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Acas Policy Discussion Papers

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Has consultation's time come?

The new *Acas Policy Discussion Papers* series is designed to stimulate discussion and debate about key employment relations issues.

This second paper in the series has been written by Miranda Grell and Keith Sisson of Acas' Strategy Unit and reflects their experience of involvement in a wide range of activities associated with the Information and consultation of Employees Regulations.

We welcome your comments and opinions. These should be sent to the authors c/o strategy@acas.org.uk

Summary

The UK Regulations implementing the EU's Information and Consultation Directive have put consultation firmly back on the agenda. It would take some courage, though, to suggest that consultation's time has come in many of the UK's workplaces. Information and consultation breathe life into the employment relationship as well as being important in organisational performance and working life. But putting arrangements into practice is as demanding as it is necessary. There are particular problems with consultation, stemming from our employment relations history. Like Cinderella, consultation is very much the poor relation – for management, it compares unfavourably to communications, while trade unions much prefer collective bargaining. There is little or no consensus about the meaning of consultation and many practical issues embracing substance and methods.

Embedding consultation will not be easy. Recent experience suggests how it might be done. Direct and indirect methods are not mutually exclusive as is sometimes argued – there are key roles for both. Consultation based on 'options' rather than 'decisions' would also help.

Many of the practical difficulties might be negotiable within collective agreements including such vexed issues as mixed union and non-union constituencies and the boundaries between consultation and collective bargaining. If this practice is taken up and expanded by the public services, it would set a powerful example. A concerted trade union campaign promoting information and consultation agreements involving non-union employees could also give a considerable boost to the cause. Implementing future legislation by agreement would similarly help, as would an Acas Code of Practice. The forums proposed under the 'Warwick agreement in low pay, low productivity sectors could be used to spread the net still further.

Introduction

It is a truism to say that information and consultation are the lifeblood of organisations. Nothing is automatic about the employment relationship – whether it is a matter of management decisions, legal rights or collective agreements. Information is critical to bringing clarity and direction. What's more, it's day-to-day involvement and consensus-building stemming from consultation that breathes life into the employment relationship.

The question is not whether to have information and consultation arrangements – it is the form and type that are at issue. Information and consultation can to a greater or less extent be structured to help the organisation and its employees to achieve their objectives. Or they can be left to their own devices, which means that rumour and suspicion will take over. John Cleese's legendary training film, *The Grapevine*, graphically portrays the unintended consequences that can follow.

Our primary focus here is on consultation. In practice, of course, information and consultation are inextricably linked – you can't have consultation without information. But it is consultation that is the more controversial process, raising major issues of policy and practice, above all in the UK.

Consultation = 'win-win'?

The *business case* for consultation is well established. Although it takes time, it can make a major contribution to organisational performance. Employees are only able to perform at their best if they know their duties, obligations and rights and have opportunities to make their views known to management on issues that affect them. Employees are more likely to be motivated if they have a good understanding of their job and the contribution it makes. Their commitment is also likely to be enhanced if they are actively encouraged to express their views and ideas and they know that they can influence decisions.

Consultation is the critical tool to get the input of employees – it is employees who have the knowledge and experience of the detailed operations, the problems and the pitfalls, and how they might be dealt with to reduce costs and improve productivity, quality and customer care. Furthermore, having to think through and justify decisions to employees can make a significant contribution to the quality of decision making. It encourages managers not to leave decisions to the last minute.

Discussing issues of common interest and giving employees an opportunity to express their views helps to promote trust and minimise misunderstanding. These benefits are most keenly felt during times of major change. Time spent in consulting at the outset of a new project or development can minimise the rumour and misunderstanding that can delay or scupper implementation.

The *individual case* for consultation has taken a back seat in recent years, yet it remains as powerful today as it ever did. Most of us spend a considerable proportion of our waking hours in work. Giving us *a voice in the decisions that affect us critically* affects the quality of working life. This is because work is not just about the means to a livelihood. It also has a fundamentally important role in defining our place in society, providing status, dignity and, perhaps above all, the opportunity for personal development. Skills and abilities are of little consequence if employees are not given a chance to use them. The same is true of opinions if they are not valued.

Of course, some employees may not be interested in becoming involved. Dig a bit

deeper, however, and this reaction very often reflects experience rather than a natural inclination. Every one has an anecdote about employees who, when challenged about being apathetic, say that no one has ever asked their opinion. Or that they've expressed a view that has been ignored or even ridiculed.

Society also stands to benefit from the widespread practice of consultation at work. In the UK, in particular, it could give a much-needed boost to improving the UK's training record and achieving a better work-life balance. Perhaps most importantly, realising the ambition the UK had in promoting the EU Lisbon agenda of becoming the 'most competitive and dynamic knowledge economy in the world' seems hardly achievable unless consultation is deeply embedded in organisations. It could even help to reduce the costs of the employment tribunal system – along with adequate workplace procedures for handling disciplinary cases, the lack of dialogue is one of the reasons behind the resort to litigation.

There are also strong links with citizenship, as the EU Charter of Fundamental Rights recognises. The government has actively championed 'consumer citizens', most recently in public services such as the NHS; introduced citizenship classes in schools; and created and financed a plethora of community initiatives, neighbourhood boards and local residents forums. Arguably, the democratic engagement and sense of involvement in local communities is likely to be more successful if the concept of citizenship is carried over into the workplace. Furthermore, it would go some way towards minimising the dissatisfaction and demoralisation that spills over into and negatively impacts on family and community life.

