Information and consultation agreements: British “works councils”

A summary guide for clients
Information and consultation agreements in British undertakings

Background
The Information and Consultation of Employees Regulations 2004 (the ‘ICE Regulations’) create rights for employees in all but the smallest organisations to be informed and consulted, normally through elected representatives, about developments in the workplace on an ongoing basis. They implemented the EU Directive 2002/14/EC on informing and consulting employees and their final version built on a framework agreed between the CBI and the TUC.

The ICE Regulations apply to an undertaking (such as a limited company, partnership or public sector organisation) with 50 or more employees that has its principal place of business or head office in Great Britain. Separate but similar Regulations apply to Northern Ireland. In particular, there are four features of the ICE Regulations worth highlighting at the outset:

- They provide for an information and consultation procedure, as opposed to a procedure for negotiating terms and conditions of employment.
- They encourage an employer and employee representatives to agree an information and consultation procedure which suits their needs. It is only in the absence of an agreement that they prescribe the content and nature of such an agreement.
- They are concerned with information and consultation affecting the undertaking. This contrasts with European works councils which address transnational information and consultation (but inevitably there may be an overlap).
- There is no duty on the employer to be pro-active and institute an information and consultation mechanism; the duty is only triggered if employees make a request (or the employer starts the process of its own volition).

The Central Arbitration Committee (CAC) hears disputes on the ICE Regulations and the EAT can impose fines where the CAC makes certain orders against the employer.

A flowchart summarising the ICE Regulations is located at the end of this document.

Why do the ICE Regulations matter?
The requirement to provide for national information and consultation arrangements, upon receipt of a valid employee request, was greeted with employer concern when first introduced in 2005. However, where employers have good employee relations, such concerns have receded given the relatively slow take up of national information and consultation arrangements by employees and trade unions.

It remains the case, however, that any employer in receipt of such an employee request must treat the issue seriously because:

- A number of companies have already received serious fines from the Employment Appeal Tribunal (EAT), with the associated adverse publicity, for failing to properly engage with, or misunderstanding, the legal process which is triggered by an employee request.
- Given the way in which the information and consultation provisions are structured, it is unlikely in our view that employees acting alone will be sufficiently organised to secure a petition or petitions signed by up to 10 per cent of employees in the undertaking. We have seen an increase in information and consultation claims being organised by trade unions in circumstances where a recognised trade union wishes to expand the ambit of its involvement with the employer, where it wishes to exercise the information and consultation opportunities, or, where a trade union, particularly with a small employer, wishes to raise its profile with the workforce prior to making a formal claim for recognition.
- Requests for experts, funded by the employer, to advise information and consultation representatives in European works councils are on the increase. The
use of experts has implications for confidentiality, delays to restructuring and cost. While there is no express right to use experts under the ICE Regulations, we anticipate that trade unions will apply their experience from EWC information and consultation to national information and consultation, for example, requesting earlier and more detailed information from employers as well as, in some circumstances, seeking to use experts to produce an opinion in response to the information.

- Unlike the statutory recognition procedure, once employees have triggered the operation of the ICE Regulations they are bound (in the absence of a pre-existing agreement) to ‘win’; in other words, to compel the employer to establish either a negotiated agreement or a standard information and consultation agreement.

The trigger – an employee request
A valid employee request must be made by at least 10 per cent of the employees in the undertaking, subject to a minimum of 15 employees and a maximum of 2,500 employees. Employees or their representatives contemplating whether to make such a request are entitled to information about the number of employees in the undertaking as a whole and what number of employees constitutes 10 per cent. A complaint may be lodged with the CAC that the employer has failed to provide the information or that the information supplied is false or incomplete in some material respect. For example, the CAC has ruled that the employer may have to give a breakdown of the information on a site by site basis, if asked.

To be valid, the employee request must:

- be made in writing
- state the date on which it was sent
- name those making the request
- be made by at least 10 per cent of the employees in the undertaking
- be either a single request or a number of requests submitted in a six-month period
- be submitted to the employer or to the CAC.

