

Policy and Practice Regarding Involvement and  
Participation in the Workplace.  
How Effective is the European Union's Approach  
for the English Patient?

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# Abstract

The purpose of this thesis is to evaluate evidence about the European Union's approach to involvement and participation (**I&P**) in the workplace and whether this is the most appropriate policy for the UK.

The first part overviews the development of social policy involving I&P in the European Union and the UK. It traces how social policy involving I&P developed from an incidental part of the Treaty of Rome to the point where I&P in the workplace became enshrined in the Treaty on The Functioning of the European. Since 1970 the Commission has put forward a series of legislative measures that required I&P in the workplace. Primary and secondary sources are analysed to identify factors that influenced the development of I&P policy and led to a new style of Directive that has been used in this area since 1994.

The second part analyses the anatomy of I&P using six factors found in the literature. Although the importance of the depth and type of I&P was identified, the literature lacked a comprehensive analysis of key terms used in the I&P. An Involvement and Participation Framework is developed to fill this gap. Whilst Chapter 4 investigates features that combine to produce different forms of I&P Chapter 5 shows how they are used in EU legislative measures.

The third part uses Workplace Industrial Relations Surveys and Workplace Employment Relations Surveys to examine I&P practice in the UK. It assesses how management, employees and employee representatives approach and value different forms of I&P in the UK. In order to do this five new hypotheses are developed and tested through quantitative analysis; further results are drawn from literature and studies using *survey* data. The results challenge basic assumptions made by the EU and give rise to doubts about the basis for the EU's I&P policy.

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## Preface

Since the beginning of the writing up period for this thesis two works were published that had the potential to make a serious impact on its findings. In order to evaluate the effectiveness of the European Union's policy on involvement and participation in the workplace in the UK, Chapter 6 uses data, and studies based upon data, from the Workplace Industrial Relations Surveys and Workplace Employment Relations Surveys. The last survey related to 2004. Since then the Information and Consultation of Employees Regulations 2004 SI 2004/3426 have come into force. Relevant data from the Workplace Employment Relations Survey was published in 2013 and reference has therefore been made to van Wanrooy, B, Bewley, H, Bryson, A, Forth, J, Freeth, S, Stokes, L and Wood, S, *Employment Relations in the Shadow of the Recession: Findings from the 2011 Workplace Employment Relations Study* (Palgrave Macmillan 2013). Reference was also made to the Department of Business Innovation and Skills' document 'Collective Redundancies. Consultation on Changes to the Rules' (2012) URN: 12/808 3.

The law is as stated at 31<sup>st</sup> December 2012.

# Chapter 1 Introduction

The European Commission has promoted measures containing indirect involvement and participation in the workplace (**I&P**) since 1970.<sup>1</sup> Whilst direct participation concerns interaction between management and employee(s), indirect participation involves electing, or appointing one or more employee/worker representatives. These represent (and should ideally report back to) all or a section of a workforce. Management then interacts with the representative rather than directly with workers. At various times it has stated that the practice would:

- (1) lead to humanisation of working conditions;
- (2) help organisations adapt to market conditions and increase competitiveness; and
- (3) promote employee involvement within the workplace.<sup>2</sup>

The European Union (**EU**) has been consistent in its preference for indirect I&P. Despite its policy, little has been written about how effective EU legislation is, or has been, in achieving the three objectives.

Is the implementation of this policy, via indirect participation using worker representatives, the best way of achieving these objectives in the UK (or the most effective treatment for the English Patient)? The thesis explores and assesses EU policy, and places it in the context of alternative approaches to I&P. In order to distinguish what key terms mean and how they relate to each other a new Involvement and Participation Framework (**IPF**) is created

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<sup>1</sup> Proposal for a Council Regulation (Com) 70(600) embodying a statute for European companies [1970] 1970 OJ C124/1.

<sup>2</sup> *Bull Supp 8/75* (n 34) European Commission *Employee participation and company structure in the European Community (Green Paper)* (Bull Supp 8/75, pg 54, 1975) 9,11; Commission *Communication on worker information and consultation* (COM(95) 547 final, 1995) 7; Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29 recitals 7-10.

and used to expose problems with some of the EU's definitions. UK data, mainly drawn from the Workplace Industrial Relations Surveys and Workplace Employment Relations Surveys, is used to discover how management and employee representatives view the I&P process, before evaluating different kinds of I&P against the claims made by the Commission about its I&P policy.

Section 1.1 overviews the thesis, whilst 1.2 seeks to place the author's approach to the thesis in the context of the orthodox industrial relations framework.

## 1.1 OVERVIEW

### Chapter 2

#### The Emergence of European and English Policies Concerning Involvement and Participation

Chapter 2 seeks evidence of a coherent European Union (**EU**) policy on I&P in the workplace. Issues behind the rise of the EU's I&P policy are examined through analysis of primary and secondary sources. The chapter goes on to show the extent to which the EU influenced I&P in the UK.

The Treaty of Rome initially reflected a neo-liberal outlook on social policy. This focused on economic growth rather than social policy. European economic and social rights within the workplace were addressed through the Council of Europe's European Social Charter (**ESC**). However economic and social upheaval during the 1960s led to demands that European Economic Community (**EEC**) address social policy issues. Legislative provisions relating to this movement included the Collective Redundancies Directive and Acquired Rights Directive.<sup>3</sup> Both concerned specific

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<sup>3</sup> Council Directive (EEC) 75/129 on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L39/40; Directive (EEC) 77/187 on the approximation of the legislation of Member States on the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of business [1977] OJ L61/26.

economic situations that gave rise to social problems and required consultation with employee representatives.

Developing a more ‘comprehensive’ social policy was problematic. Whereas consensus was reached on the uncontroversial Health and Safety Directive,<sup>4</sup> agreement regarding the European Works Council Directive<sup>5</sup> required a separate social policy agreement. Not until 1997 were the Treaties Establishing the European Economic Community amended to include the general objective of supporting ‘the information and consultation of workers’<sup>6</sup>. More measures requiring I&P followed.<sup>7</sup>

Part of the reason for this slow development was a difference in views between the Commission and Member States - especially the UK - about the role that the state, management, and employees should play in the workplace. In the UK the main tool for resolving difficulties has traditionally been collective bargaining. The model that the EU favours is based upon indirect representation through representative bodies.

### Chapter 3

#### The Development of European Legislative Concerning Involvement and Participation

Chapter 3 looks at EU policy at a legislative level. Primary and secondary sources illustrate the struggle to find successful formulae for legislation requiring I&P. Relevant proposals and legislation can be divided into three overlapping categories. The first attempted to harmonise practice by

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<sup>4</sup> Council Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

<sup>5</sup> Council Directive (EC) 94/45 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 [1994] OJ L254/64.

<sup>6</sup> TFEU Arts 137(1) and 153(1).

<sup>7</sup> E.g. Council Regulation (EC) No 2157/2001 on the Statute for a European Company (SE) 2001 L294/1; IC Directive 2002/14 (n 5); Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) 2003 L207/1.

introducing uniform rules to apply across the community irrespective of current national work practices. Early drafts of the European Companies Statute and the Fifth Directive<sup>8</sup> fall into this category. The second sought to resolve pressing socio-economic problems, such as collective redundancies, that had arisen within the EEC. The third seeks to encourage I&P by fusing legislative practice into acceptable legislative measures. An example is the European Works Council Directive.<sup>9</sup> Only proposals falling into the last two categories met with success.

The chapter investigates why by 1993, despite numerous proposals, only three pieces of EU legislation that required I&P had been enacted. Seven factors that appeared to determine success or failure are identified:

1. Subject matter. Member States had to have sufficient interest in a topic for it to go through what could be a long legislative process.
2. Realistic objectives about changes Member States would make to laws and/or practices.
3. Un-complex non-prescriptive formulae that allowed for Member States to use existing practices to implement Directives.
4. Limited impact on Member States' legal systems. Directives that succeeded either required, or were interpreted as requiring little national legislation to comply with practices in Member States.
5. Sufficient impetus to negotiate acceptable agreements.
6. Sponsorship by a member state or European institution to prioritise proposals on the Community's, or EU President's, legislative agenda.
7. Whether legislation could be blocked by one or more objecting Member State.

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<sup>8</sup> E.g. ECo Proposal 70/600; Draft of a Fifth Directive on the structure of Sociétés Anonymes 1972 OJ C 131 12.12.1972 Bull Sup 10/72.

<sup>9</sup> Council Directive 2009/38/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 [2009] OJ L122/28.

The chapter charts the development of a framework upon which subsequent measures requiring I&P have been based.

## Chapter 4

### A Typology of Involvement and Participation in the Workplace

Chapter 4 explores characteristics that combine to form various kinds of I&P. It identifies basic differences between the UK's and EU's approaches using Zumbansen's 'Human Resources' and 'Co-determination' models.<sup>10</sup> Whereas the first stresses management's freedom to organise work, the second emphasises co-operation between management and workers when devising and organising policy on employee related issues. Six different aspects of I&P are identified, defined, and key terms are placed in the context of a new analytical framework.

The six factors are:

1. The purpose or objective of the exercise. I&P can be the result of management initiative, worker pressure, and legislative policy. These factors can affect the rationale of the interaction, and its objectives.
2. Subject matter. The issues upon which I&P take place.
3. The point at which the interaction takes place. Be it on the shop floor, supervisory board, or any level between the two.
4. Who is involved. Marchington<sup>11</sup> distinguished between direct participation (involvement between management and employee) and indirect participation (involvement between management and employee representative).

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<sup>10</sup> Zumbansen, 'Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law' in Boeger, Murray and Villiers (Edd) *Perspectives on Corporate Social Responsibility* (Edward Elgar Publishing Ltd Cheltenham 2008) 114.

<sup>11</sup> Marchington and Wilkinson, 'Direct Participation and Involvement' in Bach (ed) *Managing Human Resources* (4th edn Blackwell Oxford 2005) 402.

5. The formality of the involvement/participation mechanism. This may be determined by government regulation, industrial agreements, or be at management's discretion.
6. Terminology used to express the depth or type of involvement or participation. For example 'consult' or 'co-determination'. Textual analysis is used to explore the meaning of relevant terms and how they are used.

Analysis of the literature<sup>12</sup> showed that terms such as 'participate', 'consult', and 'co-determination' were not defined or used in a systematic fashion. When placing I&P mechanisms in a hierarchy based upon increasing levels of employee influence authors' choices about what to include differed. The chapter builds on the literature to provide clear definitions for each term and creates a *new* comprehensive 'Involvement and Participation Framework' that distinguishes between different terms and shows how they interrelate.

## Chapter 5

### An Analysis of Seven Measures Requiring Involvement and Participation

Chapter 5 looks at the way EU legislation impacts on I&P in the workplace. It examines seven EU provisions in relation to the six factors identified in Chapter 4. The provisions are:

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<sup>12</sup> Ibid 400; Blyton and Turnbull (1998) *The dynamics of Employee Relations* 2<sup>nd</sup> edn London Macmillan in Rose *Employment Relations* (3rd edn Pearson Education Limited Harlow 2008) 339; Industrial Democracy in Europe International Research Group *Industrial Democracy in Europe* (Clarendon Press Oxford 1981)53-4; Elliott *Conflict or Co-operation? The Growth of Industrial Democracy* (Kogan Page Limited London 1978). 125; Biagi and Tiraboshi, 'Forms of Employee Representational Participation' in Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Wolters Kluwer Austin 2007) 504.

1. The Collective Redundancies Directive
2. The Acquired Rights Directive<sup>13</sup>
3. The Health and Safety Directive<sup>14</sup>
4. The European Works Council Directive<sup>15</sup>
5. The European Company Regulation<sup>16</sup>
6. The European Company Directive<sup>17</sup>
7. The Information and Consultation Directive<sup>18</sup>

To establish a reliable basis from which to understand inconsistencies amongst, and problems within, the legislation, Section 5.1 looks at the European Court of Justice's methodology.

The EU's approach to I&P is then explored. Key areas of, and differences between, the measures are examined. These include the level of an organisation at which employees and management should be involved and if, or when, 'indirect' and 'direct' participation should be used.

Terms such as 'consult' are compared and found to lack or have inconsistent definitions. They are considered in the context of Chapter 4 and its 'Involvement and Participation Framework'. Analysis leads to new ideas regarding EU 'policy' and the way in which I&P should be implemented. Conclusions are based upon statutory analysis, ECJ rulings, and textual analysis of primary and secondary sources.

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<sup>13</sup> Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses [2001] OJ L82/16.

<sup>14</sup> H&S Directive 89/391 (n 4).

<sup>15</sup> EWC Directive 2009/38 (n 5).

<sup>16</sup> ECo Regulation 2157/2001 (n 7).

<sup>17</sup> Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294.

<sup>18</sup> IC Directive 2002/14 (n 11).

## Chapter 6

### Perceptions of Participation

Chapter 6 seeks to discover how I&P is perceived in the workplace. The literature is used to develop five new hypotheses that relate to I&P and the I&P process. The hypotheses are:

1. When compared with management, employee representatives are less likely to report interactive approaches to decision-making;
2. Managers and employee representatives are more likely to report more interactive forms of I&P around issues which give rise to distributive bargaining or are regulated by legislation;
3. Management is more likely to report the occurrence of negotiation or consultation when there are union representatives;
4. When compared with the private sector, management uses more interactive forms of I&P in the public sector;
5. Compared with the public sector, management in the private sector is less interactive with employee representatives on goals of non-commercial importance and more interactive with employee representatives on goals of commercial importance.

Quantitative analysis using data from the Workplace Employment Relations Survey 2004 (WERS2004) is used to test the five hypotheses. WERS2004 asked the same questions of management *and* employee representatives so the responses of each can be compared. ‘T tests’ are carried out in order to ascertain whether differences between the two are significant. Three sets of questions from the survey are used. These concerned:

1. which of three options best described the way management consulted;
2. the redundancy process; and
3. whether management negotiated, consulted, informed, or did not inform on 12 wide ranging issues. These included terms and

conditions such as pay, grievance procedures and also issues such as training and recruitment policy.

The tests relating to the three sets of questions lend varying levels of support to all five hypotheses.

## Chapter 7

### An Evaluation of the Success of Different Models of Involvement and Participation in the UK

Chapter 7 examines different kinds of I&P against claims made by the European Commission in respect of its I&P policy. The Commission has consistently promoted structured I&P with employee representatives. It bases its policy on the assumption that this will: (1) lead to humanisation of working conditions; (2) help organisations adapt to market conditions and increase competitiveness; and (3) promote employee involvement within the workplace. These assumptions are evaluated and tested using the results of *quantitative and qualitative* analysis mainly drawn from studies using Workplace Industrial Relations Surveys (**WIRS**) and Workplace Employment Relations Surveys (**WERS**).

There have been no EU studies to assess the Commission's presumptions. The literature was searched for supporting evidence. It found eight 'qualities' that relate to the Commission's claims had been examined in connection with the UK's workforce (helpfulness, trust, organisational commitment, job satisfaction, contentment, employee relations, financial performance, labour productivity, employee involvement in and influence over the workplace). Section 7.4 looks at correlations between the 'qualities' and:

1. different sorts of direct contact between management and employee;
2. indirect contact via Joint Consultation Committees (**JCCs**); and
3. indirect contact via unions.

Other sections analyse the incidence of JCCs, union recognition, and ‘direct participation’ over a twenty-four year period and look at four factors that appear to have impacted on the type of I&P used and its success (organisation size, management attitudes, worker attitudes, and trade unions).

In the UK it appears that management attitudes have played a key role in the success or failure of any I&P process. Survey data reveals a decline of JCCs and union recognition has coincided with an increase in the use of direct participation. These developments appear to point towards practices that management find the most useful. Evaluating connections between different I&P practices and the eight qualities (above) provide a source of evidence to test the wisdom of management trends and EU ‘assumptions’.

## Chapter 8

### Conclusion

The EU has promoted a policy of indirect I&P in the workplace based upon the practices of some of its Member States. Despite its claims, the source of its endorsement appears to be little more than idealistic preference. Little research has been carried out around the EU’s policy concerning its three objectives.<sup>19</sup> However, evidence has been found which indicates that in the UK’s working environment, the EU’s strategy is not necessarily best suited to advancing many of its underlying aims.

#### 1.2 THEORETICAL PERSPECTIVES

Industrial relations literature categorises three major views of industrial relations namely: ‘unitarist’, ‘pluralist’, and ‘radical’.<sup>20</sup> Developed by Fox,<sup>21</sup>

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<sup>19</sup> Text to n 2.

<sup>20</sup> E.g. Salamon *Industrial Relations Theory and Practice* (Prentice Hall London 1987) 24; Ackers and Wilkinson, ‘Introduction: The British Industrial Relations Tradition- Formation, Breakdown, and Salvage’ in Ackers and Wilkinson (Eds) *Understanding Work and Employment* (OUP Oxford 2003) 8; Gospel and Palmer *British Industrial Relations* (Routledge London 1983) 12-28; Farnham and Pimlott *Understanding Industrial Relations*

these frames of reference have been described as both ‘mutually exclusive’<sup>22</sup> and ‘crude’.<sup>23</sup> Placing the approach taken within this thesis within this typology is problematic. Section 1.2 defines the frames of reference, overviews the context in which they were developed, identifies perceived gaps within the frameworks in the context of the twenty-first century, reviews the way different people have attempted to develop the typology, and constructs a structure that reflects the author’s stance.

### **1.2.1 Fox’s Three Frames of Reference:**

The typology was developed in the context of the philosophy of the ‘Oxford School’. During the 1950s and 1960s it was felt that Trade unions and employers’ associations were the chief institutions of industrial relations and that their main relationship was through collective bargaining.<sup>24</sup> The three frames reflect the industrial and social norms and ideas of the period.

**Unitarist** The origins of the unitarist frame are historical, and based upon the right of a ‘master to demand unquestioning obedience from his servants.’<sup>25</sup> It presents the work situation as characterised by harmony and trust.<sup>26</sup> The ‘failure of some groups... to fully acknowledge management’s prerogative and its call for obedience, loyalty and trust is seen as springing from responses of doubtful validity and legitimacy.’<sup>27</sup> Union activity should

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(Cassell London 1995) 45; Blyton and Turnbull *The Dynamics of Employee Relations* (3rd edn Macmillan London 2004) 31; and Rose (n 8).

<sup>21</sup> Fox 'Industrial Sociology and Industrial Relations' (1966) Royal Commission Research Paper No. 3 HMSO ,Fox *Beyond Contract: Work, Power and Trust Relations* (Faber and Faber Limited London 1974).

<sup>22</sup> Purcell 'Mapping Management Styles in Employee Relations' (1987) 25 5 J Manage Stud 533-548 546.

<sup>23</sup> Gospel and Palmer (n 20) 64.

<sup>24</sup> Flanders and Clegg (1954: v-vi) in Ackers and Wilkinson 'British Industrial Relations Paradigm: A Critical Outline in History and Prognosis' (2005) 47 4 J Ind Relat 443-456 446.

<sup>25</sup> Fox *Beyond Contract* (n 21) 250.

<sup>26</sup> Ibid 249.

<sup>27</sup> Ibid 249.

be ‘responsibly’ confined within whatever limits management currently found appropriate.<sup>28</sup>

**Pluralist** This recognises that those within organisations do not have identical motives or objectives. The view assumes:

managers... may be tempted to govern their human resources in ways which one or more subordinate groups experience as arbitrary, summary, or contrary to their own interests and which they are likely to challenge through independent collective organisation. It sees trade unions or organised workgroups as possibly being able to readjust the power balance to such effect as to be labelled subordinate to impose their preferences in ways which management may find arbitrary and summary.<sup>29</sup>

Collective bargaining is traditionally interpreted as a way of legitimising the industrial order because it is ‘based upon negotiated consent.’<sup>30</sup> The organisation is therefore ‘seen as a complex of tensions and competing claims which have to be “managed” so as to maintain a viable collaboration structure within which all stakeholders can, with varying degrees of success, pursue their aspirations. Some degree of conflict between the interests is expected.<sup>31</sup>

**Radical** This also takes the position that there are competing interests and values within an organisation. However, whereas pluralism takes the position that industrial relations structures will result in the accommodation of dissonant interests, radicalism does not. Its viewpoint is that the balance of power between management and employees is not one that enables the latter to secure their interests. The solution is to restructure society in order to redress this imbalance.<sup>32</sup>

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<sup>28</sup> Ibid 251.

<sup>29</sup> Ibid 262.

<sup>30</sup> Ibid 247.

<sup>31</sup> Ibid 261.

<sup>32</sup> Ibid 283-6.

## 1.2.2 Contemporary Problems Inherent With Frames of Reference

The area of industrial relations and its frames of reference concern a relatively limited area of management activity. Its approach and theory were rooted in the practices and concerns of post-war liberal collectivism. This advocated freely negotiated agreements between management and labour with a limited role for government and law.<sup>33</sup> Ackers and Wilkinson stated ‘by and large, management activity outside collective bargaining (including non-union companies) became no concern of industrial relations and neither “employer regulation” nor consultation received much... attention.’<sup>34</sup> The Oxford School took a critical stance towards industrial relations,<sup>35</sup> industrial sociology, other work-related management studies, and disciplines (such as economics) that were ‘typically unfriendly to unions.’<sup>36</sup> This meant that such areas of management practice as voluntary welfare provision, co-partnership, profit sharing, industrial psychology, and human resource management (**HRM**) faded from post-war texts on Industrial relations and were not taken seriously into consideration within the framework Fox developed.<sup>37</sup>

In eschewing the study of HRM type techniques (whether indigenous developments in the UK or influences from the USA and Japan) the frames categorised such practices as unitarist. The frames deny a place for genuine interaction/participation (albeit at the discretion of management) outside the context of collective bargaining. These practices were grouped as illegitimate because they were said to deny the legitimacy of employee organisations in trade unions.<sup>38</sup> However, evidence in Chapter 7 shows that

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<sup>33</sup> Gospel and Palmer (n 20) 15.

<sup>34</sup> Ackers and Wilkinson (n 20) 8.

<sup>35</sup> Ackers, P and Wilkinson, A, 'British Industrial Relations Paradigm: A Critical Outline in History and Prognosis' (2005) 47 4 J Ind Relat 443 446.

<sup>36</sup> Kaufman 'History of the British Industrial Relations Field Reconsidered: Getting from the Webbs to the New Employment Paradigm' (2014) 52 1 BJIR 1-31, 19-20.

<sup>37</sup> Ackers and Wilkinson 'British Industrial Relations' (n 35) 445.

<sup>38</sup> Gospel and Palmer (n 20) 14.

such practices can, and do, work in tandem with the presence of recognised unions.<sup>39</sup>

There are problems with the bipolar (or bi-focal) presentation of pluralism as opposed to unitarism.<sup>40</sup> A choice is to be made between two philosophies. Pluralism is predicated on the idea that ‘the degree of common purpose which can exist in industry is only of very limited nature’<sup>41</sup> with ‘collective-bargaining... as a symbol of... a legitimized pluralistic industrial order based upon negotiated consent.’<sup>42</sup> Words associated with pluralism/pluralistic practices include ‘legitimate’ and ‘democratic’.<sup>43</sup> By the 1970s, industrial relations theory/commentary was effectively pluralist.<sup>44</sup> Unitarism is inevitably viewed as having illegitimate and undemocratic associations; human relations practices (such as HRM) are therefore perceived as being ‘*manipulative... techniques* to promote harmony and willing cooperation under management “leadership”’.<sup>45</sup>

Fox was of the opinion that low trust and conflict existed because workers were defining, and seeking to accomplish, goals that differed from those of management. In Chapters 2 and 7 it will be seen that the industrial landscape altered dramatically after 1979. The frames of reference were developed in the context of the 1960s/1970s industrial society with a ‘largely male semi-skilled, workforce with a standard employment relationship’.<sup>46</sup> Today the economy is dominated by services with a high proportion of part-time women workers. Such

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<sup>39</sup> Also Ackers and Wilkinson 'Understanding Work' (n 20) 18-19.

<sup>40</sup> Ackers 'Rethinking the Employment Relationship: a Neo-Pluralist Critique of British Industrial Relations Orthodoxy' (2014) 25 18 Int J Human Resour Man 2608-2625 2612.

<sup>41</sup> Fox 'Industrial Sociology' (n 20) 2.

<sup>42</sup> Fox *Beyond Contract* (n 20) 247.

<sup>43</sup> Fox 'Industrial Sociology' (n 20) 2.

<sup>44</sup> Cradden 'Reconsidering the Frames of Reference: Expanding Fox's Theory beyond Unitarism, Pluralism and Radicalism' Academiaedu <[https://www.academia.edu/3309237/Reconsidering\\_the\\_Frames\\_of\\_Reference\\_expanding\\_Foxs\\_theory\\_beyond\\_unitarism\\_pluralism\\_and\\_radicalism](https://www.academia.edu/3309237/Reconsidering_the_Frames_of_Reference_expanding_Foxs_theory_beyond_unitarism_pluralism_and_radicalism)> accessed 7th October 2014.

<sup>45</sup> Fox *Beyond Contract* 247 (n 21).

<sup>46</sup> Ackers 2620 (n 40).

differences mean that many employee expectations, orientations, and experiences have changed.<sup>47</sup>

Chapter 2 outlines how, post 1979, Conservative governments sought to alter the balance of power away from unions.<sup>48</sup> Union membership dropped: Willman et al's figures show that between 1980 and 2004 the number of workplaces which recognised unions for the purposes of collective bargaining fell from 64% to 38%.<sup>49</sup> Legislative changes and falling union numbers have altered the ability of 'trade unions or organised workgroups... to readjust the power balance'.<sup>50</sup> However, the fall in the number of days lost to strike action is much more than the drop in membership might suggest. This might be due to factors other than a straightforward link between divergent interests and conflict. Part of the disproportionate fall might be due to legislative changes. However, it is suggested that the figures throw doubt on the pluralist assertion that conflict is a 'rational and inevitable'<sup>51</sup> outcome of the divergent interests between management and worker.

There have been other significant legal developments. At the time of the heyday of the Oxford School, regulation of the employment relationship was the preserve of employers and workers/unions with little government regulation.<sup>52</sup> Since then, individual employment relationships have been increasingly regulated by statute.<sup>53</sup> As has been seen, collective relationships have also been regulated in new ways via Directives including the Collective Redundancies, and Information and

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<sup>47</sup> Ibid.

<sup>48</sup> Section 2.3.1.3

<sup>49</sup> Willman, Gomez and Bryson 'Trading Places: Employers, Unions and the Manufacture of Voice' (2008) Discussion Paper No 884 Centre For Economic Performance 23.

<sup>50</sup> Fox *Beyond Contract* 262 (n 21).

<sup>51</sup> Salomon 29 (n 20).

<sup>52</sup> Kahn-Freund *Labour and the Law* (2nd edn Stevens & Sons London 1977) 1-4.

<sup>53</sup> E.g. unfair dismissals, (Employment Rights Act 1996), working time and holidays (Working Time Regulations 1998 SI 1998/1833) minimum wage (National Minimum Wage Act 1998), Information and Consultation Regulations (The Information and Consultation of Employees Regulations 2004 SI 2004/3426).

Consultation Directives. Such developments mean that frames of reference that are defined by the absence or presence of collective bargaining no longer reflect the employment landscape.

The Oxford School's analysis is only understandable if the workplace is viewed through the lens of collective bargaining. However, it presented no systematic cross-sectional empirical evidence to support its basic assumptions. These include beliefs that 'harmony and willing cooperation' is the result of 'manipulative human relations techniques'<sup>54</sup> and that conflict is the *natural* result of divergent interests.<sup>55</sup>

Section 1.2.3 outlines attempts to make the typology more sophisticated.

### **1.2.3 Frames of Reference: Developments**

Two types of development were found within the literature. The first involved breaking down Fox's categories so that they better reflected workplace practice. The second was to focus on the underlying approaches of the participant(s).

Farnham and Pimlott<sup>56</sup> referred to a distinction between 'hard' pluralism and collective bargaining, which were classified as conflict centred, and 'soft' pluralism and joint consultation, which were classified as being problem centred. Gospel and Palmer<sup>57</sup> used the terms 'traditional' and 'sophisticated' in the same way. They also differentiated between 'sophisticated' unitarist firms which use human resources/Japanese management techniques and 'traditional' unitarist organisations. Befort and Budd split the unitarist frame into an 'egoist' neoclassical economics model and a 'human resource' model.

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<sup>54</sup> Fox *Beyond Contract* 247 (n 21).

<sup>55</sup> Section 4.3.2 discusses how subject matter and attitude can affect discussions and how divergent ideas may lead to conflict.

<sup>56</sup> Farnham and Pimlott (n 20) 49 .

<sup>57</sup> Gospel and Palmer (n 20) 64-65.

In ‘Beyond Contract’ Fox used pluralism and unitarism as umbrella terms. He took into account soft/sophisticated and hard/ traditional pluralism and referred to pluralists who differed

in respect of whether they... may be especially concerned with ensuring the democratic rights of employees;... [or] with the contribution which institutionalised forms of conflict resolution can make to the effective conduct of the enterprise...<sup>58</sup>

It has been seen (above) that Fox was aware of the presence or absence of HRM type techniques, but equated them with management manipulation. The literature appears describe rather than develop Fox’s theory; the fundamental differentiation between unitarist and pluralist remains the same.

Cradden sought to expand the frames of reference by interpreting them in the light of two ideas. The first was that Fox conflated two separate systems of structural incentives and constraints (the external market and within the workplace) and assumed that managers had little choice in the design of the social organisation of work.<sup>59</sup> The second of was to view ‘social incentives and constraints’ in terms of positive, negative or neutral outlook rather than ‘legitimate’ or ‘illegitimate’.<sup>60</sup> The result is that he re-defines unitarism, pluralism, and radicalism in the context of these two ideas.

Purcell’s method of analysis differed. Working from the position that the ‘mutually exclusive nature of ... [the] categories have limited further development’<sup>61</sup> he suggested concentrating on the notion of individualism. This approach was related to individual employees *and* collectivism and

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<sup>58</sup> Fox *Beyond Contract* (n 21) 271.

<sup>59</sup> Cradden 12. It is arguable that Fox was fully aware of management’s ability to organise the workplace differently because his awareness of, and attitudes towards the idea of human resource techniques.

<sup>60</sup> Cradden (n 44) 2.

<sup>61</sup> Purcell (n 22) 546.

focused upon the extent to which groups of workers gained independent voices and participated in management decision making.<sup>62</sup>

Farnham and Pimlott, Gospel and Palmer and Budd view unitarism and pluralism through the Oxford School's prescription, that is the lens of collective bargaining. Cradden and Purcell take into account other issues. Cradden interpreted Fox in the context of attitudes towards the external market and the social organisation of work, whilst Purcell focused on individualism. It is submitted that the workplace cannot be viewed realistically without taking into account both external and internal influences. Collective bargaining is only one of these influences. Drawing on Cradden's and Purcell's work, the next section develops such varifocal approach.

#### **1.2.4 The Position of the Thesis: a Varifocal Approach.**

The author perceives serious limitations with Fox's frames of reference. The employment 'relationship' goes beyond economic terms and conditions and management's wish to 'subjugate' and employees' wishes to limit management's prerogative where it is felt that employee interests 'diverge from those of management.'<sup>63</sup> To 'load employment relations with the expectation that conflict is somehow normal and cooperation deviant [is] turning upside down most commonsense experience of work.'<sup>64</sup> Unitarism does not recognise that management comprehends differences of opinion. It is felt that the absence of collective bargaining does not mean that management cannot appreciate that different views are valid and accommodate them. The frames do not allow that individual relationships with employers are based upon anything other than manipulation.

Farnham and Pimlott appear to infer that intentionally building a corporate culture with the belief 'that committed, motivated and well trained people

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<sup>62</sup> Purcell (n 22) 546.

<sup>63</sup> Fox *Beyond Contract* (n 21) 272.

<sup>64</sup> Ackers (n 40) 2616.

are the key to corporate success<sup>65</sup> means that the employment relationship is viewed as a factor of production. Despite the formulaic intentions when articulating such a policy and the economic benefit that arises as a result of the employment relationship, where any interaction takes place ‘relationships’ are formed. It is difficult to believe on management’s side a relationship is *only* motivated by a desire to ‘promote harmony and willing cooperation under management “leadership”’.<sup>66</sup>

This thesis takes the position that employers and employees have a variety of attitudes towards work and each other. Budd studied perceptions of work and placed them into ten categories (work as a: curse, freedom, commodity, occupational citizen, social relation, as disunity, personal fulfillment, caring for others, identity, and service).<sup>67</sup> Not only will employees have different attitudes to their workplace, but (especially in larger organisations) they will have different relationships (positive or negative) with differing levels of management. To categorise all employees who are not covered by collective bargaining as being subjugated by management and not able to judge and assess the negative *and* positive aspects of work and their employers’ motivations would be disingenuous.

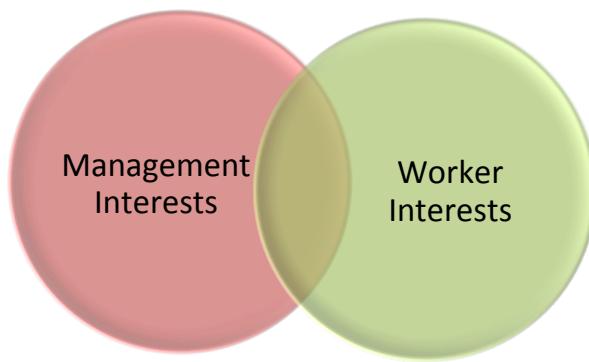
It is therefore contended that individual relationships affect employment relationships for good and bad. Figure 1.1 shows how mutual benefit (e.g. job satisfaction, pleasant working environment, and economic exchange) might be expressed by overlapping interests. The degree of overlap signifies mutual objectives and interests and will vary with each relationship.

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<sup>65</sup> Farnham and Pimlott (n 20) 46.

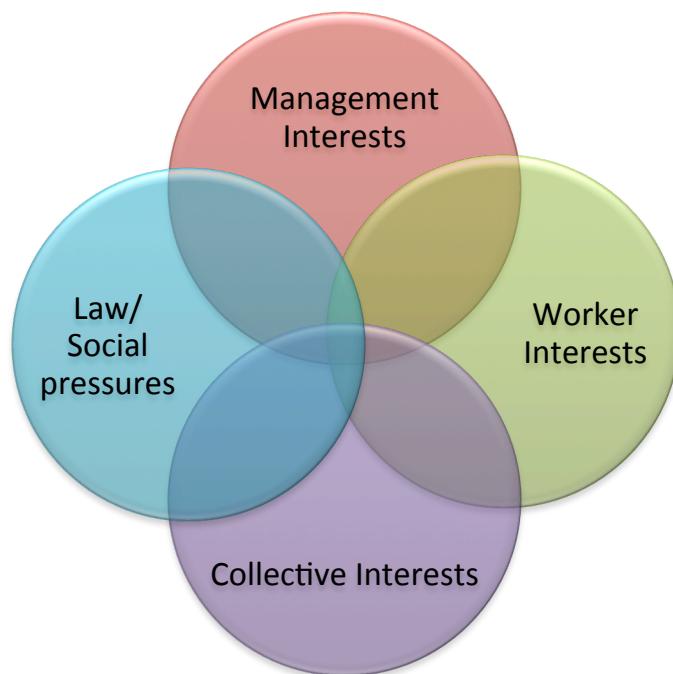
<sup>66</sup> Fox *Beyond Contract* (n 21) 247.

<sup>67</sup> Budd *The Thought of Work* (Cornell 2011).



**Figure 1.1**  
**Shared Management and Worker Interests**

In the same, way collective bargaining and external influences (such as law and social norms) will also vary within the context of the employment relationship. Figure 1.2 illustrates how four different pressures/interests might interact with each other.



**Figure 1.2**  
**Interacting Interests/Pressures on Interest Groups**

Take, for example, the outcomes of the legal requirement to consult collectively with regard to collective redundancies. One outcome may be of collective benefit, enabling an organisation to continue functioning and

preserving jobs, but the overlaps will differ for individuals depending on whether they lose their jobs. The area of law could be limited to the Information and Consultation Regulations. Management might implement the regulations in a way that benefits neither management nor worker. Equally it may be implemented in a way that the collective workforce, worker, and management derive great benefit and this would be illustrated by a greater overlap.<sup>68</sup>

This section has considered both unitarist and pluralist perspectives. However, this thesis takes a more nuanced varifocal perspective. The approach considers that management primarily determines that nature of the employment relationship. This may be positive or negative, authoritarian or inclusive and consultative. However, these relationships are or may be influenced by factors such as employees, collective interests (not necessarily manifested in the form of trade unions), law, and society as a whole.

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<sup>68</sup> Better economic performance for management, higher wages for employees, more involvement for individuals.

# Chapter 2 The Emergence of European and English Policies Concerning Involvement and Participation

The Treaty Establishing the European Economic Community<sup>1</sup> (TEEC) initially focused upon establishing a single market. During the European Union's (EU) first two decades social policy was left in the domain of Member States and the Council of Europe. But by 1972 there was pressure for it to begin to examine problems with the purpose of directly addressing social issues. The next 40 years saw the development of a social policy that has included worker involvement and participation (I&P) in the workplace.

This chapter places the development of EU social policy on I&P in context before overviewing industrial relations and the impact of European Law on I&P in the UK. Section 2.1 looks at the Council of Europe and early EU social policy. Section 2.2 then examines the development of EU law involving I&P. Section 2.3 outlines the history of industrial relations in the UK before summarising the influence EU law has had on UK law involving I&P.

## 2.1 SOCIAL POLICY WITHIN EUROPE AFTER 1945

During and after World War II European politicians sought ways to preserve European stability.<sup>2</sup> Finding methods to prevent clashes of interests that could result war and/or abuses of human rights led to questions about how best to foster a suitable climate for European states to develop. The development of the Cold War gave greater impetus to finding solutions to these problems.<sup>3</sup> Two innovations from this period had lasting impact; the first was the Council of Europe and the second became the European Union.

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<sup>1</sup> Treaties Establishing the European Communities 1957.

<sup>2</sup> Dedman *The Origins and Development of the European Union 1945-1995* (Routledge London 1996) 16-33.

<sup>3</sup> For example the Prague coup and Berlin Blockade.

Literature about early social policy within the EU generally focuses on the EU and nation states.<sup>4</sup> However the original six Member States were also members of the Council of Europe. The latter was established in 1949 with the aim to ‘achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are common heritage and facilitating their economic and social progress.’<sup>5</sup> Members of the Council of Europe signed the European Convention of Human Rights (ECHR) in 1950 and a year later the Council of Europe proposed a common policy in the social field. This became the European Social Charter (ESC). Early developments point to members using the European Economic Community (EEC) as a tool to develop economically, and the ESC as an instrument to develop social policy in the workplace. The next sections overview the objectives of the ESC and how social policy was viewed in the context of the TEEC.

### **2.1.1 The Council of Europe and the European Social Charter**

In 1961, all six signatories of the Treaty of Rome signed the ESC.<sup>6</sup> Whereas the European Convention on Human Rights (ECHR) was limited ‘to the civil and political rights, the ESC was to be the ECHR’s ‘counterpart in the field of economic and social rights.’<sup>7</sup> The Council of Europe was active in laying down standards by which contracting parties should abide. Although not comprehensive, the ESC was a mechanism that encouraged states to raise or maintain those rights to which they had ‘committed’ themselves.<sup>8</sup>

The ESC consisted of two parts. Part I was hortatory and contained economic and social rights policy objectives. Part II contained obligations

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<sup>4</sup> Barnard *EC Employment Law* (2nd edn Oxford University Press Oxford 2000) 20; Nielsen and Szyszczak *The Social Dimension of the European Union* (3rd edn Handelshøjskolens Forlag Copenhagen 1997) 17.

<sup>5</sup> Statute of the Council of Europe European Treaty Series No 1 1959.

<sup>6</sup> Harris *The European Social Charter* (University Press of Virginia Charlottesville 1984) Appendix 2.

<sup>7</sup> Ibid xiii.

<sup>8</sup> Ibid 312.

that member states were required to incorporate into national law (a state party to the treaty need only have accepted a minimum number of obligations). With regard to I&P in the workplace, Article 6 concerns the ‘The Right to Bargain Collectively’. It sought to ensure effective collective bargaining (**CB**) by requiring contracting parties undertaking to promote: (1) joint consultation between workers and employers; (2) appropriate machinery for negotiations; (3) the establishment of machinery for conciliation and arbitration; and (4) the right to strike. Unlike the Charter’s 1996 revision<sup>9</sup> it only sought to promote I&P in the context of CB.

A committee of independent experts examines, and produces reports on, the extent that signatories fulfilled their obligations.<sup>10</sup> It has been stated that the ESC was ‘a document recording past standards rather than setting new ones.’<sup>11</sup> However, reports show that during the period 1961-1985 compliance with the treaty’s obligations rose from 55% to 81%.<sup>12</sup>

The European Social Charter was not mentioned in the TEEC. Although it is currently not officially incorporated into European Union Law, Article 151 of the Consolidated Version of the Treaty on the Functioning of the European Union (**TFEU**) begins ‘The Union and the Member States, having in mind fundamental social rights such as those set out’ in the European Social Charter.<sup>13</sup> The European Court of Justice (**ECJ**) has a history of

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<sup>9</sup> European Social Charter (revised) Strasbourg, 3.V.1996.

<<http://conventions.coe.int/Treaty/EN/Treaties/Html/163.htm>> Accessed 8 Jan 2010.

Newly introduced Article 21 states ‘Workers have the right to be informed and to be consulted within the undertaking.’

<sup>10</sup> The report and conclusions are examined and commented upon by the Council of Europe’s Government Social Committee and Assembly before the Committee of Ministers. ‘Sanctions’ are limited to its making necessary recommendations to a contracting party. Harris (n 6) 9.

<sup>11</sup> Ibid 8.

<sup>12</sup> Ibid 9.

<sup>13</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2010/C 83/1 30.03.2010.

deriving general principles of European law from common principles within the EU and laid down in, the ECHR<sup>14</sup> and ESC.<sup>15</sup>

### **2.1.2 Early Social Policy within the EU**

The European Social Charter's strong social policy objectives contrast with those expressed in the TEEC. Early reports regarding the EU's formation<sup>16</sup> point to a neo-liberal approach that focused on economic rather than social policy. This is reflected in the Treaty and the thinking behind Articles which might be interpreted as having social policy dimensions

Article 1 of the TEEC originally referred to a 'European *Economic Community*' and the Treaty only referred to social values in passing. Article 117 [Article 151 (TFEU)] stated:

Member States agree the need to promote improved working conditions and an improved standard of living for workers, so as to make possible their harmonisation while the improvement is being maintained... such a development will ensue not only from the functioning of the common market... but also from the procedures provided for in this Treaty and from the approximation for provisions laid down by law regulation or administrative action.

This was consistent with the widely held attitude<sup>17</sup> that the strength of the trade union movement coupled with the sympathy of European governments

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<sup>14</sup> Case C 36/75 *Rutili v Minister for the Interior* [1976] CMLR I 140, Case C-105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation* [1985] ECR 2639, para 23.

<sup>15</sup> Case 149/77 *Gabrielle Defrenne v Société Anonyme Belge de Navigation Aérienne Sabena* [1978] ECR 1365, para 28; Case 24/86 *Vincent Blaizot v University of Liège and Others*. [1988] ECR 379, para 17.

<sup>16</sup> International Labour Office 'Social Aspects of European Economic Cooperation' (1956) 74 ILR 99; Barnard (n 4) 3. This was to be echoed in Spaak's report for the future community.

<sup>17</sup> Deakin, 'Labour Law as Market Regulation: the Economic Foundations of European Social Policy' in Davies, Lyon-Caen, Sciarra and Simitis (Edd) *European Community Labour Law: Principles and Perspectives* (Clarendon Press Oxford 1996) 67.

‘for social aspirations’ would ensure that labour conditions would improve and not deteriorate.<sup>18</sup>

Article 119 [157 TFEU] appeared to have social policy aims in that it dealt with differences in wages between men and women. On closer examination it did not form part of a broad social policy objective. A report by A Group of Experts on the Social Aspects of European Economic Co-operation<sup>19</sup> did not seem to envisage the new closer economic co-operation as being the proper forum in which to accomplish equality (in terms of ‘inter-industrial’ differences within sectors and gendered differences) within the workplace: ‘An attempt to establish *identical* patterns of relative wage rates and labour conditions... would... represent an unduly rigid approach.’<sup>20</sup> The committee drew attention to similar objectives in Article 2 of the Draft European Social Charter and considered a more proper forum for this approach to be within the International Labour Organisation.<sup>21</sup> However, Article 119 was included to prevent the Treaty penalising ‘French industry for the relatively high wage and social security costs it bore...’<sup>22</sup> Unlike Article 4 of the ESC, Article 119 [157 TFEU] did not form part of a broad social policy objective.

However, the early premise that (a) the electorate would be satisfied with Member State social policy and (b) economic conditions would be conducive to States raising labour conditions was problematic.<sup>23</sup> The late 1960s were a time of social and economic upheaval.<sup>24</sup> Section 2.1.3 overviews how these pressures led to the reform of labour laws in some Member States and a review of the role that the EU should play in the area of social policy.

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<sup>18</sup> International Labour Office (n 16) 112.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 107.

<sup>21</sup> Ibid 107.

<sup>22</sup> Milward and Steele *The Frontier of National Sovereignty: History and Theory 1945-1992* (Routledge London 1993) 119.

<sup>23</sup> Rapport des Chefs de Delegations, Comite Intergovernmental 21 April 1956 in Barnard (n 4) 3.

<sup>24</sup> For example demonstrations in Paris in the Spring of 1968.

### 2.1.3 Socio-Economic Pressures within Member States

After World War II there had been a period of unparalleled economic growth and social prosperity in Europe. Despite the boom, the late 1960s gave rise to the spectre of social unrest across Europe. For example, in France, student rebellion led to a wave of strikes for higher wages and better conditions.<sup>25</sup> 1971 brought currency fluctuations and a global trend towards lessening economic restraints within individual countries and this led to a world-wide boom. The boom resulted in shortages, inflation, and economic instability heightened by food shortages.<sup>26</sup> After 1973 soaring oil prices increased economic pressures.<sup>27</sup>

In many Western European countries employment law and practice was structured so that terms and conditions of employment were determined at sectoral, industry, or national level.<sup>28</sup> ‘Social programming’, where Government directly involved itself in determining national wage rates and other terms and conditions of employment, was pursued by many<sup>29</sup> Member States.

General discontent with terms and conditions of employment led to reform. For example Belgium and the Netherlands had developed a tripartite system of CB at national, industrial, and organisational levels. In Belgium, some commentators believed that ‘social programming’ eroded links between unions and those they represented and resulted in workers often being

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<sup>25</sup> Hobsbawm *Age of Extremes. The Short Twentieth Century 1914-1991* (Abacus London 1994) 298-301.

<sup>26</sup> Caused by a poor harvest.

<sup>27</sup> Maddison *Phases of Capitalist Development* (Oxford University Press Oxford 1982) 136-142.

<sup>28</sup> In Germany separate agreements between trade unions and specific companies were rare and a tradition of adhering to industry-wide agreements remained stable. European Parliament, 'Report on the Proposal Establishing a General Framework for Informing and Consulting Employees in the European Community' (1999) COM(98)0612 44.

<sup>29</sup> See chapters on Germany, France, Denmark, Sweden, Belgium, and the Netherlands in Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986); Labour Research Department *Worker Representation in Europe* (LRD Publications London, 1998).

unable to solve problems at an organisational level. This led to inter-industry trade agreements which extended training and information rights within unions and Works Councils.<sup>30</sup> In the Netherlands discontent led to fewer governmental restrictions and a strengthening of the powers given to Works Councils.<sup>31</sup>

Streeck argued<sup>32</sup> that economic and social pressure made countries with more advanced national social policy regimes conscious of competitive pressures on their economies. Upward harmonisation would have served to protect employment (for example where an international group selects collective redundancies on the basis of which country makes the cost of redundancy cheaper, or where it bases its plans to expand on social costs such as working time restrictions). As far back as December 1969 the West German Chancellor, Willy Brandt, submitted a memorandum calling for co-ordination of economic integration with social harmonisation in order to give the EU a 'human face' that could be understood by its citizens.<sup>33</sup>

The call for social harmonisation tied in with the agenda of the federalist elements within the Commission.<sup>34</sup> In 1972 The First Summit of the Enlarged Community<sup>35</sup> stressed 'that vigorous action in the social sphere is... just as important as achieving Economic and Monetary Union...'.<sup>36</sup> The summit led the EU's first social action programme.<sup>37</sup>

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<sup>30</sup> Blanpain, 'Fifty Years of Labour Law in Belgium' in Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986) 59.

<sup>31</sup> Van Der Ven, 'Social Law in the Netherlands' in Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986) 163.

<sup>32</sup> Streeck 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 11 ELJ 31.

<sup>33</sup> Kenner *EU Employment Law From Rome to Amsterdam and Beyond* (Hart Oxford 2003). This statement might have stemmed from what turned out to be a temporary downturn in the German Economy and a rise in unemployment. (Maddison (n 27) Appendix C).

<sup>34</sup> Streeck (n 32) 42.

<sup>35</sup> *First Summit Conference of the Enlarged Community* (Bull EC 10-1972 1972).

<sup>36</sup> *Ibid* para 6.

<sup>37</sup> Council Resolution of 21 January 1974 concerning a social action programme [1974] OJ C 13/1.

## 2.2 EUROPEAN INITIATIVES INVOLVING SOCIAL POLICY

As social policy questions became more prominent in the EU agenda there was increasing demand for such issues to become formally incorporated into the EU's objectives. With regard to I&P, the next sections show that over time the EU adopted documents of increasing legal significance and finally adapted the TEEC's objectives. The rationale behind its approach toward I&P was given in the 1975 Green paper on Employee participation and company structure.<sup>38</sup> This linked indirect I&P using formal structures within companies to: (1) the humanisation of working conditions;<sup>39</sup> (2) being better able to adapt to market conditions;<sup>40</sup> and (3) the introduction of 'democratic' decision-making processes in enterprises.<sup>41</sup> Within the scope of Article 151, the TFEU now includes the formal objective of supporting and complementing I&P in Member States.<sup>42</sup>

### 2.2.1 The 1974 Social Action Programme

The 1974 Council Resolution for a Social Action programme fell broadly into four areas:

- employment protection and the working environment;
- equality between women and men;
- employee participation; and
- employment creation through vocational training and the European Social Fund.<sup>43</sup>

It included proposals for what would become the Collective Redundancies Directive 1975<sup>44</sup> and the Acquired Rights Directive 1977<sup>45</sup> (**CR Directive**

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<sup>38</sup> European Commission *Employee participation and company structure in the European Community (Green Paper)* (Bull Supp 8/75, pg 54, 1975).

<sup>39</sup> Ibid 14.

<sup>40</sup> Ibid 9.

<sup>41</sup> Ibid 11.

<sup>42</sup> Art 153(1)(e) and (f).

<sup>43</sup> Kenner (n 33) 26.

<sup>44</sup> Council Directive (EEC) 75/129 on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L39/40.

**1975 and AR Directive 1977).** Both Directives involved informing and consulting employees. This was not an end in itself but a by-product of attempts to protect specific employee interests.<sup>46</sup>

### **2.2.2 The Single European Act (1986)**

Treaty changes reflecting the EU's widening interest in areas of social concern began with the Single European Act. Although primarily aimed at facilitating the completion of the internal market, it contained limited recognition of the EEC's social dimension by incorporating provisions regarding health and safety.<sup>47</sup>

### **2.2.3 The Community Charter on the Fundamental Social Rights of Workers<sup>48</sup> (the Community Charter)**

The Community Charter is an instance of an initiative by a Member State to extend EEC competence, and by doing so promote upward harmonisation.<sup>49</sup> In 1988 the French produced a report which called for Europe to produce a text 'similar to the ESC' which would define fundamental social rights.<sup>50</sup> The Community Charter was adopted under the French Presidency in 1989.<sup>51</sup> Although described as 'a solemn proclamation of fundamental

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<sup>45</sup> Directive (EEC) 77/187 on the approximation of the legislation of Member States on the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of business [1977] OJ L61/26.

<sup>46</sup> Chapter 3 discusses the Directives and their objectives.

<sup>47</sup> TEEC Art 118a.

<sup>48</sup> Community Charter of the Fundamental Social Rights of Workers *Social Europe* 1/90 51-76 Luxembourg: Office for Official Publications of the European Communities.

<sup>49</sup> For a more detailed analysis of French involvement see Section 3.7.1.1.

<sup>50</sup> — 'Report on "Social Europe"' (1988) 179 EIRRR 18 19. The same year Jack Delors asked the Economic and Social Committee to draw up a European Charter of Fundamental Social Rights — 'EEC In Brief' (1989) 181 EIRRR 2.

<sup>51</sup> It was adopted by all Member States except Britain through signing a political declaration. Barnard (n 4) 10; — 'Social Charter: Action Programme Released' (1990) 192 EIRRR 11.

social rights' it is not legally binding.<sup>52</sup> Rights contained within it were to be implemented under the Social Action Programme.<sup>53</sup>

Articles 17 and 18 of the Charters concern information, consultation, and participation for workers. Article 17 states:

Information, consultation and participation for workers must be developed along appropriate lines, taking account of the practices in force in the various Member States. This shall apply especially in companies or groups of companies having establishments or companies in several Member States of the European Community.

Article 18 states that '[s]uch information, consultation and participation must be implemented in due time, particularly...' in the cases of technological change relating to working conditions, collective redundancies, and acquired rights.

The Charter gave rise to an Action Programme<sup>54</sup> which 'proposed' an instrument that became the basis for the European Works Council Directive<sup>55</sup> (**EWC Directive 1994**). However, because draft Directives on this subject<sup>56</sup> pre-existed the Charter, Article 17 appeared to formalise part of a pre-existing objective (see Chapter 3).

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<sup>52</sup> Barnard (n 4) 10.

<sup>53</sup> Commission Report on the Social Charter Action Programme [1989] COM (89) 568 final Brussels, 29 Nov. 1989.

<sup>54</sup> Ibid.

<sup>55</sup> Council Directive (EC) 94/45 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 [1994] OJ L254/64.

<sup>56</sup> E.g. Proposal for a Council Directive on the procedures for informing and consulting employees of undertakings with complex structures, in particular transnational undertakings 1980 Bull Sup 3/80 OJ C 297/3.

#### **2.2.4 The Social Policy Agreement (SPA) 1991**

The SPA was a way of expanding the EU's social competence without requiring the acceptance of all Member States. In order to secure the UK's agreement to the Treaty on Economic Union (TEU) many proposals to change the treaty were placed within the SPA. The SPA widened competence on matters of social policy and allowed for legislative measures to pass without the approval of all Member States. It specifically referred to information and consultation. The provisions (detailed below) were later incorporated into the TEEC under the Treaty of Amsterdam. The earliest measure to be passed under the SPA was the EWC Directive 1994. This provided for the involvement of an employee representative in large undertakings operating in at least two Member States.<sup>57</sup>

#### **2.2.5 The Treaty on European Union and Beyond**

The Treaty on European Union (1991) reflected the treaty's widening competence by altering the original wording of the Article 1 of the Treaty of Rome and changing its object from establishing a 'European Economic Community' to a 'European Community'. The Treaty of Amsterdam (1997) went further and absorbed the SPA into the Treaty. Article 136 of the revised TEEC (TEEC 1991) related to social policy in general whilst Article 137(1) included policy objectives regarding information and consultation in the workplace.

Article 136's social policy aspirations remain framed in Article 151 TFEU. This states that EU objectives 'shall have in mind fundamental social rights such as those... in the European Social Charter... and in the 1989 Community Charter of the Fundamental Social Rights of Workers' and include:

... the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human

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<sup>57</sup> Art 2(1)(a) 1000 employees with a minimum of 150 in at least two member states.

resources with a view to lasting high employment and combating exclusion.'

The term 'harmonisation' was found also found in Article 151's predecessor Article 117 (see above). The term is a vague concept and could mean:

- (a) achieving a parity of costs between Member States so that each state has an identical system of social protection which is brought about by identical taxation to various sectors of society through taxation on individuals and organisations;
- (b) raising existing standards with a view to improving living and working conditions (i.e. 'positive harmonisation'<sup>58</sup>);
- (c) setting standards at a new low, but common level (i.e. 'negative harmonisation') thereby creating a 'transnational floor of rights in labour standards, which would aim to entrench certain irreducible levels of protection';<sup>59</sup>
- (d) the removal of any barriers which arise from EU legislation, aimed at social protection.<sup>60</sup>

EU policy towards 'harmonisation' with regard to I&P (as reflected in policy initiatives, the wording of legislation, community charters, and reformed treaty articles) has changed.

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<sup>58</sup> For example Council Directive (EEC) 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding [1985] OJ L374/1.

<sup>59</sup> For example CR Directive 75/129; Deakin, (n 17) 64.

<sup>60</sup> The ECJ ruled that France could not use economic pressure as an excuse for excluding anyone under 26 years of age from the provisions of the Collective Redundancies Directive Case C-1385/05 *Confédération Générale du Travail (CGT) and Others v Premier Ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement.* [/2007] ECR I 611.

Chapter 3 shows that although early legislative *proposals* fitted into category (b) legislation concurs with ‘negative harmonisation’. The CR Directive 1975 stated

The Directive shall not affect the right of member states to apply or to introduce... provisions which are more favourable to workers...<sup>61</sup>

The wording of a similar Article in the European Works Council Directive 1994 was less aspirational and also can be placed within (c):

Implementation of this Directive shall not be sufficient grounds for any regression in relation to the situation which already prevails in each Member State... in the areas to which it applies.<sup>62</sup>

The EWC Directive 1994 pointed towards a new development in labour law. This was away from ‘rigid and compulsory systems of statutory regulations to more open flexible legal frameworks... in particular in the areas connected with the internal management of firms.’<sup>63</sup>

‘Negative harmonisation’ is reflected in Article 153(1) TFEU (TEEC 1991 Article 137(1)). It states that Article 151’s objectives are to be achieved by supporting and complimenting the activities of Member States in fields including ‘the information and consultation of workers’. This is to be accomplished by adopting ‘by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.’<sup>64</sup> It appears that progress is to be via minimum requirements that are rooted in the status quo.

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<sup>61</sup> Art 5.

<sup>62</sup> This is also found in Council Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1, Art 1(3).

<sup>63</sup> European Commission *Partnership for a new Organisation of Work (Green Paper)* (COM(97)128, 1997) 44.

<sup>64</sup> Art 153(2)(b).

The Lisbon summit in March 2000 set the objective of becoming ‘the most competitive economy in the world with greater social cohesion’.<sup>65</sup> This was to be achieved by improving existing practices through encouraging best practice via ‘new open method of coordination’.<sup>66</sup> One of the summit’s objectives was to promote ‘companies corporate sense of social responsibilities’ through best practice.<sup>67</sup>

Policy objectives evident in proposals laying out harmonisation via detailed regulation were formally expressed in the TEEC 1991. However, unlike early draft legislation the TEEC rooted future progress in the context of existing practice in all Member States. Regulatory techniques encourage I&P objectives; establishing and ‘translating... European guidelines into national and regional policies... taking into account national and regional differences.’<sup>68</sup>

### **2.2.6 2001 and Thereafter**

Several measures after 2000 potentially impact I&P in the workplace. The European Union Charter of Fundamental Rights was adopted under the Treaty of Nice in 2001. It contains civil, political, economic, and social rights based upon the Community Social Charter 1989 and the Council of Europe’s Charter. Article 27 concerns workers’ rights to information and consultation within undertakings, and states:

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 Union law and national laws and practices.

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<sup>65</sup> — 'Lisbon European Council 23 and 24 March Presidency Conclusions' (2000) <[http://www.europarl.europa.eu/summits/lis1\\_en.htm](http://www.europarl.europa.eu/summits/lis1_en.htm)> accessed 01 March 2013 para 5.

<sup>66</sup> Ibid para 7.

<sup>67</sup> Ibid para 39.

<sup>68</sup> Ibid para 37.

It ‘reaffirms the rights, freedoms and principles... but does not create new rights or principles’.<sup>69</sup> Barnard stated that the Charter ‘will help provide some counterweight to the neo-liberal orientation of the Treaties, providing the Court with a firmer foundation to reconcile social and economic rights.’<sup>70</sup>

Social rights were referred to in the Commission’s Green Paper creating a framework for Corporate Social Responsibility.<sup>71</sup> It stated that the EU’s approach would be to complement and add value to existing activities by:

providing an overall European framework, aimed at promoting quality and coherence of corporate social responsibility practices through developing broad principles, approaches and tools, and promoting best practice and innovative areas.<sup>72</sup>

This included ‘the development of new appropriate legislation’,<sup>73</sup> and the promotion of extensive consultation with workers’ representatives as was proposed in what was to become the Information and Consultation Directive (**IC Directive**).<sup>74</sup>

In 2001 a Statute for a European Company<sup>75</sup> was passed. It created a framework so cross-frontier European Companies can be established

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<sup>69</sup> Charter of Fundamental Rights of The European Union 2010/C 83/2 preamble. However as with the 1989 Community Charter, the ECJ has referred to it when interpreting existing provisions of EU law e.g. Case C-402/05P and C-415/05P *Joined Cases Kadi and Al Barakaat International* [2008] ECR I 6351.

<sup>70</sup> Barnard *EU Employment Law* (4th edn Oxford University Press Oxford 1012) 33.

<sup>71</sup> European Commission *Promoting a European framework for Corporate Social Responsibility (Green Paper)* (COM(2001) 366, 2001).

<sup>72</sup> Ibid 18.

<sup>73</sup> Ibid 22.

<sup>74</sup> Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

<sup>75</sup> Council Regulation (EC) No 2157/2001 on the Statute for a European company (SE) 2001 L294/1; Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294.

independently of national laws. The Regulation, with its accompanying Directive requires some sort of formal body within which employee representatives can be informed and consulted. One year later the IC Directive was passed. This ensures that all Member States provide an opportunity for employee representatives to be informed and consulted about a wide range of issues affecting their employer. A Statute for a European Cooperative Society mirroring that for a European Company was passed in 2003.<sup>76</sup>

In 2007 the Treaty of Lisbon consolidated and amended the treaties establishing the European Community and European Union. The objectives of Article 153(1) TFEU now include supporting and complementing Member States in the field of ‘representation and collective defence of the interests of workers and employers, including co-determination’. In achieving that Article’s objectives paragraph (2)(a) specifically excludes ‘any harmonisation of the laws and regulations of Member States’. Article 153(2)(b) uses wording from the original Article 137(2) stating that the Article’s objectives are to be fulfilled ‘by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States.’

Social policy objectives involving workplace I&P have become incorporated into treaty objectives. Initially I&P was part of the means for achieving specific aims such as a fair redundancy process or an effective ‘democratic’ European Company. Chapter 3 shows the extent to which initial legislative goals involving ‘positive harmonisation’ were compromised. However, Chapters 4 and 5 analyse the EU’s approach towards the kind of I&P to be practiced and show that its basic principles remained consistent. After 1988 I&P ‘policy’ hardened from being part of defined non-legally binding rights within the Social Charter to being part of

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<sup>76</sup> Council Regulation (EC) No 1435/2003 on the Statute for a European Cooperative Society (SCE) 2003 L207/1; Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] OJ L 207/25.

a binding Social Policy Agreement, to being fully incorporated as a Treaty objective. However, the TFEU reflects an ethos of ‘negative harmonisation’.

## 2.3 INDUSTRIAL RELATIONS IN THE UK

This section overviews the development of industrial relations in the UK before outlining the impact of EU law relating to I&P on the UK.

### 2.3.1 Historical Context

The framework within which employers and workers conduct their relationship is reflected in general and specific legal requirements. In the UK regulation was traditionally the preserve of employers and workers/unions. Problems were resolved through CB; a practice supported by the legislature.<sup>77</sup> World War I resulted in greater Governmental intervention<sup>78</sup> and better co-operation between employers and workers. Generalised agreements (sometimes at industry level) relating to terms and conditions and machinery for settling disputes multiplied. However, during the latter part of that war, recommendations for formalised tripartite machinery for organised industries<sup>79</sup> were largely ignored.<sup>80</sup> Traditional practices continued post World War II.

By the 1970s economic conditions had resulted in industrial unrest across Europe. Other Member States extended existing mechanisms, such as works councils, to cope with new pressures.<sup>81</sup> The UK differed from much of Europe. This was because many trade unions in Britain saw such collective consultation as an ‘inferior process to collective bargaining’.<sup>82</sup>

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<sup>77</sup> Kahn-Freund *Labour and the Law* (2nd edn Stevens & Sons London 1977) 1-4; Smith and Thomas *Smith & Wood's Industrial Law* (7th edn Butterworths London 2000) 3.

<sup>78</sup> This included some industries being temporarily nationalised and some prohibition of the right to strike, or both.

<sup>79</sup> Seymour *The Whitley Councils Scheme* (P S King & Son Ltd Westminster 1932) 13.

<sup>80</sup> Now, with the exception of the Agricultural Wages Board, disbanded. Wedderburn and Davies *Employment Grievances and Disputes Procedures in Britain* (U California Press Burkley 1969) 60.

<sup>81</sup> See 1.1.3.

<sup>82</sup> Wedderburn 'Consultation and Collective Bargaining in Europe: Success or Ideology?' (1997) 26 1 Ind LJ 16.

Industrial unrest did not lead to the development of alternative legally required methods of communication between organisations and representatives. Government proposals<sup>83</sup> which were ‘genuinely meant to increase the unions’ influence and participation in management were objected to as patronising and paternalistic.<sup>84</sup> Attempts to bring about change may be roughly divided into four approaches:

1 1971-1974 An attempt at formalising of industrial relations: The Conservative Party’s Industrial Relations Act 1971 sought ‘to introduce “order” into the largely informal system of plant bargaining, in order to reduce wage inflation, restrictive practices and strikes.’<sup>85</sup> Economic difficulties led the Conservatives to seek a proactive approach through regulation.<sup>86</sup> However, a policy of non-co-operation by The Trades Union Congress (TUC) made it largely inoperable<sup>87</sup> and ultimately led to the Government’s downfall.

2 1974-1979 Labour’s ‘Social Contract’: In return for pay restraint, the TUC agreed to a programme of social and legal reform. Repeal of the Industrial Relations Act 1971 was followed by a range of new legal rights for trade unions and employees. Labour law remained limited to being ‘a countervailing force to counteract the inequality of bargaining power... inherent... in the employment relationship.’<sup>88</sup>

A common element to Conservative and Labour administrations was the desirability of information disclosure by management to recognised trade

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<sup>83</sup> HMSO *In Place of Strife* (Cmnd 3888, 1968).

<sup>84</sup> Horner *Studies In Industrial Democracy* (Victor Gollancz Ltd London 1974) 24.

<sup>85</sup> HMSO *Report of Royal Commission on Trade Unions and Employers' Associations* (Cmnd 3623, 1968), para 190.

<sup>86</sup> Thomson and Engleman *The Industrial Relations Act a Review and Analysis* (Martin Robertson & Co Ltd London 1975) 19.

<sup>87</sup> Hepple, 'Labour Law and Social Security in Great Britain' in Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986) 113-114.

<sup>88</sup> Kahn-Freund (n 77) 7.

unions. This was provided for in section 58 of the Industrial Relations Act 1971 and sections 17-21 of the subsequent Employment Protection Act 1975 (EPA). However, its purpose concerned support for negotiation via CB rather than consultation.<sup>89</sup>

UK implementation of the CR and AR Directives only obliged management to consult representatives of trade unions recognised by employers. The first went further than the Directive instructed because section 99(1) of the EPA was triggered upon a redundancy proposal for one person, rather than twenty people. However, the Employment Protection Act's jurisdiction was limited by restricting the obligation to inform and consult with representatives of recognised unions.<sup>90</sup> Freedland wrote of Part IV, '...whilst influenced by the directive and by the desire to implement the directive, [it] is basically concerned to follow out the Government's [objective of]...the strengthening of collective bargaining.'<sup>91</sup>

Labour's plans to extend workers' participation in enterprises did not develop. Recommendations by the Bullock Commission<sup>92</sup> followed by a White Paper<sup>93</sup> on industrial democracy were not met with enthusiasm by the unions. A winter of industrial unrest led to Labour's defeat in the 1979 elections.

3 1979-1997 Legal Restriction and Market Individualism: The incoming Conservative administration advocated and encouraged principles of active market individualism.<sup>94</sup> The intention was for the market place to

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<sup>89</sup> Hussey and Marsh *Disclosure of Information and Employee Reporting* (Gower Aldershot 1983) 3-7.

<sup>90</sup> s 99(1)-(2).

<sup>91</sup> Freedland 'Employment Protection: Redundancy Procedures and the EEC' (1976) Industrial Law Journal 24 34; Ld Hughes HL Deb 7 August 1975, vol 363, col 1852 (series 5).

<sup>92</sup> Law Commission *Report of the Committee of Inquiry on Industrial Democracy* (Cmnd 6706 1977).

<sup>93</sup> HMSO *Industrial Democracy* (Cmnd 6810, 1978).

<sup>94</sup> Hepple, (n 87) 115.

adjust more readily to the national and international industrial climate. It sought to create an environment that altered the existing balance of power. Examples of this were the removal of immunity from most forms of secondary industrial action<sup>95</sup> and making a strike ballot mandatory in all cases of industrial action.<sup>96</sup> The power held by trade unions was weakened.

4 1997-2010 Increased Government intervention: In terms of I&P in the workplace the election of ‘New Labour’ did not bring a wholesale withdrawal of 18 years of Conservative policy towards unions.<sup>97</sup> It enacted legislative measures that provided workers with new rights. These included some which were the result of its decision to opt into the SPA. The Government’s position regarding the EWC Directive and IC Directive differed. The UK initially opposed the latter, but the Directive was passed after the text was altered to the satisfaction of other Member States within a ‘blocking minority’.<sup>98</sup> Acceptance of qualified majority voting on social policy issues meant that the UK, when it lacked sufficient support from other Member States, had given up its right to reject proposals on I&P.

### **2.3.2 I&P in the Workplace in the UK**

Since 1971 an increasing number of rights<sup>99</sup> affecting the employment relationship, have been laid down by statute. Four European Directives have had a marked effect on positive obligations to inform and consult with workforces within the UK. The way in which the UK implemented EU law reflected existing traditions and practices.

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<sup>95</sup> Employment Act 1980.

<sup>96</sup> Employment Act 1984.

<sup>97</sup> Trade union recognition has continued to decline (see Chapter 7) despite a new union recognition procedure Employment Relations Act 1999; Trade Union and Labour Relations (Consolidation) Act 1992 sched. A1.

<sup>98</sup> Dobbins ‘Implications of Proposed EU Information and Consultation Directive in Ireland’ (2006) Eurofound <<http://www.eurofound.europa.eu/eiro/2001/06/feature/ie0106168f.htm>> accessed 11 January 2010.

<sup>99</sup> Many the result of European provisions.

The CR and AR Directives were the first legislative provisions requiring I&P within specific, although limited, parameters. The Directives left the method and structure of I&P for Member States to determine.<sup>100</sup> As was seen in the previous section the UK based its implementation upon existing relationships between employers and recognised trade unions.<sup>101</sup>

Health and Safety was an area on which the UK had legislated since 1802;<sup>102</sup> market forces were felt to give workers inadequate protection. In 1977 regulations were introduced allowing recognised trade unions to appoint safety representatives and, through them, request the creation of safety committees.<sup>103</sup> I&P was supplemented by further European measures beginning with the Health and Safety Directive (**H&S Directive**).<sup>104</sup> Government policy combined with structural changes within the economy eroded trade union membership and decreased the number of those covered by all three Directives.<sup>105</sup> During part of this period companies employing over 250 people were required to report on employee I&P.<sup>106</sup>

In 1992 the Commission questioned the UK's methods of implementing the CR and AR Directives. The ECJ ruled that the UK had failed to provide for all employees.<sup>107</sup> There was no provision for circumstances where there was no recognised union. The result of the judgment was that the UK had to provide structures where there was no recognised union. The way that the UK originally revised its legislation enabled management to choose between representatives of a recognised union and employee representatives who

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<sup>100</sup> See Chapter 3.

<sup>101</sup> The Social Security Pensions Act 1975 also required consultation with independent recognised unions in relation to contracting out of the state pension scheme.

<sup>102</sup> Act for the Preservation of the Health and Morals of Apprentices and Others Employed in Cotton and other Mills, and Cotton and Other Factories 1802 (Geo 3 c73).

<sup>103</sup> Safety Representatives and Safety Committees Regulations 1977 SI 1977/500.

<sup>104</sup> H&S Directive 89/391.

<sup>105</sup> Between 1977 and 1992 Trade Union Membership decreased from over 13 million to under 10 million. BERR 'Trade Union Membership 208' (2009) URN 09/P77 5.

<sup>106</sup> Companies Act 1985 (as amended by the Companies Act 1989).

<sup>107</sup> Case C-382/92 and C-383/92 *Commission v United Kingdom of Great Britain and Northern Ireland* [1994] ECR 2435.

were not connected with a union.<sup>108</sup> New Labour changed the provision in 1999 to require that an independent trade union be consulted if it is recognised by an employer. The result is that all workers are capable of receiving information and expressing their views on a limited number of subjects.<sup>109</sup>

After 1997 several Directives gave rise to information and consultation with employee representatives on more general topics. The EWC Directive was implemented in the UK in 2000, whilst the I&C Directive began to take effect in 2005.<sup>110</sup> Under certain circumstances organisations can elect to be governed by the Statutes for a European Company or Cooperative Society. Both require some sort of I&P with employee representatives.

John Major's Conservative administration had refused to adopt the EWC Directive. However, a number of major UK companies were affected by its adoption in relation to their non-UK operations. New Labour accepted the Directive, but objected to the IC Directive on the grounds that it would be an unnecessary burden on business.<sup>111</sup> Qualified majority voting meant that the UK was not in a position to prevent it becoming law. The UK enacted both<sup>112</sup> in a way that did not go beyond their minimum requirements. Neither provision is mandatory; both are triggered by management initiative or by employee request.<sup>113</sup> It can be seen that in the UK I&P has been driven by EU policy. In the case of the IC Directive, it was irrespective of the UK's wishes.

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<sup>108</sup> TULRA before the 1999 amendment.

<sup>109</sup> The ability to alter employer decisions is considered in later chapters.

<sup>110</sup> Art 10 provided for staged implementation based upon employee numbers.

<sup>111</sup> European Industrial Relations Observatory On-Line *Joint Statement by German, Irish, Spanish and UK Unions on EU Consultation Directive* (<http://www.eurofound.europa.eu/eiro/2000/10/feature/DE0010288F.htm> Accessed 31/10/11).

<sup>112</sup> Transnational Information and Consultation of Employees Regulations 1999 SI 1999/3323.

The Information and Consultation of Employees Regulations 2004 SI 2004/3426. Implementation was staged according to the number of employees between 2005 and 2008.

<sup>113</sup> TICE 1999/3323 Reg 6; ICE 2004/3426 regs 7 & 11.

## 2.4 CONCLUSION

Economic upheaval in the 1970s led to demands for change at national level. This coincided with politicians, unions, the Commission, and academics attempting to create some sort of social policy within the EU. The 1974 Social Action Programme included suggestions for legislative measures on a number of issues. The fact that legislation was not on as broad a sphere as envisaged by the 1972 summit is indicative of tension between competing interests in the EU.

Streeck suggested that a way of preventing others gaining an economic advantage over regimes with more rigorous social standards is to impose an EU wide norm on those with lower standards. Alternatively formally stating principles can be seen as a ‘pure’ intention to ‘ensure at appropriate levels the development of the social rights of workers’. <sup>114</sup> Pressure from interested parties led to the passing of the Community Charter and the Social Policy Agreement. Until Amsterdam a legally binding policy was not attainable without the unanimous agreement of all Member States. However, no provision is possible without adequate will. Successive negotiations on various proposals involving I&P established an understanding that, in order to achieve unanimity or a qualified majority, different interests and practices create a need for flexibility.<sup>115</sup>

The TEEC initially reflected a neo-liberal approach to social policy. Early legislative proposals, such as the formation of a European Company, or regulating collective redundancies required I&P. All initially reflected the Commission’s thinking about how management and employees should interact.<sup>116</sup> However, proposals requiring positive harmonisation became measures involving negative harmonisation. Until *Commission v UK* the UK lacked any comprehensive formal provision relating to I&P outside the

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<sup>114</sup> Community Charter Social Europe 1/90.

<sup>115</sup> See Chapter 3.

<sup>116</sup> *Ibid.*

scope of CB agreements.<sup>117</sup> Therefore comprehensive legally binding developments in this area have followed European legislation.

The Community Charter was the EEC's first formal document proclaiming fundamental rights and it referred to information and consultation in the workplace (specific reference to 'companies or groups of companies having establishments or companies in two or more Member States' reflected pre-existing policy initiatives<sup>118</sup>). It contained facets of the EU's approach to I&P. Legislative proposals, measures, the Community Charter and subsequent developments in the treaties, indicate an ongoing policy where I&P is encouraged in the workplace. However, TFEU obligations do not amount to, even negative, harmonisation ((Article 153(2)(a) specifically excludes harmonisation of regulations and laws) but point towards an ethos. Although referring to 'information and consultation' the TFEU is silent as to how this should be carried out. The EU's approach to I&P is explored in Chapters 3 to 5.

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<sup>117</sup> Chapter 7 explores developments in I&P in the UK.

<sup>118</sup> See Section 3.7.1.

# Chapter 3 The Development of European Legislation Concerning Involvement and Participation

## 3.1 INTRODUCTION

By 1990 the Commission had made seven proposals for legislative measures requiring involvement and participation (I&P) in the workplace. However, only those that dealt with specific issues (collective redundancies, acquired rights, and health and safety) had become law. This chapter analyses the dynamics that drove the Commission's activism and led to a new style of directive. By analysing the progress of each proposal it identifies seven factors that are significant to a provision's success.

Section 3.1 overviews the pressures and thinking behind community policy and the individual measures. It identifies differences in the Commission's approach when drafting the seven proposals and overviews seven factors that were common to the four that became directives before 1995. The following sections analyse the progress of each proposal. The conclusion then differentiates between the factors necessary for a directive's success prior to, and post, 1994.

### 3.1.1 Pressures and Thinking Behind Community Policy

The first European legislative proposals that required I&P in the workplace were made against a backdrop of increasing social and economic instability within the EU. In 1972 the Community officially announced that its legislative objectives were changing; they would now include an aim to tackle socio-economic problems.<sup>1</sup> The First Summit Conference of the Enlarged Community led to Council Resolution of 21 January 1974

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<sup>1</sup> *First Summit Conference of the Enlarged Community* (Bull EC 10-1972 1972).

concerning a social plan.<sup>2</sup> The Council's Resolution went beyond the reported objectives of a programme drawing up 'practical measures... *within the scope of the Social Fund*'.<sup>3</sup> Proposals connected to I&P in the workplace included: a previous legislative initiative on collective dismissals;<sup>4</sup> plans for a Directive on the harmonisation of laws with regard to the retention of rights and advantages in the event of changes in the ownership of undertakings;<sup>5</sup> and 'improvements in health and safety conditions at work.'<sup>6</sup>

Something of the political ideology behind the Commission's policy at this time can be learnt from its Green paper 'Employee participation and company structure in the European Community'<sup>7</sup> (the **1975 Green Paper**). This considered and supported developments that had been taking place across the Community:

... it is clear... that the time is ripe for the reform of certain social institutions, companies included, to take into account of some important evolutions which have been gathering momentum....

The first evolution is the increasing recognition being given to the democratic imperative that those who will be substantially affected by decisions made by social and political institutions must be involved in the making of those decisions.... *In particular, employees are increasingly seen to have interests in the functioning*

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<sup>2</sup> Council Resolution of 21 January 1974 concerning a social action programme [1974] OJ C 13/1.

<sup>3</sup> *Bull EC 10-1972* (n 1) 19 (emphasis added).

<sup>4</sup> OJ C 13/1 (n 2) 13/4 The Council *Proposal for a Council Directive on the harmonization of the legislation of Member States relating to redundancies* (COM (72) 1400, 8 November 1972).

<sup>5</sup> OJ C 13/1 (n 2) 13/4.

<sup>6</sup> *Ibid* 13/3.

<sup>7</sup> European Commission *Employee participation and company structure in the European Community (Green Paper)* (Bull Supp 8/75, pg 54, 1975).

*of enterprises which can be as substantial as those of shareholders, and sometimes more so....*<sup>8</sup>

The Commission went on to state that ‘[d]ifficult problems of industrial relations will be easier to solve properly... if there are mechanisms which involve those closely affected in the process of finding solutions.’<sup>9</sup>

The 1975 Green Paper reviewed approaches to employee participation in four areas:

1. negotiation of collective agreements;
2. representative institutions within organisations for the purposes of information, consultation and approving certain decisions;
3. participation within the decision-making bodies of those organisations; and
4. share participation schemes.

The Commission found that differing practices within the EEC made it difficult to systematically apply one approach across all Member States.

The paper concluded that it was not possible to impose its understanding of effective employee participation and company structures upon Member States. It proposed that in order to reach its goals, the Community should construct a less rigid ‘framework which provides for the objectives to be reached’ in the future.<sup>10</sup> It will be seen that instead of creating prescriptive frameworks, the Commission fell back on superimposing a few of its key objectives on top of or within current practice.<sup>11</sup>

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<sup>8</sup> Ibid 9 (emphasis added).

<sup>9</sup> Ibid 9.

<sup>10</sup> Ibid 42-46.

<sup>11</sup> This is particularly evident in Council Directive (EC) 94/45 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 [1994] OJ L254/64.

This change in the Commission's approach to regulation has been noted in other areas of Community competence: e.g. products after *Cassis de Dijon*.<sup>12</sup> Initial proposals had been normative.<sup>13</sup> They sought the 'upward harmonisation' of standards across the Community by laying down detailed norms. It has been suggested that subsequent measures projected a new balance between Community level and national action.<sup>14</sup> This new approach left considerable discretion to member-states over the application of broadly framed EC *minimum standards*.<sup>15</sup>

### **3.1.2 European Community Proposals Involving Involvement and Participation**

Legislative proposals requiring interaction between management and labour within organisations can be traced to two sources: the Commission's Directorates General department 'DG XV Internal Market and Financial Services' (now DG Internal Market) and 'DG V Employment, Industrial Relations, and Social Affairs' (now DG Employment, Social Affairs & Inclusion). It has been argued that a

... different, "social affairs" approach can be identified in DG5's legislative proposals... These have tended to be more pragmatic than DG15's company-law-based approach to employee participation, relying on member-states' existing employee representation arrangements instead of specifying particular models...<sup>16</sup>

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<sup>12</sup> Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung fur Branntwein* [1979] ECJ 649; Baldwin *Rules and Government* (Clarendon Press Oxford 1995) 233-237.

