she represents	Minimum length of service (12 months); employment within the constituency he/she represents	No criteria specified ²²⁶	All UK-based employees

²²³ These include the forum's chairperson, two management representatives elected by the senior management population and an HR representative, nominated by the forum's chairperson.

²²⁴ Reg 19, Sch 2.

²²⁵ Sch 2 (2) (e).

²²⁶ The supporting documents state that 'to seek election as an employee representative, employees are required to: have a UK-based permanent employment contract at the time of the elections, be available to personally attend the meetings, confirm with the manager that they will be seeking elections as an ER and can

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Definition of termination of office	n/a	Notice of termination of employment; no longer employee; expelled from the forum (breach of confidentiality); becomes subject to formal written disciplinary action; failure to attend meetings (at the discretion of the forum); disruptive behaviour (at the discretion of the forum); resignation	De-selection of ERs or management representatives by agreement; failure of ER to perform the ER role; becomes subject to disciplinary action; no longer permanent contract of employment	No longer employee; no longer working in the constituency; failure to attend two consecutive meetings; expelled from the forum (breach of confidentiality)	No criteria specified	Inadequate performance of ERs' duties and request made by 75% of ERs; agreement by the company and 75% of the ERs
Attendance of non-forum members	n/a	Attendance of internal individuals by invitation from the company; agreement required for attendance of third parties	No attendance specified	Attendance of non-elected or nominated participants by invitation	Attendance of CEO by right; attendance of management members by invitation	ERs' request for additional participants who will provide input/perspective on subjects under discussion by invitation

Table 5.7 Organization

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Chair of the meetings	n/a	Rotation of the chair and vice-forum chair between the company and the ERs	Management representative (CEO)	Management representative (COO)	Management representative (MD)	Management representative

be made be available for these duties, if elected. The documents also provide that eligible to seek elections are also those who are currently employee elected representatives of a union with whom BS1 has recognition.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Employee-side chair	n/a	Employee chair elected by the ERs	Employee chair	ERs right to elect a coordinator	No chair specified ²²⁷	Chair of the employee consultative committee ²²⁸
Notice of meetings and agenda items	n/a	Company responsibility to give notice as reasonably possible of the meeting dates/agenda items	No notice specified	Set-up of agenda at least two weeks prior to a meeting	No notice specified ²²⁹	Agenda distributed to the forum at least one week prior to the meeting
Method for setting up of the agenda	n/a	Jointly by management and ERs	Jointly by management and the ERs	Jointly by management and ERs	No method specified ²³⁰	Jointly by management and ERs
Preparation of minutes/report of the meetings	n/a	Drafted by management and approved by the ERs	Action points and record keeping taken by the forum's secretary	Drafted by management and ERs	No preparation specified ²³¹	Drafted by the management chair and the chair of the employee representative committee
Provisions for feedback of information from the meetings	n/a	Distribution of the minutes to the workforce	ERs to report back to employees ²³²	Distribution of a joint communiqué to the workforce as a whole	No provisions specified ²³³	Distribution of a joint report to the workforce as a whole; ERs to additionally report back to employees

²²⁷ The supporting documents provide that during the teleconferences held between the ERs a chair and deputy chair, who may alternate, should be appointed for each of the meetings

²²⁸ The elected between - ERs – employee consultative committee includes the Chair of the committee and a small number of ERs.

²²⁹ The documents stipulate that it is the company's responsibility to send agenda items at least a week in advance.

²³⁰ The supporting documents provide that the agenda is set jointly between management and the ERs

²³¹ The supporting documents stipulate that the minutes from the meetings are kept by management, drafted by UK Communication and approved by two ERs.

²³² However, the document continues by stating that 'the full-time ERs undertake to produce this material, so that all members of the forum give a consistent message, which can be tailored to the needs of their constituencies.'

²³³ The supporting documents stipulate the distribution of a joint communiqué to workforce as a whole, i.e. to all sites.

Table 5.8 Meetings

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Number of ordinary forum meetings	n/a	Twice per year	Bi-monthly	Three times per year	Six times per year	Three times per year
Facilities for extraordinary meetings	n/a	Yes, ad hoc full forum/relevant ERs and management meetings called by either side	Yes, ad hoc meetings agreed by the management chair and the employee chair	Not facilities specified	No, only ad hoc interaction between the ERs and the standing members regarding urgent matters	Yes, called by the management chair or called on a request from half of the ERs or the Select Committee
Facility for ERs to hold pre-forum meetings without management	n/a	No facility specified	No facility specified	Facilities for ERs to hold preparatory meetings	No facility specified ²³⁴	Facilities for ERs to hold preparatory meetings
Facility for ERs to hold post-forum meetings without management	n/a	No facility specified	No facility specified	No facility specified	No facility specified	Facilities for the employee representative committee to hold follow-up meeting

Table 5.9 Facilities and protection

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Access to external experts	n/a	No access specified	No access specified	No access specified	Provided for unspecified number of experts, where necessary	Access to an expert satisfactory to the employee representative committee
Provision of full-	n/a	Forum chair and	Employee chair and	Not provision	No provision	No provision specified

²³⁴ The supporting documents state that the employee representatives have a pre-meeting to discuss agenda items.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
time representatives		forum coordinator ²³⁵	two ERs	specified	specified	
Responsibility for operating expenses	n/a	Not specified	Budget agreed between the forum and the employee chairs	ERs entitled to claim expenses for any cost in relation to attendance at forum meetings	Not specified	All reasonable costs will be reimbursed to the ERs
Other management provisions/funding	Right to time off, ²³⁶ right to remuneration for time off ²³⁷	Reasonable time-off for forum meetings and training; accommodation and travel for ERs; training for ERs	Reasonable time-off for ERs' duties by line managers; utilization of expertise and experience of recognized third parties; participation in discussions with recognized third parties	Time off to attend the forum meetings and to obtain feedback from employees; provision of resources (email, telephone); training to develop skills and knowledge required	Time off: 5% of the ERs' total working time; provision of facilities/technology for ERs (e.g. email, forum mailbox, forum website, surgeries) ²³⁸	Time off: 15% of working time, additional time if required (decision by the management chair following discussion with the ERs); training on employment law; provision of additional sources of information
Communication with employees	n/a	ERs encouraged to communicate through the intranet and means agreed with the company	Communication using other media (e.g. display boards, intranet and management briefings); regular interaction for information sharing;	Entitlement to feedback communication by phone or email; consultation with employees' means agreed at forum meetings	Right of ERs to communicate freely with employees using appropriate mechanisms	Provision of intranet site; use of normal computer, communications and other office facilities; use of meeting rooms; provision of email distribution lists

²³⁵ The full-time status of those ERs is defined in the supporting documents and not in the agreement.

²³⁶ Reg 27.

²³⁷ Reg 28.

²³⁸ These are stipulated in the supporting documents.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
			canvass regularly opinion from constituents			
Protection of ERs	Protection against unfair dismissal, ²³⁹ detriment ²⁴⁰	No discrimination/damage through membership; indemnity provision	No disadvantage of ERs	No advantage/disadvantage through membership; same protection as in labour law	No protection specified	No advantage/disadvantage through membership, indemnity provision

Table 5.10 Confidentiality

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Confidentiality agreement/cause	Breach of statutory duty, withholding of information by the employer ²⁴¹	Yes	Yes	Yes	Yes ²⁴²	Yes
Details of confidentiality provisions	A person to whom the employer, pursuant to his obligations under these Regulations, entrusts any information or document on terms requiring it to be held in confidence shall	Obligation on ERs to enter a confidentiality undertaking; to treat as confidential information identified as such; confidentiality provisions continue to	Obligation on ERs to enter a confidentiality undertaking; to treat as confidential information identified as such; confidentiality	Obligation on ERs to treat as confidential information identified as such; confidentiality provisions continue to apply after expiry	Obligation to respect confidentiality of sensitive information; separate confidentiality	Obligation on ERs to treat as confidential information identified as such; ERs right to apply to the CAC for the reasonableness of the imposition of

²³⁹ Regs 30 and 31.

²⁴⁰ Regs 32 and 33.

²⁴¹ Regs 25 and 26.

²⁴² Separate confidentiality and insider dealing agreements have been signed by all the ERs.

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
	<p>not disclose that information or document except, where the terms permit him to do so, in accordance with those terms.</p> <p>The employer is not required to disclose any information or document to a person for the purposes of these Regulations where the nature of the information or document is such that, according to objective criteria, the disclosure of the information or document would seriously harm the functioning of, or would be prejudicial to, the undertaking.</p>	<p>apply after expiry of mandate; sanctions for breach of confidentiality identified; confidentiality applies to minutes/reports etc; ERs refrain from making any statement to the media concerning matters coming to knowledge in their position as ERs.</p>	<p>provisions continue to apply after expiry of mandate; sanctions for breach of confidentiality identified</p>	<p>of mandate; sanctions for breach of confidentiality identified; management right to withhold 'super-confidential'²⁴³ information</p>	<p>agreement signed by the ERs; insider dealing agreement signed by the ERs</p>	<p>confidentiality requirements; sanctions for breach of confidentiality identified; confidentiality applies to minutes/reports etc.</p>

²⁴³ 'Super-confidential' information includes: any information which is BS1 Group price sensitive; information which is of sufficiently commercially sensitive nature that, if disclosed to any person outside the forum, could risk causing the company or any other BS1 Group company material harm or serious prejudice; any information which has been given to the company or any other BS1 Group company in confidence by a third party; any information, the disclosure of which would be in breach of any legal obligation, Code of Practice, FSA requirement, or the rules of any other regulatory body.

Table 5.11 Resolution of disputes and termination of agreement

Name	ICER	Fin1	Fin2	BS1	BS2	BS3
Procedures for resolving disputes	CAC/EAT, ²⁴⁴ ACAS ²⁴⁵	Internal procedure followed by application to ACAS on a second level	No procedures specified	Dispute resolution through discussion with the Chairperson	No procedures specified	No procedures specified
Renewal/ amendment/ termination of the agreement	n/a	Automatic renewal after 2 years of its operation; amendment by written agreement; termination by notice by either party; automatic termination on commencement of any negotiated agreement or the standard provisions under the ICER	Renewal from time to time	Automatic renewal after 5 years of operation; amendment by written agreement by joint decision of both management and a majority of ERs; termination by written notice by either the management team or a majority of the ERs; termination by management on commencement of any negotiated agreement	Review on an annual basis; amendment with request by either party and agreement by both parties; termination by notice by either party	Amendment by request by either party and agreement; termination by notice by either party

²⁴⁴ Regs 19 (5), (6) and (7), 22, 23.

²⁴⁵ Reg 38.

5.3.3 Assessment of the form and substance of the ICE agreements

The descriptive analysis of the text of the PEAs concluded in the five case studies presented here demonstrated that the high degree of flexibility provided by the ICER for the conclusion of organization-specific ICE agreements was reflected in the considerable variation in their provisions. However, these PEAs exhibited interesting commonalities with one another as well with the provisions of the ICER and other influences emanating from the UK IR system. The following common structural features of PEAs were identified. Regarding the composition of ICE arrangements, in line with evidence on EWC agreements in Anglo-Irish multinationals (MNCs) (Marginson *et al.*, 1998), all the agreements opted for a joint management/employee structure. The nature of the agreements, as revealed by the findings, was consistent with the suggestion that ICE arrangements would resemble the structures that constituted established consultation practice in the UK IR system (Gilman and Marginson, 2002: 43). However, there was evidence of impact of the statutory model in the case of employee coverage as all employees, including those in senior management positions, were explicitly covered by three ICE agreements, i.e. Fin1, BS1 and BS2. While the coverage of all employees under the agreements contrasted with previous non-union consultative structures' practice of excluding certain employee bands from their coverage (Terry, 1999) there was no extension of the agreement to cover agency or casual workers; as such, categories of precarious workers were excluded from benefiting from the formal rights stipulated under the ICE agreements. This finding is particularly significant from a capability-based perspective as it demonstrates that in line with the ICER 'standard provisions' the provision of formal information and consultation rights was denied in the case of workers in precarious positions.

Further, it is argued that the strategies for appointing ERs to ICE agreements should be fair and transparent (Dix and Oxenbridge, 2003). Possible mechanisms for ensuring fairness and transparency include the provision of elections, or other procedures that allow individuals to be selected or nominated by employees, rather than being appointed by management. The selection of ERs in all cases was through direct elections from the workforce. This finding is in line with the WERS 2004 findings (Kersley *et al.*, 2005) and the 'standard provisions', which opt for direct election. However, the finding also constituted a break from the previous practice of appointing ERs for the purpose of complying with ICE requirements in the case of transfers of undertakings and collective redundancies in non-unionized organizations (Hall and Edwards, 1999; Terry, 1999; Sargeant, 2002). However, regarding the organization of elections there was no significant evidence of the use of an independent body as in two of the case studies the arrangements were made at the discretion of the organization and in the other two cases there was no provision at all.

With few exceptions (see chapter four), the ICER make no mention of trade unions. However, the right of trade unions to have ‘specified seats’ in the ICE arrangements is an indicator of the extent to which ICE agreements provide an ongoing role for trade unions. The incidence of this provision can vary according to the IR situation in the organization, and more particularly the management rationale for setting up the ICE body and the trade union approach to the ICER. In none of the unionized organizations did the ICE agreements provide for nomination by trade unions for at least some of the ERs. As a result, a dual model of representation with the trade unions and the forums running in parallel was preferred instead of extending the union arrangements to all employees or establishing ‘hybrid systems’ where unions could have specified seats. The analysis further demonstrated that in contrast to the ICER, but in line with evidence from non-union representation practice (Terry, 1999), all the agreements specified a method for the allocation of seats and provided for a distribution of seats that varied according to business areas and/or geographical locations. Finally, the majority of the ICE agreements operated at company-wide level, reflecting possibly the large workforce size of the organizations under study. Only in BS1 were there two different ICE agreements covering the distinct two business units of the organization.

Concerning the operational aspects of the ICE agreements, the stated role of the arrangements in all but Fin2, where the role of the forum was the individual and collective representation of employees, was information and consultation. However, the analysis demonstrated that in the majority of the agreements there was no definition of the notion of ‘information’ or any details on the timing/method of information provision. Only in BS3, the timing/method of information provision reflected accurately the ICER wording; in the majority of the other cases such definitions were absent. In contrast, considerable variation existed with regard to the definition of consultation, which ranged from an ‘exchange of views and ideas’ to the ‘establishment of dialogue with a view to reaching a consensual understanding or decision.’ However, in none of the agreements was there reference to ‘consultation with a view to reaching an agreement’ that is stipulated in the ICER standard provisions, probably limiting the extent to which the ICE arrangements can develop the capability to influence management decision-making. Additionally, more encompassing provisions, such as on timing and scope of consultation, including in case of transfers of undertaking and collective redundancies, were – apart from the case of BS3 – absent. While in most of the agreements there was no distinction between information and consultation topics,²⁴⁶ leading to potential confusion regarding the specific remit of the ICE bodies, evidence of similarities in the issues the ICE bodies were entitled to deal with was provided. In most of the cases, information and consultation topics included the following: economic and financial

²⁴⁶ The exception is BS3 where information topics are explicitly distinguished from consultation topics.

situation of the company; organizational changes; changes to working arrangements or HR policies, learning and development, collective redundancies and transfers of undertakings.

All the ICE agreements contained to a greater or lesser extent provisions that excluded specific matters from information and consultation. For example, in a number of cases pay and remuneration as well as individual matters were excluded from the remit of the agreements. Fin2 was an exception here as individual matters and pay and bonuses were included; the inclusion of such topics can be though attributed to the explicit non-union character of the forum (Butler, 2004: 81-82; Hall and Terry, 2004: 215). Workforce size criteria for raising ICE issues were also stipulated in the cases of Fin1, BS1 and BS3. The greatest constraints in the remit of the ICE arrangements were evident in the case of BS1, where issues excluded included: remuneration and benefits, terms and conditions, health and safety, individual/collective grievances, TUPE and collective redundancies and information which is described as 'super-confidential'. Management's insistence on the exclusion of issues in all the cases arguably reflects, as in the case of EWCs in UK-based multinationals (MNCs) (Hall *et al.*, 2003: 83), unfamiliarity with works council practice in the UK and the absence of clear-cut distinction at institutional level between information and consultation on the one hand and consultation on the other (Sisson, 2002; Terry, 2003). Similarly, all the agreements contained 'damage limitation provisions' as detailed and restrictive confidentiality requirements, in the form of separate agreements or specific clauses in the agreements, were inserted reflecting arguably not only Anglo-Saxon traditions of corporate governance (Hall *et al.*, 2003) but also potentially sensitivities about protecting information in organizations operating in the business services and financial sectors.

In contrast to the absence of specific provisions in the ICER, formal provisions covering the chairing of the meetings, the employee-side coordinator or chair, the setting up of the agenda, the drawing up of minutes and the dissemination of the outcome of meetings were stipulated in all the agreements. The fact that the agreements tended to spell out these operational issues may be attributed to the need of the parties to ensure clarification of the agreements, which cover unfamiliar aspects of the ICE arrangements. Secondly, while an employee-side chair or coordinator was provided in most cases and the setting up of the ICE agenda was done jointly, the organization of the ICE arrangements was significantly management-led. Considerable variation regarding the number of ordinary meetings held existed, with meetings ranging from twice a year (Fin1) to bi-monthly (Fin2). However, facilities for extra-ordinary meetings or ad hoc interaction between the representatives and management were included in all cases except from BS2. Rights to arrange extraordinary meetings and/or to receive information on an ongoing basis from management are important to underpinning an ICE body characterized by ongoing

activity, in contrast to less frequent meetings (Marginson *et al.*, 1998: 76-77; Gilman and Marginson, 2002: 40). As Gilman and Marginson (2002: 40) also note in the context of EWCs ‘the facility to convene a follow-up meeting between the ERs is likely to strengthen the effectiveness of ERs to pursue issues with management, and to report back to employees.’ Within this context, the facility to convene pre-meetings is also important as it allows representatives to prepare adequately and develop a coherent strategy. However, in all but one of the agreements (BS3) there were no explicit provisions regarding the facilities for the representatives to hold pre- and post-forum meetings without management.

From an operational point of view, another important dimension for the development of capabilities for voice is the ICE bodies’ access to facilities and protection for the ERs. While training and time-off to perform their duties were stipulated in the agreements, access to external experts was only provided in limited cases. Interestingly, the ICE agreements in unionized organizations did not mention trade unions as a potential source of experts nor did they stipulate rights for union representatives to attend ICE meetings. Provision of additional resources and participation in discussions with recognized third parties, e.g. IPA, were also stipulated. In two of the cases, i.e. Fin1 and Fin2, full-time posts were also provided. The facility to communicate with employees freely through adequate means is also vital in raising the profile of the forum, gaining and retaining legitimacy among the workforce and consulting employees on significant issues. Communication with employees relies significantly on the provision of intranet, email and phone; only the BS3 agreement stipulated the use of meeting rooms for communicating with employees. The possibility for consultation between the ICE bodies and the workforce was also explicitly stipulated in some agreements. Lastly, in line with the ICER, provisions on the protection of the ERs are included, covering cases of discrimination and advantage/disadvantage through membership. Based on these elements, signs of significant dependence of the ICE arrangements on management for the provision of basic operating resources, such as expertise, time off for training, proper contact with external union officers, effective contact with members, issues which were highlighted by Terry (2003: 502) in the case of ‘consultative’ unionism, were evident here. Equally importantly, apart from Fin1, there were no provisions stipulating procedures for the resolution of disputes arising within the ICE arrangements. This finding is significant as it confirms the concerns expressed elsewhere in the thesis regarding the lack of compliance of the ICER with the ICED due to the absence of enforcement procedures in the case of PEAs.

Apart from the influence of the ICER, company-specific factors and the more general UK IR climate, a ‘learning effect’ (Gilman and Marginson, 2002) was evident in Fin1, Fin2, BS2 and BS3. In effect, provisions allowing for practical experience from implementation to be reflected in the agreements were included in all these

agreements. Specifically, the agreements allowed for an amendment of the structural and operational aspects of the ICE agreements with requests by either party and agreement by both parties. While the ICE agreements were fairly recent at the time of the research, some changes had already been made regarding provisions concerning follow-up meetings, communication between the ERs and the remit of the ICE agreements. For instance, drawing on experience from the early operation of the initial arrangements in BS2, management and ERs issued supporting documents that specified in more detail the consultative remit of the forum suggesting that a 'learning effect' was in operation there, in which innovations regarding the operational aspects of the forum's operation were later incorporated in the ICE agreement.

Importantly, evidence of integrative purposes in the establishment of all the ICE agreements was also provided (Heery *et al.*, 2004). This was illustrated in the pattern of issue-specific rights conferred to the ICE bodies, which sought to balance the respective interests of employers and employees and in the balancing of rights with organizations via stipulating co-operative and participative principles. Within this context, the influence of considerations of enterprise performance and managerial control to the establishment/amendment of ICE agreement was also evident. Broad (1994: 27) has suggested that representative participation may be established 'to provide a mechanism to rationalize the information and communication systems directed towards the achievement of a 'consensus culture'. The use of terms such as 'consensual management' in the description of the nature of the relationship between the ICE arrangements and management provided evidence of such an approach. In conjunction with the dominance of a managerial agenda in some of the cases, e.g. BS1, and the emphasis on employee output in almost all the agreements, evidence of constrained forms of participation with limited space for the expression of employee voice and collective interests (Hall and Terry, 2004: 216) was provided. The inclusion of explicit provisions that clarified that the ICE arrangements did not supersede existing collective agreements in organizations where trade unions were recognized and that the forums' role was consultation, not negotiation, could also be seen within the context of limiting the role of the arrangements to a role that is importantly underpinned by a spirit of co-operation and partnership.

On the basis of the comparison here, a 'basic model' of ICE bodies can be identified in particular with regard to its composition as a joint management-employee body that is chaired by management, and its competences that are limited to information and consultation and do not extend to any co-decision rights, as it is the case in some continental European legal systems. The finding of a 'statutory model effect' (concerning mainly scope of application, employee coverage, selection of ERs and nature of the arrangements) demonstrates, how when 'bargaining under the shadow of the law' (Bercusson, 1992), the choices made by management and ERs over the provisions of ICE agreements are likely to be constrained, as in the case of EWCs

(Gilman and Marginson, 2002: 49). Bearing in mind the minimalist approach of the ICER evidence of weak institutionalization of the ICE bodies and in certain procedural aspects, such as the dominant position of management, the exclusion of certain issues from the ICE bodies' competences, the absence of the right of the ERs to consult external experts and, the lack of enforcement procedures was found. However, the analysis also demonstrated evidence of other sources of influences on the provisions of the ICE agreements. These sources of influence had their origin in the business structure, IR situation and broader practice of employee representative structures in the UK. However, the evidence of a 'learning effect' suggests that as in the case of EWCs, 'the parties are developing a momentum of their own, in which good practice progressively evolves. Periodic review and renegotiation of agreements means that the scope of learning is ongoing' (Gilman and Marginson, 2002: 50).

Despite the existence of a significant number of similarities between the ICE agreements analyzed here, it is still possible to suggest that the degree to which the ICE agreements provided opportunities for the development of capabilities for employee voice differed to a significant extent. In their study of voluntary agreements under the art 13 procedure of the EWCD, Marginson *et al.* (1998) defined 'active' EWCs as those that have the potential to generate activity in a company by allowing ERs to share ideas and information outside meetings. In opposition, 'formal/symbolic' EWCs are those with no provision for employee-side meetings, no access to employee expert assistance, no independent administrative procedures and no rights to alter the agenda of the EWCs. In line with the typology suggested by Marginson *et al.* (1998) and based solely on the text of the ICE agreements, 'active' forums could include the ones in Fin1, BS2 and BS3. The forum in Fin2 could also be included in this category provided that the agreement was in writing. Instead, based on the significant restrictions regarding information and consultation topics the forum in BS1 could be described as 'symbolic'.

As seen from this chapter, the implementation of the ICER acted as a 'catalyst' for the review of existing approaches to information and consultation of employees in all the organizations studied. Significantly, in the majority of cases it also led to the establishment or amendment of existing arrangements in order to qualify as PEAs. In taking advantage of the institutional design of the legislation and the lack of active involvement of trade unions – where recognized – in the process, ICE arrangements that operated in parallel with established collective arrangements were promoted. Importantly, from a capability-based perspective there was very limited scope for collective organization between management and ERs concerning the structural and operational details and the method for the approval of the ICE agreements. Hence, while the ICER and the 'standard provisions' shaped to some extent management priorities they proved unable to promote genuine participation of employees in the framing of the agreements.

However, for the purpose of assessing the potential of the ICE arrangements to provide effective rights for the development of capabilities for employee voice an analysis of only the aspects of the agreements is not sufficient. As Marginson (1999: 260) suggests in the case of EWCs, 'at best, the formal provisions of agreements are likely to constitute only an approximate guide to the actual practice evolved by the parties in functioning EWCs.' For this reason, the following chapter focuses on the actual operation of such arrangements and assesses the extent to which the 'nominal rights', as stipulated under the ICE agreements, become 'effective rights' for the purpose of developing capabilities for employee voice.

