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Reflexive law and the reformulation of EC-level employee consultation norms in the British systems of labour law and industrial relations

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Abstract

The 2002/14/EC Directive establishing a general framework for informing and consulting employees in the European Community allowed considerable flexibility in transposition and implementation. Viewing – in line with reflexive law theory – the Directive as a key tool in allowing EC law to become embedded in the national legal and industrial relations systems, the paper assesses its transposition and impact in Britain. The very flexibility of the Directive made it possible for the British social systems to respond in an innovative way to the changing forms of employee representation. But the relative weakness of the regulatory design of the transposing legislation with regard to the nature of the legal obligations, the enforcement mechanism and the degree to which legal resources could be utilised by trade unions constrained the re-configuration of labour law and its coupling to employee representation arrangements traditionally associated with the British industrial relations system.

1 Introduction: The institutional design of the 2002/14/EC Directive and the theory of reflexive law

The adoption of Framework Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community (I&C Directive)[2] is among the latest in a long and controversial line of European Community (EC) employee representation legislative initiatives stretching back three decades.[3] Its stated purpose is 'to establish a general framework setting out minimum requirements for the right to information and consultation of employees in undertakings or establishments within the European Community'.[4] In line with the notion of 'framework directives', the Directive lays down certain core standards but the detail of their operation is left to be determined by the Member States and/or the social partners. Further, it sets minimum standards which Member States are free to improve upon. But flexibility is not confined to the form of the legislative instrument. Increasing flexibility manifests itself within the Directive in the provision allowing Member States more time to apply the national provisions transposing

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

3 For a review of EC developments concerning collective labour law, see Barnard (2006a), part VI.

4 Article (art.) 1(1).

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the Directive, and in permitting the conclusion of I&C agreements with provisions that are different from those referred to in art. 4.[5]

The latter aspect of this 'internal flexibility' envisages simultaneously a greater role for the social partners. Not only can they transpose the Directive, but, according to art. 5, 'Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees', providing thus a space in which the social partners can negotiate for improved standards and – contrary to the Continental legal tradition – for worse (Barnard, 2006a, p. 82).[6] Hence, the Directive is based on a notion of subsidiarity at two levels, otherwise 'double' subsidiarity, i.e. at first level, it requires transposition into national law and, at second level, precedence is given to arrangements negotiated by the parties (Blanke, 1999; Marginson and Sisson, 2004, p. 291).

In adopting such a regulatory approach, the I&C Directive can be seen as a prime example of 'reflexive harmonisation', in that it is the outcome of recognition on the part of EC law-makers that the self-production processes of the national industrial relations systems should be employed to achieve substantive standards of protection (Barnard and Deakin, 2002, p. 220). Reflexive law theory represents an attempt to move beyond a straightforward dichotomy between 'instrumentalist' theories and 'deregulatory' theories of regulation, which suggest the removal of all external regulatory controls (Teubner, 1993; Rogowski and Wilthagen, 1994). Its central tenet is that 'traditional' regulatory interventions, consisting of top-down homogeneous rules supplemented by sanctions, which aim to directly set down or require particular substantive standards, will not succeed in attaining their goals because of the nature of the interaction between the legal system and other systems, such as the political and the economic systems. Due to their 'autopoietic' nature,[7] social systems create their own internal norms and discourses, and as such they are differentiated from one another by their specialised communicative characteristics.

While the specialised communicative characteristics create the autonomy of each system with regard to other social systems, they do not isolate it from its environment and from other systems. Autopoietic systems are operatively closed but cognitively open in that they can observe their environment and other subsystems (Teubner, 1993, p. 86). But as a result of operative closure, any system 'can only deal with its own internal construct of the environment' (p. 74). The autonomy emanating from the self-referentiality of autopoietic systems has negative repercussions for attempts at direct legal intervention through command and control regulation. According to Teubner (p. 75), 'it is not legislation which creates order in the social subsystems. It is the subsystems themselves which deal selectively with legislation and arbitrarily use it, to construct their own order.' In the industrial relations system, for instance, only industrial relations norms, and not legal norms, are recognised as valid, and law cannot thus simply instruct the industrial relations system to act in the way that law demands. Legal norms are merely external noise, which the industrial relations system will reconstruct in accordance with its own rationality of efficiency and fairness (Cooney, Lindsey, Mitchell and Zhu, 2002).

The solution to this problem lies in law espousing a reflexive strategy of procedurally orientated regulation that stimulates and facilitates self-regulation in the other social systems (Rogowski and Wilthagen, 1994). In that way, reflexive law orients its norms and procedures towards co-evolution and the reciprocal structural coupling of the autonomous evolutionary mechanisms developed by the social systems. The adoption of a reflexive legal strategy necessitates not only a retreat from substantive to procedural regulation, but also the adaptation of the form of the regulatory instrument

5 Barnard (2006a, p. 81) describes this type of flexibility as a form of 'internal flexibility'.

6 This is an example of 'controlled' or 'negotiated flexibility' (Barnard, 2006a, p. 82). This is also described as 'centrally-coordinated' regulation by Ferner and Hyman (1998, p. xvi).

7 Autopoiesis ('auto' meaning 'self' and 'poiesis' meaning 'creation') is a term developed initially in biological sciences. While Teubner's approach is premised on Luhmann's theory of autopoiesis, Luhmann's theory as such lies beyond the scope of the paper.

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to the specific self-steering, or self-regulatory, mechanisms of the field that it seeks to regulate. Consequently, reflexive law exhibits elements of both substantive and procedural responsiveness: 'it is substantively responsive in that it allows for substantive standards to be determined through self-regulatory processes and it is procedurally responsive in that the procedural framework that it lays out should reflect the processes and operations of the regulated arena' (Hobbs, 2005, pp. 124–25).

Specific reflexive strategies that can assist in securing structural coupling between the legal and the other social systems can be deployed. One way is coupling through optional regulation. Teubner suggests that unlike 'command and control' regulation, law can increase its regulatory interference by developing an 'option policy' based on the knowledge of the regulated system in its capacity as an outside observer (1993, p. 93). Law should hence present the regulated arena with legal options, which can be used as those concerned see fit. The consequence of this flexible legal policy is that the law is used only when it meets social needs, otherwise not. It is important that conditions should be applied in order to limit the possibilities that the law is merely preserving the status quo or enables those who are already powerful to become more so (pp. 94–95). A second reflexive legal strategy is 'coupling through collective organisation' (p. 95). The preference for collective organisation as a reflexive legal strategy has been advanced in the context of EC regulation. For instance, Deakin (1999, p. 245) suggests that 'the preferred mode of intervention is for the law to underpin and encourage autonomous processes of adjustment, in particular by supporting mechanisms of group representation and participation'. Finally, structural coupling can be achieved through 'establishing a communication link' (Teubner, 1993, p. 91) through the use of moral pressure, persuasion as to the rightness of law or even sanctions (Hobbs, 2005, p. 12).

Building on an analysis of the closed, autopoietic forces underlying the different social systems, it becomes feasible to illuminate the sophisticated processes involved in the open transformational relations between law and the other social systems. In locating European-level social policy initiatives as key tools in allowing EC law to become embedded in the national legal and social systems, such initiatives can be seen as acting as irritants of a co-evolutionary process of separate trajectories. While on the legal side they will be recontextualised in a new network of legal distinctions, on the social side, they will have an impact on the social system that has responsibility in the area under regulation, altering the existing configuration of law and its coupling to the social processes associated with those systems (Teubner, 1998, p. 21). From a sociolegal point of view, what is important is to confront the images of changes and developments in the legislation with regulatory practice and assess how institutional responses to changes in the environment of EC labour law are formulated in the national social systems.

It is in this context that the paper provides an original empirical study of the pattern of change in the field of employee representation in Britain, as influenced by the transposition and implementation of the I&C Directive.[8] The Directive extends legal regulatory norms into areas of the employment relationship, which, as will be seen next, were until recently largely a matter for voluntary determination between employers and unions. In contrast to earlier EC legislation, the development of the I&C Regulations 2004, which transposed the Directive, was broadly based on a set of principles agreed between the Department of Business, Innovation and Skills (BIS, then called the Department of Trade and Industry (DTI)) and the 'two sides of industry', that is the Confederation of British Industry (CBI) and the Trade Union Congress (TUC). Further, in rejecting a 'one size fits all' approach, the Regulations provided employers, trade unions and employees a set of innovative responses to the statutory requirements.[9]

8 The word 'Britain' is used throughout this article as shorthand for the United Kingdom of Great Britain and Northern Ireland, which includes England, Wales, Scotland and Northern Ireland. It has to be noted that the equivalent legislation for undertakings situated in Northern Ireland is the Information and Consultation of Employees Regulations (Northern Ireland) 2005 (S.R. 2005 No. 47), as amended.