<sup>13</sup> E.g. the Proposal for a Council Regulation (Com) 70(600) embodying a statute for European companies [1970] 1970 OJ C124/1.

<sup>14</sup> Commission *The Social Dimension of the Internal Market* (Social Europe (Special Edition) Commission of the European Communities (CEC) Luxembourg (1988)).

<sup>15</sup> Hall 'Behind the European Works Council Directive: The European Commission's Legislative Strategy' (1992) 30 4 BJIR 547, 556.

<sup>16</sup> Ibid 555.

The first two legislative proposals that involved employee involvement and participation came from DG XV<sup>17</sup> and were very prescriptive. However, whilst DG V's early drafts of the Collective Redundancies<sup>18</sup> and Acquired Rights<sup>19</sup> Directives were also relatively detailed and prescriptive it quickly modified its objectives and approach.<sup>20</sup> It is suggested that the socio-economic factors surrounding the legislative measures made compromises possible. A series of meetings established the boundaries of how much change Member States were prepared to accept and the Commission adapted both proposals accordingly.

This chapter overviews the development of early proposals for European legislation involving workplace I&P. The following are considered:

1. The draft Regulation for a European Company:<sup>21</sup>
2. The draft Fifth Directive<sup>22</sup>
3. The Directive Relating to Collective Redundancies<sup>23</sup>
4. The Directive Relating to Acquired Rights<sup>24</sup>
5. The Vredeling proposal on organisations with complex structures<sup>25</sup>

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<sup>17</sup> ECo Proposal 70/600; Draft of a Fifth Directive on the structure of Sociétés Anonymes 1972 OJ C 131 12.12.1972 Bull Sup 10/72.

<sup>18</sup> The Council. Working Party on Social Questions *Proposal for a Council Directive on the harmonization of the legislation of the Member States relating to collective dismissals* (T/135/74 (SOC), 14 March 1974). Areas of the proposals that are relevant to this chapter were modelled upon principles used in Germany (see section 2.2).

<sup>19</sup> Proposal for a Directive of the Council on harmonization of legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations 1974 OJ C 104 of 13.9.1974 amended Bull EC 7/8-1975.

<sup>20</sup> The original proposal for the Directive relating to Collective Redundancies prescribed a procedure based upon French practice (see section 3.3).

<sup>21</sup> ECo Proposal 70/600.

<sup>22</sup> Fifth Directive Proposal 10/72.

<sup>23</sup> Council Directive (EEC) 75/129 on the approximation of the laws of the Member States relating to collective redundancies [1975] OJ L39/40.

<sup>24</sup> Directive (EEC) 77/187 on the approximation of the legislation of Member States on the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of business [1977] OJ L61/26.

6. The Health and Safety Directive<sup>26</sup>
7. The European Works Council Directive.<sup>27</sup>

The seven can be divided into three overlapping categories. The first attempted to harmonise practice by introducing uniform rules to apply across the community irrespective of current national work practices.<sup>28</sup> The second involved directives that sought to solve pressing socio-economic problems within the EEC.<sup>29</sup> The third sought to fuse current practice into an acceptable legislative measure.<sup>30</sup> Only proposals falling into the last two categories met with success.

The second category differed in that its objectives were relatively limited. This, coupled with political/economic pressure, provided conditions<sup>31</sup> in which the Commission and Member States were able to formulate

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<sup>25</sup> Proposal for a Council Directive on the procedures for informing and consulting employees of undertakings with complex structures, in particular transnational undertakings 1980 Bull Sup 3/80 OJ C 297/3.

<sup>26</sup> Council Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

<sup>27</sup> EWC Directive 94/45.

<sup>28</sup> ECo Proposal 70/600; Fifth Directive Proposal 10/72.

<sup>29</sup> CR Directive 75/129; AR Directive 77/187; H&S Directive 89/391.

<sup>30</sup> EWC Directive 94/45.

<sup>31</sup> A difference in momentum is easily seen by comparing the frequency of drafts of for the European Company with those of the draft Redundancy Directive. Between 1970 and 1989 there were three drafts for a European Company compared with four drafts within three years for collective redundancies: ECo Proposal 70/600; Proposal for a Council Regulation Com (75)150 on the statute for European companies 1975 Supp. 4/75 Bull; EC Proposal for a Regulation on the Statute for a European Company 1989 Bull Supplement 5/89 37; Proposal for a Regulation Com (89) 268 on the statute for a European company 1989 Bull Supplement 5/89; COM(72)1400; Economic and Social Committee *Opinion on the "Proposal for a Council Directive on the harmonisation of the legislation of the Member States relating to mass dismissals"* (CES 529/73, 27 June 1973); The Council. Working Party on Social Questions *Draft report: Proposal for a Council Directive on the approximation of the laws of the Member States relating to collective dismissals* (R/1199/74 (SOC 100), 16 May 1974); The Council *Subject: Draft Council Directive on the approximation of the laws of the Member States relating to collective redundancies* (R/3632/74 (SOC), 27 January 1975).

compromises. These took into account the latter's industrial relations practices. The third category involved relatively complex issues, but they were formulated in a way that emphasised objectives rather than the structure and methods through which the objectives had to be met. Comparing successive proposals shows how the Commission arrived at a successful formula in the European Works Council Directive. This was used for subsequent legislative measures that specify the use of I&P. In order to make this clearer Vredeling will be discussed immediately before the European Works Council Directive (sections after 3.5 are therefore not in chronological order).

By analysing the backgrounds of these measures, the following sections seek to unpick the main factors determining their ability to pass into law. In addition to the Commission's change of approach, factors that bear on the success or failure of these proposals include:

1. Subject The type of issue that each proposal was seeking to address. It shall be seen that economic downturn resulted in well publicised problems and questions that gave rise to the Collective Redundancies and Acquired Rights Directives. More theoretical questions were less pressing.
2. Realistic Objectives How realistic the Commission's proposals were and the extent to which it compromised its initial ideal.
3. Structural Change The amount of structural change required of Member States and organisations.
4. Complexity The number of issues that each proposal involved.
5. Momentum Whether there were external circumstances that encouraged Member States to conclude an agreement about the issues within the Directive and how they should best be resolved.
6. Sponsorship Whether Member States and/or European Institutions were instrumental in keeping a proposal on the Community agenda.

7. Treaty Base	Whether the Treaty Article upon which the proposal was based required the Council's unanimous agreement or a qualified majority.
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### 3.2 THE EUROPEAN COMPANY STATUTE

The first legislative proposal that involved I&P in the workplace was a draft Statute for European Companies<sup>32</sup> (**the 1970 ECo Proposal**). It was to create a company that was 'wholly subject only to a specific legal system that was directly applicable in all the Member States...' <sup>33</sup> Traditionally a company is regulated by the law of the land under whose jurisdiction it is registered irrespective of the number of countries in which it operates. The Commission stated that a common legal standard would overcome reluctance to deal with, or invest in, companies which were incorporated under foreign law.<sup>34</sup> A European Company or Sociétés Anonymes (SE) was considered to provide 'the only solution' to help companies effectively merge, incorporate and form groups across the Community.<sup>35</sup>

The Commission was in favour of incorporating elements of 'democracy' in the running of companies. Employees would play an active role in influencing an SE's future. It also made the unsubstantiated claim that 'efficiency... will depend largely upon the existence of legal means of assisting and encouraging cooperation... between employees and management....'<sup>36</sup> Decision-making machinery was to promote employee representation at three levels: on the board that supervised the organisation's overall management; in Works Councils; and via European-wide collective agreements.<sup>37</sup>

The 1970 ECo Proposal was based upon a template that prescribed a legal relationship between shareholders, management, and employees. This was

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<sup>32</sup> ECo Proposal 70/600.

<sup>33</sup> Ibid 6.

<sup>34</sup> *Bull Supp* 8/75 (n 7) 7.

<sup>35</sup> ECo Proposal 70/600 6.

<sup>36</sup> Ibid 87.

<sup>37</sup> Art 146.

alien to the United Kingdom. UK Company Law traditionally focused on the relationship between corporation, shareholder, and creditor. The Proposal reflected law in other parts of Europe.<sup>38</sup> There, statute often regulated the relationship between employer and employee and gave employees a legal role in making organisational decisions.<sup>39</sup>

The 1970 ECo Proposal was modified in 1975,<sup>40</sup> and the Council suspended work on it in 1982.<sup>41</sup> As part of the drive towards completing the internal market President Delors had the initiative redrafted. The redraft was in two parts; a regulation<sup>42</sup> and a supplementary Directive concerning employee involvement.<sup>43</sup> These were more flexible than their predecessors in terms of how the SE's governing bodies should be constructed and the way in which employees' representatives were to have input into running the organisation. The Regulation and Directive of 2001<sup>44</sup> are based upon this 1989 redraft.

Sections 3.2.1 and 3.2.1 focus on 1970 ECo Proposal and that of 1989. Comparing the two indicates how the Commission's initial proposals were altered to accommodate Member State requirements.

### **3.2.1 The 1970 European Company Proposal**

Title V of the 1970 ECo Proposal dealt with 'Representation of Employees in the European Company.' The Commission wrote, the 'laws of the

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<sup>38</sup> *Bull Supp 8/75* (n 7) 28-30; European Parliament, 'Report on the Proposal Establishing a General Framework for Informing and Consulting Employees in the European Community' (1999) COM(98)0612; Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986).

<sup>39</sup> *Bull Supp 8/75* (n 7).

<sup>40</sup> ECo Proposal 75/150.

<sup>41</sup> Proposal for a Council Directive complementing the Statute for an European company with regard to the involvement of employees in the European Community 1989 Bull Supplement 5/89 37 Introduction 11.

<sup>42</sup> ECo Regulation Proposal 89/268.

<sup>43</sup> ECo Directive Proposal 5/89.

<sup>44</sup> Council Regulation (EC) No 2157/2001 on the Statute for a European company (SE) 2001 L294/1; Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294.

Member States... all involve the principle that the employees of a company must be enabled to unite in defence of their interests within the undertaking and to share in the making of certain decisions.<sup>45</sup> The concept of 'principle' appears stretched if the law of that time is examined. In Italy there was no right to participation in decision-making bodies.<sup>46</sup> Although the Commission claimed that the SE's efficiency 'will depend largely' on the framework set out in the 1970 ECo Proposal, no supportive evidence was given.<sup>47</sup>

The next sections look at the three types of mechanism through which these objectives were to be achieved: (1) representation on the Supervisory Board; (2) works councils; and (3) concluding collective agreements. These roles were set out with varying degrees of detail.

### 3.2.1.1 The Supervisory Board

The organisation's basic structure was stipulated in detail. The administrative organs were composed of three bodies: the Board of Management; the Supervisory Board; and the General Meeting.<sup>48</sup>

#### 3.2.1.1.1 The role of the Supervisory Board within the European Company structure

The General Meeting (comprised of shareholders) was to hold supreme authority inside the company. By selecting the majority of the Supervisory Board, the General Meeting would have controlled how the SE was run.<sup>49</sup> The 1970 ECo Proposal provided for one third of the Supervisory Board's members to be appointed by employees.<sup>50</sup> This would have enabled employee input at supervisory level.

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<sup>45</sup> ECo Proposal 70/600 87.

<sup>46</sup> *Bull Supp* 8/75 (n 7) 59-60, 78-81.

<sup>47</sup> ECo Proposal 70/600 87.

<sup>48</sup> *Ibid* 55.

<sup>49</sup> *Ibid.*

<sup>50</sup> Art 137.

The Supervisory Board was to have controlled and supervised the company's affairs. Its duties included appointing the Board of Management which would have had responsibility for motivating and managing the company.<sup>51</sup>

### 3.2.1.1.2 The Supervisory Board's rights and responsibilities

#### 3.2.1.1.2.1 *Right to information*

In addition to being provided with regular information<sup>52</sup> it would have had additional powers to request supplementary reports<sup>53</sup> and unlimited rights to access and inspect ledgers and other company documents.<sup>54</sup>

#### 3.2.1.1.2.2 *The ability to exert direct influence over the Board of Management*

Although not intervening *directly* in the management of the company it would have exerted direct influence in two ways. Article 73(2) authorised it 'to advise... on any matter of importance to the company.' Article 66 specified acts<sup>55</sup> that needed the Supervisory Board's prior authorisation.

These were:

1. closure or transfer of the whole or part of an undertaking;
2. substantial curtailment or extension of the undertaking's activities;
3. substantial organisational changes;
4. establishment or termination of long term co-operation with other undertakings.

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<sup>51</sup> ECo Proposal 70/600 55.

<sup>52</sup> Arts 68 and 73 stated that the Board of Management was to submit a quarterly report of the administration of the Company and its progress (with draft accounts attached).

<sup>53</sup> Art 73(1).

<sup>54</sup> Art 78.

<sup>55</sup> Art 66 (2) stated that the Statutes of the Company may specify that other acts should be subject to prior authorization.

### *3.2.1.1.3 Employees' representatives on the Supervisory Board and potential conflicts of interest*

The 1970 ECo Proposal took into account that some workers had objections to sitting on the Supervisory Board.<sup>56</sup> It provided an opt-out based upon a decision by two-thirds of employees.<sup>57</sup> If one country abstained from recommending a candidate for election, it would have been possible for representatives from other countries to be appointed.

Article 80 (1) stated that members of the Supervisory Board 'should have regard to the interests of the company and of its personnel'. Once on the Board, provisions on secrecy would have limited representatives' ability to discuss company secrets with their fellow workers.<sup>58</sup> They would have had to assess the situation and argue for those they represented in isolation. Representatives in this position have traditionally been seen as having compromised their loyalty.<sup>59</sup>

### **3.2.1.2 Works Councils**

The 1970 ECo Proposal provided for three bodies designed to put forward employee interests:

1. European Works Council (**EWC**) would have been responsible for representing the interests of employees where SEs had establishments in more than one Member State;
2. Group Works Council. (**GWC**) would have been formed where a number of undertakings were united under a single group management;
3. Representative bodies formed under national law.

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<sup>56</sup> ECo Proposal 70/600 Arts139-141.

<sup>57</sup> Arts 74(2) and 138(2).

<sup>58</sup> The legal position of employee representatives on the Supervisory Board, in terms of secrecy and liability (for failing to observe organisational and statutory rules or committing wrongful acts) would have been identical to other board members. Art 88(1)-(2).

<sup>59</sup> Simitis 'Workers' Participation in the Enterprise- Transcending Company Law?' (1975) 38 1 MLR 1.

Both EWC and GWC were given rights to ‘information’, ‘consultation’, and ‘co-decision-making’ on specific employee related issues. Decisions were to be taken at the level that reflected the number of employees influenced by that decision. Matters that had ramifications for all employees could only be decided at the level where everyone was represented. In the event of disputes between Management and any one of the three bodies (above) the proposed regulation provided for a court of arbitration.<sup>60</sup>

### 3.2.1.2.1 The European Works Council (EWC)

Article 100 stated that a EWC should be formed in every European Company with establishments in more than one Member State. Article 119(2) stated that the EWC ‘shall confine itself to...matters that concern the SE as a whole or several of its establishments’. The Commission sought to ‘ensure uniformity of representation’<sup>61</sup> with members elected directly by all employees.<sup>62</sup> There were no provisions to feed back information between representative and constituent. EWC powers went beyond those that existed in many Member States at the time.

#### 3.2.1.2.1.1 *Information*

The EWC would have been entitled:

1. to receive the same information as the SE’s shareholders,<sup>63</sup> be notified about important events, and obtain regular updates about the SE;<sup>64</sup>
2. to request written information<sup>65</sup> and meet the Board of Management at regular intervals for joint discussion.<sup>66</sup>

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<sup>60</sup> Arts 128, 129, 135 and 136. The court was to be composed of assessors, half appointed by the employee representative body, half by the Board of Management with an impartial chairman.

<sup>61</sup> ECo Proposal 70/600, Commission’s notes on Art 100.

<sup>62</sup> Arts 102-4.

<sup>63</sup> Art121.

<sup>64</sup> Art 120(2).

<sup>65</sup> Art 122 It was entitled to give and discuss its opinion with management.

### *3.2.1.2.1.2 Consultation*

The EWC would have been consulted before the Board made decisions relating to:

1. job evaluation;
2. rates of wages per job or for piece-work;<sup>67</sup> and
3. matters triggering prior authorisation for the Supervisory Board under Article 66.<sup>68</sup>

The Proposal specified what was to constitute the consultation process:

Consultation... shall be in writing, setting out the reasons underlying a decision and the likely consequences of the decision from the point of view of the business and of the employees... If the Board of Management disregards... recommendations in the European Works Council's opinion, it shall state its reasons for so doing.<sup>69</sup>

Failure to consult on matters of job evaluation and wage rates meant that a management decision was void.<sup>70</sup> These would have been powerful tools to ensure that the spirit and letter of the measure were complied with.

### *3.2.1.2.1.3 Co-decision-making*

Decisions were to have been made with the EWC's agreement relating to:

1. rules about recruitment, promotion, and dismissal;
2. implementation of vocational training;
3. the fixing of terms and methods of computing remuneration;
4. industrial safety, health, and hygiene;
5. social facilities;

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<sup>66</sup>Art 120(1).

<sup>67</sup> Art 124.

<sup>68</sup> Art 125.

<sup>69</sup> Art 126.

<sup>70</sup> Art 124(2).

6. working time;
7. holiday schedules.

Article 123(2) stated that without the EWC's agreement, decisions on these matters would have been void. Sub-section (3) provided for arbitration if the EWC did not agree or gave no opinion.

### 3.2.1.2.2 Group Works Councils (GWC)

GWCs<sup>71</sup> were to be formed where a controlling SE would have been authorised to take decisions concerning a number of undertakings.

Employees would have been represented by members of local representative bodies.<sup>72</sup> Its area of competence would have reflected the range of decisions taken by the controlling SE for the group as a whole.<sup>73</sup> It would have had the same rights and powers as the EWC.<sup>74</sup>

### 3.2.1.2.3 Employee representation at a national level

Article 102 defined representative bodies in terms of national legislation. The bodies were to function according to national law but could not carry out any role that was given to an EWC or GWC.<sup>75</sup>

The role and powers of representative bodies differed amongst Member States.<sup>76</sup> This would have meant the possibility of unequal employee representation throughout the Community and within an SE. Reliance on national bodies potentially undermined the objective of ensuring 'uniformity of representation for all employees in a European Company.'<sup>77</sup>

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<sup>71</sup> Art 130(1).

<sup>72</sup> Art 131-132 The method of appointment differed from the EWC.

<sup>73</sup> Art 134(2).

<sup>74</sup> Art 134(3).

<sup>75</sup> Art 101.

<sup>76</sup> The functions developed as result of such factors as industrial history *Bull Supp 8/75* (n 7) 49-103; '50 years of Labour Law' (n 38).

<sup>77</sup> ECo Proposal 70/600, 87.

### 3.2.1.2.4 Conclusion

The 1970 ECo Proposal relied upon national representative bodies. Where they existed,<sup>78</sup> such bodies served different functions across the Community. In Germany the ‘Betriebsräte’ had far reaching rights laid down in statute including co-determination regarding the organisation and conduct of employees<sup>79</sup> Italian works councils differed. Their duties were to ensure compliance with works agreements and hygiene/ health and safety provisions.<sup>80</sup> Representatives from Italian organisations would have probably been ill-prepared to carry out their duties under the Commission’s proposal. Management, no doubt, would have been reluctant to cede powers that had traditionally been within their prerogative. The European Company would have altered the balance of power where countries<sup>81</sup> had a tradition of settling terms and conditions though collective bargaining. This might have discouraged some Member States from accepting the 1970 ECo Proposal.

### 3.2.1.3 Collective Agreements

The 1970 ECo Proposal provided for the possibility of concluding collective agreements between the European Company and unions represented within the undertaking. Article 146 would have extended collective agreements based at a national level<sup>82</sup> to cover all employees.<sup>83</sup> The idea was ‘to avoid undesirable disparities in conditions of employment within the one undertaking.’<sup>84</sup>

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<sup>78</sup> Such bodies did not exist in all organisations in the UK.

<sup>79</sup> *Bull Supp* 8/75 (n 7) ,59-60.

<sup>80</sup> *Ibid* 78-81 See below for further details.

<sup>81</sup> E.g. Italy.

<sup>82</sup> The Commission acknowledged that conditions of employment and remuneration ‘are generally determined in the Member States by collective agreements concluded between the undertakings or employers’ federations on the one hand, and the national trade unions in the Member States on the other.’ ECo Proposal 70/600 88. It did not take into account the involvement of the Member States in determining many employment conditions; European Company agreements appeared to supersede not only national agreements but national law.

<sup>83</sup> *Ibid* 147.

<sup>84</sup> *Ibid* 121.

#### 3.2.1.4 Conclusion

The 1970 ECo Proposal was complex. It specified structures for corporate governance and provided for employee involvement. The proposal gave employee representatives an input into the decision-making process on Supervisory Boards and co-determination via works councils. Provisions for information, consultation, and co-decision were backed up by the ability to void decisions if management did not comply with their obligations.

Between 1970 and 1975 the economic climate within the European Economic Community (EEC) changed for the worse. Even prior to this, Member States responded to industrial pressures by developing and adapting existing practices particular to their labour regimes.<sup>85</sup> In its 1975 Green Paper the Commission acknowledged that immediate structural change was not a realistic objective.<sup>86</sup> In 1989 the Commission drastically altered its proposal stating: ‘... the great diversity of rules and practices existing in the Member States...makes it impossible to lay down uniform rules on the involvement of employees in the SE’.<sup>87</sup> The Green Paper marked a shift towards ‘negative harmonisation’.

### 3.2.2 The 1989 Proposal for a Statute for a European Company

#### 3.2.2.1 Introduction

The 1989 Proposal for a Statute for a European Company differed in structure and content from 1970 ECo Proposal. It consisted of a Regulation detailing Company structures and constitutions<sup>88</sup> (**1989 ECo Regulation Proposal**) and a Directive concerning employee participation<sup>89</sup> (**1989 ECo Directive Proposal**). Both provided for considerable flexibility. Formal provision for collective bargaining was dropped.

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<sup>85</sup> Treu, 'Fifty Years of Italian Labour Law' in Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986); Van Der Ven, 'Social Law in the Netherlands' in Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986).

<sup>86</sup> *Bull Supp* 8/75 (n 7).

<sup>87</sup> ECo Directive Proposal 5/89 Preamble 69.

<sup>88</sup> ECo Regulation Proposal 89/268.

<sup>89</sup> ECo Directive Proposal 5/89.

### 3.2.2.1.1 The 1989 ECo Regulation Proposal

The proposal took account of new thinking connected with the proposed Fifth Directive<sup>90</sup> and provided for two alternative corporate structures. These were the original ‘two-tier system’ using a ‘Management Board’ and a ‘Supervisory Board’ or a ‘one tier system’ using an ‘Administrative Board’. SEs with registered offices in a Member State were to be governed by EU law modified to suit that Member State.

### 3.2.2.1.2 The 1989 ECo Directive Proposal

I&P remained integral to the proposal. However, the Commission had become more flexible in how the goal was to be achieved. It proposed that a SE must have one of three models of participation. These were outlined in the Directive: section I covered employee presentation on the Supervisory or Administrative Board,<sup>91</sup> section II defined the rights of a separate body representing the employees,<sup>92</sup> and section III concerned other bodies established by collective agreement between employers and employees.<sup>93</sup>

The Directive allowed Member States to restrict the number of models available to SEs in their territory.<sup>94</sup> Subject to Member State laws and practices, Article 3(1) stated that the Boards of the founder companies should agree a form of representation with employee representatives. Where no agreement could be reached it would have been for ‘management’ to choose a model. The next section will overview the three models. More detailed examination follows showing that rights accorded to employee representatives differed in each model.

### 3.2.2.2 Models of Participation Under the 1989 ECo Directive Proposal

#### 3.2.2.2.1 Section I: Supervisory Board or Administrative Board

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<sup>90</sup> European Commission *Statute for a European Company* (Bull Supp 5/89, 1989) 11.

<sup>91</sup> Art 4.

<sup>92</sup> Art 5.

<sup>93</sup> Art 6 and Pages 8-12.

<sup>94</sup> ECo Regulation Proposal 89/268 Art 3(4-5).

The widest ranging rights would have been under Article 4. Employees' representatives would have made up<sup>95</sup> between one third and a half of the Supervisory or Administrative Board.

#### 3.2.2.2.2 Section II: Separate body

Article 5 provided for a 'Separate body', to be formed according to laws and practices of the Member States and the SE's constitution. The body's detailed rules would have appeared in the Company's statutes.<sup>96</sup>

#### 3.2.2.2.3 Section III: Other models (Article 6 model)

Representation under Article 6 was to be established by means of agreement. It was to have been concluded between the Management/Administrative/Supervisory Boards of the founder companies and the employees or their representatives.<sup>97</sup> Member States would have provided a 'standard model' that conformed to the most advanced national practices.<sup>98</sup> This higher standard was to have applied if both parties agreed, or if no agreement could be reached.

#### 3.2.2.4 Election of representatives

All employees would have been entitled to elect their representatives under any of the models. Article 7 stated that voting was to be 'conducted in accordance with the laws or practices of Member States.' This meant that the provision would appear to have left a degree of flexibility as to whether the elections might have been direct or indirect (via other representatives).

### 3.2.3 A Comparison of Rights to Participation within the 3 Models

Rights to participation rested on three concepts: the right to be provided with information; the right to request information; and the right to be informed and consulted before any decision referred to in Article 72 of the 1989 ECo Regulation proposal.

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<sup>95</sup> Appointed by employees or their representatives. Art 4(ii).

<sup>96</sup> Art 5(1).

<sup>97</sup> Art 6(1).

<sup>98</sup> Art 6(8).

### 3.2.3.1 The Right to be Provided with Information

Representatives in all models were to receive quarterly reports on the progress and prospects of the undertaking. Only members of the Board were to have access to information on matters of importance between the reports<sup>99</sup> and the ability to meet and discuss matters with management.<sup>100</sup>

Where employee representatives were *not* part of the SE's governing institutions, the inability to receive and discuss additional information with management would have lessened their ability to influence the decision-making process.

### 3.2.3.2 The Right to Request Additional Information

Members of the Board had the right, through the chairman, to 'require the management board to provide... any information necessary for the performance of its duties'.<sup>101</sup> The separate body could only require a report where necessary for the performance of its duties.<sup>102</sup> The Article 6 model would have had the ability to require 'the management board or the administrative board to provide the information necessary for the performance of its duties'<sup>103</sup> but *only* where the agreement provided for a collegiate body representing the employees.<sup>104</sup> In addition to this, Article 6(5) permitted information 'which might seriously jeopardize the interests of the SE or disrupt its projects' to be withheld from employees.

### 3.2.3.3 The Right to be Informed and Consulted

Article 72(1) stated that decisions could not be implemented without prior authorization 'of the supervisory board or administrative board as a whole' concerning:

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<sup>99</sup> Art 64(2), Art 67(2).

<sup>100</sup> Art 65, Art 67(3).

<sup>101</sup> Art 64(5).

<sup>102</sup> Art 5(c).

<sup>103</sup> Art 6(3).

<sup>104</sup> The term Collegiate Body was not defined.

- (a) the closure or transfer of establishments or of substantial parts thereof;
- (b) substantial reduction, extension or alteration of the activities of the SE;
- (c) substantial organisational changes within the SE;
- (d) the establishment (or termination) of important long term co-operation with other undertakings;
- (e) the setting-up of a subsidiary or a holding company.

Employee board members<sup>105</sup> would have had significant input into the decision-making process. The separate body had a right to be informed and consulted by Management or Administrative Board before any decision was made involving subjects under Article 72.<sup>106</sup> Article 6 models had similar rights but it did not specify who should inform and consult with employees.<sup>107</sup>

Only those on a Board had the right to vote and potentially prevent management implementing decisions. There was no provision for co-decision-making within the second and third models. The 1989 Proposal was silent on sanctions for management who failed to comply with its provisions.

### **3.2.4 Conclusion**

In 1970, when putting forward its model of a European Company, the Commission stated:

the legal position of the employees within the undertaking is just as essential to its proper internal functioning and its business relations with others as its relationship with shareholders and third parties.<sup>108</sup>

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<sup>105</sup> Art 4(i) of the proposed European Company Directive 1989 stated that between one third and one half of board members should be employees.

<sup>106</sup> ECo Directive Proposal 5/89.

<sup>107</sup> Ibid.

<sup>108</sup> ECo Proposal 70/600 88.

The 1970 ECo Proposal provided for employee representation on the Supervisory Board, three types of works council, and collective agreements. The model was one that did not take into account the characteristics of different types of company structure in Member States. The 1970 ECo Proposal gave worker representatives at board level and in Works Councils powers above those existing at national level in some Member States. Works councils would have had the right to receive: (a) the same information as the SE's shareholders;<sup>109</sup> (b) regular information about the SE's general economic position and future developments;<sup>110</sup> (c) to request written information;<sup>111</sup> and (d) to meet the Board of Management at regular intervals for joint discussion.<sup>112</sup> Article 126 strengthened the consultation process by requiring the Board to give reasons for rejecting any proposals made in the course of consultation. Article 123 would have supported the EWC's position by making specific decisions without its agreement void,<sup>113</sup> and those where it failed to reach agreement or express its opinion, subject to an internal 'court of arbitration'.<sup>114</sup> At national level it relied on representative bodies to implement its objectives. But the Proposal omitted to specify duties or a role beyond that which they already carried out.<sup>115</sup> There appeared to be an implicit assumption that these pre-existing structures would give equivalent results. Participation rights would not have been standard across the Community.

By 1989 the Commission had abandoned its original model of a European Company. It stated that the great diversity of existing rules and practices made it impossible to lay down uniform rules of involvement for employees in an SE.<sup>116</sup> But its alternative models did not give employees identical rights.

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<sup>109</sup> Art 121.

<sup>110</sup> Art 120.

<sup>111</sup> Art 122.

<sup>112</sup> Art 120(1).

<sup>113</sup> Art 123(2).

<sup>114</sup> Art 123(3).

<sup>115</sup> Arts 101 and 102.

<sup>116</sup> ECo Directive Proposal 5/89, preamble 69.

The three options in the 1989 ECo Directive proposal had differing I&P provisions. Although employees could be full members of the Supervisory or Administrative Board, under Article 74 (2) they were obliged to ‘carry out their functions... having regard in particular to the interests of the *shareholders and the employees.*’<sup>117</sup> This model is not without problems. Smitis described a widespread apprehension that representatives, once elected, disregard their connections with fellow employees, and stated that the ‘general attitude of German workers towards participation may be described as a mixture of dissatisfaction and distrust’<sup>118</sup>

Representatives under the other models were to have been given more limited rights to be informed and consulted. The terms under which the process was to be carried out were not described. Article 6 agreements had the potential to be much weaker than the other options. Consultation was not defined, and reference to co-decision-making was dropped.

Examination of the three models showed little equivalence in the proposed rights for employees. There was a ‘base level’ of safeguards to which all Member States had to adhere. This involved the provision of quarterly information and the right to be consulted on matters in Article 72(1). There was no attempt to distinguish between representation at local, national, or group level. This meant that the legislation did not have to deal with problems of where each level stood in the hierarchy of consultation and the possibility of unequal consultation provisions at national level across the SE. No provision for co-decision-making and a lack of definitions meant that proposals could only guarantee a minimal level of protections of employee. There was also no reference for employee protection during the course or their duties.

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<sup>117</sup> Emphasis added.

<sup>118</sup> Smitis (n 59) 13.

The Commission realised that if it was to legislate, it had to take into account national traditions of Company law and employee relations.<sup>119</sup> The result was less detailed, more realistic legislation and a number of alternative methods of achieving employee involvement. This was far from the vision in the 1970 ECo Proposal which gave employees access to, and the ability to influence, the organisation's decision-making process.<sup>120</sup>

Differences amongst Member States meant that discussions on the provisions for worker participation in the 1989 ECo Directive proposal stalled. In 1997 the proposal was re-launched by the Luxembourg presidency. A new proposal drew on the European Works Council Directive<sup>121</sup> regarding such issues as creating a 'special negotiating body' in order to negotiate an agreement. To achieve a European Company Directive<sup>122</sup> the Commission had to drastically revise its initial concept of how a European Company should function and the role of employee representatives. It was more realistic in that it took account of a variety of models for I&P. The 2001 Directive drew on years of compromises and ideas that had gradually developed in successive legislative proposals that involved workplace consultation.

### **3.3 THE FIFTH DIRECTIVE**

The first draft of the Fifth Directive<sup>123</sup> (**the 1972 Fifth Directive Proposal**) dealt with the structure of SEs<sup>124</sup> (currently known in the United Kingdom as Public Limited Companies) and the powers and obligations of their organs. The Commission based its proposals on the three-tier model found in the 1970 ECo Proposal: a rigid blue-print to be implemented across six Member States. It illustrated the Commission's thinking about the functions and rights of employees. Temple-Lang wrote, the 'Fifth Directive represents

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<sup>119</sup> *Bull Supp* 8/75 (n 7).

<sup>120</sup> Arts 123 and 125.

<sup>121</sup> EWC Directive 94/45.

<sup>122</sup> ECo Directive 2001/86.

<sup>123</sup> Fifth Directive Proposal 10/72.

<sup>124</sup> Art 1 of the 1972 and 1983 Fifth Directive proposals listed the companies to which the Directive would have applied.

a more paternalistic attitude towards shareholders and a more democratic attitude towards employees than has hitherto existed in Irish and British company law.<sup>125</sup>

Based upon Article 54(3)(g) of the TEEC (Article 50(2)(g) (TFEU)) the proposal sought to protect the interests of those involved with companies through unifying the structures that governed SEs. It would have affected those employing 500 or more staff.<sup>126</sup> The proposal was not without controversy and it was suggested that the Commission had exceeded its competence and its goal ‘by initiating legislation to make the laws of Member States uniform.’<sup>127</sup>

The 1972 Fifth Directive Proposal was revised twice, in 1983 and 1991,<sup>128</sup> before being officially withdrawn in 2001.<sup>129</sup> The 1989 ECo Regulation Proposal was influenced by, and in turn influenced the revisions of 1983 and 1991. Many principles relating to its development have been discussed in the section on the European Company. This section overviews the 1972 and 1983 drafts and focuses on the Commission’s change in attitude towards its attempts to ‘approximate’ legal standards.

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<sup>125</sup> Temple Lang 'The Fifth EEC Directive on the Harmonization of Company Law' (1975) 12 CMLR 155, 163.

<sup>126</sup> Fifth Directive Proposal 10/72 Art 4 (1).

<sup>127</sup> Däubler 'The Employee Participation Directive- A Realistic Utopia?' (1977) 14 CMLR 457, 460; Conlon 'Industrial Democracy and EEC Company Law: A Review of the Draft Fifth Directive' (1975) 24 Int'l & Comp LQ 348, 358; Temple Lang (n 125) 159.

<sup>128</sup> Amended Proposal for a Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs 1983 OJ 1983 C 240/2, Bull Supplement 6/83; Draft Directive Second amendment to the proposal for a Fifth Council Dir based on Art 54 of EEC treaty concerning the structure of Public Limited Companies and the powers and obligations of their organs 1991 COM/90/629 OJ C7 11.1.1991 p4.

<sup>129</sup> Commission Communication from the Commission - Withdrawal of Commission Proposals which are no longer topical 2001 OJ C 143.

### **3.3.1 A Proposed Structure for Public Limited Companies**

The 1972 Fifth Directive Proposal adopted the rigid separation of powers amongst three management organs<sup>130</sup> found in German Company Law. It acknowledged that, in systems where there was no supervisory organ, distinctions were made between ‘executive members who managed the company and non-executive members who confined themselves to supervision.’<sup>131</sup> But it was felt that this did ‘not afford equivalent safeguards to shareholders and third parties.’<sup>132</sup> The initial approach was ‘positive harmonisation’; the two-tier board was to be ‘made compulsory for all SEs.’<sup>133</sup>

By the time of its 1975 Green Paper on employee participation the Commission had lowered its opinion of what was achievable. It concluded that the ‘dualist board system and employee participation in the Supervisory Board, remain a *valuable and realistic objective*’<sup>134</sup> rather than a pre-requisite of reform. Article 2(1) of the 1983 Fifth Directive Proposal allowed for Member States to permit a company to have a choice between a two-tier system and a one-tier system.

### **3.3.2 Worker Involvement in the Company’s affairs**

#### **3.3.2.1 The 1972 Fifth Directive Proposal**

Under the 1972 Fifth Directive Proposal, not less than one-third of the Supervisory Board would have been appointed by the workers or their representatives.<sup>135</sup> This structure was more rigid than the 1970 ECo Proposal because it lacked an option for workers to decline to sit on it. Employee representatives would have had an input into the composition of the Supervisory Board appointed by the shareholders; Article 4(4) allowed them to object to a candidate put forward by the general meeting. As part of

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<sup>130</sup> (1) the Board of Management, (2) the Supervisory Board, and (3) the General Meeting.

<sup>131</sup> Fifth Directive Proposal 10/72 preamble.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

<sup>134</sup> *Bull Supp* 8/75 (n 7) 46. (emphasis added).

<sup>135</sup> Art 4 (2).

the Board, representatives would have been responsible for appointing the Board of Management.<sup>136</sup>

Workers, as members of the Supervisory Board, would have been involved in any major decision the company took. The Supervisory Board would have had extensive rights to information.<sup>137</sup> Its authorisation would have been needed before the Management Board could have made decisions on issues<sup>138</sup> identical to those in Article 66 of the 1970 ECo Proposal. All members of the Supervisory Board would have been subject to conditions of confidentiality.<sup>139</sup>

### 3.3.2.2 The 1972 and 1983 Fifth Directive Proposals Compared

The original proposal only dealt with representation of employees on the Supervisory Board. In an attempt to provide for systems where employees had no role at this level, the 1983 Fifth Directive Proposal set out eight alternative models of employee participation. This was far from a one-size-fits-all solution.

The default system was for employees to be represented on the Supervisory Board/body, but where employees or their representatives expressed opposition,<sup>140</sup> or where Member States provided different methods of representation, other systems of representation could be used.<sup>141</sup> These were: participation through employees' representative bodies at company level but separate from company boards themselves;<sup>142</sup> participation through collectively agreed procedures; and collectively agreed procedures allowing

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<sup>136</sup> Fifth Directive Proposal 10/72 Art 3(1).

<sup>137</sup> Art 11(1)-(5). Rights were equivalent to those in the 1970 European Companies Proposal.

<sup>138</sup> Art 12(1)(a)-(c).

<sup>139</sup> Fifth Directive Proposal 10/72 Art 14.

<sup>140</sup> Fifth Directive Proposal 6/83 Art 4(2).

<sup>141</sup> Art 4(2).

<sup>142</sup> S III.

for employee representatives to be co-opted onto the Supervisory or Administrative Boards.<sup>143</sup>

Compared with the 1972 proposal, both supervisory bodies had fewer rights. Article 11<sup>144</sup> concerned rights to information and meetings with management. Article 12, requiring prior consultation before certain acts could be taken, was almost identical to the 1972 Fifth Directive Proposal. Rights for employees who would not have been represented on supervisory bodies would have differed.

### 3.3.2.2.1 The appointment of employees' representatives

Articles 4(1) and 21(j) 1983 Fifth Directive Proposal laid down base level rules for the election of all representatives. The principles were 'designed to guarantee the democratic character of... employee participation'<sup>145</sup> and included proportional representation, full employee participation, and secret ballots.<sup>146</sup> In some Member States<sup>147</sup> the concepts of non-union participation and proportional representation would have created difficulties by altering the balance of power between employee, unions, and employer. These measures went far beyond the controversial statutory reforms made to trade union practices in the United Kingdom during the 1980s. For the UK, the Article would have introduced mandatory structural change, something which it was against in principle.<sup>148</sup>

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<sup>143</sup> S IV. This reflects the French system where the law provides for two to four representatives of the works council to attend board meetings; their role is consultative. *COM(98)0612* (n 38) 41.

<sup>144</sup> Fifth Directive Proposal 6/83. This was similar to Art 64 of the proposed European Company Directive 1989.

<sup>145</sup> *Ibid* Commission's commentary pg 9.

<sup>146</sup> *Ibid* Arts 4i(a)-(c) and 212(a)-(c).

<sup>147</sup> E.g. the UK, Ireland, and Italy.

<sup>148</sup> The Government stated that it was 'committed to the principle of management informing and consulting employees about matters which affect them, but believes that successful employee involvement is best introduced voluntarily. We therefore see no need for Community legislation in this field and we have made clear our profound reservations...' *HC Deb 6 December vol 50 cols 27-8W* (6 Dec 1983).

### 3.3.2.2.2 Involvement and participation

The Commission stated that where employees were to be represented outside Board level (on a separate body), their right to information, consultation and participation should be ‘assimilated as closely as possible to those members of a company’s Supervisory Board.’<sup>149</sup> Rights to information would have been ‘the same’ as those given to the supervisory body. It was to meet regularly, at least prior to the supervisory organ and have access to relevant paperwork. It could request that the chair or deputy of the supervisory organ or a member of the management organ attend its meetings. Full members of the Supervisory Board were required to authorise certain management decisions. Although employee bodies were not given powers of co-determination, the proposal did require the supervisory organ to communicate why it did not comply with the employees’ ‘opinion’.<sup>150</sup> The term ‘consulted’ was not defined.

### 3.3.2.2.3 Secrecy and confidentiality

Provisions relating to confidentiality were more developed in the 1983 Fifth Directive Proposal. Employee representatives on the board were to have regard to the interests of the shareholders and employees but exercise discretion in respect of confidential information.<sup>151</sup>

Article 14 provided for compensation to be obtained by the company as a result of breaches of law committed by members of its management organs when carrying out their duties. There were no similar provisions for those who were not full members of the Supervisory Board (i.e. co-opted onto it).

## 3.3.3 Compromise and Withdrawal

In 1972 the Commission argued that the one-tier administrative organ ‘no longer answers the needs of modern management of undertakings.’<sup>152</sup> It wished to eliminate differences in power held by employee representatives

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<sup>149</sup> Fifth Directive Proposal 6/83 pg 6.

<sup>150</sup> Ibid 4e.

<sup>151</sup> Ibid Art 10a(2).

<sup>152</sup> Fifth Directive Proposal 10/72 33.

across the EEC, and saw its function as building on the law found in some Member States to create a single provision applicable throughout the community.<sup>153</sup> This ‘positive harmonisation’ would have provided for employee representatives to form part of a Company’s Supervisory Board and have joint responsibility for appointing its Board of Management.

In its original form, the 1972 Fifth Directive Proposal did not make adequate provision for difficulties that would have been critical to the smooth running of employee relations. It:

1. superimposed Commission policy on different systems of company law and employee relations;
2. ignored potential employees’ objections to serving on the Supervisory Board;
3. did not state where employee representatives’ primary loyalties should be: towards the company (as a Board member) or towards their ‘constituencies’;
4. made members of a Supervisory Board collectively and/or personally liable for a breach of duty (Article 14) but made no provision to train employee representatives or ensure that they would have been able understand and carry out their duties properly;
5. said nothing relating to questions of confidentiality.<sup>154</sup>

The 1983 proposal only addressed some of these issues. It encouraged the original ideal of elected employee representatives on a Supervisory Board. But it also provided for alternative models of employee participation. This overcame the problem of demanding that all Member States adopt one structure for all companies under the Directive’s provisions. However, the proposal sidestepped the issue of employees refusing to serve on supervisory boards, and it failed to address problems of confidentiality, and

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<sup>153</sup> Ibid 35-36.

<sup>154</sup> Conlon (n 127) 362.

how a place on the board might appear to compromise loyalty to fellow employees.

The 1983 Fifth Directive Proposal also failed to make adequate provision for confidentiality where employee representatives were not board members. There was a provision for personal liability for those in positions of management<sup>155</sup> but no penalty if those on other representative bodies breached their duty to the company. Articles on confidentiality and secrecy in the Works Council Directive<sup>156</sup> indicated the importance of detailing such matters in a realistic, workable way.

Irrespective of whether employee representatives were to be elected or appointed to the Supervisory/Administrative Board, two sets of standards applied to employees that would have given them input into running companies. Employees with a position on a Supervisory Body would have been able to have a say in who was appointed to management, have access to information at board level,<sup>157</sup> and vote on issues of importance to the company.<sup>158</sup> Employees who would have been members of other bodies formed under the provisions had rights to information equivalent to those on the Supervisory Board, but only the ability to be consulted on specific subjects.

The Commission wrote that the 1983 Proposal was the first step towards employee participation within the supervisory or administration organ. It continued that it left Member States free ‘to choose between a number of equivalent arrangements’.<sup>159</sup> Although the proposal went some way towards providing similar I&P rights to all employees covered by the proposal, these rights fell very short of being equivalent.

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<sup>155</sup> Art 14.

<sup>156</sup> EWC Directive 94/45.

<sup>157</sup> Arts 11 and 21r.

<sup>158</sup> Arts 21 and 21s.

<sup>159</sup> Fifth Directive Proposal 6/83 (emphasis added).

By 2001 the plan to introduce a Fifth Directive on Company Law had run out of steam and the Commission included the proposal in its Communication relating to the withdrawal ‘of Commission Proposals which are no longer topical’.<sup>160</sup> No other reason for the withdrawal was noted. During the 1960s and 1970s Member States had been actively engaged in searches for better forms of corporate structure,<sup>161</sup> but the 1972 Fifth Directive Proposal failed to take into account the economic and political landscape in individual Member States. The 1983 Fifth Directive Proposal went some way to solving problems within the 1972 Proposal. However, it appears there was not sufficient interest or impetus to negotiate an acceptable formula.

### **3.4 THE COLLECTIVE REDUNDANCIES DIRECTIVE**

The Collective Redundancies Directive<sup>162</sup> (**CR Directive 1975**) was the first piece of European legislation to include mandatory workplace information and consultation in its provisions. This section summarises the background surrounding the provision and then overviews the Directive’s development. Compared with the original 1973 proposal on collective redundancies,<sup>163</sup> the CR Directive 1975 was less far-reaching in the role that Member States should play in the redundancy process. Even so, some Member States underestimated the amount of structural and legal change that would be necessary to comply with the Directive’s requirements.

#### **3.4.1 Historical Background**

Although economic down-turns had caused mass unemployment before 1970,<sup>164</sup> new thinking resulted in three major innovations in the dismissal

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<sup>160</sup> Withdrawal Communication 2001/143.

<sup>161</sup> In the UK this found expression in the Donovan Commission —, 'Royal Commission on Trade Unions and Employers' Associations' (Cmnd 3623 1968).

<sup>162</sup> CR Directive 75/129.

<sup>163</sup> Proposal for a Council Directive on the harmonization of the legislation of the Member States relating to mass dismissals 1973 R/2976/73 (SOC 236).

<sup>164</sup> For example the Great Depressions of 1873 to 1896 and 1929 to 1934.

laws and practices of Member States.<sup>165</sup> The first was the concept that termination of employment may go beyond the concern of affected individuals and be of collective interests.<sup>166</sup> The second was that workers' representatives and public authorities had developed an increasingly powerful role in mitigating the effects of collective redundancies. The third was the concept that people acquired rights in respect of their jobs.

In 1972 economic turbulence led to fiercely contested mass-redundancies and resulted in talks between large European 'multinationals' and the EEC Commission.<sup>167</sup> During this period the European Community had flagged the area of collective redundancies as being one that required harmonising legislation because there were disparities in reducing the labour force between Member States.<sup>168</sup> Following a report on redundancy practices across the Community the Commission sent the Council a proposal for a Directive to harmonise Member States' collective redundancy legislation.<sup>169</sup>

The Council's Working Party on Social Questions began to examine the proposal after the opinions of the European Parliament and Economic and Social Committee had been incorporated into an amended proposal<sup>170</sup> (**the 1973 Mass Dismissals proposal**). The Explanatory Statement stated that Member States had noticeable differences 'as regards conditions and procedure and measures which have been taken to alleviate the consequences of dismissals for workers'. It continued by saying that differing levels of protection can lead to decisions about where to make redundancies being based 'at least in part' on the level of protection a Member State offers its workers.

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<sup>165</sup> Hepple 'Community Measures for the Protection of Workers Against Dismissal' (1977) 14 *Common Market Law Review* 489 489.

<sup>166</sup> *Ibid* 496.

<sup>167</sup> For example 'Man-Made Fibres More Trouble' *The Economist* (7 October 1974) 95.

<sup>168</sup> Hepple (n 165) 489-490.

<sup>169</sup> *COM(72)1400* (n 4).

<sup>170</sup> The Council. Working Party on Social Questions *Proposal for a Council Directive on the harmonization of the legislation of the Member States relating to collective redundancies 200/74 (SOC 25)*, 7 February 1974).

### 3.4.2 The Development of the Collective Redundancies Directive 1975

There are key differences in the objectives of the 1973 Mass Dismissals Proposal and the CR Directive 1975. The former aimed to ‘harmonise national provisions by setting up minimum Community rules’.<sup>171</sup> The latter’s preamble just stated that ‘the approximation [of rules] must therefore be promoted’. The next sections overview and highlight differences between the 1973 Mass Dismissals Proposal and the CR Directive 1975.

#### 3.4.2.1 The 1973 Mass Dismissals Proposal

The 1973 Mass Dismissals Proposal concerned eliminating disparities ‘as regards conditions and procedures and measures which have been taken to alleviate the consequences of dismissals for workers...’<sup>172</sup> Based on French Law,<sup>173</sup> its powers would have ensured that public authorities could take an active role in the dismissals process. By comparison, workers’ rights to be consulted appear to have been a relatively minor part of the proposal. The proposal can be divided into three parts. The first set out the powers of an ‘authorized public authority’ over an employer intending to effect the dismissals.<sup>174</sup> The second concerned the nature of the relationship between ‘workers’ representatives’ and employers, and workers’ representatives and government authority. The third section specified contracts that would have fallen beyond the Directive’s scope.<sup>175</sup>

##### 3.4.2.1.1 The role of the Authorised Public Authority

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<sup>171</sup> Mass Dismissals Proposal 2976/73 preamble.

<sup>172</sup> 200/74 (SOC 25) (n 170) recitals.

<sup>173</sup> Mukherjee *Through No Fault of Their Own. Systems for Handling Redundancies in Britain, France and Germany* (Macdonald and Company (Publishers) Ltd London 1973)189-19.

<sup>174</sup> Art 1 specified: least five in enterprises employing between five and 50 workers; 10% or workers in enterprises normally employing between 50 and 250 workers; and at least 25 in enterprises normally employing 250 or more workers.

<sup>175</sup> Dismissals effected pursuant to contracts of employment for limited periods of time or for a determined task.

The ‘appropriate public authority’ had a role during the collective redundancies process. Article 1 ensured that it was provided with ‘all relevant’ information. Article 2 stated that during the period of not less than a month between the authority’s notification and the dismissal’s taking effect it was to ‘seek solutions’ to problems arising from the dismissals.<sup>176</sup> This period could be *extended* by a further month in exceptional circumstances.<sup>177</sup> Article 3 laid out the scope of the authority’s powers, which included the power to *suspend* or *prohibit* dismissals. These key powers meant that all Member States would have had a law enabling public authorities to influence or change decisions taken by enterprises. By contrast, the role given to workers’ representatives appears subsidiary.

**3.4.2.1.2 Workers’ representatives and the consultation procedure**  
Article 4 concerned the part which was to be played by workers’ representatives. Article 4(1) defined a workers’ representative and the point at which consultations were to have started. Article 4(2) detailed topics the consultations were to have covered. Article 4(3) set out the form the information should have taken, its purpose and the level of detail, whilst Article 4(4) required that the Member State make provisions for a mediation service. In the event of non-agreement about a proposed measure either party could request mediation, or that the public authority act as mediator.

**3.4.2.2 The 1973 Mass Dismissals Proposal and the CR Directive 1975 Compared**

Compared to the 1973 Mass Dismissals Proposal, the CR Directive 1975 had a very different structure which reflected a divergence in approach. In the former the role of the public authority preceded that of the workers’ representatives; this order is reversed in the CR Directive 1975. Section I of the Directive dealt with when, and to whom the provisions related. It defined the point at which the Directive was triggered, using criteria concerning the size of establishment and number of workers dismissed in a given period. Section II dealt with the consultation process between

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<sup>176</sup> Art 2(2).

<sup>177</sup> Art 2(3).

employer and workers representatives. Section III defined the role public authorities should play.

#### 3.4.2.2.1 The role of the Authorised Public Authority

There was a dramatic shift in the role the public authority was to play in the redundancy process; powers to suspend or prohibit dismissals were noticeably absent.<sup>178</sup> Article 3 of the directive detailed the information that employers should send to the competent public authority.<sup>179</sup> Article 4 provided for a thirty-day period between an employer informing a public authority of impending redundancies and their taking place.<sup>180</sup> The period was to ‘be used by the competent public authority to seek solutions in the problems raised by the projected collective redundancies.’<sup>181</sup>

Articles 3(1), 3(2), and 4(4) of the 1973 Mass Dismissals Proposal had required that Member States give a public authority powers to look at an employer’s proposal and assess its validity. As well as seeking solutions it would have had the power to suspend or reject the proposal. Compared with the 1973 Mass Dismissals Proposal, the role of the public authority in the 1975 Directive is vague and far less interventionist. There were/are differences in the powers that Member States give to public authorities under their domestic laws to intervene during the redundancy process.<sup>182</sup> The extent of the intervention is therefore dependent on existing practice within individual Member States.

#### 3.4.2.2.2 Workers’ representatives and the consultation procedure

Article 2 of the directive was in three sections. Article 2.1 set out at what point an employer should begin consultations and the spirit in which they should be conducted. Article 2.2 concerned subjects that consultations

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<sup>178</sup> The substance of the section (with the exception of the provisions regarding redundancies involving judicial decisions) has remained the same in subsequent revisions.

<sup>179</sup> Art 3(2) stated that the same information should be sent to workers’ representatives who could send comments to the public authority.

<sup>180</sup> The Directive allowed a public authority could extend or reduce this period.

<sup>181</sup> Art 4(3).

<sup>182</sup> Mukherjee (n 173).

should cover. Article 2.3 described the information that employers were required to supply to workers' representatives and the competent public authority.<sup>183</sup>

Consultation rights were via worker representatives<sup>184</sup> and there was no provision for informing and consulting directly with groups of those employees or workers affected.<sup>185</sup> When compared to the 1973 Mass Dismissals Proposal, the CR Directive 1975 was less prescriptive about the areas that negotiations should cover.<sup>186</sup> The provision about mediation in the 1973 Mass Dismissals Proposal was abandoned.

### 3.4.3 Conclusion

During the late 1960s and 1970s Member States passed legislation in an effort to mitigate problems caused by collective redundancies.<sup>187</sup> The idea of European legislation relating to collective redundancies was, in principle, uncontroversial. In developing and agreeing the measure, Member States appeared to be taking action on a matter about which there was often widespread disquiet.<sup>188</sup> It was a recognised problem to which their electorates could relate.

However, Member States had different views on how and what protection employees should receive. The 1973 Mass Dismissals Proposal was based upon French law which made any redundancy conditional upon employers

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<sup>183</sup> CR Directive 75/129 Art 2.

<sup>184</sup> Art 1(1)(b) 'workers' representatives' means the workers' representatives provided for by the laws or practices of the Member States.

<sup>185</sup> As with the Directive relating to the Transfer of Undertakings, where there are no workers' representatives then it is incumbent upon Member States to provide machinery to enable this. Case C-382/92 and C-383/92 *Commission v United Kingdom of Great Britain and Northern Ireland* [1994] ECR 2435.

<sup>186</sup> Art 3(2) stated that consultations should cover transfer to another job in the same enterprise and 'measures to be taken in favour of workers to be dismissed, in particular with regard to the possibility of severance grants and priority for re-employment.

<sup>187</sup> E.g. The Redundancy Payments Act 1965.

<sup>188</sup> Mukherjee (n 173).

obtaining prior approval of their local employment exchange.<sup>189</sup> It was envisaged if this kind of model should be adopted across Europe organisations would no longer make decisions about redundancies ‘based on the level of protection a Member State...’<sup>190</sup>

The 1973 Mass Dismissals Proposal would have created a standardised interventionist role for public authorities. They would have been given the power to mediate between employer and employees’ representatives and prohibit<sup>191</sup> or suspend proposed redundancies.<sup>192</sup> However, the Commission’s objective of ‘positive harmonisation’ was not realistic. Many Member States refused to adopt the model, and that part of the proposal was abandoned. The Commission adapted its objectives to those that were acceptable to Member States.

In order to secure agreement the Commission had unpicked the redundancy proposal and reassembled it so that it focused on consultation between employer and workers’ representatives. The public authority still had a potential role during the redundancy process but it was not one that was mandatory; it was not ‘compelled to intervene in order to seek solutions to the problems raised by the projected collective redundancies.’<sup>193</sup> The ECJ stated that the Collective Redundancies Directive’s ‘sole object is to provide for consultation with the trade unions and for notification of the competent public authority prior to such dismissals’.<sup>194</sup>

Although the Directive required less structural change than the 1973 Mass Dismissals Proposal, some Member States failed to properly transcribe the

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<sup>189</sup> Ibid 189-191.

<sup>190</sup> Mass Dismissals Proposal 2976/73, explanatory statement.

<sup>191</sup> Art 3(4).

<sup>192</sup> Mass Dismissals Proposal 2976/73 Arts 3(2), 4(4).

<sup>193</sup> Case C-91/81 *Commission of the European Union v Italian Republic* [1982] ECR 2133, para 10.

<sup>194</sup> Case C-284/83 *Dansk Metalarbejderforbund and Specialarbejderforbundet i Denmark v H Nielsen & Søn, Maskinfabrik A/S* [1985] ECR 553, para 10.

former into law.<sup>195</sup> Some had implemented the Directive by relying on collective agreements<sup>196</sup> or traditional methods of communication between worker and employer.<sup>197</sup> Problems arose when such methods did not apply to every worker.

The ECJ found that the UK<sup>198</sup> had failed to comply with the Directive's obligations. This was because workers were left without a mechanism that ensured representation if there was no union representative. Would the UK have agreed to the Directive if it had been aware of the problem in 1974? An attempt to alter the balance of power between employer, employee, trade unions, and State through the Industrial Relations Act 1971 had been rejected by the Labour movement.<sup>199</sup> Those parts of the 1971 Act not acceptable to unions were repealed.<sup>200</sup> Against this background it is difficult to know whether the UK government would have been willing to implement the CR Directive 1975 in a way that would have complied with its provisions.

At the heart of the CR Directive 1975 and its successors lies the balance of power between the EC, Member States, employers, and workers' representatives. Employers have had to alter their behaviour to comply with

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<sup>195</sup> The Commission brought three Member States before the ECJ for failing to properly transcribe the Collective Redundancies Directive into national law: Belgium, Italy, and the UK.

<sup>196</sup> Case C-215/83 *Commission of the European Communities v Kingdom of Belgium* [1985] ECR 1039, *Commission v Italy*.

<sup>197</sup> The UK relied upon structures that had mainly arisen as a means for trade unions to communicate/negotiate/bargain with management. Trade union representation was not universal and the UK did not provide for situations where such structures did not exist.

<sup>198</sup> *Commission v UK (Redundancy)*.

<sup>199</sup> Vic Feather of the TUC stated 'unions had always respected the law, but they did not accept the Industrial Relations Act as the law of the Land.' Thomson and Engleman *The Industrial Relations Act a Review and Analysis* (Martin Robertson & Co Ltd London 1975) 144.

<sup>200</sup> *Ibid* 157.

the Directive, but it did not alter their prerogatives<sup>201</sup> ('an employer's freedom to effect or refrain from effecting collective dismissals.'<sup>202</sup>). The 1973 Mass Dismissals Proposal had sought to harmonise<sup>203</sup> practices throughout the European Community, but in order to secure agreement its goals were changed (resulting in a shift from 'positive' to 'negative harmonisation'). The Directive gave workers' representatives and designated public authorities a chance to influence the decision-making process in relation to collective redundancies. However, without the teeth of the 1973 Mass Dismissals Proposal there is considerably less chance of either successfully influencing management decisions.

### **3.5 THE ACQUIRED RIGHTS DIRECTIVE 1977 (AR DIRECTIVE 1977)**

The Commission's report on the Development of the Social Situation in the Community referred to an 'increasing number of mergers, concentrations and rationalisation measures in undertakings.'<sup>204</sup> In order to protect workers affected by a transfer of a business a proposal<sup>205</sup> was submitted to inform and consult affected workers.<sup>206</sup> The resulting Draft Acquired Rights Directive (**1974 AR proposal**)<sup>207</sup> underwent significant alteration before being accepted by the Member States.

The 1974 AR Proposal was intended to ensure two types of right for those whose employer changed as a result of a whole or partial transfer from one

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<sup>201</sup> Case C-449/93 *Rockfon A/S v Specialarbejderforbundet i Danmark* [1995] IRLR 169, para 21.

<sup>202</sup> Case C-284/83 *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark v H Nielsen & Søn, Maskinfabrik A/S* [1985] CMLR 91, para 10.

<sup>203</sup> Mass Dismissals Proposal 2976/73. The tone is very different from that within the ILO report which preceded the creation of the EEC. This presumed 'expanding markets'. See International Labour Office 'Social Aspects of European Economic Cooperation' (1956) 74 ILR 99 115.

<sup>204</sup> — 'European Commission Report on the Development of the Social Situation in the Community' (1974) 3 EIRRR 20 21.

<sup>205</sup> OJ C 13/1 (n 2) 13/4.

<sup>206</sup> — (n 204).

<sup>207</sup> AR proposal 7/8-1975.

organisation to another. The first provided that rights and obligations arising from a contract of employment are transferred along-side employee(s) involved in a ‘take-over’. With the exception of termination for ‘pressing business reasons’,<sup>208</sup> this included protection against dismissal for reasons connected with the transfer. The second concerned employee rights to be consulted prior to the transfer.

Chapter I of the 1974 AR Proposal dealt with ‘Scope and definitions’, Chapter II with the ‘Safeguarding of employees’ rights’, Chapter III with ‘Workers’ representation and consultation’. Its basic format was incorporated into the AR Directive 1977. This section looks at the development of the AR Directive 1977 in respect of employee rights regarding I&P.

Sections 3.5.1 and 3.5.2 overview rights given to employees in respect of I&P in the 1974 AR Proposal and compares them with those in the AR Directive 1977. They focus on: (a) who was given the right to interact with management under the Directive; (b) what that right consisted of; (c) whether the Directive provided any mechanism that would help ensure management might be influenced by employee suggestions and; (d) the potential relevance of the timing of when such interaction should take place. Ideas within the proposal were compromised to a point where Member States were able to reach unanimous agreement.

### **3.5.1 The 1974 AR Proposal**

#### **3.5.1.1 Representation**

The 1974 AR Proposal used the term ‘workers’ representatives’ when referring to those who were to gain rights under the proposal. The term ‘workers’ representative’ was not defined. Communication between employer and worker was only through these representatives.

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<sup>208</sup> Art 4(1).

### 3.5.1.2 Information Rights and the Decision-Making Process

The provisions concerning I&P were contained in Article 9. The Article afforded two rights. The first required the transferor and transferee to provide workers' representatives with information about: (a) the reasons that led them to 'consider such an operation',<sup>209</sup> (b) the legal, economic, and social consequences it would entail for the workers; and (c) what measures were to be taken in relation to the workers.

The second arose before the merger or takeover when *workers' representatives* considered that it would be likely to be prejudice worker interests. The transferor and transferee would have been required 'to enter into negotiations with the representatives' with a view to reaching agreement about measures relating to workers. This would have allowed worker representatives, rather than employers, to decide whether something was worth discussing.

### 3.5.1.3 A Chance to Influence the Decision-Making Process

The 1974 AR Proposal gave workers' representatives, or transferor, or transferee the option of referring the matter to arbitration where negotiations did not result in an agreement.<sup>210</sup> An arbitration board was to give a definite ruling 'as to what measures shall be taken for the benefit of the workers'. The board was to be composed of an equal number of nominees from both sides. If employer and workers' representatives could not agree the composition of the arbitration board the decision was to be made by 'the competent court'.

### 3.5.1.4 Timing

The 1974 AR Proposal stated 'The transferor and the transferee shall be required, before carrying out the projected operation, to inform the representatives or their respective workers...'<sup>211</sup>

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<sup>209</sup> Art 9(1).

<sup>210</sup> Art 9(2).

<sup>211</sup> Art 9(1).

### **3.5.2 The 1974 Acquired Rights Proposal and the 1977 Acquired Directive Compared**

#### **3.5.2.1 Representation**

The 1974 AR Proposal and the AR Directive 1977 varied over who was to be represented and whether workers had to be represented through official representatives. The AR Directive 1977 used the term ‘representative of employees’ rather than ‘workers’ representatives’.<sup>212</sup> This excluded workers who were not employees. The Directive also reduced those with whom employers were obliged to communicate from workers’ representatives to the representatives of those ‘*affected* by a transfer’.<sup>213</sup> However, the Directive gave employees the right to information (but not consultation) ‘where there are no representatives of the employees in the undertaking or business’.<sup>214</sup>

#### **3.5.2.2 Involvement and Participation Rights and the Decision-Making Process**

The AR Directive 1977 took into account the fact that Member States had different models of employee representation. Some did not provide for the kind of arbitration system and employee representation found in the 1974 AR Proposal. Therefore, arbitration was no longer required. The Directive appeared to provide for a variety of different employment traditions: (a) those with traditions of state or third party involvement in the decision-making process; (b) those with systems of employee representation; and (c) those without employee representation.

The Directive gave employee representatives or, where there were no representatives, individual employees, identical rights to certain information.<sup>215</sup> Employee representatives had further rights with respect to when the information was given, and a right to be consulted when a transferee or transferor envisaged the proposed measures would affect

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<sup>212</sup> Both kinds of representative were defined in terms of the laws and practices in Member States.

<sup>213</sup> AR Directive 77/187 Art 6(1) (emphasis added).

<sup>214</sup> Art 6(5).

<sup>215</sup> Arts 6(1) and 6(5).

employees. A third difference occurred when the Member States provided for recourse to an arbitration board.<sup>216</sup> The differences in the three basic standards also depended on whether the affected employees were employed by the transferee or transferor.

### 3.5.2.2.1 Information

Employees' representatives, or employees where there were none, were entitled to three types of information: (a) the reasons for the transfer; (b) the legal, economic, and social implications of the transfer for the employees; and (c) measures envisaged in relation to the employees.<sup>217</sup> Substitution of the words 'measures are to be taken'<sup>218</sup> by 'measures envisaged'<sup>219</sup> suggested that information should be given at an earlier stage of the planning process. The revised wording focused on giving employees the right to know about potential rather than just actual consequences of the transfer.

### 3.5.2.2.2 Consultation

Unlike under the 1974 AR Proposal, the duty to consult fell on the employer. The obligation was stronger because it arose when measures were envisaged in relation to employees<sup>220</sup> as opposed to being likely to be prejudicial to worker interests.

Article 6(2) of the Directive stated that the transferor or transferee 'shall consult his representatives of the employees in good time on such measures with a *view to seeking agreement*';<sup>221</sup> the 1974 AR Proposal stated that the transferor or transferee 'shall be required to enter into *negotiations*... with a view to *reaching an agreement*'.<sup>222</sup> The verbs 'to seek' and 'to reach' are not

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<sup>216</sup> Art 6(3).

<sup>217</sup> AR Directive 77/187, Art 6(1). The current version of the AR Directive includes the date or proposed date of the transfer in this information.

<sup>218</sup> AR proposal 7/8-1975, Art 9(2).

<sup>219</sup> AR Directive 77/187, Art 6(1).

<sup>220</sup> Ibid Art 6 (2).

<sup>221</sup> Emphasis added.

<sup>222</sup> AR proposal 7/8-1975, Art 9(2) (emphasis added).

synonymous. One implies ‘to go in search of...’<sup>223</sup> the other, ‘to come to’ a resolution.<sup>224</sup> The obligation to reach agreement in the 1977 AR Directive was therefore weaker than the original. Unrepresented employees had no right to be consulted.<sup>225</sup> Compared with those who had representatives, those without representation were in a worse position to influence the decision-making process.

### 3.5.2.3 A Chance to Influence the Decision-Making Process

The 1977 AR Directive provided more lenient terms for Member States that granted employees’ representatives recourse to an arbitration board. Article 6(3) stated that Member States could limit employer obligations to consult under Article 6(1)-(2) to those ‘cases where the transfer carried out gives rise to a change in the business likely to entail serious disadvantages for a considerable number of the employees.’ A ‘considerable number’ and ‘serious disadvantages’ were not defined. Unlike the arbitration was not to be a right given to employees’ representatives, the transferee, and the transferor. If Member States took advantage of Article 6(3), employee rights with respect to Article 6(1)-(2) could have been restricted.

### 3.5.2.4 Differences between the rights given to employees employed by transferor and transferee

The AR Directive 1977 gave transferor and transferee different timescales in which to pass on the information within Article 6(1). For the transferor it was ‘in good time before the transfer is carried out’, whereas for the transferee it was ‘in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.’ The phrase before his employees are *directly* affected could have implied that transferee need not consult with their original work force (as provided in Article 6 (2)) until after the transfer had taken place. Had the

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<sup>223</sup> Onions (ed) *The Shorter Oxford English Dictionary* (3rd edn Clarendon Press Oxford 1973) 1929.

<sup>224</sup> Ibid 1754.

<sup>225</sup> This will be discussed Chapter 5.

text of the 1974 AR Proposal been accepted, this would have not been the case.

#### 3.5.2.2.5 Conclusion

The AR Directive 1977 created three tiers of rights for employees employed by the transferee and three tiers of rights for those employed by the transferor. Those without employee representatives were only given access to information, whilst employee representatives were able to enter into consultations. The chance of influencing certain decisions increased when Member States provided structures enabling a third party to arbitrate on the transferor's and transferee's proposals.

### 3.5.3 Conclusion

The AR Directive 1977 related to a relatively new area of employment law. Before the measure was passed only four of the Member States had legislation on this subject.<sup>226</sup> The result of the legislative process was a shift from 'positive' to 'negative harmonisation'. The 1974 AR Proposal was generally more prescriptive than the Directive in the following areas:

#### 3.5.3.1 Representation

The AR Directive 1977 differed from the 1974 AR Proposal in defining what section of the workforce should be represented and who should take part in the information and decision-making process. The Directive limited the scope of its application to affected employees. This would have made the consultation process less onerous for employers.

Unlike the 1974 AR Proposal, the Directive provided for situations where there were no employee representatives. This could have been interpreted by Member States as a way of avoiding the need for indirect representation using employees' representatives. The ECJ has interpreted the Directive narrowly and limited the circumstances where Article 6(5) applies to

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<sup>226</sup> — 'The "Acquired Rights" Directive: A Full Explanation' (1974) 5 EIRRR 9, 9.

organisations that do not have sufficient numbers of employees to elect or designate a collegiate body.<sup>227</sup>

### 3.5.3.2 Information Rights

The provisions in the Directive relating to I&P developed and focused on giving employees information about potential rather than actual consequences of the transfer.

### 3.5.3.3 Consultation

The 1974 AR Proposal left the option of when to start negotiations with worker representatives, and then only if workers considered that events were likely to be prejudicial to their interests. The Directive's threshold was higher: obliging the transferee and transferor to consult with employees' representatives when they envisaged measures in relation to their employees. However, the Directive laid down lesser obligations with regard to the spirit in which communications were to take place. The parties were not required to 'negotiate' with a view to reaching an agreement, but 'consult with a view to seeking agreement.'

### 3.5.3.4 The Decision-Making Process

The Directive left the option for arbitration, and which matters that should go to arbitration, to the discretion of Member States. The original proposal would have interfered with management prerogatives in some Member States. In the UK the concept of a third party reviewing and altering management decisions in this area would have required fundamental changes to Company and Industrial law. The current system means that the degree of influence employees' representatives have varies between the different Member States.

### 3.5.3.5 Conclusion

In terms of employee participation, the AR Directive 1977 differed greatly from the 1974 AR Proposal. As with the CR Directive 1975, it is difficult to

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<sup>227</sup> Commission v UK (Acquired Rights) para 18 The Judgment did not indicate what number of employees would trigger the need for a representative body.

know whether Italy and the UK would have agreed to the AR Directive 1977 had they known that they did not comply with its provisions. Member States appeared to have negotiated lesser standards regarding the type of ‘consultation’ and a choice of whether to omit or restrict the option of arbitration. The Directive therefore provided a floor of rights with levels of employee involvement that will differ within each Member State as well as across the European Union.

### **3.6 HEALTH AND SAFETY**

The 1989 Health and Safety Framework Directive (**the H&S Directive**) incorporates provisions to inform,<sup>228</sup> consult,<sup>229</sup> and involve<sup>230</sup> employees in issues of health and safety within the workplace. EU-inspired measures relating to Health and Safety within the workplace can be seen to have developed systematically. A more considered approach, combined with the relatively uncontroversial nature of the subject, meant that, compared with other measures involving I&P, the H&S Directive’s journey into law was uneventful. Section 3.6.1 briefly overviews the development of health and safety legislation, whilst Section 3.6.2 discusses provisions in the H&S Directive that relate to employee information and consultation.

#### **3.6.1 Development of Health and Safety Objectives**

##### **3.6.1.1 The Early Years to 1989**

The right to safe and healthy working conditions was neither a new nor a contentious concept.<sup>231</sup> Within the European Community co-operation in this area is first evidenced in the European Communities for Steel and Coal’s creation of a Tripartite Mines Safety Commission.<sup>232</sup> The Advisory

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<sup>228</sup> H&S Directive 89/391, Art 10.

<sup>229</sup> Art 11.

<sup>230</sup> Art 7.

<sup>231</sup> For example, provision of an enforceable regime date back to the Treaty of Versailles 1919 and the subject was included as part of the European Social Charter Recommendation 14 September 1953. Harris *The European Social Charter* (University Press of Virginia Charlottesville 1984) 3.

<sup>232</sup> ECSC decision concerning the terms of reference and rules of procedure of the Mines Safety Commission 1957 9 July 1957 OJ 1957 B28/487.

Committee on Safety, Hygiene and Health Protection at Work<sup>233</sup> and The European Foundation for the Improvement of Living and Working Conditions<sup>234</sup> were amongst the earliest measures arising from the 1974 Social Action Programme.<sup>235</sup> Both played a major role in drawing up and developing the Community policy in this area.

Early legislation focused on combating specific risks such as those caused by safety signs differing across the EEC.<sup>236</sup> The technical nature of issues related to health and safety led to innovative legislation. In 1980 some of the Community's objectives were set out in a 'framework' Directive.<sup>237</sup> This was followed by 'daughter' directives dealing with additional subjects/agents.<sup>238</sup>

### 3.6.1.2 The Single European Act and a New Treaty Base for Health and Safety

Before the Single European Act, Directives relating to safety and health had been based upon Article 100 [TFEU 115]. Its objectives were economic: the approximation and the establishment or functioning of the common market. The Single European Act of 1986 supplied health and safety with a separate treaty base: Article 118(a) [TEFU 153]. Its objectives were to harmonise conditions based upon minimum requirements 'having regard to the conditions and technical rules...in each' Member State. Provisions based upon Article 118a did not require the Council's unanimous agreement, only

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<sup>233</sup> Council Decision (EEC) 74/325 on the setting up of an advisory committee on safety, hygiene and health protection at work [1974] OJ 1975 L185/15.

<sup>234</sup> Council Regulation (EEC) 1365/75 on the creation of the European Foundation for the Improvement of Living and Working Conditions [1975] OJ L 139/1. This is based in Dublin.

<sup>235</sup> OJ C 13/1 (n 2) 13/3.

<sup>236</sup> Directive (EEC) 77/576 for the provision of safety signs at places of work [1977] OJ L229.

<sup>237</sup> Council Directive (EEC) 80/1107 framework Directive on the protection of workers from risks related to exposure to chemical, physical and biological agents at work [1980] OJ L327/8.

<sup>238</sup> E.g. Council Directive (EEC) 82/605 on the protection from the risks related to exposure to metallic lead and its ionic compounds at work [1982] OJ L247.

a qualified majority. That Member States had given up their ability to veto measures concerning Health and Safety is perhaps indicative of a perception that issues raised under this heading would be of a non-contentious nature.<sup>239</sup>

### 3.6.2 The H&S Directive

Duties under the H&S Directive served two purposes: to encourage improvement in protection across the Community, and provide a basis to facilitate further more specific measures.<sup>240</sup> It acknowledges that standards differ across the Community. The Directive does not require specific institutional structures, and leaves it to Member States to implement the broad duties. The next section shall examine the Directive's requirements for 'information, consultation and participation of workers'.<sup>241</sup>

#### 3.6.2.1 General Provisions and the Member States

The H&S Directive's 'object' is 'to introduce measures to encourage improvements in the safety and health of workers at work'.<sup>242</sup> Article 1(2) outlines the principles of how its objectives are to be met. These include '*informing, consultation, balanced participation* in accordance with national laws and/or practices.'

With limited exceptions,<sup>243</sup> the Directive applies across the workforce and includes private, public, and government sectors. It uses the term 'worker' (not employee).<sup>244</sup> This increases the number covered by the provisions.

Article 3(c) defines 'workers' representative' in terms of those with specific responsibility for the safety and health of workers. As with the CR and AR

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<sup>239</sup> However, Member States differed in their opinion of the meaning of the terms 'working environment' and 'health and safety'. The terms were given a wider meaning than envisaged by the UK Case C-84/94 *United Kingdom v EU Council* [1997] IRLR 30.

<sup>240</sup> Art 1.

<sup>241</sup> Art 1(2).

<sup>242</sup> Art 1(1).

<sup>243</sup> E.g. the armed forces and domestic servants.

<sup>244</sup> Art 3(a).

Directives, the H&S Directive uses the principle of relying on ‘the laws or practices of the Member States.’<sup>245</sup> There is no universal method of appointment; representatives can be ‘any person elected, chosen or designated’<sup>246</sup>.

Health and Safety regimes differ throughout the Community, not only within organisations, but also in terms of inspection and enforcement.<sup>247</sup> In order to provide regulations suitable for implementation across the community, the H&S Directive uses general terms to describe how Member States are to implement the Directive. Article 4 places the responsibility on Member States to provide an adequate framework<sup>248</sup> to support its objectives.

### 3.6.2.2 Obligations

Member States have a duty to provide adequate means of enforcing the H&S Directive and employers have ‘the duty to ensure the safety and health of workers in every aspect related to the work’.<sup>249</sup> Workers are obliged to co-operate<sup>250</sup> and notify the employer of ‘a serious and immediate danger to safety and health and of any short comings in the arrangements’.<sup>251</sup> The Directive lays down general principles governing how dangers should be prevented<sup>252</sup> and how the system should operate.<sup>253</sup> However, without an external body assessing or judging each Member State’s approach it is possible that what constitutes a safe working environment differ across the Community.

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<sup>245</sup> Arts 1(2) and 2(c) respectively.

<sup>246</sup> Art 3(c).

<sup>247</sup> Baldwin (n 12) 257-260.

<sup>248</sup> Arts 14 and 15 ensure that there is adequate health surveillance and provision for employees in general and specific risk groups.

<sup>249</sup> Art 5(1).

<sup>250</sup> Art 13.

<sup>251</sup> Art 13(d.).

<sup>252</sup> Art 6(3).

<sup>253</sup> Arts 7-9.

### 3.6.2.3 Information, Consultation and Participation of Workers.

#### 3.6.2.3.1 Information

Article 10 concerns ‘Worker information’. It is divided into three subsections dealing with: (1) with the workforce in general; (2) workers on site employed by third parties; and (3) workers who have specific functions within the health and safety system. Article 10(1) states that employers are to take appropriate measures so that workers and/or their representatives receive all necessary information. Subsection (a) sets out the kind of information they are to receive.

Article 10(2) ensures that workers who are engaged in work in one undertaking, but employed by a second organisation, are provided with information. Article 10(3) instructs employers to give workers, or workers’ representatives, with ‘specific functions in protecting the health and safety of workers’ access to information so that they may carry out their duties.<sup>254</sup>

#### 3.6.2.3.2 Consultation and participation of workers

Article 11 concerns consultation and participation of workers. It distinguishes between the rights of workers and/or their representatives and a second category of workers or workers’ representatives with specific responsibilities.

##### 3.6.2.3.2.1 *General rights*

Article 11(1) states that ‘Employers shall consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work. This presupposes: (a) ‘the consultation of workers’;<sup>255</sup> (b) that workers and/or their representatives have the right to make proposals; and (c) that participation is ‘balanced.’

The H&S Directive fails to define key concepts such as the meaning of ‘consultation’ or ‘balanced participation’. Nor does it guarantee any internal mechanism to ensure that any proposal is properly considered and/or

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<sup>254</sup> For example, to carry out risk assessment.

<sup>255</sup> ‘Consultation’ is not defined.

responded to. However, Article 11(6) states that workers and/or their representatives are entitled to appeal ‘the authority responsible for authority health and safety at work if they consider that the measures taken and the means employed are inadequate to ensure safety and health at work.’ Workers also have a right to submit observations during official inspections. This would enable them to draw attention to matters that might influence an inspector’s opinion of whether an employer is complying with the obligations.

#### *3.6.2.3.2.2 Workers or workers’ representatives with specific responsibility for the safety and health of workers*

Article 11(2) concerns ‘Workers or workers’ representatives with specific responsibility for the safety and health of workers’. It states they: ‘shall take part in a balanced way, in accordance with national law and/or practice, or shall be consulted in advance and in good time by the employer with regard to:’ (a) any measure substantially affecting safety and health; (b) the designation of workers specifically involved with the formation and ongoing development and the organisation’s health and safety; (c) the provision of information regarding that policy; (d) the enlistment of the competent specialists to help organise protective and preventative measures; and (e) training. Again the terms ‘consulted’ and ‘balanced way’ are not defined.

They have the ‘right to *ask* the employer to take appropriate measures and to submit proposals to... mitigate hazards for workers and/or to remove sources of danger’.<sup>256</sup> Autonomy to reject or accept a proposal is left to the employer. There is a right to appeal to the appropriate authority under Article 11(6).<sup>257</sup>

### **3.6.3 Conclusion**

Health and safety has long been perceived as belonging ‘to the nucleus of the unalienable rights of workers’,<sup>258</sup> and was at the forefront of the

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<sup>256</sup> Art 11(3) (emphasis added).

