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Representation of Employees in Collective Bargaining within the Firm: Voluntarism in the UK

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I. Trade Union Representation of Employees in Collective Bargaining within the Firm

1. Trade union as a traditional form of employees' representation in collective bargaining within the firm

'Britain is the home of the collective bargain.'¹

In historical terms, the defining characteristic of the British system of collective labour law has been its commitment to *voluntarism*. This was an aspect of collective *laissez-faire* policy. It found its most eloquent exposition in the seminal work of Otto Kahn-Freund. In 1954 Kahn-Freund observed that 'there is, perhaps, no major country in the world in which the law has played a less significant role in the shaping of these relations than in Great Britain and in which today the law and the legal profession have less to do with labour relations.'² Collective bargaining had developed, it was said, 'by way of industrial autonomy.'³ As an explanatory concept for tracing the historical trajectory of collective bargaining voluntarism has been subject to a large degree of misunderstanding. It did not equate with a stance of State neutrality towards the institution of collective bargaining. On the contrary, the post-war State was highly supportive of joint regulation through collective bargaining. Nor did it equate with an abstention of the law from industrial relations. On the contrary, there was a stable pattern of legal and administrative intervention regulating many aspects of the collective bargaining process. What it did correspond to was a very distinctive legal structure that supported autonomous collective bargaining as its central regulatory method. This embodied two fundamental axioms: a positive preference for voluntary collective bargaining over State regulation; coupled with a negative distrust of the common law and its courts in the sphere of

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¹ O Kahn-Freund, 'Collective Agreements Under War Legislation' (1943) 6 *Modern Law Review* 112

² O Kahn-Freund, 'Legal Framework', in A Flanders and H Clegg (eds), *The System of Industrial Relations in Great Britain* (1954) 42, 44 (hereafter 'Legal Framework')

³ O Kahn-Freund, *Legal Framework* at 44

collective labour relations. This did not merely mirror trade union values. The tenets of 'industrial autonomy' formed the basis for a consensus between organized labour, employers and the State.

This positive preference for voluntary collective bargaining was reflected in two features of the legal framework relating to collective representation. First, auxiliary supports promoted collective bargaining through a strategy of indirect inducement rather than direct legal compulsion in the form of a legal duty to bargain. This explains why the idea of a legal duty to bargain was historically anathema to the values and structures of British labour law.⁴ Policing the duty to bargain would have necessitated administrative and judicial scrutiny of the structures and procedures of collective bargaining.⁵ From the perspective of voluntarism, this would involve an illegitimate incursion on the autonomous processes of joint regulation. Secondly, the principle of industrial autonomy explains the historical absence of legislatively mandated works councils in the enterprise.⁶ This regulatory space was instead occupied at a relatively early stage by union shop stewards engaged in collective bargaining at plant level. The continental works council system had 'its British equivalent in the functions of the shop stewards',⁷ but 'without – from the British point of view – the oppressively gigantic legal apparatus of the works council system.'⁸ Instead, collective bargaining at plant level was very procedural in its orientation, eschewing formalized codification and operating on the basis of informal 'custom and practice'.

2. *Trade union employees' representation in collective bargaining within the firm and the decrease of unionization*

In line with international trends the coverage of collective bargaining has contracted over the last twenty five years in the United Kingdom. However, the gradient of this decline has been far steeper here than in other Western European countries.⁹ This contraction has been traced in a series of periodic analyses of employment relations in the workplace. Thus, in workplaces with 25 or more employees, union recognition stood at 66 percent in 1984. This had dropped to 53 percent in 1990 and to 45 percent in 1998.¹⁰ Preliminary findings from the 2004 Workplace Employee Relations Survey suggest there has been further erosion of the collective bargaining base.¹¹ This estimates that unions are recognized for the purposes of collective bargaining in only 30 percent of workplaces. Much of this decrease between 1998 and 2004 is accounted for by a decline in recognition in small workplaces of between 10 and

⁴ Eventually the emergence of a statutory duty to bargain occurred in the 1970s, with statutory recognition machinery implemented in the Industrial Relations Act 1971 and then later in the Employment Protection Act 1975. Space precludes any discussion of these measures.