Chapter 6. Analysis of the operation of the ICE arrangements

As Lecher *et al.* (2002: 131) emphasize in the case of EWCs, consultative arrangements must develop a number of autonomous qualities independently of the quality of the agreement. This chapter examines the operation of the ICE arrangements in terms both of their 'inner life' and their relevant external relations (Lecher *et al.*, 1999). The analysis proceeds on the basis that the capability for voice that the new consultative arrangements can develop is the product of external influences, i.e. effect of the ICER, and internal developmental preconditions of the ICE arrangements that operate in the organizations under study. As analyzed in chapter two, the internal preconditions refer to four fields of interaction. The first is between the employee-side ICE arrangements and management, where the two dimensions that are critical are: to what extent does management grant the ICE arrangements, voluntary or as a concession, firstly scope to operate and secondly scope to participate? The second is the internal employee-side ICE arrangements, where the key dimensions are the employee-side's internal capacity and cohesion. The third is between the employee-side ICE arrangements and employees, where the dimensions are the capacity and legitimacy of the arrangements. The fourth is between the employee-side ICE arrangements and trade unions, where issues of formal integration, specialist and policy support and resource supplementation and concentration constitute the key dimensions. In line with Lecher *et al.*, (1999: 77) interaction is defined here as 'a process of mutually-related action, in which actors respond to and anticipate the actions of others.' Having provided an analysis of each field of interaction, a brief summary is included at the end of each case study where the ICE arrangements are positioned on the four internal fields of interaction.

6.1 Fin1

6.1.1 ICE arrangements and management

Scope to operate

The forum had a management-appointed, full-time administrator. Training – including sessions that were available only for senior managers – was provided to all ERs at the establishment of the forum and later by external organizations and in-house specialists. The objective was not only to send a message to the management community that the forum should be seen as important but also to give the ERs the opportunity to network with senior management, understand management thinking and ultimately be able to contribute to organizational objectives. Whilst there was good management 'buy-in' in terms of time-off facilities, both the ER manager and the forum chair attempted to minimize face-to-face communication with the ERs so as to 'play down' line management concerns. However, ERs noted that work related to the forum was usually performed outside normal working hours.

Due to greater familiarity with the rationale and objectives of the forum, the first chair was a management appointed representative.²⁴⁷ In practice, there was significant evidence that the management chair controlled substantial aspects of the forum meetings, such as choosing which ERs to be consulted on specific issues and arranging meetings with management, hence significantly restricting the scope available to the ERs. The majority of agenda issues came from the HR side. This was attributed to a number of factors: firstly, ICE issues were initiated by the HR department; secondly, the forum was still *'finding its feet'*; and thirdly, the structure for communication with employees was not yet in place.²⁴⁸ The dissemination of documents prior to consultation was reported in some cases but there were no minutes taken in any of the forum meetings.

Scope to participate

The forum held bi-annual formal meetings attended by the CEO, other executive members and the HR director. In one of the meetings, management provided information on the UK business, including a review of the past year and the prospects for the following twelve months concerning financial, business and operational aspects. Information exchange between management and the ERs took also place outside of the formal meetings. Monthly and ad-hoc communications between the forum and the Business Area (BA) chairs took place through teleconferences and site-level meetings. Whilst the timing, level and nature of such information were considered satisfactory by ERs, the provision of such information was predominantly for the purpose of the conduct of consultation and did not extend to wider organizational issues.

Consultation took place on an *ad hoc* basis and included the following stages: when management decided there was an issue for consultation with the forum they informed the chair of the forum who then organized the appropriate ERs for consultation. The ERs were then provided with information for and consultation took place with the management responsible for the affected area. According to the ER manager:

'We will listen, we will discuss, we will thrash out, but we won't seek agreement, and that to me is the essential difference between the union and the forum.'

ERs reported generally their satisfaction with their level of involvement and the supportive management approach. Subject for consultation included changes in pensions, the refurbishment of a site canteen, changes in the IT architecture, changes in the retirement age, an update of the so-called 'People Capability Project', flexible

²⁴⁷ The management representative was seconded into that role for a year and after the expiration of the year, a full-time employee-side chair would be elected among the ERs' team.

²⁴⁸ In order to develop a pro-active approach and reinvigorate the forum's agenda, ERs intended to introduce a diary including all the issues raised regularly within the organization. The minutes from the meetings were solely management's responsibility.

working policies, accounting trainee schemes, restructuring and redeployment. In some cases, consultation took place at an early stage of decision-making. For example, in the case of changes to the 'People Capability Project', which involved a new way of profiling staff, ERs participated at an early stage in a workshop, where they were able to reflect and comment on what was proposed and gave substantial feedback on the scheme.

Despite the significant support by the CEO and the HR department, instances where the forum was only consulted at a late stage were reported, especially in restructuring exercises. For example, due to cost savings Fin1 decided in April 2006 to close offices at three sites. The decision involved around 700 job losses over 2006-08. The most affected areas were customer services (365 posts) and telesales, (115 posts) and involved the transfers of the majority of the jobs (around 700) – some to other locations within the UK and others to India. Following a 90-day period of consultation between management, the union and the forum over the future of a specific site, Fin1 agreed to outsource life and pensions' sales and administration services to another organization operating in the UK. Approximately 450 employees working in Fin1's customer services, direct-to-consumer and support operations in Ireland were transferred to the acquiring organization under TUPE in early autumn 2006. The outsourcing agreement that was agreed in consultation with the union and the forum helped provide employees with continued employment. However, union's view was that this was predominantly a result of union organization and activity and that the forum's involvement was insignificant.

The term 'consultation' was also used in situations where the forum served more as a means for employee feedback with no possibility for actual consultation. For example, regarding changes in the retirement age the forum hosted employee focus groups in order to gauge employee perceptions and concerns regarding the three options on retirement, as suggested by the HR team, and then fed back to management. While management considered this as a major consultation exercise, ERs commented that while the exercise was well structured in terms of the options provided and their substantive value, it could not be described as consultation; instead, it was seen as providing a service for the company. It is important to add here that there was strict adherence to the confidentiality provision in the ICE agreement. All the issues that were dealt with were considered as confidential, the rationale being that ERs had exclusive access to issues that were not even available to management. Lack of ERs' interest in challenging management proposals and decisions was also evident. Non-union ERs were keen to examine the extent to which the operation of the forum impacted positively on organizational efficiency.

Impact on management decision-making

Impact of the forum on organizational decision-making was reported in some cases. For instance, in the cases of training and communication in the largest business area, the 'People Capability Project' and the rationalization of flexible working policies, the suggestions made by the forum were taken into account and influenced the substance and implementation of management decisions. The fact that in all these cases the involvement of the forum had taken place at an early stage was identified by ERs as a key factor for the effectiveness of the forum. Regarding the capacity of the forum to influence decision-making, the view of ERs was that whilst it would not fundamentally change business strategy overnight, it was in a *'fairly sharp end to influence some thinking.'*

On the management side, the influence of the forum was considered to range from impact on communication and implementation of decision-making to the substance of decision-making. While recognizing the involvement of the forum as a means to legitimize management's decisions and to provide a support mechanism for restructuring instances, as precipitated by developments in the finance sector, the ER manager stressed the potential input of the forum in better decision-making:

'Certainly by talking to people change is going to happen more easily as a result of it. But change is a necessary evil and I suppose by being creative you can minimize the negative impacts of that having by having representatives who do a good job. They may not always agree with you, but the likelihood is you will make slightly smarter decisions. If nothing else, you have to think things through.'

While management was keen to measure the impact of the forum on organizational performance they recognized the intangible character of the criteria used and chose instead to focus on measuring the quality of the consultation exercises. For this purpose, a number of categories for ranking consultation were developed by management and the forum, including: the timing of consultation, provision of adequate information, value added in terms of ideas taken on board, and provision of feedback by management. Effective consultation took place in 56% of all exercises. In 20 consultations the level of the forum's involvement was measured at around 4 points out of 11. According to management, the nature of these consultations – mainly organizational policies – did not allow the development of 'real consultation': while the forum was involved at an early stage the process was described as mostly information provision. Consultation in the other 20 cases, with the exclusion of two issues where the forum was not consulted, was measured at around 8 out of 11 as the forum was involved at a relatively early stage and had an influence on management decisions.

6.1.2 Internal ICE arrangements

The communication structures were radial. The central figure was the management-appointed full-time coordinator, who was given instructions by the management chair. This was reflected by the absence of infrastructural support to the ERs so as to organize meetings independent of management and the fact the management chair was the main contact between the forum and HR and senior management. The coordination and distribution of responses from consultation exercises to ERs were dealt with either by the forum coordinator in cases of UK-wide exercises or by the BA (Business Area) chairs in the case of local consultations. General communication between the BA chairs and ERs was reported, such as in the case of the election of the next chair of the forum. The BA chairs had monthly meetings and feedback was then provided to the rest of ERs. Similarly, they took issues from ERs in case there were specific issues for discussion and they provided feedback to the ERs. The coordination of the forum activities was considered by the chair of the forum particularly significant in light of the pressure across all the business areas and the limited time-off facilities for ERs to perform their roles. A number of work streams, managed by the forum chair, operated on issues such as the election of the forum chair, the retirement age consultation and the training offered to new ERs. While communication and feedback between ERs was very common at the initial set up of the forum, representatives stressed that this settled down in the following months and there was limited evidence that ERs developed their own procedures for information exchange, for agreeing and for coordinating interests among themselves.

The existence of a diverse group of employees with varying experience in consultation and exposure to senior management was considered as beneficial by both management and ERs. The representation of senior management by four ERs was particularly viewed by management as contributing to the leverage of employee interests in the forum. In terms of cohesion, concerns were expressed by non-union ERs regarding potential differences of opinion between themselves and union ERs, especially when representing a common constituency. While instances of disagreement between ERs were mentioned, these were described as a *'healthy two-way communication'* by both management and ERs.

6.1.3 ICE arrangements and employees

Particular emphasis was put by management on the need for the forum not to be seen as a *'corporate mouthpiece'*. Accordingly, management felt that the provisions for a full-time coordinator and forum chair contributed to an increased level of physical manifestation and visibility of the forum. The need for ERs to forge relationships with their constituents, e.g. through feedback mechanisms in consultation exercises, was also considered important. However, the interaction of the forum with employees was limited. For example, the absence of minutes meant the inability of the forum to communicate the outcomes to employees. While the intranet was used to promoting

its launch, ERs emphasized the constraining impact of the confidential nature of the issues dealt with later, such as restructuring, on the dissemination of results to the workforce. Further, email communication by the ERs to their constituents was prohibited on the basis of data protection issues and concerns were expressed particularly by ERs representing larger constituencies that covered disparate areas. Each representative had a clearly defined constituency of between 40 and 300 employees. ERs reported in many cases limited time-off facilities with the workforce, especially in larger constituencies. Importantly, evidence of lack of intention on the part of some ERs to interact independent of management with their constituents due to concerns over potential division and confidentiality was reported by ERs.

The absence of workforce interaction had, in turn, significant repercussions for the ability of the ERs to consult adequately their constituents and receive feedback, limiting the extent to which the forum could accurately represent workforce's interests. Concerns were expressed by both management and ERs regarding the limited potential for the development of a two-way dialogue between the forum and the employees. Employee apathy in certain constituencies was attributed to the lack of the forum's visibility and the absence of interest in employee representation. In the view of ERs, there were only two instances where they managed to raise the level of employee awareness. The first concerned the process for the launch of the forum in 2005 and the second involved a consultation held with employees about the refurbishment of one of the canteens. In the view of ERs, the latter constituted a 'symbolic activity' that acted not only as a means to raise awareness of the forum but also as a means to highlight its ability to represent employee interests and, more importantly, the ability to deliver.

6.1.4 ICE arrangements and trade unions

In the views of management and union representatives alike the introduction of the forum did not impact on the nature and scope of the collective agreement. Concerning the process for dealing with issues that affected both unionized and non-unionized employees, the ER manager explained:

'What I do is I consult with the forum first, bearing in mind that I am often talking to the same people in both, because there are union representatives in the forum so they know precisely what I am up to because they are at both meetings and it's all open. So I consult with the forum first, and it might be an hour or two or the day before, it's on the basis of I am purely consulting with you, I make it clear that I need to negotiate with the union about this, but in order for the company to reach a negotiating position to take then to the union I want to understand what the forum thinks about it and that will help inform my thinking which I then take and negotiate with the union.' (ER manager)

Management was positive that the involvement of the same union representatives in both structures brought an alignment of interests and as a result both discussions went in a positive direction. For instance, two ERs engaged in the consultation about changes to flexible working patterns were also union representatives and the manager responsible held that the outcome was acceptable to all parties. In re-organization exercises that involved collective redundancies, statutory consultation took place with both the union, where recognized, and the forum, albeit under separate channels. According to a union official, the nature of the issues influenced significantly the approach developed for the discussions held with the forum and the union:

'Some things like the refurbishment of the [site] canteen were dealt with by the forum and the company did not speak to the union on this. And then I think on some of the bigger issues they've spoken to us first and then spoken to the UK forum. .But on some of the even still bigger issues what they seem to do, which is the way we want it in many ways, is they speak to us, they will inform the UK forum rather than negotiate and consult, and then they will come back to us and we will go through any proper consultation and negotiation.' (Full-time union representative)

There was evidence that the union promoted the nomination of union representatives to participate in the forum. For instance, in their communication to their constituents during the 2004 forum election the experience of union representatives in dealing with management and their skills in consultation and negotiation were highlighted. However, the distinction between the capacity of the forum and the union was also clearly emphasized. This rested on issues such as the level of support on all employment issues, e.g. difference of the level of resources available to the union and the forum; the secured independence of the union in contrast to the inability of the forum to campaign, take legal action or industrial action as a last resort; the right of negotiation that the union enjoyed while the forum was only limited to consultation; the statutory rights coming with union recognition, e.g. TUPE and health and safety rights; the provision of independent training to the union representatives and; the response to the challenges of the finance industry, e.g. offshoring, where reportedly such forums *'cannot really fight – they can only consult'* (union communication). Evidence of positive impact of the operation of the forum on the union was reported. For example, the full-time union representative highlighted the potential for the union to be informed through the forum of issues about areas not covered by the collective agreement. In terms of other advantages for the union from the operation of the forum, it was suggested that owing to the approach adopted by the union the latter picked up some members in areas where it did not have recognition.

Attempts to transfer knowledge and information between the union and the forum were also reported by both sides. For instance, non-union ERs stressed that in certain

cases, e.g. in constituencies where vocal senior union representatives existed, they tended to invite them along in the ad-hoc forum meetings. They also emphasized that the fact that the same people were sitting on both groups could create synergies in terms of cooperating in certain issues and achieving alignment where differences between the two existed. This view was shared by union ERs, who also stressed their ability to contribute substantially to the operation of the forum due to their greater training and experience in employee representation. However, tensions reportedly existed between collective bargaining and the union's sphere of influence and the recently established forum, where the latter could attempt to encroach on the former. For instance, tension between non-union ERs and the union was reported regarding the impact of the lack of transparency regarding developments in the discussions between management and the union on employee interests on an organizational-wide scale. ERs questioned the priority of the union in consultation exercises and were wary of the potential impact of the pay negotiations with the union on the remit of consultation within the forum, e.g. limiting potentially the ability of the forum to expand the consultation scope to the issue of bonuses. Interestingly, non-union ERs in the non-union site also stressed that they were careful not to be seen in *'too close company with the union'* as this would possibly endanger the relationship of the forum with management.

6.1.5 Case study summary

As evidenced from the analysis, whilst a level of interaction existed between management and the employee-side arrangements, provision of information and conduct of consultation could be described as rather poor. For the most part, ERs were passive and allowed management to determine the course of joint meetings. Nor was the forum in a position or willing to obtain and work with information and feedback from the workforce. Finally, although the forum was formally recognized by the recognized union, the level of informal support between the two was not significant.

6.2 Fin2

6.2.1 ICE arrangements and management

Scope to operate

A budget was allocated to the forum. Subject to the prior approval of the CEO as the forum's chair, the budget covered the full-time representatives' salaries, costs of training and development, equipment, membership of professional organizations, travel, stationery and printing expenses. Further, ERs benefited from training provided by in-house lawyers, solicitors and external consultants in health and safety, employment law, managing change, disciplinary procedures and performance reviews, and balloting services. Since July 2003, responsibility for training representatives has belonged to the forum's employee chair. This enabled ERs to be trained by a variety of trainers from different sources, through which they reportedly

acquired a sense of independence. ERs also stressed the importance of developing networks with organizations where similar arrangements operated and the IPA for the purpose of advice and guidance. Their 'professional' stance was positively commented upon by the HR management, who claimed that they were in a better position to understand the organizational culture than trade unions.

Concerning time-off, part-time ERs had around four hours per week to perform their forum duties and there were reportedly no challenges regarding the allocation of time-off. At formal meetings the agenda was shaped by both management and the employee chair after consulting with the ERs. The forum meetings were jointly chaired by the CEO and the employee chairperson. Secretarial support was provided by the other full-time representatives. The management chair, the employee chair and the secretary were responsible for arranging formal meetings and providing an agreed agenda. The employee chair also had responsibility for agreeing with the CEO an annual work programme for the forum as well as any structural or procedural changes to the way in which it operated. There were no reported problems on the distribution of material before meetings. Minutes were agreed between the management and the employee-side jointly and were then distributed in the form of communiqué to the workforce.

Scope to participate

The forum was informed on a regular basis on business, operational and employment issues. ERs reported that the CEO shared with them information on all aspects of the organization's operations, including information that could be deemed as confidential. For instance, in 2004, the then majority owner of Fin2 was considering selling the business. The forum was brought in as soon as the CEO became aware of the issue and in two days a communiqué was distributed to the workforce. Information exchange also took place through informal and flexible ways, such as through ERs participating in team meetings and maintaining regular contact with the HR and communication teams.

Since the amendment of the agreement in July 2003, the forum, with the crucial support of the CEO and the development of a partnership relationship with the advice of the IPA, attempted to acquire strategic influence over individual and collective workplace issues. Issues where the forum was involved in collective consultation included: changes in shift patterns, flexible working, home computing, a new employee assistance programme, career development and departmental restructuring. The forum also functioned as Health and Safety Committee. ERs were also consulted on pay, reward and pension issues, relating to both salary and additional benefits. Involvement in discussions regarding organizational policy was also reported; issues included: mobile telephone use, the application of the working time directive, holidays, anti-bribery and flexible working.

Despite having a formal consultation process in place, ERs preferred operating in a more informal and flexible manner. The forum acted as a task-group on a range of issues at any one time and dealt directly with the departments concerned. For example, in the case of the introduction of flexible shift patterns, conversations directly with the department highlighted specific issues that would be significant when implementing the new policy. The interaction of the forum with middle management led reportedly to a greater willingness on the part of managers to work together with ERs as *'business partners'* and respect their opinions. The ERs also worked closely with the HR department as *'a matter of good practice'* and cooperated on a day-to-day basis on issues such as policy development and strategic issues. The balance between formality and informality in the consultation was attributable by both parties to the lack of established history or culture of management-employee relations.

A so-called 'option-based consultation process' was adopted and included the following stages: business objectives are identified at the level of strategy and policy development. Management identifies different options, which are shared with ERs well in advance of any meeting. Consultation starts before a decision is made: options are examined; ERs share views and offer alternatives; managers take views and options on board, responding directly or promising to provide a fuller response at a later date; ERs have a genuine opportunity to influence the outcome. Management then consults informally and identifies further options, based on the action points derived above. Then the final decision is made by management and ERs are given a reasoned justification for the final decision, including why other alternatives were rejected. Following this, consultation over communication ensures that confidentiality remains intact and that all staff receive the same information. ERs and management noted that the consultation process provided an adequate framework for employee representation. Whilst it was recognized that responsibility for decision-making lay with management, the forum's role was to challenge and question decision-making. The ERs saw themselves as *'business partners'* in consultation and stressed that in order to be able to influence decision-making it was important to use an approach similar to that of management. Management also recognized that the forum was aligned with the objectives of the organization and it had assisted in strengthening the need for workplace changes, such as in the changes on shift patterns.

Regarding the timing of consultation, earlier consultation took place overall since the amendment of the forum in 2003, especially in restructuring. For example, two major cases of restructuring took place in the IT department; one in February 2003 and one in March 2005. In the first instance, which involved 100 collective redundancies, the forum was only given 24-hours notice in advance of the public announcement of the redundancies. The consultation process was characterized as *'an absolute disaster. Management just gathered the people in the room where they were told of the*

developments’ and ERs felt that their role was essentially confined to supporting the people affected. Negative repercussions in terms of employee morale levels and the organizational culture were later observed. Prompted by this experience the forum was informed three months in advance about the possibility of 55 redundancies in the IT department in March 2005. ERs were involved in the definition and application of the selection criteria and drew plans for the redeployment of employees. Only 9 employees finally left Fin2 through the application of a voluntary redundancy scheme agreed between management and the forum. ERs felt that their early involvement increased the opportunities to ensure the transparency of the process, to challenge the business rationale through different options, e.g. redeployment, and finally to influence the outcome of management decisions.

Importantly, the forum represented individuals on a range of issues including: performance management, general support and guidance, organizational processes, disciplinary issues, sickness reviews, child-care, medical issues, and redundancy hearings. At the request of management, ERs also represented individual employees over pay determination; their role was to support direct communication and consultation between individuals and their line management rather than *‘act as a go between’*. ERs were usually present at disciplinary hearings and sickness review meetings and offered impartial and informal advice to employees and managers on individual and collective issues. In the view of management, the involvement of the forum in the proceedings on individual issues contributed to *‘rounded, more objective and informed decisions.’*

Impact on management decision-making

Management suggested that the forum was in a strong place to influence the organization. The importance of the CEO’s support was seen as critical to the capacity of the forum to integrate employee interests in management decision-making:

‘He [CEO] went for them [the ERs], he recognizes the value they add, he listens to them, he values their contribution, and so the support is there from the top. And basically, he will bring them into any very initial changes in business management, he will bring them in very early on and he will listen to them.’ (HR manager)

An impact of the forum on the substance of management decision-making was reported in a number of cases. For example, regarding proposed changes to the employee bonus scheme an agreement was reached whereby employees could choose whether to have their bonus paid in cash, child-care vouchers or into a pension fund. Further, concerning the retention bonuses (£1,000) that CEO decided to give to employees when the majority owner contemplated selling it, the forum worked with the HR and reward teams and arranged for vouchers or contributions to pensions to be

given so as to avoid tax charges. In 2004, the forum assisted in the redefinition of policies regarding the conduct of interviews and disciplinary sessions and all the forum's suggestions were implemented by management. Finally, in a matter which involved management closing down the on-line warehouse, consultation resulted in the redeployment of the employees affected. The input of the forum was acknowledged by the communications' manager:

'The benefits for having the forum are that they are involved in the projects; decision-making has become faster. The forum is independent and apolitical and represents Fin2 employees efficiently. Through the forum employees are also happier and the shareholders benefits due to lower attrition costs. Customers have happier experience, which considering the competitiveness of the financial sector is very important for Fin2.'

6.2.2 Internal ICE arrangements

Each site was required to maintain a minimum of two representatives. In the view of ERs, the internal communication links operated very well. Despite operating in geographically dispersed locations the interaction between the part-time and full-time ERs was frequent and regular. The employee chair also kept regular communication with the other ERs through weekly emails, phone and visits to the other sites. While being a full-time ER was recognized as not being very good for individual career prospects, the benefits of having full-time posts were reportedly significant for the operation of the forum. These included the full commitment of the ERs, increased flexibility, the possibility for additional research, training, relationship building and earlier consultation in management decision-making. Both full time and part time representatives had defined job profiles and had key accountabilities that were performance managed. Part-time representatives had a primary role in allocating time to meet with the employees in their constituencies, while the full-time representatives were responsible for raising general awareness about the forum at the different sites. However, a challenge that was identified was the limited involvement of the part-time ERs. Full-time ERs were involved naturally more in consultation exercises, particularly regarding strategic issues, and part-timers were concerned that in some cases they were by-passed. Increased emphasis was also given by the ERs to the importance of developing and maintaining links with other organizations where consultative forums existed. ERs believed that such activity assisted in acquiring a level of independence and autonomy from management that could be appreciated by the workforce. Substantial cohesion among ERs was also reported by both ERs and management. Whilst ERs represented different bands and locations, the regular interaction and the development of internal procedures between ERs had positive impact on the cohesiveness of the employee-side to agree on common action, define and implement projects as a body and deliver agreed opinions to management.