<sup>257</sup> Art 11(6).

<sup>258</sup> Blanpain *European Labour Law* (7th edn Kluwer London 1997) 302-303.

European Economic Community's embryonic social policy programme. The Community approach to legislation on health and safety developed systematically. After focusing on specific risks and hazards it developed the idea of using framework Directives.<sup>259</sup> In 1989 this policy developed into a community-wide principle of informing and consulting employees on matters relating to health and safety.

The H&S Directive is relatively simple in terms of its requirements. The Commission accommodated Member States' differing systems of providing for employee health and safety. Potential controversy was avoided by limiting obligations and not defining terms such as 'inform' 'consult' and 'balanced participation'. The H&S Directive provides no mechanism to ensure that workers' proposals are properly considered.<sup>260</sup> It leaves 'as much scope as possible for the application of detailed rules at the appropriate level.'<sup>261</sup> What is considered safe is often based on cultural norms. For example, before the fire at Kings Cross Station in 1987 it was acceptable to smoke in stations owned by the London Underground. There is nothing to prevent standards of safety differing across Member States.

Where management complies with the law, the Directive does not threaten traditional management prerogatives. The only time that employees or an external authority can change management decisions 'is when employee health and safety is not properly ensured.'<sup>262</sup>

The ease with which the H&S Directive passed into law appears to indicate three things: that Member States supported the principles behind the proposal; that they were content with how these were to be achieved; and that the proposals did not conflict with existing health and safety regimes. The Directive addressed an uncontentious issue, one that Member States could unite around and be seen to be making progress over. Harmony was

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<sup>259</sup> H&S Directive 80/1107.

<sup>260</sup> Art 11(1)(b).

<sup>261</sup> Kenner *EU Employment Law From Rome to Amsterdam and Beyond* (Hart Oxford 2003).

<sup>262</sup> Art 11 (6).

probably aided by the Commission's having sidestepped defining crucial terms, and doing little to ensure that suggestions made by workers and/or their representatives are considered.

### 3.7 VREDELING

#### 3.7.1 Background

In 1980 the Commission introduced a proposal for a Directive on the procedures for informing and consulting employees of undertakings with complex structures, in particular transnational undertakings<sup>263</sup> (**1980 Vredeling**). Its purpose was to fill the gap between the Fifth and ECo proposals. It was felt that procedures for consulting and disclosing information to employees had failed to develop to take account of complex organisational structures at national and international level.<sup>264</sup> 1980 Vredeling was to provide a link between the level where decisions were taken and employees at local level.

1980 Vredeling was based upon national legislation (in France, Germany, and the Netherlands) and international voluntary codes of conduct.<sup>265</sup> First proposed in 1980, criticism led to its revision in 1983<sup>266</sup> (**1983 Vredeling**). The intention of both was to: (a) supplement existing national legislation; (b) ensure that information was transmitted to employees or their representatives at local level,<sup>267</sup> and (c) make sure that employee representatives were to be consulted over decisions substantially affecting

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<sup>263</sup> Vredeling 3/80.

<sup>264</sup> Ibid 5.

<sup>265</sup> ILO *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (16.11.1977) and OECD *Guidelines for Multinational Enterprises* (21.06.1976) in Docksey 'Information and Consultation of Employees: the United Kingdom and the Vredeling Directive' (1986) 49 1 MLR 281 283; — 'Multinationals: Draft Directive on Disclosure' (1980) 82 EIRRR 5.

<sup>266</sup> Amended proposal for a Council Directive on the procedures for informing and consulting employees of undertakings with complex structures, in particular transnational undertakings 1983 Bull Sup 2/83 4.

<sup>267</sup> Ibid Art 3.

their interests.<sup>268</sup> It was presumed that Member States had sufficient I&P systems in place to meet Vredeling's objectives.<sup>269</sup>

Proposal and amendment were controversial. The watered down revision 'produced a spirited opposition from industry, certain trading partners of the Community, and the Government of the United Kingdom... [The reasons given were] that its provisions are complicated and unfamiliar, and that it would disrupt voluntarist systems of industrial relations.'<sup>270</sup> In order to gain an understanding of the issues that caused problems for the proposals, Section 3.7.2 summarises 1980 Vredeling whilst Section 3.7.3 outlines changes within 1983 Vredeling.

### **3.7.2 1980 Vredeling**

The Commission argued that Member State procedures for informing and consulting employees did not take into account the development of sophisticated organisational structures at national and transnational level.<sup>271</sup> Employees were not consulted in a consistent way across the Community. 1980 Vredeling's preamble stated that for economic activities to develop harmoniously all firms should be subject to the same obligations towards employees affected by their decisions.<sup>272</sup>

It proposed procedures for informing and consulting employees in two situations: where employees were employed in a Member State by an undertaking whose decision-making centre was located in another Member State or in a non-member country<sup>273</sup> and where an undertaking had several establishments, or more than one subsidiary, in a single Member State.<sup>274</sup> The obligations laid on undertakings in both situations were identical.

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<sup>268</sup> Ibid Arts 4 and 5.

<sup>269</sup> Vredeling 3/80, explanatory memorandum pg 4 para 3.

<sup>270</sup> Docksey 'Information and Consultation of Employees: the United Kingdom and the Vredeling Directive' (1983) 49 1 Modern Law Review 281, 281.

<sup>271</sup> Vredeling 3/80 5.

<sup>272</sup> Ibid 5.

<sup>273</sup> Art 1.

<sup>274</sup> Art 1.

### 3.7.2.1 Information

1980 Vredeling provided that the management of each subsidiary that employed over 100 employees should ‘communicate’ with its employees’ representatives every six months.<sup>275</sup> The communication was to give a clear picture of the activities of the whole undertaking.<sup>276</sup> Details were to have included information on: (a) structure and manning; (b) its economic and financial situation; (c) probable developments within the business; (d) investment and rationalisation plans; and (e) the introduction of new working methods; and (f) all procedures and plans liable to have a substantial effect on employees’ interests.<sup>277</sup>

### 3.7.2.2 Consultation

Where a decision was proposed that was ‘liable to have a substantial effect on the interests of its employees...’,<sup>278</sup> management was required to communicate the information to its employees’ representatives and ask their opinion.<sup>279</sup> Decisions included: (a) closure; (b) reorganisation or transfer of part or all of an establishment; and (c) modification to activities in the undertaking. Where employees’ representatives felt the proposed decision was likely to have a direct effect on employees’ terms of employment or working conditions, local management would have been required to hold consultations about the measures with them with a view to ‘reaching agreement’.<sup>280</sup>

The requirement to forward information on which representatives could give an opinion lay with the undertaking. However, the initiative to discuss the proposals lay with the employees’ representatives. This would have been controversial amongst Member States where management had no tradition of employee involvement in the decision-making process.

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<sup>275</sup> Arts 5 (transnational organisations) and 11 (complex national organisations).

<sup>276</sup> Arts 5(1), 5(3), 11(1), 11(3).

<sup>277</sup> Arts 5(2), 11(2).

<sup>278</sup> Arts 6(1), 12(1). This had to be done before 40 days of adopting the decision.

<sup>279</sup> Arts 6(3) & 12(3). Employees had a 30 day period in which to give their opinion(s).

<sup>280</sup> Arts 6s(4), 12(4).

### 3.7.2.3 Redress for Non-Compliance

1980 Vredeling provided for two sorts of redress for when local management had failed to comply with its obligations; the first was via management of the dominant undertaking, the second through the legal system.

#### 3.7.2.3.1 Appeal to management of the dominant undertaking

If local management failed to comply with their obligation to provide information, Articles 5(4) and 11(4) would have given employees' representatives the right to request and receive information from the management of the dominant undertaking. Articles 6(5) and 12(5) enabled employees' representatives to obtain information and consult with the management of the dominant undertaking *as if they had been* local management.<sup>281</sup> This would have by-passed local management and might have interfered with an organisation's wishes regarding how its different entities should interact.

#### 3.7.2.3.2 Redress via a Member State's legal system

Member States were to provide 'appropriate penalties' for failure to comply with the Directive's provisions. Employees' representatives would have had the right of appeal so action could 'be taken to protect their interests'.<sup>282</sup> It is not clear whether these rights would have related to monetary compensation or, as with the early ECo Directive,<sup>283</sup> whether non-compliance would have made the decision void.

### 3.7.2.4 Confidential Information

Section IV concerned secrecy requirements. Article 15(1) stated that members, former members of bodies representing employees, and 'authorized delegates' should maintain discretion as regards confidential information, take account of the interests of the undertaking and not divulge

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<sup>281</sup> Art 5(5) (emphasis added).

<sup>282</sup> Arts 6(6), 12(6).

<sup>283</sup> See above ECo Regulation Proposal 89/268 5(2) and 6(2).

secrets regarding the undertaking or its business. Article 15(2) instructed Member States to provide for a body to settle disputes concerning confidentiality. There was nothing that gave management the right to withhold information if it might seriously jeopardise the interests of the organisation or disrupt its projects.

### 3.7.2.5 Conclusion

The provision was based upon legislation in ‘Member States which are *most advanced* in this field.’<sup>284</sup> The Commission envisaged ‘positive harmonisation’ where management would have to engage with employee representatives whenever decisions were liable to have a substantial effect on the interests of its employees. Again, it used a template that did not take into account practices where consultation procedures did not exist or were not developed. Comments by the Council and Parliament focused on these issues<sup>285</sup> and led to a revised text.

### 3.7.3 Vredeling: 1980 and 1983 Proposals Compared

Compared with 1980 Vredeling, 1983 Vredeling weakened rights to access information and to be consulted. It altered: (a) the circumstances of when the Directive could be triggered; (b) the provision of information and the nature of consultation; (c) the available forms of redress if the information and consultation requirements were not met; (d) to whom the information should be given; and (e) issues of confidentiality and secrecy.

#### 3.7.3.1 Triggering the Directive

1983 Vredeling used the trigger point of at least 1,000 workers employed in ‘the parent undertaking and its subsidiaries taken as a whole’.<sup>286</sup> The criterion had been based on minimum numbers employed in any one

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<sup>284</sup> Vredeling 3/80 para 11 (emphasis added).

<sup>285</sup> —, ‘Transnationals: Shaping EEC Law “Vredeling” Draft Directive: European Commission and Parliament Versions’ (1983) 109 EIRRR 21, 21-23 also European Industrial Relations Review issues 82-109.

<sup>286</sup> Art 2(1). It is interesting to note that the term ‘worker’ rather than ‘employee’ has been used here.

subsidiary.<sup>287</sup> It is difficult to know whether this would have increased or decreased the overall number of organisations covered by the Directive.

### 3.7.3.2 Information and Consultation

#### 3.7.3.2.1 The provision of information

The minimum period between which management should provide information to employee representatives was increased from six months to one year. However there would have been an additional obligation to forward information produced for shareholders and creditors. These half-yearly reports would have covered much of the information required in Art 3 of 1980 Vredeling,<sup>288</sup> although the list specifying subjects to be covered was less specific and shorter in 1983 Vredeling (three of five original requirements were omitted). The information requirement therefore fell short of the Commission's original intentions in terms of detail and frequency.

#### 3.7.3.2.2 Consultation

The trigger for, and process of providing information and consulting was similar to 1980 Vredeling.<sup>289</sup> 1983 Vredeling decreased the obligation to consult to those subsidiaries directly concerned. In line with Parliament's request, the list of circumstances triggering consultation was expanded and clarified as being non-exhaustive. However, consultation was no longer to concern all employees in the Community, but only to have been available to those directly affected by a decision.

The phrase concerning the spirit in which consultations were to be held was altered. 1980 Vredeling stated that any consultation was to be 'with a view

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<sup>287</sup> Arts 4 and 10 in Vredeling were triggered by a subsidiary employing at least 100 employees.

<sup>288</sup> Vredeling 2/83, Art 3(1). Council Directive (EEC) 82/121 on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing [1982] OJ L48/26.

<sup>289</sup> Vredeling 3/80 Arts 6(1), 12(1) and Vredeling 2/83, Art 4 (Art 6(1) altered the time scale from 40 days before the final decision to in good time before the final decision is taken).

to reaching agreement...<sup>290</sup> This was qualified in 1983 Vredeling by the addition of the word ‘attempting’.<sup>291</sup> It appears that management would have had less of an obligation to accommodate employee suggestions in the decision-making process. The change corresponds with the Commission’s statement that ‘the intention was not to impose a right of codetermination.’<sup>292</sup> Stages in the consolation process were not defined and by introducing the word ‘attempting’ the Commission conveyed a less onerous process.

1983 Vredeling reduced the quality and frequency of information to be provided to employees’ representatives. Although it expanded the areas over which consultation was required, the right to be consulted was limited, and the spirit in which management was obliged to consult altered. Such changes were consistent with a wish not to infringe upon management prerogative where there was no tradition of this type of co-operation.<sup>293</sup> Although less demanding than 1980 Vredeling, 1983 Vredeling would have required some Member States to alter fundamental concepts in established systems of Company and Employment law.

### 3.7.3.3 Non-Compliance

Compared with 1980 Vredeling, 1983 Vredeling reduced employees’ representatives’ right to interact with management in the controlling undertaking. They were limited to requesting that the parent company pass required information to the subsidiary’s management.<sup>294</sup> There was no longer a right to consult at the higher level. This would have preserved an organisation’s prerogative to determine its lines of communication.

### 3.7.3.4 The Information Chain

1980 Vredeling proposed to inform and consult via a body representing all employees of the dominant undertaking. This was to have been set up by

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<sup>290</sup> Art 4(4).

<sup>291</sup> Art 4(3).

<sup>292</sup> Vredeling 2/83,pgs 5-6.

<sup>293</sup> For example in the UK and Italy.

<sup>294</sup> Art 3(5).

means of agreement between management and employees' representatives.<sup>295</sup> 1983 Vredeling provided for five different methods of I&P:

1. An existing body representing employees at a level higher than that of the subsidiary or establishment;<sup>296</sup>
2. Where employees' representatives agreed, to transfer their right to be *consulted* to a pre-existing body;<sup>297</sup>
3. An agreement between management and employee representatives to create a community/nationwide body to which employees' representatives transferred their right to be informed or consulted, or both;<sup>298</sup>
4. Limiting information and consultation obligations to subsidiaries that fulfilled the conditions for a collegiate body;<sup>299</sup>
5. Member States providing that information and consultation could take place directly with employees.<sup>300</sup>

The new approach echoed the Commission's Explanatory Memorandum which stated that the Directive 'is not designed to change existing industrial relations systems in the community...'<sup>301</sup> Individual Member States and representatives would have had an input into whether employees' representatives were to be informed/consulted at local, national, or international level. The Directive also provided for Member States to potentially sideline employees' representatives and thereby enable management to communicate directly with employees.<sup>302</sup>

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<sup>295</sup> Art 7.

<sup>296</sup> Art 5(1).

<sup>297</sup> Art 5(2).

<sup>298</sup> Art 5(3).

<sup>299</sup> Art 5(4).

<sup>300</sup> Art 5(5).

<sup>301</sup> Vredeling 2/83 , pg 4.

<sup>302</sup> Art 5(5).

### 3.7.3.5 Confidentiality and Secrecy

#### 3.7.3.5.1 Confidentiality

1983 Vredeling clarified what information was to be considered confidential. Such information could not be communicated to third parties (such as fellow employees).<sup>303</sup> In view of the competitive environment in which businesses have to operate, this change would have been likely to be more acceptable to management.

#### 3.7.3.5.2 Secrecy

One criticism against the initial proposal was that business secrets could not be omitted from information supplied to employee representatives.<sup>304</sup> 1983 Vredeling authorised management not to communicate secret information. It defined 'secret' information as that, 'which... could substantially damage the undertaking's interest or lead to failure of its plans.'<sup>305</sup>

Article 7(3) stated that Member States should provide a body to settle disputes over secrecy. There were to be appropriate penalties if the Article was infringed.<sup>306</sup> This meant that information could not be withheld as secret at management's total discretion. The new provisions appear more considered because they provided for employers' interests and prerogatives but balanced them with employee rights.<sup>307</sup>

#### 3.7.3.6 Exemptions

1983 Vredeling limited the range of organisations it covered. Inspired by German legislation, the Commission's intention was to mirror national legislation.<sup>308</sup> Article 8(2) protected the freedoms of charitable, political or

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<sup>303</sup> Art 7(2).

<sup>304</sup> Vredeling 2/83, pg 4.

<sup>305</sup> Art 7(1).

<sup>306</sup> Art 7(4).

<sup>307</sup> As in Vredeling 3/80, Vredeling 2/83 made provision for appeal against Management decisions to keep decisions secret or label them as confidential.

<sup>308</sup> Such organisations are exempted from the application of the provision of the German Works Council Act of 1972. Pipkorn 'The Draft Directive on Procedures for Informing and Consulting Employees' (1983) 20 CMLR 725.

public information bodies (freedom of the press), and religious, humanitarian, educational scientific and artistic bodies.

### 3.7.4 Conclusion

The preamble of both versions of Vredeling stated that ‘all firms should be subject to the same obligations towards employees affected by their decisions’.<sup>309</sup> However, each approached what constituted ‘the same obligations’ differently. In the first, the legal framework to inform and consult employees was to ‘constitute a stepping-stone to the creation of a uniform operating environment for all undertakings in the Community...’,<sup>310</sup> However, by 1983 the Commission stressed that the Directive ‘is not designed to change existing industrial relations systems in the community.’<sup>311</sup> A shift from ‘positive’ to ‘negative harmonisation’.

The alteration in policy led to many significant changes in the Directive namely: (a) a reduction in the scope and frequency of information to be provided; (b) a reduction of those entitled to be consulted and a restriction in the provisions enabling representatives, in certain circumstances, to interact with management controlling the undertaking; (c) flexibility allowing Member States and organisations choice in how to structure I&P; (d) new confidentiality and secrecy requirements, and (e) a new provision allowing exemptions under Article 8(2). This development was the result of the legislative process.<sup>312</sup>

More flexibility allowing Member States to preserve existing industrial relations systems would have led to different rights throughout the Community under the provision. In Member States with no history of legislation that required consultation, even 1983 Vredeling would have altered traditional paths of communication between management and workers/unions. Therefore, such changes as were made fell short of the

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<sup>309</sup> Vredeling 3/80, pg 5.

<sup>310</sup> Ibid pg6.

<sup>311</sup> Information for Plc Directive 82/121, Art 4.

<sup>312</sup> Vredeling 2/83, pg 3.

Commission's intention of not changing existing industrial relations systems.<sup>313</sup>

Despite the revisions, problems of a technical and political nature led to 1983 Vredeling being held up by both Parliament and Council.<sup>314</sup> There were attempts to reach agreement,<sup>315</sup> but in 1986 the Council formally decided to postpone negotiations until 1989.<sup>316</sup> By 1989 the Social Charter<sup>317</sup> and the Social Action Program that was to accompany it put forward a new instrument that was 'envisaged to *cover* the area of the draft Fifth and Vredeling Directives.'<sup>318</sup> The 1983 Vredeling proposal was formally withdrawn in 1998.<sup>319</sup>

### **3.8 THE EUROPEAN WORKS COUNCIL DIRECTIVE**

The European Works Council Directive<sup>320</sup> (**EWC Directive 1994**) sought to promote information and consultation in complex transnational organisational structures.<sup>321</sup> The Commission stated that the 'Vredeling Proposal... is the immediate precursor of the "European Works Councils" proposal'.<sup>322</sup> However its approach differed because the Directive was based on a new type of agreement as used in some European multinationals. These

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<sup>313</sup> Ibid pgs 3-4. For example the exclusion of certain types of organisation and alteration of the requirements for consultation (see above).

<sup>314</sup> European Industrial Relations Review and Report Vols 100-133.

<sup>315</sup> — 'New Approach on "Vredeling"' (1985) 133 EIRRR 10, 10; — 'June Council Meeting' (1985) 139 EIRRR 11.

<sup>316</sup> European Communities The Council *Council conclusions on procedures for informing and consulting the employees of undertakings with complex structure* (SOC (1987)7536/86, 1986) 4.

<sup>317</sup> Community Charter of the Fundamental Social Rights of Workers *Social Europe* 1/90 51-76 Luxembourg: Office for Official Publications of the European Communities.

<sup>318</sup> — 'Social Charter: Action Programme Released' (1990) 192 EIRRR 11, 14 (emphasis added). See EWC Directive 94/45 below.

<sup>319</sup> Withdrawal of certain proposals and drafts from the Commission 1998 OJ C 040 07/02/1998 4.

<sup>320</sup> EWC Directive 94/45.

<sup>321</sup> Ibid preamble.

<sup>322</sup> Commission *Communication on worker information and consultation* (COM(95) 547 final, 1995) 3.

had established various types of jointly-agreed European-level information and consultation arrangements.<sup>323</sup>

For Member States to agree to the Commission's proposals the latter had to resolve two issues. Firstly, should the Directive create a unified system of law imposing identical requirements on all Member States, or a framework of minimum standards which allowed for national practice ('positive' versus 'negative harmonisation')? Secondly, what types of structure and forms of communication were to be used? The following sub-sections look at how these issues were resolved by examining influences behind the EWC proposal and the changes that led to the EWC Directive 1994.

### **3.8.1 Political Influences Behind the European Works Council Directive**

Opinions about how management and worker should interact, and the relative influence of workers in the decision-making process, differ across the political spectrum. It will be seen (below) that after the appointment of Jacques Delors as President of the EEC Commission thinking on European Social Policy was heavily influenced by those who were on the left of the political spectrum. The French presidency set in motion a train of events that led to the EWC Directive 1994.

#### **3.8.1.1 The Influence of French Politicians**

Jacques Delors became President of the EEC in 1985. He had been part of a French Socialist Government that had introduced laws intended to strengthen workers' rights. One such new law extended the rights of existing statutory works councils and introduced group works councils.<sup>324</sup> In September 1988 the French government produced a report which was to serve as the basis for the French Presidency of the EEC the following year.<sup>325</sup> This called for employees to have their fundamental social rights defined

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<sup>323</sup> Marginson 'European Integration and Transnational Management-Union Relations in the Enterprise' (1992) 30 BJIR 529 540.

<sup>324</sup> — 'A Decade of the "Auroux" Laws' (1993) 233 ILR Rev 30.

<sup>325</sup> — 'Report on "Social Europe"' (1988) 179 EIRRR 18.

in a text (such as the European Social Charter) and referred to the desirability of ensuring information disclosure and consultation of employees at a European level.<sup>326</sup>

### 3.8.1.1.1 Community Charter on the Fundamental Social Rights of Workers (1989) (Social Charter 1989)

In November 1988 Jacques Delors asked the Economic and Social Committee to draw up a European Charter of Fundamental Social Rights.<sup>327</sup> This was revised and adopted<sup>328</sup> under the French Presidency. Article 17 concerned 'Information, consultation and participation for workers' especially in companies having establishments or companies in two or more Member States. The Action Programme<sup>329</sup> accompanying the Social Charter 1989 proposed 'an instrument on information, consultation and participation of workers of European-scale undertakings'.<sup>330</sup> In 1990 the Commission submitted a proposal for an EWC Directive.<sup>331</sup>

### 3.8.1.1.2 European Works Councils in French organisations.

In 1992 The European Foundation for the Improvement of Living and Working Conditions produced a report overviewing Europe-wide information and consultation arrangements within multinationals.<sup>332</sup> It noted that French-based multinational groups pioneered European-level

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<sup>326</sup> Ibid 19.

<sup>327</sup> — 'EEC In Brief' (1989) 181 EIRRR 2.

<sup>328</sup> It was adopted by all Member States except Britain. Barnard *EC Employment Law* (2nd edn Oxford University Press Oxford 2000) 10; — 'Social Charter: Action Programme' (n 318).

<sup>329</sup> Commission Report on the Social Charter Action Programme [1989] COM (89) 568 final Brussels, 29 Nov. 1989.

<sup>330</sup> — 'Social Action Programme Priorities Established' (1990) 196 EIRRR 2.

<sup>331</sup> Proposal for a Council Directive COM (90) 581Final on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees 1991 OJ C 39/11 15.2.1991.

<sup>332</sup> Gold and Hall 'Report on European-Level Information and Consultation in Multinational Companies- An Evolution of Practice' (1992) Eurofound 13.

information/consultation arrangements during the latter half of the 1980s.<sup>333</sup>

Comparing nine organisations, its authors stated:

it is possible to identify a set of key characteristics... With the exception of Swiss-owned Nestlé, all the companies concerned are French-based, and... appear to reflect the influence of...legislation in France.<sup>334</sup>

The report found two key differences between practice and the minimum requirements set out in the draft Directive. Firstly the draft went beyond the 'information-only remit typical of existing bodies'.<sup>335</sup> Secondly, it gave no role for external trade union organisations which generally played an important co-ordinating role in the establishment<sup>336</sup> of such bodies.

### 3.8.1.2 Factors Influencing Early Arrangements

The 1992 report looked at factors that influenced management when establishing Euro-level information/consultation arrangements. Of the eleven organisations analysed, five had socialist senior management, some form of state-ownership, or both. Management ideology appeared to have been a factor leading to the agreement.<sup>337</sup> Economic issues relating to restructuring were present in six organisations.<sup>338</sup> The report found that existing bodies within organisational structures, such as group-level enterprise committees or employee representative bodies, provided environments that gave rise to formal or informal agreements.<sup>339</sup> However, it distinguished between cases where management agreed a joint formula with employee representatives<sup>340</sup> and those arrangements that were seen 'as a means of heading off EC legislative moves or more ambitious trade union

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<sup>333</sup> Ibid 13.

<sup>334</sup> Ibid 28.

<sup>335</sup> Hall (n 15) 552.

<sup>336</sup> Ibid 553.

<sup>337</sup> Gold and Hall (n 332) 38-39.

<sup>338</sup> Ibid 39.

<sup>339</sup> Ibid 38-39.

<sup>340</sup> Ibid 38.

objectives.' The triggering causes were therefore political, economic and legal.<sup>341</sup>

### 3.8.1. 3 Trade Union Influence

The European Trade Union Confederation (ETUC) was actively involved in promoting the development of group works councils and put forward a proposal for legislation to be included in the Social Charter Action Programme.<sup>342</sup> In 1992 the Community began to use its 'social dialogue' budget to encourage 'labour' (unions) to negotiate works council-type structures.<sup>343</sup> Money was 'aimed at supporting "workers' representatives pending adoption of the Commission's proposal" for a Directive on European Works Councils.'<sup>344</sup> The European Foundation for the Improvement of Living and Working Conditions' report also stated that in some cases management 'tended to see [such]... arrangements as a way of pre-empting the possibility of EC-level legislation or trade union initiatives...'<sup>345</sup>

### 3.8.1. 4 European Policy: Upward Harmonisation or Minimum Standards

In 1990 all successful Directives that required informing and consulting<sup>346</sup> employees/workers *appeared* to involve little change to existing labour relations practices.<sup>347</sup> All had shifted from proposals that visualised upward harmonisation to Directives imposing minimum standards. The Commission's document 'The social dimension of the internal market'<sup>348</sup> referred to the movement from harmonisation by 'bureaucratically-inspired

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<sup>341</sup> Ibid 39.

<sup>342</sup> Since 1973 Hall states that a key ETUC aim had been cross-border collective bargaining within transnational companies. Hall (n 15) 551.

<sup>343</sup> Between 1992 and 1993 the social dialogue budget was increased from 14 to 17 million Ecu. — 'Subsidies for Transnational Meetings' (1993) 231 ILR Rev 3.

<sup>344</sup> Ibid.

<sup>345</sup> Gold and Hall (n 332) 38.

<sup>346</sup> CR Directive 75/129, AR Directive 77/187.

<sup>347</sup> The ECJ found that existing practices in some Member States did not comply with European Law: *Commission v Italy* ; *Commission v Belgium*; *Commission v UK Combined*.

<sup>348</sup> Gold and Hall (n 332) 68.

directives,<sup>349</sup> towards legislation in which Member States apply broadly framed *minimum standards*. From ‘positive’ to ‘negative harmonisation’.

The EWC Directive 1994 differed from Vredeling in that it only dealt with organisations with a presence in two or more Member States. This meant that no change was required to provisions regulating informing and consulting employees at national level. The legal framework was to be ‘superimposed on - but not replacing the functions of - existing national systems... [There was] considerable flexibility to make the supplementary procedures ... consistent with existing national practice.’<sup>350</sup> There was relatively little legislation in force in Member States that required European works councils.<sup>351</sup> However, finding an acceptable formula was problematic.<sup>352</sup>

### 3.8.1.5 Conclusion

These influences helped the proposal remain high on the Commission’s agenda. Although a new and growing phenomena, it appears that European Works Councils had mainly arisen as a result of French legislation and practice. The Commission in turn encouraged their development through its social dialogue budget. An acceptable formula was developed which took account of existing practice.

## 3.8.2 The Development of the European Works Council Directive

When the EWC Directive 1994 is compared with the 1990 EWC Proposal<sup>353</sup> major changes are apparent. The next sections overview the 1990 EWC Proposal, compares it with the Directive, and highlights significant differences.

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<sup>349</sup> Hepple 'The Crisis in EEC Labour Law' (1987) 16 Ind LJ 77.

<sup>350</sup> Hall (n 15) 559.

<sup>351</sup> I.e. the Auroux Laws.

<sup>352</sup> — 'The EWCs Directive and Previous Participation iInitiatives' (1991) 207 EIRRR 23,— 'UNICE Renews its Opposition to EWCs' (1993) 233 ILR Rev 2; Hall (n 15) 559.

<sup>353</sup> EWC Proposal 90/581.

### 3.8.2.1 The 1990 EWC Proposal

The purpose of the proposal was to ‘improve the provision of information to and the consultation of employees in Community-scale undertakings or groups of undertakings.’<sup>354</sup> It was in six sections: Section I defined its parameters; Section II concerned the creation of, and the content of, European Works Council agreements; while Section III dealt with the absence of an agreement. Sections IV and V dealt with subjects such as confidential information, employee protection, and providing remedies if the Directive was not complied with. An Annex laid down minimum requirements in the event that no agreement was reached.

Article 1(2) stated that ‘a European Works Council *or a procedure for informing and consulting employees* shall be established in every Community-scale undertaking and every Community-scale group of undertakings *where this is requested...*’<sup>355</sup> Organisations would have employed at least 1000 employees, with at least 100 employees in each of two Member States.<sup>356</sup> Negotiations to form a body under the Directive would have either been instigated by employees or their representatives, or by management.<sup>357</sup> Under Article 5 a special negotiating body (**SNB**) would have informed management of its request to form a European Works Council (**EWC**). These negotiations would have led to one of four outcomes:

1. A written agreement for an EWC;
2. Written agreements that did not involve a EWC but complied with Article 6(1)(2) (this set out the minimum requirements in relation to an information and consultation body);
3. An agreement to Article 7’s requirements. The Annex contained minimum standards which were to be laid down by the legislation of Member State;

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<sup>354</sup> Art 1(1). In limiting itself to a narrow area it ignored the issue that employees were not necessarily informed and consulted in all Member States (e.g. the UK).

<sup>355</sup> Art 1(2) (emphasis added).

<sup>356</sup> Art 2.

<sup>357</sup> Art 5(3).

4. Failure to reach agreement would have resulted in having to comply with Article 7 and the default standards within the Annex.

Undertakings would have been subject to the legislation of the Member State in which the central management of the organisation was based. Where central management was outside the community, jurisdiction fell where its representative management was based, or the establishment employing the most employees.<sup>358</sup>

### 3.8.2.2 Agreements Under the 1990 EWC Proposal

The Draft Directive set out rules for three different sorts of agreement.

#### 3.8.2.2.1 European Works Councils agreements

Article 6(1) specified a set of minimum requirements for a body to qualify as an EWC. The section contains little detail and the subsections cover:

- (a) the nature, duration, and composition of the EWC;
- (b) its ‘function and powers’;
- (c) ‘procedure for informing and consulting the EWC’;
- (d) ‘place frequency and duration of meetings’; and
- (e) allocation of financial and material resources.

It did not require that EWCs were to have been subject to conditions in the Annex.

#### 3.8.2.2.2 Written Agreements that complied with Article 6(1)(2)

The requirements for bodies formed by written agreements under Article 6(1)(2) were more detailed. They required five of seven sections in the Annex.<sup>359</sup>

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<sup>358</sup> Ibid.

<sup>359</sup> These included: 1(a) limiting the body’s competence to matters concerning the organisation as a whole or at least two establishments/group undertakings in different Member States; 1(c) giving bodies the right to meet with management at least once a year to discuss, amongst other things, the organisation’s ‘structure, economic and financial situation, probable developments, and investment prospects’; and 1(d) giving bodies the

### 3.8.2.2.3 Minimum requirements to be laid down by Member States under Article 7

The third and fourth outcomes would have been regulated by legislative provisions in Member States. These would have been subject to ‘matters set out in 6(1)’<sup>360</sup> and the Annex.

### 3.8.3 Differences Between Proposal and Directive

The 1990 EWC Proposal was discussed in a number of meetings by the Council of Labour and Social Affairs. This resulted in a report being commissioned to evaluate ‘current practice regarding information and consultation in multinational companies’.<sup>361</sup> It found that the proposal imposed higher requirements - in terms of formal documentation *and* obligations - than those in existing agreements. Some of the report’s findings are reflected in the EWC Directive 1994.

#### 3.8.3.1 Basic Structure

The EWC Directive 1994 regulated six separate situations. Both parties could:

1. Negotiate to establish a European Works Council;<sup>362</sup>
2. Negotiate to establish an Information and Consultation Procedure;<sup>363</sup>
3. Decide to have an ‘off the peg’ European Works Council;<sup>364</sup>
4. When both parties failed to agree on a procedure representatives had

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right to be informed and consulted by central management about proposals ‘likely to have serious consequences for the interests of the employees.’

<sup>360</sup> In addition to sections 1(c) and (d), 1(e) the Annex required the right to at least one meeting to discuss matters arising under article 1(d).

<sup>361</sup> Explanatory memorandum on proposal for a Council Directive COM (94) 134 Final-91/113(PRT) on the establishment of European committees or procedures in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees 1994 OJ 94/C 135/08; Gold and Hall (n 332).

<sup>362</sup> Art 6(2).

<sup>363</sup> Art 6(3).

<sup>364</sup> Art 7(1).

the right to a default ‘off the peg’ European Works Council;<sup>365</sup>

5. Decide not to establish a European Works Council or Information and Consultation Agreement;<sup>366</sup>
6. To maintain or change an existing works council or information and consultation procedure.

The Directive added two additional alternatives. The first was that the special negotiating body could decide to terminate negotiations and not proceed with the process. This was included after the Commission accepted the argument that to insist upon a works council ‘would constitute a totally unwarranted violation of... bargaining autonomy.’<sup>367</sup> The second was that Article 13 provided for procedures that did not have to comply with the Directive’s provisions (providing they existed prior to a given date).

The procedure for reaching one of these outcomes was similar to that in the 1990 EWC Proposal. This was also true of the minimum requirements to form an EWC.<sup>368</sup> Compared with the proposal, the Directive was less specific about the content of ‘information and consultation procedures’.<sup>369</sup> Again, the Annex provided default rules in situations 3 and 4.<sup>370</sup> Provisions about which jurisdiction the undertaking is governed by remained the same.

### 3.8.3.2 The Annex

Both Annexes provided for two types of meeting: the mandatory annual meeting, and additional meetings on matters of importance. With regard to the mandatory annual meeting, the EWC Directive 1994’s Annex<sup>371</sup> increased employees’ representatives’ rights in three ways: firstly it

<sup>365</sup> Ibid.

<sup>366</sup> Art 5(5).

<sup>367</sup> Explanatory memorandum 94/134 (n 361) 12.

<sup>368</sup> Art 6(2).

<sup>369</sup> The Directive states that they must be in writing, stipulate by what method employees’ representatives shall have the right to meet to discuss the information conveyed to them, and the information should be of a transnational nature. Art 6(3).

<sup>370</sup> Art 7(1).

<sup>371</sup> S 2.

introduced the right to be consulted<sup>372</sup> *as well* as informed; secondly it introduced the requirement for the meeting to be based upon a report provided prior to the meeting; and thirdly it increased the number of compulsory subjects to be discussed.

Compared with the Directive, the Proposal's Annex gave greater access to management in the form of additional meetings. The 1990 EWC Proposal stated that the EWC should have the right to be informed and consulted about any proposal likely to have serious consequences for employee interests.<sup>373</sup> The EWC Directive 1994 appeared to have had a higher threshold for triggering an additional meeting. It stated that the EWC or its select committee had the right to be informed and consulted where there were 'exceptional circumstances affecting the employees' interests to a considerable extent.'<sup>374</sup> '*Any* proposal likely to have serious consequences' became '*exceptional circumstances affecting employees' interests to a considerable extent*' (emphases added). The wording appears to infer that the meeting would be triggered by more serious events than originally envisaged.

The Commission stated that in formulating the provision on additional meetings it had considered criticisms made by employers' organisations. They were wary of the disrupting effect of having too many consultation meetings 'every time there was a decision in the offing that might have a significant effect on employees' interests...' With a view to striking an acceptable balance the Commission introduced the concept of creating an executive committee of the EWC to avoid the 'excessive cost and cumbersomeness of consulting the entire committee'.<sup>375</sup> Irrespective of employees' representatives' views, the Directive made it clear that management prerogatives were not affected.

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<sup>372</sup> Art 2(1)(g) defines 'consultation'.

<sup>373</sup> S 1(d).

<sup>374</sup> S 3.

<sup>375</sup> Explanatory memorandum 94/134 (n 361) 14.

In order to secure the Directive's adoption the Commission had to take into account the views of the Member States and Social Partners. It compromised its initial idea of what minimum standards should apply across all organisations covered by the Directive. Although lesser standards were only achievable with the acceptance of management and employees' representatives, this was not the upward or 'positive harmonisation' envisaged in the original proposal.

### 3.8.3.3 Terminology and Implementation

Unlike the 1990 EWC Proposal, the EWC Directive 1994 defined the terms 'consult',<sup>376</sup> 'European Works Council',<sup>377</sup> and 'Special Negotiating Body'.<sup>378</sup> Different terminology was used with regards to the manner of I&P before and after an EWC or alternative body was formed.

#### 3.8.3.3.1 Forming a EWC or Alternative Body

The 1990 EWC Proposal stated that when forming an EWC or alternative body 'negotiations' should take place 'with a view to concluding an agreement'.<sup>379</sup> The EWC Directive 1994 expanded on this phrase in two sections that only related to forming the EWC. Article 4 (1) placed the responsibility for creating the appropriate conditions for establishing negotiations on management and Article 6(1) required both parties to negotiate in 'a spirit of cooperation with a view to reaching agreement'.

#### 3.8.3.3.2 EWCs and information and consultation bodies

The objective of the EWC Directive 1994 was to establish:

... a European Works Council or a procedure for informing and consulting employees... where requested in the manner laid down in Article 5 (1), with the purpose of informing and consulting employees...<sup>380</sup>

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<sup>376</sup> Art 2(f).

<sup>377</sup> Art 2(g).

<sup>378</sup> Art 2(h).

<sup>379</sup> Art 5(3).

<sup>380</sup> Art 1(2).

Although not defining inform, it was first piece of European legislation in which the term ‘consultation’ was defined. The definition: ‘the exchange of views and establishment of dialogue between employees’ representatives and central management or any more appropriate level of management’<sup>381</sup> is discussed in Chapter 5. The EWC Directive 1994 stated that EWCs or information and consultation bodies ‘shall work in a spirit of cooperation with due regard to their reciprocal rights and practices’<sup>382</sup> (a requirement not in the proposal). The phrase, coupled with the definition of ‘consultation’ the Directive indicated that employees’ representative and management should establish a dialogue and work in a spirit of co-operation. The obligation applied to all bodies under the Directive, with the exception of those covered by Article 13 agreements.

#### 3.8.3.3 Conclusion

When compared with the 1990 EWC Proposal, the EWC Directive 1994 was much more precise in expressing how the Directive’s requirements were to be conducted. However, it is difficult to establish the extent to which these definitions and instructions were and are adhered.<sup>383</sup> Differences in such terms as ‘negotiate’ and ‘consult’ are considered further in Chapter 5.

#### 3.8.3.4 Confidential Information

The 1990 EWC Proposal required that members of bodies, or employees to whom they refer, should not reveal information provided to them in confidence.<sup>384</sup> The EWC Directive 1994 adapted and clarified this section in three ways: (a) by extending this obligation to experts assisting bodies covered by the Directive;<sup>385</sup> (b) by defining confidential information as that

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<sup>381</sup> Art 2(1)(f).

<sup>382</sup> Art 9.

<sup>383</sup> See Chapter 5.

<sup>384</sup> Art 8(3).

<sup>385</sup> The Directive provides for expert help for the special negotiating body, and when necessary, for the Works Council (Art 5(4), Annex S 6).

‘expressly provided in confidence’;<sup>386</sup> and (c) by stating that confidentiality continues after office. This meant that there was no option to resign from office and then speak out. Such restrictions might make the idea of providing confidential information more acceptable to management.

### 3.8.3.5 Withholding Information

Art 8(1) of the 1990 EWC Proposal stated that Member States could provide that management might withhold information which ‘would substantially damage the interest of the undertaking’. The EWC Directive no longer gave management carte blanche to decide to withhold information. It provided two options. The first was an administrative or judicial procedure that employees’ representatives could initiate if management failed to provide information, or required confidentiality.<sup>387</sup> The second was to make non-release of information subject to prior judicial authorisation.<sup>388</sup>

Both options are problematic. With the first option, employees might have nothing upon which to base a complaint until a rumour or a decision becomes known. At this point it might be too late for employees to participate in the decision-making process. If decisions not to disclose have to be ‘vetted’, management may weigh the cost of making a case before a higher authority and ‘penalty’<sup>389</sup> versus calling a meeting of the consultation body and sharing the information. Neither option produces infallible protection against non-compliance.

### 3.8.3.6 Undertakings with Ideological Aims

Article 8(3) of the Directive added a new section concerning undertakings pursuing ideological aims with ‘respect to information and the expression of opinions’.<sup>390</sup> Where a member state made special provision for such undertakings when the Directive was adopted, it was able to make

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<sup>386</sup> Art 8(1).

<sup>387</sup> Arts 11(3), 11(4).

<sup>388</sup> Art 8(2).

<sup>389</sup> Art 11(4).

<sup>390</sup> This kind of provision first appeared in Vredeling and forms part of IC Directive 2002/14.

‘particular provisions for central management’. The Explanatory Memorandum indicated that Member States had wished to lay down more provisions than the Commission could accept.<sup>391</sup> It is not clear how these would differ from the Directive’s normal requirements.

### 3.8.4 Conclusion

Widespread agreement on the benefits of including employees in the decision-making process is evident in EU treaties and international agreements.<sup>392</sup> However, the limits of what Member States were willing to agree were evident in the EWC Directive 1994. It incorporated major concessions including Article 13 Agreements and provisions regarding confidential information. Using the Agreement on Social Policy meant that the United Kingdom’s consent was not required in this area of policy-making.

The Commission’s position was not neutral and it took steps to actively encourage the setting up of more EWCs.<sup>393</sup> One of the Commission’s arguments for the EWC Directive 1994 was that EWCs would enhance the competitiveness of European industry and be cost effective. There was no empirical data to support this. This claim was one issue that was flagged as needing more detailed research in 1992 (something that did not happen before the Directive became law).<sup>394</sup>

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<sup>391</sup> Explanatory memorandum 94/134 (n 361) 10.

<sup>392</sup> See Chapter 2.

<sup>393</sup> Making millions of ECUs available to the ETUC was likely to have reinforced the trade union campaign for more European Works Councils. Hall, Marginson and Sisson 'The European Works Council: Setting the Research Agenda' (1992) Number 41 Warwick Papers in Industrial Relations 1.

<sup>394</sup> Ibid 15. The issue was examined in European Commission 'Report from the Commission to the European Parliament and the Council on the Application of the Directive 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 (Council Directive 94/45 of 22 September 1994)' (COM(2000)188).

The Commission's Explanatory Memorandum declared widespread support for the measure. This was misleading. The Commission failed to mention that key employers' organisations consistently opposed European proposals on this matter.<sup>395</sup> UNICE (now Business Europe) found the 1990 EWC Proposal 'totally unacceptable'.<sup>396</sup> According to the Industrial Relations Review and Report, it only dropped its 'outright opposition' to the *principle* of EWCs when UNICE members thought the Commission would use the Social Policy Procedure to enact the proposal. It 'then began to work "to find an acceptable alternative" to the proposed directive.'<sup>397</sup>

Catherine Barnard commented that the Directive's potential for flexibility, especially under Article 13 Voluntary arrangements, is one of its most striking features.<sup>398</sup> Such characteristics circumvented problems of imposing rigid and bureaucratic structures on very different organisations. The Directive took into account forms of agreement developed and explored in the 1992 report.<sup>399</sup>

In 1992 Hall argued that the Commission rejected

the established "normative" approach and... used a fully decentralized approach (meaning a minimal role for EC regulation, and competition between the social rules of member-states)... [It] proposed a new balance between Community-level and national action and between legislation and collective bargaining (CEC 1988:68) under which considerable discretion was to be left to member-states over the application of broadly framed EC *minimum standards*.<sup>400</sup>

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<sup>395</sup> Gold and Hall (n 332) 62; — 'EWCs Directive and Previous Initiatives' (n 352) 24.

<sup>396</sup> Gold and Hall (n 332) 62.

<sup>397</sup> Quoting a statement from UNICE Secretary General Mr Tyszkiewicz on 20<sup>th</sup> September 1993— 'UNICE Ready to Talk on Information and Consultation' (1993) 237 ILR Rev 3.

<sup>398</sup> Barnard (n 328) 535.

<sup>399</sup> Gold and Hall (n 332) 39.

<sup>400</sup> Hall 'Behind the EWC Directive' (n 15) 556.

The EWC Directive 1994 stretched those minimum standards. Its subject matter meant that there was little Member State legislation to take into account of, or incorporate into the EWC Directive 1994, whilst it was being formed. It concerned issues that would affect relatively few organisations.<sup>401</sup> Given the potentially weak nature of its procedures for informing and consulting employees, can this be viewed as a Directive that received consent because of its relatively uncontroversial nature? This is perhaps reflected in the Commission's subsequent opinion of the provision: that the 'right to transnational information and consultation lacks effectiveness'.<sup>402</sup>

### **3.9 CONCLUSION**

Between the 1970 ECo proposal and the EWC Directive 1994 the Commission's objectives regarding proposals that involved I&P procedures altered drastically. The next section overviews some dynamics that encouraged and limited the Commission's activism. Issues that appear crucial to securing the co-operation of Member States' in passing a Directive are then considered. Section 3.9.3 goes on to identify five factors that appear significant to a provision's success.

#### **3.9.1 The Commission's Activism: Objectives and Limitations**

Commission activity in the field of I&P can be divided into two periods. The first produced a draft regulation for a European Company, the Draft Fifth Directive, Vredeling, and the CR Directive 1975 and AR Directive 1977. The second, in the wake of the Single European Act 1986, saw the H&S Directive, the redrafting of the ECo Proposal, the Fifth Directive, and

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<sup>401</sup> In 2009 'some 2300' companies fell within the scope of the legislation. European Commission 'Questions and Answers on the new legislation on European Works Councils' (24 April 2009)

<<http://europaeu/rapid/pressReleasesAction.do?reference=MEMO/09/192&format=HTML&aged=0&language=EN&guiLanguage=en>> Accessed 9 October 2009.

<sup>402</sup> Proposal for a Council Directive COM (2008) 419 Final Proposal for a European Parliament and Council Directive on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees 2008, Explanatory Memorandum.

the arrival of a proposal for a European Works Council. By 1994, only four of these proposals had passed into legislation. Why?

The first period of the Commission's activity occurred during economic upheaval. Streeck stated that during this period

considerable attention was also devoted to finding new ways of protecting the political stability especially of the countries with more advanced national social policy regimes... Originally the natural response of hegemonic countries, to perceived competitive pressures... had been demands for... *harmonisation*.<sup>403</sup>

However, stipulating specific 'models' of corporate governance meant that the proposals ran up against: (a) technical complexity; (b) economic and institutional nationalism; and (c) economic policies that began to favour 'deregulation' and 'flexibility'.<sup>404</sup> At this point, to succeed legislative proposals required unanimity and therefore took all national interests into account.

In 1992 it was noted that European legislative provisions that successfully incorporated information and consultation procedures tended to be pragmatic, 'relying on Member States' existing employee representation arrangements instead of specifying particular models.'<sup>405</sup> Initial drafts of the CR Directive 1975 and AR Directive 1977 were as prescriptive as the 1970 European Companies and 1972 Fifth Directive proposals. One factor influencing the Commission's ability to transpose draft directives into legislation was its capacity to adapt its plan to a form acceptable to Member States.

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<sup>403</sup> Streeck 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 11 ELJ 31 41.

<sup>404</sup> Ibid 41.

<sup>405</sup> Hall 'Legislating for Employee Participation: A Case Study of the European Works Councils Directive' (1992) Number 39 Warwick Papers in Industrial Relations 6.

The CR Directive 1975 and AR Directive 1977 were created in DG V. They dealt with specific problems that were included as part of the 1974 Social Action Programme.<sup>406</sup> During the 1970s successful proposals from DG XV concerning companies<sup>407</sup> related to organisational procedure,<sup>408</sup> not how stakeholders should interact. The thinking behind the European Companies Regulation and the Fifth Directive differed from these because they were linked to a philosophical preference about how to plan social Europe. This altered the balance of interests between workers and organisations in some Member States.

Conflict over philosophy was not the sole reason why proposals failed. Issues of sex equality in the 1970s also posed significant structural and social problems, but these did not prevent the successful enactment of legislation on equal treatment. There appear to be three significant differences between the Equal Pay and Treatment Directives<sup>409</sup> and the failed proposals that included I&P. Streeck stated that support for sexual non-discrimination ‘extended well into the professional middle classes, making it difficult for national governments to be perceived as opposing Community initiatives in the area.’<sup>410</sup> There was not the same degree of support for the failed proposals discussed in this chapter. Secondly, ECJ activism<sup>411</sup> based upon Article 119 [157 TFEU], had already established

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<sup>406</sup> OJ C 13/1 (n 2).

<sup>407</sup> DG XV concerned the internal market and financial services.

<sup>408</sup> E.g. Council Directive (EEC) 178/885 concerning mergers of public limited-liability companies [1983] OJ L 295; Council Directive (EEC) 77/91 coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited-liability companies and the maintenance and alteration of their capital with a view to making such safeguards equivalent [1977] OJ L 26.

<sup>409</sup> Directive (EEC) 75/117 on the approximation of the laws of Member States relating to the application of the principle of equal pay for men and women [1975] OJ L 45/19; Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L 39/40.

<sup>410</sup> Streeck (n 403) 44.

<sup>411</sup> E.g. Case 43/75 *Defrenne v Belgium State* [1971] ECR 455.

EEC law on this matter that Member States could not ignore. Thirdly equality between men and women at work was not central to most Member States' social policy concerns.<sup>412</sup> Streeck argued that this was territory that the Community could relatively easily enter in an effort to expand its jurisdiction and enlarge its constituency.<sup>413</sup> Additionally, the Equal Treatment Directive did not prescribe the introduction of specific systems of codified behaviour into a pre-structured environment.

The CR Directive 1975 and AR Directive 1977 were also introduced in a period where the approach to managing domestic economies within the EEC was predominantly Keynesian. At 'national level there was a new, managed capitalism, with workers throughout Europe gaining new legal rights and welfare benefits...'<sup>414</sup> By 1980, acceptance of the concept of 'hands-on' regulation was no longer universal across the EEC. The United Kingdom's Conservative administration adopted a philosophy of de-regulation. Member States' unanimity was required for most measures that involved issues concerning workplace consultation.<sup>415</sup> This only changed with the 1994 Social Policy Agreement.

Baldwin observed a changing emphasis within Community Law and the development of a new approach to technical directives. He wrote that '[u]ntil the mid-1980s it was assumed that problems arising from different regulatory systems... could only be tackled by harmonization in the form of uniform rules....'<sup>416</sup> Using health and safety legislation he charted the development of directives finding a movement away 'from the wholesale reliance on highly detailed Directives'<sup>417</sup> towards basic standards set out in a way that Member States can incorporate into existing structures and

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<sup>412</sup> An early exception being France, which instigated the inclusion of Article 119 into the TEEC. Barnard (n 328) 23. During the early 1970s the UK saw the introduction of The Equal Pay Act 1970 and The Sex Discrimination Act 1975.

<sup>413</sup> Streeck (n 403) 44.

<sup>414</sup> Hepple 'Crisis in EEC Labour Law' (n 349) 78.

<sup>415</sup> An exception related to Health and Safety.

<sup>416</sup> Baldwin (n 12) 234.

<sup>417</sup> Ibid 234-240.

improve upon. This trend is apparent when the successive failed proposals involving I&P are compared. The content of the CR Directive 1975 and AR Directive 1977 also 'progressed' from prescribed rules to basic standards during their passage into law.

### **3.9.2 Seven Key Factors in the Success or Failure of Legislative Proposals**

If the background to each Commission proposal and its content are analysed, seven overlapping differences stand out between the proposals that became legislation and those that did not:

#### **3.9.2.1 Subject**

The subject matter of the CR Directive 1975 and AR Directive 1977 were topical. During the late 1960s and early 1970s there was a backdrop of civil unrest and industrial change. Discontent led to many Member States reforming industrial relations legislation.<sup>418</sup> Unemployment was a problem across Europe. It is in a Government's interest to be seen to be doing everything it can to alleviate related problems. These Directives would have helped this perception. The H&S Directive is another example of an issue of a serious nature, where action also reflects well on Government.

Other proposals were on more theoretical, less pressing issues. They were not 'hot topics' where all Member States felt able to benefit from transnational regulation. This meant that Member States would have less enthusiasm to negotiate to a point where it would have been possible to legislate. Lack of any real urgency or motive could have meant that there was less reason to overcome the opposition of dissonant Member States and interest groups. This is particularly evident in the proposals relating to a Fifth Directive. The first draft was introduced in a climate where many Member States were reviewing and/or revising their Corporate Structures. By 2001 this kind of reform was no longer a topic of such widespread discussion and the Commission withdrew the proposal.<sup>419</sup>

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<sup>418</sup> See Section 2.1.3 and 2.3.1.

<sup>419</sup> Vredeling withdrawal [1998] OJ C040.

The EWC Directive 1994 was not needed to solve a pressing problem and did not provoke widespread interest. However, in 1993 the Commission selected the newly amended EWC Proposal as the first legislative measure to be enacted under the new ‘Agreement on Social Policy’, which crucially did not require unanimity among Member States. The 1990 EWC Proposal became significant as a trailblazer, especially to the Commission and those Member States which pressed for the agreement. The EWC Directive 1994 proved that European social policy could develop without any individual Member State blocking progress.

### 3.9.2.2 Realistic Objectives

The Commission’s idea of what the CR Directive 1975 and AR Directive 1977 should achieve shifted between drafts and Directives. Both initially envisaged that Governments should be heavily involved in the decision-making process. The 1973 Mass Dismissals Proposal emphasised Government input in avoiding mass redundancies and achieving solutions to problems associated with them (such as a reduction of hours, alternative training, or alternative employment).<sup>420</sup> Mandatory external arbitration would have given employees a stronger bargaining position. However, the legislative provisions were adapted to the point where it appeared that Member States had little to do in order for the Directives to slot into existing industrial relations systems.<sup>421</sup> Compared to Vredeling, the EWC Directive 1994’s objectives narrowed considerably.

All four Directives dealt with relatively discrete issues. Employee representation was not part of a wider corporate governance policy. Unlike the Vredeling proposals, the EWC Directive 1994 only included organisations that had subsidiaries in more than one Member State. This meant that in most cases Member States did not have to drastically change representative practices at national level.

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<sup>420</sup> Article 3(4).

<sup>421</sup> This was also the case with the Health and Safety Directive.

### 3.9.2.3 The Amount of Structural Change Asked of Member States and Organizations

Streeck argued<sup>422</sup> that European nation-states have lost much of their capacity to govern ‘their’ economies and ‘control’ market forces. But ‘electorates still regard national democratic politics as their principal source of protection... from economic dislocation caused by “market forces”’<sup>423</sup>. He continued that during periods of turmoil

the problem for... the nation-state is to protect the ability of governments to preside over such changes *and maintain the appearance that they take place, or at least could take place under political control...* “Saving face” in this sense is... part of the defence of national sovereignty under international interdependence.<sup>424</sup>

The CR Directive 1975 and AR Directive 1977 appeared to require little structural change to Member States’ industrial relations regimes.<sup>425</sup> Other early measures might have required significant changes to the balance of power in SEs/Public Limited Companies. Their implementation would have altered the ability of some Member States to regulate their own company and labour law. It can be argued that it was against many Member States’ interests to adapt their law to fit the proposals.

With each revision, the provisions become increasingly flexible. Commission policy towards employee representatives changed drastically during the period in question, and can be summed up as a desire to work within current structures and not ‘change existing industrial relations systems in the community.’<sup>426</sup> A clear example is the development of the European Company. The first proposal would have required a uniform Company Structure across the Community. The Commission stated:

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<sup>422</sup> Streeck (n 403) 33.

<sup>423</sup> Ibid.

<sup>424</sup> Ibid 41 (emphasis added).

<sup>425</sup> Some member states were wrong in assuming this. See note 195 above.

<sup>426</sup> Vredeling 2/834 (emphasis added).

Organization of an undertaking involves not only the regulation of the company's legal relationships with its shareholders and third parties, which is the purpose of company law in the narrow sense; the legal position of the employees within the undertaking is just as essential...<sup>427</sup>

By the time of its Green Paper, the Commission had revised its position on what it felt was essential:

...certain Member States are not simply unwilling to implement a Community framework, but they are unable to adopt, in the immediate future, the principle of employee representation itself...<sup>428</sup>

By 1989 it had shifted to the idea of employee participation using one of three types of representation, thereby increasing the scope for Member States to adapt the proposals to meet their own.

Such developments were also evident in the legislative history of the EWC Directive 1994. The Directive probably benefitted from EWCs being a relatively new phenomenon which meant that national procedures concerning transnational organisations had not been set in stone. Many Member States had no existing legislation on this subject-matter, and Article 13 agreements took account of any existing practice. This, coupled with the way the Directive was eventually drawn up, meant that Member States could easily adapt existing practices relating to consultation at national level to comply with the Directive. Successful proposals differ from unsuccessful ones because they establish a framework for involving workers rather than providing 'for forms of employee "*involvement*"... which supplement or replace employee information and consultation.'<sup>429</sup>

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<sup>427</sup> ECo Proposal 70/600, pg 88.

<sup>428</sup> *Bull Supp* 8/75 (n 7) 42.

<sup>429</sup> *I&C Communication* 95/547 (n 322) 4.

#### 3.9.2.4 Complexity

The 1970 ECo Proposal detailed a complex template including structures and procedures for informing, consulting, and co-determination. The CR Directive 1975 and AR Directive 1977 did not impose intricate formulaic rules about how employees should be represented or consulted. Instead they relied upon the national laws and practices of Member States. Successive drafts of the European Companies, Fifth, Vredeling, and EWC Directive 1994s reflected this movement away from complexity and developed increasingly less rigid I&P requirements.

Development in the Community's approach to legislation was also reflected in the Single European Act and Articles 5 and 118a of the revised Treaty of Rome.<sup>430</sup> Of Article 5, Kenner stated that the adoption of a middle way between normative regulation and decentralisation was a part of the new treaty scheme.<sup>431</sup> This was also illustrated by the second paragraph of Article 118a, which appeared to take into account existing regimes in stating that measures would be based upon *minimum requirements* 'for gradual implementation, having regard to the conditions and technical rules...in each' Member State.<sup>432</sup>

#### 3.9.2.5 Momentum

Unlike the CR Directive 1975 and AR Directive 1977, the three proposals that failed were not 'hot topics'. They were complex and could not easily be transformed into acceptable legislative measures. To turn a complex proposal into legislation there must be sufficient drive to negotiate through and around Member State objections.

Controversial measures need to be championed. Without sponsorship, draft directives are likely to fall off the agenda. In addition to this, they must either attract the support of all, or be introduced under an Article that does

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<sup>430</sup> Replaced, in substance, by Articles 13(2) and 153 TFEU.

<sup>431</sup> Kenner (n 261) 92.

<sup>432</sup> Kenner stated that 'This provision reflected the concerns of those Member States... which had developed [health and safety regimes]... and expected to make a minimal number of technical changes...' *ibid* 93.

not require unanimity. It was not until the EWC Directive 1994 that the right combination of factors arose that allowed for the successful introduction of a measure focusing on I&P for its own sake, rather than as an adjunct to a wider social policy objective.

### 3.9.2.6 Sponsorship/Popularity

This factor ties in with ‘Momentum’; a wish by any one or more Member States<sup>433</sup> and/or the Commission to pursue an issue. Streeck stated that Social Democratic governments and union officials drove many of the (above) initiatives. They ‘linked up with the older federalist state-building agendas harboured in particular by the Commission’ and pursued draft legislation.<sup>434</sup> The support of France, the Commission, and the ETUC during the passage of the EWC Directive 1994 exemplifies this.

### 3.9.2.7 Treaty base

Of the four successful Directives, all but one passed with the unanimous support of all Member States. The EWC Directive 1994 was originally passed using the Agreement on Social Policy which did not require the agreement of the United Kingdom. However, it will be seen (below) that it appears that, on this matter, the principle of unanimity for those who were part of the Agreement still applied.

The Social Policy Agreement had been created so that Member States could adopt provisions in spite of the UK, which appeared to be slowing down the process of integration. Because the EWC Directive 1994 was the first piece of legislation to be passed under the Agreement, its passage was probably something of a political statement. The Commission desired to make the Directive ‘appropriate and consensual’,<sup>435</sup> and the proposal was passed

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<sup>433</sup> In terms of voting power and the ability to bargain, larger Member States are able to exert more pressure when backing proposals than smaller States. This influence will increase with the support of additional Member States. At some point a critical mass of consensus is reached which might increase its chance of becoming law.

<sup>434</sup> Streeck (n 403) 42.

<sup>435</sup> For example, the requirements for agreements to be subject to a more provisions in the Annex and that representatives be elected. Explanatory memorandum 94/134 (n 361) 10.

unanimously. Arguably, by this time the Directive had been compromised to such an extent that there was nothing to object to.

### **3.9.3 Common Factors in the Success of Early Legislative Proposals**

It has been seen that the European Community changed its approach to legislation on involvement and participation. Instead of proposing detailed and prescriptive rules, it increasingly took into account Member States' laws, customs, and practices. Proposals succeeded when they no longer sought 'positive harmonisation' of a practice; this entailed altering objectives. Prior to 1994, for legislative a measure involving I&P to succeed, the subject had to have been one:

1. over which Member States were content to enter into serious negotiations;
2. where existing practices could be used or adapted;
3. that was not unduly complex;
4. where there was institutional and/or state sponsorship/support;
5. where there was consensus.

The Commission adapted its original policy of seeking to impose rigid structures on all Member States.<sup>436</sup> Successive revisions of earlier measures meant that concepts such as secrecy and confidentiality<sup>437</sup> were developed and incorporated into the EWC Directive. These would have made the proposal more acceptable to Member States, unions, and employers' organisations.

In the 1970s, for a Directive relating to I&P to succeed, it had to be based upon little more than what appeared to be the existing practice in the Member States. The EWC Directive 1994 *did* impose a standard higher than existing practice, but crucially, it allowed lower standards to continue if these had been established before a specific date, and it did not require all

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<sup>436</sup> E.g. AR Directive 77/187; Fifth Directive Proposal 6/83;

<sup>437</sup> ECo Directive Proposal 5/89, Art 72; ECo Regulation Proposal 89/268 Art 6(5).

organisations covered by the Directive to implement its provisions.<sup>438</sup> With no requirement on employers to initiate negotiations to form a EWC or alternative body,<sup>439</sup> and the option to elect not to form such a body,<sup>440</sup> the EWC Directive could be described as offering a plethora of options with a floor it was impossible to descend beneath. Over time the Commission had developed ways of working within the limits which Member States were willing to change. The model it developed for the EWC Directive 1994 formed a basis for introducing other measures such as the Information and Consultation Directive<sup>441</sup> and progressing measures such as the Statute for a European Company Directive.

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<sup>438</sup> In 2008 only 37% of organisations falling under the Directive's provisions had some sort of information/consultation forum. EWC Proposal 2008/419, preamble.

<sup>439</sup> Article 5(1).

<sup>440</sup> Article 5(5).

<sup>441</sup> Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

# Chapter 4 A Typology of Involvement and Participation in the Workplace

This chapter provides a typology of the theory and mechanics of involvement and participation (**I&P**). Different aspects of involvement and participation are identified, defined, and key terms are placed in the context of a new analytical framework. It has been seen that Commission's proposals were determined by an underlying philosophy about the role employees should play in workplace industrial relations. In order to gain an understanding of the mechanics of I&P the chapter places the EU's policy on I&P in context with practices in the UK and other countries.

Section 4.1 outlines Zumbansen's distinction between the 'human resources' and 'co-determination' models and shows how different kinds of I&P fit within these models. Examination of the literature identified<sup>1</sup> six key factors that influence approaches to I&P. These are:

1. The purpose or objective of the exercise;
2. Subject matter;
3. The level at which the interaction takes place;
4. Who is involved;
5. The formality of the I&P mechanism;
6. Depth or type of involvement or participation (e.g. workers are 'informed', 'consulted', or entitled to 'co-determination').

Section 4.2 analyses these factors in terms of how they relate to Zumbansen's models and EU policy.

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<sup>1</sup> Williams and Adam-Smith *Contemporary Employment Relations* (2nd edn Oxford University Press Oxford 2010) 28-29; Rose *Employment Relations* (3rd edn Pearson Education Limited Harlow 2008) 339; Marchington and Wilkinson, 'Direct Participation and Involvement' in Bach (ed) *Managing Human Resources* (4th edn Blackwell Oxford 2005) 400; ILO <<http://www.ilo.org/public/english/dialogue/ifpdial/areas/social.htm>> accessed 19 September 2011.

EU primary and secondary legislation<sup>2</sup> has either failed to define, or has defined the terms ‘participate’, ‘inform’, ‘consult’, and ‘negotiate’ in different ways. Ironically, the potential meaning of these terms has not been clarified, but made more complex by case law.<sup>3</sup> The literature did not provide clear consistent definitions, or used terms in a systematic fashion. Terms associated with I&P will be analysed and clarified in Sections 4.2.6 and 4.3. A comprehensive structured framework for terms relating to I&P will be advanced to fill this gap in the literature. This provides a neutral framework from which to examine EU legislation in Chapter 5.

Evaluating EU law that requires I&P is complex because legislative measures differ in the way they use the six factors. It was therefore decided to create a typology in Chapter 4 that could be used to examine EU law in detail in Chapter 5. Little reference is made to UK legislation because it largely follows EU law. This chapter is concerned with the workplace environment which includes businesses and other organisations of the sort within the scope of the Information and Consultation Directive (**IC Directive**).<sup>4</sup> These are termed ‘organisations’ in the rest of this chapter.

#### **4.1 TYPES OF INVOLVEMENT AND PARTICIPATION**

Participation has evolved in different countries to produce diverse practices. Zumbansen distinguished between two approaches to employee I&P:<sup>5</sup>

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<sup>2</sup> E.g. Council Directive (EC) 98/59 on the approximation of the laws of the Members States relating to collective redundancies [1998] OJ L225/16; Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294.

<sup>3</sup> E.g. Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel* [2005] ECR I 885.

<sup>4</sup> Amended Proposal for a Council Directive COM (2001) 296 Final Establishing a General Framework for Improving Information and Consultation Rights of Employees in the European Community 2001 C 240 E/21 28.08.2001, p. 0133.

<sup>5</sup> Zumbansen, P, 'Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law' in Boeger, Murray and Villiers *Perspectives on Corporate Social Responsibility* (Edward Elgar Publishing Ltd Cheltenham 2008) 114.

- 1 Human Resources;
- 2 Co-determination.

In order to take account of differences in approach within similar organisational structures, the human resources model can be sub-divided into the ‘corporate’ and ‘market’ models. When the three are explored, the EU’s workplace I&P policy most comfortably fits the tradition of co-determination.

Systems following the human resources model do not usually grant workers the right to take part in the decision-making process. The corporate model promotes a culture where employee well-being and the sustenance of stable employment form part of an organisation’s core objectives.<sup>6</sup> The corporate model has a paternalistic integrated human resources policy that ‘nurtures’ employees. Japan is usually given as an example.<sup>7</sup> Rose identified other elements of the corporate model.<sup>8</sup> These included a broad-based forum for consultation and employee participation and complete freedom for management to organise work. The objectives of such forums are not to empower workers but tend to be paternalistic (providing ‘stability and predictability’).

In the market model organisations lay less stress on employee wellbeing/human resources and focus more on strategic and financial management. Historically employee involvement was not looked upon as a factor of importance.<sup>9</sup> Zumbansen stated that patterns of ‘involvement usually develop without granting workers substantive input into

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<sup>6</sup> Ibid (n 5); Kester G, Zammit E and Gold, 'Introduction' in Gold (ed) *New Frontiers of Democratic Participation at Work* (Ashgate Publishing Limited Hampshire 2003).

<sup>7</sup> Zumbansen, (n 5) 114; Kester G, Zammit E and Gold, (n 6); Rose (n 1) 100.

<sup>8</sup> Rose (n 1) 100.

<sup>9</sup> The Donovan Commission suggested that failures in communication between employer and union ‘were a consequence of management’s failure to give personnel management sufficiently high priority.’ — ‘The History of Human Resource Management (HRM)’ <<http://www.cipd.co.uk/hr>>

management issues of the firm'.<sup>10</sup> The market model is prevalent in the UK and USA.

According to Zumbansen, co-determination comprises different forms of employee involvement in the management of an organisation. It is based upon the idea of management and workers co-operating in developing and deciding organisational policy on specified employee related issues. An example is Germany's statutory system for employee representation through works councils and, in certain cases, on an organisation's supervisory board. Both mechanisms allow employees' representatives rights to make decisions with management (co-determination).<sup>11</sup>

Economic conditions have influenced the way practices have developed. Pusic argued that economic performance and the ups and downs of the economic cycle influence the way organisations treat people.<sup>12</sup> He continued that globalisation has changed 'the overall economic level' and put pressure on the ethos behind the German co-determination model and Japan's human resources model. These have traditionally had financial and human resource strategies based upon long term objectives. Zumbansen pointed to the influence of global financial liquidity. Global pressures mean that organisations' economic performances are increasingly judged on short

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<sup>10</sup> Zumbansen (n 5) 114.

<sup>11</sup> Areas in which works councils have joint decision-making authority with management include: the beginning and end of working hours; remuneration arrangements (but not wage bargaining); the regulation of overtime and reduced working hours; the introduction and operation of technical devices to monitor worker performance; and health and safety measures. Schnabel 'Only One Firm in Five has a Works Council' (1997) EIRO <<http://www.eurofound.europa.eu/eiro/1997/02/feature/de9702101f.htm>> accessed 9 February 2010; Carley, Baradel and Welz 'Works Councils, Workplace Representation and Participation Structures' EIRO Thematic Features Eurofound <[http://www.eurofound.europa.eu/eiro/other\\_reports/works%20councils\\_final.pdf](http://www.eurofound.europa.eu/eiro/other_reports/works%20councils_final.pdf)> accessed 8 January 2013 7.

<sup>12</sup> Pusic, 'Organization Theory and Participation' in Heller, Pusic, Strauss and Wilpert (Edd) *Organizational Participation Myth and Reality* (Oxford University Press Oxford 1998) 79.

term results and this has put pressure on systems of I&P based on 'long-term' orientation.<sup>13</sup>

Practices and discussions relating to co-determination Law have altered since the 1970s when many EU Member States expanded co-determination rights.<sup>14</sup> In Germany industry wide collective agreements have traditionally provided terms and conditions within organisation. In an effort to improve organisational competitiveness individual works councils have accepted agreements containing standards below the threshold contained in collective agreements.<sup>15</sup> Royce stated that 'there appears to be an increasing number of options or 'avoidance strategies' which large companies utilise to avoid or undermine the value of the institutions in place...'<sup>16</sup> Cheffins asserted that German co-determination 'is a legal fiction in many small to medium-sized businesses ... [and] the works council is either ignored or completely isolated by owner/managers'.<sup>17</sup> Economic pressures have decreased the relative influence of labour in the co-determination and archetypal human resources models.

In Germany discourse has changed from promoting the extension of co-determination and the proportion of workers' representatives on supervisory boards<sup>18</sup> to openly discussing their reform. Goetschy stated that employers

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<sup>13</sup> Zumbansen, (n 5) 115; also Kester G, Zammit E and Gold, (n 6) 21.

<sup>14</sup> See Section 2.1.3; Strauss, 'Collective Bargaining, Unions, and Participation' in Heller, Pusic, Strauss and Wilpert (Eds) *Organizational Participation Myth and Reality* (Oxford University Press Oxford 1998) 111.

<sup>15</sup> Zumbansen, (n 5) 118-119. The economic environment has lessened the relative bargaining power of works councils and enabled the undermining of collective agreements in Germany. These traditionally provided minimum terms and conditions across sectors of industry.

<sup>16</sup> Royle 'Avoidance Strategies and the German system of Co-determination' (1998) 9 6 IJHRM 1026, 1043.

<sup>17</sup> Cheffins *Company Law, Theory, Structure and Operation* (Clarendon Press Oxford 1997) 593.

<sup>18</sup> Simitis 'Workers' Participation in the Enterprise - Transcending Company Law?' (1975) 38 1 MLR 1, 7-8.

have increasingly tended to see such bodies as a burdensome cost<sup>19</sup> and Steeleib-Kaiser argued that reform would help reduce the business costs.<sup>20</sup> The abolition of co-determination has been a topic of debate.<sup>21</sup> France has 'rationalised' the operation of works councils and worker representatives in an effort to reduce their cost to companies.<sup>22</sup>

Ironically the EU has enshrined minimum standards of I&P at a time when the German 'gold standard' was questioned. Across Europe Marchington and Wilkinson found trends indicating a decline of indirect participation (such as co-determination) in favour of direct interaction between management and worker.<sup>23</sup> At the same time the UK's market model has also moved towards human resource style practices and increasing direct communication between management and workers.<sup>24</sup> The next sections overview the dynamics that affect the type of I&P adopted.

#### **4.2 THE SCOPE AND MECHANICS OF INVOLVEMENT AND PARTICIPATION**

Section 4.2 overviews the six elements that produce different kinds of I&P:

1. The purpose or objective of the exercise;
2. Subject matter;
3. The level at which the interaction takes place;
4. Who is involved;
5. The formality of the involvement/participation mechanism;

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<sup>19</sup> Goetschy, 'EU Social Policy and Developments in Worker Involvement' in Gold (ed) *New Frontiers of Democratic Participation at Work* (Ashgate Publishing Limited Hampshire 2003) 39.

<sup>20</sup> Steeleib-Kaiser 'Globalisation and the German Social Transfer State' (2001) 10 3 German Politics 103, 109.

<sup>21</sup> German Co-determination law has attracted criticism from sections of the press, scholars, and lobbyists who fear it deters inward investment. A national lawyers meeting in 2006 explored its possible demise. Zumbansen, (n 5) 21 123.

<sup>22</sup> Goetschy, (n 19) 39.

<sup>23</sup> Marchington and Wilkinson, (n 1) 403.

<sup>24</sup> See Chapter 7.

6. Terminology used to express the depth or type of involvement or participation. For example ‘consult’ or ‘co-determination’.

These are examined in the context of the human resources and co-determination models, and EU policy and practice.

#### **4.2.1 Purpose/Objective**

Involvement and participation can originate from management initiative, worker pressure, or legislative policy. Different factors appear to influence management’s agenda (in varying proportions): improved worker commitment, increased output, better management/worker relations, the influence of worker strength, and legislation.<sup>25</sup> Management objectives are usually connected to their perception of what is best for the organisation.<sup>26</sup> Worker pressure is usually aimed at restricting or influencing management prerogatives<sup>27</sup> and gaining better terms of employment and/or working conditions. The approaches taken by management, workers, or government have been influenced by the economy<sup>28</sup> and changing perceptions of the role of labour and the state within organisations.<sup>29</sup>

An example of this is a period after the late 1950s when participation was framed within a broad framework of ‘economic democracy’ or ‘citizenship’.<sup>30</sup> This was despite the reality that most Member States did not consider employees as co-proprietors,<sup>31</sup> and most ‘organisations… [were]

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<sup>25</sup> These factors are discussed and analysed in Chapters 6 and 7.

<sup>26</sup> E.g. ‘market model’ (above).

<sup>27</sup> Williams and Adam-Smith (n 1) 28.

<sup>28</sup> Ramsay ‘Cycles of Control: Worker Participation in Sociological and Historical Perspective’ (1977) 11 *Sociology* 481; Marchington, ‘Employee Involvement: Patterns and Explanations’ in Harley, Hyman and Thompson (Edd) *Participation and Democracy at Work Essays in Honour of Harvie Ramsay* (Macmillan Hampshire 2005).

<sup>29</sup> HMSO *Report of Royal Commission on Trade Unions and Employers’ Associations* (Cmnd 3623, 1968).

<sup>30</sup> Harley, Hyman and Thompson, ‘The Paradoxes of Participation’ in Harley, Hyman and Thompson (Edd) *Participation and Democracy at Work* (Macmillan Hampshire 2005) 1.

<sup>31</sup> Däubler ‘The Employee Participation Directive - A Realistic Utopia?’ (1977) 14 *CMLR* 457, 464-465.

considered as ‘centralized’, ‘closed’, and ‘non-democratic’.<sup>32</sup> During this period legislative proposals echoed this philosophy<sup>33</sup> and powers of co-determination were widened in many Member States.<sup>34</sup>

Chapter 3 showed how, when promoting worker I&P, the Commission repeatedly adjusted its policy objectives. In order to take into account Member States’ views the Commission abandoned key policy objectives, or altered how they should be achieved. The preambles of European Directives relating to I&P reflect the Commission’s/Community’s policy aspirations.<sup>35</sup> At various times the Commission/EU has indicated that I&P would: (1) lead to humanisation of working conditions; (2) help organisations adapt to market conditions and increase competitiveness; and (3) promote employee involvement within the workplace.<sup>36</sup> Chapters 6 and 7 discuss how realistic these claims are in the UK.

Employers within the market models have the objective of benefitting from employee input as and when they think fit. Generally management has a philosophy of keeping its prerogatives. This would be true of the corporate model although the underlying philosophy means that employee interests should be given more consideration. Co-determination guarantees employee input into aspects of the decision-making process irrespective of management’s wishes.

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<sup>32</sup> Industrial Democracy in Europe International Research Group *Industrial Democracy in Europe* (Clarendon Press Oxford 1981) 8.

<sup>33</sup> E.g. *Donovan Commission* (n 29).

<sup>34</sup> European Commission *Employee participation and company structure in the European Community (Green Paper)* (Bull Supp 8/75, pg 54, 1975) 58-66, 49-50; Van Der Ven, 'Social Law in the Netherlands' in Rood (ed) *Fifty years of Labour Law and Social Security* (Kluwer Deventer 1986).

<sup>35</sup> E.g. CR Directive 98/59 recital 7; Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29 recitals 7-10.

<sup>36</sup> *Bull Supp 8/75* (n 34) 9,11; Commission *Communication on worker information and consultation* (COM(95) 547 final, 1995) s 7; IC Directive 2002/14 recitals 7-10.

#### 4.2.2 Subject Matter

I&P potentially covers any subject affecting organisations. It may concern strategic decision-making or issues such as parking. Forums in the archetypal ‘corporate’ and ‘co-determination’ models focus on employee wellbeing and matters of strategic interest. The archetypal market model would lay less stress on the former.

These splits are clear when UK and German law is compared. In Chapter 2.3 it was seen that, with the exceptions of its policies relating to trades unions and health and safety, UK government interventions as regards I&P were the result of EU policy initiatives. This is contrasted with Germany’s Works Constitution Law that gives rights of co-determination regarding social matters and the right to approve or disapprove management proposals on diverse issues.<sup>37</sup> Co-determination laws can require half of a large company’s supervisory board to consist of employee representatives with full voting rights.<sup>38</sup>

The EU has required or promoted information and consultation on a variety of subjects. These range from topics of direct personal interest to employees (health and safety, collective redundancies, and decisions likely to lead to substantial changes in work<sup>39</sup>) to more general things (an establishment’s economic performance, future plans, and employment prospects).<sup>40</sup> Provisions for ongoing I&P tend to be of a strategic nature (the financial situation, probable developments). Other than health and safety, the EU has not concerned itself with the ‘minutiae’ of running an organisation such as the management of social facilities or day to day production issues.

#### 4.2.3 The Level at which Interaction Takes Place

Levels of action include department, establishment, and groups of establishments or companies. The type of task or objective will determine

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<sup>37</sup> *Bull Supp* 8/75 (n 34) 26; also see n 11.

<sup>38</sup> — ‘Germany Mitbestimmung Co-determination’ Eurofound <<http://www.eurofound.europa.eu/emi/GERMANY/CODETERMINATION>>.

<sup>39</sup> IC Directive 2002/14, Art 4(2)(c).

<sup>40</sup> *Ibid* Art 4(2)(a) ECo Directive 2001/86, Annex Part 2(b).

with whom interactions take place: a level of management with single or combinations of individual(s), worker representative(s), or union official(s). In the co-determination model, employee representatives may have different rights in a number of forums concerned with different issues within the same organisation. Employee representatives may be full members of the board and entitled to vote on organisational strategy,<sup>41</sup> whilst representatives on works councils may deal with subjects of direct personal interest to employees e.g. health and safety or rules relating to work such as shift patterns. Legislation may require consultation or require a works council's consent before an issue is decided.<sup>42</sup>

Depending on the topic the EU has legislated for I&P bodies to operate at a number of levels. These can range from department (where a limited number of employees are affected by collective redundancies) to groups of undertakings (via European Works Councils).

#### **4.2.4 Who is Involved**

Marchington used the terms 'direct' and 'indirect' participation<sup>43</sup> to distinguish between forms of I&P between management and employee(s) and management and employee representative(s). The first is often initiated by management and involves face to face or written communication between management and employee. Examples include: meetings with the entire workforce; team briefings; newsletters; and suggestion schemes. Indirect participation involves electing, or appointing an employee or worker representative. These represent (and should ideally report back to)

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<sup>41</sup> Schulten and Zagelmeyer 'Board-Level Employee Representation in Europe' (1998) Eurofound <<http://www.eurofound.europa.eu/eiro/1998/09/study/tn9809201s.htm>> accessed 9 Feb 2010.