⁵ O Kahn-Freund, 'Industrial Relations and the Law: Retrospect and Prospect' (1969) 7 *British Journal of Industrial Relations* 301, 307

⁶ W Streeck, 'Works Councils in Western Europe: From Consultation to Participation', in J Rogers and W Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (1995) 316

⁷ O Kahn-Freund, 'Labour Law and Industrial Relations in Great Britain and West Germany', Lord Wedderburn, R Lewis and J Clark (eds), *Labour Law and Industrial Relations* (1983) 8

⁸ Kahn-Freund, above n 7 at 5

⁹ S Machin, 'Trade union decline, new workplaces and new workers', in H Gospel and S Wood (eds), *Representing Workers: Union Recognition and Membership in Britain* (2003) 17

¹⁰ W Brown, S Deakin, M Hudson and C Pratten, 'The limits of statutory trade union recognition' (2001) 32 *Industrial Relations Journal* 180, 184

¹¹ B Kersley, C Alpin, J Forth, A Bryson, H Bewley, G Dix, and S Oxenbridge, *Inside the Workplace: First Findings from the Employment Relations Survey (WERS 2004)* (2004)

24 employees – from 28 percent to 18 percent. With respect to larger workplaces recognition has in fact stabilized at about 40 percent between 1998 and 2004. Given the concentration of recognition arrangements in larger workplaces, 50 percent of employees are currently covered by some form of recognition for collective bargaining. This decline in collective bargaining coverage has been coupled with a large dilution in union membership density. In 1979, for example, 53 percent of employees were trade union members; by 1999 only 28 percent of employees were trade union members.¹² This decline has been largely attributable to new entrants to the labour market not joining unions rather than those already in union membership walking away from the union. The upshot of this pattern of decline is that by 2001, 48 percent of all employees had never been a member of a trade union.¹³ This rise in never-membership presents significant obstacles to unions seeking to expand their organizational base into new territories. The regulatory vacuum left by the recession of collective bargaining has not been filled by the emergence of other forms of voluntary collective regulation to take its place. Joint consultation committees are much more likely to be found in unionized than non-unionized workplaces. As such, consultative committees seem to operate as adjuncts to rather than substitutes for collective bargaining.¹⁴ This confirms the thesis that a regulatory implication of the decline in collective bargaining is the increasing ‘procedural individualization’ of the employment relation, involving a power shift to employers unilaterally determining contractual relationships on a standardized basis.¹⁵

This paints a rather broad brush picture of the dominant trends in collective bargaining since 1979. Nevertheless, with the election of Labour government in 1997 there has been a marked shift in public policy towards union recognition. In particular, the introduction of a statutory union recognition mechanism has led to some modest recognition gains for unions invoking the statutory procedure. More significant still is the ‘shadow’ effect of the statutory procedure as a stimulant to targeted union organizational activity leading to voluntary recognition by employers. According to Gall approximately 2331 new recognition deals had been signed between 1995 and 2002, and there has been a corresponding diminution in levels of employer de-recognition of unions.¹⁶ Furthermore, statistics from the Trade Union Congress (TUC) indicate a sharp increase in voluntary recognition since the enactment of the statutory procedure.¹⁷ While this trend has levelled out in recent years, the number of new voluntary recognition deals in 2004-2005 still exceeds that prior to the implementation of the statutory procedure.¹⁸ All of this indicates a shift in the relative balance between recognition and de-recognition cases when comparing pre- and post-1997 data.¹⁹ This gives some ground for cautious optimism in predicting the future trajectory of collective bargaining in the UK.