There is also a strong *trade union* case for consultation. If given a choice trade unions generally would prefer collective bargaining to consultation. Under the former, the emphasis is on reaching agreements, which means they have an element of veto power in the event of a failure to agree. Under the latter, the emphasis is most commonly understood to be on managers actively seeking and then taking account of the views of employees before making the final decision. Complicating matters in the UK, as will be argued in more detail later, the distinction between processes such as communications, consultation and collective bargaining is not fully appreciated.

Nonetheless, public policy support for consultation crucially reinforces the principles of dialogue and representation that are among the foundations of trade unionism. In workplaces where they already have recognition, trade unions can seek to extend and deepen the coverage of dialogue. In workplaces where they don't have recognition – and, today, less than four in ten British workplaces is unionised – there is an opportunity to demonstrate the valuable role that trade unions can play in representing employees more generally.

Why consultation is so controversial

Consultation may be a necessary process, but it is also a very controversial one. This is true of the many spheres where it is found – the family, social and sporting clubs, local community organisations, national government and international relations as well as the workplace. It is not only very demanding in terms of interpersonal skills, but also of awareness. Doing what I or my party or my country feel is right is intuitively preferable to seeking the views of others, especially where there appears to be a premium on a quick decision. Appreciating

that the compromise solution may be preferable is something that has to be learnt. It also needs a culture of openness and honesty, which means trusting people. But trust is not something that is automatic – it is built through working together through difficult issues, which takes time. Furthermore, one abuse of trust can put back years of hard work in its building.

The workplace brings its own very special pressures. Like Cinderella, consultation is very much the poor relation. Most managements prefer communications, which allows them to feel more in control. Attempts, such as the EU directives dealing with information and consultation, are often rejected as extra 'burdens on business' that damage 'flexibility', create 'rigidities' and 'harm competitiveness'. It is not just that consultation takes time. It is very demanding of individual managers in terms of their social skills and it challenges the function and process of management – effective employee involvement potentially does away with the need for much of the expensive command and control structures that give many managers their careers. There are also worries that consultation will lead to collective bargaining 'by the back door'. These amount to strong cultural barriers.

Paradoxically, trade union suspicion of consultation turns some of these arguments on their head. For them, for the reasons already given, consultation is the poor relation to collective bargaining. Just as management is worried that trade unions will use consultation to increase the scope of collective bargaining, so trade unions are worried that managers will exploit the potential to diminish it and, perhaps, withdraw recognition.

The legacy of voluntarism

Context is all important. It is not unfair to suggest that consultation is especially controversial in the UK, reflecting a very particular employment relations history. In many other EU member countries, legislation produces a pretty workable distinction between consultation and collective bargaining. It effectively defines the two processes in providing for works constitutions, on the one hand, and the status of collective agreements, on the other. The right of veto by employee representatives in countries such as Germany and the Netherlands also puts considerable pressure on management to do its homework and have good reasons for their decisions.

The structure of collective bargaining also makes its own significant contribution to drawing the boundaries in these countries. A sector-based multi-employer structure means that the collective bargaining process is primarily the responsibility of employers' organisations and trade unions *outside* the workplace, with consultation being the job of the works council or its equivalent *inside*. Moreover, in as much as their much wider coverage means they constitute codes as well as compulsory contracts, collective agreements enjoy priority status. In most legal systems, the agreements that arise from consultative bodies such as works councils are not legally enforceable as collective agreements are.

Going with this status in most countries is a clear division of competence – only bona fide trade unions can negotiate collective agreements. In some countries, notably Germany, management and works council are debarred from negotiating on issues that are subject to collective agreements, unless

these agreements expressly provide for them to do so.

In the UK, by contrast, the legal framework and collective bargaining have interacted very differently. A tradition of voluntarism has meant a piecemeal approach to legislation. Apart from the 1971 Industrial Relations Act, there has been no attempt to put in place an overarching framework. Indeed, the ill-fated experience of that legislation appears to have persuaded policy makers never to return to the idea.

Consequently, consultation is dealt with in a plethora of legislation ranging from collective redundancy and business transfers, to health and safety, working time, and pensions (see Annex 1). Each piece of legislation has been designed to cope with the immediate pressure, arising from the need to implement EU Directives or deal with a perceived crisis, eg pensions. The result is a confusing overlap.

Arguably, the ICE Regulations themselves complicate rather than clarify matters. Effectively, they provide for a hierarchy of consultation with no fewer than three levels. The word 'consultation' does not even appear in the requirements of 'pre-existing' agreements. The word 'consult' appears in the requirements for 'negotiated' agreements, but the meaning is taken for granted. Only in the 'standard provisions', which copy out the provisions of the EU Directive, are there any details (see Box 1), with the DTI's guidance expanding on these (see Annex 2).

UK collective bargaining developments have also complicated matters. Collective agreements do not enjoy any special legal status. The collapse of multi-employer agreements in most industries – which is partly to be explained by their lack of legal status – means that the division of responsibilities found in other countries is no longer possible.