<sup>42</sup> van het Kaar 'Works Councils and their Right of Appeal - Current Trends' (1998) Eurofound <<http://www.eurofound.europa.eu/eiro/1998/10/feature/nl9810102f.htm>> accessed 28 January 2013; — 'Co-determination Rights of the Works Council. Germany' EIRO Thematic Features Eurofound <<http://www.eurofound.europa.eu/emire/GERMANY/CODETERMINATIONRIGHTSOFTHEWORKSCOUNCIL>>.

<sup>43</sup> Marchington and Wilkinson, 'Direct Participation' (n 1) 402.

all or a section of a workforce. Management interacts with the representative rather than directly with workers.

Indirect representation is an integral part of the co-determination model and essential to aspects within the human resources model. In the former individual employees are represented by employee representatives (sometimes professional union representatives) at works councils, on supervisory boards, and at national level during collective bargaining (**CB**). In the latter, union representatives (drawn from the work force or unions) take part in CB. Union and non-union employee representatives may also sit on committees, or works councils.<sup>44</sup> In the UK there has been a shift away from indirect towards direct forms of I&P. Since the 1980s there has been a marked decline of CB and representation through Works Councils.<sup>45</sup>

The relative effectiveness of direct versus indirect I&P will be discussed in Chapters 6 and 7. It shall be seen that indirect participation may lose its effectiveness without management's co-operation, or a critical mass of employees supporting their representatives' position. An example is bargaining without widespread support for industrial action. One of the problems with the ethos of EU policy is that it relies upon representatives representing their constituents effectively, and management co-operating.

Article 153(1)(f) of the TEU and Article 28 of the Charter of Fundamental Rights of the European Union promote indirect representation. The first refers to 'representation and collective defence of the interests of workers and employers, including co-determination'. The second affirms EU and national rights in relation to CB and collective action. Chapter 5 focuses on six directives<sup>46</sup> requiring I&P and demonstrates how EU policy specifies, or encourages, indirect rather than direct involvement and participation.<sup>47</sup>

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<sup>44</sup> See Chapter 7.

<sup>45</sup> Ibid.

<sup>46</sup> CR Directive 98/59; Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses [2001] OJ L82/16; Council Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at

#### 4.2.5 Formality

I&P mechanisms may be determined by government regulation, industrial agreements, or be at management's discretion. Indirect participative practices in the form of works councils or CB are, to a greater or lesser extent, influenced by legislative frameworks. In the co-determination model, in addition to regulating union activity, countries<sup>48</sup> have long-standing rules controlling the governance of works councils. These include: when a mechanism should be set up,<sup>49</sup> its structure and composition, tasks and rights,<sup>50</sup> and provisions for adjudication or arbitration.<sup>51</sup> The EU uses works-council type bodies in its EWC, Company, and IC Directives and relies upon Member States to implement a suitable *de jure* systems<sup>52</sup> (legislative requirements regarding these bodies will be discussed in Chapter 5).

The presence of a formal structure does not mean that a *de jure* system operates or creates the desired environment. Government regulation just provides a background for I&P to take place. In the Netherlands the performance of works councils has been affected by 'mounting problems... relating to issues such as a lack of interest...among employees and the

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work [1989] OJ L183/1; Council Directive (EC) 94/45 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 [1994] OJ L254/64; ECo Directive 2001/86; IC Directive 2002/14.

<sup>47</sup> AR Directive 2001/23, Art 7(3) provides for situations where there are no representatives.

<sup>48</sup> For example Germany, the Netherlands, and Belgium.

<sup>49</sup> Often when an organisation has a minimum number of employees.

<sup>50</sup> European Parliament, 'Report on the Proposal Establishing a General Framework for Informing and Consulting Employees in the European Community' (1999) COM(98)061215-16, 28-29, 44-47, 78-78, 78-80.

<sup>51</sup> See above, and Schnabel (n 11).

<sup>52</sup> Case C-91/81 *Commission of the European Union v Italian Republic* [1982] ECR 2133.

ability of individual works council members to perform their duties...<sup>53</sup> Research conducted by West German Federal Ministry of Labour indicated that the general attitude of German workers towards participation is ‘a mixture of dissatisfaction and distrust’.<sup>54</sup>

A problem with the *de jure* system is enforcement. The Commission’s early legislative proposals often contained recourse to arbitration if parties could not agree on a course of action.<sup>55</sup> Management’s behaviour and argument could have been assessed and a final decision on that issue made by an impartial outside body. This is not required in the final Directives. Enforcement is left to the Member States. Administrative or judicial procedures<sup>56</sup> vary and therefore might, or might not, require arbitration.

#### **4.2.6 Depth or type of I&P**

Terms used to describe the I&P process fall into two categories. The first describes styles of practice (e.g. participation) and the second relates to specific practices (e.g. consultation). Section 4.2.6.1 identifies differences in the way terminology is used across the EU. Section 4.2.6.2 briefly outlines problems found within the literature. Section 4.3 goes on to analyse the literature and a wide range of sources before advancing clear definitions and creating a comprehensive framework of I&P practices: the Involvement and Participation Framework (**IPF**).

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<sup>53</sup> van het Kaar 'Problems Emerge as Works Councils' Role Expands' (2002) EIRO <<http://www.eurofound.europa.eu/eiro/2002/03/feature/nl0203102f.htm>> accessed 9th Feb 2010.

<sup>54</sup> Simitis (n 17) 45.

<sup>55</sup> Proposal for a Council Regulation (Com) 70(600) embodying a statute for European companies [1970] 1970 OJ C124/1 Article 123(3); Proposal for a Directive of the Council on harmonization of legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations 1974 OJ C 104 of 13.9.1974 amended Bull EC 7/8-1975 Article 9(2).

<sup>56</sup> E.g. IC Directive 2002/14 Article 8; ECo Directive 2001/86 Article 12.

#### 4.2.6.1 Terminology

Three terms are found in EU primary legislation<sup>57</sup>: ‘information’, ‘consultation’, and ‘participation’. They are not defined. In common English usage information and consultation appear to be facets of participation. However, ‘participation’ has specific meanings in some member states<sup>58</sup> and in literature relating to employment relations.<sup>59</sup>

Some European countries use the term ‘participation’ in the context of joint regulation/co-determination. This meaning appears to be reflected in EU secondary legislation. Ramsay argued that this ‘European’ interpretation is reflected in European law and the European Works Council Directive (EWC Directive);<sup>60</sup> there is no reference to ‘participation’ because it does not involve joint-regulation or co-determination.<sup>61</sup> Ramsay’s argument appears correct because the European Company Directive has subsequently defined ‘participation’ in terms of worker representation on, and influence over, a Company’s management organs<sup>62</sup>.

In the UK the word ‘participation’, in the context of the workplace, is wider. Against the backdrop of the human resources model of employment relations, participation has been defined as the ‘influence in decision-making as exerted through a process of interaction between workers and

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<sup>57</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2010/C 83/1 30.03.2010, Art 153(e); Charter of Fundamental Rights of The European Union 2010/C 83/2, Art 27; Community Charter of the Fundamental Social Rights of Workers *Social Europe* 1/90 51-76 Luxembourg: Office for Official Publications of the European Communities, Art 17.

<sup>58</sup> Ramsay 'Fool's Gold? European Works Councils and Workplace Democracy' (1997) 28 4 IRJ 314, 318.

<sup>59</sup> E.g. Rose (n 1) 341.

<sup>60</sup> EWC Directive 94/45.

<sup>61</sup> Ramsay 'Fools Gold?' (n 58) 318.

<sup>62</sup> ECo Directive 2001/86, Art 2(k).

managers.<sup>63</sup> It has been used to include involvement by employee representatives and include or exclude direct involvement by employees.<sup>64</sup>

In employment relations literature these terms take on specific meanings.<sup>65</sup> Hyman and Mason connect 'employee participation' with state or employee initiatives which promote the *collective* rights of employees to be represented in organisational decision-making. This definition includes CB over terms and conditions of employment.<sup>66</sup> They associate 'employee involvement' with practices and policies which emanate from management and sympathisers of free market commercial activity. Management sets the agenda in accordance with its needs: 'the requirements for a flexible and adaptable workforce within a competitive product market.'<sup>67</sup> Employee involvement corresponds with Zumbansen's human resources model, whereas co-determination fits within their definition of employee participation.

The term 'participation' is therefore associated with the co-determination model in some European countries, whilst is applicable to the market model in others. In a UK Department of Trade and Industry paper on management-employee communication Cox, Marchington and Suter overcome possible ambiguity by using the phrase 'employee involvement and participation'.<sup>68</sup> The phrase will be understood by all to cover all types of interaction between management and workforce or workforce representatives.

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<sup>63</sup> Rose (n 1) 3, 39 (quoting Levinson 1966 p 38).

<sup>64</sup> Dachler and Wilpert 'Conceptual Dimensions and Boundaries of Participation in Organizations: A Critical Evaluation' (1978) 23 ASQ 1, 14.

<sup>65</sup> Rose (n 1) 341.

<sup>66</sup> Hyman and Mason *Managing Employee Involvement and Participation* (Sage London 1995)21 in Rose (n 1) 341.

<sup>67</sup> Ibid.

<sup>68</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace: a Longitudinal Analysis of Employee Outcomes in 2008 and 2004' (2007) Employment Relations Research Series No.72 DTI.

#### 4.2.6.2 The Literature

A review of the literature<sup>69</sup> found an absence of or partial analysis of terms used in the I&P process. Classifications and descriptions were often unclear. It will be seen that I&P has been analysed in terms of scales that show the least interactive forms of I&P at one end and the most interactive at the other. The scales are ordered in terms of continental-style participation, or a combination of co-determination and CB. They all fail to provide a comprehensive analysis of terms used to describe various forms of I&P and how they interrelate. Section 4.3 develops clear definition and a comprehensive framework of terms relating to I&P.

### **4.3 THE INVOLVEMENT AND PARTICIPATION FRAMEWORK (IPF)**

Section 4.3.1 overviews gaps in the literature and problems with approaches that have been taken when describing the terminology used to express different kinds of I&P. It considers the difficulty of constructing a hierarchy of terms showing increasing employee involvement in the decision-making process. This occurs because of differences in approach between co-determination and collective bargaining (these are considered in Section 4.3.1.1). Section 4.3.1.2 goes on to discuss the wide-ranging (but partial) analysis of terms carried out by Industrial Democracy in Europe.<sup>70</sup> This is one of many sources used to create full cohesive definitions and to construct a comprehensive framework for I&P (the IPF) in Section 4.3.2.

#### **4.3.1 The Literature**

Table 4.1 shows that the literature has categorised different types of involvement and participation in a linear fashion. Words used to describe the scales reflect this: ‘escalator of participation’;<sup>71</sup> ‘ladder of labour management relationship’;<sup>72</sup> ‘continuum of employee participation’;<sup>73</sup> and

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<sup>69</sup> See section 4.3.1.

<sup>70</sup> Industrial Democracy in Europe International Research Group (n 32).

<sup>71</sup> Marchington and Wilkinson, 'Direct Participation' (n 1) 400.

<sup>72</sup> Elliott *Conflict or Co-operation? The Growth of Industrial Democracy* (Kogan Page Limited London 1978) 125.

‘mode of involvement scale’.<sup>74</sup> The authors used a variety of terms, but did not explain the reasoning behind the order of their ‘hierarchies’. Interestingly the only term they all have in common is ‘consultation’.

**Table 4.1**  
**Different Ordering of the Information and Participation Process**

<b>Marchington<sup>75</sup></b>	<b>Blyton and Turnbull<sup>76</sup></b>	<b>Industrial Democracy in Europe<sup>77</sup></b>	<b>Elliott<sup>78</sup></b>	<b>Biagi<sup>79</sup></b>
	No involvement			
Information	Information	Information after decision		Information
		Information before decision		
Communication			Communication	
Consultation	Consultation	Consultation	Consultation	Consultation
			Collective bargaining,	
			Extended collective bargaining <sup>80</sup> .	
Co-determination	Joint decision-making	Joint decision-making	Co- determination.	Joint decision-making
Employee control	Employee control	Group has final say		
				Collective bargaining;
				Industrial conflict

At first glance, the progressions appear to be based upon ceding management prerogative. Marchington, Blyton and Turnbull, and Industrial Democracy in Europe all start with the giving of information and progress through consultation to its ceding certain powers through joint decision-making or co-determination. This becomes problematic when CB is

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<sup>73</sup> Blyton and Turnbull *The dynamics of Employee Relations* (2nd edn Macmillan London 1998) in Rose (n 1) 339.

<sup>74</sup> Industrial Democracy in Europe International Research Group (n 32) 53-4.

<sup>75</sup> Marchington and Wilkinson, 'Direct Participation' (n 1) 400.

<sup>76</sup> Blyton and Turnbull in Rose (n 1) 339.

<sup>77</sup> Industrial Democracy in Europe International Research Group (n 32) 53-4.

<sup>78</sup> Elliott (n 72) 125.

<sup>79</sup> Biagi and Tiraboshi, 'Forms of Employee Representational Participation' in Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Wolters Kluwer Austin 2007) 504.

<sup>80</sup> This refers to matters outside the traditional orbit of pay and employment conditions (e.g. collective redundancies). Elliott (n 72) 131.

introduced. Section 4.3.1.1 will look at the way co-determination and CB influences the relationship between management and employee representative.

#### 4.3.1.1 Co-determination and collective bargaining

Co-determination differs from CB in that neither management nor labour should take unilateral action. If both parties fail to reach an agreement, there is the threat of outside adjudication.<sup>81</sup> In the co-determination model used in Germany and the Netherlands management prerogatives are altered and limited by law. In some cases parties might be said to be in a stronger position because they can force resolution through adjudication (all are bound even if they do not agree with its conclusion). However, there is weakness in that the process removes management and labour's autonomy.

CB does not guarantee a solution but maintains the ability of each party to act autonomously.<sup>82</sup> Broadly speaking, in the co-determination model trade unions carry out CB at national or sectoral level.<sup>83</sup> Contentious issues, such as wages, are settled nationally. This leaves those specific to individual organisations to be decided using co-determination.<sup>84</sup> In the market model CB also occurs at organisational level.

Co-determination and CB are very different processes. Placing them in a logical order of progression is problematic. Elliott and Biagi ordered co-determination and CB differently. Elliott stated that CB differs from other forms of participation on his ladder because:

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<sup>81</sup> Ibid 125.

<sup>82</sup> The ability to act can be within the context of a legal framework. For example the need to hold a secret ballot before taking official industrial action Trade Union and Labour Relations (Consolidation) Act 1992 s 62.

<sup>83</sup> Bargaining is often conducted at the level of employers' organisations, implemented across a whole sector of industry, and sometimes extended by Government. *Bull Supp* 8/75 (n 34) 49-93.

<sup>84</sup> Docksey 'Information and Consultation of Employees: the United Kingdom and the Vredling Directive' (1983) 49 1 Modern Law Review 281, 298.

each side lodges claims and offers and... when they cannot agree, had the right to walk away in disagreement leaving the other side to do his own thing - the management to implement its decisions unilaterally or the workers to stage some form of protest action.<sup>85</sup>

An example of 'resolving' a difficulty in this way was the 1984 miners' strike. A strike over pit closures failed and this enabled management to carry out its plans unilaterally. It has been noted that the adversarial nature of CB can hinder a co-operative environment within the workplace.<sup>86</sup>

CB lacks order and stands a little outside a continuum where management *systematically* shares/cedes its prerogatives.<sup>87</sup> But CB is still a participatory process. Its 'anarchic' properties mean that it is impossible to confine CB in the context of a power continuum in relation to co-determination. Therefore the comprehensive structure that will be advanced in Section 4.3.2 is nominated a framework (the IPF). Of those listed in Table 4.1, only the study by Industrial Democracy in Europe International Research Group (**IDE**) examined the concepts used in I&P in detail. Its classification of concepts provides a useful starting point to construct the IPF.

#### 4.3.1.2 The Industrial Democracy in Europe scale

The IDE study covered 12 nations and was the result of international public servants' interest in the 'real life effects of industrial democracy in Europe'.

<sup>88</sup> Its objective was to find what conditions made for the success or failure of legislation to increase workplace participation.<sup>89</sup> Although that is not relevant to this section, its scales and concepts provide a starting point from which to develop a framework.

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<sup>85</sup> Elliott (n 72) 125.

<sup>86</sup> Däubler (n 31) 460; *Bull Supp* 8/75 (n 34) 24, 33.

<sup>87</sup> In the UK, when management recognises a union it will have ceded some of its prerogatives. But, unlike co-determination both parties have the power to accept or reject proposals.

<sup>88</sup> Industrial Democracy in Europe International Research Group (n 32) 3.

<sup>89</sup> Ibid 1.

Table 4.2 replicates the schematic classification of concepts the IDE used to categorise I&P.<sup>90</sup> It shows three scales; the first was termed ‘de jure participation’ and others ‘de facto’ participation. The former means employee involvement that is legally or formally prescribed. It may have written rules and regulations concerning some kind of participation in the decision-making process. These may be set down by law or by individuals. The latter refers to the actual influence groups and individuals have.<sup>91</sup> The existence of an extensive body of legal rules does not guarantee the ability to influence decisions. A de jure formal consultation system may produce a de facto situation where management pay no attention to the consultation process.

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<sup>90</sup> Ibid 59.

<sup>91</sup> Ibid 4-5.

**Table 4.2**  
**IDE De Jure and De Facto Scales**

<b><i>De Jure</i> Participation</b>	<b><i>De Facto</i> Participation</b>	
<b>Scale</b>	<b>Influence Scale</b>	<b>Involvement Scale</b>
1 No regulation	1 No influence	<i>Information</i>
2 Information, general	2 Little influence	1 Not involved
3 Information ex ante	3 Moderate influence	2 Information before act
4 Consultation	4 Much influence	<i>Consultative</i>
5 Joint decision-making	5 Very much influence	3 Opinion given
6 Group final say		4 Opinion taken into account
		<i>Co-determination</i>
		5 Equal weight in decision-making
		6 Own decision

De facto participation breaks the involvement and participation process into concepts of influence and involvement. In common with other literature, the De Jure scale uses single terms ('information', 'consultation') in their hierarchies. The involvement scale lends additional clarification to them by expressing them in terms of the kind of involvement taking place. When the 'De Jure Participation' (**De Jure Scale**) and 'De Facto Participation-Involvement' (**Involvement Scale**) are considered together they provide a basis for the IPF.

**Table 4.3**  
**IDE De Jure and Involvement Scales**

	<b>De Jure Scale<sup>92</sup></b>	<b>Involvement Scale</b>
		<i>Information</i> 1 I am not involved at all
	1 No regulation	
Inform	2 Information (unspecified) must be given to the group.	
	3 Information <i>ex ante</i> must be given to the group (i.e. before the decision is made).	2 I am informed about the matter beforehand
Consult	Consultation of the group is obligatory (i.e. group must always be consulted prior to the decisions taken).	<i>Consultative</i> 3 I give my opinion 4 My opinion is taken into account
Co determine	Joint decision-making with the group (i.e. group has the power to veto and must give its approval).	<i>Co determination</i> 5 I take part in the decision-making with equal weight
	Group itself has the final say	
		6 Own decision

Table 4.3 places the two scales side by side. The stages are not necessarily equivalent. The Involvement Scale under ‘Consultative’ indicated that an opinion may or may not be taken into account but this was not made clear in the De Jure Scale. The latter did not clearly define ‘consultation’ and indicate whether anything more than the right to give an opinion was required. Terms including CB were absent and the IDE did not distinguish between various forms of co-determination. The next sections draw upon

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<sup>92</sup> Ibid 5.

the scales and other sources to establish and analyse the terms which will make up the IPF.

### **4.3.2 The IPF: Establishing the Terminology**

This section draws upon a number of sources to establish clear meanings for terms associated with I&P and places them in a comprehensive structured framework (the IPF).

#### **4.3.2.1 'Information'**

Information can be general in nature or serve a specific purpose. General information can contribute to feelings of involvement.<sup>93</sup> Alternatively, information might be part of a wider process and relate to: (a) some form of inclusion in the decision-making process (e.g. consultation) or (b) CB.<sup>94</sup>

The De Jure Scale distinguishes between 'information' and 'information *ex ante*'. The possibility of information after an event (*ex post*) is not included in the Involvement Scale. An example of *ex post* information would be a report on an organisation's financial situation. It is arguable that the receipt of such information is a form of involvement because it might influence subsequent actions, or lead to participation at a later date.

Neither scale refers to who gives or receives information or its purpose. Information can flow in either direction, from workers or management. Workers can inform or be informed directly or via representatives. Management can communicate at a variety of levels and in different ways. Senior management can brief all workers, or information can be 'cascaded' down the organisation via team leaders, employee representatives, and paper or electronic media (e.g. newsletters, the intranet, e-mail).

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<sup>93</sup> See Chapter 7.

<sup>94</sup> Under TULRA s181(2) an employer is obliged to disclose information: (a) without which a trade union would be materially impeded in collective bargaining and (b) which it would be in accordance with good industrial relations practice to disclose for collective bargaining.

To be accurate the IPF requires two kinds of information to cover situations before or after an event. It can flow from management to worker, or worker representative, and vice versa. The first two layers of the IPF are

Information: ex post
Information: ex ante

#### 4.3.2.2 ‘Communication’

The Involvement Scale splits ‘consultative’ involvement into ‘I give my opinion’ and ‘my opinion is taken into account’. The former indicates a level between the giving of information and consultation. Blumberg’s analysis of ‘co-operation’ distinguished between four states, two of which exist in between the receipt of information and consultation. They are

1. Workers have the right to receive information
2. Workers have the right to protest decisions
3. Workers have the right to make suggestions
4. Workers have the right to prior consultation but their decisions are not binding on management

Stages 1-4 can be described as ‘communication’; a term that Marchington placed in his escalator of participation between ‘information’ and ‘consultation’.<sup>95</sup> The passing of information (ex post or ex ante) involves communication. Protesting decisions or making suggestions can be a one-way exercise which falls short of consultation. ‘Communication’ covers the ability to comment on information and the right to protest decisions or make suggestions. It fills the gap between information and consultation. The third layer of the IPF is:

Communication
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<sup>95</sup> Marchington and Wilkinson, ‘Direct Participation’ (n 1) 400.

#### 4.3.2.3 ‘Consultation’

When the De Jure and Involvement Scales are analysed two factors about ‘consultation’ emerge. The first is that consultation is a three stage process: information is provided, an opinion is given, *and* then it is taken into account. The second is that it should take place prior to a final decision. Without the second, an opinion cannot be taken into account. ACAS states that consultation goes beyond communication in that it is not just concerned with the interchange of information and ideas within an organisation but ‘involves managers actively seeking and then taking account of the views of employees before making a decision’.<sup>96</sup>

The Shorter Oxford Dictionary’s (**OED**) definition of ‘consult’ includes

- (a) To take counsel together, deliberate, confer... to confer about deliberate upon, consider; (b) to take counsel to bring about; to plan, devise, contrive...<sup>97</sup>

This broadly coincides with the meaning attributed to that term in an industrial relations context by ACAS, UK Courts, and the ILO. ACAS states:

*Consultation* is the process by which management and employees or their representatives jointly examine and discuss issues of mutual concern. It involves seeking acceptable solutions to problems through a genuine exchange of views and information. Consultation does not remove the right of managers to manage – they must still make the final decision – but it does impose an obligation that the views of employees will be sought and considered before decisions are taken.<sup>98</sup>

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<sup>96</sup> ACAS ‘Employee Communications and Consultation’ (August 2009) B06 4.

<sup>97</sup> Onions (ed) *The Shorter Oxford English Dictionary* (3rd edn Clarendon Press Oxford 1973) Vol I 409.

<sup>98</sup> ACAS (n 85) 3.

In the context of collective redundancies, Glidewell LJ<sup>99</sup> in *R v British Coal* adopted Hodgson J's<sup>100</sup> test for 'fair consultation'. He stated it means:

- (a) consultation when the proposals are still at a formative stage;
- (b) adequate information upon which to respond;
- (c) adequate time in which to respond;
- (d) conscientious consideration ... of the response to consultation.

[continuing:] Another way of putting the point more shortly is that fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted, and to express its views on those subjects, with the consultor thereafter considering those views properly and genuinely.<sup>101</sup>

The ILO's Consultation (Industrial and National Levels) Recommendation states:

consultation and co-operation should aim, in particular... at joint consideration by employers' and workers' organisations of matters of mutual concern with a view to arriving, to the fullest possible extent, at agreed solutions.<sup>102</sup>

ACAS states that consultation should take place before a decision has been taken; a position held by the Employment Appeal Tribunal in *UK Coal*

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<sup>99</sup> *R v British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price* [1994] IRLR 72 Divisional Court.

<sup>100</sup> *R v Gwent County Council ex parte Bryant* [1988] Crown Office Digest 19; *British Coal, ex parte Price*.

<sup>101</sup> *British Coal, ex parte Price* paras 24-25.

<sup>102</sup> ILO Recommendation R113: 'Consultation (Industrial and National Levels) Recommendation' (1960)

<[http://www.ilo.org/global/What\\_we\\_do/InternationalLabourStandards/InformationResources/KeyILObodiesanddocuments/lang\\_Para\\_5](http://www.ilo.org/global/What_we_do/InternationalLabourStandards/InformationResources/KeyILObodiesanddocuments/lang_Para_5).

Mining v NUM.<sup>103</sup> Glidewell LJ's need for adequate time and information in order to properly prepare for consultation<sup>104</sup> is something stated in ACAS's guidance on Collective Redundancies<sup>105</sup> and Department of Business Innovation and Skills guidance on transfers of undertakings.<sup>106</sup> The OED, ACAS,<sup>107</sup> and the ILO mention the necessity of an exchange of views. All define 'consult' using the word 'consider'<sup>108</sup> and the UK courts have stated that consideration should be 'meaningful'.<sup>109</sup> The sources therefore point towards consultation as meaning: (1) a process that takes place before a decision has been made; (2) for which there has been adequate preparation; (3) during which there is an exchange of views; (4) which are considered or contemplated.

Employers are not bound to accept another's opinion; therefore it is difficult to know whether consultation has taken place. Should 'consultation' involve just consideration? Or demand, in line with the ILO's definition, a dialogue where the objective is to bring about a solution that takes into consideration (to the fullest *possible* extent) the other side's opinion(s)? Parts (a) and (b) of the OED definition differ and imply distinct types of consultation. The first involves the act of contemplation and consideration. One party is taking 'council' or conferring with another. There is an exchange of views which are taken into account. The second entails formulating, or bringing about some sort of plan. The verbs 'devise' and 'contrive' are used and appear to indicate more active involvement. The objective of an agreed solution does not form part of ACAS's definition, but is part of the ILO recommendation.

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<sup>103</sup>UK Coal Mining Ltd v National Union of Mineworkers (Northumberland Area) and Another [2008] IRLR 4 (EAT) paras 38-39.

<sup>104</sup> A point also made in connection with TUPE Royal Mail Group Ltd v Communication Workers Union [2009] IRLR 108 (EAT) para 50.

<sup>105</sup> ACAS 'Redundancy Handling.' (April 2013) B08 13, 20.

<sup>106</sup> BIS, 'Employment Rights on the Transfer of an Undertaking A guide to the 2006 TUPE Regulations for Employees, Employers and Representatives' (2009) URN: 09/1013 23.

<sup>107</sup> In their collective redundancy guidance ACAS mentions the need for representatives to 'to play a constructive part in discussions'. ACAS 'B08 2013' (n 94) 5.

<sup>108</sup> Ibid 20.

<sup>109</sup>E.g. GMB and others v Susie Radin Ltd [2004] 2 All ER 279 (CA) para 46; ACAS 'B08 2013' (n 94) 20.

In addition EU legislation uses the terms ‘consultation’ and ‘consultation’ with a ‘view to reaching agreement’.<sup>110</sup> It would appear that there are different degrees of ‘consultation’.

It is possible to legislate that parties must consult with a view to reaching an agreement,<sup>111</sup> but is difficult to show that they enter a dialogue with the objective of doing so. The only way to prove consultation has taken place is evidence that a worker’s opinion has become part of the employer’s decision-making process. A way of showing that suggestions have been taken into account is for management to produce a reasoned response that includes explanations of why suggestions have not been accepted.<sup>112</sup> But to explain why something is not practicable does not mean that it might be ideal were another approach taken. Management may be doing no more than paying lip service.

Consultation does not require mutual agreement, or a similarity of aims. It only requires consideration of the other’s view. The decision maker is not bound to accept another’s opinion or suggestion. Different sources point to two kinds of consultation. The first is being termed ‘contemplative’ and involves: (1) a process that takes place before a decision has been made; (2) for which there has been adequate preparation; (3) during which there is an exchange of views; and (4) which are considered or contemplated. The second is ‘focused’ it includes the four steps, but with the objective of arriving at an agreed solution. In both cases one party has the authority to make decisions. Consult therefore constitutes two layers of the IPF:

Contemplative Consultation
Focused Consultation

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<sup>110</sup> See Chapter 5.

<sup>111</sup> TULRA, s188(2).

<sup>112</sup> Transfer of Undertakings (Protection of Employment) Regulations 1981 SI 1981/1794, reg 13(7) goes some way towards this (‘and, if he rejects any of those representations, state his reasons’).

#### 4.3.2.4 ‘Consult’, ‘Negotiate’, and ‘Bargain’

Consultation involves an exchange of views or dialogue between two parties. This is also true of negotiation and bargaining. The purpose of this section is to differentiate between the three.

The Shorter Oxford Dictionary defines the verb ‘negotiate’ as:

To confer (with another) for the purpose of arranging some matter by mutual agreement; to discuss a matter with a view to a settlement or compromise... To deal with, manage or conduct (a matter, etc., requiring skill or consideration)... To arrange for, bring about (something) by means of negotiation...<sup>113</sup>

and ‘bargain’ as:

To haggle over terms to negotiate. To arrange terms....<sup>114</sup>

‘Consult’ and ‘negotiate’ stand alone in that, although there are similarities between the definitions, neither is defined in terms of the other. However the OED uses the word negotiate as part of its definition of bargain. This suggests that the two are linked in a way that the others are not. Goldman treated ‘negotiate’ and ‘bargain’ the same way,<sup>115</sup> whilst Walton and McKersie used the terms interchangeably.<sup>116</sup>

Sections 4.3.2.4.1 and 4.3.2.4.2 will examine differences between ‘consult’ and ‘negotiate’ before drawing a distinction between ‘negotiate’ and ‘bargain’.

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<sup>113</sup> Onions (ed) (n 86) Vol II 1303.

<sup>114</sup> Ibid Vol I 157.

<sup>115</sup> Goldman, 'Settlement of Disputes over Interests' in Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Wolters Kluwer Austin 2007) 723.

<sup>116</sup> Walton and McKersie *A Behavioral Theory of Labor Negotiations* (McGraw-Hill New York 1965).

#### 4.3.2.4.1 'Consult' and 'negotiate'

When the dictionary definitions of 'consult' and 'negotiate' are compared three things are evident. Firstly, a clearer purpose is more apparent in the definition of negotiate. It uses the words/phrases 'purpose', 'arranging or bringing about', and 'with a view to settlement or compromise'. These can be contrasted with the more reflective words found describing 'consult': 'counsel', 'confer', 'deliberate', 'plan'. Secondly, the element of 'mutual agreement' in negotiation is lacking in 'consultation'. Thirdly, 'negotiate' also contains additional concepts of settlement and compromise. These differences take on additional inferences in the context of employment relations.

Goldman commented on the disparity between consultation and negotiation.

He stated:

Although there is an uncertain line between consultation and negotiation, consultation, in its pure form, aims at avoiding disputes as contrasted with settling them. It accomplishes this through the exchange of information and persuasion that results in unilateral acts of accommodation. However, if that exploration fails to avoid the dispute, and the issue is not reserved for unilateral resolution, *consultation is readily transformed into negotiation.*<sup>117</sup>

On this premise, once there is disagreement, two things will keep consultation from turning into negotiation: (1) when an issue is not contentious and falls within management prerogative, or (2) when one party is content to acquiesce. This might be because the weaker party lacks the bargaining power to enter into negotiations and force a contractual change.

It has been argued that there is a difference between subjects connected with 'joint *consultation* and those considered suitable for *negotiation*.'<sup>118</sup>

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<sup>117</sup> Goldman, (n 104) 722-723 (emphasis added).

<sup>118</sup> Beaumont 'The Safety Representative Function: Consultation or Negotiation?' (1980) 9 2 PR 17, 17.

Beaumont presumed that health and safety was a subject that would encourage ‘consultation’, as opposed to ‘negotiation’, because union and management should have similar aims. Analysis of his data indicated that a basic similarity of aims on a subject encourages consultation, as opposed to negotiation.<sup>119</sup> However, the attitude of both parties was very important. He found that perceptions of management’s attitude towards union involvement affected whether representatives defined their function as consultation or negotiation.<sup>120</sup> Therefore the perception that management was hostile or reticent to consider ideas seriously meant that representatives changed their style of interacting to negotiation.<sup>121</sup>

The definition in the OED connects negotiation with problems and agreeing solutions. This contrasts with consultation which emphasises joint consideration and planning. Two additional factors distinguish the terms consult and negotiate. First is bargaining power. Second is the attitude of mind that either or both parties bring to the process.

#### 4.3.2.4.2 ‘Negotiation’ and ‘bargaining’

Goldman distinguished between ‘negotiation’ and bargaining’. He defined the process of negotiation as ‘clarifying issues, exchanging information, exploring alternative settlements, examining the consequences of not settling, persuasion and mutual accommodation’.<sup>122</sup> He stated that in some countries, for example Germany, ““bargaining” is used to denote a settlement reached under pressure of a work stoppage...”<sup>123</sup> Although Walton and McKersie used the terms interchangeably, their distinction between different types of bargaining (distributive and integrative bargaining) corresponded with Goldman’s definitions.

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<sup>119</sup> Ibid 18.

<sup>120</sup> Ibid 19-20. Representatives who felt management did not minimise union involvement in decision-making would describe their function as consultation.

<sup>121</sup> Such influences are explored more fully in Chapters 6 and 7.

<sup>122</sup> Goldman, (n 104) 722.

<sup>123</sup> Ibid.

Walton and McKersie defined negotiation as ‘the deliberate interaction of two or more complex social units which are attempting to define or redefine the terms of their interdependence.’<sup>124</sup> Three types of issues were identified as giving rise to different levels of conflict:<sup>125</sup> (1) economic,<sup>126</sup> (2) rights and obligations,<sup>127</sup> and (3) relationship patterns.<sup>128</sup> They argued that conflict of interest, coupled with the relative strength of labour, determines how the parties approach negotiation. Specific terms were used to describe how parties bargain; the most relevant to this chapter are ‘distributive’ and ‘integrative’ bargaining.<sup>129</sup>

#### *4.3.2.4.2.1 ‘Distributive Bargaining’*

The conduct which was termed ‘distributive bargaining’ infers goal conflict or perceived goal conflict concerning the dividing of limited resources.<sup>130</sup> The types of issues over which it takes place are of common concern and often economic in nature (e.g. wages and terms of employment). An extreme form would be ‘conjunctive bargaining’ where ‘the parties agree to terms as a result of mutual coercion and arrive at a truce only because they are indispensable to each other... It provides no incentive to the parties to do more than carry out the minimum terms of the agreement which has temporarily resolved their divergent interests.’<sup>131</sup>

#### *4.3.2.4.2.2 ‘Integrative Bargaining’*

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<sup>124</sup> Walton and McKersie (n 105) 3.

<sup>125</sup> Ibid 18.

<sup>126</sup> This contains the most inherent conflict because it concerns the direct allocation limited economic resources (pay, vacations, and benefits).

<sup>127</sup> I.e. discipline and discharge, job rights, lay off, transfer and work schedules.

<sup>128</sup> Factors affecting relationships such as the degree or absence of co-operation, involvement, and participation. Walton and McKersie (n 105) 17-18.

<sup>129</sup> The other terms are attitudinal structuring (relating to basic relationship bonds) and intra-organisational bargaining.

<sup>130</sup> Walton and McKersie (n 105) 9; Chamberlain and Kuhn *Collective Bargaining* (McGraw-Hill New York 1965) in Fox *Beyond Contract: Work, Power and Trust Relations* (Faber and Faber Limited London 1974) 29.

<sup>131</sup> Chamberlain and Kuhn in Fox (n 119) 29. Distributive Bargaining would be the type used in CB in the UK.

‘Integrative bargaining’ occurs when each party’s objectives do not fundamentally conflict. The ‘nature of the problem permits solutions which benefit both parties, or at least when the gains of one party do not represent equal sacrifices by the other...’<sup>132</sup> An example would be modifying a grievance procedure. The authors distinguish between issues that are settled because the parties compromise (the stuff of ‘distributive bargaining’) and problem solving. ‘Compromise does not create, it deals with what already exists; integration creates something new...’<sup>133</sup>

Walton and McKersie proposed that strategies or tactics vary according to goals and circumstance. Goldman used the term mutual accommodation in respect of negotiation. Definitions of ‘distributive’ and ‘integrative’ bargaining distinguished between subjects where mutual accommodation is or is not likely. For the purposes of the IPF ‘negotiate’ shall be used for integrative bargaining whilst ‘bargain’ will equate with distributive bargaining. This difference in attitude forms the point at which the IPF divides.

Like the other terms already considered in the IPF, ‘negotiation’ easily exists within the co-determination model and human resources model. However, the co-operative nature of co-determination means that ‘bargaining’ within organisations only fits in with the market model. The next two layers of the IPF are.

Negotiation	
	Bargaining

#### 4.3.2.5 ‘Collective Bargaining’

Bargaining may occur at any level of an organisation. Senior staff with a rare skill set are in a much stronger position to bargain a wage increase than those on the shop floor. It is therefore often more effective for bargaining to

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<sup>132</sup> Walton and McKersie (n 105) 5.

<sup>133</sup> Metcalf and Urwick *Dynamic Administration: The Collected Papers of Mary Parker Follett* (Harper Collins New York 1942) 34-35 in Walton and McKersie (n 105) 128.

take place collectively. This is because the ultimate sanction employees have is to withdraw their labour. The greater the proportion of employees threatening to take action the larger the potential impact on an organisation. The cost/benefit of potential losses then become a factor in deciding a solution. ACAS states that CB is 'quite different from consultation where the responsibility for decision-making remains with management. With CB both employer and trade union take responsibility for fulfilling the bargain.'<sup>134</sup>

CB can take place at organisational, sectoral, and national level. The level at which it takes place can have implications for the participative processes in organisations.<sup>135</sup> In Belgium, France, Germany, Luxembourg, and the Netherlands, trade unions engage in CB at national or sectoral level through representative institutions.<sup>136</sup> German unions are said to favour CB on a sectoral level to determine terms and conditions because it gives them greater bargaining power.<sup>137</sup>

CB has been an integral part of the co-determination and market models. However, whereas it tends to occur at sectoral level in the former, it generally refers to sectoral, plant, and organisational level<sup>138</sup> in the latter. At plant level the historical potential for industrial action in the market model can be contrasted with the consensual corporate model. Literature referred to Japan as having a more consensual approach within organisations,<sup>139</sup> and at national level, CB has been the 'exception'.<sup>140</sup> Although less widespread

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<sup>134</sup> ACAS 'B06 2009' (n 85) 4.

<sup>135</sup> Dachler and Wilpert (n 55) 26.

<sup>136</sup> See n 83.

<sup>137</sup> Dachler and Wilpert (n 55) 26.

<sup>138</sup> Willman, Gomez and Bryson 'Trading Places: Employers, Unions and the Manufacture of Voice' (2008) Discussion Paper No 884 CEP 32.

<sup>139</sup> Morishima 'Informatin Sharing and Collective Bargaining: Effects of Wage Negotiation in Japan' (1991) 3 44 ILR Rev 469.

<sup>140</sup> The International Labour Organisation Publication *Collective Bargaining Negotiations* (<http://www.ilo.org/public/english/dialogue/actemp/downloads/publications/srscbarg.pdf> accessed 08 01 2013, 26 June 1996).

than in the past, CB is still relied upon to determine terms and conditions of employment.<sup>141</sup>

The layer beneath 'Bargaining' is:

Collective bargaining

#### 4.3.2.6 Co-determination and Beyond

Joint decision-making and co-determination follow consultation on the IDE scales. The De Jure Scale stresses employee power within a group to veto or approve a decision. The Involvement Scale's definition is 'decision-making with workers being given equal weight'. Blumberg stated that German literature sub-divides co-determination as follows:<sup>142</sup>

*Co-determination* (Workers control decisions and are responsible for them)

1. Workers have the right of veto
  - (a) Temporary, after which management
    - (i) may implement its decisions
    - (ii) must negotiate with workers
  - (b) Permanent
2. Workers have the right of co-decision
3. Workers have the right of decision

However, workers are not necessarily given equal weight in the decision-making process. In Germany either one third or a half of an organisation's supervisory board may be employee representatives.<sup>143</sup> The first, more common practice, does not constitute the Involvement Scale's definition of 'equal weight'. Board-level employee representatives have the right of co-decision-making, but, unlike representation on works councils, no right to secure agreement over a decision. Sections 2 & 3 of Blumberg's Scale

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<sup>141</sup> Collective bargaining is discussed in Chapter 7.

<sup>142</sup> Blumberg *Industrial Democracy: the Sociology of Participation* (McGraw-Hill London 1960) 71.

<sup>143</sup> — 'German Co-determination' (n 38).

appeared to coincide with the final two segments of the IDE's De Jure Scale and Involvement Scale.

Neither the De Jure Scale nor Blumberg's Scale mentioned co-decision-making with redress to arbitration. In Germany works councils can refer matters of disagreement (on limited issues) to an arbitration committee.<sup>144</sup> In the Netherlands a company must seek the advice of its works council in advance of making strategic planning decisions. If agreement is not reached and the company decides to continue, the decision must be postponed for a month. During this time works councils can lodge an appeal to a Court which might result in management's plans being overturned.<sup>145</sup> Additional layers of the IPF will be added to 1(a) and 2. The final layers of the IPF are therefore:

<p>Co-determination</p> <p>7 The right of veto:</p> <p>(a) Temporary: after which management:</p> <ul style="list-style-type: none"> <li>(i) may implement its decisions</li> <li>(ii) must negotiate with workers</li> <li>(iii) must go to arbitration</li> </ul> <p>(b) Permanent</p> <p>8 Workers have the right of co-decision-making:</p> <ul style="list-style-type: none"> <li>(i) as a proportion of a committee</li> <li>(ii) with redress to arbitration</li> </ul>	<p>9 Workers have the right of Decision-making</p>
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#### 4.3.2.7 The Involvement and Participation Framework

Table 4.4 shows the complete IPF:

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<sup>144</sup> — 'Germany Works Councils' (n 42).

<sup>145</sup> van het Kaar (n 42).

**Table 4.4**  
**The Involvement and Participation Framework (IPF)**

<ol style="list-style-type: none"> <li>1. Information, ex poste</li> <li>2. Information, ex ante</li> <li>3. Communication</li> <li>4. Contemplative Consultation</li> <li>5. Focused Consultation</li> <li>6. Negotiation</li> </ol>	
Co-determination 7.2 The right of veto: (a) Temporary: after which management: (i) may implement its decisions (ii) must negotiate with workers (iii) must go to arbitration (b) Permanent 8 Workers have the right of co-decision-making: (i) as a proportion of a committee (ii) with redress to arbitration	7.1 Bargaining 8.1 Collective Bargaining
9 Workers have decision-making rights	

From ‘information’ to ‘consultation’, the IPF includes the full range of terms used by the five authors in Table 4.1. However, it distinguishes between ‘contemplative’ and ‘focused’ ‘consultation’ and includes the ‘new’ term ‘negotiation’. So far, it is ordered in terms of increasing employee involvement in the decision-making process. The IPF differentiates between the very different processes of ‘co-determination’ and ‘bargaining’/‘collective bargaining’ by splitting into two. Unlike the 5 authors, it goes on to fully order different levels of co-determination before finishing with workers having full control.

#### 4.4 CONCLUSION

The purpose of this chapter was to create a thorough typology of the theory and mechanics of I&P. Six factors that influence I&P were identified. It was found that terms relating to I&P depth had not been fully analysed in the literature. Section 4.3 drew on different meanings attributed to I&P and I&P practices to create clear definitions. A comprehensive Involvement and Participation Framework was then created against which the full range of I&P practices may be analysed and evaluated.

Choices made by organisations are governed by legislation, culture, and the attitude of those taking part. The objectives behind I&P practices are not necessarily planned or clear. Approaches taken by management, workers, or government have been influenced by the economy and changing perceptions of the roles of the state and labour within organisations.

Compared with the human resources model, the co-determination model is more likely to ‘interfere’ with management prerogatives to encourage employees/management to benefit from employee involvement.

The EU has opted to implement its policy using aspects of the co-determination model via indirect, rather than direct, I&P.<sup>146</sup> This has implications for the UK. With the exception of trade union and health and safety law, legislation requiring I&P in the UK has been the result of EU initiatives. This further limits the autonomy of management to choose:

1. the subjects upon which I&P should take place;
2. the level at which I&P should take place;
3. whether to communicate through indirect or direct I&P;
4. what form of I&P to use;
5. how formal a structure, if any, there should be;
6. not to act if there is there does not appear to be a valid case for a type of I&P.

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<sup>146</sup> See Chapter 5.

Chapter 5 analyses EU policy in more detail by looking at differences in European legislation that involves I&P. Unlike UK government policy the EU has consistently advocated I&P for social and economic purposes. This is despite changing attitudes towards the co-determination model and evidence that works council-type bodies are being undermined by market pressures.<sup>147</sup> The validity of the EU's policy for the UK will be questioned in Chapters 6 and 7.

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<sup>147</sup> See 5.1.

# Chapter 5 An Analysis of Seven Measures Requiring Involvement and Participation

This chapter analyses six European Directives and one Regulation that require involvement and participation (**I&P**). They are:

- The Collective Redundancies Directive<sup>1</sup> (**CR Directive**)
- The Acquired Rights Directive<sup>2</sup> (**AR Directive**)
- Health and Safety Directive<sup>3</sup> (**H&S Directive**)
- The European Works Council Directive<sup>4</sup> (**EWC Directive**)
- The European Company Regulation and Directive<sup>5</sup> (**ECo Regulation Directive**)
- The Information and Consultation Directive<sup>6</sup> (**IC Directive**)

Chapter 3 showed that to secure agreement Community proposals were altered and sometimes left ambiguous. Few cases have focused on issues that directly or indirectly concern I&P. In order to better understand how the European Court of Justice (**ECJ**) would approach statutory interpretation section 5.1 looks at the ECJ's methodology. Subsequent sections use its

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<sup>1</sup> Council Directive (EC) 98/59 on the approximation of the laws of the Members States relating to collective redundancies [1998] OJ L225/16.

<sup>2</sup> Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses [2001] OJ L82/16.

<sup>3</sup> Council Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

<sup>4</sup> Council Directive 2009/38/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 [2009] OJ L122/28.

<sup>5</sup> Council Regulation (EC) No 2157/2001 on the Statute for a European company (SE) 2001 L294/; Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294.

<sup>6</sup> Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

tools of interpretation and a mixture of case law, EU sources, and academic commentary to develop a clearer understanding of I&P in EU legislation.

Section 5.2 examines the seven measures in relation to the six factors, identified in Chapter 4, that combine to produce different kinds of I&P:

7. The purpose or objective of the exercise;
8. Subject matter;
9. The level at which the interaction takes place;
10. Who is involved;
11. The formality of the I&P mechanism;
12. Depth or type of involvement or participation (e.g. workers are ‘informed’, ‘consulted’, or entitled to ‘co-determination’)

In doing so, it identifies factors that should impact on the way management and workers conduct their relationships under EU provisions.

A flexible approach to drafting means that EU primary and secondary legislation has either failed to define, or has defined the terms ‘participate’, ‘inform’, ‘consult’, and ‘negotiate’ in different ways. The potential meaning of some terms has not been clarified, but made more complex by case law.<sup>7</sup> Section 5.3 assesses and evaluates EU terms using, secondary sources, the literature, and Chapter 4’s Involvement and Participation Framework (IPF).

Chapter 5 shows how EU policy promotes indirect participation via formal participatory bodies using the six factors identified in Chapter 4. Section 5.3 then examines the EU’s terminology against that in Chapter 4. It questions the ECJ’s interpretation of ‘consultations... with a view to reaching an agreement’<sup>8</sup> and exposes problems with some of the EU’s definitions that go to the heart of providing effective I&P.

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<sup>7</sup> E.g. Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel* [2005] ECR I 885.

<sup>8</sup> Ibid.

## 5.1 THE ECJ'S APPROACH TO STATUTORY INTERPRETATION

Problems with interpretation arise when legislation is unclear, or does not define key words or terms. With undefined words, the ECJ generally applies 'recognized principles of interpretation by referring... to the ordinary meaning to be attributed to that term in its context and by obtaining such guidance as may be derived from Community texts and from concepts common to the legal systems of the Member States.'<sup>9</sup> Is it possible to infer some sort of hierarchy of interpretative aids when interpreting EU instruments?

ECJ rulings are limited by the questions that come before it. Under Article 258 TFEU the Commission brings before the ECJ Member States which have failed to properly implement Directives. When the judicial body of a Member State is uncertain of EU law it refers question(s) to the ECJ under Article 267 TFEU. Relatively few cases have involved I&P. However, ECJ decisions relating to legislation discussed in this chapter may indicate the ECJ's approach on other issues.

To illustrate the ECJ's methodology Arnulf<sup>10</sup> cited three features of European Law found in *CILFIT*:<sup>11</sup>

- (a) all languages in which legislation is drafted are regarded as equally authentic;
- (b) terms and concepts specific to Community Law may have different meanings from those of Member States;
- (c) that every provision is interpreted within the context of Community Law in its present state of development.

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<sup>9</sup> Case C-105/84 *Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar, in liquidation* [1985] ECR 2639 [23].

<sup>10</sup> Arnulf *The European Union and its Court of Justice* (2nd edn Oxford EC Law Library Oxford 2006) 607.

<sup>11</sup> Case 283/81 *CILFIT v Ministry of Health* [1982] ECR 3415 paras 17-20.

In addition to this he associated Article 296 TFEU's requirement that '[l]egal acts shall state the reasons on which they are based...' with the ECJ's teleological and contextual approach when clarifying ambiguities and filling in the gaps in the legal framework.<sup>12</sup> Hartley also highlighted the ECJ's teleological and contextual approach. He wrote that the ECJ places great emphasis on: the scheme of the instrument; its legislative context (systematic interpretation); and on the aims and purposes of the instrument.<sup>13</sup> Methods of interpretation used by Advocate General (AG) Jacobs in his opinion in *ARD v PRO*<sup>14</sup> included: (a) literal, (b) legislative history, (c) systemic (the context of a piece of legislation), and (d) the aims of the Directive. He pointed out that the Court used legislative history infrequently and it is generally regarded as a supplementary form of interpretation.<sup>15</sup>

The ECJ relies on more than one method of interpretation. Arnulf suggested that 'that there is no fixed hierarchy among the range of interpretative methods available to the Court: the Court simply selects those it considers most appropriate in the circumstances.'<sup>16</sup> When overviewing the literature and case law relating to the seven measures six tools of interpretation were identified. They are outlined below.

### 5.1.1 Interpretation in Context

When terms are not defined, definitions are unclear, or text is ambiguous, the ECJ looks at the natural meaning of the text (literal interpretation) and how wording may be affected by the rest of a measure. An example of this

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<sup>12</sup> Arnulf (n 10) 612.

<sup>13</sup> Hartley 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 LQR 95.

<sup>14</sup> Case C-6/98 *Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH*. [1999] ECR 7599 AG, paras 17-51.

<sup>15</sup> The ECJ has not attached weight to declaratory statements made at the meeting of the Council adopting Directives Arnulf (n 10) 619 citing Antonissen, *Generics and Denkavit Internationaal*.

<sup>16</sup> Ibid 617.

was in *Dansk Metalarbejderforbund v Nielsen*.<sup>17</sup> The ECJ found that no other provision in the CR Directive supported the argument that the term ‘collective redundancies’ might be extended beyond the definition given in Article 1(1)(a).

### 5.1.2 The EU’s ‘Foundations’

In order to be valid EU measures must have a sound legal base, usually a treaty article. When the treaty is silent, the ECJ has drawn on common constitutional traditions and contemporary international instruments.<sup>18</sup> In *Kadi* the ECJ referred to the general principle of effective judicial protection being reaffirmed by the Charter of Fundamental Rights for the European Union.<sup>19</sup> The decisions point towards such measures influencing interpretation under the right conditions.

### 5.1.3 Recitals

The ECJ uses information found in a legislative measure’s preamble to aid interpretation. For example in *Commission v Portugal* it found that Portugal had inadequately defined ‘collective redundancy’ by excluding circumstances unconnected with the will of an employer (e.g. compulsory purchase or force majeure).<sup>20</sup> In addition to Article 1(1)(a) of the CR Directive, the ECJ used the third, seventh, and ninth recitals of the preamble to clarify the concept of redundancy.<sup>21</sup>

The legislature has increasingly made use of recitals to illustrate its objectives. The number of recitals in the CR Directives increased from six

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<sup>17</sup> Case C-284/83 *Dansk Metalarbejderforbund and Specialarbejderforbundet i Denmark v H Nielsen & Søn, Maskinfabrik A/S* [1985] ECR 553 para 8.

<sup>18</sup> Craig and De Burca *EU Law Text, Cases and Materials* (3rd edn Oxford University Press Oxford 2003) 323-324.

<sup>19</sup> Case C-402/05P and C-415/05P *Joined Cases Kadi and Al Barakaat International* [2008] ECR I 6351.

<sup>20</sup> Case C-55/02 *Commission of the European Communities v Portuguese Republic* [2004] ECR 9387.

<sup>21</sup> *Ibid* paras 52-54; Case C186/83 *Arie Botzen and others v Rotterdamsche Droogdok Maatschappij BV* [1985] ECR 519, para 6; Case C-24/85 *Jozef Maria Antonius Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen BV* [1986] ECR 1119.

in 1975 to 13 in 1998. It appears that recitals are sometimes used in order to create a compromise acceptable to Commission, Council, and European Parliament.<sup>22</sup> During negotiations regarding the EWC Directive 1994 the European Parliament called for account to be taken of employee categories when selecting a works council. The Commission responded that this constituted a principle that was unknown in much existing national legislation and practice. However, the principle became enshrined in the recitals.<sup>23</sup> It could be argued that this was used to bring best practice to the attention of Member States' legislatures.

Alaimo indicated a discrepancy between the EWC Directive 1994's recital and text. The text limited its mandate to issues that concern undertakings or establishments in at least two different Member States whereas the sixteenth recital had a more 'flexible terminological attitude'.<sup>24</sup> She stated:

...it may be that the ECJ will interpret the Directive so as to widen the parameters of the EWCSSs, drawing on the preamble to do so.

One can only speculate whether the discrepancy between the body of the text and the preamble was intentional, to allow the ECJ to enact changes in the law in interpreting the Directive that the European business interests prevented the political institutions from introducing, or whether it was a unintentional slip stemming from a

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<sup>22</sup> Also the social partners within the context of Article 154.

<sup>23</sup> Commission of the European Communities *Reexamined Proposal for a Council Directive on the Establishment of a European Works Council or a procedure in Community-scale Undertakings and Community-scale Groups of Undertakings for the Purpose of Informing and Consulting Employees*. (COM (94) 406 final, 1994) 3. It provided for balanced representation where Member States considered it appropriate. The need (where possible) for balanced participation has since been incorporated into Article 6(1)(b) of the 2009 EWCD.

<sup>24</sup> '...the mechanisms for informing and consulting employees... must encompass all of the establishments or, as the case may be, the group's undertakings located within the Member States...'.

lack of coordination between the preamble and the main body of the text.<sup>25</sup>

Additions/compromises included in recitals may provide material to influence ECJ judgments and potentially expand a Directive's provisions beyond its Articles and Annex.

#### 5.1.4 Comparing Language Versions

Three cases (*Rockfon*,<sup>26</sup> *Akavan*,<sup>27</sup> and *Henke*<sup>28</sup>) indicate different ways in which the ECJ uses various language versions of the same Directive. The judgment in *Rockfon* points to a hierarchy of interpretation. The clear meaning of the text takes primacy when all language versions give rise to the same interpretation. When this is not the case other tools are used.

In *Akavan* the court compared different language versions to establish what the Community legislature envisaged by the expression 'is contemplating collective redundancies'.<sup>29</sup> In *Rockfon* the ECJ found that the term 'establishment' had different connotations in various language versions.<sup>30</sup> However, in *Henke* the ECJ first referred to the Directive's preamble<sup>31</sup> before stating:

This interpretation, moreover is borne out by the terms used in most of the language versions... and is not contradicted by any of the other language versions of the text.<sup>32</sup>

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<sup>25</sup> Alaimo 'The New Directive on European Works Councils: Innovations and Omissions' (2007) 26 2 Int J Com LLIR 217 221.

<sup>26</sup> Case C-449/93 *Rockfon A/S v Specialarbejderforbundt i Danmark* [1995] IRLR 169.

<sup>27</sup> Case C-44/08 *Akavan Eritysalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers O.* [2010] ECR I 8163.

<sup>28</sup> Case C-298/94 *Annette Henke v Gemeinde Schierke and Verwaltungsgemeinschaft Brocken* [1996] ECR 4989.

<sup>29</sup> *Akavan* (n 27).

<sup>30</sup> *Rockfon* (n 26) paras 28-32.

<sup>31</sup> *Henke* (n 28) para 13.

<sup>32</sup> *Ibid* para 15.

It appears that where the meaning is not clear from comparing language versions the ECJ will use a non-definitive comparison as *part* of its ‘general scheme of rules’ to support its judgment.

### 5.1.5 Comparing Different Directives

Because the meaning of words and phrases can be influenced by context, comparing legislative measures is problematic. Context can be discovered by analysing how a measure’s language fits its objectives. Alternatively the legislature may have expressed its intention to connect one measure with another.<sup>33</sup>

The Commission’s ‘Memorandum on the AR Directive’<sup>34</sup> lends support to the model of using the meaning in one Directive to interpret another. When defining the extent of the obligation in Article 7 of the AR Directive to ‘consult... with a view to seeking agreement’ it stated that the ECJ had interpreted a similar provision in the CR Directive.<sup>35</sup> The Commission used the case to establish that, under the AR Directive, consultation must be made ““in good time” with the employees’ representatives’.<sup>36</sup>

The legislature’s use of the same word, definition, or phrase does not guarantee that it intended to imply the same meaning in all Directives. In *Rockfon* the ECJ looked at the meaning of the undefined term ‘establishment’ in the CR Directive. It found that the term had to have a universally applicable meaning, and could not be interpreted according to the laws and practices of member states.<sup>37</sup> AG Mengozzi looked at the CR and IC Directives in a later case.<sup>38</sup> He argued that the way establishment

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<sup>33</sup> E.g. ECo Directive 2001/86 Art 2(a).

<sup>34</sup> Commission *Memorandum from the Commission on acquired rights of workers in cases of transfers of undertakings* (COM (97) 085 final, 1997) The Commission was referring to *Dansk v Nielson* (n 17).

<sup>35</sup> *AR Memorandum 97/85* (n 34) section 4.

<sup>36</sup> *Ibid 10.*

<sup>37</sup> Para 25.

<sup>38</sup> Case C-1385/05 *Confédération Générale du Travail (CGT) and Others v Premier Ministre and Ministre de l'Emploi, de la Cohésion sociale et du Logement*. [2007] ECR I 611.

was defined in the IC Directive (with reference to national law and practice) made it incompatible with that definition in *Rockfon*.<sup>39</sup>

However, AG Mengozzi continued ‘that example *does not mean that it would be impossible*, in the context of Directive 98/59, to define the meaning of “employee” in exactly the same way as that term is defined in Directive 2002/14.’<sup>40</sup> He stated that it was not intended to extend the definitions in the IC Directive to the CR Directive ‘not least in the absence of clear evidence that that was the express intention of the authors’.<sup>41</sup> The presumption appears against indiscriminately using definitions in one Directive to interpret another.

Using another Directive to clarify or fill in a gap of an undefined or differently defined term appears imprudent without careful consideration. If it is done it may imply an intention which was not considered. AG Mengozzi weighed the following factors: the discretion allowed by the legal base upon which a Directive is based; whether the legislation makes a connection; the time between which measures were adopted; existing judgements; and the expressed intention of the legislature.<sup>42</sup>

Comparing Directives appears to be very low down the hierarchy of ways used to interpret legislative measures. In the two cases where the term ‘consult/consultation... with a view to reaching agreement’ was analysed, neither the AG nor the ECJ considered the word ‘consult’ in the light of existing definitions in other Directives. In the absence of indications by the Legislature, comparison does not appear to be a valid tool in the context of I&P.

### **5.1.6 Trauvaux Preparatoires**

The ECJ has looked at *travaux préparatoires* in order to interpret legislation. In *Commission v UK* evidence from minutes of a Council

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<sup>39</sup> Ibid AG para 80.

<sup>40</sup> Ibid para 81. Emphasis added. This reasoning is somewhat problematic because the term ‘employee’ is not used in the Collective Redundancies Directive.

<sup>41</sup> Ibid para 82.

<sup>42</sup> Ibid paras 79-82.

meeting led to the ECJ's rejecting the Commission's claim that employers should be subject to a form of no fault liability.<sup>43</sup> In *Rockfon*<sup>44</sup> the ECJ supported its interpretation of the term 'establishment' by referring to the Commission's initial proposal for a Directive. The Council replaced the term 'undertaking' with 'establishment' and the ECJ stated that this 'meant that the definition originally contained in the proposal and considered to be superfluous was deleted.'<sup>45</sup> No evidence supported this conclusion. The minutes of the Working Party revising the CR Directive show that the Council did not unanimously agree the original definition for establishment; four of its nine Members of the council favoured deleting it 'on the grounds that it could give rise to difficulties of interpretation'.<sup>46</sup> It appears that the definition was not abandoned because it was superfluous but because Member States could not agree on a description.

Where motives are clearly expressed, *travaux préparatoires* give an insight into how legislative measures developed. However, using proposals without the minutes of working party discussions and other such documentation do not provide a complete picture. This means, as in *Rockfon*, that reasons surrounding such alterations might be subject to a degree of speculation.

### 5.1.7 Conclusion

It has been seen that the ECJ has no fixed hierarchy of tools to interpret legislative measures. In *Dietmar* the ECJ stated that:

according to settled case-law, in interpreting a provision of Community law it is necessary to consider not only its wording but

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<sup>43</sup> Case C-127/05 *Commission of the European Union v United Kingdom* [2007] ECR I paras 43-45.

<sup>44</sup> *Rockfon* (n 26); *Commission v UK (H&S)* (n 43).

<sup>45</sup> *Rockfon* (n 26) para 33.

<sup>46</sup> The Council. Working Party on Social Questions 'Draft Council Directive on the approximation of the laws of the Member States relating to mass dismissals' (692/74 (SOC 69), 3 April 1974) para 11a.

also the context in which it occurs and the objectives pursued by the rules of which it is part...<sup>47</sup>

Techniques, such as literal interpretation, are at the forefront of the ECJ's methods but *Henke* indicated that there is no consistent pattern to the ECJ's approach. It appears to use other aids to interpretation (like *travaux préparatoires* and comparing two Directives) rarely. The changing dynamics of community policy, lack of a hierarchy in methods of interpretation, and the problematic nature of some tools, means that any interpretation should be treated with caution. Sections 5.2 and 5.3 draw upon the ECJ's approach to statutory interpretation to better understand the characteristics of I&P under EU law.

## **5.2 THE SCOPE AND MECHANICS OF INVOLVEMENT AND PARTICIPATION**

The next sections look at EU policy relating to I&P in the context of the seven measures in the introduction. It examines them in the context of the six factors identified in Chapter 4.

### **5.2.1 A Provision's Purpose or Objective**

Establishing an EU legislative measure's purpose can be problematic. Differing agendas and compromises illustrated in earlier chapters support *EEckhout*'s statement that the Commission, Council, and Parliament not only differ in intention amongst themselves, but also internally.<sup>48</sup> In addition to this *Kenner* referred to the flexibility of recent Directives stating that textual opaqueness meant that they read more like collective agreements based on the lowest common denominator than crisp and coherent laws for implementation.<sup>49</sup>

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<sup>47</sup> Case C-466/07 *Dietmar Klarenberg v Ferrotron Technologies GmbH*. [2009] ECR I 00803 para 37.

<sup>48</sup> *EEckhout* 'The European Court of Justice and the Legislature' (Inaugural lecture as Herbert Smith Professor of European Law, Kings College London) <<http://fds.oup.com/www.oup.co.uk/pdf/0-19-829879-X.pdf>> accessed 1 August 2010, 17.

<sup>49</sup> *Kenner* 'EC Employment Law' (1998) 148 6855 Ind LJ 1316.

Where gaps are left the ECJ has adopted a purposive interpretation. When the UK<sup>50</sup> was found to have failed to ensure a universal obligation to consult during the collective redundancies process the ECJ stated the CR Directive is:

not designed to bring about full harmonization of national systems of worker representation in undertakings... the limited extent of the harmonization... cannot prevent Member States from being required to take all appropriate measures to ensure that workers' representatives are designated with a view to complying with [the directive]<sup>51</sup>

However, the underlying purpose a measure is not always clear.

With the exception of measures relating to the European Company, all Directives examined in this chapter refer directly or indirectly to Article 136 (Article 151 TFEU) (the promotion of improved working conditions).

However, the CR and AR Directives also refer to Article 94 (Article 115 TFEU) (the functioning of the internal market) and the objectives of both Articles potentially conflict. AG Mengozzi commented on the 'dual nature' of the CR Directive stating that

‘...the legislature noted... that the Community system is based on social objectives... however, the Directive was adopted using... [Article 94] which provides for... the establishment or functioning of the common market’<sup>52</sup>

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<sup>50</sup> Case C-382/92 and C-383/92 *Commission v United Kingdom of Great Britain and Northern Ireland* [1994] ECR 2435.

<sup>51</sup> Ibid ECJ 25.

<sup>52</sup> Case C-12/08 *Mono Car Styling SA v Odemis* [2009] ECR I 6653, AG para 32.

The ECJ stressed the CR Directive's social, not economic, objectives, stating that the Directive's intention is 'to afford greater protection to workers in the event of collective redundancies.'<sup>53</sup>

But the ECJ has not been consistent in favouring worker protection over promoting the internal market. Hunt argued that the ECJ's jurisprudence in extending protection afforded by the AR Directive provoked a political response leading to an attempt to re-orientate the court through legislative intervention. Although the Community's legislative channels were unable to reach an agreement and revise the Directive, the 'court has to some extent effected such change itself.'<sup>54</sup> This change was initially reflected in the decision in *Rygaard*,<sup>55</sup> which was the first occasion in which the ECJ decided that there had not been a transfer of an undertaking. It is difficult to know whether the current economic climate will lead the ECJ to emphasise economic over social objectives.

The objectives of the three early Directives are issue specific and involve economic problems or risks. Later measures have more general policy objectives. At various times the Commission/EU has indicated that I&P in its proposals would: (1) lead to humanisation of working conditions; (2) help organisations adapt to market conditions and increase competitiveness; and (3) promote employee involvement within the workplace.<sup>56</sup> These claims, in respect of the UK will be discussed in Chapters 6 and 7.

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<sup>53</sup> *Rockfon* (n 26) para 29; Case C-187/05 *Agorastoudis and Others v Goodyear Hellas ABEE Joined cases C-187/05 to C-190/5* [2006] ECR I 7775, para 34; Case C-250/97 *Dansk Metalarbejderforbund (Acting on behalf of John Lauge and Others) v Lønmodtagernes Garantifond* [1998] ECR I 8737, para 19.

<sup>54</sup> Hunt 'The Court of Justice as a Policy Actor: The Acquired Rights Directive' (1998) 18 *Legal Studies* 336, 358-359.

<sup>55</sup> Case C-48/94 *Ledernes Hovedorganisation, acting for Ole Rygaard v Dansk Arbejdsgiverforening, acting for Strø Mølle Akustik A/S* [1995] ECR 2745.

<sup>56</sup> European Commission *Employee participation and company structure in the European Community (Green Paper)* (Bull Supp 8/75, pg 54, 1975); Commission *Communication on worker information and consultation* (COM(95) 547 final, 1995) 7; IC Directive 2002/14 recitals 7-10.

## 5.2.2 Subject Matter

The seven measures can be placed into three categories. Early Directives involving I&P focused on specific issues and were responses to (i) specific events (CR and AR Directives) and (ii) specific risks (the H&S Directive). Compared with later measures, (which concern organisations' performances, circumstances, and plans) all three provide more detail as to the scope of information and consultation required. Chapter 3 showed that finding an acceptable formula to regulate I&P on general issues (e.g. recent and probable development of the undertaking's or the establishment's activities, production, employment, and economic situation)<sup>57</sup> was problematic.

Directives differ in the degree to which they specify areas over which I&P shall take place. The CR,<sup>58</sup> AR,<sup>59</sup> H&S,<sup>60</sup> and IC<sup>61</sup> Directives detail the areas in which they require I&P within the Directive. The EWC and ECo Directives only specify subjects within their Annexes under Article 7's subsidiary requirements/standard rules (these apply where parties agree, or by default, where no agreement has been reached). There is the potentiality for multiple standards across the EU where parties agree to differ from these standard rules,<sup>62</sup> or if there are pre-existing agreements.<sup>63</sup>

Subject matter impacts upon the level within an organization that I&P takes place and who is involved. The need to include workers at every level of an organisation in matters of health and safety can be contrasted with representatives of all employees interacting with the top levels of management on European Works Councils. These issues are discussed in more detail in Sections 5.2.3 and 5.2.4.

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<sup>57</sup> IC Directive 2002/14 Art 4(2); EWC Directive 2009/38 Annex 1(a).

<sup>58</sup> Art 2(3).

<sup>59</sup> Art 6.

<sup>60</sup> Arts 10 and 11.

<sup>61</sup> Art 2(2).

<sup>62</sup> EWC Directive Arts 6 and 14; ECo Directive Art 7.

<sup>63</sup> Detailed in Sections 5.3.2.4; 5.3.2.6; 5.3.4.2; 5.3.4.3.

### 5.2.3 The Level at Which Interaction Takes Place

The EU has legislated for ‘involvement’ and ‘participation’. ‘Participation’ is only found in the ECo Regulation and entails taking part in, or helping to form a company’s supervisory or administrative organ.<sup>64</sup> ‘Involvement’ is more common and has been defined as ‘any mechanism, including information, consultation and participation, through which employees’ representatives may exercise an influence on decisions to be taken within the company’.<sup>65</sup> This may take place at any level within an organisation below that of supervisory organ.

The level of worker involvement might concern an individual department or the whole organisation. Of the earlier Directives only the AR Directive specifically targets involvement by those *affected* (by a transfer).<sup>66</sup> The H&S and CR Directives are not specific about which level involvement should take place. It would be logical for I&P to take place at the level of those affected. The three Directives do not specify the level of management with whom to interact.

The IC Directive concerns consultation at the ‘relevant level of management and representation, depending on the subject under discussion’.<sup>67</sup> The EWC and ECo Directives create bodies that represent a number of subsidiaries/establishments. The EWC Directive gives the right to consult ‘with central management or any more appropriate level of management’.<sup>68</sup> The ECo Directive only prescribes access to an ‘appropriate level of management’ in exceptional circumstances where companies use the Directive’s standard rules.<sup>69</sup>

Measures give I&P rights to workers/employees and their representatives. They do not necessarily set down from which level(s) worker/employee

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<sup>64</sup> ECo Directive 2001/86 Art 2(h).

<sup>65</sup> Ibid.

<sup>66</sup> Art 6.

<sup>67</sup> IC Directive 2002/14 Art 4(4)(c).

<sup>68</sup> Art 1(g).

<sup>69</sup> Part 2(c).

representatives should be drawn. Nor do all Directives ensure worker/employee or representatives have the ability to interact with the level of management involved in making the relevant decision(s). Both factors potentially interfere with the ability of affected workers to influence decision making.

#### **5.2.4 Who is Involved**

Chapter 4 distinguished between ‘direct’ I&P between management and worker and ‘indirect’ I&P between management and worker/employee representatives. The seven measures focus on indirect I&P via worker/employee representatives. Rights are usually ‘intended to benefit workers as a collective group and... [are] therefore collective in nature.’<sup>70</sup> The term representative allows for workforce and trade union delegates. Three Directives refer to workers/employees as opposed to representatives<sup>71</sup> but sections 5.2.4.1-5.2.4.3 show that the EU usually ‘closes off the regulatory choice of dispensing with representatives’.<sup>72</sup>

##### **5.2.4.1 The Acquired Rights Directive**

Member States have the option of limiting the information and consultation rights to those businesses where the number of employees meet ‘the conditions for the election or nomination of a collegiate body representing the employees’.<sup>73</sup> This provision addresses situations, as in the Netherlands, where the statutory requirement for information and consultation is via worker representatives and only applies to works councils. Undertakings in which these are mandatory include those employing at least 100.<sup>74</sup> Where there are no employee representatives, Article 7(6) provides that employees themselves must be given the same information as would have been given to the employee representatives.

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<sup>70</sup> Barnard *EU Employment Law* (4th edn Oxford University Press Oxford 2012) 637.

<sup>71</sup> AR, H&S. and IC Directives.

<sup>72</sup> Davies and Kilpatrick ‘UK Worker Representation After Single Channel’ (2004) 33 2 Ind LJ 121, 134.

<sup>73</sup> Art 7(5).

<sup>74</sup> The Law on Works Councils Art 25 in Barnard (n 70) 618.

This creates a two tier system. Employee representatives have rights to information,<sup>75</sup> to be consulted with a view to reaching an agreement,<sup>76</sup> and in some Member States, to arbitration<sup>77</sup> whilst employee rights under Article 7(6) only relate to information. In *Commission v UK*<sup>78</sup> the UK defended itself for not requiring consultation where there was no recognised union. It argued that by allowing for direct communication with employees Article 6(5) (currently 7(5)) provided for situations where there were no employee representatives.<sup>79</sup> The ECJ responded that Article 6(5) should not be read independently of other provisions within that Article. It stated that the Community legislature did not intend ‘to allow the different national legal systems to accept a situation in which no employee representatives are designated since such designation is necessary to ensure compliance with the obligations laid down in Article 6 of the Directive’.<sup>80</sup>

Employees have lesser rights than representatives. This created a two tier system based upon the existence of a system of indirect representation triggered by minimum numbers. However, in *Commission v UK* the ECJ has maximised employee rights by limiting situations in which Article 7(6) applies. This supported the EU’s policy preference for indirect representation over direct representation.

#### 5.2.4.2 H&S Directive

This is the only Directive which provides for involvement with workers or their representatives. Article 11(1) states:

Employers shall consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work

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<sup>75</sup> Art 7(1).

<sup>76</sup> Art 7(2).

<sup>77</sup> Art 7(3).

<sup>78</sup> *Commission v UK (Acquired Rights)* (n 50).

<sup>79</sup> *Ibid* para 13.

<sup>80</sup> *Ibid* paras 21-24.

There is no bias towards indirect participation. This is not the case with specific responsibilities in Article 11(2); only workers' representatives have rights to ask employers to take appropriate measures and submit proposals regarding hazards<sup>81</sup> and time off, without loss of pay to exercise their rights under the Directive.<sup>82</sup>

The provision for direct I&P might lie with the nature of the Directive. The CR and AR Directives do not deal with on-going events and require training. It would be inefficient to train employees' representatives to carry out general health and safety training or use representatives to convey information regarding individual working conditions (especially where only information is required might only relate to a few individuals with more specialist knowledge than those who represent them). It is therefore necessary to include individuals to achieve the Directive's objectives: 'to encourage improvements in the safety and health of workers at work'.<sup>83</sup>

#### 5.2.4.3 IC Directive

Paragraph 16 of the preamble states that the Directive

'is without prejudice to... systems which provide for the direct involvement of employees, as long as they are always free to exercise the right to be informed and consulted through their representatives.'

This gives precedence to representative forums. Article 4's 'practical arrangements for information and consultation' does not concern employees, only representatives.

#### 5.2.4.4 Conclusion

EU policy has always favoured indirect representation and usually closes off the choice of dispensing with representatives. Of the two Directives that provide for direct I&P the AR Directive does so in limited circumstances. In

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<sup>81</sup> Art 11(3).

<sup>82</sup> Art 11(5).

<sup>83</sup> Art 1(1).

both cases, when compared to representatives, employees/workers are at a disadvantage when exercising their rights.

Only the H&S<sup>84</sup> and EWC<sup>85</sup> Directives specifically provide for training representatives to understand and fulfil their duties.<sup>86</sup> Unless part of a measure, member States do not necessarily include training in their implementing legislation.<sup>87</sup> Lack of training may hamper workers or representatives from carrying out their roles effectively and thereby undermine the effectiveness of EU policy.

### **5.2.5 The Formality of the Involvement/Participation Mechanism**

The degree of formality prescribed differs. Compared with later Directives, the three early Directives are more specific about what areas of information and consultation should be covered. However, they are silent about the mechanism through which management and representatives should interact. Later Directives provide minimal detail about information and consultation mechanisms, and less detail concerning subjects to be covered.

The legislature has provided that representation shall take account of the laws and practices of Member States.<sup>88</sup> This means that the mechanisms, functions, and procedures are either decided via negotiation or left to Member States. In the cases of the EWC and EC Directives the level of formality prescribed by the Directives may vary according to circumstances.<sup>89</sup> Both provide more detail under their subsidiary requirements<sup>90</sup> or standard rules<sup>91</sup> (e.g. consultation bodies should meet at

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<sup>84</sup> Art 12(3).

<sup>85</sup> Art 10(4).

<sup>86</sup> ECo Directive's Annex (Part 2(g)) provides for time off for training. The IC Directive is silent on this matter.

<sup>87</sup> Training is not mentioned in The Information and Consultation of Employees Regulations 2004 SI 2004/3426.

<sup>88</sup> CR Directive 98/59 Art 1(1)(b); AR Directive 2001/23 Art 1(1)(c); H&S Directive 89/391 Art 3(c); EWC Directive 2009/38 Art2 (d); ECo Directive 2001/86 Art 2 (e).

<sup>89</sup> These were discussed in Section 2.7.3.1.

<sup>90</sup> EWC Directive 2009/38 Arts 6, 7, 14.

<sup>91</sup> ECo Directive 2001/86 Art 7.

least yearly).<sup>92</sup> Because other specific details may be determined by Member States<sup>93</sup> the degree of formality will vary across the EU.

When the Commission re-examined the EWC Directive it gave reasons for the EU's approach of using Member States' existing laws and practices to select employee representatives. It stated 'that the best approach is not to interfere in existing forms and arrangements for employee representation at national level ... Introducing uniform and restrictive rules into the text of the Directive would seriously limit... freedom... [and] lead to a conflict of laws.'<sup>94</sup>

The result is that there are varying degrees of formality across the EU in terms of how representatives are chosen and how I&P agreements operate. Referring to Article 3(c) of the H&S Directive the ECJ stated that the Directive does not oblige Member States to provide detailed rules for an election procedure for workers' representatives or other possibilities for choosing or designating representatives.<sup>95</sup> The ECJ has stated that where Directives do not provide details about the framework with which to implement its objectives, failure to provide adequate procedures results in Member States being in breach of the Directive.<sup>96</sup> The six Directives provide relatively little detail about mechanisms; they tend to focus on basic content and composition. This leads to differing requirements and unequal rights for workers across the EU.

### **5.2.6 Depth or Type of I&P**

Prior to 1994 no EU legislative measure defined the terms 'consult' or 'inform'. Since then the terms 'involvement', 'participation', 'information', and 'consultation' have been defined. However, these definitions sometimes

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<sup>92</sup> Ibid Annex Part 2(b); EWC Directive Annex 2.

<sup>93</sup> E.g. the election or appointment of members. ECo Directive Annex Part 1(b); EWC Directive Annex 1(b).

<sup>94</sup> COM(94)406 (n 23) 3.

<sup>95</sup> Case C-425/01 *Commission of the European Communities v Portuguese Republic* [2005] ECR 6025 paras 20-21.

<sup>96</sup> *Commission v UK (Redundancy)* (n 50) para 25.

differ from each other in depth, content, and degree of specificity (77 words define the term ‘inform/information’ in the EWC Directive versus 28 in the IC Directive). Such differences might alter the meaning of the same term within different Directives. Furthermore the wording surrounding a defined term within a Directive means that there may be different degrees of involvement relating to the same term within a Directive. Section 5.3 examines these issues in detail. It goes on to compare and evaluate EU definitions relating to the seven measures against those in Chapter 4.

### **5.3 EVALUATING TERMS USED BY THE EU FOR INVOLVEMENT AND PARTICIPATION AGAINST THE IPF**

This section examines the way in which terms are used in seven measures that specifically provide for worker/employee I&P. However, other legislative provisions also involve I&P.<sup>97</sup> The Working Time Directive does not specify any type of I&P and has not been included in this section. The European Cooperative Society’s provisions on I&P are virtually identical with those of the ECo Regulation and Directive and the Directive on Cross-border Mergers of Limited Companies refers to legislation relating to the European Company. The two measures are therefore covered by the analysis relating to the European Company.

Appendix 1 contains an overview of key terms and phrases relating to I&P in the six Directives (The ECo Regulation is omitted because it contains no definitions). Alongside each Directive are the terms it uses which are found in the I&P Framework. Next to each term is any definition connected with that term in the Directive. The final column concerns phrase(s) associated with that term which might have some bearing on its meaning. Appendix 1 indicates that the European legislature appears to have three approaches to terms associated with the participation process. The first is to leave them

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<sup>97</sup> Council Directive 2003/72/EC supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [2003] OJ L 207/25; Council Directive (EC) 2005/56 on cross-border mergers of limited liability companies [2005] OJ L 310/1; Council Directive (EC) 93/104 concerning certain aspects of the organization of working time [1993] OJ L 307/18 Art 17(2).

undefined,<sup>98</sup> the second to refer to the laws and practices of Member States,<sup>99</sup> and the third to give definitions.<sup>100</sup> This approach is inconsistent. Not all Directives define key terms and, where defined the content (and therefore perhaps the meaning) of the same word differs between Directives. For example unlike earlier Directives, the IC Directive split practical arrangements, such as timing and content, from the definition of consultation. Doing so enables management and labour to negotiate more flexible agreements under Article 5 which allows arrangements ‘different from those referred to in Article 4’.