9 The Regulations initially applied (from 6 April 2005) to undertakings with 150 or more employees, but were extended in two further stages to cover undertakings with at least 100 employees (from April 2007) and then those with at least 50 (from April 2008) (I&C Regulations 2004, reg 3, Sch 1).

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In its recent report, the Commission acknowledged that 'the national implementing measures should be given some time to bed down in the industrial relations systems of the Member States' (2008, pp. 9–10). However, it also hinted that the British legislation's provisions in respect of direct forms of information and consultation and the definition and enforceability of 'pre-existing agreements' (PEAs) are potentially challenging areas in terms of compliance with the Directive, which the Commission intends to examine more closely.[10]

The next section examines the operation of the 'double subsidiarity' mechanism in the British context of labour market regulation, and the evolution of labour standards governing information and consultation of employees. Section 3 gives a brief account of the research design of the study. Then, section 4 provides an assessment of the development and impact of the legislation, as reformulated by the social systems. Section 5 critically evaluates the institutional design of the Regulation, and section 6 concludes.

2 The 'double subsidiarity' mechanism and the British industrial relations system

2.1 The absence of tripartism

As noted above, the government's strategy for the transposition of the I&C Directive aimed at generating consensus between the CBI and TUC. Traditionally, social norms and conventions in Britain have not been in favour of agreement of the government with the 'two sides of industry' on labour market issues, regarding especially EC labour law initiatives. There have been recently some – albeit limited – instances of such activity under the Labour government, although in different forms. First, for the establishment of the National Minimum Wage in 1998, a Low Pay Commission was set up, which was composed of members representing the interests of trade unions, employers, employees and the independent community (Metcalf, 1999, p. 171). Second, the CBI and TUC worked together to produce the productivity reports, which made a number of suggestions to government regarding how to improve productivity levels through initiatives in diverse areas in 2001. Third, for the statutory trade union recognition procedure, an attempt for involvement similar to the one in the case of minimum wage was made. However, the CBI and TUC were unable to resolve their differences, and a formal statement was issued highlighting the areas of continued disagreement between them, which the government was left to resolve (Novitz and Skidmore, 2001, pp. 72–73).[11]

But, as Hobbs and Njoya suggest in the context of the European Employment Strategy, 'the very fact that the UK lacks institutional arrangements for national-level social dialogue and established structures of "social partnership" arguably increases the potential of the reflexive governance mechanisms of EC social policy to be an important dynamic in UK industrial relations practice' (2005, p. 308). While employing a different theoretical approach, the study by Falkner, Treib, Hartlapp and Leiber (2005) found that Britain belonged to a 'world of domestic politics' when it came to the transposition and implementation of EC social policy directives that combine a 'hard' and 'soft' regulatory dimension (p. 321). The authors suggested that the procedural pattern under both Conservative and Labour governments was one based on domestic political considerations, rather than on a culture of

10 For the reaction of employers' associations to the Commission's intention to review the transposition of the I&C Directive in Britain, see Berry (2008).

11 One month after the conclusion of the agreement on the 'outline scheme' with respect to the I&C Directive, the CBI, TUC and CEEP UK agreed on a Code of Practice for the implementation of the EU Framework Agreement on Telework; see Prosser (2007). While BIS participated in the discussions, it was not signatory to the agreement. A further agreement on a code of practice for the implementation of the EU Framework Agreement on Work-related Stress was concluded later. On 20 May 2008, an agreement on a proposed joint statement with the government and the CBI on agency workers was also reached.

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dutifulness vis-à-vis EC law. Specifically, it was found that the fate of non-binding or soft law recommendations typically depended on the extent to which they fitted with the agendas of important political actors at the domestic level. An alternative explanation, informed by reflexive law theory, would suggest that the priorities of the political system can bring about a fundamental reconstruction of the notion of employee representation and produce results at variance to the I&C Directive. This is especially the case when the EC initiative in question is in the form of a framework directive, thus providing a great margin of flexibility when transferring the EC norms into the national legal order and implementing them in the industrial relations system (Koukiadaki, 2008, p. 36).

2.2 The legacy of the single channel of employee representation

In line with the 'double subsidiarity' mechanism used in the I&C Directive, the involvement of the industrial relations system is not confined to the transposition of EC law. Instead, its function, as delineated in both the Directive and the Regulations, is significantly greater in the application and enforcement of the new statutory I&C requirements. In providing for alternative compliance methods, the legislation gives a major role to employers, employee representatives and trade unions in modifying statutory provisions which, as a consequence, take on the character of 'default rules'. Nevertheless, the impact of statutory employee representation rights is significantly dependent on the ways in which the new framework is perceived by the 'binding arrangements' (Teubner, 1998, p. 12) of the industrial relations system. Hence, the question is not so much if the British industrial relations system will reject or integrate statutory employee representation rights. Rather, it is what kind of transformations of meaning the term will undergo, how its role will differ, once it is reconstructed anew by the industrial relations system (Teubner, 1998).

Britain has been traditionally portrayed as having a distinctive voluntaristic ideology underpinning its unregulated collective bargaining: 'the single channel model formed the centre-piece of the industrial pluralist model of worker representation which was informed by the idea of equality of arms and an acceptance of a conflictual relationship between employers and unions' (Barnard, 2006b, p. 65). The principle of 'industrial autonomy' (Kahn-Freund, 1954, p. 44) hence explains the historical absence of legislatively mandated works councils in the enterprise.[12] In contrast, in Germany a statutory framework has allowed for workplace consultation and co-determination (*Mitbestimmung*)[13] to proceed through works councils separately from the collective negotiation of terms and conditions of employment by trade unions and employers at sectoral level.[14] Long-standing 'continental' statutory works councils have been in existence in a number of other Member States as well, such as France, the Netherlands, Belgium and Luxembourg (Broughton, 2005).[15] Instead, the continental works council system had 'its British equivalent in the functions of the shop stewards', but 'without – from the British point of view – the oppressively gigantic legal apparatus of the works council system' (Kahn-Freund, 1983, p. 8).

Starting in 1975 with the legislation on collective redundancies,[16] a piecemeal development of statutory requirements for consultation on a range of issues took place, where the right to be consulted

12 Owing to a history of voluntarist industrial relations, Ireland was another country with no works council tradition. For an assessment of the transposition of the Directive in Ireland, see Doherty (2008).

13 Co-determination means employee representatives sharing responsibility with management for making decisions in areas such as organisation of working time, methods of remuneration, leave arrangements, health and safety, and bonus arrangements (Barnard, 2006a, p. 703).

14 Rogers and Streeck (1995, chapters 3 and 11).

15 Relatively general statutory employee consultation systems, albeit of comparatively recent origin, are available in new Member States in Central and Eastern Europe as well (the Czech Republic, Hungary, Latvia and Lithuania). In Nordic countries, such as in Sweden, works councils exist but are essentially trade union bodies, established and regulated by collective agreement rather than legislation (Rogers and Streeck, 1995, chapter 7).

16 Sections 188–198 of Trade Union and Labour Relations (Consolidation) Act (TULRCA) 1992, as amended.

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was, though, confined to representatives of recognised trade unions. Following two European Court of Justice (ECJ) decisions in the 1990s condemning this choice of representation,[17] a 'modified single channel' (Davies, 1994, p. 279) emerged, under which worker representation is primarily conducted by recognised trade unions but, in the absence of union representation, workers can be represented by elected representatives, who negotiate a 'workforce agreement'. The transposition of the European Works Councils (EWCs) 94/95/EC Directive[18] in 1999, by the Transnational Information and Consultation of Employees (TICE) Regulations,[19] extended the range of issues on which employees have statutory information and consultation rights through the creation of a standing works council-type body, albeit of a transnational nature. But, recent years have also witnessed significant decline in multi-employer, sectoral bargaining, which had accelerated rapidly in the mid-1980s (Brown, Deakin, Nash and Oxenbridge, 2000), declining trade union membership and influence, a decrease in the incidence of joint consultative committees and an increase in direct forms of employee involvement (Kersley *et al.*, 2006).[20] Alongside these developments, there came a 'growing heterogeneity of representational forms within British workplaces' that includes non-union structures and hybrid arrangements combining both union and non-union representation (Charlwood and Terry, 2007, p. 325).