6.2.3 ICE arrangements and employees

Constituencies were divided according to site, and ERs retained a wide remit of activities and responsibilities in the sites. All were involved in presentations to new-starters about the forum as part of employee induction and took part in monthly 'open house' sessions. The forum's identity was also promoted by ERs' wearing brightly coloured uniforms, the use of the forum's letter-headings, communicating via the forum's intranet and adopting an immediately accessible location in Fin2's sites. The forum's desks were strategically located in the entrance of the building. ERs did not only rely on the use of modern technology, such as email, telephone, intranet, use of display boards and plasma screens at the workplace, to communicate with the workforce. More informal ways, such as monthly open-house sessions, 'desk drops', 'walk-about', and team meetings were utilized so as to maintain the liaison with their constituents and to canvass their opinion regularly. ERs also worked with the corporate communication team in a number of instances such as in assessing the results from the employee surveys and in advising senior management about how and when communications regarding restructuring should be addressed to employees. ERs were then available to employees, particularly where jobs were affected, to provide support and advice.

Evidence of the visibility of the forum to employees was provided in the employee surveys. In October 2004, the percentage of employees who understood the forum's values and role stood at 60%, and 50% knew how the forum could support them. In September 2005, the percentages had increased to 83% and 77% respectively. A high employee turnout was also reported in the forum elections. The importance of dealing with individual issues was stressed by ERs, who believed that otherwise the forum would run the risk of being seen as 'management' by employees. However, the operation of the confidentiality provisions prohibited the forum from demonstrating its involvement in individual issues to the workforce, damaged its legitimacy. Evidence that the ERs were seen in some cases as an adjunct of management when they advocated unpopular decisions was provided. For instance, in the case of changes on call arrangements in the call centre, while the issue was initially a subject for direct ICE methods the ERs got involved in the process and supported the management proposals as they were perceived as beneficial for employees. Due to the impact of the new policies on shifts and pay the forum's stance angered a number of employees. ERs recognized that in hindsight their involvement was a mistake and that it compromised the independence of the forum. Interestingly, the lesson learnt from this case for ERs was that whilst the forum should be free to represent individual concerns it should also allow management to make the final decisions.

6.2.4 ICE arrangements and trade unions

While Fin2 did not recognize any trade unions, it is useful to examine briefly the role of the forum in rebuffing union recruitment activity. Formal and informal discussions

on the issue were held with the participation of the forum in 2001 and 2002. At the end of the discussions ERs stated that *'we have no objection in principle in allowing the union to make representation to Fin2 employees'*. In the view of ERs, the question was not whether the union should be allowed to talk to employees. It was rather whether they could add any value to supporting the workforce by working with the forum. Fin2 and the union were then to continue the dialogue as Fin2 would make the final decision. The forum started at that time to transform into a more influential voice. The union did not then contact Fin2 or the forum for a number of months.

A presentation took place by the union towards the end of 2004. However, by this time the forum had undergone re-elections and the HR personnel had changed significantly. Changes in personnel had taken place in the union as well. The forum felt that the new ERs needed to review the previous statement of the forum as the original ERs were no longer there. Fin2 requested the forum's opinion on this before making any final decision. The ERs talked to their business areas and consulted the workforce. The feedback from the employees was that unions were not required in Fin2. When this conclusion was communicated, Fin2 made the final decision and informed the union that the forum would continue to be Fin2's recognized consultation body and the union's services would not be required. The change in the forum's approach to endorsing the union's calls for union representation was arguably attributed to the substantial changes that had taken place with regard to the role of the forum in Fin2, the significant support to the forum's work by the CEO and the sense of independence that the ERs had acquired as a result of their affiliation to the IPA.

6.2.5 Case study summary

There was satisfactory provision of information with active forum participation that extended to consultation on a wide range of issues. Employee-side organization was strong and sufficiently cohesive to define and implement projects as a body. It sought to consolidate the autonomy of the forum and build a sustained capacity to engage successfully in consultation with management. Regular interaction between the forum and the workforce took place but the forum rejected union attempts to gain recognition in the organization.

6.3 BS1

6.3.1 ICE arrangements and management

Scope to operate

All ERs were provided with training on the remit of the forum and the distinction between consultation and negotiation when the forum was established. Whilst useful, ERs stressed that the provision of additional training and access to experts, concerning especially the development of their role and their adequacy in dealing with complex information, could enhance further their capabilities. ERs were given time to

attend the forum meetings and were entitled to reasonable time to obtain feedback from employees within their constituency. However, they saw their role as *'tagged on to their normal duties'* and raised concerns over the possible adverse effects of limited time-off on their performance. The fact that the amount of time spent on forum work was not quantified either in the agreement or in practice caused further uncertainty among ERs, especially those representing a large number of constituents, regarding the division of time between the forum and their work.

Management was responsible for preparing the agenda and sending it to ERs. At the first meeting it was agreed to structure future meetings around a standard agenda: business performance, organizational and people issues. These were subsequently divided into further sub-sections, whose substance varied depending on the time of the year and developments in the organization. ERs could add issues and specific questions for discussion with management during the meetings. The agenda was then published on the intranet so that employees could become aware of and give feedback. The process of drafting the agenda allowed ERs to familiarize themselves with the issues and to prepare for the discussions. However, as recognized by both management and ERs, the agenda was predominantly management-led. As a result of the recent establishment of the forum, ERs felt that they were still *'finding their feet'* regarding the issues that they could bring to the forum. The lack of interaction between the ERs themselves and between them and their constituents were also identified as reasons for the absence of significant input into the agenda. Despite the top-down approach to agenda setting, ERs still saw an improvement on the number of issues brought and the discussions held between them and management over the course of the meetings.

However, cases of excluding items proposed by ERs were mentioned. For instance, despite requesting the inclusion of annual leave and flexible working issues on the agenda, these were excluded and no reasoned management response was provided. There was also limited evidence of management providing documents to ERs before the meetings. In terms of the minutes from the meetings, it was the management coordinator's duty to take notes during the meetings. These were then written up and after review by the COO and any other senior managers present at the meeting they were sent to ERs. The latter ensured that the document reflected accurately the substance of the meeting and the minutes were finally published on the intranet by the management coordinator.

Scope to participate

The forum met three times per year. The meetings normally lasted about half a day, depending on the number of topics on the agenda. A considerable amount of information was provided about the business and financial performance. The COO's starting premise was that management would share all the information with the ERs

with the exception of information that was not shared with the City and the Stock Exchange. In practice, management identified beforehand the information that should not be divulged to anybody outside the forum. In cases where management and ERs agreed on the confidential nature of an issue, the COO prepared a short note, which provided guidelines as to how ERs should respond to their constituents in case relevant issues were raised. There was general satisfaction with the practice developed and management attitude regarding the dissemination of information was regarded as considerably open.

Examples where management shared information included the organization's future, customer satisfaction reviews, new business updates and future plans, and developments in information systems projects. Information was also provided regarding organizational issues, such as commercial strategy and service delivery. In terms of employment issues, information on the employee surveys, training initiatives, legislative developments, and staff conferences was provided. In light of the significant number of new contracts ERs stressed the need for provision of greater and earlier information on the future business and employment plans. Further, in their views, information concerning restructuring, the potential for job losses and the application of the legislation regarding transfers of undertakings was provided in some but not all instances.

While the forum was supported by the HR department it was considered important that its operation should be seen as driven by senior management. Management and ERs stressed that the participation of senior management, such as the COO, the HR Director and other board-level managers in the meetings illustrated the serious management commitment to the forum, added credibility to the forum and allowed the discussion to extend to more important issues. While rejecting the notion of 'consultation with a view to reaching an agreement' and entering into consultation on issues that affected fewer than 20 employees, the COO stressed that management was interested in examining the ER proposals and in giving a reasoned response in cases where management decided to act otherwise:

'Because it is not a negotiating forum, I do not discuss things with them with a view to reaching an agreement. It is a consultation forum, saying what is happening. Now, equally they express views and thought, and actually, in a large part we can agree with these.' (COO)

Consultation took place over some issues. For instance, in the case of the employee surveys, ERs were asked to suggest ways of retaining the positive results and improving areas where employee morale was low. The forum's feedback was then fed into the lower-level departmental forums. Evidence of consultation with employees at the instigation of middle-level management was also provided. For example, in the

case of the annual employee road shows the manager responsible involved the forum in the organization of the events: ERs invited employees to join focus groups and contacted their constituents so as to find out their preferences regarding the organization of the event. The feedback received was then submitted to management, which was taken into account in the final decision. However, consultation on such issues was generally confined to management presenting proposals and ERs responding to the proposals during the same meeting.

While the issue of collective redundancies was not in the remit of the forum, ERs seemed keen to bring this issue up for discussion. For example, in a case that involved making redundant 30 posts, the forum was not involved at all in the process. Despite management resistance to enter into consultation some ERs seemed determined to promote such issues for discussion:

'I do not think we are going to give up just because they are not in the remit...I think that we should discuss issues of redundancies, maybe if there are major health and safety issues, major business continuity issues or changes in employees' working, transparency in pay scales, changes in terms and conditions. I think those are important because they do impact upon people.' (ER)

Overall, information provision rather than consultation took place. Management noted that it was 70% information provision and 30% consultation and explained that this was a result of the absence of items brought up by the employee side. The view that the forum was primarily a means for dissemination of management information to employees was shared by ERs who felt that they did not have the chance to feed in more about what was going on the ground to management. The lack of consultation was attributed by ERs to the need for it to take place at an earlier stage of decision making and for further development of trust between management and ERs that would then induce the expansion of the consultative scope. The limited number of forum meetings in conjunction with the significant amount of information provided seemed to inhibit further the development of greater dialogue between the ERs and management during the meetings. In terms of the balance of objectives an ER noted:

'While the forum is an excellent progression for the employees and the company it is very company-based. It is more about what the employer wants than what the employees want. I know why it is like this. Well we are not a trade union, whereas a trade union is all about what the employee wants and not the employer, so it is restricted to that.'

Impact on management decision-making

Both management and the ERs felt confident that on issues, such as the road shows, full consultation had taken place and suggestions regarding the substance of some of

the proposals and their implementation were taken into account by management. Regarding the impact of the forum on the process of management decision-making, the COO noted that although the forum was still evolving, there had been an intervention in the senior management decision-making process. This was evident in the Group-level board meetings where issues under discussion were considered by the COO and the BS1 HR Director as matters where the forum could get involved. However, it was also noted that due to the time-sensitive nature of some management decisions and the lack of provision for *ad hoc* forum meetings, decisions were knowingly taken without the involvement of the forum.

As suggested above, the general feeling of ERs was that the outcome was just a greater degree of communication to employees. In operational issues, ERs believed that the potential for influence on these issues was limited to specific elements of the management proposals so as to attain more efficient implementation and not on the substance of the proposals. In terms of issues related more directly to the workforce, the limited scope of the remit in conjunction with the fact that consultation on such issues predominantly took place at departmental level, where the forum did not have access at all, reduced the ability of the forum to influence the substance of such decisions. An ER commented:

'I do think the majority of the forum is really about us receiving information, it is not really about consultation. I think it is receiving information about what is going to happen, what they have decided is going to happen, as opposed to us having major influence, any particular strong influence on them...So I think we are fairly toothless as we can just report back to people about what is going on. And the main reason for this is the limited scope of the forum... So in a way, if that's what the directive is saying, that it should be a forum for influence, a forum for consultation, then I do not feel that is what it is.'

6.3.2 Internal ICE arrangements

ERs were complemented by deputies who were equally involved in the first stages of the development of the forum. Despite the right of ERs to elect a coordinator as the primary interface between the management team and ERs on matters to do with the administration of the forum, they had not done so. The importance of the pre-forum meetings was stressed and ERs noted that these allowed them to discuss developments and to present more coherent arguments in the forum meetings. However, it was regarded as better if the pre-meetings could be arranged two weeks before the forum meetings. Whilst email and phone facilities were provided for the development of procedures for information exchange, for agreeing and coordinating interests, communication between the ERs was essentially confined to the pre-forum and forum meetings.

Further, there were no informal contacts based on mutual forum membership. Plausible reasons for the absence of internal structures were the ERs' confusion and uncertainty regarding the nature of their role and the nature and frequency of forum meetings. The main reason cited for the uncertainty was the constrained remit of the forum, which did not provide them with opportunities to deal with collective issues. In line with the absence of a recognized union and low union membership in the sector there were no union members elected as ERs. Relations between the ERs were generally described as open. There were no reported differences and divisions between ERs representing different groups of employees. Nonetheless, the level of cohesion of the ERs' team must be read within the context of the absence of informal contacts, which limited the degree of cohesion which had been achieved.

6.3.3 ICE arrangements and employees

On average, the number of employees that each ER represented was 60-80; however, problems were reported concerning the lack of coverage of outsourced employees. The opportunity for employees to raise their concerns before meetings and then being informed of the outcome of the forum discussions was seen by ERs as a key factor in achieving a level of legitimacy. When the forum was established ERs embarked on presentations to the workforce that covered matters such as the remit of the forum and the methods of communication. A forum section was included in the intranet, which gave information on the forum's structure, future agenda items and agreed minutes. Employee feedback was provided via phone and email.

Whilst management at all levels were generally supportive of ERs communicating with their constituents there were concerns that employees were not aware of the forum. In most of the cases, it was only at the ERs' initiative that they actually received feedback from employees. Within this context, consultation exercises with employees such as the annual employee road shows were considered beneficial for the visibility of the forum. There was initially no provision of facilities for surgeries or meetings with employees. Weekly surgeries later took place in some sites and ERs also attended regional meetings. Both were considered useful for the dissemination of key forum messages. However, ERs felt that due to the limited remit of the forum and the operation of the confidentiality agreement they were not able to discuss with their constituents a number of issues. Instances of employee dissatisfaction with the forum when ERs declined to report such issues to the workforce were reported. The issue of misunderstanding by employees of the role of the forum was highlighted by some ERs; employees tended to perceive the forum's role as akin to that of a trade union. For instance, during forum briefings items were raised by employees on topics which were clearly not within the scope of the forum, such as terms and conditions and pensions. An ER even described the outcome of the operation of the forum as negative for employees and justified this view on the higher expectations of employees and the actually restricted remit of the forum.

6.3.4 Case study summary

Although established the forum's scope to operate and participate was significantly constrained. While the level of information provision was considerable instances of consultation were limited and activities were confined to meetings with management. The limited facilities provided for were not used by ERs to build internal capacity and cohesion. Nor was the forum in a position to engage with the workforce and to take action above and beyond what was stipulated in the ICE agreement.

6.4 BS2

6.4.1 ICE arrangements and management

Scope to operate

Training was provided to all ERs during the establishment of the forum and an additional session was held when the ICER were introduced. Concerns were raised as to the independence of the external organization providing the training and the lack of training on management conflict and negotiation. ERs also emphasized the significant challenges in combining their duties at work with the role as ERs. The limited time-off was due to work requirements and not necessarily the lack of management support for the performance of their duties. However, in some cases managers did not wish to allocate more time to ERs. This was evident in the case of ERs representing lower occupational roles, and those in operational roles or who had clients as their direct managers. An ER resigned from her post and other ERs missed several forum meetings because of work commitments.

At the initial stages, the agenda was mainly dictated by management with the ERs adopting a re-active approach. Over time, the ERs developed a more proactive stance and challenged the agenda topics. An ER described the drafting of the agenda as '*collaborative on both sides but with equal input.*' However, there was still evidence of management apprehension. For instance, it was only at the ERs' insistence that management decided to include the feedback received from the consultation with the workforce on salary review. The agenda was usually finalized a week in advance and included a number of matters for which documentation was needed, but ERs complained that they did not receive the documents in advance and felt they had insufficient time to digest the information, let alone discuss as a group and agree on an approach. In response, ERs tended to put off the issues until the next meeting so as to read the relevant documents.

There was an agreement to increase the number of regular meetings from four to six per year and, by the end of 2005, to eleven. ERs were responsible for drafting the minutes and distributing them to the forum members for approval. A communication was prepared by the ERs' team, which was then available to the employees on the intranet. Instances of management refusing to include specific topics for publication

on the intranet were reported. In the case of the salary review, for instance, management successfully objected to the publication of the strong negative employee feedback. ERs strongly criticized management's refusal and felt that this came close to censorship.

Scope to participate

Twice a year the CEO informed the forum on the current finance and business situation, future prospects and the strategic direction of BS2. While in the view of ERs the provision of information was generally satisfactory they did not receive the information beforehand and were unable to comment and pose any questions to management. Information was also regularly provided during the normal forum meetings. An expansion of information topics was reported by the ERs and it was seen as significant in terms of both indicating management's appreciation for the ERs' views and allowing them to prepare for the consultation stage. The signing of confidentiality and insider-dealing agreements facilitated the provision of more detailed information on business and financial issues and items that were considered by management as confidential were clearly defined in the forum meetings.

During its early stages the forum was more involved in *'tea and toilet'* issues. For instance, a decision to reduce the hot meal service at BS2 sites introduced before the forum was launched, was overturned thanks to the forum's efforts. Concerning the general quality of consultation, an ER remarked it was a case of *'consultation with a view to getting the forum's agreement, which is not the same as with a view to agreeing'*. ERs attempted to expand the scope of the forum and develop a fully-fledged consultative function, particularly on pay and reward issues. The initial exclusion of these issues from the scope of the forum was met with concern by ERs, who were determined to pursue the issue. Following the demonstration to management of the value of the forum in communications and in understanding employees' perceptions they were able to persuade management to include them in the discussions over the annual business cycle. Hence, the forum became involved in mid-2005 on aspects of pay and bonuses with particular emphasis on the maintenance of transparency, planning of pay and bonuses and communication of related decisions to the workforce and influence over the distribution of the reward pot was reported.

Further, the ERs played a significant role in changes regarding the so-called 'marketplace salaries', a concept introduced as a result of the different terms and conditions and benefits in BS2. Precipitated by the lack of employee awareness on the criteria utilized, ERs suggested specific means for the measurement of the values included in the marketplace salaries and insisted that management should write to every employee informing them of their actual and nominal salaries. Whilst the concept was reportedly intrinsically bound up with BS2's history of TUPE transfers, management agreed to the need for transparency and decided to inform employees on how their

marketplace salary was made up, and how they were planning on completing the salary review process. During mid-2005 ERs collated a significant amount of workforce opinion on the salary review process and its outcomes for employees. The employee feedback was received in two 'waves'. The first wave was stimulated by the communication of details regarding marketplace salaries. The second larger wave came when the actual impact of marketplace salaries and the salary review process on employees became clear. The key message from the employee feedback was that whereas the principles of marketplace salary and review process were generally well received, the management guidelines were seen by employees as setting the wrong expectations and were not always seen to have been fairly applied. ERs noted their significant dissatisfaction with the bad management communication and the lack of intention to increase actual salaries so as to reflect the market-place salary level and the increased performance.

Another example of the greater involvement of the forum was its inclusion in discussion of the so-called 'bench process', that involved employees who had recently finished working on assignments, waiting 'on the bench' until a new assignment was available. An ER described the process as *'a clock that starts ticking and is unspoken a time limit on how long you can spend being on the bench before potentially you could be made redundant.'* The forum encouraged management to be more transparent about the process. Feedback on the administration of the process, such as earlier communication to employees so that they could start searching for a new assignment, was also given by the forum and it was taken into account by management in the final decision. Finally, while initially it was stipulated that after a specific number of weeks being on the bench employees would be made redundant this was subsequently removed. While it could be suggested that this increased the insecurity of employees ERs claimed that there was no evidence that the process was used as a mechanism for making employees redundant. In the view of the ERs, management was making genuine efforts to try and retrain employees and relocate them so as to avoid redundancies. The forum was further involved in consultation on a number of issues that related to organizational issues, such as career/assignment management, performance and absence management; and to employment issues such as promotion frequency, standardization of terms and conditions on promotion, flexible working. The salience of ERs' activity to the development of the forum's role was recognized by the Managing Director (MD):

'They (ERs) are trying to push the boundaries a little bit into what I would call information and consultation into negotiation, and we are trying to keep the boundaries very much around consultation and input.' (MD)

While the expansion of the consultative remit was considered by ERs as significant, the HR Director was concerned about the move from the original terms of reference

and expressed a preference for rethinking the forum's remit. For example, their request to have access to information regarding the annual reward review was described as *'an uneasy development for management'*, since it was considered as outside of their scope. It was also suggested that ERs pursued in some cases personal agendas when raising issues. In conjunction with the low success rate of the surgeries that ERs ran from time to time, HR management claimed that the forum did not always truly represent workforce interests. However, in a significant number of cases, management and the ERs sought consultations with the workforce on employment issues. Examples included the consultations held on the 'employee of the year' scheme, the introduction of a childcare voucher, the standardization of terms and conditions and pensions. Based on employee feedback, ERs were then able to make specific suggestions to management that were all taken into account and influenced the substance of decision-making.

Whilst the involvement of the forum grew substantially on some issues, its role in restructuring and collective redundancies was often limited. In the early operation of the forum, there was no involvement whatsoever in the consultation exercises held between management and the group of elected ERs. Later it was decided that, where appropriate, an ER would be included in all major redundancy processes to *'ensure consistency of approach and that lessons would be learnt and carried forward.'* For instance, in a case of collective redundancies in late 2004, an ER was invited to participate in the discussions held between a committee consisting of three representatives selected from the affected group and management. As the details of the redundancy packages had been decided upfront there was no impact on the substance of the management decision as a result of intervention by the forum. However, the issue of communication in such instances was seen as critical by the ER since it influenced the number of enforced redundancies. In two further redundancies that were the result of outsourcing contracts, ERs *'shadowed'* the consultation exercises. Whilst consultative meetings were held reasonably early between the ad-hoc committee with the participation of an ER and management employees that came in as a result of outsourcing could not *'identify'* with the forum.

Evidence of late consultation was also provided even in the period when the forum had significantly expanded its scope and it was pointed out that consultation took place when the decision was already taken by management. ERs felt that a more proactive stance should be followed: *'We lack teeth in being able to follow some of those things through.'* In addition, instances of absence of involvement in employment issues, such as changes to maternity benefits, normal retirement age, changes in contractual locations, and HR policies were reported. Some ERs perceived that the HR approach to the forum was not always positive: *'They see the forum as irritation that we've got to do so we'll just get on with it.'* The lack of support at other management levels was also stressed. In the view of the ERs, the absence of

attendance of senior management and the apprehensive stance of middle and HR management had implications for the implementation of decisions taken within the forum.

Impact on management decision-making

While the scope of the forum expanded significantly, most ERs noted that its influence on the substance of management decision-making was still weak. The capacity of the forum to influence management decision-making was summarized by an ER:

'We've got an influence in terms of getting management to stop and rethink about the appropriateness of certain decisions. We have had quite a significant impact on the way in which they communicate things but in terms of influencing key decisions, such as do we pay a bonus this year, how much is in the pay pot, do we change the pensions' scheme, I do not think we have much influence. So great influence around the way decisions are made and the way decisions are communicated, but not on the actual decision.'

The absence of sanctions was considered as an important factor determining the effectiveness of the forum when disagreements with management existed. Instead, the dependence of the forum on the power of argument was stressed:

'When you bring something to the table, the only thing you have that you can use is the power of persuasion and argument, whereas obviously a union representative would have the ultimate sanction, to strike.' (ER)

A perception that the forum concentrated mostly on dealing with issues of interest to more senior employees and not with issues that concerned employees at lower bands, such as job security, was expressed by some ERs representing lower bands. The inability of the forum to influence the way the bonus was distributed was referred to as an example of this situation. In-depth discussions took place within the forum and an agreement was reached that the bonus should be motivational for all employees. However, the level of the bonus provided to each band remained unchanged, limiting, in the view of the ERs, the extent to which employees on lower bands would be able to benefit.

6.4.2 Internal ICE arrangements

Despite the fact that ERs were elected to represent specific bands, they tended in practice to consider issues irrespective of the band they represented. The presence of internal communication networks was evident. ERs developed informal structures and procedures for information exchange, for agreeing and coordinating interests and for dealing with issues arising during the operation of the forum. 'Away days' were

organized that allowed them to develop networking activities and a common approach to the representation of the employees' interests. A teleconference, which was chaired each time by a different ER, was also held every fortnight and allowed ERs to discuss what needed to be included in the agenda for the forum meetings and delegated issues that were brought forward by employees for resolution. ERs also attempted to divide their responsibilities and take on specialist subjects among themselves. For instance, they bracketed specific issues into categories such as 'my life after BS2', 'pensions', 'pay and reward' and 'career management'. Each ER 'owned' a subject and with the help of a deputy was responsible for dealing with the issues coming up under the category. In order to become 'sharper' in dividing the responsibilities it was agreed to introduce an annual calendar so as to prepare for the consultation exercises held regularly within the forum and get involved at an earlier stage.

While ERs came from diverse business divisions, this did not impact on the internal network; ERs also reported the absence of different interest groups. While no representative had a 'greater voice' than the others, differences in terms of motivation and willingness to get things done were noted between ERs that represented lower bands and ERs that represented senior bands. These were solely attributed to the greater flexibility in terms of time off and greater confidence that ERs representing senior bands enjoyed. While all ERs operated on the '*same wavelength*' their different backgrounds assisted in bringing different issues to the discussion table: '*you've got the diversity so you can think of all the facets of it.*' (ER). In a similar vein, all ERs emphasized that whilst some were union representatives the latter had successfully distinguished their different roles.