The fact that ‘inform’ and ‘consult’ were not defined in the CR or AR Directives was not raised as a problem during subsequent reviews of the Directives.<sup>101</sup> However when consulting the Social Partners on revising the original EWC Directive, the Commission commented on problems caused by having no definition for the term ‘inform’ and ‘inadequate’ definitions for ‘consult’. They stated that the situation within the Directive ‘as well as the existence of other directives on information and consultation lead to different interpretations affecting the clarity of the legislative

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<sup>98</sup> CR Directive 98/59.

<sup>99</sup> ECo Directive 2001/86 Art 2(1).

<sup>100</sup> IC Directive 2002/14 Art 2(g).

<sup>101</sup> *Commission Proposal for a Council Directive on the approximation of the laws of the Member States Relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of Businesses* (COM(94) 300 final 94/0203, 08.09 1994); *Commission Amended proposal for a Council Directive amending Directive 77/187/EEC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses* (COM(97) 60 final, 1997); *Commission Commission Report on Council Directive 2001/23/EC of March 2001 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses* (Commission of the European Communities 2007); *Draft Directive proposal amending Directive 75/129/EC on the approximation of the laws of the Members States relating to collective redundancies* 1991 Com 91/0292 Final; *Commission Proposal for a Council Directive on the Approximation of Laws of Member States Relating to Collective Redundancies* (COM (96) 620 final, 1994).

framework'.<sup>102</sup> The Commission was referring to two French cases. In *Beiersdorf*<sup>103</sup> the Cour d'appel de Paris used a definition in another Directive to clarify the original EWC Directive, but this was not done in *Alcatel Lucent*.<sup>104</sup>

No preliminary references have concerned what constitutes 'information' or 'consultation' (only when the requirement to inform or consult arises).<sup>105</sup> National courts have applied the 'Acte Claire' doctrine over these terms (i.e. that the answer to the issue is so clear that no reference to the ECJ is warranted).<sup>106</sup> The lack of clarity was not sufficient reason to make a preliminary reference to the ECJ.

Before sections 5.3.1-5.3.8 look at individual I&P terms, the phrase 'the spirit of cooperation' will be examined. It is used in connection with 'work' or 'negotiate' in the EWC, ECo, and IC Directives. The phrase 'the spirit of cooperation' is in itself unclear. Dorssement points out that this is an ambiguous concept, adding that the context 'is reminiscent of the principle of "bargaining in good faith"'.<sup>107</sup> During discussions before the IC Directive was passed, both Parliament and the Committee on Employment and Social Affairs proposed substituting 'work in a spirit of co-operation' for 'work

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<sup>102</sup> Commission, 'European Works Councils: Consultation of the European Social Partners on the Revision of Council Directive 94/45/EC of 22 September 1994 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' (2008) C(2008) 660 21.

<sup>103</sup> Beiersdorf: TGI Melun 13.10.2006 in Waddington, J, *European Works Councils a Transnational Industrial Relations Institution in the Making* (Routledge Abington 2011) 79.

<sup>104</sup> TGI Paris 27.04.2007 in *ibid*.

<sup>105</sup> Case C-62/99 *Betriebsrat der bofrost\* Josef H. Boquoi Deutschland West GmbH & Co. KG v Bofrost\* Josef H. Boquoi Deutschland West GmbH & Co. KG* [2001] ECR 2579; Case C-440/00 *Gesamtbetriebsrat der Kühne & Nagel AG & Co. KG v Kühne & Nagel AG & Co. KG*. [2004] ECR 787; Case C-349/01 *Betriebsrat der Firma ADS Anker GmbH v ADS Anker GmbH* [2004] ECR 787.

<sup>106</sup> CILFIT (n 11) para 16.

<sup>107</sup> Dorssement 'Case C-440/00, Gesamtbetriebsrat der Kuhne & Nagel v Kuhne & Nagel AG Co KG, Judgment of the Court of Justice of 13 January 2004' (2004) 41 CMLR 1712.

together in good faith'.<sup>108</sup> This was rejected by the Commission, which indicated, without explanation, that the two phrases are not interchangeable. In either case where co-operation is lacking there is little that worker representatives can do to force compliance in the spirit rather than letter of the law.

The phrase is accompanied by additional wording in the EWC and IC Directives. In the EWC Directive Article 6(1) concerns negotiating the agreement for a EWC or I&P body and states 'central management and special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement', whilst Article 9 directs 'central management and the European Works Council to work in a spirit of cooperation with due regard to their reciprocal rights and obligations.'

Article 1(3) of the IC Directive states:

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.

Has this additional wording added additional meaning? Article 6(1) appears to stress the need to focus on reaching an agreement. The addition of 'with due regard to reciprocal rights and obligations' in Article 9 seems to highlight that each side's position should be respected. The implications of the phrase 'with a view to reaching an agreement' is discussed in 5.3.5. Article 1(3) in the IC Directive expands Article 9, but only draws attention to each side's interests. They both emphasise that the nature of what should be discussed often concerns issues where the interests of employee and employer will differ. Such rights and obligations are not defined (although the Annex of the EWC Directive specifies that special meetings shall not affect central management's prerogative). If the legislature wished to

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<sup>108</sup> European Parliament, 'Report on the Proposal Establishing a General Framework for Informing and Consulting Employees in the European Community' (1998) COM (98) 0612.

convey some additional meaning the language used has not added much that is useful.

Sections 5.3.1-5.3.8 examine the nature of terms used in the seven legislative measures by placing them in the context of Chapter 4's I&P Framework.

### **5.3.1 Information Ex Post**

Chapter 4 examined how information can be provided for its own sake, in preparation for consultation, or as part of the collective bargaining (CB) process. The seven measures tend to focus on the provision of information before an event, sometimes as a precursor to consultation. The three later Directives may require organisations to describe their progress,<sup>109</sup> or economic,<sup>110</sup> or financial situation.<sup>111</sup> Annual reports provide historic (ex post) information.

### **5.3.2 Information Ex Ante**

The six Directives require differing kinds of ex ante information. Whilst the three early Directives do not define 'inform', the other measures do.

#### **5.3.2.1 The CR Directive**

The CR Directive requires information to be given to a national authority<sup>112</sup> and employee representatives.<sup>113</sup> With regard to the latter, the information is to enable employees' representatives to make constructive proposals or comment on the employer's communication with the public authority.<sup>114</sup> This type of extended description appears in the other Directives with the exception of the AR Directive. The consultation obligation 'is triggered first with subsequent obligations to provide appropriate information arising

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<sup>109</sup> ECo Directive, Annex 2(b).

<sup>110</sup> I&P Directive, Art 2(4)(a), EWC Directive Annex, 1(a).

<sup>111</sup> EWC Directive Annex, 1(a).

<sup>112</sup> Section III.

<sup>113</sup> Section II.

<sup>114</sup> Arts 2(3)(a) and 3(2).

throughout the consultation procedure'.<sup>115</sup> This is not necessarily the case with other Directives. Although the Directive contains no definition of 'information', Article 3(b) requires information for employee representatives to be in writing.

### 5.3.2.2 The AR Directive

The reason for giving information about a transfer differs depending upon whether it is provided for employees or given to employee representatives to prepare for consultations.<sup>116</sup> Article 7(1) details the information to be given in the event of a transfer. The obligation also varies according to whether employees are employed by transferor or transferee. The transferor must give information concerning the date, reasons for the transfer, also implications of the transfer and 'measures envisaged in relation' to employees or employee representatives before the transfer.<sup>117</sup> The directive is less specific about the transferee's representatives: information must be given 'in good time, and in any event before... employees are directly affected by the transfer...'

### 5.3.2.3 The H&S Directive

The purpose of information is to protect against or help prevent risks.<sup>118</sup> The Directive refers to the receipt of information in accordance with national law and/or practice.<sup>119</sup> Information relates to 'risks and protective and preventative measures' concerning a worker's job and working environment.<sup>120</sup> The Directive is flexible regarding the method of transmitting information, but specifies that 'all the necessary information...'<sup>121</sup> should be conveyed. Unlike the other Directives one of its purposes is

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<sup>115</sup> Kilpatrick 'The European Court of Justice and Labour Law in 2009' (2010) 39 3 Ind LJ 287, 296.

<sup>116</sup> See above.

<sup>117</sup> Arts 7(1) and 7(6).

<sup>118</sup> Art 10.

<sup>119</sup> H&S Directive 89/391 Art 10 (1).

<sup>120</sup> Arts 8 and 10(1).

<sup>121</sup> H&S Directive 89/391 Art 10 (1).

risk prevention<sup>122</sup> which means that information is not just geared towards informing representatives about specified situations as they arise.

#### 5.3.2.4 The EWC Directive

This requires information for its own sake, for negotiations concerning establishing a EWC or I&P body,<sup>123</sup> and to prepare for consulting once a body is set up. The Directive's structure is complex because it provides for four types of body which are subject to different definitions of 'information' under the 2009 Directive. Under Article 14, two kinds of agreements formed before 2011 are still subject to the EWC Directive 1994.<sup>124</sup> This means that there are potentially four standards of 'information' under the EWC Directive:

1. 'Article 13' agreements formed under the 1994 Directive fall under Article 14(1)(a) of the EWC Directive. They do not have to comply with the definition of 'information' in Article 2(1)(f) or any Member States' definition.
2. 'Information' was not defined under the 1994 Directive. Article 14(1)(b) of the EWC Directive concerns Article 6 agreements signed or revised between June 2009 and June 2011. It states that the 'national law applicable when the agreement is signed or revised shall continue to apply to' such undertakings.
3. Information under agreements concluded under Article 6 of the 2009 Directive and where Article 14 exemptions do not apply have to comply with the definition in Article 2(1)(f).
4. Agreements made under Article 7's subsidiary requirements have to comply with information as defined by Article 2(1)(f) and details under the Article 7 and Section 1a of Annex I.

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<sup>122</sup> Biagi 'From Conflict to Participation in Safety: Industrial Relations and the Working Environment in Europe 1992' (1990) 6 2 Int J Com LLIR 67, 75.

<sup>123</sup> Art 4(4).

<sup>124</sup> For a full account of different types of bodies formed under EWC Directive 1994 see Chapter 2, Section 2.7.3.1.

The definition in Article 2(1)(f) appears to be a rough amalgamation of the IC and ECo Directives. The whole of the former (in italics) is contained in the EWC Directive. Sections taken from the ECo Directive are in bold italics.<sup>125</sup>

*'information' means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with **such content as** are appropriate to enable **employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations** with the competent organ of the Community-scale undertaking or Community-scale group of undertakings*

The definition relates to the transmission of data and to examining subject matter. The Directive is vague about the information that should be transmitted. It states that this should be 'particular to transnational questions which significantly affect workers' interests'.<sup>126</sup> More specific information is found in the Directive's Annex I.

Alaimo argued that the definition of 'information' in the EWC Directive establishes that information is seen as the potential precursor to consultation. But agreements are potentially bound by three differing definitions of 'information' under the EWC Directive, and Article 13 agreements are not subject to any definition. 'The result is a series of stages of involvement, in which the first stage of information may be followed by the second stage of consultation.'<sup>127</sup>

#### 5.3.2.5 The ECo Directive

The requirements for information are similar to those in the EWC Directive. EWC Directive. Article 2(i) states information

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<sup>125</sup> The word order differs slightly sometimes.

<sup>126</sup> Art 6(3).

<sup>127</sup> Alaimo (n 25) 222-223.

means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE

The definition also connects information with preparing for consultation.<sup>128</sup> Article 4 does not specify the type of information to be provided, although further direction about what is required is found in the 'standard rules'. Again this means that information requirements will potentially differ in different European Companies.

### 5.3.2.6 IC Directive

The approach taken to defining 'inform' differs from the other Directives. The process of informing is broken down into three parts; firstly the definition of 'information'; secondly the situations in which information is to be provided; and thirdly, timing fashion and content. Article 2(f) ('Practical arrangements for information and consultation') states that information is the

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;

This appears to mean more than the provision of raw data. Bercusson has looked at the French language version of the Directive to confirm that 'examine it' refers to broader subject matter rather than data (the difference between data that has been processed and considered as opposed to 'raw'

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<sup>128</sup> Bercusson 'The European Social Model Comes to Britain' (2002) 31 3 Ind LJ 209, 221.

data).<sup>129</sup> He also commented on how data may be manipulated by those presenting it to aid or hinder the user.<sup>130</sup> The extent of the information required to be given will be affected by national regulation and individual agreement.

Article 4(2) provides for three different kinds of information:

- a) information on recent and probable developments;
- b) information and consultation on the situations likely to lead to probable developments;
- c) information and consultation on decisions likely to lead to substantial changes.

Article 4(3) states that:

information shall be given at such time, in such fashion and with such content as are appropriate to enable, in particular, employees' representatives to conduct an adequate study and, where necessary, prepare for consultation.

It would appear that a greater depth of information is needed to usefully consult on matters relating to Article 4(2) (b)-(c). Bercusson wrote

differences could have implications if the different procedures set out for information... in Article 4(3) as well as the different definitions in Article 2(f)...are deemed to cover different matters.<sup>131</sup>

Undoubtedly 4(2)(b)-(c) will include information covered in (a), but there will be a difference in the type of information given, for example biannual accounts information provided to shareholders versus detailed costing.

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<sup>129</sup> Ibid 220.

<sup>130</sup> For example the provision of too much data. Ibid 221 at fn 34.

<sup>131</sup> Ibid 221.

### 5.3.2.7 Conclusion

Wording used in regard to the type and quantity of information appears to differ according to a Directive's underlying objectives. For example, contrast Article 10 of the H&S Directive, which states that employers shall 'take appropriate measures so that workers and/or their representatives receive... all *necessary* information...', with Article 3(a) of the CR Directive which obliges the supply of 'all *relevant* information'.<sup>132</sup> This might reflect the nature of the 'information': discrete events versus planning<sup>133</sup> the prevention of, and protecting against ongoing risks.<sup>134</sup> Where there is the obligation to provide information for consultation the kind of 'information' is influenced by the type of consultation.

Under the six Directives 'information' appears to be:

- 1 given for its own sake;
- 2 part of a process of consultation, and/or
- 3 part of a problem solving exercise such as risk prevention.

Definitions of information and the amount of practical guidance found in Directives vary. No Directive states that information must be given before a decision has been made, although this may be, and has been inferred.<sup>135</sup> This is key if consultation is to be meaningful.

### 5.3.3 Communication

The EU does not specifically provide for this kind of involvement. However, it might be used within 'Article 13' and 'Article 5' agreements under the EWC and I&P Directives.

### 5.3.4 Consultation

All six Directives use the term consultation. In Chapter 4 the IPF distinguished between two kinds of effective consultation. 'Contemplative

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<sup>132</sup> Emphases added.

<sup>133</sup> H&S Directive 89/391 Art 2(d).

<sup>134</sup> Ibid Art 1(2).

<sup>135</sup> *Junk* (n 7) para 44.

consultation' involves: (1) a process that takes place before a decision has been made; (2) for which there has been adequate preparation; (3) during which there is an exchange of views; and (4) which are considered or contemplated. 'Focused consultation' entails the additional objective of arriving at an agreed solution.

Textual analysis of Fig 5.1 shows that 'consult' has failed to be defined, or defined in different ways. All six Directives add additional phrases to the term 'consultation'. There are four key phrases:

1. 'consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work.'<sup>136</sup>
2. 'work in a spirit of cooperation with due regard to their reciprocal rights and obligations'<sup>137</sup>
3. '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.'<sup>138</sup>
4. consultation/negotiation 'with a view to reaching an agreement'<sup>139</sup>

The first three phrases are consistent with the term 'consult' within Chapter 4. The first appears to distinguish the concept of consultation from general discussion. By emphasising interests, rights, and obligations the second and third underline the co-operative nature of the consultation process. The fourth focuses on reaching agreement on specific objectives and appears to correspond with 'focused consultation' in the IPF. Directives using 'consultation' in association with that phrase will be discussed under the heading 'focused consultation' in section 5.3.5.

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<sup>136</sup> H&S Directive 89/391 Art 11(1).

<sup>137</sup> EWC Directive 2009/38 Art 9; ECo Directive 2001/86 Art 9.

<sup>138</sup> IC Directive 2002/14 Art2 (g).

<sup>139</sup> CR Directive 98/59 Art 2(1); AR Directive 2001/23 Art 6(2); EWC Directive2009/38 Art 6(1); ECo Directive 2001/86 Art 4(1).

Referring to the CR Directive, Hall and Edwards asked does consultation ‘mean more than giving notice of proposed redundancies and listening to the responses of employee representations?’<sup>140</sup> Where consultation is not defined, does EU law go beyond Hall and Edwards’ statement? Arguably responses are of little utility unless management considers them properly.

Sections 5.3.4.1-5.3.4.4 analyse those Directives which use ‘consult’ when the term appears to fall within the meaning of ‘completive consultation’ in the IPF. It measures their requirements against Chapter 4’s definition and attempts to draw some idea of what the legislature means by the term ‘consult’ in each Directive and what it might mean when a term stands alone.

#### 5.3.4.1 The H&S Directive

Although the H&S Directive does not define the term ‘consult’, Article 11 (‘Consultation and Participation of Workers’) identifies several individual elements of the consultation process. Howes argued its component parts appear to indicate something more than what she terms ‘mere consultation’.<sup>141</sup> If this is so, then by removing additional phrases is mere consultation ‘divinable’? And would it fit Hall and Edwards’ concept of giving information and listening to workers’ responses and Chapter 4’s definition?

Article 11(1) states:

Employers shall consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work

This presupposes:

-the consultation of workers,

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<sup>140</sup> Hall and Edwards ‘Reforming the Statutory Redundancy Consultation Procedure’ (1999) 28 4 Ind LJ 299, 312.

<sup>141</sup> Howes ‘Workers’ Involvement in Health and Safety Management and Beyond: The UK Case’ (2007) 23 2 Int J Com LLIR 245, 251.

- the right of workers and/or their representatives to make proposals,
- balanced participation in accordance with national laws and/or practices.

It is not clear whether ‘consultation’ is a distinct concept independent of the pre-suppositions, or whether the term is connected to, and therefore presupposes the three elements. The rest of the section assumes the second option is correct and that ‘consultation’ involves: (a) the consultation of *workers* (not just their representatives); (b) the right for workers and/or their representatives to make proposals; and (c) balanced participation.

Hall and Edwards’ use of the word ‘response’ is reactive, but a response can be proposal. The sparking off of ideas and making proposals appears to be a consequence of being consulted. The Directive therefore corresponds with Hall and Edwards’ requirements. Although the Directive underlines the right to make proposals when being consulted, it does not go as far as specifying that management should respond to them. This misses elements of the definition of ‘consultation’ in Chapter 4.

What constitutes ‘balanced participation’ is not described. Biagi stated that the expression is capable of provoking endless discussion, that its meaning is very difficult to define. In his view it goes beyond simple consultation.<sup>142</sup> Howes stated that the phrase is obscure and ‘it very much depends on national systems and practices’.<sup>143</sup> In some Member States, ‘balance’ equates to co-determination. One possibility is that it means that both parties respond to a response or proposal. This should mean an exchange of views where the other side’s opinion is listened to and considered.

Article 11(2) states that workers or workers representatives with the responsibility for health and safety of workers:

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<sup>142</sup> Biagi (n 143) 76.

<sup>143</sup> Howes (n 162) 249.

...shall take part in a balanced way, in accordance with national laws and/or practices, or shall be consulted in advance and in good time by the employer with regard to: [a limited range of topics including] (a) any measure which may substantially affect safety.<sup>144</sup>

Taking part is either in a ‘balanced way, in accordance with national laws and/or practices’ or involves consultation in advance. The Directive does not explain the difference between ‘balanced participation’ and taking part in ‘a balanced way’. Again, the first option might refer to co-determination.

Commentators have stressed that the Directive was intended to foster a positive industrial relations working environment.<sup>145</sup> Howes stated that the Directive encourages a ‘genuine form of consultation’,<sup>146</sup> one that ‘goes further than providing for mere consultation.’<sup>147</sup> If balanced participation correlates with the right to a dialogue Article 11(1) of the H&S Directive would still lack two components of Chapter 4’s definition of ‘consultation’: the need for adequate preparation and being consulted in advance of a decision.

#### 5.3.4.2 The EWC Directive

The revised Directive is based upon the same principles as its predecessor and provides for: (a) agreements between a special negotiating body and management (Article 6); (b) a more detailed fall back provision (Article 7); and (c) pre-existing agreements (Article 14). As with the term ‘inform’, what constitutes ‘consult’ under the EWC Directive will vary according to whether an agreement was concluded under:

1. an ‘Article 13’ agreement formed under the EWC Directive 1994;<sup>148</sup>

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<sup>144</sup> E.g. Art 8(2) regarding the designation of workers to implement measures relating to first aid, firefighting and evacuation.

<sup>145</sup> Biagi (n 143) 75; Nielsen and Szyszczak *The Social Dimension of the European Union* (3rd edn Handelshojskolens Forlag Copenhagen 1997) 305.

<sup>146</sup> Biagi (n 143) 75.

<sup>147</sup> Howes (n 162) 251.

<sup>148</sup> Article 14(a).

2. an Article 6 agreement formed under the EWC Directive 1994 and signed or revised between June 2009 and June 2011;<sup>149</sup>
3. Article 6 of the EWC Directive;
4. Article 7 of the EWC Directive.

Section 5.3.4.2.1 looks at the first two forms that relate to agreements falling under Article 14 before considering the Commission's need for reform. Section 5.3.4.2.2 considers consultation as it is defined within the EWC Directive.

#### 5.3.4.2.1 Article 14 agreements

Article 14 of the EWC Directive states that certain agreements continue to be governed by the EWC Directive 1994. 'Article 13' agreements do not regulate when and how consultation takes place. 'Article 6' agreements are regulated by Article 1(f) of the 1994 Directive. Article 1(f) stated:

"consultation" means the exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management

The definition goes further than Hall and Edwards' giving information and listening to a response<sup>150</sup> because it requires 'the exchange of views and establishment of dialogue'. A dialogue implies that each side's views are being listened to and considered.

The Commission was of the opinion that Works Councils were not filling their expected role 'in anticipating and managing restructuring operations'.<sup>151</sup> A preparatory study for an Impact Assessment on the reform of the EWC Directive 1994 stated that

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<sup>149</sup> Article 14(b).

<sup>150</sup> See text to note 140.

<sup>151</sup> Commission Communication from the Commission - restructuring and employment - anticipating and accompanying restructuring in order to develop employment: the role of the European Union 2005 Com (2005) 0120 Final 2 pg11.

it is rare for... meetings to occur in time to allow for meaningful consultation or for the EWC's position to be taken into account prior to restructuring decisions being taken. This is seen partly to be the result of the very narrow application of the definition of "consultation" as used in the current wording of the Directive...<sup>152</sup>

It is difficult to judge how much this was to do with the narrowness of the definition or management policy/misunderstanding of the definition. The report found instances where EWCs had gone beyond their remit and responsibilities and others which failed to inform and consult when it was clear that they should have done.<sup>153</sup> One company stated that their

EWC was informed after the decision was presented to the press because "*the EWC is an information and consultation body, not a negotiating body. Negotiations took place at local level*".<sup>154</sup>

For some, consultation, unlike negotiation, does not appear to be a part of the decision making process. The Commission attempted to resolve these problems through revising the Directive.

#### 5.3.4.2.2 Agreements other than those covered by Article 14

Consultation is now defined under Article 2(1)(g) which states that a dialogue should be established and views exchanged with the appropriate level of management:

... at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the

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<sup>152</sup> DG BUDG DG Employment, Social Affairs and Equal Opportunities *A Preparatory Study for an Impact Assessment of the European Works Councils Directive* (VT/2007/098, 2007) 69-70.

<sup>153</sup> Ibid 70.

<sup>154</sup> Ibid 78.

management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings;

Article 2(1)(g) coupled with 2(1)(f) implies adequate information to allow for the formation of an opinion on proposed measures. Although it does not state that consultation should occur before a decision has been taken, the Directive might infer this by reference to the ‘proposed measures’. There is no requirement that the opinions are considered, but that they ‘may be taken into account’ might infer consideration. Recitals 23 and 24 are clearer than Article 2(1)(g). Recital 24 states:

The definition of "consultation" needs to take account of the goal of allowing for the expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate.

Article 2(1)(g) and Recital 24 refer to ‘information’ and the goal of expressing a *useful* opinion. It also refers to a decision-making process which implies that an opinion will be considered. These factors, combined with the *travaux préparatoires* support the proposition that consultation should take place before a decision has been made after adequate preparation.

The definition in Article 2(1)(g) applies to all agreements made under the current Directive. However, those made under the subsidiary requirements (Article 7) of the 1994 and 2009 Directives are subject to additional requirements within the Annex. This states:

The consultation shall be conducted in such a way that the employees’ representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express;

This goes further than the original Annex (which stated that ‘an opinion may be delivered’) and current Article 2(1)(g).

The 2009 Annex was strengthened, despite its requirements having previously ‘been applied only in a very limited number of cases’.<sup>155</sup> The Commission stressed its ‘important benchmark role, especially in the negotiation or renegotiation of agreements’.<sup>156</sup> This is backed up by a study by Marginson et al which found that since the Directive was adopted in 1994 the Annex’s ‘requirements become a benchmark for negotiators.’<sup>157</sup> Article 13 agreements and an initial review of those made under Article 6 displayed ‘a noticeably higher density of formal provision than those which pre-date it.’<sup>158</sup>

#### 5.3.4.2.3 Conclusion

There are four levels of ‘consultation’ under the 2009 Directive. The first, ‘consultation’ under ‘Article 13’, is not required to conform to any specification and might not coincide with Chapter 4’s definition. The second, ‘consultation’ as defined in the EWC Directive 1994, establishes a dialogue, but does not specify the need for adequate preparation; that consultation should take place before a decision has been made; or that representatives’ views are considered. It can be argued that the third, agreements formed post 2011 contain the four components of ‘consultation’ defined in Chapter 4. This is also the case with Article 7’s subsidiary requirements where there is the (qualified) right to express an opinion and the potential right to reasons for management’s response.

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<sup>155</sup> Commission *C(2008)660* (n 123) 6.

<sup>156</sup> *Ibid* 6.

<sup>157</sup> Marginson, Gilman, Jacobi and Kreiger *Negotiating European Works Councils An Analysis of Agreements under Article 13* (European Foundation for the Improvement of Living and Working Conditions Dublin 1998) 73.

<sup>158</sup> *Ibid* 73.

### 5.3.4.3 The ECo Directive

The ECo Directive has a structure providing for information and consultation that is similar to the EWC Directive.<sup>159</sup> Under the ECo Directive there are potentially three kinds of consultation: (i) consultation under procedures created under Member State provisions;<sup>160</sup> (ii) consultation under Article 4 Agreements; and (iii) Article 7's more detailed 'Standard rules'.

#### 5.3.4.3.1 Basic provisions

Article 2(j) defines 'consultation' as meaning

the establishment of dialogue and exchange of views... at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE

A 'dialogue and exchange of views' and 'opinion... which may be taken into account in the decision making process' infers a discussion where each side is listening to, and considering the opinion of the other. Reference to 'content' points to the provision of information. 'Measures envisaged' and 'decision making process' appear to indicate that consultation should take place before a decision has been made. However, unlike the EWC Directive, there is nothing relating to timing in the Recitals. There is nothing instructing the provision of information so that adequate preparation may take place. However, this might be inferred from the definition of 'information' in Art 2(f).

#### 5.3.4.3.2 Provisions within Member States

Article 3(6) provides for the special negotiating body forming the agreement

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<sup>159</sup> ECo Directive 2001/86 Art 3.

<sup>160</sup> Art 3(6).

not to open negotiations or to terminate negotiations already opened, and to rely on the rules on information and consultation of employees in force in the Member States where the SE has employees.

A problem of seeking to rely on rules within the Member States is that provisions vary. Differences mean that coverage under Article 3(6) will give rise to different rights across the Union (in the UK I&P is not compulsory, management either elects to provide an I&P system or employees ask for one). However, definitions of key terms provide minimum standards.

#### 5.3.4.3.3 Article 4

Article 4(2) sets out basic requirements relating to the structure of the representative body, the scope of the agreement and how it is to function. Companies may elect to make an agreement under Article 4(3) that does not involve the option to rely upon Member State Legislation, or rely on Article 7.

#### 5.3.4.3.4 Article 7

Article 4(3) states that ‘unless provision is made otherwise’ the agreement shall be subject to standard rules under Article 7. These must satisfy the provisions set out in and the Directive’s Annex. This contains rules relating to setting up the representative body and its composition. Section 2 concerns information and consultation. It deals with the body’s competence and rights to information and meetings. Subsection (c) concerns ‘exceptional circumstances affecting the employees’ interests to a considerable extent’. This enables the representative body (or a select committee) to be informed about a situation and meet management (with relevant decision making powers) *at the representatives’ request* ‘so as to be informed and consulted’. It continues:

Where the competent organ decides not to act in accordance with the opinion expressed by the representative body, this body shall have the right to a further meeting with the competent organ of the SE

with a view to seeking agreement... these meetings shall not affect the prerogatives of the competent organ.

The phrase is not the stronger ‘with a view to reaching an agreement’ (see below). What ‘with a view to seeking/reaching an agreement’ means is not clear and no guidance was found in the *travaux préparatoires* of the ECo or AR Directives.<sup>161</sup> These additional words appear to indicate going further than ‘working together in a spirit of cooperation with due regard for their reciprocal rights and obligations.’<sup>162</sup> When management have not agreed to alter their opinion after one meeting, it is difficult to know how effective the altered mind set will be in changing the decision in the subsequent meeting.

#### 5.3.4.3.5 Conclusion

It may be argued that ECo Directive’s wording does not provide for ‘consultation’ to take place before a decision has been made. Unlike the EWC Directive, there is nothing in the recitals. Both point to this not being part of ‘consultation’ under the ECo Directive. Given this, is a reference to ‘envisaged measures’ adequate to secure consultation before a decision? There is nothing that requires time for adequate preparation before consultation in Article 2(j). ‘Consultation’ under Article 2(j) does not clearly contain the four component parts of Chapter 4’s definition.

In creating a representative body a Company may rely upon existing legislation in member states, create an individual agreement under the Directive, or create one subject to standard procedures. Under the Annex, where there are special circumstances, representatives have additional rights. This means that consultation requirements will differ from European Company to European Company across the EU and within each Member State. This is far from what was proposed by the Commission in 1970.<sup>163</sup>

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<sup>161</sup> The AR Directive 1977 used the term ‘seeking’. See Section 2.4.2.2.1.

<sup>162</sup> Art 9.

<sup>163</sup> See Chapter 2.

#### 5.3.4.4 The IC Directive

The IC Directive provides for two types of arrangement. The first concerns pre-existing or newly negotiated agreements under Article 5. Article 5 enables management and labour to define their own practical arrangement for informing and consulting employees. Article 4 contains a ‘fall-back position’ and specifies minimal rules to apply in the absence of a negotiated agreement. Both types of arrangement are subject to the definition of ‘consultation’ in Article 2(g).

##### 5.3.4.4.1 Consultation

Article 2(g) defines consultation as ‘the exchange of views and establishment of dialogue between the employees' representatives and the employer.’ This is a standard that applies to all agreements under the Directive. Originally this definition was stronger and included information, such as the right to a response to representatives’ opinions contained in Article 4(4)(a)-(d).<sup>164</sup> This means that there is now a greater distinction between arrangements made under Articles 4 and 5.

There is nothing in the text that indicates that consultation should take place before a decision has been made. The European Parliament’s proposal that the original definition be changed from stipulating that consultation require effective timing, method and content, to consultation shall be ‘during the planning stage, so as to ensure that this step is effective and that an influence can be exerted’<sup>165</sup> was rejected. However recital 6 refers to existing measures not having prevented decisions being taken before procedures are implemented to inform and consult. Article 2(g) does not provide for adequate preparation (although this might be inferred from the definition of ‘information’ in Article 2(i)), or that representatives’ opinions should be considered.

##### 5.3.4.4.1.1 Article 5 agreements

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<sup>164</sup> Proposal for a Council Directive COM (1998) 612 Final Establishing a General Framework for Informing and Consulting Employees in the European Community 1998 OJ C 002 05.01.1999, p. 0003 Art 2(1)(e).

<sup>165</sup> COM(98 )0612 (n 11).

Consultation under Article 5 is potentially the least prescriptive of the options. It allows Member States to permit management and labour (at any level) to negotiate agreements regarding practical arrangements for information and consultation. These

... may establish while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4.

Article 5 agreements (this includes pre-existing agreements) are only bound by Articles 1(3) (concerning the obligation to work in the spirit of co-operation), 2(g), and Member State legislation. Like agreements under the EWC and ECo Directives, they are negotiated with labour who have a strong fall-back position in Article 4.

#### *5.3.4.4.1.2 Article 4 'agreements'*

Article 4 concerns practical arrangements for information and consultation. These apply when parties fail to reach agreement, or elect to comply with the Article. There are two standards of 'consultation'. Article 4(2)(b) concerns:

Consultation on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;

Consultation under Article 4(2)(c) is of a more serious nature and involves:

consultation on decisions likely to lead to substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).

Article 4(4)(e) states that consultation shall take place under Article 4(2)(c) 'with a view to reaching an agreement'. The implication of the additional wording (also used in the CR and AR Directives) is discussed section 5.3.5.

Those consulting under Article 4 are subject to additional obligations within Article 4(4)(a)-(d). Article 4(4)(a)-(c) ensures the timing, method, and content of consultations are appropriate, that they are with the appropriate level of management, and that employees' representatives have sufficient information to formulate an opinion. Article 4(4)(a) ensures timing is 'appropriate', the draft used the term 'effective' and the EP's alteration making it clearer as to when consultation should occur was omitted.<sup>166</sup> However, Article 4(4)(d) states that consultation should be:

in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate<sup>167</sup>

Although there is nothing within the Article that states that this should be so factors, including Recital 6,<sup>168</sup> point to 'consultation' taking place before a decision has been made.

#### 5.3.4.4.2 The IC Directive and management prerogatives

Article 1 (3) requires employer and employees' representatives work with:

due regard for their reciprocal rights and obligations, taking into account the interests both of the undertaking or establishment and of the employees.

The 27<sup>th</sup> recital also refers to 'cooperation' and 'due regard to reciprocal rights and obligation' but is silent upon what these rights and obligations are. Recitals 6<sup>169</sup> and 13<sup>170</sup> infer the importance of consultation being taken

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<sup>166</sup> See text to ns 186-187.

<sup>167</sup> Art 4(d).

<sup>168</sup> Discussed in Section 4.3.4.4.1.

<sup>169</sup> 'legal frameworks... intended to ensure that employees are involved... [have] not always prevented serious decisions affecting employees from being taken and made public without adequate procedures having been implemented beforehand to inform and consult them'.

<sup>170</sup> 'existing legal frameworks for employee information and consultation at Community and national level tend to adopt an excessively a posterior approach to the process of change'.

before a decision. Although not in the main body of the Directive, these point to management needing to consult before a decision is made. But what of any obligation to foresee events upon which to consult? An analogous situation can be found in *Dansk Metalarbejderforbund v H Nielsen*.<sup>171</sup> The case raised questions about whether management had an obligation to foresee collective redundancies. The ECJ found that the CR Directive does not affect an employer's freedom to 'decide whether or when he must formulate plans for collective dismissals and there was no implied obligation to foresee collective redundancies.'<sup>172</sup> It would appear management remains free to act with minimal restrictions on its prerogative.

#### 5.3.4.4.3 Conclusion

There are three different standards of consultation under the IC Directive. In addition to this, stricter definitions of consultation may apply in Member States.<sup>173</sup> 'Consultation' under Article 5's voluntary agreement is missing at least one component of Chapter 4's definition. Bercusson wrote that Article 4 'is the definitive description of the process of participation by employees' representatives in management decision-making, which is established by this Directive as a cornerstone of the European social model.'<sup>174</sup> However, there is no mention of adequate preparation for consultation within the definition. The Directive does not explicitly require that consultation takes place before a management decision (although this might be inferred by Recitals 6 and 13). Unlike the original proposal for a Regulation to form a European Company there is nothing to specify that consultation shall be in writing and:

set out not just the reasons underlying a decision in writing but the likely consequences of the decision from the point of view of the business and of the employees.<sup>175</sup>

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<sup>171</sup> *Dansk v Nielsen* (n 17).

<sup>172</sup> *Ibid* para 15.

<sup>173</sup> Art 9(4).

<sup>174</sup> Bercusson (n 149) 226.

<sup>175</sup> Proposal for a Council Regulation (Com) 70(600) embodying a statute for European companies [1970] 1970 OJ C124/1 Art 126.

Article 4(4)(d) is also lacking because it does not specify the form that an employer's response should take. Lack of a reasoned response<sup>176</sup> means that employees' representatives might not receive sufficient detail to continue a dialogue. Article 4(4)(a)-(b) creates conditions for adequate preparation for all consultation under Article 4. It appears that only Article 4 arrangements clearly contain the four factors in Chapter 4's definition of 'consult.'

#### 5.3.4.5 Conclusion

Under European Law the term 'consult' is not defined consistently (if at all). Where the term is expanded upon or defined, Directives do not always make it clear that consultation should take place before an event with adequate preparation. All definitions have in common the idea of an exchange of views and the establishment of a dialogue. However, where this 'exchange' of views ends falls within management's prerogative.

Table 5.1 compares the five directives which contain some kind of definition of 'consult'.

**Table 5.1**

**Comparing Definitions of Five Legislative Measures with the Definition of 'Consultation' as Defined in Chapter 4**

Directive	H&S Art 11(1)	H&S Art 11(2)	EWC 1994 Art 1(f)	EWC 2009 Art 2(1)(g)	ECo Art 2(j)	I&C Art 5Min std	I&C Art 4
Before a decision is made	x	✓ <sup>a</sup>	x	✓	x	?	?
Adequate preparation	x	x	x	✓	x <sup>b</sup>	x <sup>b</sup>	✓
Exchange of views	?	?	✓	✓	✓	✓	✓
Other side's view is considered	?	?	✓	✓	✓	✓	✓

(a) The text read that consultation should either be in a 'balanced way'.

(b) This can be inferred from the definition of 'information'.

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<sup>176</sup> The phrase reasoned response is not found within the Directive. It is used in Recital 44 of the EWC Directive 2009/38.

Where ‘consult’ is defined its meaning may vary within the same Directive. This can result in multiple standards within the same Directive. With the potential exception of the H&S Directive, all go beyond Hall and Edwards’ minimum requirement. The only two stages that all the Directives appear to have in common are an exchange of views in which the other side’s views are considered. This commonality might point to a minimum standard of ‘consultation’ where the term is undefined. It appears that only definitions relating to Article 2(1)(g) of the EWC Directive and Article 4 of the I&C Directives correspond with the definition of ‘consult’ in Chapter 4.

### **5.3.5 Focused Consultation**

Consultation/consult ‘with a view to reaching an agreement’ on specific issues has been used in a number of Directives. This section examines what the phrase might mean. The subject is made complex by two cases, *Junk*<sup>177</sup> and *Re Akavan*,<sup>178</sup> where the phrase was used in connection with the term ‘negotiate’. This begs three questions. The first is what the ECJ and Advocates General meant by ‘negotiation’? The second is whether the interpretation in *Junk* is relevant to other directives using that phrase? The third is whether there is evidence to support the connection made between ‘consult’ and ‘negotiate’ in *Junk* and *Akavan*.

Section 5.3.5.1 looks at where ‘with a view to reaching an agreement’ is found and analyses the phrase in the context of consultation. Section 5.3.5.2 outlines the way that the ECJ<sup>179</sup> and two Advocates General<sup>180</sup> have linked ‘consultations’ ‘with a view to reaching an agreement’ with negotiation. Section 5.3.5.3 goes on to rebut that link by using the ECJ’s approaches to statutory interpretation.

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<sup>177</sup> *Junk* (n 7).

<sup>178</sup> *Akavan* ( n 27).

<sup>179</sup> *Junk* (n 7).

<sup>180</sup> *Ibid*; *Akavan* ( n 27).

### 5.3.5.1 The Apparent Nature of Consultations With a View to Reaching an Agreement

The legislature has qualified the term ‘consultation’ by adding ‘with a view to reaching agreement’ in the CR, AR, EWC, ECo, and IC Directives. The phrase is either used in connection with consultation over issues which will seriously impact employment or terms and conditions<sup>181</sup> or when negotiating an agreement for a EWC or I&P body.<sup>182</sup> The Directives provide no additional information as to its meaning.

This phrase appears to fit the IPF’s category of ‘focused consultation’. This involves more than consideration; the formulation, or bringing about of some sort of plan. Reaching agreement seems to imply a considered exchange of views, entail a duty for management to engage with representatives and give the consultation process additional focus. The ECJ considered consultation in connection with the CR Directive in *Junk*. It stated that ‘the terms [including the word contemplate] used by the Community legislature indicate that the obligations to consult and to notify arise prior to any decision’ to terminate a contract.<sup>183</sup> However, the ECJ has apparently gone further than this.

### 5.3.5.2 *Re Junk* and *Re Akavan*: a Possible Connection between ‘Consultation’ and ‘Negotiation’?

Section 5.3.5.2.1 reviews the relevant sections in AG Tizzano’s opinion and the ECJ judgment in *Junk*. Section 5.3.5.2.2 then analyses AG Mengozzi’s opinion in *Akavan*.

#### 5.3.5.2.1 *Re Junk*

After indicating that the consultation procedure must precede notice of dismissal, AG Tizzano stated:

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<sup>181</sup> CR Directive 98/59 Art 2(1); AR Directive 2001/23 Art 6(2); IC Directive 2002/14 Art 4(e).

<sup>182</sup> EWC Directive 2009/38 Art 6(1); ECo Directive 2001/86 Art 4(1).

<sup>183</sup> *Jun* (n 7) para 37.

In my opinion, that interpretation is supported and reinforced by the objective of those consultations, which are not restricted to merely “passive” information for workers, but are conducted “with a view to reaching an agreement” Art.2(1) and “shall, at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences” (Art.2(2)). At the least, Art.2 *therefore imposes an obligation to negotiate.*<sup>184</sup>

The ECJ did not go into so much detail. It stated:

42 With regard to the consultation procedure, this is provided for, within the terms of Art.2(1) of the Directive, ‘with a view to reaching an agreement’. According to Art.2(2), this procedure must, ‘at least, cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures.

43 It thus appears that Art.2 of the Directive imposes an obligation to negotiate.

AG Tizzano might have used the word ‘negotiate’ as a means of illustrating (as opposed to defining), the phrase ‘consultations... with a view to reaching an agreement.’ The opinion was given in the context of whether the notification procedure under Articles 2 and 4 of the Directive must be concluded before an employer manifests his intention to bring the employment relationship to an end.<sup>185</sup> He looked at the ‘objective of those consultations’ stating that they ‘are not restricted to merely ‘passive’ information for workers. He later used the term ‘meaningful discussion’<sup>186</sup> to describe the sort of consultation which would be necessary to effect the Directive’s objectives. However, the fact remains that he appeared to say that consult equates with an obligation to negotiate.

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<sup>184</sup> Ibid AG para 59. Emphasis added.

<sup>185</sup> Ibid para 55.

<sup>186</sup> Ibid para 60.

The ECJ might also be interpreted as intending to illustrate (not define) what ‘consultations... with a view to reaching an agreement’ means. After setting out what the consultation procedure must involve it stated ‘It thus *appears* that Art.2 of the Directive imposes an obligation to negotiate...’<sup>187</sup> The phrase is almost a direct quote from AG Tizzano’s opinion. However, the ECJ did not state that there is an obligation to negotiate only that there ‘*appears* to be’ one. Why did it hold back from making a direct statement? There are several possible interpretations of the statement. The first is that it was fully conscious of the implications of equating ‘negotiate’ with ‘consult’, had not fully considered all the potential consequences of this, so did not wish to fully commit itself to idea. The second is that it did not fully contemplate the implications of equating ‘negotiate’ with ‘consult’, but thought the term was the best way of conveying the process of consulting, of expressing the ‘meaningful discussion’<sup>188</sup> without going into great detail. The third is that it did not wish to make a formal link between the two terms. Or fourthly, that it was using the term ‘negotiate’ unthinkingly without considering the phrase’s implications.

### 5.3.5.2.2 Re Akavan

In *Re Akavan* AG Mengozzi cited the ECJ Judgement and AG’s opinion in *Junk*. The relevant section of the opinion concerned the meaning of ‘contemplating collective redundancies’. It stated:

...consultation is essentially a function of negotiation; (11) the employer is required to begin those consultations in good time, that is to say at a moment when, because of its function, consultation will enable the workers' representatives to participate effectively in those negotiations.<sup>189</sup>

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<sup>187</sup> Ibid para 42. Emphasis added .

<sup>188</sup> Ibid para 60.

<sup>189</sup> *Akavan* ( n 27) AG para 53.

It would appear that he meant that consultation requires negotiation because footnote 11 stated ‘to highlight the function of consultations as being to give rise to negotiations see point 59 of the Opinion of AG Tizzano’<sup>190</sup> in *Junk*.

Despite the AG’s drawing attention to *Junk* regarding ‘consultation’ as being a function of ‘negotiation’ there does not appear to be anything directly in the wording of the *Junk* judgment that he refers to that supports his statement. In *Akavan* the ECJ judgment did not refer to this part of the AG’s opinion.

#### 5.3.5.2.3 Conclusion

Both the ECJ and two Advocates General appeared to be of the opinion that the term ‘consultations... with a view to reaching an agreement’ involves ‘negotiation’ of some sort. Two connected issues should be borne in mind. Firstly, the phrase did not form the operative part of the judgment. It was discussed in the context of whether consultations should occur before notice of collective redundancies was given and before all relevant information had been received. Secondly, *Junk* and *Akavan* concerned the CR Directive. Extending the link with negotiations to other measures involving the same phrase is potentially flawed without taking account of factors used in statutory interpretation.

#### 5.3.5.3 Rebuttal of the Link Between ‘Consultations... With a View to Reaching an Agreement’ and ‘Negotiation’?

This section examines ‘consultations... with a view to reaching an agreement’ using the ECJ’s methods of statutory interpretation. Three approaches are used and none supports a link with the term ‘negotiation’. The first is through interpretation in context. The second looks at *travaux préparatoires*. The third examines the language used in different Directives.

##### 5.3.5.3.1 Interpretation in context

A major factor supporting the proposition that the legislature did not intend consultation to involve negotiation is that the word ‘negotiate’ does not

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<sup>190</sup> Ibid Footnote 11.]

appear in the recitals or text of the CR Directive. Both Advocates General were Italian and might have been expressing the situation in the context of their language. Nowhere in the Italian version of the Directive is the word ‘negotiate’ (negoziare). But this is the term that is used in other Directives.<sup>191</sup> In their opinions the AGs do not use ‘negoziare’ but do use the term ‘trattativa’. This translates as negotiate but much of the dictionary definition might also apply to consultation:

Preliminary discussion in which the parties are interested in an agreement (in particular the representatives of two or more political parties, economic bodies, social categories, etc.). They exchange and assess the reciprocal proposals and they try to bring their respective points of view closer and to reconcile their opposed interests to reach a solution that is acceptable to everyone.<sup>192</sup>

The IPF views negotiation in the context where two parties have some sort of power with which they are able to bargain or compromise. It appears that ‘trattativa’ can convey something between ‘consult’ and ‘negotiate’.

Is it possible that this was meant rather than ‘negotiate’? This would be consistent with AG Tizzano’s having stressed that consultation should not involve the passive receipt of information but something meaningful. This line of reasoning has implications for the conclusion that negotiation equates with ‘consultations... with a view to reaching an agreement’.

#### 5.3.5.3.2 Trauваux Preparatoires

Drafts of the CR Directives consistently used the term ‘consult’. Chapter 3 showed that Article 9 of the Draft AR Directive<sup>193</sup> originally provided for negotiation. But ‘negotiation’ formed part of a process that greatly differed

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<sup>191</sup> E.g. in ECo Directive 2001/86 Art 2(2)(g).

<sup>192</sup> Battaglia *Grande Dizionario Della Lingua Italiana* / (Unione Tipografico-Editrice Torinese Turin 1961).

<sup>193</sup> Proposal for a Directive of the Council on harmonization of legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations 1974 OJ C 104 of 13.9.1974 amended Bull EC 7/8-1975.

from that enacted in the CR and AR Directives. The option of third party arbitration in the draft AR Directive would have given representatives additional bargaining power. Section 5.3.5.3.3 shows that bargaining power is a common factor in legislation that uses the term ‘negotiate’.

#### 5.3.5.3.3 Comparing the language in Directives involving I&P

Three Directives that provide for I&P<sup>194</sup> use the term ‘negotiate’. It is used in the context of deciding the type of agreement that will govern employee involvement under the Directives. Employee representatives are in a position to negotiate because the Directives provide for a fall-back position, subsidiary requirements/standard rules, in the event that no agreement is reached.<sup>195</sup> The difference in use coincides with Howe’s statement that ‘negotiation between employees and management lead to contractually binding agreements’.<sup>196</sup> The CR Directive does not interfere with management’s prerogative to decide; concepts of mutual agreement, settlement and compromise that form part of ‘negotiation’<sup>197</sup> are absent from the Directive. This differs from the way ‘consultation’ is used. Consultation might lead, as in the case of CR Directive, to agreements bound by contract; but the purpose of consulting is more general.

The separation of the meanings of ‘consult’ and ‘negotiate’ appears to be supported by Dorssemont who argued that the wording used in many of the CR Directive’s language-versions regarding the outcome of the consultation process (*akkoord- accordo- Einigug*) is at variance with that used for proper CB (*overeenkomst-contratto collettivo-Vertag*).<sup>198</sup> The language appears to reflect the dual stream approach to labour relations that is found in Germany where there is no tradition of CB being carried out at company

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<sup>194</sup> ECo Directive 2001/86; EWC Directive 2009/38; IC Directive 2002/14.

<sup>195</sup> ECo Directive 2001/86 Art 7(1); EWC Directive 2009/38 Art 7.

<sup>196</sup> This is not so in the case of CB in the UK.

<sup>197</sup> Onions (ed) *The Shorter Oxford English Dictionary* (3rd edn Clarendon Press Oxford 1973) Vol II 1303.

<sup>198</sup> Dorssemont 'Case C-55/02 Commission of the European Communities v Portuguese Republic, Judgment of the Second Chamber of the Court of Justice of 12 October 2004 Case C-188/03 Irmtraud Junk v Wolfgang Kühnel. Judgment of the Second Chamber of the Court of Justice of 27 January 2005' (2006) 43 CMLR 225 238-239.

or organisational level.<sup>199</sup> In the case of the CR Directive, this points to the legislature describing something less strong than ‘negotiation’.

Are there links between the way that the phrase ‘with a view to reaching agreement’ is used in the CR and other Directives? The legislature establishes no connection between the phrases used in each of the Directives. ‘Consultation’ or ‘consult’ ‘with a view to reaching an agreement’ is used in the CR, AR, and IC Directives.<sup>200</sup> The term is used with ‘negotiate’ in the EWC and ECo Directives. The phrase is used in connection with events outside the course of day-to-day business (collective redundancies, transfers of undertakings, situations that seriously impact on employment relationships, and negotiating EWCs or I&P Bodies). However, when compared to its use in other Directives, the CR Directive appears to use the phrase differently.

The language the CR Directive uses regarding the consultation process differs from the AR and IC Directives. In the AR and IC Directives ‘consult’/‘consultation’ are in the singular ‘he shall consult the representatives of this employees’ and ‘Consultation shall take place’<sup>201</sup>. The CR Directive’s ‘shall begin consultations’<sup>202</sup> appears to indicate a positive instruction to begin a process. It seems that the legislature is pointing to a process that gives employees as much of a chance as possible to influence outcomes. The envisaged ending an employment relationship has potentially more impact compared with less specific subjects in other Directives.

#### 5.3.5.3.4 Academic comment

Hall and Edwards argued (albeit before Junk) that ‘consultations... with a view to reaching an agreement’ ‘does not imply joint regulation of the

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<sup>199</sup> *Bull Supp* 8/75 (n 56) 58.

<sup>200</sup> Arts 6(2) and 4(4)(e).

<sup>201</sup> Arts 7(2) and 4.

<sup>202</sup> Art 2(1).

redundancy process and falls short of a duty to bargain'.<sup>203</sup> Post Junk, Dorssemont wrote:

The wording of the CR Directive "consultation with a view to reaching an agreement" seems to blur [the distinction between consultation and bargaining]. The identification by the Court in *Jun v Kühnel* of "consultation" with "negotiation" is somewhat more puzzling.<sup>204</sup>

Catherine Barnard stated, regarding the CR Directive, that the phrase 'blurs the distinction between consultation and collective bargaining.'<sup>205</sup> There is no evidence of this link within the Directive's preamble. The recitals refer to points 17 and 18 on information, consultation and participation for workers in the Community Charter of the Fundamental Social Rights of Workers<sup>206</sup>. They do not mention paragraphs 11-14 concerning CB. The legislature did not make that link.<sup>207</sup> It would appear that CB is viewed as being conceptually distinct.

Dorssemont went on to distinguish consultation from CB because in the former 'representatives cannot be held responsible, let alone liable for that decision.'<sup>208</sup> The process forms part of the unilateral managerial decisions for which workers' representatives cannot be held responsible or liable.<sup>209</sup> Managerial prerogative is 'ultimately [left] intact'.<sup>210</sup> Other commentators appear to be of similar opinions. Writing of the phrase 'consultations... with a view to reaching an agreement' Smith stated that 'it does not impose a

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<sup>203</sup> Hall and Edwards (n 161) 312.

<sup>204</sup> Dorssemont 'Case study; Com v Portugal and Junk' (n 219) 225.

<sup>205</sup> Barnard *EC Employment Law* (2nd edn Oxford University Press Oxford 2000) 493.

<sup>206</sup> Community Charter of the Fundamental Social Rights of Workers *Social Europe* 1/90 51-76 Luxembourg: Office for Official Publications of the European Communities.

<sup>207</sup> Commission of the European Communities 'Report by the Commission to the Council on progress with regard to implementation of the Directive on the approximation of laws relating to collective redundancies' (1991) SEC(91)1639 final. 38.

<sup>208</sup> Dorssemont 'Case study; Com v Portugal and Junk' (n 219) 238.

<sup>209</sup> Ibid 238.

<sup>210</sup> Deakin and Morris p 796; Hall and Edwards (n 161) 312.

duty to bargain or imply the joint regulation of the redundancy process',<sup>211</sup> whilst Heinsius stated 'it may be argued that – though consultation has to be distinguished from collective bargaining and merely concerns social dialogue - it primarily refers to a social plan'.<sup>212</sup> No commentator associated the phrase with 'negotiation', and the majority did not associate it with CB.

#### 5.3.5.4 Conclusion

No evidence was found to support a link between the phrase 'consultations... with a view to reaching an agreement' and negotiation. The ECJ's statement in *Junk* does not form the operative part of the judgment; the term 'negotiation' appears to have been used in the context of illustrating the consultation process. It should be borne in mind that neither the ECJ nor AGs specifically stated the phrase consultation 'with a view to reaching an agreement' meant to 'negotiate'. However, if Article 2 of the CR Directive imposes an obligation to negotiate, would the same apply to other Directives using the phrase? AG Cosmas stated that where terms are used cumulatively individual elements can take on a wider meaning.<sup>213</sup> It has been seen that each Directive uses slightly different forms of wording. If the ECJ intended to construe the phrase as meaning negotiation, AG Cosmas' argument would point against giving the phrase the same meaning in all Directives.

There are no definitions of the term 'negotiate' and the legislature has consistently used 'negotiate' in a context where employee representatives are in a position to bargain. This issue was not considered by the ECJ and might point towards the legislature's using 'consult'/'consultation' 'with a view to reaching an agreement' in a different sort of way; perhaps illustrating a more serious, meaningful, and purposeful form of

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<sup>211</sup> Smith and Hall 'Redundancy Consultation: A Study of Current Practice and the Effects of the 1995 Regulations' (1999) Employment Relations Research Series No 5 DTI 16.

<sup>212</sup> Heinsius 'The European Directive on Collective Dismissals and its Implementation Defects. Six ECJ Judgments as a Potential Incentive for Amending the Directive' (2009) 25 3 Int J Com LLIR 261, 264.

<sup>213</sup> *Rockfo* (n 26) para 40.

consultation. One that would coincide with the IPF's 'focused consultation'.

### 5.3.6 Negotiation

Within the context of EU law the term 'negotiate' is used in connection with forming agreements that are potentially less stringent than the default position within the Directive (e.g. Article 5 of the IC Directive). This type of bargaining agreement was mentioned by Davies and Kilpatrick<sup>214</sup> in the context of the Working Time,<sup>215</sup> Parental Leave,<sup>216</sup> and Fixed-Term Workers Directives.<sup>217</sup> They called these sorts of agreements 'adjustments' because the result 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'.<sup>218</sup> This sort of process has been termed 'Bargaining in the shadow of the law'.<sup>219</sup>

There are factors that limit the autonomy of the parties to negotiate without fetters in all Directives using the term 'negotiate'. The EWC ECo, and IC Directives do not define 'negotiate' but indicate the conditions under which negotiations should take place. All require negotiation 'in the spirit of cooperation',<sup>220</sup> but the EWC and ECo Directives state '... central management and the special negotiating body must negotiate in a spirit of cooperation with a view to reaching an agreement'.<sup>221</sup> The difference in wording raises the issue of whether there are two standards of negotiation.

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<sup>214</sup> Davies and Kilpatrick (n 72) 123-124.

<sup>215</sup> Working Time Directive 93/104.

<sup>216</sup> Council Directive (EC) 96/34 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145.

<sup>217</sup> Council Directive (EC) 99/70 concerning the framework agreement on fixed-term work [1999] OJ L175.

<sup>218</sup> Davies and Kilpatrick (n 72) 125.

<sup>219</sup> Bercusson 'The Dynamic of European Labour Law After Maastricht' (1994) 23 1 Ind LJ 1 1.

<sup>220</sup> EWC Directive 2009/38 Art 9; ECo Directive 2001/86 Art 9; IC Directive 2002/14.

<sup>221</sup> EWC Directive 2009/38 Art 6(1).

Dorssement stated that requirement to negotiate ‘with a view to reaching an agreement’, along with central management’s obligation to provide all the essential information for the opening of the negotiations, can be seen as an aspect of the duty to bargain in good faith.<sup>222</sup> Moreover the obligation on management to create the necessary conditions to establish the special negotiating body to make the agreement appears at odds with the ‘autonomous character of collective bargaining.’<sup>223</sup> The qualification of ‘negotiation’ with the phrase ‘with a view to reaching an agreement’ does not appear to equate with CB because it hampers each side’s autonomy to walk away.

Under EU law representatives have a firm position from which to bargain ‘because they can always insist on the statutory standard requirement by failing to agree with what the employer is proposing.’<sup>224</sup> Given that it appears illogical that employee representatives should agree to lesser standards when it is in their power to refuse to co-operate and rely upon default provisions, do Article 5/6 agreements merely give the illusion of choice? Davis and Kilpatrick’s study covering 71 Article 6 agreements ‘indicates a movement towards increasing uniformity of provision in comparison with Article 13 agreements’. They found fewer instances of ‘downward deviation from the benchmarks set by the subsidiary requirements.’<sup>225</sup> There is some opting out of the subsidiary requirements. Despite the ability to ‘insist on the statutory standard requirement by failing to agree with what the employer is proposing’<sup>226</sup> Article 5/6 agreements still give rise to lower standards than within default provisions.

Under EU law the term negotiation is qualified by requirements to ‘negotiate in the spirit of cooperation’ and ‘with a view to reaching an agreement’. It appears that there might be two standards of negotiation.

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<sup>222</sup> Dorssemont 'Kuhne & Nagel' (n 128) 1713.

<sup>223</sup> Ibid 1714.

<sup>224</sup> Davies and Kilpatrick (n 72) 138.

<sup>225</sup> Carley and Hall 'The Implementation of the European Works Councils Directive' (2000) 29 2 Ind LJ 103, 108-109.

<sup>226</sup> Davies and Kilpatrick (n 72) 138.

These alter frame of mind and, in the case of the second, add focus to negotiations. Using such tools as refusing to co-operate, or stating a position is non-negotiable are important assets when bargaining. This influencing of mindset diverges with spirit of ‘negotiation’ under Chapter 4’s definition.

### **5.3.7 Collective Bargaining**

Despite support for CB in its Treaty and Charter no EU legislation requiring CB has been passed so far. All Directives in this chapter provide for collective agreements so CB may arise out of circumstances connected with these Directives.

The AR and CR Directives provide for collective agreements that may produce conditions more favourable than those in the Directives.<sup>227</sup> The AR Directive also takes into account the results of collective bargaining. Article 3(3) provides that a transferee shall continue to observe the terms and conditions agreed in any collective agreement that the transferor was bound by until it expires, or is replaced by another agreement (the period may be limited by Member States). As has been seen, the EWC and ECo Directives allow for management and labour to agree terms that differ from those in the Directives and Article 5 of the IC Directive specifically makes provision for Member States to entrust management and labour with defining practical arrangements for informing and consulting employees.

Failure to comply with a Directive may result in collective bargaining. When BMW attempted to sell Rover it did not consult employee representatives about the transfer. This meant that liability for failure to consult would be transmitted to buyers of its businesses. The potential financial burden resulted in one buyer withdrawing and was used to broker enhanced redundancy terms in the contracts of employees in the eventual sale.<sup>228</sup> Unions agreed to waive claims arising from the failure of BMW (through Rover) to begin consultation at the time of a prospective sale to

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<sup>227</sup> Articles 8 and 5 respectively.

<sup>228</sup> Armour and Deakin 'Commentary—The Rover Case (2)—Bargaining in the Shadow of TUPE' (2000) 29 ILJ 395.

Alchemy in return for enhanced redundancy terms. According to Armour and Deakin, this saved the buyer £100 million.<sup>229</sup>

Breach of rights under the AR Directive helped unions bargain a deal more advantageous than if such rights had not been breached. Had the obligation to consult been fulfilled, the transferor could have potentially dismissed employees under Article 4. Ironically, bargaining under the shadow of the law appeared to secure employees better rights than they would have had if obligations arising under the AR Directive had been fulfilled.

### **5.3.8 Workers' Right to Challenge of Veto Management Decisions**

There are three Directives that have provisions which may give rise to circumstances in which employee representatives might veto management decisions. The first situation involves the referral of a matter to a Public Authority for arbitration. The second requires the agreement by employees or their representatives before decisions are made. The third concerns the ability to influence management through 'participation' within a company's supervisory or administrative organ.<sup>230</sup>

#### **5.3.8.1 Arbitration**

It was seen, in Chapter 2, that early drafts of the CR and AR Directives provided for employee representatives to request mediation or arbitration where no agreement was reached. The current Directives maintain a structure that leaves room for Member States to provide for mediation or arbitration.

##### **5.3.8.1.1 The Collective Redundancies Directive**

Under the CR Directive workers have the ability to voice their comments about management's proposals concerning redundancies to a public authority. The Directive, unlike the 1974 Draft,<sup>231</sup> does not give power to

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<sup>229</sup> Ibid.

<sup>230</sup> Art 2(k) ECo Directive 2001/86.

<sup>231</sup> See Chapter 2.

local authorities to veto or postpone management decisions. However, public authorities in some European countries have this right.<sup>232</sup>

The role of the public authority has come before the ECJ several times.<sup>233</sup> Article 4(2) of the CR Directive states that it should ‘seek solutions to problems raised by collective redundancies’. The ECJ has not taken an expansive approach to the provisions relating to the duties of the competent public authority. It stated that the Directive’s sole object is to provide for consultation with representatives and to notify the competent public authority prior to such dismissals.<sup>234</sup> Without additional provisions in Member States competent public authorities are ‘not compelled to intervene in order to seek solutions to the problems raised by the projected collective redundancies’.<sup>235</sup>

#### 5.3.8.1.2 The Acquired Rights Directive

Article 7(3) allows Member States to give employees’ representatives recourse to an arbitration board to obtain a decision on measures that give rise to changes in the business likely to entail serious disadvantages for a considerable number of employees. This is in line with 7(a)(iii) of the IPF.

#### 5.3.8.2 Co-decision making

##### 5.3.8.2.1 The Acquired Rights Directive

Member States are allowed to circumvent the requirement that employee terms and conditions remain unchanged after a transfer where there is a

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<sup>232</sup> E.g. — 'Luxembourg Licenciemment Collectif' European Foundation for the Improvement of Living and Working Conditions <<http://wwweuropaeu/empre/LUXEMBOURG/COLLECTIVEDISMISSALREDUNDANCY-LXhtm>> accessed 28 January 2013; - 'Greece OMADIKÍ APÓLYSI' (2003) European Foundation for the Improvement of Living and Working Conditions <<http://wwweuropaeu/empre/GREECE/COLLECTIVEDISMISSALREDUNDANCY-GRhtm>> accessed 28 January 2013.

<sup>233</sup> Case C-91/81 *Commission of the European Union v Italian Republic* [1982] ECR 2133; *Dansk v Nielson* (n 17); *Junk* (n 7).

<sup>234</sup> *Dansk v Nielson* (n 17) para 10.

<sup>235</sup> *Commission v Italy* (n 254) para 10.

‘serious economic crisis’.<sup>236</sup> This exception is subject to several provisos: Article 5(2)(b) requires that representatives of the employees agree the alteration, whilst 5(3) states that the situation is open to judicial supervision. The Directive allows divergence, within limited criteria,<sup>237</sup> subject to employee agreement.

#### 5.3.8.2.2 ECo and IC Directives

Both allow for ‘involvement’ or ‘any mechanism, including information, consultation and participation, through which employees’ representatives may exercise an influence on decisions to be taken within the company’.<sup>238</sup> Practical arrangements are in accordance with national law and practice in individual Member States.<sup>239</sup> As has been seen in earlier chapters, some states provide for co-decision making. The Directives provide for rights existing in those states consistent with Sections 7 and 8 of the IPF.

#### 5.3.8.3 European-Style ‘Participation’

Article 40 of the European Company’s Regulation<sup>240</sup> provides for participation at board level. Art 2(h) of the ECo Directive defines participation as

the influence of the body representative of the employees and/or the employees’ representatives in the affairs of a company by way of

- the right to elect or appoint some of the members of the company’s supervisory or administrative organ,
- the right to recommend and/or oppose the appointment of some or all of the members of the company’s supervisory or administrative organ.

This definition encompasses models of participation found across the EU.<sup>241</sup>

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<sup>236</sup> Article 5.

<sup>237</sup> Representatives can only go as far as current law and practice permits. Davies ‘European Developments-Amendments to the Acquired Rights Directive’ (1998) 27 Ind LJ 365.

<sup>238</sup> ECo Directive 2001/86 Art 2(h).

<sup>239</sup> ECo Directive Art 6; IC Directive 2002/14 Art 1(2).

<sup>240</sup> ECo Regulation 2157/2001.

Employee participation though the board is mandatory only where such participation is a feature of national law applying to the companies forming a European Company.<sup>242</sup> Employees caught by the provisions have rights under section 8 of the IPF.

#### 5.3.8.4 Conclusion

With the exception of the provisions of the AR Directive, the ability of employees to activate EU provisions involving the right to veto management decisions depend upon practices in Member States. Member States are unlikely to use such forms of I&P if doing so is alien to their industrial relations culture. Again, the result is differing rights to I&P across the EU.

### 5.4 CONCLUSION

When legislating for employee I&P the EU has taken into consideration the practices and preferences of Member States. Compromise resulted in flexible legislation with multiple 'standards' applying in several Directives. It also led to ambiguity and key terms are defined unclearly, or left undefined. Although traditional methods of interpretation are at the forefront of the ECJ's approach to legislative interpretation, it has no fixed hierarchy of interpretative tools. It considers a provision in the context of EU Law in its present state of development. This is made complex by the changing dynamics of community policy. The six factors discussed in Chapter 4 provide a basis from which to assess the characteristics of I&P in seven measures that require employee involvement.

#### 5.4.1 A Provision's Purpose or Objective

Different ideas about worker rights and economic priorities amongst Member States, the Commission, and Parliament resulted in compromises. This means that legislative measures may have objectives that are potentially at variance with each other such as balanced economic and social

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<sup>241</sup> Windbichler 'Cheers and Boos for Employee Involvement: Co-Determination as Corporate Governance Conundrum' (2005) 6 Eur Bus Org L Rev 507.

<sup>242</sup> Article 7, Davies 'Workers on the Board of the European Company?' (2003) 32 2 Ind LJ 75 81, 84.

development. Both Hunt<sup>243</sup> (with regard to Acquired Rights) and Kilpatrick<sup>244</sup> (in respect of Posted Workers<sup>245</sup>) argue that the ECJ has been influenced by the economic/political climate in deciding to reverse a previously expansive approach to interpretation. An increasingly competitive global market coupled with a fragile European economy may result in the ECJ favouring economic over social objectives.

Discerning EU objectives is made more complex by the way recitals are now used. These sometimes make grandiose unsubstantiated statements that indicate a 'Community' approach that falls far short of what is required in the Directive:

[t]imely information and consultation is a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy...<sup>246</sup>

Recitals have also been used to incorporate clauses that would not be acceptable, or are not clearly expressed in the body of the Directive. However, recitals influence ECJ decisions and may result in interpretations unanticipated by a measure's signatories.

#### **5.4.2 Subject Matter**

Early legislation was issue specific and dealt with economic problems or risks. Later measures focus on more general issues concerning an organisation's performance, circumstances, and plans. In the case of the EWC and ECo Directives this provides for potentially uneven subject coverage within different EWCs and European Companies.

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<sup>243</sup> Hunt (n 54) 358-359.

<sup>244</sup> Kilpatrick 'The ECJ and Labour Law: a 2008 Retrospective' (2009) 38 2 Ind LJ 180 196.

<sup>245</sup> Council Directive 96/71/EC Concerning the Posting of Workers in the Framework of the Provision of Services [1996] OJ L18/1.

<sup>246</sup> IC Directive 2002/14 Recital 9.

#### **5.4.3 Level at which Interaction Takes Place**

Measures allow for different kinds of I&P to be practiced in Member States. This means that levels of interaction can vary amongst and within member states. For example, the ECo Directive provides for European Style participation at board level, or for separate information and consultation mechanisms. This creates the potential for representatives to exert very different levels of influence within European Companies across the EU. The level at which interaction takes place depends upon each Directive and not all Directives provide for representatives to consult with management at an appropriate level. This may hamper the effectiveness of EU legislation.

#### **5.4.4 Who is Involved**

EU law focuses on indirect I&P through worker representatives and it usually ‘closes off the regulatory choice of dispensing with representatives’.<sup>247</sup> Only three Directives mention individual workers or employees as well as representatives. The two Directives that provide for direct participation favour indirect over direct I&P. Irrespective of whether Directives provide for direct and indirect I&P, with the exception of the H&S and EWC Directives, there is nothing to ensure that workers or representatives are trained so that they are able to understand and fulfil their duties effectively. This omission may undermine the effectiveness of provisions.

#### **5.4.5 The Degree of Formality Prescribed by Directives**

The legislature has based its measures on the assumption that Member States have appropriate structures to implement EU Law. Beyond laying down minimum standards, it tends not to prescribe how Directives requiring I&P should be implemented. The EU has provided for rights beyond ‘consultation’ in accordance with Member State practice. But these rights have not been extended to Member States without a tradition of I&P.

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<sup>247</sup> Davies and Kilpatrick (n 72) 134.

#### 5.4.6 Depth or Type of I&P

Terms, definitions, and phrases in EU measures that are associated with I&P lack cohesive meanings. Before 1994 key I&P terms were not defined.

There is no standard definition for ‘consult’, ‘inform’, or ‘negotiate’. A legislative style allowing management and labour to negotiate derogated agreements that differ from Directives’ standard rules creates complexity because terms may have more than one meaning within the same Directive.

An example is the term ‘consult’. In Chapter 4 ‘consult’ was broken into component parts which give rise to effective consultation. Factors, such as clearly stating that consultation shall be before a decision has been made were deliberately omitted from the text of the ECo and IC Directives. Definitions in the H&S, Eco, and IC Directives do not clearly correspond with the definition in Chapter 4. Under the EWC Directive, only Article 7 agreements formed after 2011 appear to contain the four factors found in Chapter 4’s definition. Missing one or more of these four factors may have implications for workers, or their representatives, to put forward effective suggestions which have chance of influencing decisions.

Whilst some definitions provide additional information which does not appear to serve a useful purpose, phrases, such as ‘in the spirit of cooperation’ add additional requirements to a term. But do they blur the distinction between terms such as ‘consult’ and ‘negotiate’? Despite comments in *Junk* and *re Akavan* it has been argued that phrase ‘consultations... with a view to reaching an agreement’ does no more than make consultation more focused. This was done by analysing the terms, *trauvaux préparatoires*, different language versions, and comparing how the terms ‘consult’ and ‘negotiate’ have been used in legislative measures. ‘Consultation’/‘consultations’ ‘with a view to reaching an agreement’ appear to change the emphasis of ‘contemplative’ to ‘focused’ ‘consultation.’ This goes beyond consideration of another’s views to a more dynamic interaction which involves the joint formulation of some kind of plan.

There have been no preliminary hearings concerning I&P definitions and Member States' judicial bodies have interpreted terms<sup>248</sup> using the Acte Clair doctrine.<sup>249</sup> It is difficult to know the extent to which such hearings produce different interpretations or whether the ECJ would create a coherent approach. Its comment in *Junk* is problematic. It would be less problematic, in terms of interpretation, to provide clearer definitions within legislative measures and use clarification sheets where decisions, such as that in *Junk*, give rise to uncertainty.

#### **5.4.7 Conclusion**

It has been seen that legislation promoting indirect representation has led to minimum standards of workplace I&P across the EU. However, the same measure may give rise to different levels of I&P within Member States and across the EU and this is far from the positive harmonisation that the Commission originally envisaged in many of its proposals. Flexibility means that interaction might not take place at a suitable level and has led to different definitions of key terms within the same Directive. These factors potentially undermine effective I&P.

At various times the Commission/EU has indicated its policy regarding I&P in the workplace would: (1) lead to humanisation of working conditions; (2) help organisations adapt to market conditions and increase competitiveness; and (3) promote employee involvement within the workplace.<sup>250</sup> But are the forms of I&P, as expressed in EU legislation, effective at achieving these goals?

Research on the effects of these measures (especially the earlier ones) is not plentiful. The preparatory study for an Impact Assessment for the EWC Directive distinguished between agreements where EWCs seemed to be confined to a largely formal or symbolic existence, and those with a dynamic role.<sup>251</sup> The reasons behind this variance, and what factors would

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<sup>248</sup> Text to n 102.

<sup>249</sup> CILFIT (n 11) 16. Text to n 106.

<sup>250</sup> n 56.

<sup>251</sup> VT/2007/098 (n 173).

promote more effective compliance with the Directives are areas that would benefit from further research. Chapters 6 and 7 examine I&P practices in the UK and how these relate to the claims the EU has made regarding the results of their I&P policy.

# Chapter 6 Perceptions of Participation

Legislating for involvement and participation (**I&P**) does not ensure that those acting under its authority comply with the letter, or the spirit, of the law. When looking at I&P in theory it is easy to ignore factors that may interfere with desired outcomes. Despite some I&P processes being a legal requirement, or having a legal basis, research has not focused on how individuals operate in practice. Data relating to attitudes and I&P practice in workplaces can be found in The Workplace Employment Relations Survey (**WERS**). Analysis of this data provides an indication of differences in the way management and employees' representatives perceive management's approach to I&P. It will be seen that dynamics, such as the presence of union representatives, and whether an organisation is in the public or private sector, influence the type of I&P carried out for different subjects. These factors appeared to influence how organisations apply government regulation.

Section 6.1 provides an overview of the literature concerned with perceptions of participation. From this, it develops five hypotheses involving attitudes towards I&P and the relationship between management and employee representatives. Section 6.2 looks at WERS and the data selected to test the hypotheses. Section 6.3 presents an analysis of the data. Section 6.4 draws together findings and relates them to current practice and how to best promote compliance with and clarify the law.

## **6.1 RESEARCH HYPOTHESES**

Existing literature is used to develop five hypotheses that relate to attitudes to I&P and the I&P process. These cover the relationship between management and employee representatives and the differences between public and private sectors. The first hypothesis concerns disparities of perception in the kind of engagement each party experiences. The second, the type of I&P different issues or topics give rise to. The third, differences in the way management interacts with union and non-union representatives.

The fourth relates to variations in practice between the public and private sectors, and the fifth analyses potential causes for these differences.

### 6.1.1 Perceptions of the Participation Process

Several authors have stated that management, employees, and employee representatives have different attitudes towards participation.<sup>1</sup> The literature indicates that perceptions of what takes place during I&P also diverge.<sup>2</sup> Attitudes and conduct appears to be influenced by different outlook and objectives.

There is evidence that employees and management differ in how they view the industrial relations climate within organisations. Kersley et al<sup>3</sup> using data from WERS 2004 found that employees had more negative perceptions of employee relations than managers. In 2004, 93% of managers perceived management-employee relations as being either very good or good; the equivalent number for employees was 60%. They found that managerial perceptions of employee relations were significantly better where there were 'communication practices'. The positive impact seemed to increase with the number of practices. When the effects of these practices were tested in isolation, the only one to achieve statistical significance was monthly meetings between senior management and the workforce.<sup>4</sup> Employee views differed. Although a combination of direct I&P practices produced positive perceptions of the employee relations climate, interestingly, monthly meetings with senior management produced negative associations.<sup>5</sup>

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<sup>1</sup> Däubler 'The Employee Participation Directive- A Realistic Utopia?' (1977) 14 CMLR 457, 460; Industrial Democracy in Europe International Research Group *Industrial Democracy in Europe* (Clarendon Press Oxford 1981) 9; Hyman, Dowling, Goodman and Gotting 'Employee Participation: Managerial Attitudes and Behaviour' (1982) Discussion Paper 4 Centre for Research in Industrial Democracy & Participation 2.

<sup>2</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (Routledge London 2006); Hyman, Dowling, Goodman and Gotting (n 1).

<sup>3</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge (n 2) 277-284.

<sup>4</sup> Ibid 281-2, and 284.

<sup>5</sup> Ibid.

Differences in perception appear to go beyond the general industrial relations climate and apply to what is being communicated. Kersley et al<sup>6</sup> also looked at WERS data on collective 'conflict'. They compared management responses with those of employee representatives in the *same* workplaces. Their opinions were found to vary. Employee representatives were more likely to say that industrial action, or collective disputes over pay or other conditions of employment had been *threatened* but had not taken place. However, both sides concurred about when collective disputes had arisen in 83% of workplaces.<sup>7</sup> Other than an earlier comment about the employment relationship offering 'scope for divergent goals and behaviours'<sup>8</sup> Kersley et al did not comment on these differences. WERS data indicates that, unlike identifying the existence of industrial action, parties are not always successful in recognising underlying motives, such as whether something is negotiation or really threatened industrial action. It appears that one party is wrongly interpreting the other's motives or behaviour.

Other studies have gone into more detail about the differences between management and employee representatives' goals. With regard to management, Hyman et al<sup>9</sup> observed that management laid emphasis on participation as a trust-building mechanism that would help efficiency. Independent of creating trust, I&P has been advocated as helping improve workplace relations and organisational performance.<sup>10</sup> I&P creates an opportunity to strengthen the relationship between employer and employee by increasing communication and management can benefit from ideas and information to come out of this process.

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<sup>6</sup> Ibid 208-212.

<sup>7</sup> Ibid 211.

<sup>8</sup> Ibid 207.

<sup>9</sup> Hyman, Dowling, Goodman and Gotting (n 1) 2.

<sup>10</sup> Pfeffer *The Human Equation: Building Profits by Putting People First* (Harvard Business School Boston 1998); Wood and de Menzies 'Comparing Perspectives on High Involvement Management and Organizational Performance Across the British Economy' (2008) 19 4 IJHRM 639; Guest, Michie, Sheehan, Conway and Metochi *Employment Relations, HRM and Business Performance* (CIPD London 2000).

However, the literature indicates that market pressures are a strong factor in motivating management. Addison et al contended that management sought to maximise efficiency and/or profit by choosing relevant I&P practices.<sup>11</sup> Rose stated that the free enterprise market ideology favours the economic and production needs of the organisation over the needs and aspirations of employees.<sup>12</sup> These considerations and pressures might result in rushing I&P and concentrating on issues that appear most relevant to management's immediate agenda. Unless employees are aware of management's objectives, and management gives feedback, employees will not necessarily know if, and by how much they have contributed to a decision. Lack of communication might result in different perceptions about what form of I&P has taken place (i.e. communication rather than consultation).

Hyman et al said that unions interpreted participation in terms of influence over, or involvement in, decision-making.<sup>13</sup> It is logical that union and employee representatives would assess the kind of I&P taking place in terms of their perception of management's receptiveness/attitude to their input.

Understanding what type of I&P is taking place is likely to be based upon: underlying attitudes; preconceptions of what terms such as 'consult' or 'involve' mean;<sup>14</sup> whether a party acts in a way consistent with a term; and expectations of the participation process. These factors, especially Hyman et al's work, inform hypothesis 1:

**When compared with management, employee representatives are less likely to report interactive approaches to decision making.**

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<sup>11</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance: Evidence from Germany and Britain' (2000) 38 1 BJIR 7, 28-29.

<sup>12</sup> Rose, E, *Employment Relations* (3rd edn Pearson Education Limited Harlow 2008) 83.

<sup>13</sup> Hyman, Dowling, Goodman and Gotting (n 1) 2.

<sup>14</sup> See below for different perceptions of the meaning of consult.

### 6.1.2 Factors Influencing Kinds of Interaction

The second hypothesis relates to when parties are likely to report that more interactive forms of I&P take place. The way that bargaining power influences each party's ability to negotiate was discussed in Chapter 4. To summarise, Walton and McKersie<sup>15</sup> classified negotiation as an attempt to define or redefine the terms of interdependence.<sup>16</sup> They described two forms of negotiation: distributive bargaining and integrative bargaining. The first dealt with actual or perceived goal conflict, concerning the division of limited resources.<sup>17</sup> For example, when settling the terms of employment contracts such as pay, one party's benefit results in economic loss to the other. The second involved solving problems that do not fundamentally involve a conflict of interest.<sup>18</sup> Examples include issues concerning the employment relationship such as disciplinary/grievance procedures or health and safety.