¹² S Machin, ‘Union decline in Britain’ (2000) 38 *British Journal of Industrial Relations* 631

¹³ A Bryson and R Gomez, ‘Buying into union membership’, in H Gospel and S Wood (eds), *Representing Workers: Union Recognition and Membership in Britain* (2003) 72

¹⁴ M Cully, S Woodland, A O’Reilly and G Dix, *Britain at Work As depicted by the 1998 Workplace Employee Relations Survey* (1999) 100

¹⁵ W Brown, S Deakin, D Nash and S Oxenbridge, ‘The Employment Contract: From Collective Procedures to Individual Rights’ (2000) 38 *British Journal of Industrial Relations* 611

¹⁶ G Gall, ‘Trade union recognition in Britain, 1995-2002: turning a corner?’ (2004) 35 *Industrial Relations Journal* 249

¹⁷ TUC, *Trade union trends: focus on recognition* (2004)

¹⁸ TUC, *Trade union trends: focus on recognition* (2005)

¹⁹ See, for example, G Gall and S McKay, ‘Developments in Union Recognition and De-recognition in Britain, 1994-1998’ (1999) 37 *British Journal of Industrial Relations* 601

3. *Trade union representation of employees in collective bargaining within the firm in the light of national experience: who represents a union, scope and procedure of bargaining*

There are two methods of recognition available to unions, voluntary and statutory. With respect to bargaining level this is located predominantly at the level of the individual enterprise or plant. Multi-employer bargaining is now relatively rare in the private sector.²⁰ Indeed, the statutory procedure is itself predicated upon this dominant pattern, since the union's recognition request must be addressed to a single employer in order for it to be valid. Each method will be discussed in turn. It is important to emphasize at the outset that these two methods are interlinked by design. The statutory method is conceived as a last resort to compel recalcitrant employers to come to the bargaining table; the legislative aspiration is that in most cases the parties will, perhaps stimulated by the possibility of a statutory duty to bargain, decide their own recognition arrangements voluntarily. The *statutory* procedure was enacted in the Employment Relations Act 1999.²¹ In comparative perspective, the British Schedule A1 procedure (Schedule A1) is based on the North American model of statutory union certification. Bargaining rights are allocated on the basis of specified thresholds related to worker support in the bargaining unit. Where the union has majority membership, or it is supported by a majority of those voting and at least forty percent of those entitled to vote in a secret ballot of constituent workers in the bargaining unit, the union is entitled to a declaration of recognition. The statutory procedure is administered by the Central Arbitration Committee (CAC), an institution with industrial relations expertise. In many respects the Schedule A1 mechanism avoids many of the design weaknesses of the North American 'Wagner Act' model. Two points of distinction may be noted. First, the courts have a relatively diminished profile in its operation. There is no right of appeal from CAC decisions; and while there have been some challenges to the CAC through judicial review the courts have generally displayed non-interventionist tendencies, deferring to the expertise of the CAC.²² Secondly, Schedule A1 provides for the allocation of bargaining rights without a ballot where the union has majority membership in the bargaining unit.²³ This eliminates many of the opportunities for employer interference with workers' free choice of their bargaining representative that are facilitated by a system allocating bargaining rights on the basis of ballot procedures.

The main functions of the CAC under Schedule A1 are to determine whether the union's application is valid and admissible; to determine whether the union's proposed bargaining unit is appropriate because 'compatible with effective management'; to determine whether to award bargaining rights without a ballot in a situation of majority membership; to arrange for a secret ballot of the bargaining unit to determine majority support, and to supervise the ballot process to ensure neither party commits unfair practices; to make a declaration of recognition where the support thresholds have been reached; and to impose a default procedure agreement where the parties are unable to agree their own bargaining arrangements. The tradition of voluntarism is an enduring one and its tenets infuse the legislation. In many respects this is proving to be a valuable legacy. First, the principal method for delineating the bargaining unit is voluntary agreement between the parties. This has been achieved in 58 percent of cases.²⁴