In this context, it is important to outline the approach of the government and the two sides of industry, i.e. the TUC and CBI, towards the introduction of the 'rung two' form of representation.[21] On the government side, the Commission's proposal for the adoption of the I&C Directive was originally rejected on the basis that it would 'cut across existing practices in Member States to no benefit' and 'was difficult to reconcile it with subsidiarity' (DTI, 1998). Following the collapse of an Anglo–German 'deal' that involved British support for German concerns regarding the European Company Statute and the re-election of Labour in 2001, the Labour government was forced to withdraw its opposition. On the industrial relations side, the TUC had originally considered any proposal for the introduction of 'works councils' for the purpose of information and consultation as a risk either to 'duplicate existing structures' which would have been 'superfluous', or 'to supersede existing trade union arrangements' (TUC 1973, para 94). Trade union attitudes changed in the 1990s, in a period when union membership fell to below a third of the workforce and collective bargaining coverage below a half. Recognising that the previous regime did not substantially help the union movement in organising in sectors where the threat of industrial action was not potent, the 1995 proposals 'Your Voice at Work' included consideration of other forms of employee representation. The adoption of the I&C Directive was identified as a 'real strategic breakthrough', with major implications for patterns of employee representation and trade union organising strategies in Britain (Monks, 2002). In contrast, employers' associations, mainly the CBI, have traditionally resisted the introduction of statutory requirements for I&C rights on the basis that such legislation would increase 'red tape' and delay organisational decision-making. When the Directive was adopted, the CBI stated that they were disappointed by the agreement but added that 'the current text contains

17 C382/92 and C383/92 *Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland* [1994] I.C.R. 664, in which the Court held that the United Kingdom had failed to comply with the requirements of Directives 77/187 (OJ 1977 L61/26) and 75/129 (OJ 1975 L48/29) by failing to provide for consultation of workers' representatives where there was no recognised trade union.

18 Directive 94/45/EC on the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (OJ 1990 C39/10), as amended by Directive 97/74/EC (OJ 1997 L10/20).

19 Transnational Information and Consultation of Employees Regulations 1999, SI 1999/3323.

20 The notion of joint consultative committees refers to 'committees of managers and employees that are primarily concerned with consultation rather than negotiation' (Kersley *et al.*, 2006, p. 126).

21 'Rung two' refers to legally based forms of information exchange and consultation between management and employee representatives (McCarthy, 2000, p. 530).

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some useful flexibilities that will help limit its damaging impact. We will want to make full use of these in the implementation process' (CBI, 2002a).

3 Methodology

Empirical research, which employs a reflexive law framework, necessitates the replacement of a single horizontal chain of causal relations by 'a multitude of autonomous but interfering fields of action in each of which, in an acausal and simultaneous manner, recursive processes of transformation of differences take place' (Patterson and Teubner, 2005, p. 221). Bearing in mind that information is constructed internally by each system, the objective of analysis becomes one of inquiring into the self-steering processes developed by the systems. This is understood as 'the *minimisation of a difference*, an attempt to reduce the difference between the current situation and the desired one' (p. 221, emphasis in original). In this context, EC regulatory attempts in the form of the I&C Directive can produce effects arising from the construction of differences by the European legislators concerning employee consultation regulation at national level and their attempts to minimise these differences. Crucially, the nature of these effects depends, in turn, on the internal construction by the national systems of the differences between the EC regulatory interventions and the pre-existing norms and conventions concerning information and consultation in each Member State and their respective attempts to minimise them (Luhmann, 1997).

In order to identify the specific programmes of difference minimisation that each system followed at any given moment, the paper retells the divergent stories of employee consultation regulation in the offices of the regulator, the employers' and employee representatives' workplaces, and the enforcement agents' meeting rooms. A textual analysis of documents produced by the actors involved in the transposition and implementation of the I&C Directive, mainly BIS, the Central Arbitration Committee (CAC), trade unions, employers' associations and consultancy organisations, first provides a contextual understanding about the programmes constructed by each system for the purpose of minimising the difference produced by the I&C Directive. This data is complemented by a series of interviews with a range of public officials with responsibility for the transposition and enforcement of the new legislation. The officials represented the European Commission, BIS, the Advisory Conciliation and Arbitration Service (ACAS) and the CAC.[22] Interviews were also carried out with trade unions,[23] officials of employers' associations[24] and other advisory bodies that were involved in the transposition of the Directive and/or had a capacity for action during the implementation of the I&C Regulations.[25] Further, a survey on employee consultation was conducted in the chemical industry sector in 2006 (Koukiadaki, 2008, pp. 97–108). Its objective was two-fold: to provide a

22 The interviews with the representatives of the European Commission, BIS and ACAS were conducted in 2004 and 2005. The interview with the CAC official was conducted in early 2007.

23 The officials represented the following unions: TUC, Universities College Union (UCU), Unite Graphical, Paper and Media (GPM), General, Municipal, Boilermakers and Allied Trade Union (GMB), Broadcasting Entertainment Cinematograph Union (BECTU). The Union of Shop, Distributive and Allied Workers (USDAW) and the Transport and General (T& G) Union (as was then, now Unite) were contacted for their views but were not interviewed. The interviews with the trade unions, which in some cases involved repeat interviews so as to assess the impact of the legislation in the longer term, were conducted between 2005 and 2008.

24 These were: CBI, Engineering Employers' Federation (EEF), Chemical Industries Association (CIA), Electrical Contractors' Association (ECA), Employers' Organisation for Local Government (LGE) and Chartered Institute of Personnel and Development (CIPD). The interviews with the employers' associations, which in some cases involved repeat interviews so as to assess the impact of the legislation in the longer term, were conducted between 2005 and 2008.

25 Involvement and Participation Association (IPA). A first interview was carried out in 2005 and a repeat interview took place in 2008.

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sector-specific picture concerning the industry's approach to the legislation; and to assess the extent to which a kind of residual 'associational governance' – as a result of the CIA's active sectoral policy in the area of employment law – could promote awareness of the legislation and proactive compliance among the members of the association.[26] Finally, as there is no requirement to register I&C agreements with any public or other authority, it is not straightforward to determine the exact number and nature of agreements being concluded. Instead, the research draws upon published survey findings on the incidence of I&C arrangements, data from press releases, company information and cases adjudicated on by the CAC and Employment Appeal Tribunal (EAT), to provide an approximation of changes in employee consultation, in the light of the introduction of the legislation. The overall timeframe of the research, i.e. 2004–2008, intended to capture both the process for the transposition of the Directive and the early phases of the staged implementation of the I&C Regulations.[27]

4 Examination of key issues

The I&C Directive intended to remedy the lack of established structures for the exercise of consultation rights in certain Member States, including Britain, to promote the social dimension of Europe, and to increase the efficacy of existing Community and national law concerning the information and consultation of employees (Commission, 1998). But the Directive left a number of important aspects to be determined by Member States, including: the enabling or not of I&C arrangements that may differ from the provisions of the Directive; the designation of the 'employees' representatives' who would be informed and consulted; and the specific enforcement mechanisms and sanctions available in case of non-compliance. Public consultation on its transposition started in 2002 and an outline scheme was agreed in 2003 between the CBI and the TUC with the participation of BIS 'within parameters set by the government', which included that 'there should be no single, static model for information and consultation' (DTI, 2003a). The outline scheme included proposals for negotiations on I&C procedures to be triggered by employee request, and for endorsement ballots where so-called pre-existing agreements were in place. It also delineated statutory provisions, applicable where no negotiated agreement was reached, involving an 'I&C committee' – albeit the final I&C Regulations did not specify a representative body as such (Hall, 2005) – with representatives elected by employee ballot, and compliance and enforcement provisions. Based on further feedback, a revised draft of the Regulations was published in 7 July 2004,[28] which was accompanied by a consultative guidance on their implementation.[29] The final form of the legislation was published in December 2004.[30]

26 The questionnaire was distributed to approximately 120 CIA member organisations in May 2006 and 38 returns were received within a month – a 32% response rate, which is considered very good for this type of exercise.