The ability of employees or their representatives to successfully negotiate varies. Many terms and conditions of employment are traditionally subject to negotiation and form part of collective bargaining agreements. Other issues that potentially affect employees are governed by law. Disciplinary and grievance procedures should have, as their base line, an ACAS code of conduct. For Health and Safety there is an Approved Code of Practice, guidance, and an inspectorate to check compliance.<sup>19</sup> Because representatives have a 'legal'<sup>20</sup> base from which to argue their case they are

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<sup>15</sup> Walton and McKersie *A Behavioral Theory of Labor Negotiations* (McGraw-Hill New York 1965) 127.

<sup>16</sup> Ibid 3.

<sup>17</sup> Ibid 9; Chamberlain and Kuhn *Collective Bargaining* (New York McGraw-Hill 1965) in Fox *Beyond Contract: Work, Power and Trust Relations* (Faber and Faber Limited London 1974) 29.

<sup>18</sup> Walton and McKersie (n 15) 128 citing H. Metcalf and L Urwick (eds) *Dynamic Administration: The Collected Papers of Mary Parker Follett* (Harper Collins, New York 1942) 34-35.

<sup>19</sup> Health and Safety at Work Act 1974 s16(1) (Code of Practice) and 18-20 (inspectorate their powers).

<sup>20</sup> ACOPs are not binding law, but a breach of its terms may be used as evidence before a tribunal. Ibid; s17; Trade Union and Labour Relations (Consolidation) Act 1992 s207(2).

in an especially strong position to negotiate - 'bargaining in the shadow of the law'<sup>21</sup>. Adapting legal requirements to fit an organisation could therefore involve negotiation. Hypothesis 2 tests Walton and McKersie's claims and the concept that the law provides employee representatives with additional bargaining power.

**Managers and employee representatives are more likely to report more interactive forms of I&P around issues which give rise to distributive bargaining or are regulated by legislation.**

### **6.1.3 Management Attitudes to Trade Union Versus Non-Union Representatives**

Goldman noted that consultation can turn into negotiation when each party fails to reach an agreement and 'the issue is not reserved for unilateral resolution'.<sup>22</sup> But to be effective both sides have to have the ability to vocalise their opinions and negotiate. The third hypothesis relates to differences in the effectiveness of union and non-union employee representatives' and how this influences management's behaviour.

Rose indicated that relative power is determined by perceptions of strength.<sup>23</sup> During the nineteenth century workers combined to create a social power 'to balance that of management'.<sup>24</sup> Trade unions have been legally recognised to bargain collectively since the nineteenth century.<sup>25</sup> Their representative body, the TUC, has stated that the provision of training and education is essential if union representatives are to effectively interact with management and workforce.<sup>26</sup> ACAS also stresses the need for

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<sup>21</sup> Bercusson 'The Dynamic of European Labour Law after Maastricht' (1994) 23 1 Industrial Law Journal 1 1.

<sup>22</sup> Goldman, 'Settlement of Disputes over Interests' in Blanpain (ed) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (Wolters Kluwer Austin 2007) 722-723.

<sup>23</sup> Rose (n 12) 60.

<sup>24</sup> Kahn-Freund *Labour and the Law* (2nd edn Stevens & Sons London 1977) 8.

<sup>25</sup> Ibid 68.

<sup>26</sup> Rose (n 12); 151; <<http://wwwunionlearnorguk/>> accessed 23th October 2012.

representatives to be trained.<sup>27</sup> Unions provide training and support to their members which is not determined by, or paid for (other than provision for paid time off for union officials)<sup>28</sup> by management. There are no similar structures for non-union representatives. This means that union representatives are probably in a better position to interact effectively with management than their non-union counterparts.

These factors point to management being in a stronger position to exercise its prerogative in the absence of trade unions. Union representatives are likely to be better trained, informed, and supported when compared with their non-union counterparts. Hypothesis 3 states:

**Management is more likely to report the occurrence of negotiation or consultation when there are union representatives.**

#### **6.1.4 Public Versus Private Sector**

The fourth hypothesis relates to why, when compared with the private sector, there is more interaction with employee representatives in the public sector. There appear to be two factors that contribute to this. The first relates to union membership, the second to environmental issues.

Trade union representation is stronger in the public sector than in the private sector. The WERS 2004 noted that trade union recognition was 90% in the former and 16% in the latter.<sup>29</sup> Unions may exert an indirect influence on management I&P policy where there is no recognition, especially where there are pockets of, or high levels of union membership in an organisation. However, this is less likely in the 77% of private sector organisations where there are no union members.<sup>30</sup>

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<sup>27</sup> ACAS 'Employee Communications and Consultation' (2009) B06 34; Dix and Oxenbridge 'Information and Consultation at Work: From Challenges to Good Practice' (2003) Research and Evaluation Section 03/03 ACAS 43-44.

<sup>28</sup> TULRA s168.

<sup>29</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge (n 2) 119.

<sup>30</sup> Ibid 119.

Lewis argued that when compared with the private sector, managerial style in the public sector appears more constrained.<sup>31</sup> Boyne<sup>32</sup> made a study of empirical evidence to assess theoretical arguments on the differences between private firms and public agencies. He analysed 13 hypotheses concerning organisational environments, goals, structures, and managerial values. Boyne found evidence to support the hypothesis that the public sector is more bureaucratic<sup>33</sup> and has more formal procedures for decision making.<sup>34</sup> He also found some evidence that public sector management have a lower degree of autonomy than their private sector counterparts.<sup>35</sup> This might indicate that once I&P procedures are in place, they are more likely to be adhered to. Hypothesis 4 tests whether:

**When compared with the private sector, management uses more interactive forms of I&P in the public sector.**

#### **6.1.5 Public Versus Private Sector: Differences in Organisational Goals**

Boyne also provided an overview of studies that related to organisational goals.<sup>36</sup> Ferlie et al and Flynn<sup>37</sup> argued that public agencies have distinctive organisational goals, such as accountability. Emmert and Crow and Scott and Falcone examined differences between public and private sector goals relating to 'research and development organizations'.<sup>38</sup> They found that private firms emphasised commercial objectives, whereas public agencies focused on basic research. Without being driven by profit, the public sector appeared 'freer' to incorporate a broader range of objectives into their employment relations strategies. Boyne also found statistically weak

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<sup>31</sup> Lewis, Thornhill and Saunders *Employment Relations* (Pearson Education Ltd Harlow 2003) 121.

<sup>32</sup> Boyne 'Public and Private Management: What's the Difference?' (2002) 39 1 JMS 97.

<sup>33</sup> Ibid 112.

<sup>34</sup> Ibid 101.

<sup>35</sup> Ibid 101-112.

<sup>36</sup> Ibid 107.

<sup>37</sup> Ibid 100.

<sup>38</sup> Ibid 106.

evidence supporting the hypothesis that public organisations are more easily influenced by external events.<sup>39</sup> Specific goals and obligations that are not intrinsic to a public body's purpose are incorporated into public sector objectives. Some legal requirements are more onerous on the public sector than the private sector. An example of this is the duty to promote equality under the Equality Act 2010.<sup>40</sup> This means that, compared with the private sector, the public sector faces stricter obligations to implement and follow up government policy such as equal opportunities. Hypothesis 5 is:

**Compared with the public sector, management in the private sector is less interactive with employee representatives on goals of non-commercial importance and more interactive with employee representatives on goals of commercial importance.**

## 6.2 THE DATA

This section overviews WERS before going on to outline the variables (survey questions) used in section 6.3.

### 6.2.1 The Workplace Employment Relations Survey (WERS)

Since 1980 the UK Government has sponsored a series of employment relations surveys. After each survey an analysis of findings is published.<sup>41</sup> The datasets are then made available for wider analysis.<sup>42</sup>

The surveys 'gather information about the size and structure of the workforce.'<sup>43</sup> Their purpose is to map out changes in employment relations, inform policy development, and 'stimulate and inform debate and

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<sup>39</sup> Ibid 100, 106.

<sup>40</sup> Equality Act 2010 s129.

<sup>41</sup> E.g. Millward, Bryson and Forth *All Change At Work? British Employment Relations 1990-1998 as Portrayed by the Workplace Industrial Relations Survey Series* (Routledge London 2000); Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge (n 2).

<sup>42</sup> Economic and Social Data

Service<<http://wwwesdsacuk/findingData/werTitlesasp>>Accessed 26th July 2012.

<sup>43</sup> National Centre for Social Research 'Workplace Employment Relations Survey 2004. Panel Survey Management Questionnaire (PQ)' (2004) BIS <<http://www.bis.gov.uk/files/file11667.pdf>>accessed 05 March 2012 2.

practice.<sup>44</sup> The questions in early surveys concentrated on union organisation and collective bargaining. In 1998 they began to focus on a wider range of employment relations practices. At this point the survey changed its title from The Workplace Industrial Relations Survey (**WIRS**) to WERS. Coverage now includes: employee relations, organisation of work, consultation and communication, representation at work, and establishment performance.<sup>45</sup>

Originally information was only gathered from interviews with management. Responses to potentially subjective questions gave an employer-centred view of the workplace. Starting in 1998 WERS introduced surveys based on interviews with employee representatives and employees. There are now five surveys: (a) the management survey; (b) the employee representatives' survey; (c) the employees' survey; (d) financial performance survey; and (e) the panel survey. The last re-interviews a sample of organisations from the previous management survey. For each establishment, there is a unique reference number which is shared by surveys (a) - (d). This means that data from different surveys can be compared or analysed together.

### **6.2.2 The Questions**

The datasets for WERS 2004 were examined. Fifteen questions relevant to testing the hypotheses were identified in the management and employee representative questionnaires. They concerned: the meaning of consult, two questions relating to collective redundancies, and twelve topics or areas that directly or indirectly impact on workers that might be subject to some form of I&P. Responses help provide an insight into how management and employee representatives perceive management behaviour.

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<sup>44</sup> Department of Business Inovation and Skills 'Employment policy' (2012) <<http://www.bis.gov.uk/policies/employment> accessed 05 March 2012.

<sup>45</sup> National Centre for Social Research (n 43). Other areas include Establishment & Organisation Characteristics, Fair Treatment, Establishment Flexibility.

#### 6.2.2.1 The Meaning of Consult

In the survey management and employee representatives were asked about management's usual approach when consulting employees on committees. Three responses were available:

1. 'seeking solutions to problems':
2. 'seeking feedback on a range of options'; and
3. 'seeking feedback on one option'.

Responses to the question provided an important insight into the way management views the term 'consult' and the consultation process.

The first response suggests openness to input from employees within a consultation *process*; an exchange of views where each side's points are considered *and* discussed. That the survey designers sub-headed this response 'early' (as opposed to 'range' for response two and 'solut' for response three)<sup>46</sup> appears to indicate earlier involvement in the decision-making process than the other two responses. It appears to fall within the scope of 'consultation' as defined within Chapter 4's Involvement and Participation Framework (**IPF**).

The subheading 'early' for first response, coupled with the fact there are already formed 'options' for the other two, implies that the second and third responses relate to later in the decision-making process. Whilst the term 'discussion' was used elsewhere in the survey the term 'feedback' was selected for this question. In the interviewer handbook, 'consult/consultation' was defined as: '[w]here management elicit the views of employees, often through their representatives before coming to a decision.'<sup>47</sup> The definition appears to focus on 'consultation' as a method of drawing forth views rather than engaging in discussions or dialogues. These factors point to 'feedback' as meaning an opportunity to respond, rather

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<sup>46</sup> National Centre for Social Research 'Workplace Employment Relations Survey 2004 Cross-Section Management Questionnaire (MQ)' (2004) BIS <<http://www.bis.gov.uk/files/file11653.pdf>> accessed 05 March 2012 48.

<sup>47</sup> National Centre for Social Research 'WERS 2004 The Workplace Employment Relations Survey 2004 Interviewer Handbook Version 1' (2004) Number 5294 UK Data Archive 89.

than a discussion or dialogue. The implications of the distinction between 'consultation' and 'communication' were discussed in Chapter 4. The term 'feedback' appears to fall into the IPF category of 'communication'. Although there is input, and a possibility of influencing an outcome (perhaps of how the option is implemented), 'feedback' does not appear to involve dialogue, an essential element of Chapter 4's definition of 'consultation'.

#### 6.2.2.2 The Redundancy Process

The surveys asked a number of questions relating to redundancies which had taken place in the last 12 months. Two identical questions were asked of management and employee representatives. The first involved issues that the consultation covered; the second whether consultations had led management to change their proposal. Both questions were repeated to allow the person responding a chance to select all relevant/appropriate responses. These were:

- 1 = "Reduction in the number of redundancies"
- 2 = "Changes in the criteria for selection"
- 3 = "Increase in redundancy payments"
- 4 = "Some other changes (please specify)"
- 5 = "None of these"<sup>48</sup>

#### 6.2.2.3 12 Employee Related Issues (ERI)

Twelve variables in the management survey concerned whether or how management interacted with representatives on a number of issues. The questions were asked in respect of interactions with trade union representatives and repeated for non-union employee representatives. They enquired whether management normally negotiated with, consulted, informed, or did not involve employee representatives:

- 1. ... When setting rates of pay?
- 2. ... About hours of work?

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<sup>48</sup> This option was only available for the question on changes as a result of consultation.

3. ... About holiday entitlements?
4. ... Pension entitlements?
5. ... Recruitment and selection?
6. ... Training of employees?
7. ... Disciplinary procedures?
8. ... Grievance procedures?
9. ... Staffing plans?
10. ... Equal opportunities?
11. ... Health and safety?
12. ... Performance appraisals?

Similar questions in the employee representatives' questionnaire concerned *management's* approach on the same issue. Those questioned were not asked to provide more detail about why they had selected the response.

The four potential responses formed a declining scale from 'negotiation' to 'no involvement'. 'Consultation' is defined in the survey as:

Consultation/consult: Where management elicit the views of employees, often through their representatives before coming to a decision. This is contrasted with **negotiation**, which has the added dimension of a decision arrived at via a process of mutual concessions, bargaining and/or agreements between the parties.<sup>49</sup>

The provision of information need only be a one way process.

Unlike the employee representative survey, the management survey had separate variables relating to union and non-union representatives. In order to compare the data, the variables in the employee representatives' survey were split into trade union and non-union responses.

Chapter 4 defined negotiation as the use of some sort of bargaining position to effect an agreed change. The first three issues (pay, hours, and holidays)

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<sup>49</sup> National Centre for Social Research 'WERS 2004 Interviewer Handbook' (n 47) 89.

are traditionally associated with negotiation through collective bargaining. Pensions can also give rise to conflict over the distribution of limited resources. In Chapter 4 it was seen that Walton and McKersie identified these four as issues that could give rise to distributive bargaining. Of the remaining issues, integrative bargaining would have been more likely to occur over disciplinary or grievance procedures, health and safety, and equal opportunities. This was because employees/employee representatives have the law as a base from which to argue their case.

There are additional requirements for I&P in other legislative measures.

Regulation 20 of the Information and Consultation of Employees

Regulations 2004<sup>50</sup> (ICE) requires the giving of information on recent and probable developments concerning an undertaking's activities and employment situation. It also requires consultation on the 'situation, structure and probable development of employment' and 'decisions likely to lead to substantial changes in work organisation or contractual relations'.

The variables concerning terms and conditions of employment, 'recruitment and selection', and 'staffing plans' are relevant to one or both subsections.

The question about health and safety is relevant to the legal requirement to consult representatives under health and safety legislation.<sup>51</sup> These questions provide an insight into management behaviour and representatives' perceptions of it in 2004. ICE was not yet in force, although management might have altered their behaviour in preparation for ICE. Whether ICE appears to influence I&P practices within organisations might be discovered by comparing these results with later surveys. The results therefore provide a base line for future reference.

### 6.2.3 Sample Selection

There were 2,295 respondents to the management questionnaire compared with 984<sup>52</sup> in the sample of representatives. However, not every respondent answered each question, and not every management respondent had an equivalent employee representative in the employee representative survey.

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<sup>50</sup> The Information and Consultation of Employees Regulations 2004 SI 2004/3426.

<sup>51</sup> Health and Safety at Work Act 1974 s2(6).

<sup>52</sup> This split into 735 union and 249 non-union representatives.

In order to gain an understanding of how perceptions of management and representatives differed, the data was matched. This meant that cases were only selected for analysis when there were responses for the *same* establishment in both surveys.

#### **6.2.4 ‘Weighting’**

The sample of workplaces in WERS did not accurately reflect the size and distribution of industry across the UK.<sup>53</sup> For example, larger workplaces were overrepresented. Weights are usually used during data analysis to adjust the sample within a dataset so that it represents the total group from which the sample was drawn. In order for the survey to become representative of the UK workplace each case has been assigned a weight.

The data was examined.<sup>54</sup> The matched samples were found to be unrepresentative of the dataset before weighting and weighting resulted in greater distortion. For some tests, the weighted sample size was too small to obtain results or to run robust statistical tests. It was therefore decided not to weight the data but to interpret results with the proviso that the sample consists of a disproportionate number of larger establishments. The reader should take into account that the data is *not* a representative cross-section of ‘industry’ in the UK.

### **6.3 RESULTS**

**6.3.1 When Compared with Management, Employee Representatives are Less Likely to Report Interactive Approaches to Decision Making.**  
The data showed differences between the perceptions of management and employee representatives towards I&P, and their understanding of I&P. The responses to the questions on redundancy indicated that employees and management sometimes differed in their opinion of what had been discussed and decided. Finally, the responses to the 12 ERI pointed to a variation of opinion on whether management negotiated, consulted, or informed.

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<sup>53</sup> ‘Workplace Employment Relations Survey 2004 Information and Advice Service’  
<<http://www.wers2004.info/FAQ.php#4.php>> accessed 5 February 2012.

<sup>54</sup> Appendix 2 contains further details.

6.3.1.1 Difference of Perception on Management's Approach to Consulting Responses to the question 'Which of the following best describes managers' usual approach when consulting members of the committee?' were on a three point scale:

- 1 'seek solutions to problems' (**early**);
- 2 'seek feedback on a range of options put forward by management' (**range**); and
- 3 'seek feedback on preferred option put forward by management' (**solut**).

The employee representatives' questionnaire had separate variables for union and non-union representatives; management had one variable. The management data was split between union and non-union using a derived variable.<sup>55</sup>

**Table 6.1**  
**Which of the Following Best Describes Managers' Usual Approach**  
**when Consulting Members of the Committee?**

		1 solutions to problems	2 Feedback on a range of options	3 Feedback on a preferred option
All	Management (%)	32.48	45.01	22.51
	Employee Rep (%)	36.66	33.64	29.70
TU	Management (%)	32.52	43.71	23.78
	Employee Rep (%)	40.91	27.27	31.82
	t test	-2.22	4.41	-2.31
	Sig (1 tailed)	0.02	0.00	0.01
NU	Management (%)	32.41	47.59	20.00
	Employee Rep (%)	28.28	46.21	25.52
	t test	0.88	0.26	-1.16
	Sig (1 tailed)	0.19	0.40	0.13

Differences between management and combined representative choices appear to go against hypothesis 1.<sup>56</sup> The totals showed that whilst management was most likely to indicate 'feedback on a range of options',

<sup>55</sup> WAREPTYPa.

<sup>56</sup> A weighted average was used to total the union and non-union percentages.

employee representatives were fairly evenly split across the three outcomes but marginally more likely to choose ‘seek solutions to problems’.

In both sub-samples, management was most likely to choose ‘feedback on a range of options’, followed by ‘seek solutions to problems’ and ‘feedback on a preferred option’. Management was marginally more likely to select the second than the third response when thinking about their interactions with non-union representatives.

The order of choice for union representatives not only differed from that of management but also their non-union counterparts. They were most likely to select ‘seek solutions to problems’ followed by ‘feedback on a preferred option’. The pattern for non-union representatives followed that of management. But compared with management, a greater percentage of non-union representatives selected the third response.

In order to test the hypothesis the means of the management and employee responses were compared.<sup>57</sup> This was done by using paired-samples t-tests. There were significant differences in all responses related to the trade union

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<sup>57</sup> Hypotheses are tested by trying to disprove them. This is done by attempting to prove the opposite hypothesis to the one put forward (the **null hypothesis**). In this case there is no difference between management’s and employee representatives’ assessment of management’s behaviour. When data is analysed to test whether a practice, or a collection of practices, have specific outcomes, the result is expressed in terms of statistical significance. A high statistical significance means that the null hypothesis is correct; a low statistical significance indicates that it is incorrect.

In terms of the original hypothesis, the smaller the level of significance, the less likely an error has been made. Therefore:

- $p \leq 0.05$  means the chance that an error has occurred or the hypothesis is false is 5% or less
- $p \leq 0.01$  means the chance that an error has occurred or the hypothesis is false is 1% or less.

Convention holds that results are considered reliable where there is at least 95% certainty that the original hypothesis is correct ( $p \leq 0.05$ ).

Field *Discovering Statistics Using SPSS* (2 edn Sage London 2009) 49-50; Acton, Miller, Maltby and Fullerton *SPSS For Social Scientists* (2 edn Palgrave Macmillan 2009) 125-127.

data, but none in respect of non-union representatives. Disparities between patterns of behaviour where unions are present, and how management attitudes differ towards union and non-union representatives, is discussed in hypothesis 3.

The results for union representatives were varied. They were significantly more likely to select the most passive form of consultation, ‘seek feedback on a preferred option’, than management. However, union representatives were significantly more likely than management to select the more active approach to consultation, ‘seek solutions to problems’.

Hyman et al<sup>58</sup> observed that management use participation as a trust building mechanism. Management might have believed that it had identified all solutions and was seeking feedback. Inclusive discussion might have given representatives the impression that they had greater involvement in the decision making process than was really the case. This might have been a deliberate tactic by management, or the desire by representatives to have an effect could have given rise to an illusion of influence.

Although the differences were not significant, the choices made by non-union representatives support hypothesis 1. When compared to management fewer non-union representatives selected the first two responses, and more the third. They had a less positive view of how management consulted. The results for union representatives provided very limited support for the hypothesis.

#### 6.3.1.2 Perceptions of Participation in the Redundancy Process

Management and employee representatives were asked two questions about the consultation process in respect of redundancies. The first was ‘What issues did the consultation cover?’ The second, ‘Did the consultation lead to any of the following changes in managers[sic] original proposals?’

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<sup>58</sup> Hyman, Dowling, Goodman and Gotting (n 1) 2.

Most of the data in respect of the first question supported hypothesis 1. Paired-samples t-tests were carried out. When compared with employee representatives, significantly more managers answered that they had discussed options for reducing redundancies or criteria for selection. When compared with employee representatives, a greater number of managers reported consulting over redundancy payment, but the difference was not significant. However, when compared with management, significantly more employee representatives reported consulting about 'other' issues. These were not specified in the survey so it is not possible to further analyse the response.

**Table 6.2**  
**What Issues did the Consultation Cover?**

	Management %	Employee Rep %	t test	Sig (1 tailed)
Options for reducing redundancies	91.08	54.14	-8.30	0.00
Criteria for selection	84.08	63.69	-4.63	0.00
Redundancy payments	66.24	59.87	-1.29	0.10
Other issues	19.11	33.76	3.13	0.00

The results might be explained by employee representatives not considering that management had consulted. Section 6.3.1 dealt with perceptions of how management 'consulted' on committees dealing with a range of topics. The opportunity to provide 'feedback' might not be interpreted by employee representatives as proper 'consultation'. These questions relate directly to consultation and the results for the first three questions support the hypothesis that employee representatives' perceptions of consultation were less positive than those of management.

Under s188 (1) and (2) of TULRA<sup>59</sup> employers who propose to dismiss 20 or more employees at one establishment in a 90 day period are under an obligation to consult employee representatives with a view to reaching an agreement. A subsample of 60 cases where 20 or more employees were made redundant was tested. Table 6.3 shows that there was little difference between the percentages in the main and sub-samples. Employee

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<sup>59</sup> Trade Union and Labour Relations (Consolidation) Act 1992

representatives were slightly more likely to say that employers consulted on the first three issues. Significant differences remain about whether consultation has occurred on the ‘options for reducing redundancies’ or the ‘criteria for selection’.

**Table 6.3**

**What Issues did the Consultation Cover? Data Relates to 20 or More Redundancies.**

	Management %	Employee Rep %	t test	Sig (1 tailed)
Options for reducing redundancies	90.0	58.3	-4.324	0.00
Criteria for selection	83.3	70.0	-1.823	0.04
Redundancy payments	63.3	60.0	-.423	0.38
Other issues	15.0	28.3	1.823	0.04

Without a legal obligation to consult it might be expected that those making *fewer* than 20 redundant would have been less diligent when consulting.

This would have resulted in a larger difference between management and employee perceptions in this category.<sup>60</sup> Independent sample t-tests were run on management and employee data. The means of workplaces where 19 or fewer people were made redundant were compared with those where 20 or more had been made redundant. No significant differences were found in responses from either the management or employee representatives. A legal obligation to consult did not significantly change the results. This gives rise to questions about how useful the Collective Redundancies Directive<sup>61</sup> (**CR Directive**) is in promoting workplace I&P in the UK.

The second question concerned changes which flowed from consultation. Neither management nor employee representatives significantly differed in their view that the consultations had resulted in changes to the ‘criteria for selection’ (this is a relatively uncontroversial issue because there are established conventions for objective selection criteria). Perhaps surprisingly, employees were significantly more likely than management to

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<sup>60</sup> Where consultations involved fewer than 20 behaviour would have also been influenced by unfair dismissal law.

<sup>61</sup> Council Directive (EC) 98/59 on the approximation of the laws of the Members States relating to collective redundancies [1998] OJ L225/16.

believe that consultation had resulted in changes to management's original proposals (in the number of redundancies and the level of redundancy payments).

**Table 6.4**  
**Did the Consultation Lead to any of the Following Changes in Management's Original Proposals?**

	Management %	Employee Rep %	t test	Sig (1 tailed)
Reduction in redundancies	30.91	40.00	1.94	0.03
Criteria for selection	22.42	27.27	1.27	0.11
Redundancy payments	16.36	23.64	1.87	0.03
Other issues	6.67	12.12	1.68	0.05
None of these changes	47.27	38.18	-1.90	0.03

Management were in a better position to comment on whether consultations had made a difference. The only response where significantly more management felt that there had been change concerned none of the changes to management's original proposals. Again significantly more representatives than management felt that there had been changes. The means of workplaces where 19 or fewer people were made redundant were compared with those where 20 or more had been made redundant. No significant differences were found in responses from either the management or employee representatives.

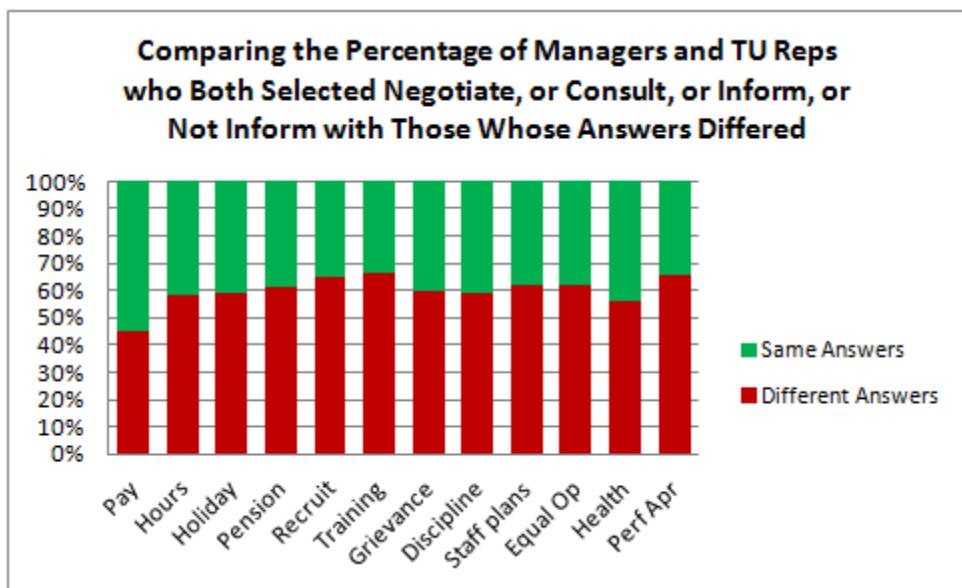
#### 6.3.1.3 Differences of Perception Across 12 Employment Related Issues (ERI)

Questions concerning the 12 ERI were asked of management and representatives. They used the format 'Does management normally negotiate with union /non-union employee representatives, consult, inform, or not involve them about....?' The responses were:

- 1 negotiate,
- 2 consult,
- 3 inform, and
- 4 not inform.

Both management and employee representatives were asked questions in respect of management behaviour. The data showed differences in views, but a similar percentage offering any one response does not imply that management and representative within the same workplace made the same choice. In the data relating to trade union representatives, between 34% and 56% of management and employee representatives questioned in the same establishment selected the same answer; identical responses varied from between 14% to 50% in data relating to non-union representatives (see Figures 6.1 and 6.2).

**Figure 6.1**



**Figure 6.2**

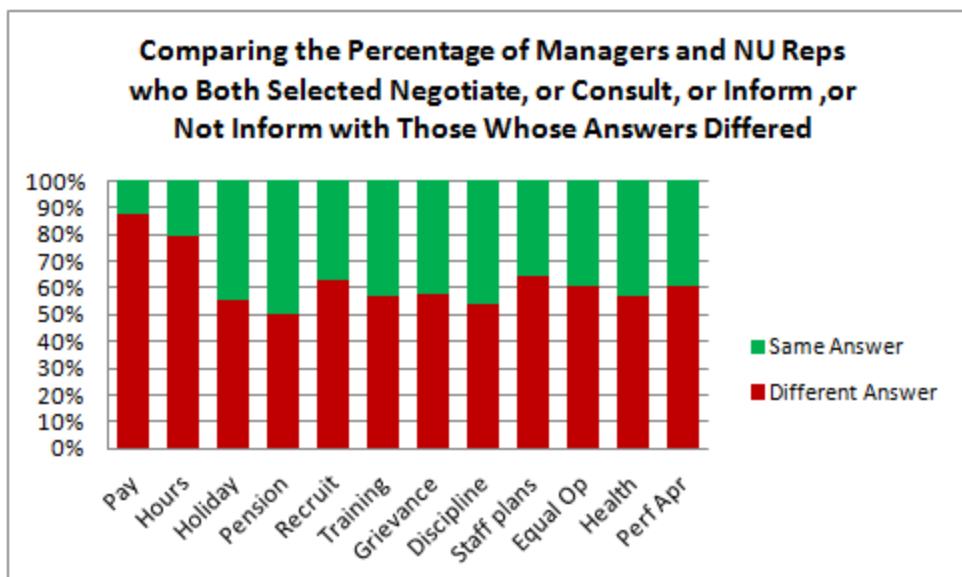


Table 6.5 shows the average of the combined totals for the 12 ERI. The weighted average of trade union and non-union responses indicated that, when compared with employee representatives overall, managers were more likely to select 'consult'. When compared with management, employee representatives were more likely to select 'inform' and 'not inform'. Thus suggesting that compared with employee representatives, management perceived that more interactive kinds of I&P took place.

**Table 6.5**  
**Figures for 12 ERI Combined: Percentage of Matched Establishments Negotiating, Consulting, Informing, or Not Informing**

		Negotiates	Consults	Negotiate or Consult	Informs	Not inform
All	Management	27	36	63	25	12
	Employee Rep	27	29	56	27	17
TU	Management	30	37	67	22	11
	Employee Rep	29	29	59	25	16
NU	Management	3	27	30	52	18
	Employee Rep	8	25	32	45	23

There were differences between the responses when management did or did not interact with unions. Union representatives and management were more likely to report negotiation and consultation than their non-union counterparts (67% and 59% as opposed to 30% and 32%). Where unions were involved, when compared with management, fewer representatives reported that they had negotiated or consulted. However, when compared with managers, more non-union representatives felt that management had negotiated but fewer felt that they had been consulted or informed.

If the totals for 'negotiate' or 'consult' are combined, the results, where unions were involved, offer support for hypothesis 1. 11 of the 12 ERI indicated that when compared with management, fewer representatives opted for 'negotiate' or 'consult' (the exception was training). For full results see Appendix 3 Table 1. In 10 of the 12 ERI the percentage difference was greater than 5% (pay, hours, holiday, pension, grievance, staffing plans, equal opportunities, health, and performance appraisals).

There was less support for the hypothesis amongst the responses from the non-union representatives. Employee representatives were less likely than management to opt for ‘negotiate’ or ‘consult’ in three of the 12 topics.

T-tests were carried out for the 24 variables. These established significant differences between management and employee representatives in six variables (table 6.6). Five of these variables were in respect of the union sample. In all cases significantly more management opted for ‘negotiate’, ‘consult’, or ‘inform’ (pay, hours, holiday, pension, equal opportunities, and pay). This supports the hypothesis.

**Table 6.6**  
**T-Tests where Significant Differences are Observed in the ERI**  
**(1-tailed)**

		Mean	Std Err	t	Sig
Pay	Man	1.54	.035	-9.191	.000
	TU	1.9600	.04325		
Hours	Man	1.65	.034	-7.526	.000
	TU	2.0000	.03826		
Holiday	Man	1.75	.037	-8.033	.000
	TU	2.1413	.04073		
Pension	Man	2.28	.038	-5.624	.000
	TU	2.5603	.03968		
Equal Op	Man	2.23	.029	-2.142	.016
	TU	2.3226	.03792		
Pay	Man	2.80	.061	-1.970	.025
	NU	2.9429	.06246		

Dummy variables were then created in order to isolate cases where an exchange between management and representative had taken place from those where none had occurred. Cases that selected the response ‘consult’ or ‘negotiate’ were combined to produce one ‘active’ response. A second ‘passive’ response was composed of the results for ‘inform’ and ‘not inform’. The divergence between union and non-union results continued. For 10 of the 12 ERI, when compared with union representatives, significantly more managers had selected ‘consult’/‘negotiate’ (pay, hours, holiday, pension, grievance, discipline, staffing plans, equal opportunities, health, and performance appraisals). The results supported the hypothesis,

but no significant differences supported the hypothesis for the non-union sub-sample.

**Table 6.7**  
**T-Tests where Significant Differences are Observed in 'Dummy'**  
**Variables for the ERI (1-tailed)**

		Mean	Std Err	t	Sig
Pay	Man	.82	.014	7.383	.000
	TU	.6731	.01743		
Hours	Man	.82	.014	5.942	.000
	TU	.7004	.01707		
Holiday	Man	.75	.016	7.674	.000
	TU	.5734	.01842		
Pension	Man	.52	.019	5.123	.000
	TU	.3951	.01854		
Train	Man	.47	.019	-1.711	.044
	TU	.5158	.01855		
Grievance	Man	.84	.014	4.063	.000
	TU	.7583	.01592		
Disc	Man	.84	.014	4.650	.000
	TU	.7500	.01615		
Staff plans	Man	.55	.019	2.100	.018
	TU	.5056	.01865		
Equal Op	Man	.71	.017	4.784	.000
	TU	.6031	.01834		
Health	Man	.83	.014	4.549	.000
	TU	.7421	.01626		
Perf Apr	Man	.58	.018	3.966	.000
	TU	.4874	.01872		
Disc	Man	.21	.049	-1.912	.030
	NU	.3429	.05714		

The results for some issues went against hypothesis 1 and two of these differences were statistically significant on: training (trade union) and disciplinary procedures (non-union). An explanation for the first result might lie in how training is organised. The question refers to 'training of employees'. Management might have been referring to training policy, whilst representatives might have been referring to policy and individual training accessed at departmental level.

A general explanation of the difference in attitude between union and non-union representatives might lie in what they understood the term 'consult' to mean. Union representatives might be sceptical of management's motives and only have selected 'negotiate' or 'consult' where there was 'evidence of

direct influence'.<sup>62</sup> Less well trained non-union representatives might have selected 'consult' for interactions that went little further than the giving of information.

#### 6.3.1.4 Conclusion

Support for hypothesis 1 can be found in all three sets of questions. In the first, union representatives were significantly more likely to think that management had selected the least interactive option and given them 'feedback on a preferred option'. The percentages for non-union representatives support the hypothesis but the differences were not statistically significant.

The data relating to issues discussed during the redundancy process also supported the hypothesis. Compared with management, significantly fewer employee representatives said that 'consultation' had covered reducing redundancies and criteria for selection. The percentages for redundancy payments supported the hypothesis, but the difference was not significant.

Results concerning the 12 ERI were more mixed. Support for the hypothesis was stronger when comparing the responses of union representatives with managers.

#### **6.3.2 Managers and Employee Representatives are More Likely to Report More Interactive Forms of I&P Around Issues Which Give Rise to Distributive Bargaining or are Regulated by Legislation.**

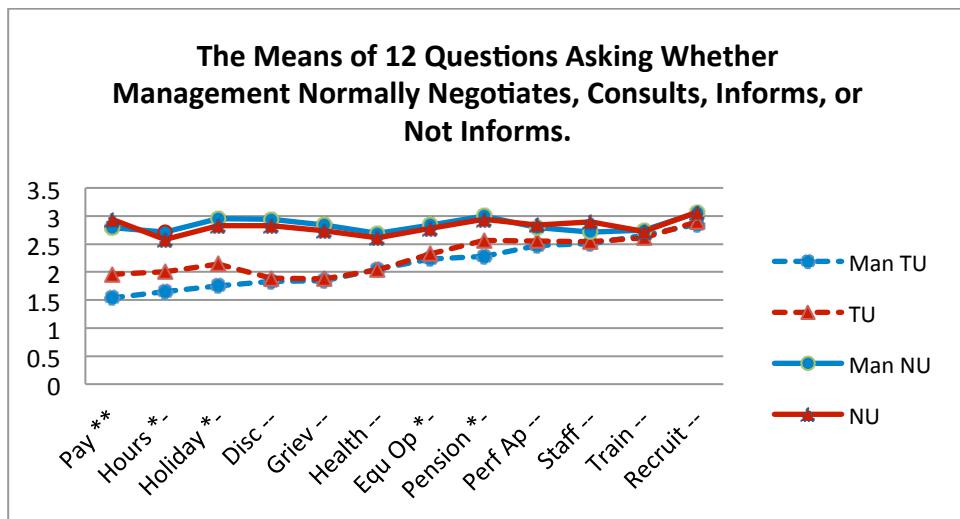
This hypothesis can be tested by comparing the means of the 12 ERI s. The answers were on a scale of 1-4, where 1 equalled the most interactive form of contact, negotiation, and 4 the least interactive form, no contact.

Therefore a lower mean indicated more interactive forms of I&P. Figure 6.3 illustrates the four means for each question.

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<sup>62</sup> Hyman, Dowling, Goodman and Gotting (n 1) 2.

**Figure 6.3**



\* indicates  $p \leq 0.001$ ; + indicates  $p \leq 0.01$ ; # indicates  $p \leq 0.05$ ; - indicates no significance.

Generally speaking, the results for management and union representatives both rose from left to right through the middle range of the scale. This showed increasingly higher means and indicated that fewer interactive forms of I&P were being used. The means for the non-union sample showed less variation. The graph clearly shows four issues where opinions were markedly different over the kind of interaction that had taken place (pay, hours, holiday, and pension). It reveals little variation in the non-union data.

For the union sample the most interactive communication occurred around pay, hours, holiday entitlement, disciplinary and grievance procedures. For management all variables for those issues had means of below 2 (indicating a tendency to select 'negotiate'). The first three issues are the traditional domain of collective bargaining. The fourth and fifth are procedures that are regulated by an approved code of practice (ACOP) under TULRA s199. The next three issues (health and safety, equal opportunities, and pensions) are also governed by law. This would give representatives the ability to use the law to support their positions during negotiations/consultations. Pensions were not high on the list even though they involve the distribution of limited resources. Although pensions form part of an employment contract they are a provision that is not usually subject to annual change. The ordering of the issues supports hypothesis 2.

The results for union representatives differed slightly from those of management. The lowest means were for disciplinary and grievance procedures followed by pay, hours, health, and holiday. A reason for this order might have been the new ACOP for disciplinary and grievance procedures issued in 2004. This would have meant that at the time of the survey many organisations would have been updating their procedures. With legal provisions behind them representatives would have been interacting with management in the 'shadow of the law'.<sup>63</sup> Overall the findings support the hypothesis. Issues that obtained the lowest means were either traditionally subject to collective bargaining, or those under which employees could bargain in the shadow of the law.

The responses from management and non-union employee representatives indicated far less interactive communication. They also did not show the same patterns in terms of integrative or distributive bargaining. Both parties showed the lowest means – most interaction - for health and hours. These topics are subject to legislation. In addition to being subject to the Working Time Regulations, hours might give rise to interaction because of fluctuations in demand for products and services. In certain situations employers have a duty to consult employees on health and safety;<sup>64</sup> both topics would be likely to give rise to more interaction. However, the means were low and fell into the lower half of the scale (2.57 and below). The percentages indicated that, in the absence of collective bargaining, only one third of 'contact' was through negotiation or consultation.

The data indicated support for hypothesis 2, but only unequivocally where unions were present. It also indicated that the presence of legal requirements influenced the type of interaction.

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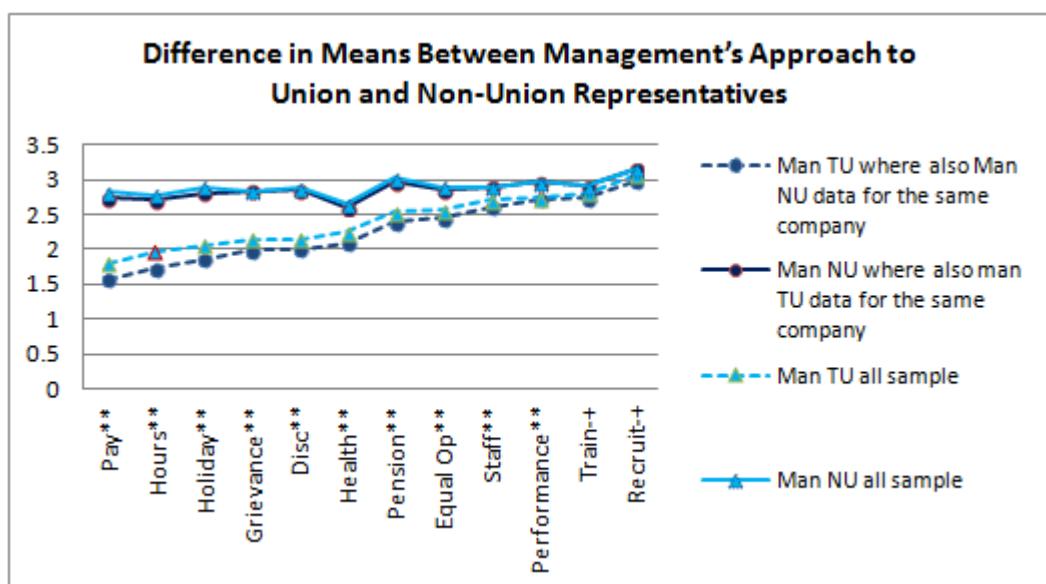
<sup>63</sup> Bercusson (n 21) 538-552.

<sup>64</sup> Health and Safety (Consultation with Employees) Regulations 1996 SI 1996/1513.

### 6.3.3 Management is More Likely to Report ‘Negotiate’ or ‘Consult’ When There are Union Representatives.

The results in Figure 6.3 indicated that management’s approach to union and non-union representatives differed. The way that the data was collected for the 12 ERI questions meant that responses given by management in respect of union and non-union representatives could be compared.<sup>65</sup> The means for the union sample ranged between 1.57 and 2.98; this compared with 2.6 and 3.15 for the non-union sample. This indicated a clear difference in approach taken by management when dealing with union and non-union employee representatives and is illustrated in Figure 6.4. With the exception of training and recruitment the differences were significant.

**Figure 6.4**



\* indicates  $p \leq 0.001$ ; + indicates  $p \leq 0.01$ ; # indicates  $p \leq 0.05$ ; - indicates no significance.

Not only was management likely to report more interactive forms of I&P in relation to union representatives, this was also true when it also had non-union representatives *within the same organisation*. Contrary to expectations, non-union representatives appear to derive little direct benefit from the presence of union representatives. This might be the result of management’s obligation to ‘consult’/‘negotiate’ with unions as a result of recognition agreements. Whether non-union representatives lack influence

<sup>65</sup> For data on these t-tests see Table 4 Appendix 3.

because of deficient ‘bargaining power’, lack of obligations under an agreement, being informed, or training, warrants further investigation.

### **6.3.4 When Compared With the Private Sector, Management Uses More Interactive Forms of I&P in the Public Sector**

It was also possible to separately identify organisations operating in the public and private sectors to test differences in approach between the two sectors.<sup>66</sup>

#### **6.3.4.1 The Meaning of Consult**

Combined weighted averages for public and private sectors indicate that the results are generally consistent with those reported in Table 6.1.

Management in both sectors were most likely to indicate response 2 (feedback on a range of options) followed by option 1 (seek solutions to problems). Interestingly, a greater percentage of managers in the private sector selected the first two responses. This went against the hypothesis. However, it is consistent with Boyne’s finding that the public sector is more bureaucratic and has more formal procedures for decision making.<sup>67</sup> Management in the private sector might have more autonomy to make decisions based upon the result of consultations.

As before, responses varied according to whether management dealt with union or non-union representatives. When working with unions, a greater percentage of management in the public sector opted for ‘seek feedback on a choice’ of options. This was in line with the hypothesis. However, a greater percentage of public sector managers also opted for the least interactive form of consultation. The differences between the means for public and private sector management were compared. None of the differences were significant; differences were not large enough to provide support for the hypothesis.

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<sup>66</sup> The division was created from WERS’s derived variable Nprivate (from astatus1).

Workplace Employment Relations Survey 2004 Information and Advice Service  
<<http://wwwwers2004info/research/primaryanalysisphp#syntax/>> accessed 10th June 2012.

<sup>67</sup> Boyne (n 32) 101, 112.

**Table 6.8**

**Which of the Following Best Describes Managers Usual Approach when Consulting Members of the Committee? Private Versus Public Sector.**

		1 solutions to problems	2 feedback on a range of options	3 feedback on a preferred option
All	Private Sector (%)	33.00	46.00	21.00
	Public Sector (%)	31.00	44.00	25.00
TU	Private Sector (%)	35.77	42.28	21.95
	Public Sector (%)	30.06	44.79	25.15
	t test	1.01	-0.42	-0.63
	Sig (1 tailed)	0.16	0.34	0.27
NU	Private Sector (%)	30.71	49.61	19.69
	Public Sector (%)	44.44	33.33	22.22
	t test	-1.16	1.33	-0.25
	Sig (1 tailed)	0.12	0.10	0.40

The results for the non-union sample were in line with hypothesis 4. However, the means showed no significant differences; this meant that differences were not large enough to support the hypothesis.

#### 6.3.4.2 Consultation Regarding Collective Redundancies

Although the percentages showed that a higher proportion of management in the private sector consulted over redundancy options, the difference was only significant for 'redundancy payments'. An explanation for this may relate to public sector terms and conditions on redundancy. An existing, perhaps collectively agreed, policy on collective redundancies would mean that there was likely to be less of a need to consult because problems have been anticipated and procedures/terms (often more generous than those laid down by law, or provided for in the private sector) already exist.

**Table 6.9**

**What Issues did the Consultations Cover? Private Versus Public Sector.**

	Private Sector %	Public Sector %	t test	Sig (1 tailed)
Options for reducing redundancies	93.0	86.0	1.183	0.121
Criteria for selection	86.8	76.7	1.392	0.084
Redundancy payments	71.1	53.5	1.996	0.025
Other issues	18.4	20.9	-.346	0.365

#### 6.3.4.3 12 ERI

The 24 variables for management were split to show how the percentages for each response were divided between public and private sectors. Table

6.10 shows that, when compared with the private sector, managers in the public sector were more likely to select ‘negotiate’ or ‘consult’ over ‘inform’ or ‘not inform’.<sup>68</sup> This was in line with the hypothesis.

**Table 6.10**  
**Figures for 12 ERI Combined: Percentage of Matched Establishments**  
**Split into Public and Private Sectors**

		Negotiates	Consults	Negotiate or Consult	Informs	Not inform
All	Private	23	34	57	29	13
	Public	31	39	70	20	10
TU	Private	28	36	64	24	12
	Public	31	39	71	19	10
NU	Private	3	27	30	51	19
	Public	10	33	43	53	3

The results for individual questions revealed that this was not the case for every topic (full details are in Table 6 Appendix 3). The small sample size (five) for non-union public sector gives rise to questions about its representativeness. Lack of reliable data makes comparisons between establishments without union representatives in the public and private sectors problematic. Therefore the following sections focus on trade union data.

When working with unions, compared with the private sector, more managers in the public sector selected ‘negotiate’ and ‘consult’. The seven ERI were: recruitment, training, grievance, staffing plans, equal opportunities, health and safety, performance. Independent sample t-tests were run to compare the means for public and private sectors. Evidence was found to support the hypothesis. However, this was considerably stronger where there were unions.<sup>69</sup>

<sup>68</sup> Full information can be found in Table 5 of Appendix 3.

<sup>69</sup> Figures for individual variables can be found on Table 6 in Appendix 3.

**Table 6.11**  
**Independent T-Test Relating to**  
**Differences in the Kind of Interaction**  
**with Union Representatives in the**  
**Public and Private Sector**

Independent Samples Test Original Data. Union					
		Mean	Std Err	t	Sig 1 Tailed
Pay	Private	1.39	.044	-3.947	.000
	Public	1.66	.051		
Hours	Private	.79	.048	-1.412	.079
	Public	.70	.049		
Holiday	Private	1.66	.051	-2.095	.018
	Public	1.82	.054		
Pension	Private	2.31	.050	.781	.217
	Public	2.25	.057		
Recruit	Private	3.03	.046	5.012	.000
	Public	2.70	.048		
Train	Private	2.80	.045	4.289	.000
	Public	2.53	.045		
Grievance	Private	1.86	.043	.645	.260
	Public	1.83	.040		
Disc	Private	1.84	.042	.437	.331
	Public	1.82	.040		
Staff plans	Private	2.68	.046	5.420	.000
	Public	2.35	.040		
Equal Op	Private	2.45	.045	7.069	.000
	Public	2.04	.036		
Health	Private	2.14	.035	3.357	.000
	Public	1.98	.032		
Perf Apr	Private	2.68	.051	5.526	.000
	Public	2.29	.047		

**Table 6.12<sup>70</sup>**  
**Independent T-Test Relating to**  
**Differences in the Kind of Interaction**  
**with Non-Union Representatives in**  
**the Public and Private Sector**

Independent Samples Test Original Data. Non Union					
		Mean	Std Err	t	Sig 1 Tailed
Pay	Private	2.74	.066	-2.336	.010
	Public	3.14	.149		
Hours	Private	2.73	.105	.854	.198
	Public	2.40	.400		
Holiday	Private	2.95	.089	-.519	.303
	Public	3.00	.000		
Pension	Private	3.03	.068	1.642	.053
	Public	2.60	.400		
Recruit	Private	3.08	.094	.804	.212
	Public	2.80	.200		
Train	Private	2.77	.102	.981	.165
	Public	2.40	.245		
Grievance	Private	2.89	.084	2.185	.016
	Public	2.20	.374		
Disc	Private	2.97	.082	1.215	.114
	Public	2.60	.245		
Staff plans	Private	2.74	.091	1.006	.159
	Public	2.40	.245		
Equal Op	Private	2.88	.085	67.000	.066
	Public	2.40	.245		
Health	Private	2.69	.082	.304	.381
	Public	2.60	.245		
Perf Apr	Private	2.83	.101	1.160	.125
	Public	2.40	.245		

The means for 10 of the 12 ERI relating to unions indicated a tendency for managers in the public sector to select ‘stronger’ forms of I&P. There were significant differences with union representatives in eight areas. Of these, six (recruitment, training, staffing plans, equal opportunities, health, and performance appraisals) corroborated the hypothesis. This pointed towards other factors influencing decision making. These are discussed in section 6.3.5.

#### 6.3.4.4 Conclusion

There is mixed support for the hypothesis. However, the contradictory nature of the results indicated that it needed refining. This is attempted in the development of hypothesis 5.

<sup>70</sup> NB the sample size for the public sector was five.

### **6.3.5 Compared With the Public Sector, Management in the Private Sector is Less Interactive With Employee Representatives on Goals of Non-Commercial Importance and More Interactive with Employees on Goals of Commercial Importance.**

This section identifies differences in how the private and public sector treated the 12 ERI. It does so by comparing the kind of interaction each sector reported as having with employee representatives. This enables patterns and priorities to be identified in both sectors.

#### **6.3.5.1 Comparing Means**

Table 6.11 shows where the average levels of interactive involvement with employees was greater in the public sector. There were significant differences in eight of the issues where management engage with unions. Those for ‘pay’ and ‘holiday’ had lower means for the private sector. This means that there was more chance of managers selecting ‘negotiate’/‘consult’ in the private sector when discussions concerned issues that impacted on profitability and were of commercial importance. This was consistent with the hypothesis. A reason why the means in the public sector were higher than those in the private sector might relate to issues of pay and holiday being settled at national, not workplace level.

In order to more clearly distinguish between interactive and non-interactive I&P, the two main forms of interaction ‘negotiate’ and ‘consult’ were combined and given a value 1 and the non-active forms ‘inform’ and ‘not inform’, a value of 0. Unlike the original data, a higher mean indicated a greater degree of interaction. Hours became significantly different, strengthening the case that, when compared with the public sector, management in the private sector was more likely to select ‘negotiate’ and ‘consult’ on issues of commercial importance.<sup>71</sup>

#### **6.3.5.2 Priorities for Interaction**

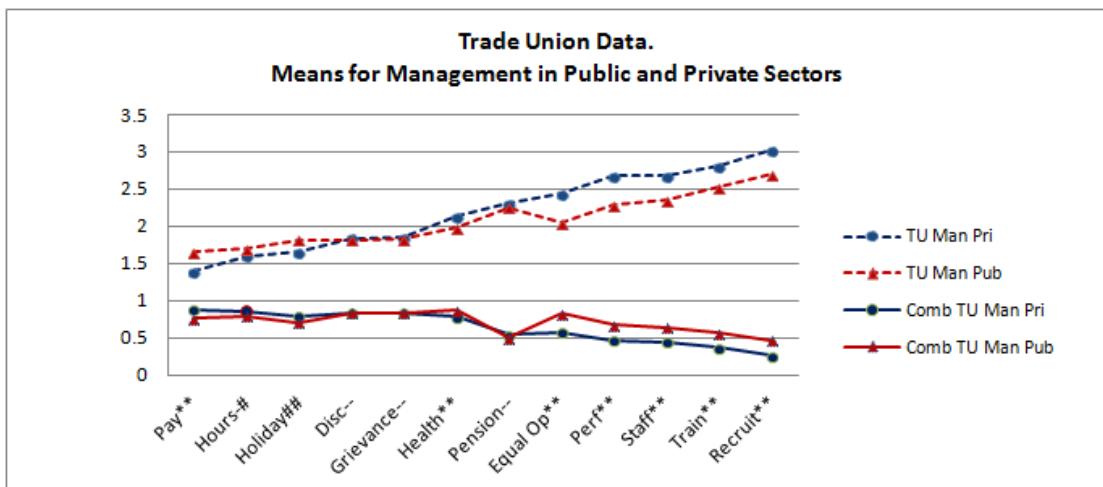
Figure 6.5 shows the means for the 12 ERI when management in the private and public sector deal with union representatives. The data was ordered so

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<sup>71</sup> Full results in Table 7 Appendix 3.

that the issues where management interacted the most are nearest the left hand side. The gradient reveals few differences in the order of priority between public and private sector.

**Figure 6.5**



The first symbol concerns original data, the second concerns dummy variables where 'consult' and 'negotiate' were given the value 1 and 'inform' and 'not inform' were given the value 0.

\* indicates  $p \leq 0.001$ ; + indicates  $p \leq 0.01$ ; # indicates  $p \leq 0.05$ ; - indicates no significance.

The graph illustrates that the private sector had significantly more interactive levels of I&P than the public sector about pay, hours, holiday (hours only became significant when 'negotiate' and 'consult' were combined in a dummy variable). The next three required a written policy (discipline, grievance, and health and safety<sup>72</sup>) and would enable representatives to bargain in the shadow of the law. The public sector only showed significantly more interactive levels of I&P over health and safety. The seventh and eighth issues are governed by law (for pensions and equal opportunities the difference was only significant in the latter). There were also significant differences between the amount of interaction relating to: performance appraisals, staffing plans, training, and recruitment and selection. Where unions were present, the differences in results between public and private sectors appeared to be driven by commercial priorities and legislative requirements.

<sup>72</sup> HSAWA s2(3) requires a written safety policy where there are five or more employees.

Table 6.13 sets out the 12 ERI in order of most to least interaction regarding private sector union and non-union data. Not only was there a divide in priority between public and private sectors where there were unions present, the order showed differences in the private sector when management interacted with union representatives. Whilst staff, training, and performance were fourth to sixth on the list relating to non-union data, they were ninth to eleventh on the list relating to unions. This data pointed to management being more likely to actively interact on areas that are either traditionally the preserve of collective bargaining or governed by law where unions were present.

**Table 6.13**  
**Differences in Management Priorities in the Private Sector for Union**  
**and Non-Union Data**

Private Sector TU	Pay	Hours	Holiday	Discipline	Grievance	Health	Pension	Equal Op	Performance	Staff	Training	Recruitment
Private Sector NU	Health	Hours	Pay	Staff	Training	Perform	Equal Op	Grievance	Holiday	Discipline	Pension	Recruitment

There is some evidence to support the hypothesis. The presence of unions meant that management was more likely to negotiate or consult on areas that are either traditionally the preserve of collective bargaining or governed by law. Differences in priority as to when greater interaction took place suggest an emphasis on commercial objectives in the private sector. The agendas of both appeared to be influenced by law as well as commercial priorities but these differed in the private and public sectors.

#### 6.4 CONCLUSION

The results lend differing levels of support to all five hypotheses and raise issues concerning the practice and of law involving I&P in the UK. Findings were strengthened when they concerned union representatives. They point to union representatives raising levels of interaction and influencing which subjects underwent the most interactive forms of I&P.

There was support for hypothesis 1 concerning management being more likely to report interactive approaches to decision making, but it was stronger when management was dealing with union representatives. The

data supported hypothesis 2. Where there were trade unions, more interactive forms of I&P occurred around issues that traditionally gave rise to collective bargaining. However, union and non-union data indicated that increased levels of interaction also occurred where there were strong legislative provisions. But does contact bordering on, or falling into ‘negotiation’ equate with effective interaction that achieves European Union Policy objectives and: (1) lead to humanisation of working conditions; (2) help organisations adapt to market conditions and increase competitiveness; and (3) promote employee involvement within the workplace?<sup>73</sup> This is something that is discussed in Chapter 7 in the light of additional evidence.

Hypotheses 1 and 2 exposed differences of approach where trade unions were present. The results for hypothesis 3 corroborated these differences. The t-tests indicated a significant increase in the occurrence of negotiation or consultation when dealing with union rather than non-union representatives (even when both types of representatives were present in the same organisation). The question of why this is so warrants further research. The answer might lie in training. Only the H&S<sup>74</sup> and EWC<sup>75</sup> Directives specifically provide for training representatives to understand and fulfil their duties<sup>76</sup> (employees in organisations employing more than 250 can also request time off for study<sup>77</sup>). The only national employee organisation that provides for training is the TUC and this places union members/representatives at an advantage. Results may reflect training and union support leading to union representatives having a better understanding of their legal position and tactics for maximising their situation. Further research would substantiate this and point to the need for representatives to

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<sup>73</sup> *Bull Supp* 8/75 (n 34) 9, 11; Commission *Communication on worker information and consultation* (COM(95) 547 final, 1995) 7; Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002 OJ L80/29 recitals 7-10.

<sup>74</sup> Art 12(3).

<sup>75</sup> Art 10(4).

<sup>76</sup> ECo Directive’s Annex (Part 2(g)) provides for time off for training.

<sup>77</sup> Employment Rights Act 1996 s63D.

be adequately organised and trained in order to interact with management effectively.

In line with hypothesis 4, management and union representatives were more likely to report more interactive I&P in the public sector. This was the case in three quarters of the questions (there were significant differences in six of the ERI questions). Some variables (with significant differences) indicated management was more interactive with union representatives in the private sector. These concerned areas that were the traditional province of collective bargaining. The results supported hypothesis 5: significantly more interactive I&P occurred in the private sector on subjects that had cost implications and were of commercial importance whilst significantly more interaction occurred in the public sector on issues that did not directly affect profitability.

In the non-unionised sector, although the results gave little evidence to support hypotheses 4 and 5 they provided an indication about management's differing priorities. Where there were no unions, management in the private sector appeared more likely to interact on issues of immediate legislative or commercial importance (health and safety, hours, pay). When working with unions, the evidence indicated that management in both sectors had similar priorities on when to consult/negotiate or inform/not inform. Therefore trade unions appeared to have influence over the amount of interaction that took place on each issue in public and private sectors.

The results point towards three factors that influenced when and how I&P was carried out. The first related to the ability of employee representatives to put pressure on management. The second involved the extent to which organisations were influenced by commercial objectives. The third involved the presence of legal requirements. The second and third are interrelated, when a legal requirement to consult, such as health and safety, became a commercial objective (because of the threat of sanctions), it was more likely to be an issue that involved consultation or negotiation.

This begs a question: how to ensure that legal provisions are interpreted properly? The variable concerning how 'consult' is defined provided an insight into management thinking/practice. The responses for defining the term 'consult' appeared to be an amalgamation of 'communicate' and 'consult' in the IPF. The results indicated that employee representatives had a less positive view of management's approach to consultation. Whilst the differences were not significant in the non-union sector, they were in the union sector.

The responses indicated that less than one third of management opted for the definition of 'consult' as 'seeking solutions to problems'. This has implications for whether laws requiring consultation are being implemented correctly. Furthermore, the data relating to collective redundancies showed significant differences between the views of management and representative.

10% of management appeared not to be complying with their obligation to consult over reducing the number of redundancies. However, *if* the correct definition of 'consultation' (in the legal sense of that term) requires more than seeking feedback only 33.3% of the management sample complied with the law and actually consulted about reducing redundancies. This does not take into account the additional factor of whether the consultations were 'with a view to reaching an agreement'.

Guidance by The Department for Business, Innovation and Skills does not provide much direction about what it means to consult. Its booklet states 'Consultation should be genuine and must be undertaken with a view to reaching agreement with the employees' representatives. Employers and employee representatives should work together to try to find common solutions.'<sup>78</sup> Recent government consultations stated that a new code of practice will cover how consultation should be conducted. It will:

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<sup>78</sup> BIS 'Redundancy Consultation and Notification Guidance' (2006) URN: 06/1965Y.

focus strongly on the spirit of the consultation, ensuring that it is conducted with a view to reaching agreement and that parties are given sufficient time to consider and respond to alternative proposals.<sup>79</sup>

This does not appear to add much to existing guidance. Chapter 5 identified ‘focused consultation’ as providing for the closest match for the CR Directive’s ‘consult’ ‘with a view to reaching an agreement.’ Clarity might be added by using the five factors identified for focused consultation in the IPF: (1) an exchange of views; (2) taking place before a decision has been made; (3) based upon adequate information; (4) where the other side’s position is considered or contemplated; (5) which focuses on arriving at an agreed solution. Additionally the term could be clarified by illustrating what is not consultation but communication.<sup>80</sup> Evidence of contemplation could be substantiated by following Reg 13(7) of the Transfer of Undertakings (Protection of Employment) Regulations.<sup>81</sup> This states that employers have to reply to any representation made by appropriate representatives, and if representations are rejected, reasons for so doing should be stated.

With regard to other legislation, further research using new WERS data will indicate whether behaviour has been affected by the economy and the altered legislative position. It would point to whether:

- findings relating to Health and Safety, with its legal sanctions and inspectorate maintain similar means to 2004;
- there has been a change in the I&P reported for grievance and disciplinary procedures because the ACOP for is no longer new;
- I&P has increased in respect of workplaces with JCCs on topics related to ICE.

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<sup>79</sup> BIS 'Collective Redundancies. Consultation on Changes to the Rules' (2012) URN: 12/808 3. 20.

<sup>80</sup> Perhaps by using the responses within the consultation variable.

<sup>81</sup> The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/24.

It would also indicate whether EU legislation has affected trends in workplace I&P that have been taking place since the 1980s. These are explored in Chapter 7.

# Chapter 7 An Evaluation of the Success of Different Models of Involvement and Participation in the UK

## 7.1 INTRODUCTION

Since 1970 the Commission has consistently advocated indirect participation using some form of representative body and/or employee representatives.<sup>1</sup> It indicated that this will: (1) lead to humanisation of working conditions; (2) help organisations adapt to market conditions and increase competitiveness; and (3) promote employee involvement within the workplace.<sup>2</sup> Within the UK indirect participation via representatives is only one form of involvement and participation (**I&P**) practiced. In this chapter statistical evidence is used to establish a better understanding of the effect that direct and indirect I&P has had in the three areas identified by the Commission. It shows that indirect participation via employee or worker representatives<sup>3</sup> does not necessarily have the desired results.

The chapter looks at the way three different categories of I&P have been used in the UK. These are: indirect representation in formal representative bodies such as works councils; indirect representation via unions; and direct forms of participation. Findings are drawn from studies that have analysed the Workplace Industrial Relations and Workplace Employment Relations Surveys (**WIRS and WERS**) between 1980 and 2004. These have been used to track workplace developments in I&P and evaluate the Commission's assumptions.

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<sup>1</sup> See Chapters 3 &4.

<sup>2</sup> See Chapters 3 (especially 3.1), 4, and 5. European Commission *Employee participation and company structure in the European Community (Green Paper)* (Bull Supp 8/75, pg 54, 1975) 9-14; Commission *Communication on worker information and consultation* (COM(95) 547 final, 1995) section 7; Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29 7-10.

<sup>3</sup> This could be at board level or through a specific committee, body, or works council.

Section 7.2 overviews the WERS/WIRS surveys and relevant empirical studies connected with them. Section 7.3 uses data taken from the surveys to establish trends in direct and indirect consultation in the UK. 7.4 uses empirical studies based upon the WIRS/WERS data to compare the impact of different forms of I&P on the three areas identified by the Commission. Section 7.5 goes on to discuss how other factors might impact on the Commission's hypothesis.

## **7.2 THE WORK PLACE INDUSTRIAL RELATIONS AND WORK PLACE EMPLOYMENT RELATIONS SURVEYS.**

### **7.2.1 The Surveys**

Chapter 6 overviewed the development of WIRS/WERS. In addition to five surveys,<sup>4</sup> the data from different years has been combined in the 'time series data set'. This allows for longitudinal analysis of the management survey. Because a new selection of establishments is used for each survey, the data set does not track long term developments in the same establishments over time. However, the panel survey re-questions the management of a selection of establishments from the previous survey. This allows for detailed analysis of a group of establishments over the period between two surveys.

### **7.2.2 WIRS/WERS and Problems with Data Analysis**

There are several issues relating to WIRS/WERS data that make comparing results in different studies of WIRS/WERS data problematic. These relate to wording, respondents, and the way data is selected.

#### **7.2.2.1 Wording**

Survey questions have been modified over time. This can alter their meaning so that data is not comparable (questions about management change related to a five year period in 1998 and a three year period in 2004). Questions are also dropped (e.g. a question asking whether productivity had

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<sup>4</sup> (1) the management survey; (2) the employees' representatives' survey, (3) the employees' survey, (4) financial performance survey, and (5) the panel survey.

gone up or down in the last five years was dropped from the 2004 survey). Comparison is then impossible.

#### 7.2.2.2 Respondents

The management questionnaire is aimed at the senior manager who deals with personnel, staff, or employment relations at the establishment.<sup>5</sup> Some questions involved opinions about profitability and employment relations and these answers are not necessarily objective. For example, the person questioned might not have a good understanding of how their organisation's financial performance compares with others in the industry. Differences between subjective and objective measures of profitability are explored below.

#### 7.2.2.3 Comparing Different Studies

Studies often selected different sections of the survey for analysis and did not use identical variables or measures (groups of variables) to represent the same concepts. For example, Fernie and Metcalf<sup>6</sup> limited the number of workplaces analysed to the 'trading sector.' The trading sector *might* not be representative of the survey as a whole so their results could give an inaccurate indication of what is taking place in the wider economy. Comparing data from a sub-section with data from the whole survey may also give a false impression of whether there had been any changes over time.

Different studies have used different variables to represent whether management consults. Wood used three questions from the employee survey<sup>7</sup> whereas Guest et al<sup>8</sup> used eight drawn from the management survey.

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<sup>5</sup> National Centre for Social Research 'WERS 2004 The Workplace Employment Relations Survey 2004 Interviewer Handbook Version 1' (2004) Number 5294 UK Data Archive 20.

<sup>6</sup> McNabb and Whitfield 'The Impact of Financial Participation and Employee Involvement on Financial Performance' (1998) 45 2 SJPE 171; Kersley and Martin 'Productivity Growth, Participation and Communication' (1997) 44 5 SJPE 485.

<sup>7</sup> Wood 'Job Characteristics, Employee Voice and Well-being in Britain' (2008) 39 2 IRJ 153.

While Wood's results indicated employee perceptions, Guest's reflected those of management. Moreover, there are no standardised measures to test for concepts like job satisfaction. For example, Cox et al<sup>9</sup> used four of the nine variables selected for analysis by Wood et al.<sup>10</sup>

Authors have also used data within the survey to control for the effects of other factors that might influence results. These include: size, ownership, union presence, and sector (e.g. different areas within the public and private sectors). Comparison between studies is difficult because such control variables are not consistent in all studies.

Such issues mean that studies may not be strictly comparable. However, trends in data can be observed. It is submitted that the cumulative results of the surveys help to build a picture of the 'validity' of the Commission's assumptions in respect of its preference for indirect participation. The results also help to establish what forms of I&P appear to work best in different circumstances, thus indicating how the Commission's objectives might best be achieved.

### 7.2.3 The Literature

This section overviews the literature concerning WIRS/WERS data that relates to I&P. Studies have reflected a wide range of political concerns and academic interests. Early work focused upon the impact and outcomes of collective representation via trade unions. After 1995 an increasing number concerned collective representation via works councils or Joint Consultative Committees (**JCCs**) and direct employee involvement.<sup>11</sup> Some of this

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<sup>8</sup> Guest and Conway 'Human Resource Management, Employee Attitudes and Workplace Performance: An Examination of the Linkages Using the 2004 Workplace Employment Relations Survey' (2007) URN 08/626 BERR.

<sup>9</sup> Cox, Marchington and Suter 'Employee Involvement and Participation: Developing the Concept of Institutional Embeddedness Using WERS2004' (2009) 20 10 IJHRM 2150.

<sup>10</sup> Wood and de Menzes 'High Involvement Management, High-Performance Work Systems and Well-Being' (2011) 22 7 IJHRM 1586.

<sup>11</sup> Direct employee involvement refers to a wide range of interactions between management and workforce including meetings, use of the management chain, and suggestion schemes.

interest arose from the developing European policy on I&P and/or from a growing awareness in the importance of I&P in human resource management (**HRM**).

The prospect of mandatory consultation arising under the Maastrict Treaty led Kersley and Martin<sup>12</sup> to investigate links between communication and high productivity and growth. Other studies have evaluated the Information and Consultation Directive (**IC Directive**) making suggestions for associated UK legislative proposals,<sup>13</sup> and assessed issues relating to The Information and Consultation of Employees Regulations 2004 SI 2004/3426 (**ICE**).<sup>14</sup> Peccei et al noted that despite growing interest in information sharing and disclosure among academics and policy makers, relatively little is known about its effects.<sup>15</sup>

Literature on HRM has advocated certain practices to improve organisational performance and employee wellbeing.<sup>16</sup> Employee I&P has become a 'key' component of HRM strategy in the workplace.<sup>17</sup> WERS data has been used in order to test hypotheses connecting I&P with

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Fernie and Metcalf 'Participation, Contingent Pay, Representation and Workplace Performance: Evidence from Great Britain' (1995) 33 3 BJIR 379 384.

<sup>12</sup> Kersley and Martin (n 6).

<sup>13</sup> Peccei, Bewley, Gospel and Willman 'Is It Good to Talk? Information Disclosure and Organizational Performance in the UK' (2005) 43 1 BJIR 11.

<sup>14</sup> E.g. Peccei, Bewley, Gospel and Willman 'Patterns of Information Disclosure and Joint Consultation in Great Britain - Determinants and Outcomes' (2007) Employment Relations Research Series No.73 DTI; Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace: a Longitudinal Analysis of Employee Outcomes in 2008 and 2004' (2007) Employment Relations Research Series No.72 DTI.

<sup>15</sup> Peccei, Bewley, Gospel and Willman 'Is It Good To Talk?' (n 13) 1.

<sup>16</sup> Pfeffer *The Human Equation: Building Profits by Putting People First* (Harvard Business School Boston 1998); Wood and de Menzes 'Comparing Perspectives on High Involvement Management and Organizational Performance Across the British Economy' (2008) 19 4 IJHRM 639; Guest, Michie, Sheehan, Conway and Metochi *Employment Relations, HRM and Business Performance* (CIPD London 2000).

<sup>17</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9).

improvements in areas such as financial performance,<sup>18</sup> labour productivity,<sup>19</sup> employee satisfaction and commitment,<sup>20</sup> and trust.<sup>21</sup>

As interest in I&P developed increasing note was taken of how a variety of factors seem to contribute to successful organisational performance or HRM. Cox et al found that links between I&P practices and commitment to an employer (or job satisfaction), were affected by establishment size.<sup>22</sup> Bryson<sup>23</sup> looked at how different combinations of I&P change employee perceptions of managerial responsiveness. Such results indicate that it is simplistic to associate indirect I&P with improved organisational performance and employee wellbeing without taking into consideration other factors.

Repeating questions over a succession of surveys has allowed tests to be replicated. Results indicate that, over time, correlations between types of I&P and measures of productivity and employee wellbeing sometimes fluctuate.<sup>24</sup> Such associations with JCCs have tended to become weaker, even negative.

Kersley and Martin found that the strongest links between consultation and productivity/growth came from informal contact rather than formal or

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<sup>18</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance: Evidence from Germany and Britain' (2000) 38 1 BJIR 7.

<sup>19</sup> Fernie and Metcalf (n 11).

<sup>20</sup> Cox, Zagelmeyer and Marchington 'Embedding Employee Involvement and Participation at Work' (2006) 16 3 IJHRM 250 1.

<sup>21</sup> Guest, Brown, Peccei and Huxley 'Does Partnership at Work Increase Trust? An Analysis Based on the 2004 Workplace Employment Relations Survey' (2008) 39 2 IRJ 124.

<sup>22</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14).

<sup>23</sup> Bryson 'Managerial Responsiveness to Union and Nonunion Worker Voice in Britain' (2004) 43 1 Industrial Relations 213.

<sup>24</sup> Addison and Belfield 'Updating the Determinants of Firm Performance: Estimation Using the 1998 UK Workplace Employee Relations Survey' (2001) 39 3 BJIR 341; Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14); McNabb and Whitfield 'The Impact of Financial Participation and Employee Involvement on Financial Performance: A Re-Estimation Using the 1998 WERS: A Reply' (2000) 47 5 SJPE 584.

‘indirect’ participation via bodies such as works councils. A series of papers by Peccei et al explored the relationship between organisational disclosure and labour productivity and product/service quality. It will be seen that they found that the consequences of information disclosure changed over time.<sup>25</sup>

The combined results of these studies provide evidence to test the Commission’s assumptions concerning the benefits of indirect participation. It shall be seen that this data does not support the Commission’s emphasis on using consultative or bargaining institutions as its preferred method of implementing I&P in the workplace.

### 7.3 TRENDS IN INFORMATION AND PARTICIPATION IN THE UK

The chapter concerns three categories of I&P: indirect participation via works councils; indirect participation via trade unions; and direct forms of I&P. This section looks at trends in the incidence of different kinds of I&P in the UK by overviewing the findings of successive WIRS and WERS surveys.

Indirect I&P involves interaction between management and worker representatives (appointed or elected). This includes interaction between union and management and covers collective bargaining. It also includes what WERS describes as ‘committees of managers and employees, primarily concerned with consultation rather than negotiation’<sup>26</sup> (**JCCs**). Worker representatives on JCCs might or might not be affiliated to a union.

Direct I&P involves interaction between management and worker. It covers briefings; meetings; problem solving groups; and verbal, written, or

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<sup>25</sup> Section 6.4.2. Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14); Peccei, Bewley, Gospel and Willman 'Look Who's Talking: Sources of Variation in Information Disclosure in the UK' (2008) 46 2 BJIR 340.

<sup>26</sup> Question 120a Social and Community Planning Research 'Workplace Industrial Relations Survey Management Questionnaires and Showcards' (1980) Study Number 1575 (a1575gab.pdf) UK Data Archive.

electronic communication between management and worker (e.g. notice boards) or worker and management (e.g. employee suggestion schemes).

Table 7.1 provides an overview of the incidence of I&P between 1980 and 2004. WIRS/WERS data shows a decline of indirect and a rise of direct I&P. Data is based upon workplaces with 25 or more employees.

**Table 7.1**  
**Incidence of Indirect and Direct I&P in Britain 1980-2004<sup>27</sup>**

	% 1980	% 1984	% 1990	% 1998	% 2004
<b>Indirect I&amp;P</b>					
Any union members	73	73	64	52	52
Any recognised union	64	66	53	41	38
Any on-site Joint Consultative Committee (JCC)	34	34	29	28	24
On-site JCC that meets at least once a month ('Functioning' JCC)	30	31	26	22	17
<b>Direct I&amp;P</b>					
Regular meetings between senior management and all sections of the workforce		34	41	37	40
Team briefings		36	48	52	71
Problem solving groups			35	42	30

Figures taken from Willman et al.<sup>28</sup> All values are percentages based upon management answers. Empty spaces indicate no data. Data is based upon all workplaces with 25 or more employees.

### 7.3.1 Indirect I&P

Table 7.1 distinguishes between two types of indirect I&P: via trade unions and JCCs. Section 7.3.1.1 briefly looks at the distribution of union membership and recognition across the UK. Section 7.3.1.2 outlines three kinds of consultation body found within the survey.

<sup>27</sup> Willman, Gomez and Bryson 'Trading Places: Employers, Unions and the Manufacture of Voice' (2008) Discussion Paper No 884 CEP 23.

<sup>28</sup> Ibid.

### 7.3.1.1 Union Representation

Based on Willman's figures, between 1984 and 2004 the number of union members in workplaces declined by 29%, while the number of workplaces recognising unions for the purpose of collective bargaining declined by 40.5%. Kersley et al used figures from the last two WERS surveys to differentiate between the public and private sectors. In the public sector the percentage of workplaces with trade union recognition dropped by 1% to 82%. However, the percentage of private sector workplaces that recognised trade unions fell from 20% to 15%.<sup>29</sup> Government figures for the period 1995-2011 show a greater difference in union membership patterns between the public and private sector. Membership in the private sector fell from just under 3 to 2.51 million whilst membership in the public sector increased from about 3.5 million to 3.88 million.<sup>30</sup> In the private sector the overall picture is one of declining union membership, and a corresponding decline in the ability of unions to negotiate with management.

### 7.3.1.2 Consultative Bodies

In 1980 34% of workplaces had some sort of on-site JCC. Between 1998 and 2004 JCC's had declined by 6% in the public sector and 3% in the private.<sup>31</sup> Kersley et al's figures are based on establishments employing 10 rather than 25 or more people. They state that in 2004 only 14% of establishments had a JCC.<sup>32</sup>

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<sup>29</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge 'Inside the Workplace: First Findings from the 2004 Workplace Employment Relations Survey' (2006) URN 05/1057 DTI 113.

<sup>30</sup> Brownlie 'Trade Union Membership 2011' (2012) URN 12/P77 BIS 10.

<sup>31</sup> 39:33 and 24:21 Willman, Gomez and Bryson (n 27) 25.

<sup>32</sup> The incidence of JCCs in workplaces employing over 10 people fell by 6% in the same period to 14%. Base: all workplaces with 10 or more employees. Figures are weighted and based on responses from 2,178 managers in 1998 and 2,047 managers in 2004. Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge 'First Findings from the 2004 WERS' (n 29) 127.

Kersley et al,<sup>33</sup> unlike Willman et al, distinguished between three types of consultation committees:

1. workplace level committees (JCCs);
2. multi-issue consultative committees operating at higher level than the establishment, for example, at regional, divisional, or head office levels (higher level consultative committees); and
3. European Works Councils (EWC).

#### 7.3.1.2.1 JCCs

The incidence of JCCs varied according to workplace size. In 2004 they were rare in workplaces with fewer than 25 employees (4%), but existed in a majority of establishments with 100 or more employees. The percentages was 59% where there were between 200-499 employees and 73% for those employing 500 or more.<sup>34</sup> Kersley et al found that the decline in incidence was primarily evident among smaller workplaces. In workplaces with less than 100 employees the percentage with on-site committees fell from 17% to 10% in the period between 1998 and 2004. This compared with a 2% drop in establishments with 100 or more employees.<sup>35</sup> They reported that the proportion of *workers* in an establishment with an on-site committee fell from 46% to 42% in the period between 1998 and 2004.

#### 7.3.1.2.2 Higher level consultative committees and EWCs

There has been a small decline in the percentage of workplaces covered by a higher level consultative committee. Between 1998 and 2004 the percentage of such committees fell from 27% to 25%. The number of workplaces covered by EWCs was unchanged since 1998 at 5%.<sup>36</sup>

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<sup>33</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Inside the Workplace: Findings from the 2004 Workplace Employment Relations Survey* (Routledge London 2006) 126-129.

<sup>34</sup> Ibid 126-127.

<sup>35</sup> 56% -54% between 1998 and 2004 ibid 126.

<sup>36</sup> Ibid.

### 7.3.1.2.3 Conclusion

Five factors might have influenced the downward trends in the incidence of consultative bodies: (1) the decline of union presence; (2) whether establishments are in the private or public sector; (3) establishment size; (4) economic/political climate; and (5) legislation. Union decline in the private sector might mean that there was less organised<sup>37</sup> pressure on management to continue using a consultative committee. This could account for their being more common in the public sector.