An employer can apply to the CAC for a declaration of validity, where the request is disputed (for example, made by insufficient employees). A three year moratorium applies where the employer has previously negotiated an information and consultation agreement, has had one imposed under the standard provisions or an earlier request was not endorsed by the workforce in a ballot relating to a pre-existing agreement. As such, a further employee request during the moratorium is not valid with some exceptions, for example, if there have been material changes to the undertaking during the period.

Note that, in contrast to the statutory union recognition rules where a union needs only a membership base of 10 per cent within the claimed bargaining unit to trigger a recognition application, for the ICE Regulations to be triggered, 10 per cent of the entire UK employee population engaged within the employing undertaking must put their names to a request.

What is an "undertaking" under the ICE Regulations?
As can be seen from the above, the term “undertaking” is an important one in the ICE Regulations. It is further defined in the Regulations as “a public or private undertaking carrying out an economic activity whether or not operating for gain." Government guidance (DTI, 2006) also interprets an undertaking as follows: "...In terms of companies, DTI believes this means a separately incorporated legal entity (which would have its own shareholders and, in the case of British companies, a unique registration number at Companies House), as distinct from say an organisational entity such as an establishment, division or business unit of a company..."

Where a business takes the form of a group of companies, the CAC has accepted that the ICE Regulations do not contemplate that an "undertaking" might be a larger unit than any of the legal entities (companies) which make up the group with the result that the concept of undertaking is confined to a single employing entity. The ICE Regulations do provide
flexibility for pre-existing and negotiated information and consultation agreements to be voluntarily extended to include multiple undertakings, however, the standard provisions (further below) are based on a single undertaking only.

**Pre-existing agreements**

An employer may already have information and consultation arrangements in place which it wishes to retain. Providing the pre-existing arrangements satisfy certain validity conditions, set out below, and fewer than 40 per cent of the employees in the undertaking’s workforce make the request, then the employer may hold a ballot to test support for the pre-existing agreement (instead of electing or appointing negotiating representatives). Again, there are timescales to be observed by the employer in relation to giving notice of, and holding, the ballot. In particular, the employer must inform the employees in writing *within one month* of the date of the employee request that it intends to hold a ballot. The CAC has confirmed that the ICE Regulations do not allow for this period to be extended or the CAC to exercise discretion where the employer exceeds this time limit.

Where the employer proceeds down this route, for the pre-existing agreement to be overturned (and for the employer to be put back in the position of having to put in place negotiating representatives), at least 40 per cent of the workforce in the undertaking must vote to replace the pre-existing agreement and those 40 per cent of employees must also represent a simple majority. It will be noted that this is the same hurdle a trade union must jump to successfully win a ballot for statutory recognition.

To be a valid pre-existing agreement between employer and employees, the agreement must meet the following criteria:

- be in writing
- cover all of the employees in the undertaking (either in one agreement or in a series of agreements)
- set out how the employer is to give information to employees/representatives and seek their views on such information, and
- have been approved by the employees (the ICE Regulations do not prescribe how approval is to be demonstrated and BIS guidance gives some example suggestions; by means of all the employees signing the agreement, by a 50 per cent majority in a ballot, by agreement with employee representatives who represent a majority of the workforce or in such a way that the CAC can properly infer approval).

Employees can challenge the validity of a pre-existing agreement by complaining to the CAC. Where the employer wins the vote to validate the pre-existing agreement, the agreement cannot then be challenged for a further period of three years (again the three-year period here mirroring the three-year moratorium period following a statutory recognition ballot).

**Negotiating an information and consultation agreement**

Where a valid employee request is made, the employer, in the absence of a pre-existing agreement, must negotiate an information and consultation agreement with representatives of the employees and must:

- make arrangements for employees to appoint or elect negotiating representatives
- inform the workforce in writing of the representatives who have been appointed or elected, and
- invite the negotiating representatives to negotiate an information and consultation agreement covering all employees and setting out the circumstances in which the employer will inform and consult with employees.

Where an employer is required to put in place negotiating representatives, negotiations with those individuals must begin as soon as reasonably practicable and the expectation is that they will begin no later than three months after the employee request. Negotiations may last up to six months (i.e. the process to be normally completed by nine months after
the employee request), which is extendable without limit by agreement by the negotiating representatives. A decision from the CAC underlines the need for agreements providing for an extension of time to be recorded in writing, not simply assumed as part of the ongoing negotiations. In certain circumstances, the timescale is extended, for example, in the event of an application to the CAC.