27 See fn. 8.

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

29 On the 2 November 2004, BIS published the government's response to the public consultation on the draft guidance and a summary guidance to the new legislation.

30 Primary powers based on Employment Relations Acts were given to transpose the Directive. The decision was made on the basis that the powers under section 2(2) of the European Communities Act 1972, which are

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The most important elements of the legislation are: the stipulation that employers need not act unless 10 percent of their employees trigger statutory procedures intended to lead to negotiated agreements;[31] the possibility for effectively pre-empting the use of the Regulations' procedures through the conclusion of voluntary PEAs that can vary the nature of I&C arrangements that will apply;[32] and, finally, the possibility for providing direct forms of information and consultation in the cases of PEAs and negotiated agreements rather than informing and consulting indirectly through employee representatives.[33] In line with the Directive, the standard provisions become applicable only as a fall-back in situations where the employer is obliged to initiate negotiations, but fails to do so, or where a negotiated agreement is not reached within the stipulated time period.[34] Reflecting the complexity of the regulated area, the analysis concentrates on the transposition and implementation of the Directive in five key areas, i.e. the nature of I&C arrangements and the standard provisions, the trigger mechanism, the choice of employee representation, the option for direct forms of information and consultation, and the enforcement regime.

4.1 Nature of I&C arrangements and the standard provisions

A key BIS objective was that, in line with the political agenda, the introduction of legislation concerning employee consultation should conform to the encouragement of 'partnership and flexibility' and to the promotion of high organisational performance (DTI, 2002; Lorber, 2003). In rejecting a 'copy-out' approach to the transposition of the Directive, BIS sought specifically to let the parties tailor the arrangements to their particular circumstances and, in that way, opt out from the more stringent standard information and consultation rules (BIS interview). The regulator's considerations were in line with the CBI and TUC views that the establishment of I&C arrangements should mesh effectively with the spirit of voluntarism, which had hitherto been the guiding principle in employee representation (CBI and TUC interviews). The CBI interpreted art. 5 of the I&C Directive as allowing companies to turn existing arrangements into agreements and to negotiate different agreements after the legislation had come into force. While the TUC welcomed the potential for compliance through arrangements of a different nature, the organisation stressed the need for the arrangements not to be 'foisted upon' employees (TUC interview). Instead, parameters should be introduced concerning what could qualify as PEAs, and the process for negotiating and concluding agreements, where the trigger had been pulled, should lead to a genuine agreement (TUC interview).

As a result, the option to make the Directive's provisions default rules was taken up, and two main ways of opting out of the default rules, i.e. one before the trigger was pulled (PEAs)[35] and the other after it (negotiated agreements),[36] were provided in both the outline scheme and the final legislation. But, in contrast to the approach adopted for the transposition of the 'soft' provisions of the Directive, the transposition of the standard provisions for information and consultation was 'copied out' from art. 4 of the Directive.[37] This was welcomed by the CBI, but considerable

usually used to implement EC Directives, were not sufficiently wide to cover aspects of the proposed Regulations (DTI, 2004), controversially including the option for direct I&C forms (Davies and Freedland, 2007, pp. 154–155; see section 4.4 below).

31 I&C Regulations 2004, reg 7.

32 I&C Regulations 2004, reg 8.

33 I&C Regulations 2004, regs 8(1) and 16, respectively.

34 I&C Regulations 2004, reg 19(1).

35 I&C Regulations 2004, regs 2 and 8(1).

36 I&C Regulations 2004, regs 2 and 16.

37 I&C Regulations 2004, reg 20. A number of issues in the standard provisions were modelled on those in the TICE Regulations. As a result of this, there is no provision in the I&C Regulations for a right of employee representatives to time off for training.

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weaknesses were identified by the TUC concerning the treatment of substantial issues, such as the topics of information and consultation, the timing of consultation, and the right to access to experts (TUC interview).

Making use of the flexibilities that the legislation offered, and opting for the significant leeway that PEAs or negotiated agreements permit, constituted significant themes in the guidance published by different employers' associations, such as the CBI, CIA and EEF, when the Regulations came into force in April 2005. Law firms and management consultancies also drew attention to the benefits of concluding PEAs before and after the application of the legislation. Facilitated by the adoption of an 'option policy' by the I&C Regulations, employers have been able to choose among a variety of legal options, which can be used as they see fit (Teubner, 1993, pp. 93–94). As seen, options include doing nothing, pre-empting the use of the statutory procedures through the conclusion of PEAs, and proceeding to the conclusion of negotiated agreements or to the application of the standard provisions. Evidence suggests that the most common employer response to the Regulations has been to undertake reviews of their existing arrangements (CBI, CIA and EEF interviews). Based on such reviews, a number of employers, mostly large undertakings,[38] have proceeded to the introduction or formalisation of existing I&C arrangements (CBI, 2006; Welfare, 2006; Edwards *et al.*, 2007; Wolff, 2008).[39] Proactive employer responses have been more frequent in organisations with existing consultative arrangements or unionised workforces, such as in the chemical, financial services and utilities sectors (CIA and IPA interviews; CIA survey; Hall, Adam and Koukiadaki, 2005). Arrangements have also been introduced in the voluntary sector, where collective bargaining arrangements have been traditionally absent (IPA interview).

In line with the employers' associations' emphasis on the flexibility of the legislation, the majority of I&C arrangements that have been established or amended in light of the legislation, are in the form of PEAs. Negotiated agreements have been less widespread and, apart from some cases in the chemical industry (CIA interview), there has been very little evidence of I&C arrangements being introduced as a result of the application of the standard provisions. However, the statutory requirements for a written agreement and the increased scope for flexibility in the PEA option reportedly constituted a source of uncertainty among employers (ACAS interview). This finding confirms earlier studies that highlighted the lack of tradition in Britain of using collective or 'workforce' agreements to vary the terms of legislative labour standards (Barnard, Deakin and Hobbs, 2003). Concerns have been raised also by employers' representatives, who suggested that, if tested, a considerable number of PEAs would not satisfy the statutory requirements. Such testing can arise when organisations face instances of major restructuring, potentially including collective redundancies (CIA interview), an issue particularly challenging in the current economic context.

Absence of clarity, particularly in terms of whether I&C agreements were approved by or on behalf of employees, has been reported as well. Whereas most employers have sought approval of the arrangements by workforce ballot, survey evidence suggests that in some cases the arrangements were not designed in consultation with employees (CBI interview); instead, the overriding majority

38 Only a 2008 IRS survey reported that 41% of organisations employing between 50 and 149 employees had made changes to the way they informed and consulted their employees during the previous three years, partially to comply with the I&C Regulations (Wolff, 2008).

39 However, the evidence from these surveys has to be treated with caution as they are not comprehensive and are sometimes inconsistent. For instance, a 2008 survey by the CIPD found that only 2 out of 5 respondents had implemented new consultation arrangements since the introduction of the regulations in 2005. Of these, 76% had entered into a voluntary agreement formalising existing arrangements, and 22% had introduced new arrangements following negotiation with employee or union representatives (CIPD, 2008). The most representative survey in the area, the Workplace Employment Relations Survey (WERS), reported that whereas in 1998 47% of workplaces were covered by a joint consultative arrangement, the proportion in 2004 stood at 39% (Kersley *et al.*, 2006). However, the fieldwork for the survey, carried out in the spring of 2004, may have been conducted before employers had begun to assess the likely impact of the legislation.

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were designed and signed off by management (CBI, 2006; ESG, 2004; Welfare, 2004; 2005; 2006). Further, a significant number of arrangements do not cover the entire workforce (Welfare, 2004) and are not in writing (Welfare, 2006; Wolff, 2008), thus raising questions about the legal validity of the agreements. In terms of the operational terms of the arrangements, such as their competence and subject-matter, research on I&C agreements suggests that the majority of organisations have I&C arrangements that diverge from the standard provisions (Koukiadaki, 2008, p. 172; Jameson, 2009).