6.4.3 ICE arrangements and employees

The number of employees represented by each ER varied, with ERs representing on average very large constituencies consisting of 300-400 employees. In the case of outsourcing contracts the workforce that came in was represented before being banded by an ER elected from the specific business unit. Concerns were expressed that the number of ERs was not sufficient for effective representation. These concerns were also precipitated by the joint venture that was entered into between BS2 and a public service organization, where a staff representative group was already in operation. An agreement was later reached to increase the number of ERs from 10 to 12 and to include a member from the staff representative group on the BS2 forum while an ER could attend some of the meetings of the staff representative group.

In terms of infrastructure, ERs deliberately avoided the use of the corporate communications team in their contact with constituents. Due to the credibility gap with the unions and the apathy gap with the employees ERs believed that a joint communication with management would significantly undermine their independence.

The forum had a dedicated webpage in the organization's intranet, which included significant information on ERs and the nature of the forum, the election process, news related to the forum, and details on meetings. A section called 'how we are making a difference' was also included, where ERs referred to the representation of employee interests on issues such as pensions, work life balance, performance management, career management and others. 'Hot topics' that were under discussion in the forum were also outlined together with documents explaining the forum's suggestions and position with regard to specific issues.

However, the constraints in the independence of the communication infrastructure were highlighted by some ERs, who felt that there was always a potential veto power by management. ERs reported instances of late distribution of communications issued to the workforce after the forum meetings due to disagreement over the content by management. For instance, management blocked the communication of the feedback on the salary review on the basis that it would have an unnecessarily detrimental effect on the workforce. The confidentiality constraints and management's apprehension to the ERs communicating the developments in consultation were emphasized by an ER:

'Many of the subjects we talk about are at that time embargoed, what that means is we're not allowed to tell the workforce about it. So it's very difficult to explain at the time that something has been done as a result of forum consultation... We also try to get communications out, there are often delays in doing that because we have rows with the standing members about what should go out. When we get feedback from a consultation we would like to summarize that and reply to the workforce, management hate that, absolutely hate it. We are sensitive to that, we do now routinely show them what we are going to send out, we do listen to them, but we must, absolutely must, tell our workforce what they have said.'

The impact of limited time-off facilities on the ability of the forum to communicate adequately with the workforce was also stressed. Further, the lack of engagement with BS2 on the part of employees coming over as a result of TUPE transfers impacted on the quality of the representative function of the forum and its legitimacy. This was exemplified in the ERs' unsuccessful attempts to represent employee interests in consultation exercises held in redundancy situations. Moreover, whereas management had adopted a pro-active stance in terms of ERs holding face-to-face meetings with the workforce, it was only in sites where the employees were concerned with particular issues, such as job security, that the surgeries were more successful.

On average, less than 50% of employees usually participated in the forum elections. Nonetheless, the perception of ERs was that a significant number of employees felt represented in the organization. In the annual surveys employees were asked to

evaluate the following statement: 'I believe that the forum's ERs add value by representing employees' views on a wide range of company initiatives at the forum'. The latest employee responses were 3 out of 5. Evidence of employee awareness was provided in the number of employee 'hits' to the forum's webpage and in the various consultation exercises held with employees. Employee responses to the consultation exercises varied according to the issues. On average, the proportion of employee responding was around 10%. The issue that had a bigger response rate, 600 of 3,500 employees, concerned the pay review. The ER responsible for the administration of the mailbox reported that there was a considerable level of activity and email coming from employees and covering a variety of issues related mostly to employment conditions. A number of employees recognized the forum's work in their email communication with the ERs. The expansion of the involvement of the forum and its role in communicating and consulting directly with employees on more significant issues, such as the changes in the pension scheme, assisted also in raising the profile of the forum.

6.4.4 ICE arrangements and trade unions

According to management, when faced with issues that needed to be discussed with both the forum and the unions, the briefing by management to the two parties and any consultation held later took place simultaneously but under separate channels. There was no evidence of management supporting formal or informal integration between the forum and the unions. Instead, the negative stance adopted by management towards potential co-operation between the forum and the unions was emphasized by ERs, who were told that it would be inflammatory if they were to sit at the table with the unions; an ER described management approach as '*divide and conquer*.' On the management side, the HR manager also claimed that ERs that were also union representatives had on occasions leaked information to the unions.

Attempts by ERs to approach the unions and develop a level of co-ordination were made during the initial stages of the forum's operation. For instance, when initially faced with the lack of engagement of unionized employees with the consultation exercises, ERs organized a meeting with the unions and fed in information on the forum's operation. Whilst they expected that the unions would exchange information with the forum, no such development took place. This lack of mutual recognition was emphasized by both ERs and union officials. According to the union side, the limited rights enjoyed by the forum and the participation in the forum of ERs representing senior bands indicated an organizational intention to use the forum as the '*mouthpiece of management*'. The existence of a number of different collective agreements stipulating different terms and conditions and the resulting friction among the unions was also referred as a significant factor influencing the level of resource supplementation between the forum and the unions. Importantly, the involvement of the forum in pay and reward issues increased further union worries as they felt that

the communications issued by the forum on these subjects undermined their bargaining groups. The potential overlap in the issue had an impact on the forum side as well and some ERs perceived that the unions negotiated to the detriment of the company and sometimes also to the detriment of their members. In the view of both the union officials and senior management, the operation of the forum had not impacted on the nature of the relationship between management and the unions or the level of employee support enjoyed by the unions.

However, an interesting development both in terms of management approach to dealing with the unions and the forum and in terms of the interaction between the forum and the unions took place at the end of 2005 and early 2006. Management expressed their support for tripartite discussions as helping overcome the difficulty in dealing separately with the unions and the forum on the complicated issue of pensions and securing a consistent approach. In the view of ERs, management was also possibly hoping that the forum would act as *'a calming voice or a voice for reason for the unions.'* Discussions were first held towards the end of 2005. A delegation of the forum comprising three non-union ERs had regular brief meetings with the union officials before the formal meetings with management so as to discuss and agree, if possible, a common response. A good working relationship was developed as a result of the forum-union meetings and a degree of alignment of interests was secured to the extent that neither of the parties did attempt to undermine each other's position. Union officials stressed that the forum was necessarily aligned to the unions' priorities as they lacked access to pensions' experts, the right to take industrial action and to negotiate on behalf of the workforce. The alignment of the forum to the unions caused concern on the part of management, who were concerned that the forum would follow the unions.

It was not until December 2005 that the forum had the first employee feedback on management's suggestions and feedback was tabled. The feedback from both parties illustrated employee dissatisfaction with management's proposals. Following discussions, management made a revised offer in January 2006, which improved some of their previous proposals such as increasing their contributions by about 4%. However, alignment between the forum and the unions seemed to weaken from that point on, as the feedback received by the employees indicated that almost half of the workforce supported management's proposal. The disassociation of the forum from the unions was welcomed and the MD stressed the constructive comments made by the forum. The involvement of the forum in the pensions' discussion was seen by ERs as important in terms of communication with the wider workforce and in feeding back the employees' views on management. But in terms of the capacity of the forum was to influence the outcome of the discussion, an ER involved in the process held:

'We were pretty ineffective, not though any fault of ourselves or the ERs, just simple because we do not have any sanctions at our disposal in the same way that a union does to use industrial action. That in itself is the quintessential between the unions and an employee consultative body.'

While ERs welcomed the inclusion of unions in the discussion over the pensions' changes, they registered their concern towards the extension of such an approach to other issues. The conflict of interests between the representation duties of both parties was brought to attention by ERs who stressed that tripartite discussions would render the fair representation of non-union employees difficult, such as in the case of pay. Efforts to bring again the forum and the unions to the same table took place in the case of collective redundancies in mid-2006. In this case, ERs reported that they *'nearly did the consultation together'*; but the unions' stance was generally cautious. In the view of the ERs, the potential for the forum and the union to be mutually compatible still existed. The basis for such compatibility was based on the different functions and areas of involvement of the two representative mechanisms. While the unions had access to stronger forms of sanctions, such as the right to strike, the forum had a wider remit in which they could exert some influence over management decision-making.

6.4.5 Case study summary

The forum aimed to open up scope for activity and participation beyond the scope of the ICE agreement and to move on towards formalized consultative procedures. It defined tasks for itself and sought to build a sustained capacity to engage successfully in consultation with management. It sought to consolidate and forge trust with the workforce as well as creating structures for regular interaction and communication with employees. With few exceptions, the informal support provided by the unions to the forum was very low.

6.5 BS3

6.5.1 ICE arrangements and management

Scope to operate

External training that covered issues related to the meaning of consultation, differences with negotiation and means of ERs' suggestions to management was provided to all ERs. In the view of the management, *'the provision of training set the ground rules and we can certainly refer back to it if they [the ERs] start behaving in a way we don't think is appropriate.'* Despite ERs' requests training had not been provided since the amendment of the forum. While access to experts was stipulated in both agreements it was only used in the case of the big restructuring process in 2001-2002 and the drafting of the amended ICE agreement. ERs had half a day before the forum meeting and half a day after to meet together. The post-forum meetings usually

involved the employee chair and a limited number of ERs responsible for issues arising during the discussions. The meetings, which took place on a quarterly basis and were chaired by a senior manager, lasted for two days. The first day ERs had their separate meeting in the morning and they later joined the management for the full forum meeting, which continued until noon the following day.

The HR manager was predominantly responsible for organizing the meetings, suggesting topics for the agenda and ensuring that relevant speakers attended. The process usually involved sending the draft agenda to the ERs' chair and asking whether there were additional issues. Management then considered whether the issues suggested by the ERs could be discussed in the forum. There was evidence that the relationship became progressively adversarial and management retained in effect the final say over the issues included in the agenda. Questions submitted by ERs for answer and discussion at forum meetings were filtered very rigorously by management at the stage of agenda setting and several were *'disallowed'* on the grounds that they addressed local issues or issues where consultation was not required as management did not contemplate changes in those areas. ERs were also concerned that management concentrated deliberately on the provision of not *'very useful'* information so as to avoid discussing issues that were of more direct interest to employees. The employee chair noted that it was perhaps easier for management to manage the forum through having meetings that did not always concentrate on important issues rather than simply declaring that they were not prepared to enter into consultation. The management chair explained:

'The ERs would like an awful lot more on the agenda than we put on but at the end of the day management actually decides the agenda but we do consult over it...The consultative forum is for us to consult with employees, it's not for us to explain ourselves to employees, you know, whatever they want us to explain to them.'

ERs requested that detailed information on the nature of the issues should be provided at least a week before the meetings so as to familiarize themselves with the issues and to reduce the time allocated for presentations saving thus time for consultation. Management rejected both requests on the basis, first, that the agenda was intended to list just the items and timing and not to provide a summary of each topic and, second, that the presentations were necessary for the discussions held afterwards.

Regarding the drafting of the minutes the process usually involved the ERs writing them and sending them to the HR manager for approval and amendments, where necessary. ERs emphasized that the process was positive as they were able to frame the documents according to employees' interests. However, substantial disagreements were reported in a number of cases over the content of the forum reports to be

communicated to employees. For instance, in August 2005 management objected to the publication of both the minutes from the May meeting, associated sub-groups reports and a report on redeployment and regrading. Following iterations in which ERs attempted to edit the documents so as to secure management's agreement while *'still maintaining a faithful report of what was discussed in the meeting'*, ERs concluded that the process did not seem to reach an outcome as there was no agreement over the wording of the communication. As a result, the ERs prefixed the documents to emphasize that these were reports from ERs alone, and not agreed with management, and published them on the forum website. The dispute escalated with management immediately closing down the website. Nearly a week later, the website finally re-appeared in the intranet but all the reports were removed and more importantly the authority for the website became the HR manager's responsibility and the ERs had no more publishing rights. The HR manager explained that the ERs' report did not give an accurate representation of the forum discussions. The dispute stalled progress on the forum for several months. Following a meeting, management decided to restore the ERs' ability to publish on the website but with an agreement that management reserved the right to insert statements in the minutes of disagreement. However, management reportedly continued to prevent the UK forum publishing documents without their approval during 2006 and both sides emphasized the negative impact of those disputes on the level of trust between the forum and management.

Scope to participate

A mixture of information and consultation took place within the forum, which, according to management, allowed the representatives to understand the business context in order to be able to hold consultation on other issues. Information on company performance was provided in every meeting by senior management invited for this purpose. The issue of long term strategic planning was also addressed where, while consultation did not take place, management was reportedly keen on receiving the ERs views regarding the possible directions forward and the way these could work in practice. Information was also provided in case of statutory consultation in cases of collective redundancies and transfers of undertakings. Requests were made by ERs to focus on matters where the company wanted to consult employees through the forum, and matters which ERs wanted to raise on behalf of employees and that management should identify prior to meetings specific decisions that were under consideration and any alternative options being considered so as to enhance the scope for consultation with the forum.

The confidentiality provisions operated in most cases on a time-limited basis: ERs were required to keep certain issues confidential until a related announcement was made by the organization. While management noted that they were nervous over maintaining information confidential there was never an issue of breach of

confidentiality provisions by ERs. An exception to the provision of information was made in the case of the amount of money put aside for the pay review, where management refused to disclose the company pay budget to ERs unless the latter agreed to keep it confidential from employees. In the view of both the unions and ERs management's insistence on keeping information confidential was attributed to their concern that the unions could use information from the forum to support their campaign on pay and benefits issues.

According to management, issues for consultation included: development and training activities, pay review process, potential changes to the appraisal system, and employment policies. Issues where both union and non-union ERs were active included: pay and benefits, offshoring, redeployment, recruitment and allocation of work within the UK, car parking, health and safety and collective redundancies. The forum operated intentionally within a formal structure as management believed that the forum should be confined to a strategic level and informal methods of engagement should remain management's responsibilities. Instead, any interaction between management and the forum was managed by the HR department, who were also responsible for arranging management participation in forum meetings. While local/regional forums also operated there was no formal link with the forum; only informal advice and guidance was possible in limited cases. Specific sub-groups were set up within the forum so as to deal with issues such as health and safety, pay and benefits, retirement age and communication.²⁴⁹ According to management, this allowed work at a more focused level, which was then taken for further discussion to the UK forum. From ERs' perspective, the sub-groups assisted the forum in developing effective consultation instead of just being given a detailed presentation by management and ERs expressing their instant reaction within the meetings.

However, evidence of lack of substantial management commitment over items discussed within the sub-groups was reported. For instance, following the amendment of the forum, the 'Reward Framework Discussion Group' was recommenced. The group, which was made up of two union representatives, two ERs and a management representative, held discussions on pay and benefits matters. However, management reportedly subsequently stopped involving the forum on certain processes regarding pay and benefits issues. Moreover, the group met very occasionally and as there was no agreement over the minutes it was effectively prevented from having an input into management decision-making. A general change of management approach to employee relations that constrained, in turn, the forum's operation since mid-2003 was stressed by ERs. An ER commented:

²⁴⁹ The sub-group on communication looks more at coordinating the means of communication of the forum with employees and as such did not deal with substantial issues that come under discussion within the forum.

'Since the company made the shift to stifle the forum and censor it a few years ago, the level of management involvement has just gone down and down. There used to be more senior management involvement. Now, sometimes you can have a whole meeting that is just one HR person after another. But there is no real engagement from the company in terms of senior management at the moment, I think it's more damage limitation.'

Especially since the amendment of the agreement in 2005, management concentrated on organizational issues that revolved more around business strategy and less on employment issues. While employee-side organization was mentioned as a means to develop a momentum for the forum ERs noted that management secrecy and constraints effectively constrained the ERs' work and led to frustration of ERs unable to represent adequately employee interests. In conjunction with the limitation of consultation only within the forum meetings and the small number of meetings the scope provided for effective employee participation was significantly reduced.

An example of the different management approaches was provided in the case of consultation held in restructuring instances. In the 2001-2002 redundancies the forum played a significant role in keeping employees informed, consulted and influencing management decision-making. Based on the forum's and unions' proposals significant improvements were made with regard to the redundancy packages, selection criteria and appeal processes. Out of around 1500 posts that originally were going to be made redundant, 700 posts actually were. Later, evidence of managerial intention to limit the extent of consultation was observed. While the management practice had been to engage in 90-day consultation with employees, irrespective of the number of employees affected, management subsequently refused to apply the same period in the case of employees not covered by the Security of Employment Agreement concluded with the unions, and excluded simultaneously the forum from the consultative meetings. This finally culminated in the formal exclusion of the forum from consultation in restructuring cases that affected specific parts of the organization. The employee chair held the view that consultation with *ad hoc* representatives enabled management to deal with less experienced representatives. In terms of consultation with a view to reaching an agreement, ERs noted that management were keen to emphasize their ultimate right to manage:

'The HR people get obsessed with the management's right to manage. So they get absolutely wound up about the difference between co-determination or negotiation, consultation and information...Every time you tried to discuss anything, HR will say, this is not co-determination. What I am trying to illustrate here is the mindset, they are very protective of their right to manage. I think partly because of the British management tradition and partly because our industry is

dominated by very anti-union, American companies and that sets the tone for how employers behave across the whole industry.'

Impact on management decision-making

Evidence on impact on the process of management decision-making was mentioned by the HR manager. According to management, the operation of the forum forced management to plan when and how employee involvement should be dealt with. While the ICER made a difference in terms of awareness of the need to inform and consult, the culture of the organization did not significantly change, according to one of the HR managers interviewed, who stressed that only at the instigation of HR management, was the forum consulted.

In terms of impact on the substance of management decisions, the employee chair noted the presence of influence but not often on matters of importance. Impact on the substance of decision making was mentioned in the case of a small increase, i.e. from 4% to 5%, in the bonus given to employees in 2005. Management representatives stressed that the ERs put a good case forward regarding the low pay reviews and the reasons for the increase and their input was finally taken into account by the CEO. Impact was also reported in the case of people development, where the training plans that were introduced so as to develop personal employee growth had taken note of the forum's comments about improved management training. In the case of annual leave, while an ERs' request in October 2005 to allow employees to carry over a number of annual leave days was initially rejected, management decided in 2007 to re-assess the situation and to relax the policy so as to give more flexibility. Overall, the existence of significant limitations on the forum's scope was highlighted by ERs. In the view of the employee chair, its constrained impact was attributed to the greater control attained by the HR department over its operation, the HR department's adversarial approach to ERs, and the exclusion of the forum – as stipulated in the 2005 agreement – from issues affecting specific parts of the organization.

6.5.2 Internal ICE arrangements

A select committee was established to allow ERs to introduce a '*notion of democracy*' as it allowed the separation of the employee-side from the joint management/employee structure of the forum. In practice, the operation of the committee assisted in the development of a common understanding among ERs on the issues dealt with by the forum and in taking up collective action in cases where management attempted to constrain the forum's operation. ERs suggested holding a select committee meeting one month before each forum meeting and invited the management chair to attend some of the time so as to identify the issues likely to arise and appropriate speakers to be available. The suggestion was rejected by the management chair on the basis of time constraints for the ERs and of seeing no additional benefit for the group meeting separately from the other ERs. The

organization of pre- and post-forum meetings allowed ERs to develop networks and build their capacity as an integrated group. Informal communicating between the ERs varied depending on the issues within the forum and peaked before and after meetings. ERs frequently used phone conferences and email correspondence; the time needed for such communication averaged one-two hours. Further, ERs had the opportunity to discuss their approach to certain issues during the sub-group meetings that were held between full forum meetings.

A significant number of ERs were either union representatives/members. Management perceived a level of friction in the employee-side that was attributed to the active stance of certain union representatives. Such ERs highlighted that considerable differences existed between unionized and non-unionized ERs regarding their response to management restraints and pressures. However, most ERs insisted that despite the significant differences between union and non-union ERs there was never a division between them as to the handling of issues. In comparing the situation with regard to the operation of the EWC in BS3 where sectional interests could reportedly create problems among the ERs, an ER who participated in both forums, i.e. EWC and UK, noted that these kind of issues did not have a bearing in the UK forum as ERs had most of the times a common understanding of the issues in question.

6.5.3 ICE arrangements and employees

ERs were given time and resources to approach employees through face-to-face meetings. So-called 'Meet the Representatives' meetings took place on a periodic basis but employee attendance was not significant. This was attributed to the absence of issues of direct relevance to employees from the remit of the forum, such as restructuring cases affecting specific parts of the organization, and the lack of consultation exercises with employees. Still, the meetings with employees were considered useful for raising the profile of the forum and giving the opportunity to employees to bring up issues. Whilst some of the issues were already on the employee-side agenda additional ones were raised, such as the issue of parking on worksites, health and safety, work-life balance, stress at work and mobile working. Based on an employee 'pulse survey', which was carried out in 2007, the issues taken up by ERs in the discussions with management were in line with employee interests. However, ERs were concerned about the finding that their ability to communicate with their constituents was reported as inadequate. Furthermore, despite the fact that BS3 had been awarded the IIP accreditation evidence from the employee surveys illustrated that employees were aware of the forum's operation but the level of greater interest in the forum was limited.

A 'Communication and Publicity Subgroup' was set up within the forum to maximize two-way communication between the forum and the workforce. The sub-group,

which included company representatives, met fairly regularly but at the time of the research it had yet to meet formally with management. Among their activities, the members of the group introduced a standard format for the forum's communications so as to separate them from other centralized email communications and agreed to introduce distribution lists so that each ER could communicate with the respective constituents. However, ERs reported that management prohibited them from using the facilities and instead requested that all communications intended for the workforce should be sent to the HR team, who would then be responsible for distributing them to employees. The case was presented as matter of 'responsible use of the communications means' but in the view of ERs the actual reason was the persistence of management to maintain certain issues confidential. In a similar vein, while an intranet page was provided where forum documents could be accessed by the employees, ERs' ability to communicate with employees was limited as a result of HR controlling the content of the website.

While in some cases ERs had consulted their constituents on specific management proposals, such as the restructuring case in 2001-2002, their ability to communicate and provide feedback to the workforce on developments in the discussions since the amendment of the agreement was limited due to management constraints put in place. In comparing the situation with that of union recognition, where representatives are able to take issues back to the members who then decide on the course of action, an ER held that the lack of a mechanism to consult the workforce hindered its accountability to employees and the extent to which it could represent accurately the interests of employees and deliver.

6.5.4 ICE arrangements and trade unions

HR managers suggested that management support for tripartite discussions between management, the forum and the unions depended on the nature of the issues and the circumstances. If they believed that the participation of the unions in the discussions with the forum would lead to the overshadowing of ERs and overall employee interests separate consultations with the forum and the unions would be held. Management was also concerned that tripartite discussions would change the nature of the discussions, i.e. from consultation to negotiation, and blur the distinction in the role of ERs that were also union representatives were. However, certain benefits from having union representatives in the forum were recognized, including their ability to contribute more and bring subjects for discussion that other ERs would not perhaps bring. This was facilitated by the better training, greater time and better resources that union representatives had at their disposal. Moreover, greater efficiency and a better alignment of interests were possible:

'If we can reach an agreement with them [the unions], then because they are more vocal they tend to say a lot more than the other people in the forum and then they can bring everybody else with them.' (HR manager)

The biggest union occupied a key position in the forum, providing training, advice and support for union ERs. The union officers expressed their wish to use the forum to *'increase workplace democracy'*. However, they were keen to emphasize that the role of unions, offering independent organization and campaigning, was crucial. Within this context, consultative forums were not seen as substitute for trade union organization; instead, *'employee interests would be best protected if union and consultative forums worked together in close co-operation'* (union representative). Acting as organizations outside the corporate sphere both unions sought to exert influence over representational issues via the forum. The fact that the unions did not have specified seats in the forum enabled them to use it as a way of attaining a greater understanding of developments across the organization and supporting union campaigns and raising their profile during forum elections. Union representatives who were also ERs were also able to use the resources provided by management to establish extensive informal contacts and co-ordination both within the same union and with the other unions. Despite the limitations imposed on the forum by the amended agreement in 2005 unions were reportedly still able to use it for networking purposes.

On the forum side, there was evidence of a desire to work with the unions to ensure better representation of employee interests. In practice, this was exemplified in the consultation exercises regarding the 2001-2002 restructuring programme. Through regular meetings that were held between the forum and union representatives, representatives from both sides were able to mobilize an exchange of information, co-ordinate their actions to a significant extent and lend each other support. The pursuit of common policies played a major role in developing specific proposals for handling the restructuring exercises and opened up space for dialogue with management that mitigated to a degree the extent of the negative repercussions of the restructuring for the workforce. While the forum was not involved in endorsing pay claims submitted by a union, the employee chair emphasized that the forum did not cut across the union's activity and signaled that it would not be successful for management to *'play us off against each other.'* However, concerns that the forum itself was in considerable danger of being perceived by management as controlled or dominated by the unions were expressed. In the view of the employee chair:

'The close relationship developed between the forum and the unions have made things difficult in a way because the company appears now suspicious that the union tries to use the forum for its purposes and has, in turn, become much less-

cooperative in some ways than it might have been with a body that it could see as an alternative to the unions.'