The decline of JCCs may possibly be linked with the rise of direct I&P practices. The evidence below indicates direct I&P has more positive associations with the Commission's three areas. The data does not clearly establish whether the decline in the incidence of JCCs was caused by management's perception of their utility. Given evidence of their effectiveness, it would be logical for management to desert existing JCCs in favour of direct practices.

It has been argued<sup>38</sup> that impending regulation under ICE has altered management behaviour over the period under examination. Where there are at least 50 employees it may be in management's interest to keep an existing arrangement; the lesser decline relating to large workplaces might be related to ICE.<sup>39</sup> Established JCCs might have less onerous mandates than those triggered under ICE and bargained in the shadow of those provisions (see below). If this analysis is correct, legislation may be impacting on the *decline* in consultative bodies in larger organisations. This appeared to be partially borne out by initial findings from WERS2011. Although organisations with 100 to 249 employees showed a significant increase in the numbers of JCCs, the percentage of JCCs in organisations employing more than 249 employees continued the downward trend. The overall figure

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<sup>37</sup> See Chapter 6.

<sup>38</sup> Peccei, Bewley, Gospel and Willman 'Look Who's Talking' (n 25) 353.

<sup>39</sup> Ibid 353.

showed that the number workplaces with an on-site JCC decreased from 9% to 8%.<sup>40</sup>

### 7.3.2 Direct I&P

Since 1984 the WIRS/WERS surveys have included an increasing number of variables relating to direct communication. Table 7.1 showed that, with the exception of team briefings (which have shown a steady rise in popularity, almost doubling in frequency), the incidence of other methods of direct I&P has fluctuated. Table 7.2 shows the full list of direct I&P found in WERS2004.

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<sup>40</sup> van Wanrooy, Bewley, Bryson, Forth, Freeth, Stokes, and Wood, *Employment Relations in the Shadow of the Recession: Findings from the 2011 Workplace Employment Relations Study* (Palgrave Macmillan 2013) 61-62.

**Table 7.2**  
**The Incidence of Arrangements for Direct Communication<sup>41</sup>**

	%	%
	1998	2004
<b>Face-to-face meetings</b>		
Meetings between senior managers and the whole workforce	-	79 <sup>42</sup>
Team briefings	-	71
Any face-to-face meetings	85	91
<b>Written two-way communication</b>		
Employee surveys	-	42
E-mail	-	38
Suggestion schemes	31	30
Any written two-way communication	-	66
<b>Downward communication</b>		
Notice boards	-	74
Systematic use of management chain (e.g. cascading information downward the management chain)	52	64
Regular newsletters	40	45
Internet	-	34
Any downward communication	-	83

All workplaces with 10 or more employees. Figures are weighted and based on responses  
 from 2,189 managers in 1998 and 2,057 managers in 2004

Between 1998 and 2004 there was an increase in the incidence of direct communication (with the exception of suggestion schemes). There was a 6% increase in the incidence of face to face meetings, a 12% increase in systematic use of management chain, and a 5% increase in the use of regular news-letters.

Table 7.3 compares the percentage of workplaces and the percentage of employees covered by different types of direct I&C. Kersley et al coded the

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<sup>41</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 135.

<sup>42</sup> This figure differs from that used in Fig 1 because the data was drawn from workplaces with 10 or more (not 25 or more) employees.

information hierarchically (if workplaces had regular meetings with feedback, they were excluded from the sample which had ‘other meetings, or written, two-way communication’ and so on, down the list). The figures show that, in 2004, 93% of workplaces, employing 97% of employees, had some sort of two-way direct communication mechanism. More than two thirds of employees were involved in regular meetings with an opportunity for feedback that occurred at least once of month.

**Table 7.3**  
**Summary of Direct Communications<sup>43</sup>**

	% <b>Workplaces</b>	% <b>Employees</b>
Regular meetings with feedback	63	67
Other meetings, or written, two-way communication (employee surveys, suggestion schemes, e-mail)	30	30
Downward communication only	4	2
No formal arrangements	2	1

All workplaces with 10 or more employees. Figures are weighted and based on responses from 2,178 managers in 1998 and 2,047 managers in 2004

Van Wanrooy et al compared the incidence of direct two-way communication between managers and employees in WERS2004 and WERS2011. The percentages of workplaces that had such arrangements either remained unchanged or continued to rise (in the case of the regular use of e-mail significantly). The exception was the percentage of workplaces using problem-solving groups (the fall was significant).<sup>44</sup> They stated that the trend for growth in structured arrangements for direct consultation and communication ‘has only continued in some limited respects.’<sup>45</sup>

<sup>43</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 139.

<sup>44</sup> van Wanrooy, Bewley, Bryson, Forth, Freeth, Stokes, and Wood 64-65.

<sup>45</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 63.

## **7.4 THE EFFECTS OF INVOLVEMENT AND PARTICIPATION**

The opening paragraph of this chapter illustrated the Commission's linking indirect consultative bodies with positive outcomes in three areas. This section draws on the available literature to establish relationships between different forms of I&P and nine factors associated with these three outcomes. These are: helpfulness, trust, organisational commitment, job satisfaction, reduction in anxiety, employee relations, financial competitiveness, labour productivity, and employee involvement. They are grouped in terms of the Commission's three outcomes: section 7.4.1 assesses findings concerning humanisation of the workplace, whilst sections 7.4.2 and 7.4.3 evaluate evidence relating to competitiveness and employee involvement.

### **7.4.1 Humanisation of the Workplace**

The notion that I&P strengthens the relationship between worker and management has varied support from empirical studies. These have sought evidence of associations between different kinds of I&P and: (1) helpfulness, (2) trust, (3) organisational commitment, (4) job satisfaction, (5) anxiety levels, and (6) employee relations.

#### **7.4.1.1 Helpfulness**

Kersley et al looked at the relationship between different kinds of I&P and helpfulness. Six survey questions asked how helpful employees found different kinds of communication arrangement in keeping them informed about the workplace. The majority of employees questioned found such arrangements 'helpful.'

**Table 7.4**  
**Employees' Perceptions of the Helpfulness of Different Communication**  
**Arrangements<sup>46</sup>**

	<b>% (if used) 2004</b>
E-mail	86
Workplace internet	80
Meetings between managers and employees	80
Workplace newsletter or magazine	76
Notice boards	72
Union or other representative	60

All workplaces with 10 or more employees. Figures are weighted and based on responses from at least 15,502 employees

Table 7.4 lists several communication arrangements in order of helpfulness. Interestingly communication via union or other representatives came last, 12% lower than the next lowest entry.

#### 7.4.1.2 Trust

Guest et al<sup>47</sup> used WERS2004 to look for associations between trust and different types of 'partnership practice'. Their trust 'measure' was based upon three WERS variables concerning reliability, understanding another's view, and perceptions of honesty/integrity. They found different associations depending on whether the data was provided by employees, union representatives, non-union representatives, or management.

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<sup>46</sup> Ibid 141.

<sup>47</sup> Guest, Brown, Peccei and Huxley 'Does Partnership Increase Trust?' (n 21).

#### 7.4.1.2.1 Employees

Data provided by employees related to:

- (a) JCCs;<sup>48</sup>
- (b) direct participation of an impersonal, general nature (attitude surveys and ‘other forms of communication’ such as notice boards, newsletters, and intranet); and
- (c) direct participation involving feedback to individuals (face to face meetings).

The first two categories had significant *negative* associations with employee trust in management ( $p \leq 0.05$ ). Therefore JCCs and direct participation of an impersonal nature were associated with a *lack* of trust in management.

There were some significant positive associations in the third category. The results showed a divide between I&P on topics of general interest with non-specific parts of the workforce and I&P which involved specific individuals. The trust measure had strong positive statistically significant associations with activities which involved one-to-one relationships, namely, ‘task based’ participation<sup>49</sup> ( $p \leq 0.001$ ) and performance appraisals ( $p \leq 0.05$ ).<sup>50</sup>

There were no significant associations where direct participation could involve general feedback. Positive (non-significant) associations were found in variables concerning whether employees were involved in change, quality improvement programmes, had face-to-face meetings with management, and whether management usually consulted about change. However,

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<sup>48</sup> Ibid 145-146.

<sup>49</sup> This was a measure made up of variables including discretion and control over work and involvement in decision making.

<sup>50</sup> Tests for statistical significance are expressed in terms of the probability or risk of an association being false. The smaller the size of the level of significance, the less likely that an error has been made, and the more likely a hypothesis is true. Therefore  $p \leq 0.001$  means that there was a 0.1% chance that there are no associations between employee trust in management being associated with participation and  $p \leq 0.05$  means that there was a 5% chance that there are no associations between employee trust and performance appraisals.

management always discussing change had a (non-significant) negative association. This might be explained by 'always discussing change' having an unsettling effect on employees who want stability.

Other data indicated that it is simplistic to propose that the greater the personal contact between management and employee, the greater the association with trust. Some types of schemes appeared to affect employee trust. In another paper, Guest et al<sup>51</sup> found significant positive associations ( $p<0.05$ ) between 'involvement' and trust in the workplace.<sup>52</sup> The 'involvement' measure was constructed from variables relating to quality circles or the presence of BS5750 or ISO9000. The latter concerns workforce practices that aim to involve people so 'their abilities are used for the organization's benefit'.<sup>53</sup> BSI/ISO standards differ from most I&P practices because continued certification requires external monitoring and assessment. They appear to be more embedded within an organisation's culture. The measure appears to indicate that an organisational culture of employee involvement is positively associated with employee trust. To effectively promote trust, management has to do more than go through the motions of implementing I&P.

#### 7.4.1.2.2 Trade-union representatives

The degree of trust between management and union representatives appeared to be affected by (a) the potential for them to be involved in the decision making process, and/or (b) contact at a personal level that did not encroach on the union's role/powerbase (e.g. performance appraisals).<sup>54</sup> 'Significant' positive associations were reported between trust and (a) involvement in change ( $\leq 0.05$ ), (b) quality improvement programmes ( $p\leq 0.05$ ), (c) performance appraisals ( $p\leq 0.001$ ), and (d) task based participation ( $p\leq 0.1$ ). Direct contact with employees involving consultation

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<sup>51</sup> Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8).

<sup>52</sup> Ibid 38.

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<[http://www.iso.org/iso/iso\\_catalogue/management\\_and\\_leadership\\_standards/quality\\_management/qmp/qmp-3.htm](http://www.iso.org/iso/iso_catalogue/management_and_leadership_standards/quality_management/qmp/qmp-3.htm)> accessed 15 March 2012.

<sup>54</sup> Guest, Brown, Peccei and Huxley 'Does Partnership Increase Trust?' (n 21) 137-139.

and ‘other forms of communications’ had negative associations with trust ( $p \leq 0.1$ ). This kind of direct participation might be perceived as interfering with traditional spheres of influence by potentially bypassing the role of union representatives. JCCs also had non-significant negative associations with trust. Unsurprisingly, the unwillingness of management to consult with union representatives had significant negative associations with trust in management ( $p \leq 0.05$ ).

#### 7.4.1.2.3 Non-union representatives

Trust between non-union representatives and management appeared to be positively affected by three factors.<sup>55</sup> These were: (a) involvement in change ( $p \leq 0.01$ ); (b) the content of discussions with non-union representatives ( $p \leq 0.1$ ); and (c) (surprisingly) mild associations with ‘not being consulted by management’ ( $p \leq 0.1$ ). There were positive non-significant associations for task based participation and ‘always discussing change’. All other variables mentioned above, including the presence of JCCs, had non-significant negative associations.

#### 7.4.1.2.4 Management

The study tested for management’s degree of trust towards union and non-union representatives. Although there were significant positive associations between trust and task based participation and trade unions ( $p \leq 0.05$ ), associations were negative in relation to non-union representatives ( $p \leq 0.1$ ). There were significant positive associations between trust and quality improvement programmes (union ( $p \leq 0.05$ ) and non-union ( $p \leq 0.1$ )) and performance appraisals (union  $p \leq 0.05$ ). Other direct forms of participation, along with the existence of a JCC had non-significant negative associations. These were slightly stronger ( $p \leq 0.1$ ) where unions were involved. Trust appeared to be associated with behaviour patterns. For management, always discussing a change was positively associated with trust (union ( $p \leq 0.01$ ) and non-union ( $p \leq 0.01$ )). But there were mild negative associations when management did not usually consult (( $p \leq 0.1$ ) for union-representatives and non-significant for non-union representatives).

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<sup>55</sup> Ibid 141-143.

#### 7.4.1.2.5 Discussion

Whilst data showed that JCCs had negative associations with trust, these were only statistically significant in the case of employees. Guest et al cited five characteristics identified in the literature, which might be ‘antecedents’ of workplace trust. These are behavioural consistency, behavioural integrity (keeping promises), sharing decision making and the delegation of control, communication, and demonstration of concern.<sup>56</sup> Representation appears to mean that employees are removed from decision-making forums and unable to establish links with many of the five. Decreased levels of trust might indicate a lack of connection between representative and represented and be indicative of something missing in the make-up or operation of JCCs in the UK. Further quantitative and qualitative research might substantiate Guest’s hypothesis and by revealing connections between one or more of the five characteristics and the levels of trust connected with JCCs. This could help provide an insight into conditions where JCCs are able to achieve their potential.

The data indicated that union representatives, non-union representatives, and employees related to trust in different ways. For union representatives ‘usually not consulting’ had mild negative associations, ‘involvement in change’ had positive associations, whilst ‘always discussing change’ had positive non-significant associations with trust. For non-union representatives ‘usually not consulting’ had significant positive associations, ‘always discussing change’ had positive associations, whilst ‘involvement in change’ had significant positive associations. This pattern was different for employees. ‘Face to face meetings’ and ‘being involved with change’ all had positive, non-significant, associations. The statistics in Chapter 6 indicate that, ‘consultation’ is often regarded as exercise in feedback. As such it might be seen, especially by non-union representatives, as a time wasting exercise because they appeared to associate trust with a perception of being directly involved with the process of change. There was no

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<sup>56</sup> Ibid 125.

indication that increased trust was connected with increased involvement for non-union representatives and employees.

For management, ‘always discussing change’ had very significant positive associations with trust, but ‘involvement in change’ had non-significant negative associations. ‘Always discussing change’ appears to reflect good employee relations. The negative direction regarding trust and involvement in change is puzzling. Associations between lack of trust and not usually consulting could be caused by, or be the result of a number of things: paternalistic management styles; bad industrial relations; the risk of disagreement leading to bad employee relations and conflict; or fear of altering the perception of the balance of power in favour of representatives.

When the results of union and non-union representatives were compared, the latter appeared to be less trusting. Lack of associations regarding quality improvement programmes and performance appraisals might reflect non-union representatives’ relative lack of influence (see Chapter 6). Union representatives are in a stronger position to negotiate the introduction of such initiatives. A sense of empowerment might have given rise to a belief that management trusted them, and in return, could be trusted.

Trust appeared to be positively associated with tasks that promote perceived mutual interests or reinforce a sense of self/group value. Significant negative associations relating to employee trust and JCCs appears to show a lack of connection between employee representatives and those they represent.

#### 7.4.1.3 Organisational Commitment

It has been suggested<sup>57</sup> that employees are more likely to be committed to an organisation and be satisfied with their work when management seek, and act upon, employee views. Cox et al<sup>58</sup> developed a commitment measure from three variables in the WERS2004 employee survey

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<sup>57</sup> E.g. Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14). 12.

<sup>58</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9).

concerning shared values, loyalty, and pride regarding their employer. They measured connections between commitment and individual I&P practices, before testing combinations of different I&P practices.

#### 7.4.1.3.1 Commitment and individual I&P practices

Two consecutive studies involving Cox found no significant associations between any single I&P practice and commitment.<sup>59</sup> Both found negative non-significant associations between organisational commitment and JCCs. This negative association might indicate a tendency not to be committed to organisations where there was a JCC.

#### 7.4.1.3.2 Breadth and depth of practice

The presence of an I&P practice does not mean that it is used effectively. Cox et al referred to a number of studies that gave reasons for ineffective implementation.<sup>60</sup> These included: work pressures, lack of management interest, and cost. This could mean that meetings did not take place regularly, ideas were not developed, decisions not implemented, or that managers did not respond to employees' concerns.

Cox et al developed ways to measure whether the depth and breadth of a practice affected results in relation to commitment.<sup>61</sup> Depth related to how a regime is implemented and was based upon such things as frequency of meetings and method of appointment. Breadth concerned the idea that a range of practices is likely to indicate a concerted effort to maximise the benefits of I&P. It was argued<sup>62</sup> that the larger the number of practices the greater management's commitment to I&P.

Using data from WERS1998 and WERS2004 Cox et al tested for associations connecting commitment with JCCs which took account of

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<sup>59</sup> Ibid 2159.

<sup>60</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 9 24.

<sup>61</sup> Ibid.

<sup>62</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2152.

depth of practice. Only non-significant negative associations were found.<sup>63</sup> However, significant positive associations were found between combinations of *direct* employee practices and their depth ( $p<0.05$ ) (WRES2004) ( $p<0.01$ ) (WRES1998).<sup>64</sup> A further study found significant positive associations between combinations of *direct* employee practices and breadth using data from WERS2004 ( $p<0.01$ ).<sup>65</sup>

When direct and indirect I&P were tested together the results were not consistent over time. Combinations of I&P (breadth) had significant associations with commitment in both time periods. Cox et al only found significant associations between commitment and depth of practice in 1998.<sup>66</sup>

#### 7.4.1.3.3 Discussion

The data pointed to important connections between employee attitudes and the way I&P practices were implemented. The first set of tests indicated that the existence of a practice did not necessarily equate with commitment. Unlike indirect participation, in some forms of direct participation employee commitment was affected by breadth and depth of practice. Commitment appeared to be strengthened by direct engagement (e.g. disclosure of performance targets led to commitment<sup>67</sup>) and this could explain lack of associations between commitment and JCCs.

#### 7.4.1.4 Job Satisfaction

Job satisfaction is hard to define. The term can be interpreted narrowly in terms of the job specification or task (e.g. the act of sexing a chicken), or widely to involve the whole working environment and connected issues

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<sup>63</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 2.

<sup>64</sup> Ibid 27 Cox, Zagelmeyer and Marchington 'Embedding I&P' (n 20) 260.

<sup>65</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2159.

<sup>66</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 26.

<sup>67</sup> Peccei, Bewley, Gospel and Willman 'Is It Good To Talk?' (n 13) 23.

such as pay and influence. Job satisfaction also appears to be influenced by factors such as management behaviour.<sup>68</sup>

What characterises job satisfaction has been approached differently by three groups of authors. Brown et al<sup>69</sup> took the simplest line and used a variable from the employee questionnaire (how satisfied were employees with their work?). Wood's<sup>70</sup> measure incorporated seven questions covering matters such as pay, scope for initiative, influence, and job security. Cox et al<sup>71</sup> also made assumptions about additional factors contributing to job satisfaction, they used variables from the employee questionnaire that concerned employees' senses of achievement and influence and their opinion of management's honesty and fairness.

Section 7.4.1.4.1 looks at associations between job satisfaction and individual I&P practices. Section 7.4.1.4.2 observes the effect of depth and breadth of practice on satisfaction levels. It appears that although job satisfaction was not associated with any one or group of I&P practices, it appeared to be significantly associated with management attitudes.

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<sup>68</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' 12.

<sup>69</sup> Brown, Forde, Spencer and Charlwood 'Changes in HRM and Job Satisfaction, 1998–2004: Evidence from the Workplace Employment Relations Survey' (2008) 18 3 HRMJ 237.

<sup>70</sup> Wood and De Menzies 'High Involvement Management' (n 10); Wood 'Job Characteristics and Well-being' (n 7).

<sup>71</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9); Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14).

#### 7.4.1.4.1 Satisfaction and individual I&P practices

Cox et al<sup>72</sup> found no significant link between any single employee I&P practice and employee perceptions relating to job satisfaction. Attitudes regarding job satisfaction appear to have changed between 1998 and 2004. Whereas only information regarding staffing had a negative association with satisfaction in 1998,<sup>73</sup> in 2004 team briefings, surveys, information re the financial situation of the establishment, and JCCs were all negatively associated with job satisfaction.<sup>74</sup> Associations between job satisfaction and JCCs went from positive to negative (but not statistically significant in either case) in the six year period. Guest and Conway<sup>75</sup> found significant negative associations between job satisfaction and union density ( $p<0.01$ ) and fringe benefits ( $p<0.05$ ).<sup>76</sup>

#### 7.4.1.4.2 Breadth and depth of practice

Breadth and depth of practice were tested in a measure that combined indirect and direct practices. Cox et al found differences between WERS1998 and WERS2004. In 1998 there were significant positive associations with depth of practice ( $p<0.05$ ); in 2004 depth had non-significant negative associations.<sup>77</sup> In 1998 there were significant positive associations with breadth ( $p<0.01$ ) of practice; in 2004 breadth of practice had non-significant positive associations.<sup>78</sup> The authors did not account for the differences.

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<sup>72</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9).

<sup>73</sup> Cox, Zagelmeyer and Marchington 'Embedding I&P' (n 20) 259.

<sup>74</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 26.

<sup>75</sup> Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8) 39.

<sup>76</sup> Size and sector were among the control variables used.

<sup>77</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 26; Cox, Zagelmeyer and Marchington 'Embedding I&P' (n 20) 259.

<sup>78</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 26.

Other studies have found varying associations between job satisfaction and depth and breadth of practice. Guest and Conway<sup>79</sup> developed measures for information sharing, communication, consultation, and involvement. The five variables that formed the information sharing measure established breadth of practice. This found positive non-significant associations with job satisfaction. It could be argued that Wood and de Menzes<sup>80</sup> high involvement management measure also tested for breadth. This was because half of its variables were associated with I&P (the rest concerned HR practices). They found negative non-significant associations using 2004 data.

Cox et al also tested for differences in depth between indirect and direct practices and job satisfaction. In 1998 and 2004 there were no significant associations for direct I&P practices. Indirect practices were found to have non-significant negative associations in 1998 and significant negative associations ( $p<0.01$ ) in 2004.<sup>81</sup> In 2004 employee associations between job satisfaction and JCCs changed from negative to *significantly negative* when they met more frequently and had more sophisticated selection criteria.

It would appear that JCCs with prescriptive constitutions can damage job satisfaction. More frequent meetings could be detrimental to job satisfaction if there is nothing new or substantive to examine. Repeatedly discussing difficult subjects in an attempt to resolve issues might have negative effects. Sophisticated selection criteria might politicise the body and potentially exclude useful/interested employees from the JCC. For example, constitutions might ensure that all recognised unions are represented without having allocated places to unrepresented junior management. Constitutions with rigid formulae might preserve JCCs in a format that has ceased to function usefully.

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<sup>79</sup> Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8) 39.

<sup>80</sup> Wood and de Menzes 'High Involvement Management' (n 10).

<sup>81</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 27.

Brown et al<sup>82</sup> used WERS1998 and WERS2004 and identified differences in the industrial relations climate over that time period, and the most important causes of change in HRM. They found no link between individual participation practices and job satisfaction. Between 1998 and 2004 there were significant positive changes in employees' satisfaction related to the sense of achievement they got from their work.<sup>83</sup> Measures of HRM were then examined including quality circles and briefing groups, but not JCCs. It was found that there had been negative changes in the incidence of these practices taking place ( $p<0.1$ ) (the exception was briefing groups that allowed time for employee questions). As the sense of satisfaction had risen and the use of most HRM practices had declined, it is unsurprising that no variables were found to have a significant positive impact on satisfaction. With the exception of the variable regarding information disclosure, variables had negative associations with satisfaction.

Although Brown et al found that job satisfaction had risen significantly between 1998 and 2004, the data indicated that the rise did not appear to be connected with I&P. Connections between job satisfaction and direct and indirect I&P practices seem unstable. Despite the rise in satisfaction, there were significant negative associations between indirect participation and satisfaction.

#### 7.4.1.4.3 Additional factors

In section 7.4.1.1 it was seen that some employees appeared to perceive some I&P practices as more helpful than others. Significant positive associations were found between employee perceptions of how helpful I&P practices were and job satisfaction ( $p<0.01$ ).<sup>84</sup> These practices were the use of notice boards, e-mail, newsletters, meetings, and the intranet. This indicated that, for establishments with more than 25 employees, high ratings of helpfulness relating to I&P practices were associated with job enhanced satisfaction.

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<sup>82</sup> Brown, Forde, Spencer and Charlwood (n 69).

<sup>83</sup> Ibid 243.

<sup>84</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2160.

Wood and de Menzes<sup>85</sup> used WERS2004 to test for job satisfaction in high performance work systems.<sup>86</sup> Two of their measures were informative management and consultative management. Both measures were based upon employee opinions of management practice. They found that informative and consultative management were both significantly related to job satisfaction ( $p \leq 0.05$ ).<sup>87</sup> However, this was not the case where there was trade union membership/recognition. Cox et al found significant positive associations between job satisfaction and managers seeking employee views and responding to employee suggestions ( $p \leq 0.01$ ) across all workplaces.<sup>88</sup> Brown et al found significant connections between a general influence measure<sup>89</sup> and job satisfaction ( $p < .01$ ).<sup>90</sup>

These findings point towards significant connections between job satisfaction and the process, or objectives of, I&P. These objectives were seeking employee views and responding to suggestions,<sup>91</sup> employee influence,<sup>92</sup> information, and consultation.<sup>93</sup> The *way* in which I&P was carried out appeared to be of importance in creating job satisfaction.

#### 7.4.1.4.4 Discussion

Positive connections between satisfaction and I&P practices appear to have declined between 1998 and 2004. Job satisfaction no longer showed significant positive associations with employee involvement and participation irrespective of its breadth and depth.<sup>94</sup> Using data from 2004,

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<sup>85</sup> Wood and de Menzes 'High Involvement Management' (n 10). An earlier paper by Wood gave a significance of ( $p \leq 0.01$ ).

<sup>86</sup> Wood and de Menzes looked at four dimensions of high-performance work systems 'enriched jobs, high involvement management, employee voice, and motivational supports'.

<sup>87</sup> Wood and de Menzes 'High Involvement Management' (n 10) 1598.

<sup>88</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2162.

<sup>89</sup> This appears to be derived from the variable 'how good are managers at responding to suggestions from employees (and their representatives)'.

<sup>90</sup> Brown, Forde, Spencer and Charlwood (n 69) 246-247.

<sup>91</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2161.

<sup>92</sup> Brown, Forde, Spencer and Charlwood (n 69) 246-247.

<sup>93</sup> Wood and de Menzes 'High Involvement Management' (n 10) 1598.

<sup>94</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2162.

Guest and Conway<sup>95</sup> found negative associations between union membership and job satisfaction, Brown et al's study showed that although satisfaction was not associated with the HRM practices they tested for, overall levels of satisfaction had increased between WRES1998 and WRES2004.

Section 7.4.1.4.3 indicated that satisfaction appeared to be associated with management attitudes. Brown et al found that the strongest associations came from job security, the climate of employment relations, and managerial responsiveness.<sup>96</sup> It was suggested employers may have made improvements in the quality of work in order to retain and recruit workers.<sup>97</sup> Part of this strategy was 'a greater willingness by management to take on board the suggestions of employees.'<sup>98</sup> The data indicated that employees did not connect this new attitude with I&P. Brown's factors were experienced by individuals daily, whilst the positive effects of I&P do not appear to be evident and/or lead to experiences that give rise to job satisfaction.

The Commission's hypothesis suggests that creating JCCs will result greater employee involvement in decision making and this would result in more job satisfaction. Cox et al argued that the way I&P was applied affected employee levels of job satisfaction and commitment.<sup>99</sup> However more recent results do not bear this out. There were no statistically significant connections, and associations with depth were negative. An explanation<sup>100</sup> (though not supported by Wood and de Menzes) might be that I&P is

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<sup>95</sup> Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8) 39.

<sup>96</sup> Brown, Forde, Spencer and Charlwood (n 69) 252.

<sup>97</sup> Ibid 252.

<sup>98</sup> Ibid 252.

<sup>99</sup> Cox, Zagelmeyer and Marchington 'Embedding I&P' (n 20) 261.

<sup>100</sup> Delbridge, Turnbull and Wilkinson 1992; Babson 1995; Harley 1999; Ramsey, Scholarios and Harley 2000 504–505; Thompson and Harley 2007 in Wood and de Menzes 'High Involvement Management' (n 10) 1602.

associated with more intensive work and stress giving rise to less job satisfaction.<sup>101</sup>

#### 7.4.1.5 Reduction of Anxiety/Contentment

All studies gauged anxiety/contentment through a variable in the employee questionnaire that asked employees to gauge what proportion of the time their job evoked feelings such as calm or worry. Tests sought to establish connections between the anxiety/contentment measure and factors in the I&P environment (e.g. union density), or opinions about an I&P procedure (e.g. whether employees felt that they had been consulted).

Guest and Conway<sup>102</sup> constructed three measures based on variables concerning direct and indirect I&P. These concerned information sharing, communication, and consultation. They<sup>103</sup> found significant negative associations between wellbeing and ‘union density’ ( $p<0.01$ ) and surveys ( $p<0.01$ ). There were no significant associations between wellbeing and their measures for communication, consultation, information sharing, and involvement.<sup>104</sup> The direction of the association was negative for the first two, and positive for the others.

Why should measures for communication and consultation be associated with anxiety, whilst that for involvement was not? Part of the answer might lie in the way that the measures were constructed and the types of meeting that each dealt with. The communication variable focused on meetings and briefings irrespective of whether management gave time for employees’ questions. JCCs were not tested separately but formed part of the consultation measure.

Communication might have had negative associations because the measure included forums where employees felt unable to communicate *directly* with management. Evidence in the section on employee involvement (below)

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<sup>101</sup> Ibid 1603.

<sup>102</sup> Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8).

<sup>103</sup> Ibid 39.

<sup>104</sup> Ibid 39.

indicated that high positive associations were linked to the provision of time for employees to offer their views. In the consultation measure this benefit might have been masked by negative associations associated with other variables, such as JCCs.

Conway's findings differed from those of Wood and Wood and de Menzes.<sup>105</sup> They used data from the 2004 employee questionnaire to test for associations between management's informing and consulting and anxiety/contentment. Their 'informative management' measure used questions concerning how good managers were at keeping employees informed about the organisation. Their 'consultative management' measure was based upon questions relating to employee opinion about their involvement in the decision making process.

The two studies produced slightly different results. Wood found significant associations between informative ( $p \leq 0.01$ ) and consultative management ( $p \leq 0.05$ ) and contentment.<sup>106</sup> Wood and de Menzes also found that contentment was significantly connected with informative management ( $p \leq 0.05$ ), but not with consultative management.<sup>107</sup> Only informative management had consistent positive significant associations with contentment.

The literature points to employee involvement being associated with reduced anxiety. All studies indicated that information was associated with a reduction in anxiety, Guest and Conway found positive associations and Wood/Wood and De Menzes significant positive associations. Evidence concerning consultative management was mixed. Wood's studies showed positive associations with the practice of consultative management. No single I&P practice was significantly positively associated with a reduction of anxiety or contentment. Conversely, a measure including JCCs had

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<sup>105</sup> Wood 'Job Characteristics and Well-being' (n 7); Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8) 38.

<sup>106</sup> Wood 'Job Characteristics and Well-being' (n 7) 162.

<sup>107</sup> Wood and de Menzes 'High Involvement Management' (n 10) 1599.

negative associations and high ‘union density’ had significant negative associations.

#### 7.4.1.6 Employee Relations

The literature<sup>108</sup> indicates that, compared with employees, managers have a more positive impression of employee relations. This should be remembered when considering the next section. Studies have used information from the employee or management surveys. Guest and Conway<sup>109</sup> used data from the employee survey to measure employee relations, whilst Fernie and Metcalf<sup>110</sup> and Addison and Belfield<sup>111</sup> used the data provided by management. Addison and Belfield found no significant associations between JCCs and employee relations; there were few positive significant associations with direct I&P.

Kersley et al tested for relationships between individual I&P mechanisms and perceptions of a good employee relations climate.<sup>112</sup> Using WERS2004 they looked at four kinds of I&P (‘union voice’, ‘non-union voice’, ‘direct voice’, and ‘no voice’), and combinations thereof. For management, when compared with no form of I&P (no voice), the only form that was associated with better perceptions of the employment climate was direct participation with no representation (direct voice). The data for employees showed no connections.

Kersley et al tested for connections between workplace climate and various sets of practices including ‘high involvement management’ and ‘flexible hours’. Only one, ‘flexible home arrangements,’ was positively associated with employee perceptions of climate. The measure included home-

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<sup>108</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 277. Also see literature and data relating to Chapter 6 hypothesis 1.

<sup>109</sup> Guest and Conway ‘HRM, Employee Attitudes and Workplace Performance’ (n 8) 14.

<sup>110</sup> Fernie and Metcalf (n 11).

<sup>111</sup> Addison and Belfield ‘Updating the Determinants of Performance:’ (n 24).

<sup>112</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 281-286.

working, flexitime, and compressed hours.<sup>113</sup> Only practices that positively affected life outside the workplace had significant positive associations. These matters were of significance to employee perceptions of the employee relations climate, but not those of management.<sup>114</sup>

Guest and Conway looked for associations between I&P and the employment relations climate using WERS2004. As has been seen, they did not differentiate between direct and indirect participation practices and their measures focused on information, communication, consultation, and involvement. They found no significant associations between employment relations and these factors. However, they found significant positive associations ( $p>0.05$ )<sup>115</sup> when the three measures were combined with others (a variable relating to surveys and another measure associated with team working). This might point to communication, consultation, and involvement being factors that might contribute to good employee relations when combined with others. Trade union density was negatively (but not significantly) associated with employment relations.

Fernie and Metcalf<sup>116</sup> and Addison and Belfield<sup>117</sup> tested for associations between employee relations and indirect and direct participation. Indirect representative participation was based upon whether there was a JCC. Both papers looked at single and different combinations of I&P measures. Results differed between WIRS3 in 1990 and WERS1998.

Fernie and Metcalf used WIRS3 to test for the impact of employee participation against a number of economic and industrial relations factors.<sup>118</sup> They found a weak positive association between there being a JCC and *management's* having a positive assessment of the industrial relations climate ( $p<0.1$ ). This was irrespective of whether management had

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<sup>113</sup> Ibid 286.

<sup>114</sup> Ibid 286.

<sup>115</sup> Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8) 39.

<sup>116</sup> Fernie and Metcalf (n 11).

<sup>117</sup> Addison and Belfield 'Updating the Determinants of Performance: ' (n 24).

<sup>118</sup> Fernie and Metcalf (n 11).

made efforts to boost employment involvement.<sup>119</sup> There was also a weak negative association between union recognition and the industrial relations climate ( $p<0.1$ ).

Differences were found amongst five direct I&P practices.<sup>120</sup> Problem-solving groups and meetings between top management and all the work force had significant positive associations with employee relations ( $p<0.01$ ). Briefing groups and use of the management chain had *negative* associations ( $p<0.05$  and  $p<0.01$ ).<sup>121</sup> Indirect and direct I&P had positive and negative connections with management's impression of employee relations.

Addison and Belfield tested consecutive surveys and found differences. Table 7.5 shows that results in 1990 and 1998 were very inconsistent. Only meetings between top management and employees had consistent statistically significant positive associations. The data appears consistent with Peccei et al's<sup>122</sup> findings relating to the Panel survey (1990-1998) regarding quality circles, problem solving groups, and regular monthly briefings.<sup>123</sup> Using the 2004 management survey Kersley et al reported significant positive associations between the industrial relations climate and meetings with top management and problem solving groups.

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<sup>119</sup> Ibid 396.

<sup>120</sup> Problem-solving groups such as quality circles that discuss performance of a work group; team briefings, regular meetings between senior management and the whole workforce, cascading information down the management chain and other methods such as suggestion schemes. Ibid 398.

<sup>121</sup> Ibid 398-9.

<sup>122</sup> Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14) 29.

<sup>123</sup> Ibid 215.

**Table 7.5**  
**Impact of Communication Methods on Industrial Relations Climate<sup>124</sup>**

	<b>1990</b>	<b>1998</b>
JCC	+p<0.1	+
Problem solving groups	+p<0.01	-
Briefing groups	-p<0.05	+
Meetings: top management	+p<0.01	+p<0.01
Management chain	-p<0.01	+
Other (suggestion schemes etc)		+p<0.01
Union recognition	-p<0.1	-

Addison and Belfield and Peccei found a negative change in the way JCCs were associated with employee relations. Fig 7.5 shows a weak positive association between JCCs and the employee relations climate. Peccei et al found no statistically relevant associations for JCCs, but associations changed from positive in 1990-1998 to negative in 1998-2004.

#### 7.4.1.6.1 Discussion

It is difficult to draw conclusions about correlations between employee relations and direct and indirect I&P. There was no evidence that consistently linked good employment relations to the existence of JCCs. Fluctuating data might point to other unknown factors affecting the results. It appeared from Guest and Conway that a range of measures including I&P improves industrial relations. Across two survey periods, only meetings with top management appeared to have a consistently better impact on management opinions of employee relations. It also appears that goodwill is generated when work accommodates personal problems and that this translates into employees having good perceptions of employment relations.

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<sup>124</sup> Addison and Belfield 'Updating the Determinants of Performance: ' (n 24) 348; 351, Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 281.

#### 7.4.1.6 Conclusion

The literature found no significant positive associations concerning JCCs and the six factors that relate to the Commission's positive outcome of humanisation of the workplace. There was evidence that principles, such as the provision of information or consulting, have significant positive associations with these factors (e.g. job satisfaction and a reduction in anxiety). The I&P mechanisms that appeared to bring these principles into the workplace related to direct interaction between management and employee/employee representative (e.g. trust was associated with actual involvement: 'task based participation'; 'meetings with top management' had consistent significant positive associations with good employee relations). Employees not being, or feeling, directly involved with indirect I&P might be why there were no positive significant associations with JCCs.

Cox et al built on earlier studies to corroborate the argument that the presence of one or more I&P practice does not mean that it/they are used effectively. They found that that employee commitment was affected by the breadth and depth of practice of indirect I&P practices. However, associations between job satisfaction and JCCs, when they met more frequently and had more sophisticated selection criteria, became *significantly negative*. Over time, associations between a number factors (e.g. 'job satisfaction' and 'employee relations') and I&P mechanisms were not stable. There were indications that factors influencing associations went beyond I&P practices: Brown et al found that during the period 1998 to 2004 job satisfaction had risen but I&P practices had declined. Kelsey et al found terms and conditions, such as home-working, were associated with job satisfaction. Other influences, such as unions, will be discussed in section 7.5.

#### 7.4.2 Increased Competitiveness

The Commission's second positive outcome relates to adaptability and increased competitiveness. Three questions in the management questionnaire were related to workplace performance. These concerned (a) financial performance, (b) labour productivity, and (c) quality of product.

The first two questions measured competitiveness by comparing an organisation's ability to generate profit, or effectively use labour, with others in that industry. The third concerned quality of product. Because product quality does not necessarily equate with competitiveness this section focuses on financial performance and labour productivity.

A problem with WIRS/WERS data is that it is difficult to judge whether the person answering the management survey had sufficient knowledge to give accurate information.<sup>125</sup> Queries have been raised relating to accuracy of the data collected.<sup>126</sup> These issues were investigated by Forth and McNabb, and Kersley et al<sup>127</sup> by comparing the management survey with the financial performance questionnaire.

Forth and McNabb found evidence of congruence between subjective and objective measures of workplace performance, although this was subject to 'substantial' caveats.<sup>128</sup> Objective and subjective measures of profitability were found to be more closely aligned than those relating to productivity. Structural models found similar results between objective and subjective measures, however, lower levels of statistical significance were found in the latter. Although subjective measures tended to underreport significant findings (links were therefore stronger than studies indicate), Forth and McNabb stated that they found some degree of support for past research concerning organisational performance that was based upon the management questionnaire.<sup>129</sup>

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<sup>125</sup> Forth and McNabb 'Workplace Performance: a Comparison of Subjective and Objective Measures in the 2004 Workplace Employment Relations Survey' (2008) 39 2 IRJ 104 106.

<sup>126</sup> An exception was for the classification 'a lot above average'. Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 287.

<sup>127</sup> Forth and McNabb (n 125); Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33).

<sup>128</sup> Forth and McNabb (n 125) 119.

<sup>129</sup> Ibid 119.

#### 7.4.2.1 Financial Performance

One WIRS/WERS question concerned how the financial performance of the establishment compared with others in the same industry. Various studies showed associations between financial profitability and different forms of communication. There were no significant associations with JCCs, but there were with some types of direct forms of consultation.

Section 7.4.2.1.1 considers how financial performance relates to measures of direct and indirect forms of participation. Section 7.4.2.1.2 looks at results for specific types of I&P. Section 7.4.2.1.3 discusses why the findings concerning I&P might not be consistent or accurate. Section 7.4.2.1.4 looks at studies concerned with concepts relating to I&P, such as 'consultation' rather than I&P mechanisms such as JCCs.

##### 7.4.2.1.1 Financial performance and direct/indirect participation

Willman et al's<sup>130</sup> discussion paper used WERS/WIRS data to look at the effects of I&P on financial performance between 1984 and 2004. They looked at 'representative voice' (some sort of consultative committee), 'direct voice' (regular meetings between senior management, team briefings, or problem solving groups), 'union voice', and 'no voice'. They also looked at 'union voice' and compared it to 'non-union voice'. There were clear associations between better financial performance and non-union voice in all years. Willman et al found that union representation was associated with poorer financial performance.

Willman et al distinguished between direct and representative regimes. JCCs did not perform significantly better than other regimes including over 'no voice'. Some direct regimes performed better than others. For 1984 they found direct I&P outperformed a combination of direct and representative I&P (representative voice and union). By 2004 the only significant difference was direct I&P over 'no voice'; the effects of direct I&P on financial performance had declined in relation to other 'voice regimes'.

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<sup>130</sup> Willman, Gomez and Bryson (n 27) 15-16.

These findings are supported by Kersley et al.<sup>131</sup> Using WERS2004 they looked at eight different kinds and combinations of I&P (see above). They found that none associated with better financial productivity than when there were no arrangements. The combination of direct and non-union representative voice was associated with better performance than most other regimes.<sup>132</sup>

#### 7.4.2.1.2 Financial performance and specific I&P schemes

Kersley et al.<sup>133</sup> also looked at distinct forms of communication. Three types were associated with better than industry-average productivity. They were: monthly meetings between senior management and the whole workforce in which employees have an opportunity to speak, problem solving groups, and formal surveys of employees.<sup>134</sup>

Addison et al<sup>135</sup> used WIRS3 to compare the effects of workplace participation in union and non-union establishments on firm performance. Two of the measures they constructed were for JCCs and ‘information and consultation’ (I/C). The I/C measure contained variables relating to regular meetings involving communication or consultation amongst workgroups or teams or between workers and management, including quality circles and team briefings.

The data for union and non-union establishments showed no statistically significant association between JCCs and profitability. Newly introduced JCCs had negative associations with profitability irrespective of union presence. Nothing was evidenced about the circumstances leading to JCCs being created. Motivating factors for introducing ‘partnership at work’ or

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<sup>131</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33).

<sup>132</sup> Ibid 292.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid 293.

<sup>135</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance' (n 18) 17.

I&C bodies are sometimes linked to crisis management;<sup>136</sup> these may be connected to financial issues such as loss of a contract and this might account for such negative associations.

The I/C measure was positively associated with profitability where no unions were present, irrespective of when it had been introduced. Where there was union recognition there were statistically significant negative associations between profitability and I/C schemes ( $p<0.05$ ).<sup>137</sup> This became more negative ( $p<0.01$ ) where a new scheme was introduced.<sup>138</sup> Reasons for this difference are discussed in the light of data regarding labour productivity in the next section.

McNabb and Whitfield hypothesised that different types of employee involvement schemes vary in their impact on financial performance.<sup>139</sup> They used, or created measures for, three types of participation based upon WIRS3:

- (a) representative participation, where an establishment had a JCC;
- (b) upward problem-solving, based upon meetings, surveys, ballots, or employee views; and
- (c) downward communication, based upon meetings between different sections of management and all or part of the workforce, or use of the management chain or newsletters.<sup>140</sup>

Table 7.6 shows the results of their tests using WIRS3 from 1990 and WERS1998's questionnaire and panel data set.

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<sup>136</sup> Knell 'Partnership at Work' (1999) URN 99/1078 DTI 17-18; Hall, Hutchinson, Parker, Purcell and Terry 'Implementing Information and Consultation: Early Experience Under the ICE Regulations' (2007) BERR URN 07/1388 BERR 20.

<sup>137</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance' (n 18) 26-7.

<sup>138</sup> Ibid 26.

<sup>139</sup> McNabb and Whitfield 'Financial Performance and Employee Involvement' (n 6) 175.

<sup>140</sup> Ibid.

**Table 7.6**  
**Employee Involvement and Financial Performance<sup>141</sup>**

	<b>WIRS 1990</b>	<b>WERS 1990- 98 Panel</b>	<b>WERS 1998</b>
JCC	-	-	+
Upward Problem solving	-p<0.1	+	-
Downward Problem solving groups	+p<0.01	+p<0.05	+

Again, JCCs had no significant associations with financial performance. The presence of upward communication/problem solving had mild negative associations in 1990, though they lost their significance in the 1998 survey. Downward problem solving groups had mixed results. There were significant positive associations in 1990 ( $p<0.01$ ), lower significance in the panel survey ( $p<0.05$ ), and positive associations in 1998. Addison and Belfield<sup>142</sup> used the cross sectional WERS1998 to replicate McNabb and Whitfield's investigation of WIRS3. They also found virtually none of the associations could be replicated. The results for WERS1998 were similar to McNabb and Whitfield's second study, with two exceptions. There was significance at the 1% level for downwards communication and negative associations between profitability and the presence of recognised unions in both periods.

Using 1990-1998 and 1998-2004 panel data, Peccei et al<sup>143</sup> tested for connections between financial performance and JCCs, recognised trade unions, and direct participation (the use of quality circles, problem solving groups, or regular briefings at least once a month).<sup>144</sup> They found positive non-significant associations between JCCs and financial performance in

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<sup>141</sup> McNabb and Whitfield 'Financial Performance and Employee Involvement a Reply' (n 24) 588.

<sup>142</sup> Addison and Belfield 'The Impact of Financial Participation and Employee Involvement on Financial Performance: A Re-estimation Using the 1998 WERS' (2000) 47 5 SJPE 571.

<sup>143</sup> Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14).

<sup>144</sup> Ibid 15.

both periods. Trade unions had negative non-significant associations with profitability. There were no significant associations for direct participation (the direction was positive in the first period and negative in the second).

In the management survey, meetings and problem-solving groups appeared to be consistently associated with good financial performance across three time periods (either by themselves in 2004, or as part of a group of I&P variables). Addison and Belfield's results indicate that the relationship between different types of I&P and financial performance fluctuates. The next section considers the reasons for this.

#### 7.4.2.1.3 Possible factors behind inconsistencies

Management policy and workplace climate might be involved with the success or failure of I&P to influence financial performance. McNabb and Whitfield suggested that the distribution of employee participation schemes had changed over time and that latecomers might be copying schemes without having positive consequences<sup>145</sup> and/or the impact of the schemes might decay over time.<sup>146</sup> Addison and Belfield also pointed to extraneous factors interfering with I&P, stating that a policy such as downward communication 'may be dominated by environmental factors such as the industrial relations climate of the workplace...'<sup>147</sup>

Another factor could be the relative strength or weakness of unions in workplaces. Addison et al<sup>148</sup> found different connections between various types of I&P depending upon whether establishments recognised a trade union for negotiating pay and conditions of employment. They assessed establishments' relative financial performance against three measures. Using 1990 data, unionised establishments were found to have negative associations between financial performance and information/consultation

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<sup>145</sup> McNabb and Whitfield 'Financial Performance and Employee Involvement a Reply' (n 24) 587.

<sup>146</sup> Ibid.

<sup>147</sup> Addison and Belfield 'Impact of Financial Participation' (n 142) 582.

<sup>148</sup> Addison and Belfield 'Updating the Determinants of Performance:' (n 24) 23.

schemes ( $p<0.05$ ), and no associations for JCCs. There were no significant connections for any type of schemes in non-union establishments.<sup>149</sup>

Using data from the 2004 survey, Kersley et al<sup>150</sup> found that neither union density nor union recognition were associated with poor financial performance. However, workplaces with multiple unions had poorer performance than non-union workplaces. The effects of unions will be discussed below. However, the data appears to point to situations where the presence of unions is associated with organisations which have poor financial performance.

#### 7.4.2.1.4 Financial performance and concepts associated with I&P

Some studies have tested for connections between financial performance and the provision of information,<sup>151</sup> communication, consultation, and involvement.<sup>152</sup> These measures differed from those discussed in section 7.4.2.1.2 because they went beyond testing for the presence of I&P mechanisms like JCCs. For example, they did not assess involvement by testing for briefings with time left for questions, but used a variable that asked whether employees had been involved in implementing change. Guest and Conway found a significant positive association between financial performance and consultation ( $+p<0.05$ ).<sup>153</sup> There were non-significant negative associations for involvement and communication.

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<sup>149</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance' (n 18) 28-9.

<sup>150</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 292.

<sup>151</sup> Peccei, Bewley, Gospel and Willman 'Antecedents and Outcomes of Information Disclosure to Employees in the UK, 1990-2004: The Role of Employee Voice' (2010) 60 3 Human Relations 419; Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14).

<sup>152</sup> Guest and Conway 'HRM, Employee Attitudes and Workplace Performance' (n 8).

<sup>153</sup> Ibid 38.

The effects of information disclosure on financial performance were tracked by Peccei et al<sup>154</sup> in the panel surveys from WERS1998 and WERS2004.

The information measures for both were based upon information disclosure on internal investment, staffing plans, and the financial position. They found that in the period ending in 1998, information disclosure had a strong significant positive associations ( $p<0.05$ ) with establishment performance.

This was not so for the period to 2004 where the association was not significant and negative. However in the second period, financial performance was positively associated with information disclosure ( $p<0.1$ ).

It was suggested that in the first period disclosure led to a positive performance, whereas performance led to disclosure in the second period.<sup>155</sup> Management appeared to have an inconsistent policy towards information disclosure. They found no consistent significant association between giving information and above average financial performance. Their study ties in with Guest and Conway's finding that communication was not associated with financial performance. Peccei et al's findings appear to suggest that management used information for its own agenda (e.g. disclosing bad financial information to justify altering terms and conditions and raising profitability). This agenda appeared to change over time and will be discussed in greater depth in section 7.4.2.2.3.

#### 7.4.2.1.5 Discussion

There was a split between results for direct and indirect I&P practices. Financial performance had some significant negative associations with union presence and no positive significant statistical associations with JCCs. One reason for the lack of positive association in respect of JCCs might be union presence; just over half of workplaces with JCCs had employees who were trade union members.<sup>156</sup> Negative associations caused by trade union presence might counter positive effects of JCCs.

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<sup>154</sup> Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14);, Peccei, Bewley, Gospel and Willman 'Antecedents, Outcomes and Human Voice' (n 151).

<sup>155</sup> Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14)18-20.

<sup>156</sup> Information taken from WERS dataset xs04\_mqv2.

However, there were significant positive associations between some direct I&P practices and financial performance, although there were inconsistencies over time. Problem-solving groups and meetings, either individually, or as part of a measure involving other variables, had positive associations with profitability for three WIRS/WERS periods. Various studies found the act of 'consultation' or giving 'information' significantly related to financial profitability. This was not the case with 'involvement' and 'communication'.

#### 7.4.2.2 Labour Productivity

Tests for labour productivity were based upon variables taken from the management questionnaire. These concerned: (a) management's opinion of how labour productivity within their establishment compared with that in similar workplaces and (b) management comparing productivity with how it was three years ago. The second variable ceased to appear in later versions of WERS. There were differences in results between studies, even when similar data was used from the same survey. The next section overviews the effect of trade union presence and indirect and direct participation on labour productivity. It is followed by an outline of the effect of specific practices or mechanisms. Section 7.4.2.2.3 considers reasons why some I&P measures have had consistent positive associations with labour productivity, whilst others have not.

##### 7.4.2.2.1 Labour productivity and direct/indirect participation

Willman et al<sup>157</sup> looked at the relationship between I&P and labour productivity during the period 1980-2004. When compared with non-union workplaces, they found trade union presence was associated with lower productivity. This was also true in workplaces that had union and non-union representation, but the significance was not significant. Practices involving direct I&P had higher labour productivity than others, though the differences were not large. When compared with direct I&P, analysis suggested negative associations between labour productivity and indirect I&P. However, this only became statistically significant when the years

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<sup>157</sup> Willman, Gomez and Bryson (n 27) 15-16.

1980-2004 were pooled together.<sup>158</sup> They concluded that these results meant that there was 'no compelling case for direct I&P on productivity grounds'.<sup>159</sup> With less positive data, this conclusion would also apply to JCCs and trade unions.

Kersley et al<sup>160</sup> found slightly different results regarding WERS2004 for their eight direct/indirect 'voice' measures (see above). They found none were individually associated with better or worse productivity than was the case where there were no arrangements. However, combinations of direct and non-union representative voice were associated with better labour productivity than either 'direct voice' only scenarios.<sup>161</sup>

It would appear that significance was associated with specific periods of time and with which variables, or combination of variables, were chosen. Addison and Belfield<sup>162</sup> used WERS1998 to recreate Fernie and Metcalf's<sup>163</sup> analysis of the WIRS3 from 1990. The latter's employee involvement (EI) measure combined variables on problem-solving groups, briefing groups, meetings with top management, and use of the information chain. While weak connections were found between productivity levels and employee involvement in 1990, none were found between EI and changes in productivity for either period.

Direct I&P contains a wide variety of possible practices. It is therefore difficult to generalise about its links with labour productivity. The next section overviews results concerning recognised trade unions, JCCs, and different kinds of direct I&P.

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<sup>158</sup> Ibid16. However, there was only statistical significance when the years 1980-2004 were pooled together.

<sup>159</sup> Ibid.

<sup>160</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33).

<sup>161</sup> Ibid 290.

<sup>162</sup> Addison and Belfield 'Updating the Determinants of Performance:' (n 24).

<sup>163</sup> Fernie and Metcalf (n 11).

#### 7.4.2.2.2 Labour productivity and specific I&P schemes

A variety of different variables and measures concerning I&P practices have been tested by Fernie and Metcalf,<sup>164</sup> Addison and Belfield,<sup>165</sup> and Kersley et al.<sup>166</sup> Table 7.7 shows that outcomes have not been consistent between 1990 and 2004.

**Table 7.7**  
**Link Between Productivity and Employee Involvement**

	Productivity 2004 Kersley et al	Productivity 1998 Addison and Belfield	Productivity 1990 Fernie and Metcalf	Productivity change 95-98 Addison and Belfield	Productivity change 87-90 Fernie and Metcalf
Union recognition		-		p<0.01	-p<0.01
JCC		-p<0.01		-p<0.01	p<0.1
Any EI		+	p<0.1	+	
Problem solving	Significant	p<0.05		p<0.01	
Briefings		p<0.05	p<0.1	p<0.05	p<0.1
Meetings with all workforce*	Significant	+		+	
Chain	Significant	-	p<0.05	-	
Other		+	-p<0.05	+	-p<0.05

\*Meetings with the entire workforce *and* an opportunity for employees to speak

No study found significant links between union recognition and labour productivity (Addison and Belfield found negative associations in 1998).

The figures for changes in productivity indicated that unions were negatively associated with productivity in the first period (p<0.01) but positively associated with productivity in the second (p<0.01). The change in direction might be a result of the recession starting in 1987. As seen above, Kersley et al found negative associations in workplaces where there was multiple union recognition.

<sup>164</sup> Ibid.

<sup>165</sup> Addison and Belfield 'Updating the Determinants of Performance: ' (n 24).

<sup>166</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33).

Whereas Fernie and Metcalf found no statistically significant associations between JCCs and labour productivity, Addison and Belfield found statistically significant negative associations with JCC presence ( $p<0.01$ ). A similar change was found with respect to changes to labour productivity over the previous three years. Fernie and Metcalf's weak positive association ( $p<0.1$ ) became significant and negative ( $p<.01$ ). Kersley and Martin also reported no association between JCCs and labour productivity re WIRS3 in 1990.<sup>167</sup>

Fernie and Metcalf looked at five types of direct I&P practice. Only the presence of briefing groups had consistently weak/significant associations across the two surveys ( $p<0.1$  &  $p<0.05$ ). Kersley and Martin also found 'nearly significant' associations between briefings and regular meetings and labour productivity.

It is impossible to make accurate comparisons between studies because the authors have selected diverse measures and variables. But of all the practices tested only union recognition, use of the management chain, JCCs, and 'other' had negative associations. Those achieving consistently positive results were practices or measures that included variables with the possibility of two-way communication with management. Only problem-solving, briefing, and meetings with the entire workforce were consistently positively associated with Labour productivity across all three periods under review.

#### 7.4.2.2.3 Possible reasons for inconsistency

Why might participation practices that are *impersonal* not influence productivity? Studies by Peccei et al<sup>168</sup> and Addison et al<sup>169</sup> indicated the difference that employee attitude can have on labour productivity. Another

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<sup>167</sup> Kersley and Martin 'Productivity, Growth, Participation and Communication' (n 6) 491.

<sup>168</sup> Peccei, Bewley, Gospel and Willman 'Is It Good To Talk?' (n 13).

<sup>169</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance' (n 18).

explanation might be that if management is removed from potentially reinforcing the relationship, other influences might negatively affect results.

Where data<sup>170</sup> has been analysed in terms of union presence, differences do emerge. Addison et al<sup>171</sup> tested for associations between changes in labour productivity and JCCs and information and consultation (I/C) schemes. Results differed according to union presence. In non-union establishments they found a significant positive change in productivity when new JCCs or I/C schemes had been introduced ( $p<0.05$ ). Equivalent results for union establishments were 'insignificant': associations with productivity for JCCs were negative and I/Cs were positive.

Addison et al concluded that, on balance, it seemed that trade union recognition made a negative difference to the results of employee involvement schemes. They stated that 'enhanced employee involvement is not apparently beneficial for labour productivity among establishment recognizing unions but it is among the non-union group.'<sup>172</sup> The effect of union involvement on I&P is a factor which should be given consideration. Studies that fail to separate this data appear in danger of providing a partial picture which may not be accurate either for union presence or non-union presence.

Peccei et al<sup>173</sup> used WERS1998 data to test for links between labour productivity and information disclosure concerning (a) general information, (b) performance targets, and (c) performance results. They found no direct connections between providing the three types of information and increased labour productivity. But they established that the disclosure of performance targets had a positive impact on employee commitment ( $p<0.001$ ), which, in turn was positively related to labour productivity ( $p<0.05$ ).<sup>174</sup>

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<sup>170</sup> E.g. Willman (above).

<sup>171</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance' (n 18) 23, 24, 26.

<sup>172</sup> Ibid28.

<sup>173</sup> Peccei, Bewley, Gospel and Willman 'Is It Good To Talk?' (n 13).

<sup>174</sup> Ibid 23.

They went on to establish that levels of employee commitment altered the results that the provision of 'general information' and 'performance results' had on employee performance. General information had a positive, though not significant relationship with productivity. But when employee organisational commitment was taken into account it became a statistically significant ( $p<0.05$ ) *negative* association. Disclosure of performance results was initially negatively associated with labour productivity (not significantly). When account was taken of organisational commitment, the relationship became positive and statistically significant ( $p<0.05$ ).<sup>175</sup>

**Table 7.8**  
**The Effect of Information Disclosure on Labour Productivity**<sup>176</sup>

	Total Sample	Non-union Sample	Union Sample	Weak Union Sample	Strong Union Sample
General information	+	-	$p<0.05$	+	$p<0.05$
Performance targets	+	+	$-p<0.01$	$-p<0.01$	$-p<0.05$
Performance results	-	+	+	-	+
General information + commitment	$-p<0.05$	$-p<0.05$	-	+	+
Performance targets+ commitment	+	+	-	-	-
Performance results+ commitment	$p<0.05$	$p<0.001$	-	-	-

The data was tested for differences in union and non-union settings (see Table 7.8).<sup>177</sup> The results for union establishments were generally weaker than where there were no unions. The exception was general information

<sup>175</sup> Ibid 12-13.

<sup>176</sup> Ibid 13-14.

<sup>177</sup> Ibid.

disclosure. In a unionised setting, the provision of information might be symptomatic of good relations between union and management. Separate analyses were carried out for establishments where unions were weak and where they were strong. The impact of disclosure was not consistently weaker in workplaces where unions were stronger. Overall the results suggested that information disclosure had stronger impact in non-union than in union settings.

The differences between union and non-union samples were attributed to management employee interaction. It was suggested that disclosure was beneficial to labour productivity where there was a reasonable degree of alignment between individual and organisational goals.<sup>178</sup> Also, that management was more likely to disclose bad information where commitment levels were high (negative news, such as the loss of orders, correlated with statistically significant negative associations relating to productivity). Peccei et al stated that performance results or feedback 'had a stronger positive effect on labour productivity in establishments where there were higher levels of employee commitment.'<sup>179</sup>

#### 7.4.2.2.4 Discussion

Addison and Belfield provided no explanation for the significantly negative associations between JCCs and productivity in 1998 and with productivity change (1995-98). Associations between I&P practices and labour productivity were found to fluctuate over time. Only indirect I&P practices had consistent positive associations over time but no significant positive association was consistent. The studies indicated that economic conditions might give rise differences in behaviour in management and unions, and these differences, in turn, result in fluctuations.

Trade union presence had significant negative associations with changes in productivity in the period 1987-1990. Between 1995 and 1998 the direction was significant and positive, but productivity in 1998 had a non-significant negative associations with trade union presence. A reason for the results

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<sup>178</sup> Ibid 16,23.

<sup>179</sup> Ibid 12-13.

relating to productivity change might be the economic climate. The depression in 1987 could have resulted in unions fighting for their members' jobs in a time of cut backs.

Other factors appear to be involved. JCCs having mild positive associations with labour productivity 'over time' (1987-1990) could have been the result of their facilitating restructuring during a time of economic downturn.

Addison et al found significant positive associations with JCCs over time in non-union establishments. This, along with their results relating to I/C schemes, and the findings of Peccei et al indicates that unions may dampen the effectiveness of I&P schemes. Peccei et al's results<sup>180</sup> connected the provision of information impacted on organisational commitment levels, which in turn affected labour productivity. These findings suggest that simply linking any I&P scheme with increased labour productivity might, in some cases be a simplistic formula.

#### 7.4.2.3 Conclusion

There is little support for associating JCCs with improving organisational competitiveness. Where unions were present there were significant negative associations between JCCs and financial competitiveness. In 1990 significant positive associations were found relating to changes in productivity when new JCCs were introduced *and* no unions were involved. However, Addison and Belfield found significantly negative associations between JCCs and labour productivity in 1998 and with productivity change (1995-98). Trade unions and economic factors appear to play a part in these fluctuations.

Addison et al attributed the difference between union and non-union results to how much management was able to use its autonomy under competitive conditions. Where there were no unions, management was able to maximise profit through introducing I&P practices. They contended that union power/objections might have influenced management's ability to act, and

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<sup>180</sup> Table 6.8 Chapter 7.

have overridden competitive initiatives to the extent that profitability and productivity was affected.<sup>181</sup>

Addison et al found no statistically significant associations between profitability and participation.<sup>182</sup> But they found a connection between higher wage levels and the presence of information and consultation schemes (I/C) ( $p<0.01$ ).<sup>183</sup> They suggested that although I/C presence had an insignificant effect on levels of profitability it increased wage levels. Effects on wage levels were insignificant where there were unions. They stated that when productivity was linked with higher wage levels, profits might increase or not change.

Another factor might account for their finding a lack of connections between I&P and profitability and productivity. Forth and McNabb found that mean productivity, measured objectively, was higher amongst respondents who considered the profitability/productivity of their workplaces to be average when compared with other establishments in the same industry. Workplaces might have been more profitable than their managers considered. Other studies did find consistent connections between specific I&P practices and profitability.

The lack of consistency might point to other factors affecting the link between I&P practices, profitability, and labour productivity. Union presence alters the dynamic between employees and management. Kersley and Martin stressed the importance of two-way communication where worker and management have the opportunity to exchange information. They stated 'initiatives that increase communication can increase productivity growth, but will only be effective if they increase the amount of informal communication.'<sup>184</sup> The evidence supports links between financial performance, labour productivity, and direct consultation/communication.

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<sup>181</sup> Addison, Stanley, Siebert, Wagner and Wei 'Worker Participation and Firm Performance' (n 18) 28-29.

<sup>182</sup> Ibid 9 30.

<sup>183</sup> Ibid.

<sup>184</sup> Kersley and Martin 'Productivity, Growth, Participation and Communication' (n 6) 501.

The formal indirect nature of participation on JCCs may account for their poor associations with profitability and productivity.

### **7.4.3 Promotion of Employee Involvement or Influence in the Workplace**

The Commission's third positive outcome of using indirect I&P is that it will promote employee involvement in the workplace. 'Involvement' is a nebulous concept. Various papers have used variables and created measures that reflect different kinds of employee involvement/influence generated by different forms of I&P. Section 7.4.3.1 concerns how perceptions of managerial responsiveness<sup>185</sup> and employee influence over their jobs<sup>186</sup> were associated with I&P.

Employees are clearly 'involved' when included in the decision-making process. But what of more passive forms of I&P? It could be argued that the provision of information to employees or employee representatives is too passive to constitute involvement. However, it has been seen that the provision of information gives rise to job satisfaction and the reduction of anxiety. In addition to this provision of relevant information is important for effective consultation. Section 7.4.3.2 focuses on how levels of information disclosure in different types of I&P mechanisms have changed over time. This has been included because information, in turn, will impact the ability to be effectively involved with other I&P mechanisms.

**7.4.3.1 Relationships Between I&P and Employee Involvement/Influence**  
Articles by Delbridge and Whitfield,<sup>187</sup> and Bryson<sup>188</sup> utilised data in WERS1998 with differing results. The first study involved associations between different kinds of I&P and the influence employees felt that they

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<sup>185</sup> Bryson (n 23).

<sup>186</sup> Delbridge and Whitfield 'Employee Perceptions of Job Influence and Organizational Participation' (2001) 40 3 Industrial Relations 472; Brown, Forde, Spencer and Charlwood (n 69).

<sup>187</sup> Delbridge and Whitfield (n 186).

<sup>188</sup> Bryson (n 23).

had over their job, the second concerned managerial responsiveness. Positive associations were found in both.

Delbridge and Whitfield used three variables to assess the amount of influence employees felt they had over their work:

- (1) the range of tasks undertaken;
- (2) the pace of work; and
- (3) how the work or job was done.

They classified four types of participation schemes: (a) union representatives, (b) JCCs, (c) team briefings with more than 25% of time allowed for employee questions or views, and (d) quality circles, problem-solving groups, or continuous improvement groups.

Table 7.9 summarises the results. Recognised unions had negative associations with all three matters, but significant negative associations with work pace. Significant positive associations were only found between JCCs and how the work was done ( $p<0.05$ ). There were positive non-significant associations with 'work pace' but 'task range' had negative non-significant associations with JCCs.<sup>189</sup> It appeared that employees positively associated JCCs with handling general matters relating to the job, but not tasks affecting individual jobs. Whether task range formed part of the JCCs' mandates is not known.

**Table 7.9**  
**Employee Perceptions of Job Influence<sup>190</sup>**

Type	Task range	Work pace	How job done
Recognised Union	-	$-p<0.05$	-
JCCs	-	+	$p<0.05$
Team briefing	$p<0.01$	$p<0.01$	$p<0.05$
Quality circles/problem solving	+	-	+

Team briefings had statistically significant positive associations with perceptions of job influence in all three categories. Quality circles/problem-

<sup>189</sup> Delbridge and Whitfield (n 186) 447-8.

<sup>190</sup> Ibid 482.

solving groups had no significant associations with job influence. They had positive associations with task range and how the job was done, but negative associations with work pace.

Delbridge and Whitfield looked at the effect of varying the time given to employees to ask questions or offer their views. Table 7.10 indicates that the more briefing time given over to employees, the greater the influence employees felt they had.

**Table 7.10**  
**Proportion of Time Given Over to Briefing Groups to Questions from Employees or for Employees to Offer their Views.**<sup>191</sup>

	>0%	>10%	>25%
Task Range	-	p<0.001	p<0.001
Work Pace	p<0.01	p<0.001	p<0.001
How job done	-	+	p<0.01

Table 7.11 indicates that there was not a simple relationship between numbers of employees involved with quality circles and perceptions of employee influence. Significant negative associations with work pace remained more or less consistent. Negative non-significant associations became positive non-significant associations when more than 60% of employees were involved in quality circles. A slightly more positive perspective of employee influence was associated with two of the three variables when over 60% of employees were involved.

**Table 7.11**  
**Proportion Non-Managerial Staff Involved in Quality Circles.**<sup>192</sup>

	>20%	>40%	>60%	>60%	100%
Task Range	-	-	+	+	+
Work Pace	-p<0.01	-p<0.01	-	-p<0.01	-p<0.05
How job done	-	-	+	+	+

<sup>191</sup> Ibid 483.

<sup>192</sup> Ibid.

Delbridge and Whitfield drew a distinction between what they termed broad participation, and focused participation.<sup>193</sup> Focused participation involved mechanisms that concentrated on production issues; these included quality circles and problem solving groups. I&P mechanisms designated as broad participation included JCCs, or other briefing groups with time devoted to employee input. They concluded that in general, schemes that offered employees broad involvement in decision-making seemed to have a stronger association with perceived employee influence than those focused on production.

Regarding ‘broad participation’, the data for the three topics indicated that employees felt more influence through team briefings than via JCCs. This might relate to the ability of employees to communicate concerns/opinions directly to management. Of the four types of I&P, team briefings would have afforded individual employees the most opportunity to interact with management on a wide range of issues.

Brown et al<sup>194</sup> looked at the relative effects of HRM practices on *changes* in satisfaction with the amount of influence employees have over work between 1998 and 2004.<sup>195</sup> No I&P method had a significant impact on employees’ ‘sense of satisfaction with their influence during that period’.<sup>196</sup> Information disclosure had positive associations whilst quality circles and briefing groups had negative associations. The associations relating to briefing groups are not consistent with Delbridge and Whitfield’s findings from WERS1998.

Bryson tested the impact of I&P on employee perceptions of managerial responsiveness. The measure for managerial responsiveness was constructed from the employee questionnaire. Many of the variables that he used relate to employee involvement. They were: how good managers are at:

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<sup>193</sup> Ibid 478.

<sup>194</sup> Brown, Forde, Spencer and Charlwood (n 69) 243.

<sup>195</sup> Work pace and how the job was done.

<sup>196</sup> Brown, Forde, Spencer and Charlwood (n 69) 247.

- (1) keeping up to date about proposed changes;
- (2) providing everybody with a chance to comment on proposed changes;
- (3) responding to suggestions from employees;
- (4) dealing with problems you or others may have;
- (5) treating employees fairly.

Table 7.12 summarises the connections he found between managerial responsiveness and different kinds of I&P. Only direct forms of I&P had positive associations with managerial responsiveness. There were negative connections (not-significant) between JCCs and EWCs, and managerial responsiveness. Where there was union recognition, the data showed different results according to the type of representative. Part-time union representatives had significant negative associations ( $p<0.01$ ), full-time representatives negative associations which were not-significant, and no on-site representatives had positive associations which were not significant. The effects of union representation are discussed in more detail in section 7.5.

**Table 7.12**  
**The Impact of Voice on Employee Perceptions of Managerial Responsiveness<sup>197</sup>**

Voice-mechanism	Association
EWC	-
JCC	-
Union recognition, part time representative	- $p<0.01$
Union recognition, full time representative	-
Union recognition, no on-site representative	+
Problem solving group	$p<0.01$
Regular meetings between management and workforce	$p<0.01$
Briefings at least once a month with time for employees questions views	+
Systematic use of man chain	+

<sup>197</sup> Bryson (n 23) 226-227.

Regular newsletter	p<0.01
Suggestion scheme	+
One direct I&P mechanism	p<0.1
Two	p<0.05
Three	p<0.05

Bryson tested management responsiveness against practices which involved direct, one-way, and two-way I&P. Newsletters had positive significant associations that were strong, as did problem solving groups and meetings between management and workforce ( $p<0.01$ ). There were no significant associations between management responsiveness and briefings, systematic use of the management chain and suggestion schemes. However, the directions of the results were all positive.

The reason for significance might lie in the nature of each I&P mechanism. Bryson stated that compared with regular meetings and problem-solving groups ‘briefing groups are less intensive interventions’.<sup>198</sup> The nature of the information could have been a reason why, of the three one-way forms of communication, newsletters achieved a significant connection with management responsiveness. Newsletters would provide management the opportunity to inform workers of proposed changes, but also provide feedback on suggestions and demonstrate that problems were being addressed.

Bryson found that using more than one direct voice mechanism had greater significant associations than a single practice. This differed from Delbridge and Whitfield’s findings. They discovered ‘little evidence that the two types of schemes interact positively with each other.’<sup>199</sup> It is unknown whether their findings on this matter would have differed had they used the same range of I&P practices as Bryson.

#### 7.4.3.1.1 Conclusion

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<sup>198</sup> Ibid 234.

<sup>199</sup> Delbridge and Whitfield (n 186) 487.

The results for different methods of communication varied according to whether a measure concerned employee tasks or a more general assessment of influence. Influence over how a job was done had positive significant associations with direct and indirect I&P. The only significant associations relating to task range and work pace were team briefings. Bryson's management responsiveness measure was less focused. There were no associations between management responsiveness and indirect forms of I&P (trade union representatives, JCCs, and EWCs). But there were direct associations with many direct methods of I&P.

#### 7.4.3.2 Influence to Effect Information Disclosure

A series of papers by Peccei et al looked at the provision of information and its relation to direct and indirect participation and found that associations differed over time. This is important beyond the provision of information because effective interaction is dependent upon the provision of adequate information. They looked at correlations between different types of I&P mechanisms and whether management disclosed information.

Two studies dealt with data from WERS1998 and WERS2004. 'Look Who's Talking'<sup>200</sup> used the management survey; 'Patterns of Information'<sup>201</sup> used the panel survey. They showed slightly different results although the variables for each were equivalent.

**Table 7.13**  
**Associations Between 'Voice' Mechanisms and Disclosure of General Information**<sup>202</sup>

	2004 Man Survey	2004 Panel	1998 Man Survey	1998 Panel
JCC	+	+	p<0.05	p<0.05
Direct participation	p<0.01	+	p<0.01	+
Union recognised for CB	+	+	p<0.01	-

<sup>200</sup> Peccei, Bewley, Gospel and Willman 'Look Who's Talking' (n 25).

<sup>201</sup> Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14).

<sup>202</sup> Ibid 3 Peccei, Bewley, Gospel and Willman 'Look Who's Talking' (n 25) 352.

Table 7.13 shows that the data indicated a decline in significant associations between the disclosure of information and the mechanisms for union representation and JCCs. In 1998 having a JCC was positively associated with disclosure of general information ( $p<0.05$ ); in 2004 there was no significant association. The second paper found significant associations with JCCs, direct participation, and trade unions ( $p<0.01$ ) in 1998. By 2004, significant associations with JCCs and trade unions had gone. It appears that between 1998 and 2004 their ability to secure disclosure of general information had declined.

Could external factors have affected disclosure? The economic or political climate did not appear to have influenced management choices. Peccei et al<sup>203</sup> submitted that there was continuity in the labour and financial markets over the two points of time and there had been no change in government. However, there was a strengthening in the implementation of the law regarding consultation on collective redundancies and transfer of undertakings and undertakings, and the period in question covered the run up to the implementation of ICE. They hypothesised that the *fall* in significant *negative* associations between numbers employed in larger organisations and information disclosure was a likely impact of the implementation of ICE.<sup>204</sup> If this were the case, then it might be expected that information disclosure would have risen in respect of JCCs, but in fact the provision of information declined, despite the potential to exert pressure to disclose in the shadow of the law.<sup>205</sup>

Peccei et al<sup>206</sup> argued that joint consultation might have become weaker in 2004 because, as a result of the strong economy, management was in a more powerful position to decide whether to share information. They suggested that information disclosure would be affected by size, financial position, and workplace goal alliance.<sup>207</sup> A strong position would have put management

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<sup>203</sup> Peccei, Bewley, Gospel and Willman 'Look Who's Talking' (n 25) 341.

<sup>204</sup> Ibid 353.

<sup>205</sup> Ibid 361.

<sup>206</sup> Ibid 360.

<sup>207</sup> Ibid 243, 343.

in the position of being able to decouple information-sharing from an existing I&P mechanism.

This idea was further explored by Peccei et al in 2010.<sup>208</sup> Panel surveys were used to see whether I&P practices within organisations strengthened, or weakened over time. There were no significant changes in associations between information disclosure and direct participation. Between 1990 and 1998 there were statistically significant associations where there was a JCC throughout both periods ( $p<0.01$ ) and where a JCC had been introduced ( $p<0.05$ ). In the second period there were weak associations where there was a JCC throughout both periods ( $p<0.1$ ), and positive associations where JCCs were introduced (not significant).<sup>209</sup> They suggested that there had been a progressive decoupling of information sharing from JCCs.<sup>210</sup> The results lent support to the argument, that over time, JCCs may have had a diminishing ability to obtain information.<sup>211</sup> Effective consultation relies upon the provision of relevant information. This decline in information sharing might have impacted on the capacity of employees to involve themselves in the workplace via JCCs.

Will ICE alter what looks like a tendency for employers to cease providing information? Studies relating to WERS 2004 predate the possibility of appealing to the Central Arbitration Committee<sup>212</sup> (on anything other than issues relating to collative bargaining<sup>213</sup>) because information had been withheld. It is difficult to know whether sanctions under ICE will have an impact on the functioning of JCC type bodies. Between 2005 and December 2012 15 of the 46 applications brought before the CAC under ICE have concerned negotiated agreements. Of these, nine were withdrawn and none

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<sup>208</sup> Peccei, Bewley, Gospel and Willman 'Antecedents, Outcomes and Human Voice' (n 151).

<sup>209</sup> Ibid 429.

<sup>210</sup> Ibid 432.

<sup>211</sup> Ibid 433.

<sup>212</sup> The Information and Consultation of Employees Regulations 2004 SI 2004/3426 Reg 26.

<sup>213</sup> Trade Union and Labour Relations (Consolidation) Act 1992 s183.

of the remainder were decided in favour of employees. CAC activity in this area has not increased: only one application was brought before it in each of the three years from 2009 and December 2012 (one was withdrawn, the two remaining complaints were found to be not well founded).<sup>214</sup> Investigation at the 'coal face' will help understand whether the threat of legal sanction under ICE has been effective in increasing the amount of relevant information brought to I&P bodies.

#### 7.4.3.3 Conclusion

There is little supportive evidence for linking JCCs with increased employee involvement. Positive connections were found between JCCs and employee perceptions of influence over how jobs are done. Results from the 1998 management and panel surveys found significant positive associations between voice mechanisms and disclosure of general information; these were no longer present in 2004.

Themes found in sections 7.4.1 and 7.4.2 regarding unions, direct I&P practices, and JCCs were evident. Unions produced negative associations in respect of employee perceptions of influence over their jobs and management responsiveness. Delbridge and Whitfield's<sup>215</sup> results support a link between feelings of involvement and direct contact with management (especially where there was provision for two way communication). Bryson's measure only showed significant positive associations between management responsiveness and direct I&P measures. Unlike Peccei et al's results for JCCs and unions, management survey data showed positive significant associations between direct participation and the provision of information in two survey periods.

Delbridge and Whitfield's results point to JCCs not being a one-size-fits-all body that will give rise to employees feeling influence over all aspects of their jobs. Bryson's data indicates that JCCs are not effective for to convey management's responsiveness. This chapter has looked for positive

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<sup>214</sup> Central Arbitration Committee 'Information & Consultation Decisions '  
<<http://wwwcacgovuk/indexaspx?articleid=2257>> accessed 19 December 2012.

<sup>215</sup> Delbridge and Whitfield (n 186).

outcomes between JCCs and nine ‘qualities’ that are associated with the Commission’s three ‘positive outcomes’. Peccei et al’s work provides further evidence that the ability of JCCs to generate positive significant associations in all areas has declined over time. However, these results relate to the period before ICE was implemented. Only further research will reveal whether ICE has affected management behaviour.

## **7.5 THE IMPACT OF ADDITIONAL FACTORS ON INVOLVEMENT AND PARTICIPATION**

The literature analysed in previous sections indicated that, contrary to the assumptions of the European Commission, it is simplistic to think that indirect participation leads to (1) the humanisation of working conditions, (2) increased competitiveness, and (3) increased employee involvement. Four additional significant factors should be taken to account when looking at sections 7.3 and 7.4. The first relates to how an organisation’s size influences I&P practice, the second and third deal with employer and worker attitudes, and the fourth with trade unions.

### **7.5.1 Size**

Establishment size has been found to influence a number of factors including the adoption of ‘formal’ direct and indirect I&P practices. Studies of WERS1998 by Cully and WERS2004 by Forth<sup>216</sup> found that those employing fewer than 250 were less likely to adopt formal HRM policies and practices. Cox et al<sup>217</sup> found differences in results relating to a number of I&P practices when workplaces with 10-24 employees were compared with those employing more than 25.<sup>218</sup> They concluded that their findings supported Forth’s suggestion that smaller workplaces were less likely to use formal HR policies than larger ones.<sup>219</sup>

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<sup>216</sup> Forth and McNabb (n 125).

<sup>217</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9).

<sup>218</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 28.

<sup>219</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2159.

Kersley et al stated that lack of formal I&P structures in smaller organisations did not equate with negative employment relations. Perceptions of the employment relations climate were *better* in single-establishment organisations and smaller establishments.<sup>220</sup> Forth *et al* also established that employees in smaller firms tended to be more content with the amount of information received.<sup>221</sup> These informal information sharing and consultation systems appeared to be more effective.

Formal I&P does not appear to provide communication channels that are equivalent in effectiveness to those in small organisations. Kaur's analysis of the British Social Attitudes Survey data showed that employees in organisations with fewer than 100 workers were consistently more likely than those in large companies to believe that people in the workplace were well informed. As workplace size increased the perception of being well informed decreased.<sup>222</sup>

Organisational size affects the way in which managers use I&P. Lack of formal structures do not mean the absence of I&P.<sup>223</sup> Day to day direct interactions can result in the transfer of information and ad hoc consultation in an informal way. Surveys indicate that employees think that they are better informed in smaller organisations. It might be argued that the aim of formal I&P should be to construct a structure that replicates the better functioning channels of communication within smaller organisations. If that is so, representational structures need to be effective at creating rapport artificially. To do this it is desirable to avoid imposing a one-size-fits-all solution.