Unions appear to have adopted differing and ad hoc approaches to the legislation, with disparities apparent within individual unions and by regions. However, proactive efforts have generally been low as unions are mostly interested in union recognition and collective bargaining (TUC interview). Even in cases where union recognition agreements are already in place, as in further and higher education, there have been limited union attempts to use the legislation to promote employee interests. But, certain unions have adopted a less indifferent approach to the legislation. For instance, BECTU, the National Union of Rail, Maritime and Transport Workers (RMT) and Prospect have either extended and refreshed their existing union agreements or negotiated I&C agreements that maintain the collective agreement for the required bargaining unit (TUC interview), deepening, as a result, the interaction between employer and union, rather than leading to the setting of up of a competing structure (Davies and Freedland, 2007, p. 157). More importantly, in the paper, print and publishing sector, Unite has effectively tested the legislation through applications to the CAC, and has held discussions with management for the conclusion of negotiated agreements, as the latter secures the applicability of the enforcement provisions (Unite GPM interview).[40] The preference for negotiated agreements stands in contrast to the stance adopted by other unions, who have reportedly been advising representatives that it is best to take the informal approach and reach an agreement, i.e. a PEA, under conditions that suit them, rather than having to follow the procedure for the negotiated agreements set out in the Regulations (LRD, 2004, p. 15). Unite GPM has also developed model I&C agreements with the British Printing Industries Federation (BPIF), the Scottish Printing Employers Federation and the Confederation of Paper Industries.

4.2 The trigger mechanism

While the Directive did not provide for a trigger mechanism as such (Davies and Kilpatrick, 2004, pp. 149–150), recital 15 stated: 'This Directive is without prejudice to national systems regarding the exercise of this right in practice where those entitled to exercise it are required to indicate their wish collectively.' The implication of referring to the 'right' to information and consultation in the Directive was that employees may not necessarily exercise it and that employers need not be obliged to inform and consult where this is the case (Hall, Broughton, Carley and Sisson, 2002, p. 9). In Britain, the designation of a trigger mechanism proved essential in winning the support of the industrial relations actors to the transposition and implementation of the I&C Directive. Relying on the messages coming out from the 2002 consultation exercise, the British regulator was in favour of legislation that would not do away with effective pre-existing arrangements and would ensure that I&C arrangements would be introduced only where there is a degree of employee support (BIS interview).

According to the TUC, the establishment of a trigger mechanism would prevent challenges by individual employees who are disgruntled with a union for some reason, while ensuring that the unions have sufficient support to allow them to negotiate a lasting and workable system (Veale, 2005). In that respect, the trigger mechanism was described as the *'flexible friend of unions'* (TUC interview). The CBI equally wished to protect existing arrangements so that their members would not have to face disruption in the ways existing arrangements operated. An 'opt-in-approach' was

40 See section 4.5.

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adopted in the outline scheme and the final legislation so that employers are required to act only when a request for I&C arrangements is made by at least 10 percent of the workforce[41] but without, unlike the TICE Regulations, any provision for a representative of the requisite number of employees (for example, a trade union) to pull a trigger at any time. The employer, by contrast, has the right to pull the trigger at any time. Further, where 10 percent of the workforce want to hold negotiations on new arrangements, qualifying existing arrangements can be maintained unless a majority of those who vote in it, as well as at least 40 percent of the workforce, endorse the request for new negotiations in a ballot.[42] There was reportedly divergence over this form of 'double trigger', with the TUC initially arguing for a lower level and the CBI supporting the 40 percent threshold, but the TUC finally accepted that 'anything less onerous would have exposed existing agreements (including trade union agreements) to easy challenge' (TUC interview).

In practice, employers have assessed the prospects of their employees seeking to trigger the procedure for the conclusion of negotiated agreements (CBI, CIA and EEF interviews). However, a significant number of employers have seen no need to establish PEAs, as they believe their existing arrangements are compliant to the statutory requirements and/or that employees will not trigger the process for negotiated agreements (EEF interview; Hall *et al.*, 2005; Welfare, 2006). Such views were confirmed in the CIA survey, where it was found that the majority of organisations (86 percent) did not expect their employees to request negotiations for the establishment or amendment of existing I&C arrangements. Besides, the high thresholds required by the legislation have reportedly constrained the development of a proactive approach on the part of the unions, especially in non-union companies. According to the TUC interviewee:

> 'The thresholds have done what they were supposed to do to an extent [assist in preserving existing agreements with unions] but the one big problem with them, which I think none of us foresaw, was that if you are out there in the workplace organizing you have got a threshold to meet. In a sense if you think you have got adequate support for information and consultation, why not hang on a bit longer and go for recognition?'

Importantly, despite being interested in the value of consultation (Talking People, 2005), individual employees lack awareness of their rights, according to surveys (Croner, 2005; CHA, 2005). Employers, but also trade unions, have reportedly done little to make employees aware of their legal rights under the Regulations (Croner, 2005). Representatives from employers' associations also suggested that the level of employee awareness of the legislation has been limited, and that there is little further employee demand for the establishment/amendment of arrangements (CIA and EEF interviews). The lack of employees triggering the process for the conclusion of negotiated agreements has been highlighted in surveys as well. For instance, the 2006 IRS survey reported that just two employers had received a request to negotiate new arrangements under the Regulations (Welfare, 2006).

4.3 The employee representation channel

With its company-based collective bargaining system, a potential difficulty in Britain is that where I&C arrangements are established alongside bargaining arrangements, competition can arise between the two bodies. There is already an issue of, as Ewing (2001) puts it, 'institutional

41 This percentage is subject to a minimum of 15 employees and a maximum of 2,500 (I&C Regulations 2004, reg 7).

42 I&C Regulations 2004, reg 8(6)(a) and (b). The first draft stated that '40% of employees in the undertaking endorse the employee request' (reg 8(5)(b)). According to the interviews with the policy actors, the insertion of the 'majority of those who vote' was a result of the CBI's insistence (see also, CBI, 2003, para 14).

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incoherence' in the system of collective representation, a problem which, as Bercusson (2001) points out, is compounded by the 'multitude of representational possibilities' in the 1999 TICE Regulations. A 'union priority' approach (Davies and Freedland, 2007, p. 147) would not only avert the development of competition between the I&C arrangements and the unions, while simultaneously securing the independence of representatives, but would also act as a means to access strategic, financial and organisational information that would be useful when engaging in collective bargaining (TUC interview). This view was rejected by the CBI and BIS on the following grounds: first, the Directive did not afford any special position to trade unions; second, unions no longer represented a substantial part of the workforce in Britain; and finally, the new legislation should be consistent with the 'all-employee bodies model' set out in the TICE Regulations (CBI and BIS interviews). Subsequently, no priority to recognised unions was stipulated in the I&C Regulations. Instead, representatives are to be elected in the case of the standard provisions by the entire workforce in a statutory ballot procedure scrutinised by an 'independent ballot supervisor'.[43]

In the light of this, it is not surprising that trade union officials have been concerned that employers can, in practice, set up alternative I&C mechanisms with employees, even where there are already existing arrangements with unions. This is particularly challenging in situations where there is partial trade union presence, i.e. at some levels or in some parts of an undertaking. Drawing the boundaries between consultation and negotiation has been considered another key challenge for the TUC. Accordingly, the TUC has advised unions to ensure that the distinction between collective bargaining and consultation remains, so that where employers set up new I&C arrangements, they do not result in the dissolution or reduction in collective bargaining (Veale, 2005). There is limited evidence that employers are deliberately using the legislation to marginalise existing union-based arrangements. However, I&C agreements have been concluded in a number of non-union organisations to prevent union organising activities (EEF and CIA interview notes). Apart from establishing supplementary arrangements for non-union groups of employees in cases where unions are recognised, or establishing I&C arrangements for which elections are held for all seats, it is reportedly more common to proceed to the establishment of 'hybrid' (Hall and Terry, 2004) arrangements made up of representatives from other, non-union, groups (CIA and IPA interviews).