6.5.5 Case study summary

Whilst the forum was active, there was limited participation above and beyond information; management policy became progressively minimalist and constrained the forum's scope to operate and participate. However, the forum saw itself as a forum for the mutual exchange of information and provision of support between ERs. It acted as an information hub with access to communication channels that allowed it to forward and exchange information between meetings. Despite management constraints it managed to maintain contact with the workforce, albeit on an infrequent basis. Finally, significant informal support was offered by the unions.

6.6 Conclusion

The aim of this chapter was to analyze the dynamic interplay of the four different 'fields of interaction' (Lecher *et al.*, 1999, 2001): interaction between the (employee side) ICE arrangements and management; interaction among the ERs; interaction between the ICE arrangements and employees; and interaction between the ICE arrangements and trade unions, as influenced by the implementation of the ICER at organizational level. Moving beyond an assessment of the formal text of the ICE agreements, the study sought to present the evolution of the ICE structures in each of the case study in terms of their role and relationship with the main actors, i.e. management, employees and trade unions.

As evident from the analysis, significant variation existed concerning the four levels of interaction of the ICE arrangements. Concerning interaction with management, this ranged from forum activities being confined to meetings with management, i.e. Fin1, BS1, to forums that worked towards extending the range of consultation and opening up channels of interaction with management, i.e. Fin2 and BS2. On the issue of employee-side organization, again the level of development of internal capacity and cohesion was different in each case study. Further, constrained by the ICE agreements, interaction with the workforce varied from regular and frequent interaction, BS2, to almost absent, Fin1. Finally, the level of informal support provided by unions to the ICE arrangements varied from being generally limited, Fin1 and BS2, to active mutual recognition in BS3. Based on this in-depth presentation of the trajectory in each of the arrangements, the next chapter focuses on an assessment of the findings from the operation of the ICE arrangements and provides an evaluation of the extent to which the 'nominal rights' stipulated under the ICE agreements developed into 'effective rights' for the purpose of integrating employee interests in the organizations.

Chapter 7. Evaluation of the operation of the ICE arrangements

The aim of this chapter is to assess the nature and extent of the capability for voice of the ICE arrangements and to account for the variation in the capability for voice observed between the ICE arrangements under study. Informed by the theoretical framework of the study, the analysis seeks ultimately to assess the capacity of the ICE arrangements to promote discursive procedures between the main parties involved in the processes with the aim of advancing capabilities for voice at organizational level. Before proceeding to such an assessment it is important to emphasize here two issues: firstly, the cases studies cannot be seen as representative of the ICE arrangements operating in UK-based organizations. Apart from the fact that the number of the case studies is small, based on their approach to the ICER the organizations under study constituted rather ‘early movers’ (Beaumont and Hunter, 2003) to the introduction of the legislation, and as such their organizational approach to the implementation of the ICER may not match the approach in cases, where, for example, ICE arrangements have been introduced either through the application of the ICER provisions concerning ‘negotiated agreements’ or standard provisions. Secondly, due to the recent introduction of the arrangements in most cases only an evaluation of the capability for voice of these arrangements during their early stages of their operation can be made. Nevertheless, this evaluation is still of substantial interest as the early operation of the arrangements can be significant in shaping the future path of their development.

Based on the analysis of the main findings from the four fields of interaction as illustrated in chapter seven, the present chapter probes first whether different case studies appear to share some similarities and deserve to be considered as instances of the same ‘type’ of general case. Such an observation assists in analyzing whether the arrayed case studies reflect subgroups or categories of general cases – raising the possibility of a typology of individual cases that can be insightful. The typology used here is based on those suggested by Marginson *et al.* (1998) and Lecher *et al.* (2001) for the evaluation of EWCs’ practices and development of a ‘capacity to act’ (Lecher *et al.*, 2001). Findings on the extent of the capability for voice in each of the ICE arrangements are synthesized in the next section, which accounts for the variation in the extent of the capability for voice observed among the five cases in terms of the influence of the external context, i.e. the ICER, and agency factors. Based on this elaboration, it becomes then possible to evaluate the extent to which the ‘nominal rights’ stipulated under the ICE agreements become ‘effective rights’ for the development of the capability for voice.

7.1. Analysis of the ICE arrangements' practice and dynamics for development of capabilities for employee voice

In light of the analytical framework, the objective of the analysis was to assess the extent to which ICE arrangements had the capacity to assist learning and evolution regarding social dialogue procedures and to advance the capability for voice. The capability for voice includes the following elements: capability of the representatives to form a view on management decisions, capability to express these views, and finally capability to have an impact on management decisions. As briefly outlined in chapter six, the study found considerable variation in the extent to which the ICE arrangements developed such capabilities. In more detail, variations between the organizations in terms of the four fields of interaction were reflected in the overall assessment of the character of each ICE forum.

In order to evaluate the capability for voice of the arrangements under study, a typology of such arrangements is here suggested (table 7.1). In table 7.2 the study categorizes each ICE forum as 'symbolic' or 'active' (Marginson *et al.*, 1998) and, for the active ICE forums, as 'service', 'project-oriented' or 'participative' based on the more detailed classification suggested by Lecher *et al.* (2001) in the case of EWCs.²⁵⁰ In two cases, Fin1 and BS1, where management's policy towards the ICE was minimalist, employee-side cohesion was low, substantial interaction with the employees was nearly absent and there was no evidence of integration with the unions, where existent, the ICE forums were essentially 'symbolic'. In the other three cases, Fin2, BS2 and BS3, the ICE forums were 'active' and fell into the categories of 'service' or 'project-oriented' ICE forums by virtue of medium or strong employee-side cohesion, pro-active management policy, strong links with the workforce and the unions. The next section presents in detail the rationales for the different classification of the case studies and accounts for the variation in the capability for voice observed between the ICE arrangements under study.

²⁵⁰ The categories by Lecher *et al.* (2001: 33) represent stages in the development 'from a symbolic to a participative EWC'. However, as the authors also note, 'this progression is not inevitable – in two respects. Firstly, a EWC in any category can remain in that category; and secondly, EWCs are not immune from the possibility of regression ... nor does every EWC has to pass through each stage; for example, an EWC can become participative without first being project-oriented.' Nonetheless, it has to be emphasized that in practice the arrangements may often be hybrid which cannot be unambiguously allocated to any of the categories (Lecher *et al.*, 2001: 54). The same considerations may apply in the case of ICE arrangements.

Table 7.1 Typology of ICE arrangements²⁵¹

Types	ICE arrangements and management	ICE arrangements internally	ICE arrangements and employees	ICE arrangements and trade unions
The symbolic ICE arrangements	Limited information provision – passive ICE forum that allows management to determine the course of meetings	Relative absence of communication structures and procedures Low level of cohesion among different ERs’ interest groups	Absence of communication structures and procedures for interaction with employees Low level of awareness of the forum by the workforce and complete absence of direct consultation	At best formal recognition
The service-oriented ICE arrangements	Adequate information provision – with active ICE forum, but limited consultation instances	‘Organic’ structures and procedures for internal communication that ensure information exchange	Moderate communication structures and procedures for interaction with employees	Integration of trade unions possible but not necessary
The project-oriented ICE arrangements	Satisfactory information provision – with active ICE forum, participation and adequate consultation	Sufficiently cohesive to ensure flow of information between the ERs Systematic and strategically developed internal structures, procedures and activities which guarantee capacity	Moderate level of awareness and limited instances of direct consultation between the forum and the workforce Satisfactory communication structures and procedures for interaction with employees	Integration of trade unions possible but not necessary
The participative ICE arrangements	Satisfactory information provision, scope for participation in the form of formalized consultations/agreements and/or bilateral projects	Sufficiently cohesive to define and implement projects as a body Distinct internal structures, procedures and activities that guarantee capacity Sufficiently cohesive to deliver opinions as a body to management, be consulted and even negotiate	Considerable awareness of the forum by the workforce and increased opportunities for direct consultation/feedback from employees Substantive capacity to communicate with employees High level of awareness of the forum by the workforce and significant scope for direct consultation/feedback from employees	Integration of trade unions necessary

²⁵¹ Adapted from Lecher *et al.*, 2001: 54-58.

Table 7.2 Variations in the operation of the ICE arrangements' case studies

Name	Type of forum	Management policy and interaction	Employee side organization	Interaction with employees	Relationship with unions
Fin1	Symbolic	Minimalist policy; medium interaction	Minimal, infrequent contact Low level of cohesion	Low, almost absent contact Low level of awareness and no consultation with employees	Informal recognition, medium informal support
Fin2	Active (project-oriented)	Minimalist ⇒pro-active policy; regular interaction	Strong, periodic contact Strong cohesion	Medium, periodic contact Considerable level of awareness and some instances of employee consultation	Rejection of unions
BS1	Symbolic	Minimalist policy; limited interaction	Minimal, little contact	Low, almost absent contact Low level of awareness and no consultation with employees	Absence of unions
BS2	Active (project-oriented)	Minimalist ⇒pro-active policy; regular interaction	Strong, periodic contact	Regular, frequent contact Considerable level of awareness and increased instances of employee consultation	Apprehension, very limited informal support
BS3	Active (service-oriented)	Pro-active ⇒minimalist; regular interaction	Strong, periodic contact	Medium, infrequent contact Considerable level of awareness and limited instances of employee consultation	Informal recognition, significant informal support

7.2 ICE arrangements and management: from acceptance to influence?

The focus here was on the dynamic of social dialogue, as developed and formalized between management and the employee-side within the ICE procedures. This was manifested in the provision of resources, the drafting of the agenda and the minutes from the meetings, the distribution of documents before the meetings and the development of information and consultation within the forums. Issues related to structural conditions, mainly the institutional design of the ICER, constituted factors shaping the level of interaction between the two actors and were also points for analysis.

In order for ERs to have the chance to get involved in a learning process of participation and of developing capabilities emphasis must be placed upon advocacy, adequate training, independence, resources and expertise (Terry, 2003). A first issue to consider here is the selection of ERs. In line with the ICE agreements, ERs were elected in practice through secret ballots, administered either by external organizations or internally. Under either route, few problems were reported regarding the transparency and fairness of the procedures and there were limited instances of management promoting specific individuals to stand for the elections and indeed of management appointing ERs directly. The issue of resources was another area of limited reported friction between the ERs and management; ERs were generally satisfied with the provision of managerial support to the performance of their duties, such as coverage of expenses. However, a level of dissatisfaction was reported concerning the absence of access to external experts, such as at BS2 and BS3, and the provision of training. Instances of greater concern were reported in the case of time-off facilities and greater challenges were encountered by ERs representing lower band constituencies. Despite the provision of facilities, resources and time-off for the ERs to perform their duties, concerns about the autonomy of the ICE arrangements were expressed as they were reliant on management's assistance and consent for their rights and power.

While the issues of training and time-off facilities constituted issues of concern without culminating in instances of disagreement between management and the employee side, considerable friction was evident regarding the drafting of the agenda and the minutes from the meetings and the distribution of documents before the forum meetings, limiting the extent to which ERs were likely to collect, process and react to new information so as to prepare for the conduct of consultation. As Hall *et al.* (2003: 88) have argued, one key test of the nature of interaction between management and the employee side, e.g. whether it is open and ongoing and whether it is constructive or adversarial, is the degree of 'jointness' in terms of the control of the ICE meeting and activities. Whilst at Fin2 and BS2 the forums' agendas were very much jointly determined and there was frequent and ongoing contact between the key management

personnel and the core of the employee side, in Fin1 and BS1 the agenda was shaped largely by management. At BS3 since the amendment of the agreement a series of consultation issues were put forward by ERs but the 'national' dimension of the management decisions in question tended to be contested. Friction also arose regarding the drafting of the minutes from the meetings. Importantly, the absence of sanctions was particularly emphasized by almost all the employee-side interviewees. Hence, the inability to translate social and labour rights into enforceable rights in case of disagreement within the context of PEAs limited significantly the possibility of them being used as 'instruments of change' (Hepple, 2002: 255).

The frequency of the meetings constitutes a further factor differentiating the extent to which ERs were given the chance to express employee opinions and thoughts and make them count in the course of organizational decision-making in line with a capability-based approach. The more regular and frequent the meetings the greater were the opportunities for the development of social dialogue procedures between the two sides. The most infrequent meetings were in Fin1 where formal ICE meetings took place twice a year; the forums at BS1 and BS3 met three times per year and the Fin2 forum met bi-monthly. The frequency of meetings in BS2 increased from six meetings per year to monthly ones, reflecting a process of learning. Information provision was considered in most cases satisfactory, with exceptions however being reported in the case of employment issues and most notably restructuring and reorganization plans. This finding from the case studies is in line with the CIA survey results concerning information topics (see section 4.2.2) Whilst there was limited evocation of confidentiality provisions and agreements by management in order to justify potential limitations in the provision of information, other justifications were brought up in order to restrict information on such issues. The business context where the organizations operated, both in the finance and the business services cases, acted in some instances as a constraint on the provision of information, especially regarding restructuring plans which were considered by management as impossible to divulge because of the inability to predict such instances in light of the turbulence in the markets, Fin1, or impractical in cases where the forums did not meet frequently, BS1 and BS3. Significantly, only the agreement in BS3 did stipulate the right of the ERs to apply to the CAC for the reasonableness of the imposition of confidentiality requirements. However, in none of the other organizations were there concerns regarding the lack of recourse to statutory mechanisms for the resolution of disputes regarding confidential information.

Reflecting the ambiguity in the ICER and in the resulting ICE agreements, the meaning of consultation was a matter of different interpretations between management and the employee side (see table 7.3 for a synopsis of issues, processes and outcomes from consultation exercises). Management used the term 'consultation' to describe cases that ranged from serious efforts to address employee interests in

management decision-making to instances, such as Fin2 and BS2, where the ERs acted in essence as 'focus groups' for the collection of feedback from employees, such as Fin1 and BS1. Evidence of absence of management response to ERs' suggestions and proposals was further apparent at BS3. In line with the definition of consultation, as stipulated in the ICER provisions on PEAs and those ICE agreements that excluded the notion of 'with a view to reaching an agreement', management reiterated in all the cases the lack of obligation on their part to seek to reach an agreement with the ERs. In light of the ambiguous understanding of the notion of 'consultation', ERs were in cases confused regarding their input and the extent to which they could get involved. The confusion was particularly evident among non-union ERs in newly established forums, such as Fin1 and BS1, constraining thus the potential of the arrangements to become an instrument for the development of social dialogue between management and employees concerning the organization and for the achievement of social rights.

Within the context of consultation, Beaumont and Hunter (2003, 2005) have suggested that the process of consultation is important both as an end in itself and as a shaper of outcomes. One of the justifications for 'works council' type structures is the greater potential for cooperative deliberation between employer and ERs as a counterpoint to the distributive conflicts mediated by collective bargaining (Bogg, 2006: 14). Whilst information provision was the predominant function of the forum in some cases evidence that the ICE arrangements acted as procedural structures that allowed the development of mediation between management orientations and employee interests was provided. Such findings were particularly present in Fin2 and BS2. In the first stages of the operation of the arrangements in Fin2 and BS2 the process of social dialogue was marked by attempts for recognition of the employee-side actors and the need to broaden the scope of the arrangements including, for instance, earlier involvement of the forum, in Fin2, and expansion of consultation topics to pay and reward issues, in BS2. As episodes of interaction multiplied the parties realized the potential for progressing towards a model of social dialogue that relied on the mutual recognition of the social actors at the organizational level. Hence, two ICE arrangements displayed essential elements of a more cooperative phase that in turn enhanced the capabilities for employee voice: recognition of collective actors, realization of the advantages of social dialogue, and the introduction of more detailed rules governing the consultation processes. From a learning point of view, these ICE arrangements evolved from a stage of uncertainty and even apprehension to a more co-operative stage with the support of senior management, that was the CEO in the case of Fin2 and the MD in the case of BS2, which enhanced the development of a learning process of participation and of integrating employee interests in corporate decision-making procedures.

In contrast, the process of consultation in Fin1, BS1 and BS3 remained limited and

tightly controlled by management. Management in each case was anxious to limit the role of the forum and to retain managerial control of the process. For instance, in Fin1 the substantial capture by management of the operation of the forum constrained the extent to which the ICE forum was recognized as a collective actor and party to social dialogue procedures in the organization. At BS1, management's approach to the ICE forum was minimalist, aimed at doing the least it regarded as necessary in terms of information provision to fulfill its obligations. This led to some complaints from the employee side regarding the lack of information and consultation about restructuring plans that were treated under the agreement as items outside the remit of the forum. While the ICE agreement in BS3 defined different stages of the consultation process management abstained regularly from responding to ERs' suggestions by providing commentary behind any subsequent decisions. Evidence of tokenism – going through the motions and recording responses, engaging in dialogue but at a stage when decisions were effectively taken and confining agenda to trivial items (Beaumont and Hunter, 2007) – was thus present, which hindered in turn the fostering of capabilities for voice.

The extent to which the arrangements broadened the scope of consultation was also contingent on management considerations on the organizational situation. In Fin2 and BS2 the decisions by management to extend the issues of consultation took place when a trade union was actively campaigning in Fin2 and when the rather militant unions in BS2 were interested in extending their influence in the organization. In contrast, where attempts by ERs to widen the remit of the forum were in the main unsuccessful, in BS1 and BS3, the situation was different. In BS3, while two unions were recognized for specific parts of the organization, management's refusal to grant further scope of action to the forum was arguably prompted by the significant level of control of the forum by one of the unions.

However, a tendency for management to be less forthcoming with information and consultation and to revert to managerial unilateralism, leading to impotent frustration on the part of ERs and pointing thus to the phenomenon of 'consultation for the good times' (Terry, 1999: 27) was evident in all the cases, albeit on particular issues. This was more evident on issues that involved pay and reward, in BS2 and more so BS3, and restructuring, in Fin1; in other words on issues where the implications for the workforce could be unpalatable (Terry, 1999). Regarding pay and rewards out of the five agreements only two, i.e. Fin1 and BS1, excluded such issues from the remit of the forums. In BS2, while management clarified in the early stages of the process that these were outside of the remit of the forum there was considerable evidence that ERs saw the role of the forum as including consultation with management on pay issues. The forums in Fin2 and BS3 were also involved in pay and reward issues however to a lesser extent and with different impact. Whilst the development of consultation on such issues was considered as positive by the ERs, there was evidence of management

being eager to limit the development of the forums' role. This finding generally accords with the CIA survey findings on the incidence of consultation on pay issues (see section 4.2.2).

Concerning restructuring, the organizations studied here represent examples of the many financial and service sector organizations undergoing a rapid and near-continuous restructuring characterized by the re-engineering of processes and their relocation to low-cost destinations in the context of fierce competitive and shareholder pressures. There were several cases where the forums were formally excluded from consultation exercises in restructuring cases as a result of 'damage limitation' provisions (Marginson *et al.*, 1998)²⁵² included in the agreements establishing or amending the ICE arrangements, such as in BS1, BS2 and BS3. Management justified the formal exclusion on the basis that that ad-hoc committees would be more suitable for addressing the interests of the employees affected from restructuring. However, there were also cases where, whilst under the scope of the agreements ERs had the right to be informed and consulted, management chose to bypass them and consulted solely with ad hoc committees, such as in BS1, or avoided altogether the obligations to inform and consult through proceeding to dismissals of less than 20 employees, such as in BS2. ERs criticized the exclusion and felt that it was principally a consequence of managerial control of the process and content of the discussions leading to the agreements establishing or amending the ICE arrangements.

Where the forums were involved in restructuring instances the decisions to proceed to restructuring were made by management and consultation with the forums and trade unions took place with regard to the process of handling job losses and not on the wider principles of restructuring (see also Hall and Edwards, 1999, Daniel 1985, Turnbull 1998, Wood and Dey 1983). The formal announcement of management proposals for restructuring was predominantly considered as the start also of the consultation process, excluding thus any possibility for consultation to take place at a point when proposals are still at a formative stage.²⁵³ In most of the cases, there was no attempt by ERs to question the rationale for the business issues that led to or influenced the restructuring and it was not clear that this had been among their objectives. This became particularly apparent where representation through the forum was operating as an additional layer to the existing ad-hoc committees that were set up for the purpose of consultation, such as Fin1 and BS2.

²⁵² Marginson *et al.* (1998) defined 'damage limitation' more narrowly and the notion concerned confidentiality and the right to withhold information that is regarded as 'sensitive'. In the present study, 'damage limitation' refers to the practice of deliberately excluding a wider range of issues from the remit of the ICE arrangements.

²⁵³ At a minimum the employer is required to engage in 'conscientious consideration' of the representatives' submissions at a formative stage in the process (see *Middlesbrough Borough Council v TGWU* [2002] IRLR 332).

But influence on the implementation of the decisions taken by management and the means to communicate these to employees was evident in some cases. ERs were able to persuade management to seek employees for voluntary redundancy and to influence the criteria used for the selection process of the employees being made redundant. There was also in some cases, i.e. Fin2 and BS3, a significant reduction of the number of employees made redundant. Confirming the conclusions in the Hall and Edwards (1999) study, ERs described the outcomes of consultation as ‘ranging from mutually acceptable arrangements through ‘acceptance of the inevitable’ to a feeling among employees that managerial prerogative has been imposed on them.’ The opportunities thus for ERs to open up new areas of social dialogue with management that will include cases of re-organizations on an on-going basis, to develop an overall organizational approach to staffing arrangements for the purpose of avoiding collective redundancies (Turnbull and Wass: 1997) and to act as buffers against pressures that emanate in the context of companies operating in economic sectors with increased outsourcing activity were limited. From a theoretical point of view, this finding is particularly significant as it points to the insufficient institutional design of the UK legislation. Whilst, as suggested in chapter two, the introduction of permanent employee consultative arrangements through the ICED could support the development of social dialogue procedures in the context of restructuring the possibility, as offered under the PEA option, for management to exclude consultation on such issues, limited in practice the opportunities for employee representation on such issues.

Moving on to examine the broader impact of the arrangements on management decision-making some further comments can be made. Reflecting broadly the different dynamics developed within the management and the employee-side interaction and the different management considerations and structures the extent to which the arrangements had an impact on management decision-making differed substantially. In the case of EWCs, Marginson *et al.*, (2004) have suggested that the impact of EWCs on management decision-making ranges from impact on the *process* of management decision-making and impact on the *outcome* of decision-making.²⁵⁴ In the cases under study, impact on the process of management decision-making was reported in some cases. For instance, at Fin2 the forum chair and the two full-time ERs saw liaising with business management and identifying potential issues as a key

²⁵⁴ The impact on the process distinguishes two forms of impact: first, impact in the form of establishment of new structures or mechanisms of management co-ordination as a result of the EWC; secondly, impact in the form of signaling mechanisms, which ensure that the individual businesses alert central management to upcoming decisions that have a transnational dimension, and which potentially need to be tabled at the EWC (Marginson *et al.*, 2004: 211). In terms of the impact of EWCs on the outcome of decisions, ‘the strongest form of impact is where the *substance* of a management decision is changed as a result of intervention by the EWC. A more limited impact is where *implementation* of a business decision is changed as a result of EWC intervention...A third form of impact is also conceivable: where management changes the way in which decisions are framed from the outset, in the light of the requirement to engage with the EWC. In practice, this is likely to prove hard to detect’ (Marginson *et al.*, 2004: 211-212).

part of their role. Central management at Fin1, BS1, BS2 and BS3 utilized existing management structures to sensitize business management to the information and consultation requirements stemming from the agreements. The greatest impact on the outcome-substance of management decision-making was evident in BS2, where in a number of instances the content of management decisions was altered as a result of ERs' suggestions. Fin2 was another example, where the forum's intervention led to greater influence in the substance of management decision-making. In both cases, senior management was regularly involved in the ICE arrangements with the latter being established at a level that matched the level of management decision-making.

The situation in the other cases was substantially different. In Fin1, with the exception of limited instances, only the implementation of business decisions was sometimes altered as a result of the forum's operation. As senior management had only 'arm's length' involvement in the forum this meant that the scope for impact on management decision-making was significantly constrained. On their part, ERs saw themselves as a 'service agency' for the communication of management decisions. In BS3, despite the continuous efforts by the ERs to influence both the implementation and substance of management decision-making, management barriers in the form of downscaling management's involvement in the forum and the adoption of a more apprehensive management approach constrained to a significant extent the ability of the forum to have an impact on management decisions. Lastly, while the forum at BS1 was chaired by the COO, the limitations in the remit of the forum, as stipulated by the ICE agreement, and the management-led process of consultation limited the extent to which the forum could encourage the shift towards the view of employee rights as organizing the socio-economic relations at organizational level. Hence, through the provision, under the ICE agreements, of a consultative framework largely delineated by management the extent to which collective representation managed to act in these cases as a means to open up space for social dialogue and redress the vulnerability of individual employees in their dealings with the employer (Hyman, 1997: 321) depended considerably on management choices; these shaped the options and to an important extent constrained the outcomes from the operation of the arrangements.