In many organisations, there has also been a blurring of the distinction between consultation and collective bargaining in practice. In some cases where trade unions are recognised, the negotiating body has effectively taken over the functions of its consultative counterpart. In some cases where representative structures are employee- rather than trade union-based,

Box 1 The ICE Regulations' 'standard provisions'

The 'standard provisions' spell out the information the employer has to consult about and go on to state that 'The 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'.

The employer must ensure that the consultation … is conducted

a) in such a way as to ensure that the timing, method and content of the consultation are appropriate;

b) 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;

c) in such a way as to enable the information and consultation representatives to meet the employer at the relevant level of management depending on the subject under discussion and to obtain a reasoned response from the employer to any such opinion; and

d) in relation to matters falling within paragraph (1)(c) [dealing with decisions likely to lead to 'substantial changes in work organisation and contractual relations'] with a view to reaching agreement on decisions within the scope of the employer's powers.

the reverse has happened – management has put pay and conditions on the agenda of the consultative committee to gauge reaction, which is a form of quasi-collective bargaining. The result is that it is virtually impossible to draw hard and fast guidelines that have widespread application.

The decline of multi-employer bargaining has also meant that it has been necessary to make provision for trade union recognition that is based on the workplace. This in turn adds to and complicates trade union concerns about undertaking-based information and consultation legislation – unlike in other countries, the latter can pose significant potential threats to trade union recognition and collective bargaining.

Employers and trade unions united in suspicion

The upshot is that there is little or no consensus even about the meaning of consultation at work. There is also a strong tendency to define consultation 'negatively' rather in comparison with other key processes, such as communication, collective bargaining and negotiation and the emphasis is on what it is *not*.

Thus, many managers continue to see consultation as two-way communications. Coming from this perspective, notions of consultation 'with a view to agreement' to be found in the EU Directive and the ICE Regulations' 'standard provisions' sit very uneasily with many managers' expectations. Agreements are associated with collective bargaining and negotiation, these two terms being used more or less synonymously. It is a testimony to the low awareness there is that such a requirement has existed in UK law since the 1990s in respect of consultation over impending redundancies and transfers of undertakings.

Meanwhile, some trade union members believe that the ICE Regulations represent more of a threat than an opportunity. The decline of multi-employer bargaining in the form of national agreements means that

Box 2 'Mixed constituency' issues

1 The 'trade union recognition' situation. The trade union is on the point of submitting a claim for recognition. The management asks for Acas' help in introducing I&C arrangements based on the ICE Regulations to avoid TU recognition.

2 The 'virgin territory' situation. The undertaking does not recognise trade unions, who are not actively building up membership. The management asks for help in introducing I&C arrangements based on the ICE Regulations.

3 The 'mixed constituency situation' (1). Some parts of the undertaking have unions recognised for collective bargaining but discreet sections do not, eg head office in the case of a manufacturing business or stores in the case of a retailer. Management asks for help in introducing *separate* arrangements for groups not covered by collective bargaining arrangements.

4 The 'mixed constituency situation' (2). Some parts of the undertaking have unions recognised for collective bargaining but discrete sections are not. Management asks for help. It does not want to change the collective bargaining arrangements. But it does want to inform/consult with representatives of the entire workforce together in an *overarching* I&C Council/Forum.

5 The 'mixed constituency situation' (3). Membership density is extremely low among the group where the trade union has recognition for collective bargaining. Management asks for help in introducing a *parallel* I&C Council/Forum with representatives elected by all employees (ie union and non-union members).

6 The 'derecognition situation'. Membership density is extremely low among the group where the trade union has recognition for collective bargaining. Management argues that the union is no longer representative and seeks to shift discussion of pay and conditions etc to an employee elected I&C Council/Forum.

the machinery to ensure a wide coverage for collective agreements regardless of trade union membership no longer exists. Collective bargaining is increasingly dependent on a workplace-based recognition process that puts a premium on building up membership as a pre-condition for reaching collective agreements – already an uphill task given the shifts in employment structure from manufacturing to services and the decline in the size of workplaces. In the circumstances, the concern is that the Regulations will be used to introduce non-union structures that, in turn, will undermine collective bargaining rather than complementing it as in other EU countries.

On-going problems?

There is reason to believe that these problems will become more apparent once the ICE regulations come into force. Having two separate sets of legislation – one dealing with information and consultation and the other with trade union recognition – is likely to lead to problems. Most obviously, there could be situations where there is conflict over which piece of legislation is going to take precedence: management could respond to a trade union request to be recognised for collective bargaining by initiating and/or encouraging an application for a 'negotiated' agreement; trade unions could do the reverse if they are unhappy with management's information and consultation proposals.

Complicating matters is the patchwork of existing recognition arrangements. There could be any number of scenarios, as Box 2 illustrates. Trade unions are likely to be primarily concerned with recognition and see the ICE Regulations as opportunity/threat from that perspective. Management, on the other hand, is likely to be primarily concerned with getting their information and consultation practice arrangements to conform to the requirements of the ICE Regulations and/or good information and consultation practice – they are also more likely than trade unions to be looking to Acas for help and advice in doing so. Trade unions are likely to want to be consulted over the implications of any proposed changes to information and consultation practice arrangements. Management, depending on the situation on the ground, is likely to see this as an unwarranted attempt to exercise a veto over matters that may or may not immediately concern trade unions. It is already clear that Acas will face particular problems responding to such scenarios: its advisers will be damned if they do and damned if they don't.