As a result, there have been some moves in companies away from a traditional single channel to a dual channel system with recognised trade unions and collective bargaining on the one hand, and I&C procedures on the other hand. There is limited evidence of the division between issues for negotiation and consultation being blurred, as distributional issues continue to be channelled into collective bargaining with the unions (Koukiadaki, 2008, p. 233). Only discussions between employers and employees over production, employee welfare and personnel have been channelled into information and consultation with the newly established/amended arrangements. Nonetheless, the issue of trade union representatives sitting at the table with the so-called 'noners', i.e. non-union employee representatives, was mentioned by both unions and employers as constituting a complicated dimension in practice (EEF and CIA interviews).

4.4 Direct forms of information and consultation

As early as 2002, the British regulator had stated that in considering how to best implement the I&C Directive, 'we should build on UK experience and create room for the wide diversity of practices that have built up over the years, combining both *representative* and *direct* forms of participation' (DTI, 2002, emphasis added), the rationale being that increased flexibility was a key ingredient of high-performance workplaces. In a similar vein, the CBI held that the insertion of a compliance option for

43 I&C Regulations 2004, regs 19 and sch 2, para 6.

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direct forms of information and consultation would be in line with the prevalence of direct communication practices in British workplaces, and would promote high organisational performance (CBI, 2002b, para 11). In contrast, the TUC identified legal and practical problems with respect to the direct participation compliance option, i.e. the potential lack of compliance of such forms of consultation with the Directive which emphasised consultation with workforce representatives, and their practical inefficiency, respectively.

While the 'outline scheme' made no explicit provision for direct forms of information and consultation, there was one phrase in it where the parties seemed to have left open the possibility for the regulator to include in the Regulations this compliance option (Hall, 2005). Reportedly, BIS did not act on its own when it included this provision in the draft Regulations (CBI and BIS interviews). The fact that the inclusion of direct I&C forms was implicitly stipulated in the 'outline scheme' did not allow the TUC to challenge this once the draft legislation was published:[44]

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

Under the current legislative framework, both PEAs and negotiated agreements may provide for the information to be given to, and the consultation to take place with, the employees directly rather than through their representatives.[45] Direct consultation can constitute a legal means of complying with the I&C Regulations when employees so choose under the PEA option. However, the fact that the existence of such consultation forms prompts the application of substantially higher thresholds of support for negotiations over new I&C arrangements to take place (40 percent of the employees and a majority of those voting in a ballot), and that, in the case of a negotiated agreement, access to the standard provisions is blocked for at least three years,[46] may frustrate the exercise of the I&C rights, via representatives, as envisaged by the Directive (Deakin and Morris, 2005; Davies and Freedland, 2007).

Despite the business case arguments concerning direct information and consultation by both the CBI and BIS, there has been very limited evidence of employers using such methods to comply with the legislation. Direct I&C methods have been in some cases used only for certain groups of employees, e.g. head office or managerial staff, not previously covered by existing consultative arrangements (Hall, 2006, p. 466). Only Yellow Pages (Unite, interview notes) and mobile operator 3 (*Personnel Today*, 2005) have reportedly used direct I&C methods to comply with the legislation for the whole of their workforce. The limited use of direct I&C forms is possibly due the fact that most I&C arrangements have been introduced so far in larger undertakings, where direct I&C methods are usually already in place and are sometimes complemented by indirect employee representation mechanisms. Besides, direct I&C forms lack clear endorsement on the part of employers' associations for fear that such forms may arguably be legally questionable (CIPD and EEF interview notes). Instead, consulting with representatives is considered beneficial for the companies in terms of the skills and experience of the representatives and the trust built-up between management and employee representatives. Collective consultation can be also a way for ensuring that adequate consultation through representatives takes place when required by the law, such as in cases of collective redundancies and transfers of undertakings (Clegg, 2005).

44 Perhaps the TUC hopes that the provision for direct information and consultation, even though based on the outline scheme, can still face challenges before the ECJ (see Commission, 2008).

45 Regs 8(1)(d) and 16(1)(f).

46 Reg 12(1)(a).

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4.5 Enforcement and remedies

The appointment of the CAC as the primary enforcement mechanism was strongly promoted by the TUC (TUC interview) and the CAC itself (Burton, 2004), on the basis of the Committee's practical and legal experience in collective procedures. But drawing on precisely this experience, the CBI and other employers' associations argued against the expansion of CAC's role into information and consultation, an area reportedly very different from that of union recognition (CBI, CIA and EEF interviews).[47] The British regulator agreed to allow complaints relating to failure to inform or consult, under the terms of an agreement reached under the legislation or the default procedure, to be made to the CAC. This decision was reportedly down to concerns that the workload of the EAT, which is responsible for enforcement in the TICE Regulations, was already overwhelming. Under the final text of the I&C Regulations, the CAC is also the body responsible for complaints about the trigger and the nature of agreements on procedures.[48] But, in line with the CAC preference for not having responsibility for imposing sanctions for breach of its orders (Burton, 2004), the EAT has responsibility for the provision of remedies that, as in the case of the TICE Regulations, are only financial.[49] However, unlike redundancy consultation, there is no provision for compensating employees in respect of whom a failure to consult has occurred. Further, the financial penalty, which cannot exceed £75,000, is payable to the Treasury.[50]

The enforcement regime is only applicable where a negotiated agreement is reached under the Regulations' procedures, or the standard information and consultation procedures apply; in such cases, employees/representatives may complain to the CAC if the terms of the agreement or the standard provisions have not been complied with.[51] Instead, any dispute about the operation of the arrangements arising from a PEA would need to be dealt with in accordance with any dispute resolution procedures the agreement itself provides for,[52] or by voluntary reference to ACAS's conciliation services. The role of the CAC is to ensure that the parties take steps to implement the legislative requirements. The Committee takes a problem-solving approach and helps the parties, where possible, to reach voluntary agreements outside the statutory process. But, in contrast to the statutory trade union recognition procedure, where recognition claims can only be submitted by trade unions, claims in the case of information and consultation can be submitted by trade unions acting as employee representatives, employee representatives, groups of employees or individual employees. Further, the I&C Regulations do not provide for a continuous process: the CAC can intervene at different stages, and then return the matter to the parties.

As suggested in section 1, power-based sanctions constitute a form of coupling and interference between different social systems. In that way, a communication link is established through which the systems, in this case the legal and the industrial relations system, can be coupled (Teubner, 1993, p. 91; Hobbs, 2005). According to the CAC 2006/07 Report (2007, p. 4), the Committee 'anticipated

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47 Neil Bentley (CBI) reportedly stated: 'Our experience of the CAC is that it has been too union-friendly. Modern employment relations use both direct and indirect communication with the workforce. But the skills pool of the CAC seems to draw on out-of-date industrial relations experience, where only representative structures are deemed to constitute valid consultation' (Overell, 2005).

48 Despite the clear stipulation of the CAC as the primary enforcement mechanism in the outline scheme, the CBI continued their opposition to the CAC's appointment after the conclusion of the scheme (CBI, 2003, paras 3 and 5) on the basis that they had not agreed to the enforcement of the I&C Regulations being given to the CAC. This runs in contrast to the position adopted by the TUC concerning the direct I&C compliance option (see section 4.4 above).

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

50 Reg 22(7).

51 This would include a failure on the employer's side to establish the agreed or required procedure, or, having established it, a failure to inform and consult in line with the agreement or the standard provisions.

52 The dispute may be brought before the courts if the agreement provides for legal enforceability.

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that this (I&C Regulations) would be a growth area for the CAC and although informing and consulting employees remains a fundamental part of the employment relations agenda it has led to few cases for the CAC'. Specifically, requests from employees regarding the establishment of I&C arrangements were received in respect of six employers in 2006 (CAC, 2006), none in 2007 (CAC, 2007), four in 2008 (CAC, 2008) and four in 2009 (CAC, 2009). In every case, the employer provided the names of those employed in the undertaking to enable the secretariat to report accurately to them on the number of employees making a request.