Table 7.3: Issues, processes and outcomes

Name	Information	Process of consultation	Extent of consultation (examples)	Impact on management decision-making (process, implementation, substance)
Fin1	Rather limited and <i>ad hoc</i> provision of information on business, financial and operational issues	HR and middle management-led, ERs' contribution mainly confined to ICE meetings	Canteen, pensions, flexible benefits, re-organizations, redeployment, retirement age, training schemes, profiling staff scheme	Limited impact on process Some impact on implementation Limited impact on substance (reportedly 56% effective consultation)
Fin2	Good and regular provision of information on business, financial and organizational issues	Senior, HR and middle management or ERs' initiative, informal consultation, option-based consultation (with exceptions)	Individual issues, shift patterns, flexible working, home computing, employee assistance programme, career development, restructuring, redeployment health and safety, pay and reward, pensions, working time, bonus scheme, retention bonus, policies on disciplinary and conduct of interviews' issues	Considerable impact on process, implementation and substance
BS1	Considerable information provided on business and financial issues	Senior- management-led, ERs' contribution mainly confined to ICE meetings	Fundraising and charitable donations, employee 'road shows', employee surveys, failed ERs' efforts to be consulted in restructuring	Limited impact on process Some impact on implementation Absence of impact on substance
BS2	Considerable and regular provision of information about financial, business and operational issues	Senior management or ERs' initiative, ERs' contribution within and between meetings	Career/assignment management, performance and absence management, promotion frequency, flexible working, standardization of terms and conditions on promotion, canteen, pay and bonuses, pensions, training, redeployment, maternity benefits, employee of the year scheme, childcare vouchers, collective redundancies	Some impact on process Significant impact on implementation Considerable impact on substance of decision-making

Name	Information	Process of consultation	Extent of consultation (examples)	Impact on management decision-making (process, implementation, substance)
BS3	Significant provision of 'not very useful' information about financial, business and operational issues	HR management or ERs' initiative, ERs' contribution within and between meetings	Development and training, pay review process, employees' appraisal system, employment policies, car parking, health and safety, collective redundancies, retirement age	<p>Limited impact on process</p> <p>Limited impact on implementation</p> <p>Limited impact on substance</p>

7.3 Relationships within the ICE arrangements: the development of networks of cooperation

While most of the forums were still in the early stages of their operation, the findings indicated possible trends regarding the development of networks of cooperation within the employee-side consultative arrangements. One of the most striking findings from the study concerned the salience of ERs in developing the role of the ICE arrangements. This in turn resulted in the development of space for social dialogue and participation in organizational decision-making. While, as suggested elsewhere in the present study, the general assumption has been that the ICE arrangements would be largely determined by management the case studies point out to the important role of the ERs' interaction within the ICE arrangements in challenging the adoption of a 'damage limitation' approach by management during the establishment and most notably the operation of the arrangements.

Regarding the capacity of the arrangements, basic infrastructural means of communication, such as telephone and email, were available and used extensively by ERs outside of the forum meetings for the maintenance of communication and the development of cohesion between the forum members in all the cases. Significantly, one common element shared by the 'active' forums in Fin2, BS2 and BS3 was the availability of an operating structure: in the form of a team of full-time ERs in Fin2, rotation of employee chairs in BS2, and a select committee in BS3 employee side. In having in place such structures, ERs sought to consolidate the autonomy of the arrangements and build a sustained capacity to engage in the development of social dialogue procedures with the aim of advancing capabilities for voice. Over time the ERs-only meetings acquired a significance of their own, especially once a level of communication relationship was developed among the ERs and were hence successful in establishing internal communicate relationships and structures, which, in turn, promoted and stabilized these relationships.

Significant presence of internal procedures between ERs was again mostly evident in the cases of Fin2, BS2 and BS3 where the ERs had developed informal structures and procedures for information exchange, for agreeing and coordinating interests, and for dealing with issues arising during the operation of the forum. In effect, ERs in Fin2, BS2, and BS3 developed substantial internal processes of constitution through which they were able to unlock the potential and build the strengths of the ICE arrangements beyond the confines of the ICE agreements. The strongest example of such activity was provided by BS2: while scope for the forum's participation in management decision-making over the longer term was originally denied, based on the systematic developments of its internal

capacities and structures and its coherence to deliver opinions as a body to management the forum managed to define various tasks for itself and open up opportunities for getting involved, such as extending the consultative remit of the forum to include pay and bonuses matters. In all three cases, a core of more proactive ERs were responsible for the management of the operation of the forum, without however having a dominant position in terms of establishing unilaterally a common forum position and strategy. Instead, this was a matter for discussion and agreement between all ERs. While there had been in some cases disagreements over the adoption of specific approaches to the operation of the forums these did not escalate to disputes between the ERs.

That the ‘symbolic’ Fin1 and BS1 forums exhibited less developed communication structures and cohesion can be attributed to a number of factors, which were rather independent of the early operation of the forums. Firstly, in contrast to the forums in Fin2, BS2 and BS3, the employee side at Fin1 and BS2 did not have in place distinct structures and procedures, which could guarantee internal capacity. While the agreement at Fin1 stipulated the election of an employee chair, a management chair was instead appointed, who constituted the radial feature in the operating structure of the employee side. The forum was largely a ‘service committee’, which met rarely independently of management. Evidence of differing interests within the employee side and lack of propensity on the employee side to engage in network activity that would encompass all UK sites was also provided in the Fin1 forum. Similar findings were evident in BS1, where while the ERs met before and after the forum meetings, there was no development of informal interaction between the ERs during the periods between the meetings. This was exemplified by the fact that while they had a right to elect a coordinator amongst them, they had not chosen to proceed to such action. Due to the lack of internal capacity and cohesion, the arrangements at Fin1 and BS1 were unable to forge trust and an experience of cooperation amongst ERs that would serve as a platform for the development of social dialogue procedures in the organizations.

7.4 ICE arrangements and employees: recognition in its infancy

A key factor conditioning ICE arrangements’ potential to foster capability for voice is the interface between the employee-side of the forum and the workforce. As anticipated, informed understanding of the significance of the ICE arrangements did not emerge spontaneously. Instead, this was dependent not only on the facilities available for interaction with the workforce, as stipulated by the ICE agreements, but also on the ERs generating interest in their work amongst employees and persuading them of the value of the ICE arrangements. As Kelly (1996) has suggested, employees require an effective voice based on workers’ rights to exercise collective power through independent mechanisms that they regard as legitimate. Regarding legitimacy, as defined by Hege and

Dufour (1995: 85), efforts were clearly made in 'active' forums of Fin2, BS2 and BS3, which included site-level meetings between ERs and employees. Significant activity was reported in Fin2, where ERs developed a rather professional approach when promoting the operation of the forum to employees and dealing with issues raised by their constituents. Moreover, as a result of external support and advice by the IPA, ERs felt more confident in their skills in representing employees and independent from management fiat. ERs in BS2 and BS3 were able through, formal in BS2 and informal in BS3, structures, procedures and means they had developed for communication and interaction with employees to maintain their links with them and to express the identity of the work group in their dealings with management. In contrast, attempts to maintain informal communication links with the workforce in the 'symbolic' forums were largely absent, Fin1, and minimal, BS1. Apart from limited efforts on the part of the ERs to develop informal communication channels with employees, the lack of communication means, such as email facilities in Fin1, played a significant role in constraining their ability to engage substantially in with the employees' immediate needs at the workplace. In BS1 whilst efforts by the ERs to develop such links were evident these were still at an evolving stage.

Further, visible process of consultation with management can confer legitimacy on accredited ERs (Terry, 1999) and act as a driving force for the ICE arrangements' representation and activity with the view to enhancing social dialogue procedures and capabilities for voice. Two means of demonstrating the visibility of the process of consultation are through ERs' reporting back to the workforce the results of the ICE meetings and consultation with management in the form of minutes or other documentation and the conduct of consultation exercises directly with employees. Regarding the former, evidence of information disseminated to employees regarding the results of the ICE meetings was apparent in Fin2, BS2 and BS3. However, serious disputes between ERs and management regarding the content of communications were reported in the cases of BS2 and BS3 that constrained significantly the ability of the ERs to report to employees their own views on the results of consultation exercises. In contrast, the fact that minutes were not kept and that strict confidentiality provisions were in operation in Fin1 meant that the communication to the workforce of developments in consultation exercises held within the forum was not possible.

Regarding the second means, consultation exercises held between management and the ERs included in some cases consultation with the workforce. The most extensive level of interaction between ERs and employees regarding this aspect took place in BS2: consultation exercises were held with employees in a number of cases in order to determine employee priorities in issues dealt in consultation with management at forum-

level. Evidence of consultation with the workforce was also provided in BS3, albeit on a more limited scale. In contrast, there was very limited consultation with the employees in Fin1, Fin2 and BS1. In Fin1, management constraint regarding confidential information largely precluded the exercise of consultation exercises. In Fin2, while the ICE documents stipulated the right for ERs to canvass regularly the opinion of the workforce, there were reportedly only limited instances where ERs sought the views of employees. Finally, in BS1 there were limited reported attempts to consult directly with employees. The absence of consultation exercises with employees meant the inability of the employee-side ICE arrangements to transfer of employee interests to forum-level which would strengthen the process of participation and of developing capabilities.

7.5 ICE arrangements and trade unions: the search for common ground?

Through the introduction of another actor, i.e. ICE arrangements, the ICER confronted the traditional industrial relations actors, i.e. management and trade unions, with challenges regarding the processes and practices of collective organization at organizational level. In line with the management policy of excluding trade unions from the process, parallel negotiating and ICE arrangements were in operation in all three unionized organizations. Whilst the general approach by management when dealing with issues that should be discussed with both the forum and the unions was to involve simultaneously both parties but usually under separate channels, exceptions to this practice were observed in BS2 and BS3 and tripartite discussions were sometimes held. Significantly, in all three cases management expressed in some instances positive views regarding the potential for the adoption of a more integrative approach, i.e. involving the unions and the forums under the same channel, when dealing with issues that should be dealt by both employee representative arrangements. This stands in sharp contrast to the management position during the establishment/amendment of the ICE arrangements in all cases and could open up opportunities for the integration of the available employee representation channels.

Many of the issues identified in the relationship of the ICE arrangements with the unions reflected some of the union discussions but also theoretical debates about the statutory recognition of employee consultative arrangements alongside trade union recognition and activity (Hyman, 1997; Kelly, 1997). The key issue was the extent to which trade unions and the forums could go in opposite directions or develop a common approach when dealing with the representation of the workforce. Although the arrangements in Fin1 and BS2 were established without active involvement of the unions in the drafting of the agreements, the unions in both cases had managed successfully to promote union representatives in the forum elections. In BS3, where the unions provided formal and informal support to the forum during the establishment of the forum, again a significant

number of trade union representatives/members were elected. Still, in line with the ICER, there were no formal procedures for exchanging information between the forums and trade unions, and trade union support for the forums in the form of seminars, training or experts, was not formally established, constraining thus the extent to which they could act together for the advancement of participation and of capabilities for voice.

The extent to which the relationship between the forums and the unions developed in practice varied significantly. This indicates the need to evaluate the empirical findings on a case-by-case basis. However, whilst the relationships between management and some of the unions were reportedly adversarial the different approaches adopted by the unions can be attributed to the different level of union activity in the organization and of general alignment of interests between the unions and the arrangements. In Fin1, the clear demarcation of the issues dealt under the negotiation channel with the union and consultation with the forum, the concern of ERs not to be seen by management as aligned to trade union interests but also the concern of the union to avoid disturbing the existing union agreements constrained arguably the development of informal interaction between the union and the forum. In contrast, the fact that the unions did not have specified seats in the BS3 forum enabled them to use the latter as a way of obtaining information and supporting union campaigns within the entire organization. Precipitated by the adoption of a minimalist approach by management to the operation of the forum over time the latter drew closer to the biggest union. The situation in BS2 was somewhat different. While no specialist and policy support and certainly no resource supplementation and concentration in the form of mutual recognition and agreement on interests (Lecher *et al.*, 2001: 32) was provided by the unions – except from the case of consultation over pensions – attempts to develop a closer relationship between the forum and the unions were reported at the instigation of the forum. With the exception of Fin1, where pay and rewards were not discussed, the unions in BS2 and BS3 adopted divergent views concerning the expansion of the forums to such issues. Whilst unions at BS2 were concerned that the forum encroached on their territory in BS3 the unions sought actively to extend the remit of the forum so as to include such issues for consultation. Irrespective of the fact that pay and benefits were in some cases issues for consultation, there was no evidence of the ICE arrangements evolving into bargaining relationships.²⁵⁵

In the context of the representation channels available, the institutional design of the ICER is organized around a complex system of representation that articulates universal

²⁵⁵ It can be suggested that the ICER 2004 do not prevent employee representatives from engaging with bargaining as opposed to consultative functions. Whilst reg 21 does impose a duty upon the parties to ‘work in a spirit of cooperation’, it is unclear whether this duty might be interpreted as excluding bargaining functions from the consultation process (see Bercusson (2002) for an alternative reading.)

and trade union representation at the same organizational level. This led Scott (2002: 6) to suggest that ‘if the UK is heading for a dual system, something which is a distinctly feasible evolution, what an amazing and appalling innovation it would be to find in a few years that the new Directive had ushered in a *mutually exclusive* dual system, *either* a single line union system *or* a single line employer controlled works council system. It would be a distinctly UK mutant hybrid, the worst of both worlds’ (emphasis in original). Whilst the present arrangements were only at an early stage of their development, there was no evidence suggesting that the implementation of the ICER resulted in a mutually exclusive dual system, either in the form of single line union system or a single line employer-controlled works council system. On the one hand, the existing structures of negotiation remained untouched. Concerning the impact of the ICE structures on trade union presence at organizational level, the temptation, which arose on the part of management in some cases to develop alternative, parallel systems of representation, one union-based and the other not, with the potential to weaken both employer and employee commitment to union-based forms, did not result in the actual weakening of the trade unions in terms of membership in the organization. In BS2 and BS3 the establishment and operation of ICE structures did not either act as a stimulus to further unionization into areas not yet covered by collective agreements or to the expansion of issues where trade unions could be involved in consultation and negotiation with management. In contrast, union representatives at Fin1 held that the introduction of the forum had a positive association with a small increase in union membership in the organization.

On the other hand, despite the absence of formal integration between the unions and the forums evidence of the forums operating and sometimes cooperating alongside trade union recognition that assisted in the integration of employee interests in organizational decision-making was provided, albeit to a varying extent. The participation of unions in the newly established ICE arrangements was manifested in two ways: directly, through consultation exercises held between management, the forums, and the unions at the same table – that was the case mostly in BS3, and indirectly, through the election of union representatives as ERs – that was evident in all the unionized organizations. While the extent to which these instances led to changes to the formal role of the unions in terms of representing non-union employees was limited, evidence of an expansion of their role within the consultative framework, as suggested in chapter two, was provided, e.g. BS3. The unions at BS3 used the ICE arrangements as the institutional framework and the considerable source of support for their activities, and succeeded in extending their involvement from once-a-year pay bargaining in specific parts of the workforce to ongoing, broadened consultation around a wider range of issues that affected the whole of the organization. Even in BS2, where the unions had adopted an apprehensive approach to the operation of the forums, the tripartite discussions on the issue of pensions provided

them the opportunity to utilize the ICE arrangements in order to remedy the lack of mobilization of employees. Whilst on a limited scale, such activities highlighted the potential of UK trade unions to develop – along their role as negotiators – a capacity to represent all employees, irrespective of trade union membership or recognition, in consultation exercises with management.

7.6 Conclusion

The recognition of a right to information and consultation at organizational level opens up opportunities for interaction between the social actors. The formation of all-employee representative structures, as stipulated by the ICER, meant that management was obliged to enter into social dialogue with the elected employee-representatives over business, organizational and employment issues. Hence, in contrast to previous UK legislation, opportunities for regular information and consultation over a broader range of issues that covered all employees, irrespective of trade union recognition or membership, were provided. Assisted by the institutional design of the ICER the operation of arrangements relied significantly on a discursive and learning logic promoting, in effect, the adoption and development of flexible standards that were adapted to the particular circumstances of the organizations and workforce under study. However, the extent to which the newly established/amended arrangements encouraged the reshaping of the context in which the actors operated and the development of a capability for voice was significantly conditioned by the interaction between the institutional design of the ICER and the approaches adopted by the social actors involved in the arrangements. Reflecting but simultaneously diverging from the formal text of the ICE agreements, the extent to which the nominal rights stipulated in the agreements developed into effective rights was thus shaped by a matrix of different sources of influence operating at organizational level.

Based on the fact that the most effective arrangements in terms of developing a capability for voice were found in BS2, where evidence of unions' integration into the arrangements was limited, a conclusion could be reached that mutual recognition and agreement on interest between the forums and the unions are not necessary preconditions for the development of effective ICE rights. However, in light of the findings presented regarding the interaction between management and the employee-side we should be cautious of such a conclusion. As already seen, management policy constitutes a determining factor in shaping the extent to which the ICE arrangement can develop a capacity to act. Whilst the arrangements at BS3 enjoyed significant support by the unions, the adoption of a minimalist policy by management constrained to a significant extent the capacity of the forum. In contrast, the fact that the forum at BS2 developed a considerable capability to act was a result of the gradual adoption of a pro-active

management approach that was arguably developed in part so as to prevent the unions from expanding their influence in the organization.²⁵⁶

Employee representative structures in the UK that were established in a regulatory vacuum, either statutory or based on industrial agreements, have been traditionally characterized as ‘managerial emanations that lack autonomy and efficacy.’ (Butler, 2003: 6). Despite the introduction of statutory requirements through the ICER, the extent to which the arrangements under study were management-led was considerable. In taking advantage of the PEA option, management-led arrangements in terms of structures, resources and subjects for information and consultation were significantly promoted. The exercise of the ICE rights was, in effect, conditioned by management organization and policies. However, there was evidence that the operation of the ICE arrangements conditioned management organization and policies as well. Within this context, management decision-making, either in the form of process, substance or implementation, was influenced by the process of information and consultation operating at organizational level allowing hence for the development of a capability for employee voice, albeit of a varying nature. To that end, the effectiveness of ICE rights, as stipulated by the ICER, was crucially dependant on the mobilization of a number of other ‘conversion factors’, such as capacity and cohesion of internal ICE arrangements, maintenance of links between the employee-side ICE arrangements and the workforce, and trade union advice and support. This confirms the argument put forward by Dufour and Hege (2002: 171) that ‘effective representation normally depends on resources extending beyond formal rights’.

²⁵⁶ This finding is arguably in line with Kotthoff’s (1981) suggestion that the quality of the union-works council relationship in Germany is influenced not only by the strength of the union identity of the works councilors, as Streeck has argued (1979), but also by the dynamic social (power) relations between works councils and management: the more powerful the management, the closer the works council gets to the union.

Chapter 8. Conclusion

While the scope of joint regulation, as evidenced in successive WERS, has diminished dramatically since 1980 there is evidence of a growing and more complicated regulatory environment – often driven by EU law – that has led to a marked increase in the number of employee representation structures and has impacted upon the traditional reliance on the ‘single channel’ of representation through recognized trade unions. In this context, the adoption of the ICED in 2002 was heralded by a significant number of academics, policy makers, and organizations as entailing significant implications for the UK system of industrial relations. Even as the question of the impact of the ICED in the nature and function of employee representative arrangements in the UK could appear very specific the empirical findings highlighted – through employing the notion of ‘double subsidiarity’ – the dependency of the analysis on factors operating in different systems and at different levels.

As Falkner *et al.* (2005: 352) note, there is limited congruence between market liberalization, on the one hand, and socially motivated EU action to secure ‘just’ and socially sustainable outcomes, on the other. The debate at EU level is increasingly informed by the economic rather than social imperatives of market integration and the ‘learning process’ encouraged by the European Employment Strategy is skewed towards neoliberal policy objectives (Deakin, 2003). In this context, the ICED – despite its limitations – marked a significant departure from the practice of subordinating social rights regarding employee representation to economic considerations that give priority to management considerations in organizational decision-making. As suggested in chapter one, the directive adopted a reflexive orientation. In providing a legal framework that allows for adaptation to particular circumstances and within which there is a degree of self-regulation the objective was to overcome the dichotomy between prescription and deregulation in the area of employee representation. Contrary to the ‘leveling-down’ agenda of negative harmonization the ICED aimed to encourage both member states, through the transposition, and organizations themselves, through negotiations with labour, to preserve a space for local-level experimentation and adaptation regarding information and consultation rights (Barnard and Deakin, 2000: 342). The starting point for RL is the nature of the interaction between the legal and other systems, such as the political and the industrial relations systems. The clear boundaries between such functionally differentiated autopoietic worlds and the resultant impossibility of directly influencing internal worlds across those boundaries has profound implications for concepts of political, legal and other intervention as any attempt must now recognize the internal dynamics of autopoietic systems which direct any external force away from the paths and goals sought by the external influencers. As a solution, reflexive regulation attempts to stimulate and facilitate a process of self-regulation (Rogowski and Wilthagen,

1994: 7) by providing a 'frame' or 'steering mechanism' rather than commanding industrial relations actors.

For the purpose of the thesis, the capability approach was used in the evaluative analysis for assessing the impact of the institutional design of the legislation on the transposition of the ICED and the establishment and operation of consultative arrangements at sub-national level. In adopting a more dynamic notion of equality, the use of a capability-based approach has increasingly being used in policy and academic debates at supra and national levels in the EU concerning social matters. In brief, the CA conceptualizes freedom as the fundamental basis not only of human development but also of social justice. What distinguishes the application of the CA in the field of social sciences from individualistic (human capital) or sociological (social context) approaches is the emphasis on the importance of institutions (De Munck and Zimmermann, 2008). The institutional dimension of the CA has two effects: firstly, it introduces – through a description of the interactions between the legal system and its realization in the social field – the concept of normative objectives in the evaluative description of public policies in the social sciences. Secondly, the capability set becomes the object of a moral evaluation in the framework of obligations on the part of public policy-makers (De Munck, 2008). In this context, the CA constitutes an evaluative theory concerned with the State and rights.

However, a capability-based approach has to be contextualized in order to function as an evaluative framework for human development. In the socio-economic context, it has been suggested that in order to promote the realization of rights as capabilities forms of procedural social rights have to be promoted (Browne *et al.*, 2004). Such social rights can influence the institutional environment so that individuals can convert their resources, e.g. competences, capital, to actual functionings. More particularly, rights to information and consultation permit engagement in all forms of co-operation and agreement within the security of law. The process of adjustment of the existing industrial relations framework to statutory information and consultation requirements can induce a process of 'institutional learning' (Didry, 2000) assisting, in turn, the integration of employee interests in organizational decision-making. In that way, the recognition of social rights in the form of proceduralized forms of participation can act as 'social conversion factors' for the development of a specific type of capability, 'capability for voice'. Rather than requiring the workforce to be 'adaptable' to changing market conditions, the introduction of such rights requires that employment practices be adapted to take into account the circumstances of the employees through the development of social dialogue procedures; hence, the substantive freedom to realize a range of desired end-states and activities becomes feasible. Bearing in mind the rejection of theoretically or dogmatically asserted efficiency, a reflexive orientation to law and regulation, which stresses the importance of

a space for standard-setting by collective actors, is potentially a principal means by which such an approach may be operationalized in legal institutional terms.

On this basis, the thesis sought to assess the extent to which the use of reflexive regulation mechanisms could promote a capability-based approach to the development of consultative arrangements. Emphasis was placed, more particularly, on the extent to which the introduction of institutional structures in the form of ICE arrangements promoted a change in the institutional logic of the British system of industrial relations and allowed, through the development of a learning process of participation, the discussion and evaluation of the organizational rules affecting employees' interests. In this context, it is important to stress here that the focus was solely on the collective dimension of freedom, i.e. capability for voice, as articulated through the establishment/amendment and operation of employee representative arrangements and not on the impact of the new statutory provisions for information and consultation on employees as individuals.

To that direction, the thesis was based on the premise that the capability for voice that the new/amended arrangements can develop at organizational level is a product of external influences, i.e. ICER, and internal developmental preconditions of the ICE arrangements that operate in the organizations. Hence, through the use of an evaluative framework, adapted from the work of Lecher *et al.* (2001), that focused on the dimensions and indicators potentially useful for the development of a capability for voice, the research attempted to highlight the links between the development of the specific type of capability – that of voice – and the institutional framework, as provided by the ICER. In that way, it was made possible to take into account the totality of the resources and factors of conversion, stipulated by the ICER and developed by the parties, highlight the changing interactions between the main protagonists, and examine the processes through which effective employee representation, as an indicator of the collective dimension of freedom, was realized in line with a capability-based approach.