There is also scope for argument about the nature and extent of consultation, which the CAC will have to try to resolve. As already indicated, there can be appeals to the CAC over the terms of 'negotiated' agreements and the 'standard provisions'. The timing of consultation could be an especially sensitive issue. A major trade union complaint about existing legislation is that it does not do enough to encourage employers to consult early in collective redundancy situations. The ICE Regulations' 'standard provisions' imply much earlier consultation, but there is no guarantee that this will happen – another trade union complaint is that the size of fine, £75,000, is nowhere near enough to deter the large multinational company from ignoring the Regulations' provisions.

There could also be problems over definitions of confidentiality in relation to information sharing. Traditionally, Stock Exchange Regulations have been given as the reason why employers cannot give commercially-sensitive, especially share price-sensitive information, to employee representatives. As will be argued below,

however, one of the results of the debate over the ICE Regulations has been to clarify these. It emerges that they are not nearly as restrictive as they have been made out.

Lessons from recent experience

This is a formidable legacy to contend with. But not everything is doom and gloom. Recent experience offers some useful pointers to moving things forward.

Using collective agreements to draw the boundaries

Two main features distinguish most of the high profile organisations that have recently revamped their arrangements in anticipation of the impending legislation. One is that the agreement has been reached with a trade union or trade unions for the whole organisation and therefore covers union and non-union employees. The other is that the agreement takes advantage of the multi-tiered structures of organisations to help resolve the potential conflict between consultation and collective bargaining.

Examples include Abbey, Northern Foods, Tesco and Thames Water. In some cases, negotiation is restricted to the higher level, with the emphasis on consultation at the middle and lower levels. In others, the emphasis is on negotiation at the decentralised level and consultation at the higher.

Separating the processes of consultation and collective bargaining also helps to resolve the issue of the representation of non-union employees for the purposes of information and consultation. There is typically a single consultative forum embracing union and non-union representatives, with trade union representatives continuing to negotiate with management in a separate body.

Such agreements have also gone a long way to diffusing the potentially difficult issue of having 'mixed' constituencies of union and non-union employees. Typically, trade unions nominate their representatives based on their normal election arrangements, with non-union employees electing their representatives by secret ballot. Alternatively, there is a secret ballot election of representatives, involving union and non-union members, as in the case of works councils in Germany and the Netherlands. In some cases, there have even been understandings about the membership threshold that will be used to determine whether there is to be appointment or election.

Direct and indirect systems mutually supporting

The role of direct systems was a major source of controversy in the run up to the development of the ICE Regulations. In practice, however, it is becoming clearer that it is not a question of 'either/or' but both. The explosion in the development of information technology has revolutionised the ability to communicate information. Electronic systems involving video-conferencing, email and intranets now make it possible to transmit information speedily and effectively to even the most dispersed and mobile of workplaces. Direct systems are the main vehicle for information even in the most unionised workplaces.

The direct methods for informing employees can also be used to consult with them. One-to-one meetings can be used to discuss personal matters including reviews of performance or training and development needs. Group meetings at the level of the team or the unit can be used to discuss local issues. Large scale meetings or assemblies can be used to seek opinion on matters of general interest.

The same goes for some of the electronic

systems. Just as managers can use video-conferencing and electronic mail to send information to employees, so individual employees can use these methods to feed back their views and comments.

Suites of conferencing tools are also now available that can be used on the internet and intranet as well in face-to-face meetings to allow people to work together from the same room or across the country. One such example is FAST ('Facilitated analysis and solution tool'). These can be used to help conduct a number of activities online such as elections, surveys and remote meetings.

Especially important are joint working parties (JWPs), which can involve individual employees as well as employee representatives, typically addressing single issues. The emphasis in JWPs is on managers and employees working together to understand issues and overcome common problems in a non-confrontational way – for instance a high rate of labour turnover or problems with the pay system or changes in working patterns.

The advantages of the JWP approach to consultation are that it can:

- help to show managers that workers can contribute to innovation and building commitment to continuous improvement
- produce mutual gains for both the workforce and the wider organisation;
- build confidence and opportunities for personal development;
- help to create a culture of autonomy and responsibility;
- promote a process of joint problem solving in a non-negotiating forum which can help ensure that eventual solutions are acceptable to those concerned and there is a prospect of proposals being acceptable in any negotiating forum;
- allow the parties to distil issues to their core elements, compare and debate realistic 'options' and balance differing opinions;
- recognise the need for clear objectives, information sharing, problem-solving approach rather than come up with solutions and then consult argue in a publicly regarding way;
- establish the commitment of the parties through the process of joint involvement; and
- build trust, which can benefit the consultative process more generally.

Even so, most large companies do not rely exclusively on direct methods and for good reasons. Meetings between individual employees and managers can handle personal matters such as performance or training and development. Task forces or working parties can handle specific issues. But discussion of major matters of common interest is very time consuming using only direct methods. A representative council or committee can benefit management – it acts as a single channel for consulting large numbers of employees, structures the dialogue and helps to order employee priorities. It does not help if management is confronted with as many conflicting opinions as there are employees.

Having representatives also means that employees are likely to feel more confident about 'voicing' their views frankly and freely on major controversial issues. In the absence of representatives to speak for them, employees may be reluctant to express their true opinions directly for fear that their comments might be held against them.