Additionally, the CAC has received twenty-six applications for decisions on issues arising under the Regulations.[53] A significant number of the applications, i.e. eight, have been made with regard to reg 19 (4), i.e. in the case where arrangements for a ballot to elect I&C representatives have not been arranged. Interestingly, eight applications have also been made with regard to reg 22(1), i.e. where the employer has failed to comply with the terms of the negotiated agreement or, as the case may be, one or more of the standard information and consultation provisions. Nine applications concerned employers in the graphic, print and media industry and were made either by Unite acting as employee representatives or were most likely organised informally by the union. This finding is in line with Unite GPM's strategy to challenge before the Committee the conclusion of agreements that provide for 'substandard I&C arrangements, which undermine the whole spirit of the new Regulations' (Unite interview). But significant problems, associated with the institutional design of the legislation, have reportedly hindered trade unions and employees from using the legislation (Unite interview), including: the ambiguity in the notion of the 'undertaking'; the need to identify the exact number of employees in the company for the purpose of triggering the process for the negotiation of I&C agreements; the discretion of management when deciding on the constituencies for the negotiating and I&C representatives; and the limitations in the PEA option (i.e. non-availability of sanctions, ambiguity concerning the methods of employee approval, and the possibility of concluding PEAs after the introduction of the legislation). The potential difficulties for individual employees bringing complaints in both large (due to possible geographical dispersion of sites) and small (due to potential exposure) companies before the CAC were also brought to attention (CAC interview).

Out of the total of twenty-six applications, eleven were withdrawn, twelve decisions have been issued and three were still live at the date of the research. The two most significant cases for the purpose of clarifying specific statutory provisions are *Stewart and Moray Council*[54] and *Amicus and Macmillan Publishers*.[55] The first case was brought before the CAC by a single employee. As such, it indicates that the widely held views that only unions would ever have the ability to organise formal employee requests for a new I&C agreement may not be true. Further, valuable observations were made by the CAC and the EAT about the nature, content and coverage of PEAs. In finding that a prior collective agreement with a trade union did not meet the requirements for a PEA, the decision by the Committee has been seen as a notice for employers and unions that rely on vague arrangements for consultation with respect to what exactly the employer undertakes to do, and how the I&C process will be conducted. At the same time, the CAC and EAT were prepared to accept as valid PEA agreements approved by trade union representatives where a majority of employees belonged to a union.

53 Of those applications, three were made with regard to MacMillan Publishers Ltd, four with regard to Moray Council, two with regard to West Ferry Printers and four with regard to Bournemouth University.

54 Case number IC/3/(2005) 9 December 2005. For the appeal, see *Stewart v. Moray Council* [2006] IRLR 592 (EAT).

55 Three complaints were made in this case. See case number IC/4/(2005) 22 February 2006 and case number IC/8/(2006) 16 February 2007. For the appeal, see *Amicus* (*as employees' representatives*) *v. Macmillan Publishers*, appeal number UKEAT/0185/RN.

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The second case, *Amicus and Macmillan Publishers*, dealt with the consequences for the employers, when faced with a request from their employees, of taking no action on the assumption that existing arrangements thought to be comprehensive and widely supported would satisfy the requirements of the legislation. As the employer had not challenged the validity of the request or sought to sustain the existing arrangements by conducting a ballot, the CAC decided that the company was under an obligation to initiate negotiations, did not do so within the prescribed timescale, and was thus subject to the standard provisions. A consequence of the application of the standard provisions was that the company was under a further obligation to arrange an election for I&C representatives. The union then applied to the EAT for a penalty notice and, on 24 July 2007, the EAT made an award of £55,000, declining to award the maximum penalty of £75,000 on the grounds that this was 'not the most serious' breach that might be envisaged by the legislation.[56]

5 Assessment

The steps finally taken for the transposition of the I&C Directive in Britain cannot be equated to the formal incorporation of employers' associations and trade unions in the EC-level legislative process, or to the legislative function that the social partners perform in some Member States, where EC labour law is transposed by collective agreements. Crucially, the opportunity for the inclusion of the CBI and TUC was first promoted by the institutional design of the Directive. The EC official involved in the process for the adoption of the Directive noted:

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

But the incorporation of the CBI and the TUC in the development of the I&C Regulations was also expected to impact on the degree of acceptance and compliance in the industrial relations system. The British regulator was eager to 'build a consensus around the introduction of the legislation' and to link, at discourse level, the I&C Regulations with the objective of maximising potential in the workplace (BIS interviewee). Not only did the CBI and TUC agree to participate in the drafting of the legislation, they also reached an agreement that became the basis for the I&C Regulations.[57] The agreement on the 'outline scheme' illustrated the possibly changing nature of the relationship between the TUC, CBI and BIS (Barnard, 2006b), with the TUC, in particular, highlighting its aspirations for developing social dialogue at a national level when it described the outline scheme as a 'social partner agreement' (TUC, 2006, p. 11).[58]

More importantly, the agreement led to a recontextualisation of the information and consultation norms promoted by the Directive. In relying on adversarialism and a strict separation of legal

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56 *Amicus (as employees' representatives) v. Macmillan Publishers*, UKEAT 0185/07. A more recent decision (*Mr G Darnton & Bournemouth University*, IC/19/2008) concluded that despite the BIS Guidance it is not necessary for an employer to take the necessary steps to begin negotiations for an agreement on information and consultation of employees within the three-month period referred to in I&C Regulations. This decision was subject to an appeal to the EAT which was ongoing at the date of this article. In another complaint (*Mr G Darnton & Bournemouth University*, IC/22/2009) the CAC specified that an agreement to extend the deadline for negotiating an agreement must specify the length of the period of extension.

57 But it has to be stressed that on this occasion the discussions took place in the shadow of obligations imposed by European law, with the threat of litigation before the ECJ lurking in the background to exercise the mind of government (Ewing, 2003).

58 But the CBI was less enthusiastic. In an interview to *The Guardian* (Elliot, 2006), Digby Jones, the then CBI Director-General, commented: 'We have no formal meetings with the TUC. I have meetings with NGOs, but I don't meet the unions. They are an irrelevance. They are backward looking and not on today's agenda.'

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regulation from employee representation and, more particularly, collective bargaining, a form of 'tight coupling' (Teubner, 1998, p. 18) has been sustained traditionally between the legal and the industrial relations system in Britain. As a result, what is imperative is the preservation of existing arrangements and the maintenance of a spirit of voluntarism in the regulation of employee consultation and representation. Guided by these considerations, the involvement of the two sides in the framing of the I&C Regulations had the effect that the transfer of EC norms was refracted and shaped to secure a response that would accommodate the new legal links within the existing social processes. In going beyond the recontextualisation that is formally envisaged under the regulatory means of directives (Maher, 1998; Deakin, 2009), the quality of the transposition of the I&C Directive was hence dependent on the social processes in the industrial relations system, which reconstructed the information and consultation norms so as to minimise the destabilisation of the existing industrial relations networks that have been traditionally responsible for information and consultation (Teubner, 1998, p. 19). The fact that the Regulations were significantly based on the outline scheme agreed by the CBI and the TUC may possibly explain why reaction to the final form of the legislation, has, to date, been relatively muted. The TUC has chosen instead to criticise only the low level of sanctions and the possibility for compliance through direct I&C methods.

The EC norms contained in the Directive were the subject of an alternative meaning in another system as well. In the political system, the government and BIS justified the transposition of the Directive on the grounds of fair treatment of workers, partnership and employee involvement (DTI, 2002, p. 4). But the potential contribution of the EC legislation to high-performance workplaces, and, in turn, to an improvement in Britain's productivity, was emphatically stressed. Although recent EC discourse increasingly stresses the importance of information and the consultation of employees in the context of economic efficiency, the EU communications that were expressly related to the I&C Directive did not straightforwardly assert that establishing I&C arrangements would increase productivity. Instead, in the explanatory memorandum accompanying the Commission's proposal (1998), four key rationales for the adoption of the Directive were identified and discussed: the political context; intra-union socioeconomic considerations on managing and anticipating change; the lessons of earlier EC employee representative participation initiatives; and the lack of established structure for the exercise of I&C rights in certain Member States.[59] In contrast, the political discourse in Britain linked employee consultation with increased economic efficiency in a rather straightforward way. Applying an autopoietic analysis, such a discourse was intended to act as a means for justifying the government's change of approach to the Directive and for engaging support from the business community that had been dissatisfied with the government's earlier failure to block the adoption of the Directive.