The research pointed out some of the difficulties in the design of the reflexive regulatory framework. It was firstly true that much depended on the nature of the transposition and how what the objectives of the reformulation of EU-level norms in the process of the transposition of directives at national level were. The change that EU legislation brought was arguably greater than just adding another 'layer' of new policies to the domestic system of employee representation (Falkner *et al.*, 2005: 347). As suggested in chapter one, the effect of the ICED was potentially very radical in its departure from a number of traditional features of the UK legal and industrial relations systems and had the potential to transform significantly the nature and function of employee representative structures in

the UK system of industrial relations. First of all, the ICED envisaged a permanent statutory system of employee representation at organizational level. Secondly, it expanded the range of information and consultation to cover aspects of managerial prerogative that were until hitherto not covered by existing legislation, nor industrial relations practice. Thirdly, its application was 'universal' covering hence all employees at a given undertaking, irrespective of their status as union members. Finally, the procedures encouraged by the ICED were more deliberative and cooperative in tone than the traditional pluralist emphasis on conflict of interest in the employment relation (Bogg, 2005).

Against this context and in diverging from existing UK social norms and conventions the institutional design of the ICED induced the creation of space for collective organization and a new role for the two sides of industry, CBI and TUC, in the development of labour legislation at national level. This was also attractive for the political system as it provided an alternative means of policy formulation and decision-making. Through this process, a re-conceptualization of the EU-level norms concerning information and consultation of employees, as stipulated by the ICED, and a consensus – based albeit on different rationales, i.e. high organizational performance on the part of the DTI and maintenance of existing arrangements on the part of the CBI and the TUC – that a 'one size fits all' approach was not suitable were reached. As a result what was proposed and finally inserted in the transposing legislation was a range of employee representation models, including both union and non-union representations as well as forms of direct representation associated with soft HRM techniques (Upchurch *et al.*, 2006).

In light of the promotion of diversity by maximizing the scope for agreed arrangements that may depart from the minimum requirements of the ICED, the examination of the impact and potential outcomes for employers and trade unions from the consultation processes and arrangements emerging from the legislative framework is crucial. In effect, the flexible legislative framework offered different strategies for employers and different implications for trade unions; as such the extent to which the introduction of information and consultation rights could act as a 'social conversion factor' for the creation of a learning process of participation and capabilities for voice were crucially dependent on the response of the main actors to the legal prompt. Similar to the legislation on EWCs and trade union recognition the new legislation drove to some extent the spread of voluntary arrangements, reached either ahead of its entry into force and less as a consequence of its trigger mechanism being used. However, there was not much evidence that the 'standard provisions' of the ICER promoted institutional experimentation or to a new framework for learning and participation in line with the two theoretical approaches of reflexive regulation and capabilities.

Hyman's assertion in 1996 that management's response to the introduction of works councils arrangements in the UK depended on the nature of the legal obligations, the efficacy of the mechanisms of enforcement and the degree to which extra-legal resources could be mobilized – notably by trade unions – to influence employer strategy was confirmed in the thesis. Concerning the nature of the legal obligations, there was evidence both from the analysis of the findings of the application of the ICED and its implementation at lower level, i.e. organizational, that the thresholds were set too high for the application of the ICER. Only in very limited instances was it reported that organizations considered likely the possibility that employees would trigger the process for the application of the 'negotiated agreement' procedure. Concerning enforcement, the analysis of the empirical findings suggests that sanctions were set up at a very low level and that the complexity of the process may have discouraged trade unions and more significantly employees from making use of the procedures. What is more, apart from few exceptions there was no effort on the part of unions to use the legal rights stipulated in the ICER to extend those available through traditional collective bargaining approaches. In general, both employers and trade unions were content to maintain the *status quo* on consultative arrangements rather than challenging existing practices or negotiating new agreements, limiting thus the extent to which collective organization for the setting of information and consultation standards could be achieved. The fact that the ICER were significantly based on the outline scheme agreed by the CBI and the TUC may possibly explain why reaction to the final form of the ICER, has, to date, been relatively muted. The TUC has chosen instead to criticize only the low level of sanctions and the possibility for compliance through direct ICE methods.

As CA advocates suggest, the so-called situated state (Storper and Salais, 1997) must be considered in combination with the situated firm (Bonvin and Farvaque 2003). The recognition of the employer's obligation to enter into processes of information and consultation with employee representatives has the effect of institutionalizing a role for employee representation when organizational decisions are taken. In the context of the ICER, an evolution away from the traditional British model towards a continental European model that stresses consultation and social dialogue and enhances the opportunities for the integration of employee interests in the organization was observed in some case studies. In some cases, management treated the ICE arrangements in a serious way and ERs proved eager and able to develop their roles and responsibilities towards the workforce. In the study of Rogers and Streeck (1995: 6), a defining mark of works councils is that they are 'institutionalized bodies for representative communication' supported by strong legal underpinning. However, reflecting the flexible design of the ICER, the powers of the ICE arrangements in the UK context were more attenuated as the

agenda of representation moved towards the vital interests of the employer and dealt with business planning, performance and finance (Hyman, 1996: 71). Furthermore, the degree of routine and stability that could be attained through the operation of consultative arrangements at organizational level was constrained to some extent. This was exemplified in the ambiguous scope for consultation, as prescribed by the ICE agreements, which resulted in uncertainty not only on the part of the workforce, but also on the part of ERs.

Further, as a result of the denial of a preferred role to trade unions by the ICER the possibilities for creating 'thick interactions' (Davies and Kilpatrick, 2004: 128) between the union channel and the newly created universal channel of employee representation were significantly constrained at organizational level. However, in some cases the introduction/amendment of ICE arrangements in light of the legislation became more accepted by trade unions and not only enabled the unions to address a considerably broader agenda than was the case until hitherto in these workplaces but also to secure better information about the organizations' business plans. The study thus confirmed the need for different 'social conversion factors' that are located at different levels, i.e. legal systems and organization-based, to operate in conjunction for the development of ICE arrangements into a meaningful and capable exercise for the development of a learning process and a capability for voice.

The difficulties reported in the present study demonstrate that whilst a reflexive legal strategy may overcome certain limitations of command and control regulation it is 'no panacea for all social ills' (Teubner, 1993: 66). As Teubner (1993: 97) further acknowledges, 'if law becomes "reflexive"... it can increase its regulatory potential to a certain extent. However, despite all "reflexivity", law is still a closed autopoietic system operating in a world of closed autopoietic systems. It is impossible to break down the barriers which result from this double closure.' Nonetheless, the empirical findings more significantly pointed to some problematic areas of the institutional design of the ICER. It is important to remember that reflexive regulation involves an attempt to use 'legal norms, procedures and sanctions to 'frame' or 'steer' the process of self-regulation (Barnard and Deakin, 2002); hence, the institutional frame and steering mechanisms provided by the legislation are of fundamental importance. From a legal analysis point of view, the argument of the present study is that whilst the legal strategy for regulating employee representation arrangements should maintain its reflexive regulation approach it should also revisit the conditions attached to the selection of different compliance options.

In more detail, as evident from the study, the operation of the high threshold criteria and the provisions on sanctions acted effectively as 'deterrents' to the establishment or

amendment of consultative arrangements so as to comply with the ICER. Whilst such absence of action can be perfectly justifiable in the case of organizations where employee representation through other effective forms exists, it may have negative repercussions in terms of the establishment of social dialogue procedures in organizations with no pre-existing arrangements or without trade unions. Further, as seen from both the application and implementation of the ICED at organizational level employee approval and agreement between management and labour on the structural and operational aspects of the ICE arrangements need not imply genuine participation of independent from management representatives of the workforce. This could be seen, then, as a means of legitimizing management as the party responsible for the aspects of the ICE arrangements.

Provided that empirical findings from further research corroborate the ones reported in the present study, some possible amendments to the institutional frame of the ICER can be suggested. Firstly, in order to overcome the inability of the ICER to act in a manner anticipated by the ICED UK law could lower the 10 per cent threshold for the application of the legislation. The problem of the high threshold may be more acute in organizations employing between 50 and 100 employees since employees are less likely to have any trade union representatives who can act on their behalf and organizations lack sophisticated human resource departments that would be aware of the statutory requirements. Lowering the threshold could not only ensure that the application of the legislation would be easier in such organizational contexts but could also give the opportunity to the workforce to overturn ICE arrangements that were imposed unilaterally by management or prescribed controversially direct methods of information and consultation. In conjunction with this, a union priority rule for the representation mechanisms of information and consultation could be introduced; this would act as a counterweight to the lowering of the thresholds and would not only ensure that existing union agreements are protected but it could also encourage unions to take a more proactive stance to the establishment and operation of ICE arrangements. In line with the suggestions by Davies and Kilpatrick (2004: 137), priority should first be given to a recognized union and then to a union with sufficient presence in the workforce; only where there is insufficient union presence, should the third possibility, i.e. elected representatives selected by workforce ballot, be used. Such changes could make more robust the regulatory framework of the ICER and could limit the possibilities that the legislation would be used for the unilateral imposition of ICE arrangements to the workforce and the containment of trade unions.

The need for improvements in the substantive context of the rights provided by the ICER was also highlighted in the research. In all organizations studied for the purpose of the

thesis PEAs were either established or amended in light of the ICER.²⁵⁷ In these cases the introduction of the legislation prompted hence a response from organizations and had an effect on organizational practice. However, the loose institutional design of the Regulations was not enough to channel the ICE processes into more substantive outcomes. The reflexive design of the ICER concerning the realization of information and consultation rights, mainly through the prescription of undemanding PEAs provisions, undercut to some extent the standard developed by the ICED. The insertion of provisions mentioning explicitly the employer's obligation to give reasoned replies to the employees' representatives' opinions or to consult with a view to reaching an agreement would provide a framework more in line with the objectives laid down in the directive.

Further, whilst maintaining a reflexive approach to the regulation of employee representation is in line with the context-dependent evaluation of valuable functionings, as suggested by CA theorists, it would be beneficial to reinforce the procedural safeguards against breach of the legislation's requirements by applying the enforcement mechanisms to the PEAs and increasing the upper level of sanctions currently available. In this context, consideration could be again given to empowering the CAC to restrain employers from implementing decisions until proper consultation has taken place. Such amendments would not only be compatible with the ICED requirements for 'effective, proportionate and dissuasive' sanctions²⁵⁸ but could also encourage in the long-term the development of information and consultation norms and could enhance social dialogue procedures at organizational level. Finally, as Hall (2005: 116) suggests, the inclusion in the 'standard provisions' of a more elaborate constitution for an undertaking-wide ICE body could also assist in more effective ICE procedures as it would provide a certain level of routine and certainty that would be valuable not only for employees but also for management.

The empirical evidence on the implementation of the ICED at organizational level provides finally the opportunity to comment on the analytical validity of the analytical framework analyzed in chapter two and to suggest areas for further research. Arguably, the analytical framework used in the present study goes some way towards providing an understanding of the dynamics of ICE arrangements across different organizational settings. In detail, the analytical framework allows a rich form of analysis to emerge surrounding the processes used by management to inform and consult with employees, which takes account of the impact of the flexible institutional design of the ICER. This stands in stark contrast to accounts portraying employee representation arrangements in a vacuum of their external regulatory environment. Ultimately, there are variations even

²⁵⁷ However, in Fin2 the arrangements were not in writing.

²⁵⁸ Art. 8.

within single types that need to be explained and analyzed, and the framework goes some way towards that objective. Given the multitude of contingent variables that shape the choices for employee representation, then the processes and outcomes associated with ICE arrangements are best seen as temporal: moving in and out of symbolic and active status is dependent on a range of contextual factors.

Although the legislation has not, as originally predicted by many commentators, resulted in 'seismic' developments in the area of employee representation, it is important to stress that ICE arrangements constitute dynamic processes that only develop consolidated structures or defined and demarcated sets of tasks over time. A fruitful area for further research would be to further test and refine the understanding of complex social processes, and this would be an area ripe for further investigation as the statutory framework becomes embedded into domestic legislation. In this context, it might prove useful to first identify what role ICE arrangements can and are developing within the overall organizational context, rather than to pre-judge the arrangements by applying an unspecific standard of effectiveness. A definitive measure of the quantitative impact of the ICER in terms of the extensiveness of ICE arrangements will be provided by the WERS series due towards the end of this decade. In terms of its qualitative impact, ongoing research by IRRU members at the University of Warwick, who have already proceeded to the publication of findings in larger organizations (Hall *et al.*, 2007), will provide a very useful basis for comparison across different case studies. Further, the response of organizations employing fewer than 150 employees, which is also addressed by the Warwick team, would be significant for the purpose of assessing, in particular, the extent to which certain features of the institutional framework, such as the trigger mechanism and the compliance option through direct ICE forms, produce results that are different from their application at larger organizations.

Furthermore, the distinction between the functions of information and consultation on the one hand, and collective bargaining on the other, has become increasingly blurred in practice over the years and will continue to be so, maybe even more since the application of the ICER. In response to this, other processes of representation may at times provide resources that strengthen the potential for effective negotiation. In light of this, it will be fruitful to explore the extent to which the embedding of the ICER will induce further such blurring. Finally, apart from the fact that ICE arrangements may be important in their own terms, it will be interesting to examine their capacity to fill an infrastructural gap by providing a bridge between local and European-level representation arrangements as well as providing a vehicle for meeting the current range of issue-specific employee representation requirements in UK law (Hall and Terry, 2004: 227).

In light of the dependency of the ICE arrangements on a complex set of factors, the realization of such research projects will be able to address the issue of the sustainability of such consultative arrangements across time as well. However, whilst the empirical findings of the present research constitute one of the first attempts to evaluate the initial impact of the directive in the UK system of industrial relations there are lessons already for those who are interested in employee representation forms that diverge from the employer-initiated mechanisms of 'direct participation' and the structures of trade union organization forms of employee representation. Embracing such employee representation forms will have important consequences for management strategies, union responses but also employees to future ICE arrangements in establishing effective workplace representation.

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Appendix A. CIA survey questionnaire



**Employee information and consultation:
Questionnaire for CIA member-organizations**

- This survey aims to collect some basic information on employers' arrangements in the chemical sector for informing and consulting their employees and the potential impact of the Information and Consultation of Employees Regulations that began to come into effect in April 2005 (see the final page for a summary of the Information and Consultation of Employees Regulations).
- Completing this short questionnaire will take only a few minutes. Please indicate your response to the questions below by ticking (✓) the appropriate boxes.
- The information you provide will be kept confidential and participating organizations will not be identified in any analysis or publication.
- A summary of the findings will be sent to all the organizations participating in the survey; the Chemical Industries Association will have access to a report including suggestions regarding advice and guidance to member organizations.
- Please return your completed form in the envelope provided, or fax it to the Industrial Relations Research Unit, Warwick Business School (024 7652 4184) by **(date)**.

Thank you for your co-operation.

RESPONDENT DETAILS

Name of your organization:

Your name:

Your job title:

1. ABOUT THE ORGANIZATION

1.1 How many employees (either full-time or part-time) does your organization have? (tick one only)

under 50 50-99 100-149 150-499 500-plus

1.2 Is your organization? (tick one only)

single-site multi-site

1.3 Which is the main activity of your organization? (tick one only)

pharmaceutical chemical

plastic manufacturing other (please specify):.....

1.4 Does the organization recognize trade unions for any group of employees? (tick one only)

yes no

2. EXISTING INFORMATION AND CONSULTATION OF EMPLOYEES ARRANGEMENTS

2.1 What type(s) of information and consultation arrangements for employees exist in your organization? (tick all that apply)

- a multi-site information and consultation body
- one or more site-level information and consultation bodies
- information/consultation via recognized trade unions
- information and consultation directly with employees
- no current arrangements for information and consultation of employees => go to section 3.1
- other (please specify):.....

2.2 If there are current information and consultation arrangements for employees in your organization, do they cover? (tick one only)

the whole workforce half of the workforce some of the workforce

2.3 Which of the descriptions below apply to your organization's employee information and consultation arrangements? (tick all that apply)

- they are based on a written agreement with trade union representatives
- they are based on a written agreement with other employee representatives
- they have been approved by employees (e.g. in a ballot)
- they are formal arrangements introduced by management acting alone
- they are ad hoc/event-specific arrangements (e.g. collective redundancies)

2.4 If you ticked more than one box in 2.3 please provide details on the scope/coverage of each of the information and consultation arrangements:

.....
.....
.....

2.5 On which of the following topics does your organization inform and/or consult employees? (tick all that apply)

- business development (e.g. strategic objectives) pay issues (e.g. wage/ salary reviews)
- financial issues (e.g. performance, health and safety of employees

outlook)

- | | | | |
|---|--------------------------|---|--------------------------|
| production issues (level of production of sales, quality of product or service) | <input type="checkbox"/> | work organization (e.g. changes to working methods, working time) | <input type="checkbox"/> |
| employment issues (e.g. redundancies, redeployment, training, transfer of undertakings) | <input type="checkbox"/> | other issues (please provide the most important ones over the past 12 months):..... | <input type="checkbox"/> |
-

2.6 If there is an employee information and consultation body in your organization, how frequently are meetings held between management and representatives of employees? (tick all that apply)

- at least monthly at least quarterly at least annually when issues arise

3. IMPACT OF THE UK INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS

3.1 Has your organization made an assessment of the possible impact of the Regulations on the way the business manages employee information and consultation?

- yes no => go to section 3.3

3.2. If yes, which of the following statements most accurately describes your organization's response to the Information and Consultation of Employees Regulations? (tick one only)

- the organization is not covered by the Regulations
- the existing information and consultation arrangements for employees meet the Regulations' requirements
- the existing information and consultation arrangements for employees have already been modified in response to the Regulations
- the existing information and consultation arrangements do not comply with the Regulations and the organization plans to introduce changes
- the existing arrangements do not comply with the Regulations and the organization is not currently planning any action

3.3 Do you intend to make an assessment of the information and consultation of employees arrangements within the next two years?

- yes no

3.4 Do you expect your employees to request negotiations under the Regulations on the establishment of information and consultation arrangements? (tick one only)

- yes no

4. CIA GUIDANCE

4.1 In assessing the possible impact of the Regulations in your organization, have you drawn on the guidance provided by the CIA? (tick one only)

- yes no not aware of the guidance

4.2 The CIA encourages organizations to adopt sustainable development goals. Does employee information and consultation constitute one of your organization's goals? (tick one only)

yes

no

5. FURTHER INFORMATION

5.1 Would you be willing to talk further to one of our researchers about the arrangements for information and consultation of employees in your organization? (tick one only)

yes

no

Thank you for completing this questionnaire.

Please send your completed form to (recipient) by (date).

Appendix B. Organizational context of the case studies

Financial services case study 1 (Fin1)

Established in the 19th century, Fin1 plc is an international financial services company with some 16 million customers and around 22,500 employees in Asia, the UK and Europe, and the US. In the UK, Fin1 is a leading life and pensions' provider with seven million customers. At the time of the research, Fin1 employed around 6,800 people. Fin1 UK, which is headquartered in London, is a multi-site organization. Its business activities have been characterized by major changes in the past few years, including the takeover of an insurance company in 1997, which enhanced the company's presence in the Independent Finance Advisors (IFA) market, and the acquisition of another company in 1999. In 1998, in response to, and in anticipation of, industry trends Fin1 created an exclusively internet-based financial services operation. However, challenges to the Fin1's UK business activities were later evident, including a takeover attempt by a rival organizational and the sale of the internet financial organization.

The organization is partially unionized. A union has been recognized for collective bargaining purposes for up to and including the middle manager level in all but one sites. Apart from the recognition agreement, Fin1 has entered into enabling, facilities and security agreements with the union. According to union information, in 2006 membership density stood at around 70% at Belfast, 55% at Reading, 30% at London and 80% at Bristol. Management believed that in average less than half of the workforce is union members. The only non-union site at the time of research was in Scotland where around 2,300 people are employed. A non-union forum, which was in operation in various forms for over 20 years and was inherited from the acquisition of an organization in 1997, constituted the principal mechanism for collective but also individual representation for all grades in the site. Both the emergence of the call centre and the digitization of the back office enabled Fin1, in common with much of the financial services sector, to launch significant offshoring of services and processes to India. In 2002, the announcement by the organization of the closure of a call centre with the loss of around 850 jobs and the subsequent creation of an offshore call-centre and back-office processing unit in Mumbai led to an acrimonious dispute between management. Whilst the decision to proceed to offshoring was implemented, the union achieved the conclusion of a 14-point agreement including a commitment to 'no compulsory redundancies' as part of a job security package that would be effective until 2005. Both the ER manager and the union representative noted that the relationship between the parties picked back again and was at the time of research '*reasonably comfortable and good.*' The general relation between management and the union was described as '*a good working relationship based on cooperation*', without however reaching the extent of a partnership approach.

Still at representative level, a 'European Employee Forum' was set up in 1999 following the adoption of the EWCD. The forum is chaired by the Chief Executive of Fin1 UK & Europe and is made up of elected representatives from a number of Fin1's European businesses. A minimum of two meetings per year are held, with different senior executives invited to attend. Employee involvement, through 'business-driven' direct

forms of employee involvement (Hall, 2005), such as the use of intranet, email systems, team briefing systems, focus groups and annual employee surveys, has also been in operation. The management style towards employees was generally described by the Employee Relations ('ER') manager as one of *'employee involvement and commitment.'*

Financial services case study 2 (Fin2)

Fin2 was launched by a major insurance company in the late 1990s following deregulation of financial services in the UK. The insurance company was the majority owner, owing 78% of the Fin2's shares. The organization is an innovative financial services company providing a range of banking, investment and insurance products through its internet site. The first internet savings accounts were marketed in 1999. The organization's goal at launch of the Fin2 brand in October 1998 was to attract £5 billion of deposits within five years. It achieved that goal in the first seven months of operation, principally through the opening of accounts over the telephone and later through the Internet and has over 3 million customers today. Fin2 was floated on the LSE in 2000 and expanded its business into Europe through the acquisition of one of France's leading online banks in mid-2002.

While during the early years of its operation Fin2's core banking products were attractive to customers in the UK challenges appeared in the following years as UK online banking became an increasingly competitive marketplace, particularly among the 'new online banks', the recently formed UK standalone Internet banks, set up by mortgage banks and retail deposit institutions. Due to operational losses in 2004 Fin2 decided to withdraw from the French market and focus on the development of their core UK business. However, particular uncertainty was created by the potential sale of the business over these years. Following unsuccessful attempts by the majority owner to sell the holding at Fin2 in July 2005, the owner announced in October 2005 that it was to hang on to its majority stake in Fin2. In December 2005, the majority owner agreed to buy the 21.7% stake in Fin2 it did not already own. However, having reviewed its UK operations, including Fin2, the majority owner organization agreed finally to sell Fin2 to a US banking organization in January 2007.

At the time of research the organization was operating entirely within the UK and employed some 2,700 staff split between Derby, Dudley and London. Head office, in Derby, is home to most of the business functions to the main call centre site and accommodates the majority of the workforce, almost 1,800 employees, who are predominantly young graduates and women. A further 400 people are located in Dudley and 150 in London. The employee chair noted that at launch Fin2 was *'a small company with a dynamic culture'*. Management at Fin2 endorsed fully the human management resource model that emphasizes the importance of cooperation in all organizational relations and employ a range of direct methods of employee involvement. Within this context, employees are encouraged to regard the relationship with management as non-hierarchical and open.

Fin2 does not recognize a trade union. Pay and benefits are determined at company level by management and are based on both individual and company performance. However,

Fin2 and a union were locked in a battle over the union's recognition since 2003. While the union is recognized for the purpose of collective bargaining in the majority owner of Fin2 management at Fin2 decided from the start of Fin2's operation that a trade union was not needed for the purpose of representing the workforce. The reason for the refusal to allow the union to operate in Fin2 was management's perception that the existing policies ensured the fair treatment of the workforce. In 2005 the union stepped up its campaign to represent Fin2's employees, claiming that the internet bank's workers needed protection from the threat of outsourcing. The union wanted to be allowed to recruit members at Fin2 and to participate in workplace negotiations at the bank. Protests were held against Fin2 in two sites. Management but also the Fin2's forum rebuffed attempts by the union to recruit members at Fin2's call centres in Derby and Dudley.

Business services case study 1 (BS1)

BS1 was borne out of an outsourcing agreement over property outsourcing with a government department in mid-1998 and has developed to be one of the UK's leading property partnership specialists. In 2001 the organization was acquired by BS1 Group. At the time of research the BS1 Group's principal activities were developing property and managing portfolio of offices, shops, retail warehouses, food superstores and leisure together with property outsourcing throughout the UK. Apart from BS1, the Group is made up of a various others business units, e.g. portfolio management, development. The Group agrees the overall strategy of the business and determines the HR policies for the business. At the time of research the total number of employees in BS1 stood at around 1,400. The organization operates in six regions. Pay and bonuses are performance-related and there is no trade union recognized in BS1. Only in the BS1 Other Services unit, which forms part of BS1, two trade unions were recognized for a small number of employees that had come as a result of a joint venture launched with another organization and an outsourcing contract. However, in September 2005 BS1 decided to dispose of its 50% in the joint venture and in 2006 the outsourcing contract for the provision of management properties services was also terminated. While management was not aware of the specific number of union members in the organization they perceived that the level of union membership was generally very low.