A 'gripevine', where employees can let off steam with anonymous emails to the chief executive can enable him or her to gauge the likely reaction of the workforce to proposals. But it is unlikely to be very helpful in gathering alternative ideas or

helping them to be discussed where major restructuring issues are involved – debate by email is difficult and summarising a collective response extremely difficult.

Box 3 Option-based consultation

1 Managers identify business objective or need for change and the options for meeting it

2 Consultation starts with employee representatives about the options before a decision is made including explanation of the rationale behind the business objective with employees having the the opportunity to suggest other options

3 After discussion and consultation, managers decide which option to take, giving a clear explanation of the decision and why other options were rejected

4 Consultation with employee representatives over how to communicate the decision

5 Communication with ongoing discussion of particular issues

6 Implementation with ongoing discussion of particular issues.

Based on Derek Luckhurst. 2003. 'United Welsh Housing and Unison break new ground using option-base consultation'. IPA Bulletin No 28 September

Systems such as FAST can be helpful here, in that they enable managers to spell out the implications and trade-offs of different propositions. They also enable employees to respond in kind. They require considerable investment in training and equipment, however. Extra time also needs to be built into the consultation process to allow employees to reflect, to discuss their response and have their concerns addressed.

The debate over the ICE Regulations has also underlined the priority that other regulations give to employee representation in matters of information consultation. Most obviously there is the legislation on collective redundancy or business transfers, where the law requires consultation with employee representatives.

The so-called Listing Rules of the Stock Exchange also differentiate between employees and employee representatives when it comes to price-sensitive information. Such information may be given to employee representatives on a confidential basis. But it may not be given to employees in general. In the circumstances, then, whatever employees may think about collective action in general terms, it does not make sense for them to agree to direct systems only under the ICE Regulations.

Consulting early – discussing 'options'

A common trade union complaint is that consultation does not take place earlier enough. Arguably, one solution that could be successful in addressing the issue is the 'option-based' consultation that the Involvement and Participation Association is promoting. It works like this: consultation with employee representatives begins as soon as a business objective is identified and options to meet that objective have been looked at, ie before one option is selected as the way forward. Box three spells out the process in more detail.

Proponents claim that option-based consultation can achieve real business benefits in terms of better decision-making and removing the current gap between the decision makers and those affected by their actions. It can work equally well in a unionised or non-unionised environment.

Under more traditional or decision-based consultation, once a decision has been made, there are only two possible outcomes; agreement or disagreement. Discussing options helps to shift the focus away from 'win-lose' to win-win' situations.

Management gets much better and earlier feedback about likely responses. It also avoids getting itself committed to positions from which it is difficult to retreat from without loss of face. Important too is that, while the decision may take longer to make, it is likely to be implemented much more quickly. Much of the frustration that many managers experience with decision-based consultation comes from the sense of delay they feel in implementing decisions. Acceptability of decisions is also likely to be much higher when employees have had an opportunity to consider the options.

For their part, employees get much earlier warning of upcoming developments and have an opportunity to make a real input into decision making. Also important is that representatives have a clear and full understanding of why a decision has been made and why other options were rejected. This is an important communication tool for the representatives because, although they will not buy-in to every decision that has been taken, they will be able to explain the reasons for them with authority to their constituents or members. Being the permanent opposition that decision-based consultation encourages may be more comfortable – being involved from the very beginning of the process is a very challenging prospect. But a bad decision is a bad decision and usually one that employees suffer most from, even if management can be blamed for it.

It goes without saying that option-based consultation involves high levels of trust. It also means being clear about everybody's responsibilities from the beginning of the process. Managers have to share not just potentially sensitive information but also their early thinking. Employee representatives have to confront two particular challenges: one is to maintain the confidences that are asked of them; and the other is to accept that there is an obligation to do more than merely saying "no"- they have to be in a position to suggest options that are more effective as well as more palatable.

Its requirements mean that the take-up of option-based consultation is likely to remain relatively low. It could, however, find a ready home in the not-for-profit sector, where often there is not the same legacy of mistrust that there is in many more traditional organisations.

Maintaining effectiveness

Our next point takes us back to the difficulties of 'doing' consultation. A common template may not be appropriate. The recent and increasingly documented experience of Acas and other organisations in the field, such as the Chartered Institute of Personnel and Development and the Involvement and Participation Association, nevertheless suggests that it is possible to draw general lessons that can help to maximise the effectiveness of consultation, namely:

- top management commitment – senior managers not only need to play high profile roles, such as making presentations and chairing meetings, but also demonstrate *commitment* by sharing information themselves, consulting early, listening to contributions and explaining final decisions;
- a clear understanding of how consultation will contribute to improved organisational performance – if consultation is simply about token things like 'tea and toilets', it will not have any credibility in the eyes of managers or employees;
- effective meetings – consultative meetings need to have meaningful agendas, professional preparation, chairing and follow-up, plus well-worked out arrangements for reporting back;

- extensive joint working and problem solving to underpin the work of committees – simply meeting regularly in a committee is unlikely in itself to make a great deal of difference; working together to resolve real problems that concern management and employees is the only way of building trust;
- training – a major barrier to effective consultation is lack of knowledge and skills; both employee representatives *and* managers need an understanding of the concepts, processes and mechanisms of consultation, along with training in such basic behavioural skills as public speaking, making presentations, 'brainstorming' and diplomacy;
- adequate time and resources for employee representatives to fulfil their responsibilities – the role of the employee representative in effective consultation is a very challenging one and the people who do the job need practical help and support;
- patience – effective consultation needs a culture of openness and honesty, which may take time to come about, especially where there is little or no tradition of informing and consulting with employees or where employment relations has been adversarial; and
- regular monitoring and review – not only will this enable managers and employees to assess whether information and consultation practice is doing what they want; it will also provide the basis on which to refresh and renew arrangements in the light of changing circumstances.