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<sup>220</sup> Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 283.

<sup>221</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 15.

<sup>222</sup> Kaur 'Employment Attitudes: Main Findings from the British Social Attitudes Survey 2003' (2004) URN 04/1868 DTI 28.

<sup>223</sup> Feeling well informed etc. in small organisation.

### 7.5.2 Management's Attitude and Perception

Without legislative support or employee pressure, informal and formal I&P appears to be management's creature. It seems that management's attitude and perceptions affect their approach to different I&P mechanisms and impact on employees' attitudes towards management.

Cox et al stated that the 'popularity of different types of I&P practices has evolved significantly over time, reflecting the societal changes which shape their creation, longevity and, sometimes, decline...'<sup>224</sup> For example the incidence of JCCs has fallen since 1984. Since 1990 WERS/WERS has asked management 'how influential do you think this committee is on management's decisions affecting the workforce?' In 1990, 32% of managers thought JCCs were 'very influential'. The figure was virtually unchanged in 1998 (33%) but it had fallen to 23% percent by 2004.<sup>225</sup> Management's perception of their significance appeared to have altered. Marchington stated that there 'is little doubt that employers are now the main drivers of participation, and schemes are therefore likely to be designed with their objectives in mind.'<sup>226</sup>

Positive perceptions of management responsiveness has had a significantly positive effect on the effectiveness of I&P regarding its impact on employees. Brown et al found support for the idea that a 'responsive management'<sup>227</sup> can lead to higher levels job satisfaction ( $p<0.01$ ).<sup>228</sup> Guest et al<sup>229</sup> used WERS2004 to look at associations between trust and different types of partnership practice. The study went on to test how these were

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<sup>224</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 7.

<sup>225</sup> Willman, Gomez and Bryson (n 27) 9.

<sup>226</sup> Marchington, 'Employee Involvement: Patterns and Explanations' in Harley, Hyman and Thompson (Eds) *Participation and Democracy at Work Essays in Honour of Harvie Ramsay* (Macmillan Hampshire 2005) 25.

<sup>227</sup> The measure included satisfaction with employees' sense of achievement, influence, and pay.

<sup>228</sup> Brown, Forde, Spencer and Charlwood (n 69) 248. The responsive management measure included satisfaction with employees' sense of achievement, influence, and pay.

<sup>229</sup> Guest, Brown, Peccei and Huxley 'Does Partnership Increase Trust?' (n 29).

affected by management attitude. It found that management attitude had a significant effect on trust, especially in the area of direct participation.<sup>230</sup>

It would appear that employee attitudes to the organisation and to their job have significant links to their perceptions of management attitude.<sup>231</sup> Connections were found between employees' perceptions of their manager's effectiveness and commitment/satisfaction. Significant positive associations occurred when managers sought employee views, responded to employee suggestions, or when employees were involved in decision making (p<0.01).<sup>232</sup>

How formal direct and indirect forms of I&P were implemented was key. Senior management introducing I&P into the workplace does not mean that practices will be carried out effectively. A number of studies indicate that the 'degree to which line managers' (sic) encourage or discourage employees' participation in EIP will help to shape employees' perceptions of the importance attached to EIP in the workplace or organisation...<sup>233</sup> Having a policy is not enough. Managers 'may not transmit the articulated values of top management but reflect instead the "informal" culture of the firm'.<sup>234</sup>

Two studies indicate the importance of the way in which line managers carry out their roles. The first was a longitudinal survey concerning Selfridges' frontline management's leadership behaviour. It showed the influence front line managers had on the transmission of HR policies (including I&P).<sup>235</sup> They were found to have had a significant effect on

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<sup>230</sup> Ibid 134-152, 140.

<sup>231</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2162.

<sup>232</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 29.

<sup>233</sup> Ibid 13.

<sup>234</sup> Purcell and Hutchinson 'Front Line Managers as Agents in the HRM-Performance Chain: Theory, Analysis, and Evidence' (2007) 17 1 HRMJ 3 4.

<sup>235</sup> Ibid 19.

employee perceptions of HR policies.<sup>236</sup> The second concerned the implementation of a new HR policy in 50 branches of a bank. It found that implementation was patchy. Managers of historically high performing branches were more likely to implement practices than those with historically low performances. The link between performance and implementation suggested that managerial attributes and attitudes drive change.<sup>237</sup> These findings support the argument that notwithstanding regulatory influence, managers have significant control in successfully implementing involvement and participation.<sup>238</sup>

Initial findings indicate that ICE has not altered management's approach. Nor was data from WERS2011 encouraging. It found that when compared with 2004, the frequency with which JCCs met did not increase.<sup>239</sup> Although the number of JCCs has increased significantly where organisations employ between 100-249 employees, overall, management's attitude towards 'consulting' had become less active. When asked about consultation in their workplace, the percentage of management who said that their usual approach was to 'seek solutions to problems' did not change between 2004 and 2011. However, the number who said that they 'seek feedback on a preferred option put forward by management' rose from 12% to 20%. This trend received corroboration from worker representatives who sat on a JCC as part of their representative role. They were asked the same question, and the number answering 'seek feedback on a preferred option' increased from 8% in 2004 to 28% in 2011.<sup>240</sup>

Other studies have examined the way in which information and consultation bodies were used. Koukiadaki's stated of the procedures in her study that 'in no case did the arrangements achieve a "participative" role' (described as 'one beyond the remit of information and communication to include

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<sup>236</sup> Ibid 16.

<sup>237</sup> Wright, Gardner, Moynihan and Allen 'The Relationship between HR Practices and Firm Performance: Examining Causal Order' (2005) 58 Personnel Psychology 409 420.

<sup>238</sup> Cox, Marchington and Suter 'Employee I&P Using WERS2004' (n 9) 2151-2.

<sup>239</sup> van Wanrooy, Bewley, Bryson, Forth, Freeth, Stokes, and Wood (n 40) 62-63.

<sup>240</sup> Ibid.

formally regulated consultative procedures')<sup>241</sup> She labelled two of the five bodies 'symbolic'. In a longitudinal study of 25 bodies Hall et al<sup>242</sup> stated that their

research underlines that management is the dominant player and it was their choices that determined the nature and extent of I&C. In particular, management determined whether I&C was, in practice, "active" or largely limited to "communication".<sup>243</sup>

They categorised 48% of their sample as 'communicators' and 32% as 'active consulters'. This appears to point to a trend for management not to 'consult' –in terms of the definition in Chapter 4. Further examination will show whether these results are the same as, or better than, longstanding JCCs. However, evidence from WERS2011 concerning how 'consult' was interpreted indicates that management is becoming less inclined to consult 'actively' in line with the definition in Chapter 4.

I&P can be characterised as a product of management style or a particular set of leadership behaviours. Managers may actively seek and respond to the views of employees and make appropriate use of delegation when taking decisions about workplace matters. It appears that ICE does not guarantee that 'consult' is interpreted in line with the definition under the I&C Directive. Lack of a formal body does not stop management consulting employees about, for example, the introduction of new work practices during a team briefing or in a less formal setting.<sup>244</sup> Involving employees in decision-making can take place within or outside the remit of formal I&P, and there may be an overlap between the two. Post ICE, evidence points to

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<sup>241</sup> Koukiadaki, A, 'The Establishment and Operation of Information and Consultation of Employees' Arrangements in a Capability-Based Framework' (2010) 31 Economic and Industrial Democracy 378 385.

<sup>242</sup> Hall, M, Hutchinson, S, Purcell, J, Terry, M and Parker, S, 'Promoting Effective Consultation? Assessing the Impact of the ICE Regulations' (2011) 51 2 BJIR 355.

<sup>243</sup> Ibid 337.

<sup>244</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 14.

management being more likely to ask for feedback on *one* item; the problem, irrespective of ICE, is how to encourage all management to understand and take advantage of the benefits of I&P.

### 7.5.3 Worker Attitudes

There appears to be little UK data indicating what proportion of employees feel they wish to be involved in I&P and how those wanting more input would like to be involved.

The TUC's British Workplace Representation and Participation Survey from 2001 asked questions of workers not found in WERS. These included how much influence they had *and* how much influence they wanted, over five areas of work.<sup>245</sup> The greatest gaps between desired and actual influence related to pay, perks, and bonuses. This was followed by use of new equipment and software, and hours. The gap in influence relating to pace of work and work organisation/deciding how to do a job, were 'relatively moderate' (5%). It appeared that largest gaps related to areas where management made decisions based upon wider (often economic) considerations. These are areas not associated with I&P in countries that have a tradition of works councils in Europe.<sup>246</sup>

Workers were asked how satisfied they were with *their* influence in company decisions affecting their job or workplace. 15% responded very satisfied, 56% quite satisfied, 20% not very satisfied, and 8% not at all satisfied.<sup>247</sup> 81.3% of those asked felt that management 'almost always' or 'sometimes' took employee suggestions seriously. Of those employees 82.1% often or sometimes made suggestions.<sup>248</sup> The report did not differentiate between different kinds of I&P nor indicate whether or how different kinds of I&P mechanism affected these statistics.

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<sup>245</sup> WERS only asked about how much influence employees felt they had. Freeman and Diamond 'What Workers Want from Workplace Organisations: A Report to the TUC's Promoting Trade Unionism Task Group' (2001) TUC 6-7.

<sup>246</sup> See Section 4.1 and 4.3.1.1.

<sup>247</sup> Freeman and Diamond (n 245) 7.

<sup>248</sup> Ibid 13.

The study found that 89.3% of union members and 77.2% of employees favoured legislation requiring management to meet with employees or their representatives. However, 53.4% of union members and 58.9% of non-members wanted representatives/employees to only have access information that is *publically* available.<sup>249</sup> The majority of those questioned appeared not to have considered what type of meeting this should be, or envisaged relatively superficial levels of interaction. The question did not specifically involve works councils. In a further question the survey found that 80% of union members and 56% of non-members thought that the workplace would be better with a works council, or works council and trade unions.<sup>250</sup> It would have been interesting to see whether there would have been a difference in these figures depending on whether there was an existing works council.

Guest and Peccei looked at individual responses to the redundancy process during the closure of British Aerospace Weybridge. They found a group slow to use the help BAE provided for seeking future employment. This group was heavily represented amongst those who were found to be unemployed at a later date.<sup>251</sup> Guest and Peccei stated that '[e]mployee involvement in the redundancy and job seeking process is based on assumptions of individual responsibility'.<sup>252</sup> This comment can equally be applied to I&P practices. Not everybody has the wish or capability to react or interact the way expected by those who design policy.

A TUC survey raises questions as to whether ICE goes further than the majority of employees wish. Over 56% thought that the workplace would be better with a works council, but it appears that more than half of those questioned desired limiting the information available to it. Information under ICE ('the situation, structure and probable development of

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<sup>249</sup> Ibid 22.

<sup>250</sup> Ibid 23.

<sup>251</sup> Guest and Peccei 'Employee Involvement: Redundancy as a Critical Case' (1992) 2 3 HRMJ 34 43.

<sup>252</sup> Ibid 54.

employment within the undertaking and on any anticipatory measures envisaged,<sup>253</sup>) is not usually publically available. Works councils, as envisaged by the 56% would therefore probably not comply with ICE. This apparent desire of the majority not to be involved in decision making appears to link with 71% of those questioned who stated that they were very or quite satisfied with their influence over the company. How many employees would wish to be involved with, or want to elect representatives to, an ICE compliant body is an area that would benefit from further research.

#### 7.5.4 Trade Unions

Given the history of industrial relations in the UK it would be foolish to ignore the impact of unions on workplace relations and profitability. Their power comes from representing large numbers of employees, and is backed up by the ability to call on those employees to withdraw their labour. It also comes from their role as the representative ‘voice’ of employees in the resolution of workplace grievances and disputes.<sup>254</sup>

Since the 1980s ‘there has been a decline in the proportion of employees whose terms and conditions are set by collective bargaining and the proportion who are union members.’<sup>255</sup> Willman et al, using WIRS/WERS data, found that the number of establishments with union members has fallen from 73% in 1980 to 52% in 2004. The number of establishments recognising a union has fallen from 64% to 38%.<sup>256</sup>

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<sup>253</sup> The Information and Consultation of Employees Regulations 2004 SI 2004/3426 Reg 20(b).

<sup>254</sup> Bryson 'Union Effects on Managerial and Employee Perceptions of Employee Relations in Britain' (2001) Working Paper 606 CEP 4.

<sup>255</sup> Millward, Bryson and Forth *All Change At Work? British Employment Relations 1990-1998 as Portrayed by the Workplace Industrial Relations Survey Series* (Routledge London 2000).

<sup>256</sup> These figures were based upon all workplaces with 25 or more employees. Willman, Gomez and Bryson (n 27) 23. The 2004 figures, based upon 10 or more employees where there is union recognition is 27% of workplaces and 48% of employees. Kersley, Alpin, Forth, Bryson, Bewley, Dix and Oxenbridge *Findings from 2004 WERS* (n 33) 120.

Peccei et al<sup>257</sup> carried out tests relating to the associations between: (a) disclosure of information, (b) organisational commitment, and (c) labour productivity on union and non-union subsamples. Although information disclosure was higher in union establishments, compared with non-union establishments, they had weaker associations for organisational commitment and labour productivity.<sup>258</sup> They found, on balance, greater direct and indirect benefits to be reaped from information disclosure in a non-union setting. In union establishments the impact of disclosure was likely to be more neutral than negative.<sup>259</sup> They surmised that in the unionised workplaces disclosure would be less likely to result in ‘employee sense of goal integration and identification with their organisation’. This was because conflicts of interest over ‘residual claims’ (e.g. over terms and conditions of work) were more likely in unionised settings.<sup>260</sup>

Bryson tested associations between management responsiveness and different kinds of union representative. He found that different types of representative produced different outcomes.<sup>261</sup> Part-time union representatives had significant negative connections with management responsiveness. This negativity was not necessarily the result of management hostility; management support for union engagement ameliorated the negative impact of part-time on-site representation. But the main effect of part-time on-site representation remained negative.<sup>262</sup>

He hypothesised that (a) the negative associations could be the result of on-site representatives having developed a more critical awareness of management, and (b) that they might have been instrumental in politicising workplace relations. He posited that full time representatives were better able to perform a pastoral role. Quoting Cully he indicated that full time

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<sup>257</sup> Peccei, Bewley, Gospel and Willman 'Is It Good To Talk?' (n 13) Tables 6.4, 6.5 & 6.6.

<sup>258</sup> Ibid 13.

<sup>259</sup> Ibid 17.

<sup>260</sup> Ibid 6-7. They do not define ‘residual claims’ but they appear to be those related to distributive or collective bargaining.

<sup>261</sup> Bryson 'Management Responsiveness to Worker Voice' (n 23) 229-230 See Table 6.10.

<sup>262</sup> Ibid 230.

representatives were: (a) more active; (b) wielded greater influence; (c) represented a larger proportion of workers; (d) were more likely to have managerial support; and (e) could call on greater resources and facilities.

Bryson<sup>263</sup> found that union recognition had weak negative associations with perceptions of climate by management *and* employees ( $p<0.1$ ).<sup>264</sup> When two or three ‘union voice mechanisms’ were tested together,<sup>265</sup> the response became negatively significant ( $p<0.05$ ) & ( $p<0.01$ ).<sup>266</sup> Employee perceptions of climate deteriorated as union density rose.<sup>267</sup>

In a later paper Bryson looked at the effects of multiple channels of communication on the employment relations climate. He found that employees and employers found perceptions were poor where there were dual channels of communication for union and non-union representation and poorest where there was representation by multiple unions;<sup>268</sup> a finding supported by Kersley et al using data from WERS2004.<sup>269</sup> This has implications for representation by multiple interests on EWCs or under ICE. If multiple interests are represented according to their ‘constituency’, how can an environment be fostered where representatives look beyond individual/sectional interests (what Peccei et al term ‘residual issues’)?

Some kinds of direct I&P appear to ameliorate the potentially negative effect of unions on the employment relations climate. Bryson found evidence that employees respond particularly positively to employers who would rather consult with employees directly than with unions.<sup>270</sup> It would appear that the opportunity to communicate directly creates/underlines a

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<sup>263</sup> Ibid; Bryson 'Union Effects on Perceptions' (n 254).

<sup>264</sup> Bryson 'Union Effects on Perceptions' (n 254) 27.

<sup>265</sup> The presence of a recognised union plus an on-site representative and a JCC with a union appointee.

<sup>266</sup> Bryson 'Management Responsiveness to Worker Voice' (n 23) 226.

<sup>267</sup> Bryson 'Union Effects on Perceptions' (n 254) 25-6.

<sup>268</sup> Ibid 26-27.

<sup>269</sup> See above.

<sup>270</sup> Bryson 'Union Effects on Perceptions' (n 254) 27.

direct personal relationship between management and worker which is not weakened by workplace politics.<sup>271</sup>

Since 1980 union membership and recognition has steadily declined. The data indicated that unions sometimes have a negative impact and decrease positive associations between JCCs and direct I&P and the nine factors. Such negative associations might be explained by underlying negotiating games between employers and unions.<sup>272</sup> Information can provide ammunition when bargaining for limited resources. Alternatively, it might bring about shared understanding. Access to information might fuel conflict or help reconcile differences depending on management and union attitudes.

## 7.6 CONCLUSION

It has been seen that associations have not been consistent between different forms of I&P and (a) the humanisation of working conditions, (b) increased competitiveness, and (c) employee involvement within the workplace.

Addison speculated that the inconsistencies might have been because initial relationships were 'spurious', or because they had changed.<sup>273</sup> Other factors could include the economic cycle, legislation, and changing management strategies.

It has been shown that data regarding JCCs provides little evidence to support the Commission's claims concerning indirect consultative bodies. Significant positive associations were found relating to changes in productivity (when a new JCC had been introduced *and* no unions were involved) and specific aspects of 'employee involvement'. However, there were significant negative associations relating to trust, job satisfaction, and labour productivity. Associations were found to be unstable. In 2004 the only significant associations were *negative* and related to trust and labour productivity. Studies examining bodies set up post ICE appear to reveal a trend towards being structures where information is given and 'communication' rather than 'consultation' takes place. There is little to

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<sup>271</sup> Bryson 'Management Responsiveness to Worker Voice' (n 23) 229.

<sup>272</sup> Peccei, Bewley, Gospel and Willman 'Patterns of Information' (n 14) 22.

<sup>273</sup> Addison and Belfield 'Updating the Determinants of Performance: ' (n 24) 358.

suggest from initial studies or findings from WERS2011, that the ICE has or will change the dynamics of JCCs.

Bryson said that good employee relations can only be fashioned with the support of management and workers. It is not simply a gift to be bestowed by one side or the other.<sup>274</sup> The existence of a JCC does not guarantee its effectiveness. It was seen that there was a tailing off of associations between JCCs and the nine ‘factors’ that were examined in section 7.4. The key question is whether ICE will be found to have altered the status quo? Initial findings do not look promising.

The literature throws up two other problems inherent in JCC-type bodies. The first relates to the potentially negative effect of representation by multiple interests. Although it has been seen that the negative effects of unions on various aspects of the workplace environment have dissipated in a number of areas this has not been the case where there are multiple union interests. There appears to be a problem in creating representative institutions without creating partisan frictions. The second involves creating links between the JCC and employees. When defining ‘genuine consultation’ an ACAS paper stressed the importance of engaging with representatives and representatives, in turn engaging with the workforce.<sup>275</sup> ACAS’s guidance on employee communication and consultation stresses the need for members of JCCs to report back to workers.<sup>276</sup> The literature indicates a need for workers to be included in the I&P loop; when positive associations with unions/JCCs failed, direct forms of I&P that underpin the relationship between employee and management succeeded.

European policy in promoting indirect I&P goes against UK managerial practice. There has been a decline in JCCs and perceptions of their usefulness and a rise in the use of various types of direct I&P. This goes against the tide of European policy. If management continues to regard

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<sup>274</sup> Bryson 'Union Effects on Perceptions' (n 254) 3.

<sup>275</sup> Dix and Oxenbridge 'Information and Consultation at Work: From Challenges to Good Practice' (2003) Research and Evaluation Section 03/03 ACAS 34.

<sup>276</sup> ACAS 'Employee Communications and Consultation' (2009) B06 26.

JCCs as being increasingly ‘less useful’ will ICE make them engage with JCCs in a way that enables their potential to be fulfilled? Initial findings tend not to support ICE having a positive effect. Or will management regard new or revitalised JCCs under the ICE regime as an imposed time-wasting layer of additional bureaucracy?

The Commission has consistently pointed out the benefits of indirect representation for employees. But this is not substantiated by recent UK evidence about the benefits of JCCs. Different kinds of direct contact appear to lead to many of the positive outcomes predicted by the Commission in respect of indirect representation. It also appears to ameliorate the negative effects of unions on the workplace climate.

The supposition that being informed and consulted through representatives will lead to positive outcomes (the humanisation of working conditions and productive workplaces where representatives are involved in decision making) is simplistic. I&P affects a variety of interactions that contribute to the workplace environment. Cox et al mention the difficulty of disentangling the effects of employee involvement and participation from those of other HR practices.<sup>277</sup>

In summary, there was little historic and no current evidence to support the Commission’s claims about the advantages to be gained from indirect I&P via consultative bodies. The existence of a JCC does not guarantee that those who are involved will use it successfully. It would appear that inherent problems with indirect I&P are not only caused by competing interests between management and representative, but also between representative factions. It is difficult to know whether management is turning towards direct I&P because JCCs are inherently problematic and direct I&P is useful because it gives better results or because of prejudice. Further research will substantiate whether ICE has had any effect on an apparent decline in JCCs’ effectiveness. Different kinds of direct interaction, whether meetings,

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<sup>277</sup> Cox, Marchington and Suter 'Embedding the Provision of Information and Consultation in the Workplace' (n 14) 12.

briefings, or just being informed appear to strengthen different aspects of an organisation. To achieve the Commission's three positive outcomes the literature points to the need for a variety of I&P mechanisms that are suitable for different purposes. It shows that indirect participation via employee or worker representatives<sup>278</sup> does not necessarily have the desired results.

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<sup>278</sup> This could be at board level or a through specific committee, body, or works council.

# Chapter 8 Conclusion

## Policy and Practice Regarding Involvement and Participation in the Workplace. How Effective is the European Union's Approach for the English Patient?

The objectives of European Union (EU) policy concerning involvement and participation (I&P) in the workplace have three dimensions. The first concerns supporting worker 'information and consultation' and the 'representation and collective defence of the interests of workers and employers, including co-determination'.<sup>1</sup> The second relates to the choice of indirect participation as the preferred method of I&P through which certain objectives are to be achieved. The third is that the first two will lead to the following 'positive outcomes':

1. the humanisation of working conditions;
2. helping organisations adapt to market conditions and increasing competitiveness; and
3. promoting employee involvement within the workplace.

Exploration of policy and practice relating I&P in the workplace has revealed evidence that points towards fundamental problems with the way in which the EU has formulated and implemented its policy. Additional factors associated with the UK's industrial relations system, such as collective bargaining taking place within organisations, seem to further hamper the effectiveness of EU policy. It appears that the EU's medicine is not the best prescription to promote 'positive outcomes' for the English Patient.

Key areas of weakness in the EU's approach, both as regards I&P in the workplace generally and its specific effectiveness in the UK, concern the presumption that indirect I&P is best suited to achieving its objectives.

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<sup>1</sup> Art 153(1) Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2010/C 83/1 30.03.2010.

Concessions and compromises that were necessary in order for the legislative proposals to gain the support of Member States have resulted in legislation that has inherent weaknesses.

Chapter 2 discussed how the approach to social policy in EU Treaties developed from ‘neo-liberal’ to one where social policy objectives are an integral part of the Treaty on Functioning of the European Union.<sup>2</sup> Successive negotiations concerning various proposals involving I&P, such as the Community Charter on the Fundamental Social Rights of Workers and the Social Policy Agreement, indicated that an understanding was established that meant that, in order to achieve change, it was essential to take into account the interests, practices, and needs of Member States. The UK’s attitude to these changes has varied. Chapters 2 to 5 considered the void between I&P policy and practices that the Commission championed, and the UK’s traditional policies and practices.

Analysis in Chapter 3 showed how Member States, and other interests, such as the European Trade Union Confederation, fashioned legislative measures into forms very different to the Commission’s original ideas. By examining the drafts and/or Directives of early legislative proposals involving I&P<sup>3</sup> five factors were identified that were critical to success. The subject had to be one:

1. over which Member States were content to enter into serious negotiations;
2. where existing practices could be used or adapted;
3. that was not unduly complex;
4. where there was institutional and/or state sponsorship/support;
5. where there was consensus.

Over time the Commission developed ways of working within the limits which Member States were willing to change. The model it developed for

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<sup>2</sup> TFEU Art 153(1)(e) and (f).

<sup>3</sup> European Company Statute, Fifth Directive, Collective Redundancies, Acquired Rights, Vredeling, Health and Safety, and European Works Councils.

the EWC Directive 1994 formed a basis for progressing measures such as the Statute for a European Company and introducing later measures such as the Information and Consultation Directive (**IC Directive**).<sup>4</sup>

Chapters 4 and 5 placed EU policy and seven legislative measures that require I&P in the context of a thorough typology of the theory and practice of I&P. Beyond laying down minimum standards, the legislature has tended not to prescribe how Directives requiring I&P should be implemented. Concessions made during negotiations have produced differing rights under the same measure and unclear terminology that could lead to inconsistent and ineffective implementation. In order to distinguish what such terms mean and how they relate to each other a new Involvement and Participation Framework (**IPF**) was created and used to expose problems with some of the EU's definitions.

Chapter 6 examined: (a) differences in the way management and employees' representatives perceive management's approach to I&P; (b) the effects of union presence on management behaviour; and (c) differences between managements' behaviour in the public and private sectors. It revealed that management tended to use more interactive kinds of I&P when interacting with union representatives. When working with unions, the evidence indicated that management in both sectors had similar priorities regarding when to consult/negotiate or inform/not inform. Where there were no unions, management in the private sector appeared more likely to interact on issues of immediate legislative or commercial importance (health and safety, hours, pay).

Chapter 7 evaluated the success of different models of I&P in the UK. Overall, it found that the incidence of formal representative bodies such as works councils and indirect representation via unions has decreased over time, whilst the use of direct I&P has increased. One reason for this trend may be the relative effectiveness of different kinds of I&P. The chapter then

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<sup>4</sup> Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

looked for correlations between different types of direct and indirect participation and nine ‘qualities’ (helpfulness, trust, organisational commitment, job satisfaction, contentment, employee relations, financial performance, labour productivity, employee involvement in and influence over the workplace) that relate to the Commission’s three areas of positive outcomes for indirect I&P. It found no ‘current’ significant positive associations for JCCs and that significant positive connections were more likely to result from direct rather than indirect representation.

Section 8.1 reviews EU policy relating to I&P in the workplace before outlining key findings concerning EU legislative measures. Section 8.2 considers evidence of their influence on the UK. It draws upon findings in Chapters 5, 6, and 7 to consider the potential consequence of the EWC, ECo, and IC Directives in altering behaviour in the workplace and the possible effect of unclear definitions, particularly in relation to key terms in EU legislation.

Three factors stand out as impacting upon I&P in the workplace; effective legislation, the ability to connect with employees, and the involvement of trade unions. The potential of ineffective legislation to hamper policy objectives has been a recurrent theme throughout this thesis. Survey evidence in Chapter 7 repeatedly pointed to additional factors (such as direct participatory practices and flexitime) that affected employees which did not concern indirect participatory practices. Data in Chapters 6 and 8 indicate that trade unions play a role in affecting the extent to which the Commission’s positive outcomes have been achieved. Section 8.2 considers the impact that these three factors appear to have on the ability of EU policy to achieve its desired results in the UK.

## **8.1 POLICY AND PRACTICE REGARDING INVOLVEMENT AND PARTICIPATION IN THE WORKPLACE**

EU policy on I&P in the workplace is a product of time and compromise. It evolved from the inclusion of indirect representation and co-determination in legislative proposals into a Treaty objective. The type of legally prescribed indirect participation preferred by the Commission is not part of

the UK's industrial relations culture. The UK has, sometimes reluctantly, followed where the EU led.

Chapter 2 revealed tensions between EU legislative initiatives requiring I&P practices and the needs and practices of Member States. Problems were caused by (a) technically complex proposals, (b) economic and institutional nationalism, and (c) economic policies that began to favour 'deregulation' and 'flexibility'.<sup>5</sup> Successful legislative measures and treaty changes concerning I&P have avoided the harmonisation of law in favour of an approach which allowed for member states' existing practices.

To become law, EU measures involving workplace I&P usually underwent significant alterations to their original objectives. Key goals were abandoned as drafts were revised to a point where a critical consensus of member states was reached. In Chapters 3 and 5 it was seen that the use of frameworks, which allowed room for individual member state's practices, do not provide irreducible minimum levels of protection.

The Commission has always favoured co-determination and/or indirect I&P as the basis for proposals requiring I&P in the workplace. In Chapter 5.2.4 it was seen that where direct participation has been included in provisions, rights given to individuals (such as a right to receive information but not to be consulted<sup>6</sup>) are less comprehensive than those given to representatives.

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<sup>5</sup> Streeck 'Neo-Voluntarism: A New European Social Policy Regime?' (1995) 11 ELJ 31 41.

<sup>6</sup> Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses [2001] OJ L82/16 Art 7(6).

**Table 8.1**  
**The Range of I&P in Seven EU Legislative Measures**

	Information	Consultation		Negotiation	Direct	Co-Determination		
		Contemplative	Focused			Arbitration	Co decision	Participation
CR <sup>7</sup>	✓		✓					
AR <sup>8</sup>	✓		✓		✓	✓*	✓	
H&S <sup>9</sup>	✓	✓			✓			
EWC <sup>10</sup>	✓	✓	✓	✓				
ECo <sup>11</sup>	✓	✓	✓	✓			✓*	✓*
I&C <sup>12</sup>	✓	✓	✓	✓			✓*	

\*Subject to a Member State's provisions including the option

Table 8.1 shows the range of I&P options used in each Directive. With one exception<sup>13</sup> co-determination is at each Member State's discretion. This is a pale shadow of the model of co-determination based upon German Company Law that featured so prominently in the early legislative proposals examined in Chapter 3. Compromise has led to differing requirements and unequal rights for workers across the EU. The flexibility afforded to member states has meant that the implementation of legislative measures has not caused much disruption to the UK's industrial relations system.

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<sup>7</sup> Council Directive (EC) 98/59 on the approximation of the laws of the Members States relating to collective redundancies [1998] OJ L225/16.

<sup>8</sup> AR Directive 2001/23.

<sup>9</sup> Council Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1.

<sup>10</sup> Council Directive 2009/38/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 [2009] OJ L122/28.

<sup>11</sup> Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294; Council Regulation (EC) No 2157/2001 on the Statute for a European company (SE) 2001 L294/1.

<sup>12</sup> Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29.

<sup>13</sup> AR Directive 2001/23 Art 5(2)(b).

## 8.2 AN EFFECTIVE APPROACH FOR THE ENGLISH PATIENT?

In Chapters 3 and 5 it was seen that EU legislation can be divided into two categories depending whether it is automatically triggered by external events or by the will of management or employees. The Collective Redundancies and Acquired Rights Directives<sup>14</sup> (**CR and AR Directives**) fall into the first category. EU law requires ‘consultation’ with representatives irrespective of whether there are recognised unions.<sup>15</sup> This has established comprehensive I&P rights where collective redundancies occur or where there is a transfer of undertaking. The Workplace Employment Relations Survey (**WERS**) findings, examined in Chapter 6, point towards the extent of ‘consultation’ under the CR Directive. They indicated that there was some sort of contact between management and representatives regarding the redundancy process in 90% of those surveyed. Evidence suggested that this intervention changes employers’ decisions. It therefore appears that the EU’s approach has resulted in employee representatives sometimes having the ability to influence management decisions in a way that can be beneficial to employees.

Health and safety is another area where evidence of the results of EU law is available. At first sight it indicates the positive effects of EU policy. However, information and consultation on health and safety matters is only one aspect of health and safety regulation. Unlike other areas of regulation involving I&P, workplaces are monitored by health and safety inspectors. It is difficult to ascertain how much of the downward trend in work related deaths and accidents<sup>16</sup> is due to indirect representation by health and safety

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<sup>14</sup> CR Directive 98/59; AR Directive 2001/23.

<sup>15</sup> Case C-382/92 and C-383/92 *Commission v United Kingdom of Great Britain and Northern Ireland* [1994] ECR 2435.

<sup>16</sup> — ‘Trends in Work-Related Injuries and Ill Health Since the Introduction of the Health and Safety at Work Act (HSWA) 1974’ (2012) V2 03/13  
<<http://www.hse.gov.uk/statistics/history/historical-picture.pdf>> accessed 27 August 2013  
HSE.

representatives and how much is related to the system created in 1974<sup>17</sup> and the work of health and safety inspectors.

Unlike the CR, AR, and H&S Directives I&P in the European Works Council, European Companies, and Information and Consultation Directives (**EWC, ECo, and IC Directives**) are triggered but by the will of management or employees. These Directives are based on the model first used in the EWC Directive. The model allows for considerable flexibility in implementation via agreements that can give rise to different rules both between and within member states. EU policy is intended to *promote* ‘quality, coherent corporate social responsibility practices through developing broad principles, approaches and tools, and... best practice.’<sup>18</sup> This begs the question of whether encouraging best practice via such inherently flexible indirect I&P is effective?

### **8.2.1 Effective legislation**

It is submitted that, to be effective in achieving the Commission’s objectives, indirect I&P (as advocated by the EU) should be: (1) well defined; (2) have realistic objectives; and (3) ensure some sort of link with employees. Only the second appears present in some of the measures that have been discussed.

#### **8.2.1.1 Terminology**

In its review of the EWC Directive 1994 the Commission found instances where EWCs had gone beyond their remit and responsibilities and others in which EWCs had failed to inform and consult when it was clear that they should have done.<sup>19</sup> The Commission was of the opinion that meaningful consultation was not taking place because of the ‘very narrow application of

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<sup>17</sup> Health and Safety at Work Act 1974.

<sup>18</sup> European Commission *Promoting a European framework for Corporate Social Responsibility (Green Paper)* (COM(2001) 366, 2001) 18.

<sup>19</sup> DG BUDG DG Employment 'A Preparatory Study for an Impact Assessment of the European Works Councils Directive' (2007) VT/2007/098 70.

the definition of “consultation” as used in the current wording of the Directive’.<sup>20</sup>

The EU’s approach to defining terms relating to I&P is problematic. Directives fail to define key terms, define the terms in different ways in different Directives, and sometimes use different definitions for different circumstances within the same Directive.<sup>21</sup> A general survey of primary and secondary sources in the UK revealed a lack of clarity as to what different terms mean and how they interrelate with each other.<sup>22</sup> To fill a gap in the literature, these terms were analysed and defined, and an Involvement and Participation Framework (**IPF**) was created.<sup>23</sup> This was used to evaluate EU definitions of key terms and revealed that terms, definitions, and phrases in EU measures that are associated with I&P lack cohesive meanings.<sup>24</sup>

Having explained the terminology used in the EU legislation in terms of its place within the IPF, Chapter 6 examined differences in the way I&P is perceived by those interacting with each other. It showed that management and representatives took a different view of whether management ‘negotiate’, ‘consult’, or ‘inform’. This kind of difference might be resolved by creating a shared understanding of what terms mean, perhaps underpinned by clearer definitions in legislative measures. In Chapter 4 it was argued that meaningful consultation consisted of four elements: (1) that it takes place before a decision; (2) with adequate preparation; (3) involving an exchange of views; (4) where the other side’s position is considered or contemplated. ‘Consultation’ is meaningless if a decision has been made and there is no intention of changing the ‘proposal’. Table 8.2 indicates how the definitions of ‘consultation’ in five Directives differ from that advocated in Chapter 4.

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<sup>20</sup> Ibid 69-70.

<sup>21</sup> Section 5.3.

<sup>22</sup> Section 4.3.

<sup>23</sup> Section 4.3.2

<sup>24</sup> Section 5.3.1-5.3.8.

**Table 8.2**  
**Comparing Definitions of Five Legislative Measures with the Definition**  
**of ‘Consultation’ in the IPF**

Directive	H&S Art 11(1)	H&S Art 11(2)	EWC 1984 Art 1(f)	EWC 2009 Art 2(1)(g)	ECoArt 2(j)	I&C Art 5Min std	I&C Art4
Before a decision is made	✗	✓ <sup>a</sup>	✗	✓	✗	?	?
Adequate preparation	✗	✗	✗	✓	✗ <sup>b</sup>	✗ <sup>b</sup>	✓
Exchange of views	?	?	✓	✓	✓	✓	✓
Other side’s view is considered	?	?	✓	✓	✓	✓	✓

(a) The text states that consultation should be in a ‘balanced way’

(b) This can be inferred from the definition of ‘information’.

Interestingly, only agreements falling under the new definition of ‘consult’ in Article 2(1)(g) of the EWC Directive 2009 clearly include all four elements. The Commission argued that the lack of a clear definition in the EWC Directive 1994<sup>25</sup> hampered the implementation of EU law.<sup>26</sup> If this was so, and the 1994 EWC Directive was ‘hampered’ by unclear definitions, then the same is likely to be true for other Directives with unclear definitions.

Evidence indicates that regulation alone will not stop a party ignoring legal requirements, no matter how clearly laid out in definitions, or manipulating the I&P process for its own ends. A way of minimising this problem would be to clearly and consistently define terms used in the I&P process within all legislative measures (not just ACAS pamphlets). Lack of clear definitions led to the phrase ‘consultations... with a view to reaching an agreement’<sup>27</sup>

<sup>25</sup> Council Directive (EC) 94/45 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 [1994] OJ L254/64.

<sup>26</sup> DG BUDG DG Employment 69-70.

<sup>27</sup> CR Directive 98/59 Art 2(1).

conflated with ‘negotiation’ in *Junk*<sup>28</sup> and *Re Akavan*<sup>29</sup>. Chapter 5.3.5 analysed the phrase using a variety of widely used interpretative tools and found no grounds for this interpretation. Clear definitions would help to prevent legal uncertainty, would enable all to judge whether legislation is being correctly implemented, and to hold transgressors to account. Findings point to the EU’s approach towards definitions, to some extent, hampering implementation of its policy. This impacts on its effectiveness for the English Patient.

#### 8.2.1.1 Realistic objectives

However, data in Chapter 6.3.5 indicated that interaction within organisations was affected by more than legislation. Bargaining power and the strength of employee representatives appear to play a role. In addition to this, the findings of a number of studies examined in Chapter 7.5.1 indicated that the identity of those *implementing*, rather than those creating, a policy shaped employee perceptions of its importance in the workplace or organisation.<sup>30</sup> The Commission’s report relating to EWCs in Chapter 5.1.4 showed that I&P institutions can be used by managers to promote strategic company aims over those laid down in statute.

Despite ‘consult’ being defined, the Commission found that management sometimes ignored its obligations.<sup>31</sup> WERS data indicated that when making collective redundancies, 76% of management either did not ‘consult’ employee representatives, or defined consult in terms of seeking feedback. In addition to this, findings in Chapter 6 indicated that management and employee representatives have different opinions about whether management is negotiating, consulting, informing, or not communicating.

Data in Chapter 6 indicated that topics that were the subject of legislation were associated with higher levels of consultation or negotiation. However

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<sup>28</sup> Case C-188/03 *Irmtraud Junk v Wolfgang Kühnel* [2005] ECR I 885.

<sup>29</sup> Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v Fujitsu Siemens Computers Oy*. [2010] ECR I 8163.

<sup>30</sup> Section 7.5.2

<sup>31</sup> Section 5.3.4.2.

findings in Chapter 7 indicated that active representation on a Joint Consultation Committee (JCC) does not mean that the JCC is effective. If the effectiveness of EU law is to be ascertained, it is necessary to establish the extent to which management complies with I&P procedures required under EU law and whether representatives enforce their rights. This is an area that warrants further investigation.

Renault's non-compliance with the CR Directive is often mentioned as a factor which led to the introduction of the IC Directive.<sup>32</sup> This raises the question about what makes effective regulation and if additional regulation will encourage increased compliance with a legislative regime. In Section 7.4 findings indicated that increased regulation, in some cases, might be counter-productive to the Commission's 'positive outcomes'. This corresponds with evidence from Germany indicating that formality does not necessarily create effective participatory organisations.<sup>33</sup> Where management lacks enthusiasm for I&P, or either side has a negative approach, strong legislative backing may not be enough to bring about effective application of the I&C and EWC Directives in the UK.<sup>34</sup>

### **8.2.2 Connections with employees**

EU policy in this area assumes indirect representation will facilitate the Commission's 'positive outcomes'. Chapter 7 looked for correlations between different sorts of direct and indirect participation and nine 'qualities' that are associated with the Commission's three 'positive outcomes'. The results lend little evidence to support the Commission's

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<sup>32</sup> Barnard *EC Employment Law* (2nd edn Oxford University Press Oxford 2000) 542; Bercusson 'The European Social Model Comes to Britain' (2002) 31 3 Ind LJ 209 216.

<sup>33</sup> Addison, Schnabel and Wagner 'Works Councils in Germany: their Effects on Establishment Performance' (2001) 53 OEP 659; Addison, Schnabel and Wagner 'On the Determinants of Mandatory Works Councils in Germany' (1997) 36 4 Industrial Relations 419; Zumbansen, 'Varieties of Capitalism and the Learning Firm: Corporate Governance and Labour in the Context of Contemporary Developments in European and German Company Law' in Boeger, Murray and Villiers (Eds) *Perspectives on Corporate Social Responsibility* (Edward Elgar Publishing Ltd Cheltenham 2008).

<sup>34</sup> However, the consistent watering down of the original proposals indicates that there is no desire to implement more rigorous legislation by the majority of Member States.

claims about the benefits of *indirect* consultative bodies. Significant positive associations were found in relation to some issues (e.g. changes in productivity when new JCCs were introduced *and* no unions were involved, and specific aspects of ‘employee involvement’), but these eroded over time. In 2004 the only significant associations were negative.<sup>35</sup> WERS evidence provides little support from the UK for the EU’s assumption that indirect representation will lead to the achievement of the Commission’s ‘positive outcomes’. It should be noted that the results relate to a period when the Information and Consultation Regulations (**ICE**)<sup>36</sup> were not yet in force. It is possible that ICE will change these results. Initial findings in Chapter 7.3 are not encouraging.

However, direct contact between employees and management was associated with significant levels of trust, organisational commitment, positive employee relations, financial performance, labour productivity, and employee involvement. Bryson found evidence that direct contact with employees can improve workplace relations where there were union representatives.<sup>37</sup> Evidence in Chapter 7.4.3 indicated that *being involved* brings about perceptions of influence and that the effectiveness of different kinds of fora varied according to subject matter.<sup>38</sup> This does not point towards a ‘one-size-fits-all’ solution.

A reason why JCCs failed to produce significant connections might be because employee representatives failed to communicate any benefits to those who were being represented.<sup>39</sup> Employees might not have felt involved when they were at one stage removed from I&P bodies. Establishing strong connections between employee and organisation appears to be more difficult when indirect participatory mechanisms are used than when creating connections using direct participation. Of the seven legislative measures analysed in Chapter 5, none require any level of

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<sup>35</sup> Trust, job satisfaction, and labour productivity.

<sup>36</sup> The Information and Consultation of Employees Regulations 2004 SI 2004/3426.

<sup>37</sup> Chapter 7 Section 7.5.

<sup>38</sup> Chapter 7 Section 7.4.3.

<sup>39</sup> Chapter 7 Section 7.4.1.5.

communication between employee representatives and those they represent. EU Directives on I&P lack instructions about the importance of establishing a strong link between a consultative body and those who are to be represented. This might have been thought to be self-evident, but data from Chapter 6 indicates that effective communication between representative and represented does not always take place.

There is no comprehensive information in the UK about whether employees prefer to be consulted directly or indirectly, or what they wish to be informed or consulted about. This is an area for further research if EU policy is to rest upon more than a presumption. If the Commission's 'positive outcomes' are to be achieved, results (albeit prior to ICE) within the UK indicate that those planning I&P policy need to ensure some sort of positive connection with employees (via representatives or management), not just their representatives.

### **8.2.3 Trade Unions**

The data in Chapter 6 indicated that, compared with non-union representatives, union representatives were more able to influence management behaviour. When the responses given by management in respect of union and non-union representatives on 12 employment related issues (**ERI**) were compared, the means indicated that significantly more managers reported 'negotiate' and 'consult' in respect of trade union representatives. There were differences between the union and non-union samples when the 12 ERI were sorted in order of most to least active I&P. This pointed towards union representatives having the ability to influence the level of interaction for each ERI thereby influencing management's agenda in terms of the kind of issues that were discussed (or not discussed) and the level of interaction that took place.

Reasons for differences between the results for union and non-union representatives were considered. It was suggested that adequate training for employee representatives coupled with a clear understanding of how I&P mechanisms are intended to work could lead to more effective interaction between management, employee representatives, and employees. Neither

EU nor UK law requires the provision of training for those involved in I&P bodies.

WIRS/WERS data indicated that union influence in promoting bargaining and consultation is not necessarily constructive in achieving the Commission's 'positive outcomes'. In Section 7.5.3 it was found that the employment relations climate was poor where JCCs had union appointees, and/or had dual channels of communication, and was poorest where there was multiple union representation. There appears to be a problem in avoiding sectarian differences so that JCCs can focus on general, common interests.

Bryson and Peccei<sup>40</sup> both attribute some of this problem to 'residual claims' regarding non-related topics that are the subject of collective bargaining. In Chapters 2-5 it was seen that the EU's model of I&P bodies was based upon industrial relations cultures (such as in Germany and the Netherlands) where terms and conditions are settled at sectoral level and I&P bodies had a specific remit. This might be a factor that means the UK's JCCs are less likely to achieve the Commission's policy aspirations than some of their European counterparts. Other than the ability to bargain in the shadow of the law, it is difficult to pin-point a factor which might bring about an alteration in attitudes in JCCs and lead to greater effectiveness in bodies created under the Transnational Information and Consultation<sup>41</sup> (TICE) and Information and Consultation Regulations<sup>42</sup> (ICE).

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<sup>40</sup> Peccei, Bewley, Gospel and Willman 'Is It Good to Talk? Information Disclosure and Organizational Performance in the UK' (2005) 43 1 BJIR 11 6-7. They do not define 'residual claims' but they appear to be those related to distributive or collective bargaining.

<sup>41</sup> Transnational Information and Consultation of Employees Regulations 1999 SI 1999/3323.

<sup>42</sup> ICE 2004/3426.

### **8.3 CONCLUSION**

It has been shown that Commission's claims that indirect I&P will lead to:

1. the humanisation of working conditions,
2. helping organisations adapt to market conditions and increasing competitiveness, and
3. promoting employee involvement within the workplace

are not supported by available evidence in the UK. Evidence, including that relating to unions, concerning the comparative effectiveness of direct and indirect I&P begs a question. If JCCs continue to have long term negative outcomes, why continue with a legislative policy that encourages indirect participatory bodies and ignores the benefits of direct contact/I&P?

The majority of the evidence in this thesis was collected before ICE. There is positive evidence that the CR and H&S Directives have been instrumental in altering management behaviour. Future WERS data will indicate whether ICE has changed to the effectiveness of JCC-type bodies but initial findings do not look promising. Unless ICE leads to clear enforceable rights with which management will comply, a reduction in the negative influence of unions, and produces positive factors inherent in some direct I&P practices the EU's policy does not appear to be one will be effective for the English patient.

## Appendix 1

### An Overview of I&P Terms and Phrases in Seven Legislative Measures

Directive	Terms used	Definition	Context
CR Directive	Information	None	None
	Consultation	None	Consultations... a view to reaching an agreement <sup>1</sup>
AR Directive	Information	None	None
	Consultation	None	Consult... with a view to reaching an agreement <sup>2</sup>
H&S Directive	General	information, dialogue and balanced <sup>3</sup> participation on safety and health at work must be developed between employers and workers and/or their representatives by means of appropriate procedures and	

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<sup>1</sup> Art 2(1).

<sup>2</sup> Art 7(2).

<sup>3</sup> The term balance, in terms of ‘balanced representation’ also occurs in EWC Directive Art 7(2)(b).

		instruments <sup>4</sup>
	None	
Information		<p>as soon as possible, inform all workers who are, or may be, exposed to serious and imminent danger of the risk involved and of the steps taken or to be taken as regards protection.<sup>5</sup></p> <p>The employer shall take appropriate measures so that workers and/or their representatives in the undertaking and/or establishment receive, in accordance with national laws and/or practices which may take account, <i>inter alia</i>, of the size of the undertaking and/or establishment, all the necessary information...<sup>6</sup></p>

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<sup>4</sup> H&S Directive 89/391 Recital.

<sup>5</sup> *Ibid* Art 8(3).

<sup>6</sup> *Ibid* Art 10(1).

Consultation	This presupposes: the consultation of workers, the right of workers and/or their representatives to make proposals, balanced participation in accordance with national laws and/or practices. <sup>7</sup>	consult workers and/or their representatives and allow them to take part in discussions on all questions relating to safety and health at work. <sup>8</sup>
EWC Directive	Information	The central management and the European Works Council shall work in a spirit of cooperation with due regard to their reciprocal rights and obligations <sup>10</sup>
Consultation	“information” means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings; <sup>9</sup> “consultation” means the establishment of dialogue and exchange of	As above

<sup>7</sup> Ibid Art 11(1).

<sup>8</sup> Ibid Art 11(1).

<sup>9</sup> Art 2(1)(f).

<sup>10</sup> EWC Directive 2009/38 Art 9.

		<p>views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings;<sup>11</sup></p>
	Negotiation	None
ECo Directive	Involvement	<p>“involvement” of employees’ means any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on</p>

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<sup>11</sup> Art2 (1)(g).

<sup>12</sup> Art 6(1).

decisions to be taken within an undertaking,<sup>13</sup>

Participation

“participation” means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a legal entity by way of:

- the right to elect or appoint some of the members of the legal entity's supervisory or administrative organ, or
- the right to recommend and/or oppose the appointment of some or all of the members of the legal entity's supervisory or administrative organ.

Information

“information” means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or

work together in a spirit of cooperation with due regard for their reciprocal rights and obligations<sup>15</sup>

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<sup>13</sup> Art 2(1)(h).

<sup>15</sup> ECo Directive 2001/86 Art 9.

		which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE <sup>14</sup>	
Consultation		“consultation” means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE <sup>16</sup>	As Above
Negotiate		None	shall negotiate in a spirit of cooperation with a view to reaching an agreement <sup>17</sup>
IC Directive	Information	“information” means transmission by the employer to the employees'	When defining or implementing practical

<sup>14</sup> ECo Directive 2001/86 Art 2(1)(i).

<sup>16</sup> ECo Directive 2001/86 Art 2(1)(j).

<sup>17</sup> Art 4(1).

	representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it; <sup>18</sup>	arrangements for information and consultation, 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. <sup>19</sup>
Consultation	<p>“consultation” means the exchange of views and establishment of dialogue between the employees' representatives and the employer.<sup>20</sup></p> <p>Consultation shall take place:</p> <ul style="list-style-type: none"> <li>(a) while ensuring that the timing, method and content thereof are appropriate;</li> <li>(b) at the relevant level of management and representation, depending on the subject under discussion;</li> </ul>	As above

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<sup>18</sup> IC Directive 2002/14 Art 2(f).

<sup>19</sup> Ibid Art2(f).

<sup>20</sup> Ibid Art 2(g).

- (c) on the basis of information supplied by the employer in accordance with Article 2(f) and of the opinion which the employees' representatives are entitled to formulate;
- (d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate;
- (e) with a view to reaching an agreement on decisions within the scope of the employer's powers referred to in paragraph 2(c).<sup>21</sup>

Negotiate

None

As above

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<sup>21</sup> Ibid Art 4.

## Appendix 2

### Weighting

Before investigating the data, each group of variables was analysed to see how representative they were of the original data. A base level was established by looking at the distribution of the derived variable for establishment size<sup>1</sup> in the employee representatives' dataset. Percentages in each category were compared with weighted results. These norms were then compared with the distribution of establishments answering the 15 questions outlined above. Table 1 summarises the results.

Table 1  
Comparison of Changes of Distribution in Establishment Size With and  
Without Weighting

	Est size	Consult defined		Redundancy	12 ERI	
		All	TU		TU	NU
Unweighted average %						
Est size: No. Employees	5 to 9	2	0	1.4	0	2
	10 to 24	5.7	1.4	0.7	2	6
	25 to 49	9.1	3.8	4.1	2	9
	50 to 99	11	4.9	11	7	10
	100 to 199	15.7	12.2	17.9	11	15
	200 to 499	22.8	23.4	27.6	23	22
	500 or >	33.7	54.2	37.2	55	36
	Total	100	99.9	99.9	100	100
	Sample size	984	286	145	161	714
Weighted average %						
Est size: No. Employees	5 to 9	23.1	0	22.2	0	20
	10 to 24	24.3	11.1	11.1	42	26
	25 to 49	20.3	22.2	11.1	29	22
	50 to 99	12.4	22.2	22.2	17	13
	100 to 199	9.8	22.2	11.1	0	10
	200 to 499	7.4	22.2	22.2	13	7
	500 or >	2.6	0	0	0	2
	Total	100	99.9	99.9	101	100

None of the six samples were representative of the dataset or the population as a whole. The data collected from non-union employee representatives

<sup>1</sup> The variable wrqwttr was used.

was based upon an incomplete sample (some responses were not included because the questions to the employee representatives had been incorrectly worded). With the exception of the data collected from the union reps (for the 12 ERI), the sub-samples were based on less than a third of those interviewed. The four samples tended to be drawn from larger establishments and standard weights seemed to result in a more, rather than a less disturbed sample.

For example, the averaged sample size for the two variables relating to redundancy was 161. This was about 16% of the total sample but 3.5% of the weighted sample. Although 55% of those answering the question were from workplaces employing more than 500 employees the 89 respondents were not reflected in the weighting. However, the 1.5 respondents in organisations employing between 10-24 employees registered as 42% of the weighted total (although they had been 2% of the un-weighted total).

It was decided not to weight the data but to interpret results with the proviso that the sample consists of a disproportionate number of larger establishments. This was not only because of the distortion. For some tests, the weighted sample size was too small to obtain results or to run robust statistical tests. Weighting the 12 ERI would have made it impossible to compare results for union-representatives with non-union representatives. The reader should take into account that the data is not a representative cross-section of 'industry' in the UK.

# Appendix 3

Table 1

Combined: Percentage of Matched Establishments Negotiating, Consulting, Informing, or Not Informing																											
Management with union reps																											
		Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Average	
ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU	ManTU	TU		
Negotiates	71.0	53.2	59.1	41.3	58.3	41.1	30.6	23.4	6.3	10.1	7.0	12.7	35.8	42.5	36.5	41.4	8.3	15.6	13.7	23.8	14.6	28.4	13.4	20.0	30	29	
	10.5	14.1	23.3	28.7	16.2	16.2	21.3	16.1	31.1	23.7	40.3	38.9	47.9	33.3	47.5	33.6	47.1	35.0	57.4	36.5	68.3	45.8	44.8	28.7	38	29	
Consults	81.5	67.3	82.4	70.0	74.5	57.3	51.9	39.5	37.5	33.7	47.3	51.6	83.7	75.8	84.0	75.0	55.4	50.6	71.1	60.3	82.9	74.2	58.3	48.7	68	59	
	12.1	16.1	10.7	18.6	17.9	30.1	37.8	41.5	33.9	32.8	33.0	23.8	12.6	18.2	12.6	20.1	30.7	28.8	21.0	23.3	14.1	19.2	23.1	27.6	22	25	
Informs	6.3	16.6	6.9	11.4	7.6	12.6	10.3	19.0	28.7	33.5	19.7	24.6	3.7	5.9	3.3	4.9	13.9	20.7	7.9	16.4	3.0	6.6	18.6	23.7	11	16	
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100	100		
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100	100		
	725	721	722	696	726	727	724	720	720	713	725	714	719	719	719	719	719	719	719	719	719	719	719	719	719		
Management with Non union reps																											
		Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Average	
ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU	ManNU	NU		
Negotiates	12.2	11.0	5.8	14.5	1.4	8.6	1.5	5.9	1.4	7.1	2.9	2.9	2.9	5.8	1.4	5.7	2.9	5.7	1.4	7.2	2.9	11.4	2.9	5.8	3	8	
	21.2	17.6	36.2	33.3	21.4	21.4	11.8	14.7	20.0	18.6	40.0	24.6	24.6	33.3	20.0	28.6	35.7	24.3	27.5	26.1	32.9	25.7	34.8	27.5	27	25	
Consults	33.5	28.6	42.0	47.8	22.9	30.0	13.2	20.6	21.4	25.7	42.9	27.5	27.5	39.1	21.4	34.3	38.6	30.0	29.0	33.3	35.7	37.1	37.7	33.3	30	32	
	41.2	37.6	39.1	31.9	57.1	48.6	72.1	58.8	50.0	34.3	37.1	58.0	58.0	42.0	61.4	42.9	48.6	44.3	56.5	47.8	57.1	52.9	42.0	43.5	52	45	
Informs	25.3	33.9	18.8	20.3	20.0	21.4	14.7	20.6	28.6	40.0	20.0	14.5	14.5	18.8	17.1	22.9	12.9	25.7	14.5	18.8	7.1	10.0	20.3	23.2	18	23	
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100	100		
Total	245	69	70	68	70	70	69	70	70	70	70	70	70	69	70	70	70	70	70	70	70	70	70	70	70		
ManTU and ManNU																											
		Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Average	
ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU	ManTU	ManNU		
Negotiates	71.0	12.2	59.1	5.8	58.3	1.4	30.6	1.5	6.3	1.4	7.0	2.9	35.8	2.9	41.4	1.4	8.3	2.9	13.7	1.4	14.6	2.9	13.4	2.9	30	3	
	10.5	21.2	23.3	36.2	16.2	21.4	21.3	11.8	31.1	20.0	40.3	40.0	47.9	24.6	33.6	20.0	47.1	35.7	57.4	27.5	68.3	32.9	44.8	34.8	37	27	
Consults	81.5	33.5	82.4	42.0	74.5	22.9	51.9	13.2	37.5	21.4	47.3	42.9	83.7	27.5	75.0	21.4	55.4	38.6	71.1	29.0	82.9	35.7	58.3	37.7	67	30	
	12.1	41.2	10.7	39.1	17.9	57.1	37.8	72.1	33.9	50.0	33.0	37.1	12.6	58.0	20.1	61.4	30.7	48.6	21.0	56.5	14.1	57.1	23.1	42.0	22	52	
Informs	6.3	25.3	6.9	18.8	7.6	20.0	10.3	14.7	28.7	28.6	19.7	20.0	3.7	14.5	4.9	17.1	13.9	12.9	7.9	14.5	3.0	7.1	18.6	20.3	11	18	
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100	100		
Total	725	245	721	69	722	70	696	68	726	70	727	70	724	67	720	70	720	70	713	69	725	70	714	69	719	84	
Union reps & Non Union reps																											
		Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Average	
TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU		
Negotiates	53.2	11.0	41.3	14.5	41.1	8.6	23.4	5.9	10.1	7.1	12.7	2.9	42.5	5.8	41.4	5.7	15.6	5.7	23.8	7.2	28.4	11.4	20.0	5.8	29	8	
	14.1	17.6	28.7	33.3	16.2	21.4	16.1	14.7	23.7	18.6	38.9	24.6	33.3	33.3	33.6	28.6	35.0	24.3	36.5	26.1	45.8	25.7	28.7	27.5	29	25	
Consults	67.3	28.6	70.0	47.8	57.3	30.0	39.5	20.6	33.7	25.7	51.6	27.5	75.8	39.1	75.0	34.3	50.6	30.0	60.3	33.3	74.2	37.1	48.7	33.3	59	32	
	16.1	37.6	18.6	31.9	30.1	48.6	41.5	58.8	32.8	34.3	23.8	58.0	18.2	42.0	20.1	42.9	28.8	44.3	23.3	47.8	19.2	52.9	27.6	43.5	25	45	
Informs	16.6	33.9	11.4	20.3	12.6	21.4	19.0	20.6	33.5	40.0	24.6	14.5	5.9	18.8	4.9	22.9	20.7	25.7	16.4	18.8	6.6	10.0	23.7	23.2	16	23	
	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100	100		
Total	725	245	721	69	722	70	696	68	726	70	727	70	724	67	720	70	720	70	713	69	725	70	714	69	719	84	

Table 2

Paired-Sample T-tests for 12 Variables. Significance is 1 tailed

		Mean	Std Err	t	Sig
Pay	Man	1.54	.035	-9.191	.000
	TU	1.9600	.04325		
Hours	Man	1.65	.034	-7.526	.000
	TU	2.0000	.03826		
Holiday	Man	1.75	.037	-8.033	.000
	TU	2.1413	.04073		
Pension	Man	2.28	.038	-5.624	.000
	TU	2.5603	.03968		
Recruit	Man	2.85	.034	-1.036	.300
	TU	2.8967	.03645		
Train	Man	2.65	.032	1.065	.287
	TU	2.6039	.03683		
Grievance	Man	1.84	.029	-.808	.419
	TU	1.8757	.03388		
Disc	Man	1.83	.029	-1.437	.151
	TU	1.8847	.03328		
Staff plans	Man	2.50	.031	-1.048	.295
	TU	2.5458	.03678		
Equal Op	Man	2.23	.029	-2.142	.033
	TU	2.3226	.03792		
Health	Man	2.06	.024	.419	.675
	TU	2.0400	.03195		
Perf Apr	Man	2.47	.944	-1.639	.102
	TU	2.5490	1.05977		

		Mean	Std Err	t	Sig
Pay	Man	2.80	.061	-1.970	.050
	TU	2.9429	.06246		
Hours	Man	2.71	.101	.837	.405
	TU	2.5797	.11753		
Holiday	Man	2.96	.082	1.054	.295
	TU	2.8286	.10370		
Pension	Man	3.00	.069	.522	.603
	TU	2.9412	.09342		
Recruit	Man	3.06	.088	-.103	.918
	TU	3.0714	.11205		
Train	Man	2.74	.811	.121	.904
	TU	2.7286	.96190		
Grievance	Man	2.84	.084	.943	.349
	TU	2.7391	.10041		
Disc	Man	2.94	.079	1.051	.297
	TU	2.8286	.10169		
Staff	Man	2.71	.087	-1.387	.170
	TU	2.9000	.10205		
Equal Op	Man	2.84	.678	.462	.645
	TU	2.7826	.83788		
Health	Man	2.69	.078	.582	.562
	TU	2.6143	.09821		
Perf Ap	Man	2.80	.096	-.320	.750
	TU	2.8406	.10245		

Table 3

Paired-Sample T-tests for 12 Dummy Variables. Significance is 1 tailed.

		Mean	Std Err	t	Sig
Pay	Man	.82	.014	7.383	.000
	TU	.6731	.01743		
Hours	Man	.82	.014	5.942	.000
	TU	.7004	.01707		
Holiday	Man	.75	.016	7.674	.000
	TU	.5734	.01842		
Pension	Man	.52	.019	5.123	.000
	TU	.3951	.01854		
Recruit	Man	.37	.018	1.558	.060
	TU	.3375	.01756		
Train	Man	.47	.019	-1.711	.044
	TU	.5158	.01855		
Grievance	Man	.84	.014	4.063	.000
	TU	.7583	.01592		
Disc	Man	.84	.014	4.650	.000
	TU	.7500	.01615		
Staff plans	Man	.55	.019	2.100	.018
	TU	.5056	.01865		
Equal Op	Man	.71	.017	4.784	.000
	TU	.6031	.01834		
Health	Man	.83	.014	4.549	.000
	TU	.7421	.01626		
Perf Apr	Man	.58	.018	3.966	.000
	TU	.4874	.01872		

		Mean	Std Err	t	Sig
Pay	Man	.33	.030	1.281	.101
	TU	.2857	.02892		
Hours	Man	.42	.060	-.630	.266
	TU	.4783	.06058		
Holiday	Man	.23	.051	-.962	.170
	TU	.3000	.05517		
Pension	Man	.13	.041	-1.150	.127
	TU	.2059	.04940		
Recruit	Man	.21	.049	-.575	.284
	TU	.2571	.05262		
Train	Man	.43	.060	.000	-
	TU	.4286	.05958		
Grievance	Man	.28	.054	-1.653	.051
	TU	.3913	.05918		
Disc	Man	.21	.049	-1.912	.030
	TU	.3429	.05714		
Staff	Man	.39	.059	1.062	.146
	TU	.3000	.05517		
Equal Op	Man	.29	.055	-.554	.291
	TU	.3333	.05717		
Health	Man	.36	.058	-.178	.429
	TU	.3714	.05817		
Perf Ap	Man	.38	.059	.536	.297
	TU	.3333	.05717		

Table 4

Paired-Sample T-tests. Management's Attitude towards Union and Non Union Representatives Significance is 1 tailed						
		Mean	Std Err	t	Sig	
Pay	ManTU	1.81	.069	-11.710	.000	
	ManNU	2.82	.058			
Hours	ManTU	1.96	.067	-9.800	.000	
	ManNU	2.78	.056			
Holiday	ManTU	2.06	.069	-10.564	.000	
	ManNU	2.90	.049			
Pension	ManTU	2.55	.061	-7.268	.000	
	ManNU	3.03	.044			
Recruit	ManTU	3.07	.049	-1.636	.052	
	ManNU	3.15	.048			
Train	ManTU	2.82	.050	-1.623	.053	
	ManNU	2.91	.050			
Grievance	ManTU	2.15	.056	-9.860	.000	
	ManNU	2.85	.053			
Disc	ManTU	2.16	.056	-10.103	.000	
	ManNU	2.88	.052			
Staff plans	ManTU	2.70	.050	-3.613	.000	
	ManNU	2.91	.050			
Equal Op	ManTU	2.57	.054	-5.210	.000	
	ManNU	2.90	.049			
Health	ManTU	2.26	.047	-6.552	.000	
	ManNU	2.65	.049			
Perf Apr	ManTU	2.74	.059	-3.940	.000	
	ManNU	2.97	.052			

Table 5

Independent Samples T Test on Management Data for the Question 'What Issues did the onsultation Cover?' Significance is 1 tailed.					
		Mean	Std Err	t	Sig
TU Solution	Private	.3577	.04340	1.013	.156
	Public	.3006	.03603		
TU Options	Private	.4228	.04472	-.422	.337
	Public	.4479	.03907		
TU Option	Private	.2195	.03747	-.628	.265
	Public	.2515	.03409		
NU Solution	Private	.3071	.04109	-1.163	.123
	Public	.4444	.12052		
NU Options	Private	.3071	.04454	1.326	.099
	Public	.4444	.11433		
NU Option	Private	.3071	.03542	-.250	.401
	Public	.4444	.10083		

Table 6

Public Private Split Within Management Variable		Management Regarding Trade Unions																									
		Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Average	
Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub
Negotiates	76.7	68.2	59.9	58.4	59.9	57.0	22.4	37.7	3.6	8.7	4.8	9.0	34.3	37.0	35.0	37.8	5.7	10.6	8.9	17.9	10.7	17.9	8.8	17.4	27.6	31.3	
Consults	11.6	9.5	25.6	21.3	19.5	13.4	32.0	12.0	22.7	38.4	32.1	47.3	49.0	47.0	49.1	46.1	39.2	53.9	48.6	64.8	67.8	68.7	38.2	50.5	36.3	39.4	
Informs	88.4	75.6	85.5	79.7	79.3	70.4	54.3	49.7	26.3	47.1	36.9	56.3	83.3	84.1	84.1	83.9	44.9	64.4	57.5	82.6	78.5	86.7	47.0	68.0	63.8	70.7	
Not inform	4.5	7.9	5.7	8.0	5.7	9.3	7.8	12.6	32.5	25.3	21.7	17.9	3.9	3.6	3.3	3.4	18.7	9.8	11.3	4.9	3.3	2.8	23.3	14.6	11.8	10.0	
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0		
	335	390	332	389	334	338	322	374	335	381	336	391	335	389	334	386	332	388	327	386	335	390	330	384	332.3	382.2	
Management Regarding Non union reps																											
Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub	Priv	Pub
Negotiates	13.3	5.7	4.7	20.0	1.5		20.0	1.5		3.1		1.6	20.0	1.5		3.1		1.6		3.1		3.1	60.0	3.2	10.5		
Consults	22.4	14.3	37.5	20.0	23.1		12.7		20.0	20.0	38.5	60.0	23.4	40.0	18.5	40.0	33.8	60.0	25.0	60.0	32.3	40.0	32.8	40.0	26.7	32.9	
Informs	35.7	20.0	42.2	40.0	24.6	.0	12.7	20.0	21.5	20.0	41.5	60.0	25.0	60.0	20.0	40.0	36.9	60.0	26.6	60.0	35.4	40.0	35.9	100.0	29.8	43.3	
Not inform	41.4	40.0	37.5	60.0	53.8	100.0	71.4	80.0	47.7	80.0	36.9	40.0	59.4	40.0	61.5	60.0	49.2	40.0	57.8	40.0	56.9	60.0	42.2		51.3	53.3	
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0		
	210	35	64	5	65	5	63	5	65	5	65	5	64	5	65	5	65	5	64	5	65	5	64	5	76.6	7.5	

Table 7

Independent Samples Test For 12 Dummy Variables and Public Private Split. Union data. Significance is 1 tailed					Independent Samples Test For 12 Dummy Variable and Public Private Split. Non Union Data. Significance is 1 tailed						
		Mean	Std Err	t			Mean	Std Err	t		
Pay	Private	.88	.018	4.549	.000		.36	.033	2.063	.022	
	Public	.76	.022				.20	.069			
Hours	Private	.86	.019	2.081	.019		.42	.062	.094	.463	
	Public	.80	.020				.40	.245			
Holiday	Private	.79	.022	2.797	.003		.25	.054	4.571	.000	
	Public	.70	.023				.00	.000			
Pension	Private	.54	.028	1.215	.112		.13	.042	-.458	.324	
	Public	.50	.026				.20	.200			
Recruit	Private	.26	.024	-5.955	.000		.22	.051	.080	.040	
	Public	.47	.025				.20	.200			
Train	Private	.37	.026	-5.317	.000		.42	.062	-.796	.214	
	Public	.56	.025				.60	.245			
Grievance	Private	.83	.020	-.282	.389		.25	.055	-1.698	.047	
	Public	.84	.019				.60	.245			
Disc	Private	.84	.020	.071	.472		.20	.050	-1.043	.150	
	Public	.84	.019				.40	.245			
Staff plans	Private	.45	.027	-5.343	.000		.37	.060	-1.014	.157	
	Public	.64	.024				.60	.245			
Equal Op	Private	.57	.027	-7.508	.000		.27	.056	-1.593	.058	
	Public	.83	.019				.60	.245			
Health	Private	.79	.022	-2.881	.002		.35	.060	-.205	.419	
	Public	.87	.017				.40	.245			
Perf Apr	Private	.47	.028	-5.768	.000		.36	.060	-1.063	.146	
	Public	.68	.024				.60	.245			

Table 8

Private Sector: Percentage of Matched Establishments Negotiating, Consulting, Informing or Not Informing Management with Trade Unions																													
Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Perform					
Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU	Man	TU		
Negotiates	76.7	60.6	59.9	41.6	59.9	46.7	22.4	23.6	3.6	6.3	4.8	9.5	34.3	40.0	35.0	38.3	5.7	9.6	8.9	17.4	10.7	23.0	8.8	14.8	27.6	27.6			
Consults	11.6	14.9	25.6	25.3	19.5	14.1	32.0	20.8	22.7	23.0	32.1	35.1	49.0	32.8	49.1	32.9	39.2	31.9	48.6	33.3	67.8	48.4	38.2	26.1	36.3	28.2			
	88.4	75.5	85.5	66.9	79.3	60.8	54.3	44.4	26.3	29.3	36.9	44.6	83.3	72.8	84.1	71.3	44.9	41.6	57.5	50.8	78.5	71.3	47.0	40.9	63.8	55.8			
Inform	7.2	14.3	8.7	20.5	15.0	28.7	37.9	38.2	41.2	35.8	41.4	27.4	12.8	20.6	12.6	24.0	36.4	30.7	31.2	28.4	18.2	20.6	29.7	29.4	24.4	26.6			
Not inform	4.5	10.1	5.7	12.7	5.7	10.5	7.8	17.4	32.5	34.9	21.7	28.0	3.9	6.6	3.3	4.8	18.7	27.7	11.3	20.8	3.3	8.1	23.3	29.7	11.8	17.6			
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0			
	335	332	334	322	335	336	335	334	332	332	335	334	335	334	332	332	327	335	330	330	332	332	332	332	332	332			
Management with Non union reps																													
Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Perform					
Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU		
Negotiates	13.3	11.0	4.7	12.5	1.5	6.2	3.2	1.5	6.2	3.1	7.7	1.6	3.1	1.5	3.1	3.1	4.6	1.6	4.7	3.1	22.2	3.1	4.7	3.18	7.4	3.18	7.4		
Consults	22.4	17.6	37.5	31.3	23.1	20.0	12.7	14.3	20.0	20.0	38.5	32.3	23.4	31.3	18.5	26.2	33.8	21.5	25.0	26.6	32.3	55.6	32.8	26.6	26.7	26.9			
	35.7	28.6	42.2	43.8	24.6	26.2	12.7	17.5	21.5	26.2	41.5	40.0	25.0	34.4	29.2	36.9	26.2	26.6	31.3	35.4	77.8	35.9	31.3	29.84	34.3				
Inform	41.4	35.7	37.5	34.4	53.8	50.8	71.6	60.3	47.7	35.4	36.9	32.3	59.4	45.3	61.5	46.2	49.2	46.2	57.8	48.4	56.9	11.1	42.2	43.8	51.32	40.8			
Not inform	22.9	35.7	20.3	21.9	21.5	23.1	15.9	22.2	30.8	38.5	21.5	27.7	15.6	20.3	18.5	24.6	13.8	27.7	15.6	20.3	7.7	11.1	21.9	25.0	18.83	24.8			
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0			
	210	64	65	63	65	65	64	65	65	65	64	65	65	64	65	64	65	65	64	65	64	65	64	65	64	76.58			
TU Reps with Non U Reps																													
Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Perform					
TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU		
Negotiates	60.6	11.0	41.6	12.5	46.7	6.2	23.6	3.2	6.3	6.2	9.5	7.7	40.0	3.1	38.3	3.1	9.6	4.6	17.4	4.7	23.0	22.2	14.8	4.7	28	7			
Consults	14.9	17.6	25.3	31.3	14.1	20.0	20.8	14.3	23.0	20.0	35.1	32.3	32.8	31.3	32.9	26.2	31.9	21.5	33.3	26.6	48.4	55.6	26.1	26.6	28	27			
	75.5	28.6	66.9	43.8	60.8	26.2	44.4	17.5	29.3	26.2	44.6	40.0	72.8	34.4	71.3	29.2	41.6	26.2	50.8	31.3	71.3	77.8	40.9	31.3	55.8	34.3			
Inform	14.3	35.7	37.5	34.4	53.8	50.8	38.2	60.3	35.4	35.4	27.4	32.3	20.6	45.3	24.0	46.2	30.7	46.2	28.4	48.4	20.6	11.1	29.4	43.8	51.32	40.8			
Not inform	10.1	35.7	12.7	21.9	21.5	23.1	17.4	22.2	34.9	38.5	28.0	27.7	6.6	20.3	4.8	24.6	27.7	20.8	20.3	8.1	11.1	29.7	25.0	18	25				
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0			
	335	210	332	64	334	65	322	63	335	65	336	65	335	64	334	65	332	65	327	64	335	65	330	64	332	64	332		
Man TU with Man Non U																													
Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Perform					
TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU	TU	NU		
Negotiates	66.2	46.9	58.4	41.1	57.0	36.3	37.7	23.3	8.7	13.3	9.0	15.3	37.0	44.7	37.8	44.0	10.6	20.6	17.9	29.3	17.9	33.1	17.4	24.5	31	31			
Consults	9.5	13.3	21.3	31.6	13.4	18.0	12.0	12.0	38.4	24.3	47.3	42.2	47.0	33.7	46.1	34.2	53.9	37.6	64.8	39.1	68.7	43.6	50.5	31.0	39	30			
	75.6	60.3	79.7	72.8	70.4	54.4	49.7	35.3	47.1	37.6	56.3	57.5	84.1	78.4	83.9	78.2	64.4	58.2	82.6	86.7	76.7	68.0	55.5	71	61				
Inform	16.4	17.7	12.3	17.0	20.4	31.2	44.4	27.6	30.2	30.5	25.8	20.7	12.3	16.2	12.7	25.8	27.1	12.4	18.9	10.5	17.9	17.4	26.0	19	24				
Not inform	7.9	22.1	8.0	10.3	9.3	14.4	21.5	7.8	15.9	32.5	20.3	17.9	21.7	3.6	5.4	3.4	4.9	9.8	14.7	4.9	12.7	2.8	5.4	14.6	18.5	10	15		
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0		
	390	389	338	5	374	5	381	5	391	5	389	5	386	5	388	5	386	5	390	5	384	5	382	5	382	5	382		
Management with Non union reps																													
Pay		Hours		Holiday		Pension		Recruit		Train		Grievance		Disc		Staff		Equal Op		Health		Perform		Perform					
Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU	Man	NU		
Negotiates	5.7	11.4	20.0	40.0	40.0	20.0	40.0	20.0	20.0	40.0	20.0	40.0	40.0	40.0	40														

# Glossary

1970 ECo Proposal	Proposal for a Council Regulation on the Statute for a European Company [1970] draft European Company Statute 1970 OJ C124/1 EC Bull Supp. 8/1970
1972 Fifth Directive Proposal	Draft of a Fifth Directive on the structure of Sociétés Anonymes 1972 OJ C 131 12.12.1972; Bull Sup 10/72
1973 Mass Dismissals Proposal	Proposal for a Council Directive on the Harmonization of the Legislation of the Member States Relating to Mass Dismissals 1973 R/2976/73 (SOC 236)
1974 AR Proposal	Proposal for a Directive of the Council on harmonization of legislation of Member States on the retention of the rights and advantages of employees in the case of mergers, takeovers and amalgamations 1974 OJ C 104 of 13.9.1974 amended Bull EC 7/8-1975
1975 Green Paper	European Commission <i>Employee participation and company structure in the European Community (Green Paper)</i> (Bull Suppl 8/75, pg 54, 1975)
1980 Vredeling	Proposal for a Council Directive on the procedures for informing and consulting employees of undertakings with complex structures, in particular transnational undertakings 1980 Bull Sup 3/80 OJC 297/3
1983 Fifth Directive Proposal	Amended Proposal for a Fifth Directive concerning the structure of public limited companies and the powers and obligations of their organs 1983 OJ 1983 C 240/2, Bull Supplement 6/83
1983 Vredeling	Amended proposal for a Council Directive on the procedures for informing and consulting employees of undertakings with complex structures, in particular transnational undertakings 1983 Bull Sup 2/83
1989 ECo	Proposal for a Council Directive complementing the

Directive	Statute for an European company with regard to the involvement of employees in the European Community
Proposal	1989 Bull Supplement 5/89 37
1989 ECo Regulation	Proposal for a Regulation on the Statute for a European Company 1989 Bull Supplement 5/89
Proposal	
1990 EWC Proposal	Proposal for a Council Directive COM (90) 581Final on the establishment of a European Works Council in Community-scale undertakings or groups of undertakings for the purposes of informing and consulting employees 1991 OJ C 39/11 15.2.1991
ACAS	The Advisory, Conciliation, and Arbitration Service
Act	Act
AG	Advocate General
AR Directive	Council Directive (EC) 2001/23 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings or businesses [2001] OJ L82/16
AR Directive 1977	Council Directive (EEC) 77/187 on the approximation of the legislation of Member States on the safeguarding of employees' rights in the event of transfers of undertakings, business or parts of business [1977] OJ L61/26
BIS	Department of Business Innovation and Skills
CA	Court of Appeal
CAC	Central Arbitration Committee
CB	Collective bargaining
Community Charter	Community Charter on the Fundamental Social Rights of Workers <i>Social Europe</i> 1/90 51-76
CR Directive	Council Directive (EC) 98/59 on the approximation of

	the laws of the Members States relating to collective redundancies [1998] OJ L225/16
CR Directive 1975	Council Directive (EEC) 75/129 on the Approximation of the Laws of the Member States Relating to Collective Redundancies [1975] OJ L39/40
DC	Divisional Court
EAT	Employment Appeal Tribunal
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECo Directive	Council Directive (EC) 2001/86 supplementing the Statute for a European company with regard to the involvement of employees [2001] OJ L294
ECo Regulation	Council Regulation (EC) No 2157/2001 on the Statute for a European company (SE) 2001 L294/1
EEC	European Economic Community
EI	Employment Involvement
EP	European Parliament
ERI	Employee Related Issues
ESC	European Social Charter 1961
ETUC	European Trade Union Confederation
EWC	European Works Council
EWC Directive	Council Directive 2009/38/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 [2009] OJ L122/28
EWC Directive 1994	Council Directive (EC) 94/45 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 [1994] OJ L254/64
GWC	Group Works Council
H&S Directive	Council Directive (EEC) 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work [1989] OJ L183/1
HC	High Court
HL	House of Lords
HRM	Human resource management
I&P	Involvement and participation
IC Directive	Council Directive (EC) 2002/14 establishing a general framework for informing and consulting employees in the European Community [2002] OJ L80/29
ICE Regulations	The Information and Consultation of Employees Regulations 2004 SI 2004/3426 1
ILO	International Labour Organization
IPF	Involvement and Participation Framework
NU	Non-Union
OED	Oxford English Dictionary
OMC	Open method co-ordination
S	Section
SE	Sociétés Anonymes
SNB	Special negotiating body
TEEC	Treaties Establishing the European Economic Community
TEEC 1991	TEEC as amended by the Treaty of Amsterdam
TEU	Treaty on European Union Maastrict 1992
TFEU	Treaty on the Functioning of the European Union

TICE	Transnational Information and Consultation of
Regulations	Employees Regulations 1999 SI 1999/3323
TU	Trade Union
TUC	Trade Union Congress
TULRA	Trade Union and Labour Relations (Consolidation) Act 1992
UNICE	Union of Industrial and Employers' Confederations of Europe
WERS	Workplace Employment Relations Survey
WIRS	Workplace Industrial Relations Survey

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