Moreover, this discourse can be also interpreted as being concerned with the preservation of organisational flexibility, with the government and BIS espousing the argument that employee consultation through voluntary and flexible arrangements would increase productivity (DTI, 2003b). In highlighting the economic benefits of a regulatory approach that takes the individual characteristics of the companies into account, the legislation offered a significant margin of flexibility in compliance. This was exemplified in the treatment of three significant issues: first, substantial flexibility was introduced in terms of the form and content of I&C arrangements; second, direct I&C forms were considered as complying with the legislation (DTI, 2004, p. 17); and finally, no formal role was provided to trade union representation in achieving the policy goals of the legislation. Similarly to the findings of Falkner *et al.* (2005), the design of the key features of the Directive, which were left to be determined by the

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59 The most prominent features of the political, economic, social and legal context described were: the increased importance attached by citizens to the social dimension in Europe; the globalisation of the economy; the completion and further development of the internal market; the new conditions imposed or prompted by the single currency and the European Employment Strategy; and the weaknesses of Community and national law (Commission, 1998).

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Member States, was thus partially a result of domestic political and regulatory agendas and communications, as reformulated through the adoption of a 'high-performance workplaces' discourse.

The implications of 'voluntarism' and 'flexibility' on the ability of the legal system to induce the industrial relations system to modify its existing paradigms in a way that builds on, yet allows for, a change in established norms are evident in practice. The introduction of the Regulations has acted as a catalyst for the institutionalisation of information and consultation in organisations where previously collective representation through the unions was absent, e.g. the voluntary sector. Moreover, the legislation has induced the formalisation of existing consultative arrangements through the review of existing mechanisms. It is thus plausible to suggest that employee representation structures, albeit not in the form of union recognition and not formalised in the way the Directive envisaged, were already a significant feature of organisational practice in Britain. Similar to the legislation on EWCs and trade union recognition, the I&C Regulations have driven to some extent the spread of PEAs reached in order to prevent the application of the standard provisions and less as a consequence of the trigger mechanism being used. As such, the 'shadow' effect of the statutory requirements – prompting PEAs – has been more important than its direct impact, that is, the application of the negotiated agreement option or of the standard provisions.

But, in contrast to Teubner's suggestion (1993, p. 94) that reflexive optional regulation should not 'enabl[e] those who are already powerful to become more so', the procedural conditions attached to the compliance options under the I&C Regulations have been generally rather weak. The inadequate design of the I&C Regulations, particularly regarding the trigger mechanism, is reflected in the generally low expectation on the part of employers that their employees would request negotiations on the establishment of negotiated I&C arrangements. As a result of high thresholds, the requirements for statutory employee consultation have been ignored in many undertakings, limiting in turn the extent to which opportunities can arise for the integration of employee interests in management decision-making. This is illustrated in the findings that very few I&C arrangements 'started from scratch' (EEF interview), i.e. in companies without existing consultative arrangements or unionised workforces. What's more, while the coverage of the Regulations extended progressively and now covers all employers with over fifty employees, the evidence of take-up has become progressively weaker. Most commentators suggest that there have been few cases of I&C arrangements being established or amended in smaller organisations, where dedicated personnel departments, which are usually aware of legislative developments, are not available (Coupar, 2009, p. 1; Jameson, 2009). Besides, as seen, while being promoted as a means to high workplace performance, direct I&C forms are not considered as a compliance option responsive to the characteristics of the British system of industrial relations.

Evidence of collective organisation for the establishment or amendment of I&C arrangements is also lacking. As a result of the absence of any formal role for unions in the legislation, there is no natural regulatory space within the company which consultative structures may occupy (Davies and Kilpatrick, 2004, p. 127); competing forms of employee representation, if created, thus exist side-by-side in British workplaces and companies. Despite the rather positive union stance at policy level and the encouraging results from union officials/representatives surveys, unions have not, with few exceptions, challenged existing practices or acted proactively to negotiate I&C arrangements. Evidence of collective organisation has only been provided in regional/sectoral associations, which are usually characterised by the existence of shared norms of behaviour among actors (CIA survey; Unite GPM interview; Hall *et al.*, 2005). Further, in cases where PEAs have been concluded, employee approval for the agreements has sometimes been secured through questionable means, e.g. email. In contrast to the intention of the Directive to transcend the unilateral character of employee involvement initiatives and provide scope for participation to the employee side, the I&C Regulations have surprisingly served as guidelines for the legitimisation of management as the party responsible for the drafting of the I&C agreements. 'Substandard' agreements may be struck down as a result of the application of the enforcement regime of the Regulations, but the extent to which employees – taking into account

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the trigger mechanism – can overturn such agreements in companies with no existing union recognition, membership or other consultative arrangements is possibly limited.

6 Conclusion

While the scope of joint regulation in Britain, as evidenced in successive WERS, has diminished dramatically since 1980, there is evidence of a growing and more complicated regulatory environment that is often driven by EC law. In this context, the I&C Directive, despite its limitations, had the potential to significantly transform the nature and function of employee representative structures in the British systems of labour law and industrial relations. First, the Directive envisaged a permanent statutory system of employee representation at organisational level. Second, it expanded the range of information and consultation to cover aspects of managerial prerogative that were hitherto not covered by existing legislation, nor industrial relations practice. Third, its application was 'universal', hence covering all employees at a given undertaking, irrespective of their status as union members. Finally, the procedures encouraged by the Directive were more deliberative and co-operative in tone than the traditional pluralist emphasis on conflict of interest in the employment relation (Bogg, 2006).

However, as a result of the processes for the stabilisation of normative expectations by the systems, the underlying principles and objectives of the I&C Directive underwent significant alteration, and were effectively recontextualised in the British systems' networks, with important consequences for the institutions responsible for I&C arrangements. As seen, at the stage of transposition, the development of discourses that centred around 'voluntarism' and 'flexibility' meant that the I&C Regulations were constructed as a difference minimisation programme that built on a history of voluntary employee representation with only weak information and consultation rights. Further, at implementation level, there has been limited evidence that the legal norms, procedures and sanctions, used to 'frame' or 'steer' the process of self-regulation in the industrial relations system, have so far provided the foundations for a paradigm that could support more substantive reforms in the area of employee consultation, as required by the Directive.

While the legal strategy for regulating employee representation arrangements should maintain its reflexive regulation approach, it should also revisit the conditions attached to the selection of different compliance options, more particularly, the nature of the legal obligations, the degree to which resources can be mobilised by trade unions, and the efficacy of the enforcement mechanisms. In the light of the Commission's review (2008) and the empirical findings of the present study, a number of specific suggestions can be made concerning the institutional design of the I&C Regulations. First, lowering the threshold for the 10 percent trigger mechanism will render the application of the legislation easier in contexts where employee representation through unions is lacking. Lowering the threshold will also give the opportunity to employees to overturn arrangements that were imposed unilaterally by management, or controversially prescribed direct methods of information and consultation. Second, the promotion of legally mandated arrangements, underpinned by strong institutional support, will be facilitated if recognised unions or other employee representation bodies are allowed to negotiate the conclusion of I&C agreements and a union priority rule is adopted when the standard provisions apply. Such action, which can act as a counterweight to the lowering of the threshold, will ensure that existing union agreements are protected and can encourage unions to take a more proactive stance to the establishment and operation of I&C arrangements. In line with the suggestions by Davies and Kilpatrick (2004, p. 137), priority should be given first to a recognised union and then to a union with sufficient presence in the workforce; only where there is insufficient union presence should the third possibility, i.e. elected representatives selected by workforce ballot, be used.

Suggestions can also be made in the area of enforcement and sanctions. As evident from the analysis, the enforcement regime has not so far succeeded in constituting an adequate form of

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communication link for the coupling between the legal and the industrial relations systems. The involvement of a variety of different institutions and mechanisms, e.g. CAC, EAT, Employment Tribunals and civil courts, the complexity of the legislation, and the operation of the trigger mechanism have limited the extent to which applications can be brought by individual employees, employee representatives or even trade unions. Additionally, the lack of power of the CAC to question the legality of any decision taken in breach of the duty to inform and consult and the fact that the financial penalty of £75,000, if imposed, is payable to the Treasury, possibly discourage individual employees and employee representatives from lodging complaints. In the light of these considerations, the application of the enforcement regime to the PEAs and an increase of the upper level of sanctions currently available have the potential to reinforce the procedural safeguards against any breach of the legislation's requirements. Such amendments will not only be compatible with the Directive's requirements for 'effective, proportionate and dissuasive' sanctions,[60] but can also motivate acceptance and compliance in the longer term.

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