Those directly involved in helping organisations to introduce effective consultation arrangements also agree on another fundamental point. The process needs to produce early 'wins' to demonstrate what can be done.

There is also a salutary warning here for those organisations that introduce arrangements simply to comply with the ICE Regulations. They are extremely unlikely to reap any of the benefits of consultation and will simply be wasting their money. The tragedy is that this experience is only likely to confirm their prejudices – consultation, they will conclude, is indeed something that imposes extra 'burdens', damages 'flexibility', creates 'rigidities' and harms competitiveness.

Moving forward

There is no magic wand for dealing with the historical legacy. Understanding is helpful, though, as are some of the lessons of recent experience. It is in the light of these that the following suggestions are made for moving things forward.

Making the most of collective agreements

Many more organisations could follow the lead of those that have recently used collective agreements to revamp their information and consultation arrangements in the light of expected legislation. This is above all true of the larger companies with multi-business and multi-establishment structures. As well as taking the opportunity provided by the ICE Regulations to refresh and renew what they already have, they could use the different levels of the organisation to differentiate more clearly between consultation and collective bargaining. Collective bargaining could be at company level and consultation at other levels. Or, in sectors such as engineering, where the workplace is the dominant level of collective bargaining, the reverse could be the case – consultation could take place at the higher level and collective bargaining at the lower.

As well as advantages already cited, having separate machinery could also lead to a wider range of issues for consultation. The disadvantage of combining consultation and collective bargaining is that the more adversarial approach associated with the latter can come to dominate the former as well. The result can be a much-restricted agenda of issues being discussed.

Although the prospect has received little or no attention, there is also an opportunity for trade unions to play an active role in promoting agreements dealing with information and consultation even where they are not currently recognised for the purposes of collective bargaining. Under the ICE Regulations, it is open to them to assist employees in reaching such agreements – and they only have to organise ten per cent of employees to trigger the process. There is no formal provision for their involvement. But, under the ICE Regulations, an intermediary such as a trade union is acceptable as an 'employee representative', which can request the relevant data to start the process. An 'employee representative' can also take responsibility for submitting to the CAC the names of employees wanting to open negotiations. Furthermore, there is nothing to stop such a body supporting employees and their elected 'negotiating' representatives in the discussions over reaching an agreement. In the event of a failure to agree, there is also prospect of the CAC imposing the 'standard provisions' of the ICE Regulations.

A concerted trade union campaign of this nature would help to make employees/employers more aware of their rights/responsibilities. It would encourage employers who might otherwise sit on their hands because they don't expect a challenge to sit up and notice – the prospect of ten per cent of employees mounting a challenge on their own is pretty remote. It would help to extend coverage of information and consultation arrangements and so build a critical mass necessary to bring about the necessary culture change. It would help to reinvigorate 'voluntarism' and so help to halt the slide towards a legal dependency culture that seems to be increasingly gripping employment relations in the UK.

It can be objected that this upsets the natural order of things – employees have to join trade unions before they can be represented. But putting their organisational and negotiating expertise at the disposal of non-union employees would not only be good for the image of trade unions, but also turn what many perceive to be a threat into an opportunity. The TUC has stated that April 2005 could herald a once in a lifetime opportunity for unions to demonstrate to employers and individual 'never member' employees that unions *are* a force for economic efficiency. There is also a strong possibility that involvement in formal information and consultation arrangements would encourage employees to join trade unions. Much of the membership base of trade unions in sectors such as finance has its roots in staff associations that subsequently merged with trade unions. Seen from this perspective, the ICE Regulations could potentially be a most effective recruitment opportunity.

A key role for public services

The public services have a lead role to play as well. Not only are the structures for consultation long stranding, but most arrangements clearly distinguish between consultation and collective bargaining. As in the case of the large private multi-establishment organisations discussed above, the levels are especially important

here. Other things being equal, the mostly national collective agreements could relatively easily be used to refresh and renew existing arrangements not just to comply with the requirements of the ICE regulations but also to develop and promote good practice that others could follow.

The public services also have an opportunity to set the example in the use of consultation to handle the management of change. In virtually every area, they are going through a rapid period of transition. Inevitably, developments are also very much in the public gaze.

So far the overall experience can only be described as disappointing, in some instances culminating in major disputes breaking out and trade unions complaining about the failure to adequately consult. There are nonetheless some positive signs, with the CIPD finding that there are 'many examples of outstanding changes that have been achieved'. Also, the setting up of a Public Services Forum means that the machinery now exists where ministers and senior managers can discuss and consult about impending changes with trade representatives at the highest level. It is largely a question of whether or not the will exists to make the most of the opportunity such a forum presents to deal with issues.