A negotiated agreement must:

- cover all employees of the undertaking
- set out the circumstances in which the employer must inform and consult the employees to which it relates (this minimal requirement reflects the ICE Regulations flexible stance on the parties agreeing their own arrangements)
- be in writing, dated and signed by the employer, and
- provide for either the appointment or election of information and consultation representatives to whom the employer must provide the information and whom the employer must consult, or that the employer provides information directly to the employees and consult those employees.

An agreement can be made up of a number of smaller agreements, providing the combination covers all employees and meets the above requirements.

When agreement is reached, the employees must then approve the agreement. In these circumstances, employee approval means written agreement from a majority of the negotiating representatives and either, at least 50 per cent of employees must approve the agreement in writing or, there must be a ballot showing approval of at least 50 per cent of voting employees. Alternatively, the agreement must be signed by all the negotiating representatives.

The default standard information and consultation provisions

If, after six months (in the absence of an agreement to extend the timescale), agreement cannot be reached with negotiating representatives, employers have a further six months to arrange for the election of information and consultation representatives, at which point the standard provisions apply (unless a negotiated agreement is reached in this further period).

Where the employer has failed to initiate negotiations after a valid request and six months have elapsed from the request, the standard provisions apply and the employer must have arranged for the election of information and consultation representatives before the end of this period.

Even when the standard provisions apply, employers and representatives may come to a negotiated agreement at any time providing the above conditions are met, although employee approval is deemed where it is signed by a majority of the information and consultation representatives.

The standard provisions are more demanding: the ICE Regulations prescribe three categories of information (set out below) that employers must provide to the information and consultation representatives. The provisions also provide for how, when and what information must be provided and when consultation is additionally required.

It should be noted that the employer must provide information on the first category below, provide information and consult on the second category and must provide information and consult with a view to reaching agreement on the third category. The three categories are as follows:

1. The recent and probable development of the undertaking’s activities and economic situation.
2. The situation, structure and probable development of employment within the undertaking (and such information must include information relating to the use of agency workers (if any) in that undertaking) and on any anticipatory measures envisaged, in particular, where there is a threat to employment within the undertaking.

3. Decisions likely to lead to substantial changes in work organisation or in contractual relations, including collective redundancies and transfers of undertakings.

Employers should take note of the stepped approach outlined above when seeking to negotiate information and consultation agreements as some employee representatives will be aiming for an agreement which exceeds the standard provisions, for example, requiring the employer to provide information and consult with a view to reaching agreement, before decisions are taken, on all three categories.

Where an employer ends up with a standard information and consultation structure, then, should the employer later face a consultation obligation under either Section 188 TULRCA (redundancies), TUPE or in relation to certain pension changes, the employer can inform representatives in writing that it intends to consult under the Section 188, TUPE or pension legislation. In this way, the risk of a double consultation obligation has been removed.

**What is “information” and “consultation” under the standard provisions?**

Both terms are further defined under the standard provisions (NB. these definitions do not apply to negotiated agreements unless the parties agree):

- Information must be given “at such time, in such fashion and with such content as are appropriate to enable, in particular, the information and consultation representatives to conduct an adequate study and, where necessary, to prepare for consultation.”
- Consultation must be conducted “in such a way as to ensure that the timing, method and content of the consultation are appropriate”, “on the basis of the information supplied by the employer to the information and consultation representatives and of any opinion which those representatives express to the employer” and “in such a way as to enable the information and consultation representatives to meet the employer at the relevant level of management depending on the subject under discussion and to obtain a reasoned response from the employer to any such opinion”.

**Confidentiality**

More generally, the ICE Regulations deal with confidential information in two ways. Firstly, the employer is allowed to withhold information where its disclosure would be seriously prejudicial or harmful to the undertaking. Secondly, the employer is entitled to require employee representatives not to disclose information entrusted to such individuals where the disclosure would be likely to harm the legitimate interests of the undertaking. Disputes as to whether it is right for the employer to insist on non-disclosure and to withhold information may be heard in the CAC (in addition to other civil remedies or employment law sanctions).