In terms of employee relations, the management style was generally characterized by both management and ERs as based on a *'co-operative spirit that supports commitment and involvement of employees in the organization.'* A culture of non-hierarchy, visibility and communication has been promoted by management at all levels. BS1's programme of internal communication include the company's intranet, regular presentations to employees on business activities and business planning, notice boards, management and staff away days, weekly email news updates, six-weekly publication of the BS1 Group's e-magazine and a monthly environmental letter. The organization carries out also annual employee opinion surveys, the results of which are communicated to all employees. Two further management initiatives include the so-called 'Ideas into Action' and 'Values into Action' schemes. Management reported that in contrast to the significant range of internal communication and employee engagement schemes at BS1, at Group level there was traditionally more information and less employee engagement. When the latter

bought BS1, the Group adopted from BS1 a significant number of practices around employee involvement.

Business services case study 2 (BS2)

Founded in the 1960s, the organization employed female computer programmers working from home. Its core activity was designing and building applications software. Between 1976 and 1987 the company grew organically. It floated on the London Stock Exchange in 1996 and renamed itself as BS2 in May 2001. A couple of IT consulting acquisitions in 2000 and 2001 allowed the organization to branch out from its applications developments roots. Today, its principal activities are the provision of computer software, consulting and related support services. The main sectors of the BS2 clients' activity are: banking and insurance, retail, telecoms, utilities and the public sector. BS2's registered office is in the UK and it operates in the UK and Asia Pacific, with three process and technology centres across India. At the time of the research the company employed 6,850 people, 4,018 in the UK and 2,815 in India. In total there are approximately 101 sites with a large number of employees working at customers' premises. In July 2007, the organization was acquired by a French IT services organization.

Historically, BS2 attempted to build employee participation and retention through share plans, including the so-called 'all employee share ownership plan' and the 'save as you earn scheme'. In the view of the Managing Director (MD), the wealth-creation basis of the relationship between management and employees created a feeling of employee commitment and ownership. The expansion of the organization to outsourcing activities and the development of a partnership strategy with clients helped in bringing lengthy contracts with customers but also a large number of employees, representing around two thirds of the whole workforce, that were transferred as a result of the application of TUPE. Owing to these developments, the culture of the organization also evolved. In effect, a different engagement model that resembled no longer the kind of '*family relationship*' as promoted at the early days of the organization, but, in the view of the ERs, towards a shareholder culture, where employees were not considered anymore the '*heart of BS2*' was developed in the recent years.

The application of TUPE meant also the bringing over in the organization of trade unions. At the time of the research, five trade unions operated at BS2. No exact figures were provided with regard to the level of union membership but ERs reported that trade unions represented around 40% of the total UK workforce. Before law acted as a catalyst to the introduction of the unions in the organization, BS2 was intentionally a non-union organization. There was no management expertise on dealing with trade unions. Management has since concentrated on redefining the relationship with the unions towards co-operation. Twice a year business review updates are held between the unions and management. The organization also invested in an Employee Relations Manager and has a structured forum for discussion with the unions. The unions have formed a Joint Unions Committee but management has refused to recognize it as legitimate for the purposes of negotiation. Where a trade union is recognized pay and rewards are set by collective bargaining while in non-union sites these issues are determined at company level by management based on both individual and company performance.

Despite working towards a more positive relationship with the unions, senior management questioned the value of trade unions in organizational contexts, such as BS2, where the majority of the workforce consists of highly educated and experienced individuals. Within this milieu, the need for the unions to adapt to the new organizational context was emphasized and the business environment was mentioned by the MD and the union officers as a significant factor determining the relationship of the organization with employees and unions as well. Another issue that seemed to hinder the development of a positive climate between management, trade unions and employees was the increased use of outsourcing and offshoring services to lower-wage countries, specifically India, and the resulting destabilization of the sense of security and sense of belonging of employees. The situation was further complicated because of the nature of the organizations where the new employees came from, mostly large public but also private organizations, which functioned in a different to that of BS2 way, and the difficult IT market context during the late 1990s and early 2000. The general management approach was described by some ERs as one of *'command and control'*, where the distinction between the roles of management and employees are clearly defined and constantly re-affirmed.

However, a range of direct forms of employee involvement have been in operation for a number of years. Monthly communication processes and the development of an Internal Communication Shared Service Centre are provided as additional means to exchange information and support between management and employees. Bi-annual, confidential employee opinion surveys take also place, the results of which are fed back to employees and action plans are put in place to address concerns raised. Career management communications address specific issues that managers need to be aware of on a monthly basis and a 'Top talent forum' has established which meets every six months and concentrates on some of the key organizational issues.

Business services case study 3 (BS3)

BS3 is a fully-owned European subsidiary of the BS3 Group that is head-quartered in Japan. It is a leading IT services company that operates through a wide range of relationships with customers, from full outsourcing through managed services, professional services and projects. BS3 employs around 18,000 people in over 20 countries, including about 12,000 in the UK. Headquartered in London, it has various additional sites located around the UK. While the organization is wholly owned by the Japanese group, the Group HR Director explained that the HR strategy is not determined by the headquarters in Japan:

'The culture of our organization is typically British and our managers are not used to having to consult with employees.'

Owing to increased outsourcing activity and acquisitions, large groups of employees with existing collective agreements were brought in BS3. As a result, while the organization does not have any national agreements with unions, at the time of the research there were around 15 different recognition agreements covering a small number of employees. Two unions enjoy the largest number of members; these are recognized for collective bargaining in certain work-sites. The biggest union is unique in that it is the only

recognition agreement for certain categories of employees in the Manchester site and goes back for almost 30 years, when BS3 was part of another manufacturing organization. Management suggested that around 1,000 employees across the UK are covered by collective agreements.

The relationship with the biggest union has been particularly adversarial, especially during the last four years. In effect, the union is viewed by management as having evolved within a manufacturing, engineering type organizational culture that no longer corresponds to the nature of the organization, i.e. a modern IT services organization, which employs professional people. On the union side, representatives have claimed that the organization tries to derecognize the union in the Manchester site and has responded with the organization of strikes. Management and the union have also been involved on a dispute over pay transparency in the recent years. In contrast, the relationship with the next largest union present in the organization was described by management as '*less confrontational*.' The latter was attributed by union representatives to the business environment where BS3 operates and the union is present, e.g. public sector, and, secondly, to the fact that union membership is dispersed in small pockets in the organization and as such management perceives this union less of a threat. The importance of the business context in framing the relationship with the unions was also emphasized by management. In their view, the employee relations strategy concerning unions in the organization is built on the perceived need for clarity that the organization is happy to work with different unions instead of having an exclusive relationship with one union as this would not help BS3 to win outsourcing contracts.

The situation with employees in the IT sector was described by ERs as lacking awareness of the collective representation of their interests through a union. Employees, according to ERs, do not see an alternative in the individualization of the employee relations culture and as a result, only a minority of employees, around 2%, are union members. The employee chair of the forum noted that although management policy was sometimes supportive of employees, it was not always implemented by managers at lower levels. A number of 'business driven' employee engagement initiatives have been in operation. These include: regular local team meetings that are held at least every six weeks, intranet for employees, employee opinion surveys, regular road shows conducted by senior managers to meet employees, quarterly business update meetings for managers, magazine for employees and twice-yearly video messages. In addition to those, local or regional consultation forums are in operation. The local forums are comprised of business managers and employees in these areas. Their purpose is to provide space for discussion regarding changes taking place in particular business areas within the UK or areas of interest developing. Apart from those 'business driven' employee engagement initiatives, a EWC was established in 1995. The organizational rationale behind this initiative was the need to consult with representatives of each country at company-level and feed then the results of the exercises at national level through the local works councils or forums operating in each of the countries. The EWC, which meets on a quarterly basis and comprises 22 ERs, concentrates on issues spanning several countries, such as the organizational direction, major re-organizations, and financial issues.

Appendix C. Checklist for ICE agreements

1. The Company

1.1. Company name	
1.2. Home country	
1.3 Principal sector of activity	
1.3.1 Secondary sector of activity	
1.4 Is any information provided on workforce size?	Yes No
1.4.1. If yes, what is the number of employees and how is it divided into different, if any, sites?	

2. The agreement

2.1. Year and month of agreement	
2.2 Employee-side signatories (or ratification)	Check field (more than one may be checked)
<i>Trade union organization (s)</i>	<input type="checkbox"/>
<i>Works council-type body</i>	<input type="checkbox"/>
<i>"Employee representatives"</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
2.3 Method of approval	Check field (only one may be checked)
<i>Majority of employees voting in a ballot</i>	<input type="checkbox"/>
<i>Majority of the workforce expressed through signatures</i>	<input type="checkbox"/>
<i>Agreement of employee representatives, representing a majority of the workforce</i>	<input type="checkbox"/>
2.4 Number of agreements	Check field (only one may be checked)
Single	<input type="checkbox"/>
More than one (specify)	<input type="checkbox"/>
2.4.1 If there are more than one agreements, do the separate agreements cover	Check field (only one may be checked)
<i>Geographically separated businesses</i>	<input type="checkbox"/>
<i>Different occupational groups</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
2.5 Legal status of the agreement	
2.6. Does the agreement provide for a core principle of cooperation between management and employees?	Yes No
2.7 Does the agreement provide for a corporate alignment principle?	Yes No

3. Nature and Name

3.1. Nature of body	Check field (only one may be checked)
<i>Joint management/employee structure</i>	<input type="checkbox"/>

<i>Employee-side only structure</i>	<input type="checkbox"/>
3.2 Is the ICE agreement set up as a	
<i>A pre-existing agreement not intended to pre-empt the ICE Regulations</i>	<input type="checkbox"/>
<i>A pre-existing agreement set-up in order to pre-empt the ICE Regulations</i>	<input type="checkbox"/>
<i>A negotiated agreement</i>	<input type="checkbox"/>
<i>An agreement based on the standard provisions</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
3.3 What is the name of the ICE body	
<i>Consultative committee</i>	<input type="checkbox"/>
<i>Consultative Forum</i>	<input type="checkbox"/>
<i>Employee Council</i>	<input type="checkbox"/>
<i>Other (specify)</i>	
3.4. Business structure covered	Check field (only one may be checked)
<i>Group-wide only</i>	<input type="checkbox"/>
<i>Divisional only</i>	<input type="checkbox"/>
<i>Groups plus divisional</i>	<input type="checkbox"/>
3.5 Are all employees covered?	Yes No
3.5.1 Are there any employees excluded from the coverage of the agreement?	
3.5.2 If yes, which are the employees not covered by the agreement?	
<i>Part-time employees</i>	<input type="checkbox"/>
<i>Fixed-term employees</i>	<input type="checkbox"/>
<i>Those employed on contracts of employment of indefinite duration</i>	<input type="checkbox"/>
<i>Agency workers</i>	<input type="checkbox"/>
<i>Contract workers</i>	<input type="checkbox"/>
<i>Others (specify)</i>	<input type="checkbox"/>

4. Role

4.1 Stated role of body	Check field (more than one may be checked)
<i>Information and consultation</i>	<input type="checkbox"/>
<i>Formal consultation on some issues</i>	<input type="checkbox"/>
<i>Giving opinions/comments</i>	<input type="checkbox"/>
<i>Making recommendations</i>	<input type="checkbox"/>
<i>Negotiating joint texts</i>	<input type="checkbox"/>
<i>Setting up sub-committees</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
4.2 Is there a definition of information in the agreement?	Yes No

4.2.1 <i>If yes, how is it defined?</i>	
4.3 Is there a definition of consultation in the agreement?	Yes No
4.2.2 <i>If yes, how is it defined?</i>	
4.4 Issues dealt by the ICE body	Check field (more than one may be checked)
<i>Structure</i>	<input type="checkbox"/>
<i>Business, production, sales</i>	<input type="checkbox"/>
<i>Economic and financial situation</i>	<input type="checkbox"/>
<i>Employment/social issues</i>	<input type="checkbox"/>
<i>Investment</i>	<input type="checkbox"/>
<i>Organization</i>	<input type="checkbox"/>
<i>New working methods/production processes/technology</i>	<input type="checkbox"/>
<i>Transfers of production, mergers, cutbacks, closures and collective redundancies</i>	<input type="checkbox"/>
<i>Training</i>	<input type="checkbox"/>
<i>Health and safety</i>	<input type="checkbox"/>
<i>Environment</i>	<input type="checkbox"/>
<i>Equal opportunities</i>	<input type="checkbox"/>
<i>Working hours/conditions</i>	<input type="checkbox"/>
<i>Trade union rights</i>	<input type="checkbox"/>
<i>R&D</i>	<input type="checkbox"/>
<i>Competition</i>	<input type="checkbox"/>
<i>Industrial</i>	<input type="checkbox"/>
<i>Legal/political developments</i>	<input type="checkbox"/>
<i>Involvement in joint ventures/projects</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
4.5 Is the ICE forum specifically excluded from considering any issues?	Yes No
4.5.1 If yes, what are these issues?	Check field (more than one may be checked)
<i>Issues already dealt with by national/local consultation/bargaining</i>	<input type="checkbox"/>
<i>Collective redundancies</i>	<input type="checkbox"/>
<i>Business transfers</i>	<input type="checkbox"/>
<i>Occupational pensions</i>	<input type="checkbox"/>
<i>Health and safety issues</i>	<input type="checkbox"/>
<i>Pay/remuneration</i>	<input type="checkbox"/>
<i>Industrial disputes</i>	<input type="checkbox"/>
<i>Personal matters</i>	<input type="checkbox"/>
<i>Political matters</i>	<input type="checkbox"/>
<i>Others (specify)</i>	<input type="checkbox"/>

5. Composition

5.1 Is it possible to calculate the number of employee representatives?	Yes No
5.1.1 How many representatives are in total?	
5.2 Is the basis for the distribution of seats specified?	Yes No
5.2.1 If Yes, how are the seats distributed?	Check field (only one may be checked)
<i>Flat-rate</i>	<input type="checkbox"/>
<i>Workforce-size related</i>	Yes No
<i>Other (specify)</i>	<input type="checkbox"/>
5.2.2 If Yes (to 5.2), is there a divisional/sectoral dimension to distribution?	Yes No
5.2.3 If Yes (to 5.2), is there an occupational dimension to distribution?	Yes No
5.2.4 If Yes (to 5.2) is a distinction drawn between different types of operation (e.g. production sites and others)?	Yes No
5.3 Is there a workforce-size threshold for ICE representation?	Yes No
5.3.1 If Yes, does this apply	Check field (only one may be checked)
<i>To all subsidiaries/national operations</i>	<input type="checkbox"/>
<i>To some subsidiaries/national operations</i>	<input type="checkbox"/>
5.3.2 If Yes, what is the threshold?	
5.4 How are representatives selected?	Check field (only one may be checked)
<i>Nomination by trade unions</i>	<input type="checkbox"/>
<i>Appointment by management</i>	<input type="checkbox"/>
<i>Direct elections</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
5.4.1. If trade union nomination is checked, is this method used	Check field (only one may be checked)
<i>As the primary or only method for the selection</i>	<input type="checkbox"/>
<i>As the subsidiary method for selection</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
5.4.2 If appointment by management is checked, is this method used	Check field (only one may be checked)
<i>As the primary or only method for the selection</i>	<input type="checkbox"/>
<i>As the subsidiary method for selection</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
5.4.3 If direct elections is checked, is this method used	Check field (only one may be checked)

<i>As the primary or only method for the selection</i>	<input type="checkbox"/>
<i>As the subsidiary method for selection</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
5.4.4 If direct elections is checked, who organizes the elections	Check field (only one may be checked)
<i>The company itself</i>	<input type="checkbox"/>
<i>An independent body</i>	<input type="checkbox"/>
<i>Some combination of the previous two</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
5.4.5 Is there a period of office of representatives defined in the agreement?	Yes No
5.4.5.1 If yes, what is the period of office of representatives?	
5.4.5.2 Is it defined in the agreement when a representative will cease to hold office?	Yes No
5.4.5.3 If yes, which are the reasons	Check field (more than one may be checked)
<i>Ceases to be an employee</i>	<input type="checkbox"/>
<i>Resigns as an employee representative</i>	<input type="checkbox"/>
<i>Is absent from work for more than a specified period owing to sickness or injury</i>	<input type="checkbox"/>
<i>Fails to attend ...consecutive meetings of the body</i>	<input type="checkbox"/>
<i>Breaches the confidentiality provisions</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
5.4.6 Are there any criteria specified for eligibility as a candidate?	Yes No
5.4.6.1 If Yes, which are these criteria?	Check field (more than one may be checked)
<i>Length of service</i>	<input type="checkbox"/>
<i>Disciplinary record</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
5.5 Are there any employee-side members of the forum, other than lay representatives?	Yes No
5.5.1 If Yes, are they	Check field (more than one may be checked)
<i>National trade union officials</i>	<input type="checkbox"/>
<i>Unspecified trade union officials</i>	<input type="checkbox"/>
<i>(Any trade union officials)</i>	<input type="checkbox"/>
<i>Others (specify)</i>	<input type="checkbox"/>
5.6 Can any non-members attend the forum's meetings, by right?	Yes No
5.6.1 If Yes, are they	Check field (more than one may be checked)
<i>National trade union officials</i>	<input type="checkbox"/>
<i>Unspecified trade union officials</i>	<input type="checkbox"/>

<i>(Any trade union officials)</i>	<input type="checkbox"/>
<i>Observers</i>	<input type="checkbox"/>
<i>Experts</i>	<input type="checkbox"/>
<i>Guests</i>	<input type="checkbox"/>
<i>Others (specify)</i>	<input type="checkbox"/>
5.7 Can any non-members attend the forum's meetings, by invitation?	Yes No
5.7.1 If Yes, are they	Check field (more than one may be checked)
<i>National trade union officials</i>	<input type="checkbox"/>
<i>Unspecified trade union officials</i>	<input type="checkbox"/>
<i>(Any trade union officials)</i>	<input type="checkbox"/>
<i>Observers</i>	<input type="checkbox"/>
<i>Experts</i>	<input type="checkbox"/>
<i>Guests</i>	<input type="checkbox"/>
<i>Others (specify)</i>	<input type="checkbox"/>

6. Organization

6.1 Who chairs the forum's meetings	Check field (only one may be checked)
<i>Management representative</i>	<input type="checkbox"/>
<i>Employee Representative</i>	<input type="checkbox"/>
<i>Joint/rotating chairs</i>	<input type="checkbox"/>
<i>Not specified</i>	<input type="checkbox"/>
6.1.1 If management chairs, can the employee side elect an employee official?	Yes No
6.2 Is it specified how the agenda for EWC meetings is set?	Yes No
6.2.1 If Yes, is the agenda set	Check field (only one may be checked)
<i>Solely by management</i>	<input type="checkbox"/>
<i>Solely by the employee side</i>	<input type="checkbox"/>
<i>By some joint process</i>	<input type="checkbox"/>
6.3 Is it specified how the minutes or report of the forum's meetings are drawn up?	Yes No
6.3.1 If Yes, are the minutes or report drawn up	Check field (only one may be checked)
<i>Solely by management</i>	<input type="checkbox"/>
<i>Solely by the employee side</i>	<input type="checkbox"/>
<i>By some joint process</i>	<input type="checkbox"/>
6.4 Are there any provisions for the feedback of information arising from the forum's meetings within the group, beyond the members of the forum?	Yes No
6.4.1. If Yes, what form does it take	Check field (more than one may be checked)

<i>Distribution of the minutes to managers</i>	<input type="checkbox"/>
<i>Distribution of the minutes to employee/union representatives</i>	<input type="checkbox"/>
<i>Distribution of the minutes to workforce as a whole (directly or indirectly-e.g. to all sites)</i>	<input type="checkbox"/>
<i>Distribution of a joint communiqué/report to managers</i>	<input type="checkbox"/>
<i>Distribution of a joint communiqué/report to employee/union representatives</i>	<input type="checkbox"/>
<i>Distribution of a joint communiqué/report to workforce as a whole (directly or indirectly-e.g. to all sites)</i>	<input type="checkbox"/>
<i>Employee representatives to report back to employees</i>	<input type="checkbox"/>
<i>Joint report back to employees</i>	<input type="checkbox"/>
<i>Joint report back to employee representative bodies</i>	<input type="checkbox"/>
<i>Information dissemination to workforce</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>

7. Meetings

7.1 How many ordinary forum meetings are held a year?	
7.2 Is there a facility for extraordinary meetings?	Yes No
7.2.1 If Yes, are meetings called by:	Check field (more than one may be checked)
<i>Management</i>	<input type="checkbox"/>
<i>Employee side</i>	<input type="checkbox"/>
<i>A joint process</i>	<input type="checkbox"/>
7.2.2 If Yes, does the meeting involve:	Check field (more than one may be checked)
<i>The full forum</i>	<input type="checkbox"/>
<i>Some other restricted group</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
7.3 Is there a facility for employee representatives to hold preparatory meetings without management?	Yes No
Is there a facility for employee representatives to hold follow-up meetings without management?	Yes No

8. Facilities

8.1 Does the employee-side have access to external experts, or similar	Yes No
8.1.1 If Yes, is the access to	Check field (only one may be checked)
<i>One expert</i>	<input type="checkbox"/>
<i>Two or more experts</i>	<input type="checkbox"/>
<i>Unclear/unspecified</i>	<input type="checkbox"/>
8.1.2 If Yes, may these experts attend:	Check field (more than one may be checked)
<i>Full forum's meetings</i>	<input type="checkbox"/>

<i>Preparatory meetings</i>	<input type="checkbox"/>
8.1.3 If yes, is management agreement required for attendance at	
<i>Full forum's meetings</i>	<input type="checkbox"/>
<i>Preparatory meetings</i>	<input type="checkbox"/>
8.2 Are the operating expenses of the forum borne by management	Yes No
8.3 Does the agreement provide for management to provide/fund the following	Check field (more than one may be checked)
<i>Paid time off for employee representatives to attend meetings</i>	<input type="checkbox"/>
<i>Paid time off for some or all employee representatives to carry out their duties (other than attending meetings)</i>	<input type="checkbox"/>
<i>Accommodation and travel for forum's members</i>	<input type="checkbox"/>
<i>Cost of preparatory meetings</i>	<input type="checkbox"/>
<i>Costs of one expert</i>	<input type="checkbox"/>
<i>Costs of more than one expert</i>	<input type="checkbox"/>
<i>Training for employee representatives</i>	<input type="checkbox"/>
<i>A separate budget for the forum</i>	<input type="checkbox"/>
<i>Secretarial/technical assistance for the forum</i>	<input type="checkbox"/>
<i>Access to workplaces</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>
8.3.1 If training checked, does this relate to:	Check field (more than one may be checked)
<i>Financial/economic matters</i>	<input type="checkbox"/>
<i>Company-specific matters</i>	<input type="checkbox"/>
<i>Social matters/legislation</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>

9. Confidentiality

9.1 Does the agreement contain a clause relating to confidentiality?	Yes No
9.1.1 If yes, which provisions does the clause contain	Check field (more than one may be checked)
<i>Obligation on members to treat as confidential information identified as such</i>	<input type="checkbox"/>
<i>General obligation of discretion for members</i>	<input type="checkbox"/>
<i>Joint process for establishing confidentiality</i>	<input type="checkbox"/>
<i>Confidentiality obligations continue to apply after expiry of mandate</i>	<input type="checkbox"/>
<i>Sanctions for breach of confidentiality identified</i>	<input type="checkbox"/>
<i>Management may withhold potentially detrimental information</i>	<input type="checkbox"/>
<i>Experts specifically covered</i>	<input type="checkbox"/>
<i>Confidentiality applies to minutes/reports etc</i>	<input type="checkbox"/>

<i>Other (specify)</i>	<input type="checkbox"/>
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10. Protection

10.1 Does the agreement make any provision on protection for employee representatives?	Yes No
10.1.1 If Yes, what provision?	
<i>Same protection as in law/practice</i>	<input type="checkbox"/>
<i>No advantage/disadvantage through membership</i>	<input type="checkbox"/>
<i>Other (specify)</i>	<input type="checkbox"/>

11. Resolving disputes

11.1 Is there any procedure for resolving disputes defined in the agreement?	Yes No
11.2 If yes, what kind of recourse is stipulated?	Check field (only one may be checked)
<i>Internal procedure only</i>	<input type="checkbox"/>
<i>Internal procedure followed by an external one on a second level</i>	<input type="checkbox"/>
<i>External-independent third party only</i>	<input type="checkbox"/>
<i>Other (please specify)</i>	<input type="checkbox"/>

12. Amending the agreement and termination of the agreement

12.1 Is there any provision stipulated regarding the amendment and termination of the agreement?	Yes No
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13. Legal status of the agreement

13.1 Is the legal status of the agreement clarified?	Yes No
13.1.1 If yes, is the agreement legally enforceable?	Yes No
13.1.2 If yes, is the whole text of the agreement legally enforceable?	Yes No
13.1.2.1. If no, which clauses are enforceable?	Check field (more than one may be checked)
Confidentiality clause	<input type="checkbox"/>
Other (specify)	<input type="checkbox"/>