Widening the net

A further opportunity to spread good practice presents itself in the form of one of the specific commitments in the 'Warwick agreement' reached between the Labour Party and the major unions in the summer of 2004 and carried over into the election manifesto of the incoming Labour Government in May 2005. This is to introduce 'New sectoral forums bringing social partners together in low paid sectors to discuss strategies for productivity, health and safety, pay, skills and pensions'. Sectors likely to be strong candidates include care, cleaning, construction, food processing, hospitality and retail.

These are sectors where the proportion of undertakings employing more than 50, which is the threshold for the ICE Regulations, is exceptionally low[1]. Moreover, few are likely to have the time or expertise to draw up arrangements on their own.

One of the subjects that such forums might therefore be encouraged to discuss as a matter of priority is a set of recommendations dealing with information and consultation that businesses in their sectors could follow. Such recommendations would serve a double purpose: they would help to ensure that the practice of information and consultation would be much more diffused than otherwise would likely to be the case; and, if they lead to effective information and consultation arrangements, they would help considerably in moving the sector's businesses up the value chain.

A code of practice

There were many respondents to the DTI's consultation in 2003 who suggested the need for an Acas code of practice to accompany the ICE Regulations. The Acas Council itself said that it would be willing to prepare a Code of Practice if and when the DTI and the main social partners indicated they would like it to do so. At the time, however, there was some difference of opinion about what was needed. Many of those taking part in Acas round tables said they would welcome advice on dealing with the practical issues involved in negotiating agreements under the Regulations. Others, by contrast, were looking for much greater clarity from the Regulations themselves.

Complicating matters were the wider political sensitivities prevailing while the final details of the Regulations were decided.

Arguably, the advantages of having a code, which need not necessarily be statutory in the first instance, now outweigh any disadvantages. Crucially, is the code could bring together in one place an authoritative statement of a number of the key issues to do with the nature and extent of consultation. For example, it could spell out the key benefits of information and consultation in greater detail than space has allowed here. It could cite the growing body of evidence that substantiates the links with improvements in organisational performance and working life. It could use up-to-date cases to illustrate practically what can be achieved.

A code could also clarify the concepts much more clearly. Sometimes there are advantages in not defining terms too closely – forcing the issue can simply result in disagreement. Arguably, this should not be one of them for the reasons cited earlier. Thus a Code could contain a clear statement of consultation and contrast it with the other key processes such as communications and collective bargaining.

A Code could also bring together developing good practice in the specific areas where CAC and Acas will have to deal with complaints and/or disputes under the ICE Regulations:

- ballots for endorsement of employee requests and negotiated agreements;
- elections of employee representatives;
- the role and facilities of employee representatives – responsibilities, time off, unfair dismissal;
- the operation of 'negotiated' agreements and the 'standard provisions' - judgements will also need to be made about phrases like 'anticipatory', 'with a view to reaching an agreement' (Part VI) and working in a 'spirit of cooperation and with due regard for their reciprocal rights and obligations' (Part V);
- confidentiality (Part VII); and
- the handling of restructuring – key points of reference such as the EU social partners' framework agreement of 2003 might be cited here.

Embedding the practice

Last, but by no means least, the way that employment legislation is implemented in the future could also be used to embed the practice of information and consultation. No one knows how the ICE Regulations are going to work out. Most commentators, though, have welcomed the flexibility these Regulations give managers and employees to reach agreements that allow implementation to be tailored to suit local circumstances. This could/should be a precedent for the future, helping to encourage the wider development of dialogue and the structures to make this possible.

Such an approach would also have an additional benefit. Individual employment rights are not automatic in effect – if they were, there wouldn't be the debates over tribunal reform or enforcement. They also encourage compliance, when it is our interests to put the emphasis on continuously raising standards. A culture of legal dependency won't help very much here – what is really needed is to encourage the day-to-day consensus building and 'give-and-take' associated with the best of collective bargaining and 'voluntarism'.

Concluding remarks

Maximising the potential of consultation at work poses enormous challenges in the UK. Realists will no doubt argue that consultation is doomed to remain a Cinderella process in the UK – the poor relation to communications and collective bargaining. Moreover, there is no obvious Prince Charming to ensure that Cinderella gets to the ball.

Very clear is that the very substantial prize that effective consultation practice could bring depends crucially on the response of management and trade unions to the ICE Regulations and whether they are able to break free from the historical legacy. If management takes the opportunity to refresh and renew their arrangements, there could be further developments that go beyond those already discussed. If, on the other hand, it ignores the Regulations because it thinks there won't be a challenge or simply does what is necessary to comply, very little will change. Similarly, if trade unions see the ICE Regulations as an opportunity – not only to extend the coverage of dialogue where they are already recognised, but also to promote the coverage of information and consultation agreements where they are not – there could be a step change in practice. If, on the other, they simply seek to defend their existing collective bargaining positions, the Regulations could turn out to be a very damp squib.

The government role will also be critical in helping to produce the critical mass necessary to bring about an information and consultation culture. The public services can be encouraged to set a good example, while the proposed sector forums in low pay-low productivity industries could be used to spread the net wider still. Support for a code of practice would help to embed good practice as would designing legislation in such a way that it promotes consultation over implementation. If these things were to happen, the tale could yet have a happy ending.

Further reading

Gill Dix and Sarah Oxenbridge. 2003 *Information and Consultation at Work: From Challenges to Good Practice*. Acas Research Paper 2003 07. London: Acas.

Philip Beaumont and Laurie Hunter. 2003 *Information and consultation at work: from compliance to performance*, London: CIPD.