**Employee protections**

The ICE Regulations confer a number of protections on negotiating representatives and information and consultation representatives. Such individuals have a right to reasonable paid time off during working hours for the performance of their duties. Employers in breach of this obligation will be required to make good any shortage in pay and the Employment Tribunal will order the employer to pay such amount as it “finds due” to the employee, although this term is not defined. Should a representative suffer either a detriment in connection with the performance of his/her duties or be dismissed, such an individual can present a claim to an Employment Tribunal, which, in the former case, will make such an award as is just and equitable and, in the latter case, such a dismissal will be regarded as automatically unfair attracting a basic award and compensatory award subject to the usual...
limits. In addition, any employee must similarly not be subjected to a detriment or dismissal on the ground that he/she sought to exercise their rights under the ICE Regulations, including campaigning and voting.

**Disputes and sanctions**

As with the statutory recognition rules, disputes and challenges under the ICE Regulations fall within the jurisdiction of the CAC. Interestingly, and in contrast to the statutory recognition procedure, it is possible to appeal against a decision of the CAC on a point of law to the Employment Appeal Tribunal (EAT) under the ICE Regulations.

Where complaints to the CAC are held to be well-founded, complainants may go on to apply to the EAT for the issuing of a penalty notice. The EAT can award penalties of up to £75,000, payable to the Secretary of State. In 2007, an employer failed to follow due procedure when they received a valid request to set up an information and consultation body, apparently believing that they could simply amend and seek employee approval for their existing arrangements at that point. Their failure resulted in a fine of £55,000. In 2009, a mistaken view of the ICE Regulations resulted in a £10,000 fine and, the following year, a more serious failure to understand the application of the Regulations resulted in a fine of £20,000. Clearly, ignorance is no defence in these circumstances.

**Comment**

Employers are well advised to analyse and review existing employee communication mechanisms to determine not only their effectiveness but also whether they meet the requirements for a pre-existing agreement. At least one employer has found to its cost that you cannot amend mechanisms to meet the legal test for a pre-existing agreement after a valid request is received.

Where the employer believes that employees want an information and consultative structure, best practice would suggest that putting in a voluntary pre-existing agreement that meets the requirements of the ICE Regulations will be in most cases the appropriate way forward. This will allow both parties to agree mechanisms that fit the particular needs of the organisation and to define the sort of information which is relevant to the employees, given the employer’s sector of operation.

*We would ask you to note that this guide is not intended to be exhaustive or a substitute for legal advice. The application of the law often turns upon the specific facts in question; there also remain considerable legal uncertainties and court decisions frequently change the law. You should seek specific advice upon any given scenario.*

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ICE Regulations – summary flowchart

The “trigger”: 10% of employees request ICE procedure (NB the employer may instead initiate the process)

Employer has **pre-existing agreement**
- **and holds a ballot** (NB may only ballot if fewer than 40% employees made the request)
- Employees **do not** vote in favour of the request for an ICE procedure (at least 40% and a majority of those voting needed in favour)

Employer has **pre-existing agreement** but decides not to ballot (or not permitted to do so where 40+% employees made the request)
- Employees **do vote** in favour of the request for an ICE procedure (at least 40% and a majority of those voting needed in favour)

Employer has **no pre-existing agreement**
- Negotiating representatives to be appointed or elected and employer must **begin negotiations** for an I&C agreement
- No agreement reached or employer fails to initiate negotiations

**Pre-existing agreement** continues. 3 year moratorium applies

**Standard ICE provisions** apply. Employer to arrange ballot for ICE representatives. 3 year moratorium applies

**Negotiated ICE agreement** is reached. 3 year moratorium applies
Our experience

Our specialist labour law team has unrivalled experience in both UK and international labour law and trade unions. Effective legal advice in this field, in particular, requires experience and not just book-learning. Our continuous exposure to industrial relations issues gives us a knowledge of strategy and tactical options which we deploy for the benefit of our clients.

Areas of expertise

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- formal claims for trade union recognition
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- information and consultation during large-scale redundancies and business transfers
- establishing employee consultation groups
- collective grievances and failures to agree
- rights of trade union officials and members
- European works councils
- international labour relations
- international or global framework agreements.

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