Derek Luckhurst. 2004. *Partnership working – a practitioners' guide*. London: Involvement and Participation Association.

Annex 1 Other legislation dealing with consultation

Apart from the ICE Regulations, UK employers are legally required to consult on the specific issues set out in the table below:

Area where there is a legal requirement to consult (2004)	Who must be consulted?	About what?
Health & Safety	Under the Safety Representatives & Safety Committees Regulations 1977 and Health & Safety (Consultation with Employees) Regulations 1996 employers must consult with recognised independent trade unions or other elected employee representatives and 'safety representatives'.	Health & Safety at work matters.
Redundancies	The Trade Union & Labour Relations (Consolidation) Act 1992, as amended by the Collective Redundancies & Transfer of Undertakings (Protection of Employment) (Amendment) Regulations (TUPE) 1995, require employers to consult about redundancies in circumstances where it is proposed to dismiss 20 or more employers at one establishment over a period of 90 days or less. Under the Collective Redundancies & TUPE amendment Act 1999, consultation must be with a recognised trade union or elected employee representatives, where no trade union exists.	With a view to reaching agreement with the appropriate representatives. Consultation must include discussion about ways of avoiding the redundancies, reducing the numbers to be dismissed and mitigating the consequences of any redundancies.
Business Transfers	The TUPE regulations 1981, as amended by the Collective Redundancies & TUPE Amendment Regulations 1995 & 1999, require employers to consult with a recognised trade union or elected employee representatives, where no trade union exists.	When there is to be a transfer of a business to which the regulations apply. Consultation must be undertaken by the employer, with a view to reaching agreement with the appropriate representatives.

Works Councils	Under the Transnational Information & Consultation of Employees (TICE) Regulations 1999, companies with at least 1,000 employees in EC member states and with at least 150 employees in two or more Member States must have a European Work Council (EWC) or equivalent procedure.	Transitional information & consultation for the entire workforce.
Occupational Pensions	The Social Security Pensions Act 1975 requires employers to consult with independent, recognised trade unions. The Pensions Act 2004 enables the Government to make regulations imposing an obligation on employers to consult before making major changes to occupational pension schemes. How the consultation is to be carried out is yet to be finalised is – it is likely that the Pension Act Regulations will not come into force until April 2006. As in the case of collective redundancies and business transfers, however, there is most likely to be an option to consult over pensions involving either dedicated arrangements or the general information and consultation framework. Those who wish to embrace consultation within their general framework, though, may have to make provision for the involvement of ex-employees who are members of the pension scheme.	Certain matters in relation to the contracting out of the state scheme of an occupational pension scheme. The precise coverage has yet to be finalised. It is expected, however, to cover issues such as the freezing of schemes, the closure to new members, changing from a defined benefit to defined contribution or a significant reduction in accrual rate.

Annex 2 Further guidance on consultation under the standard I&C provisions

- The legislation defines consultation as "the exchange of views and establishment of dialogue" between the employer and the I&C representatives. There is case law in other contexts that helps clarify the meaning of the term.
- Consultation is more than simply providing information. Consultees must be given a fair and proper opportunity to understand fully the matters about which they are being consulted, and to express their views on those subjects – that is, they must be given adequate information and time both to consider the matter, form a view on it, and express that view.
- There must be genuine and conscientious consideration by the employer of the consultees' views. The standard provisions in the I&C egulations specifically require the employer to meet the I&C representatives at a level of management relevant to the subject under discussion, and to give a reasoned response to any opinion the representatives may give.
- The purpose of consulting I&C representatives on the matters covered by categories (b) and (c) is to give them the opportunity to express their views on such things as the existing level and structure of employment within the undertaking, and its probable development, including possible recruitment, transfers or redundancies, and any plans to redeploy or retrain affected employees; and on decisions covered by category (c). I&C representatives may consider the existing level and structure of employment to be inappropriate, or may disagree with the employer's plans for changes or for redeployment or retraining. They may disagree with decisions or have suggestions for modifying them or alternative proposals. They may also have views on how decisions are to be announced to employees.
- However, employers are not obliged to follow the I&C representatives' opinion. Consultation is different from negotiation, collective bargaining or joint decisionmaking. Decision-making remains the responsibility of management.
- The requirement to consult with a view to reaching agreement is confined to decisions covered by category (c) that are within the scope of the employer's power.
- This would therefore exclude, for example, trying to reach agreement on decisions taken by a parent company that impacted on the undertaking, or decisions required by law or by a regulatory authority.
- The requirement only applies to consultation about category (c) matters, not consultation about category (b) matters. This is because category (c) concerns decisions – something on which agreement may in principle be possible – whereas the "situation, structure and probable development of employment" referred to in category (b) is of a more factual nature and therefore less appropriate for "agreement".
- The standard provisions require consultation to take place at the level of management relevant to the subject under discussion. In some cases this will mean the management of the undertaking itself, in other cases it may mean local management. In a group of companies it may include management from a parent company. It is for individual employers to decide what it may mean for them in practice. In DTI's view it implies a level of management with the authority to change the decision being consulted about.

Case quoted is *R. v. British Coal Corporation and SoS for Trade and Industry ex parte Price and others [1994] IRLR 72*, where the judge adopted the tests set out in *R v Gwent CC, ex parte Bryant (1988) COD 19.*

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