²⁰ Brown et al, above n 15 at 614-616

²¹ Inserted into TULRCA 1992, Schedule A1; for an overview of the Schedule A1 statutory mechanism see B Simpson, 'Trade Union Recognition and the Law, a New Approach – Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992' (2000) 29 ILJ 193

²² For an important judicial statement of principle with respect to the CAC's margin of discretion, see *R (BBC) v CAC* [2003] ICR 1542

²³ This is subject to a number of exceptions, defined in TULRCA 1992 Schedule A1, paragraph 22 (4)

²⁴ CAC Annual Report 2004-2005, 16

In the absence of agreement the initiative lies with the union in proposing the bargaining unit. The union is accorded a large margin of discretion in this regard since the CAC is not permitted to interfere unless the unit is *inappropriate* by reference to statutory criteria.²⁵ This high threshold has the effect of insulating the union's conception of the bargaining unit from easy displacement by employer counter-proposals. Thus the bargaining unit is more likely to reflect constituencies within the enterprise with a strong degree of union organizational presence and potential support, enhancing the prospects for a successful recognition claim. In contentious cases the CAC has adopted the union's proposed bargaining unit in 62 percent of cases.²⁶ Secondly, the CAC has interpreted restrictively the criterion for ordering a ballot 'in the interests of good industrial relations' where there is majority membership. In the first five years of the procedure there have been 57 applications for automatic recognition without a ballot and this has been granted in two thirds of cases.²⁷ This has been critical to the success of the statutory procedure in the light of defects in the US statutory framework.

In other respects, however, the legacy of voluntarism is less attractive. First, an application is not admissible if there is already a collective agreement in force that encompasses any of the members of the bargaining unit. This is based on the priority of voluntary over statutory recognition and the need to protect existing voluntary bargaining structures from destabilization. As such, an employer may block the statutory procedure by voluntarily recognizing an independent trade union even where that union is not representative of the constituent bargaining unit. This remains so even where there is a competing union with substantial support within the bargaining unit. The representative union is precluded from bringing a statutory claim in virtue of the voluntary arrangement. This occurred in *R (NUJ) v CAC*,²⁸ where the employer accorded voluntary recognition to a 'sweetheart' union with little support in the bargaining unit, blocking the statutory claim of another union with substantial organizational strength. This gives an employer considerable opportunities for avoiding effective collective bargaining through the manipulation of 'sham' voluntary agreements. The employer is also entitled to confer recognition on a non-independent union under employer domination, so blocking a statutory claim by an independent union.²⁹ What is needed is a more substantive approach, fashioning legal criteria for identifying 'representative' unions and the development of an unfair labour practice jurisdiction targeting sham organizations under employer domination and control. This would necessitate a greater degree of legal intervention in trade union affairs than voluntarism has traditionally been accustomed to countenancing.

Secondly, and reflecting the historical position, the framing of the legal duty to bargain indicates considerable reluctance on the part of the law to intrude too deeply into the bargaining relationship. Instead the law's role is procedural in orientation rather than ensuring substantive outcomes. The statutory duty is limited in both scope and depth. As regards scope the bargaining agenda extends only to pay, hours and holidays. As regards depth the statutory method of bargaining does not impose good faith duties; rather, it envisages a duty merely to meet and confer without a 'view to reaching agreement' in an annualized pay round. This limited procedural remit is also reflected in the remedy. This is an order for specific

²⁵ *R (Kwik-Fit (GB) Ltd) v CAC* [2002] IRLR 395

²⁶ CAC Annual Report 2004-2005, 16

²⁷ CAC Annual Report 2004-2005, 16; the courts have deferred to the CAC in the determination of this issue: see *Fullarton Petitioner* [2001] IRLR 527

²⁸ [2005] IRLR 28

²⁹ TULRCA 1992, Schedule A1 paragraph 35 (4); see K D Ewing, 'Trade Union Recognition and Staff Associations – A Breach of International Labour Standards?' (2000) 29 ILJ 267

performance, enforceable in the ordinary courts, of the steps specified in the default procedure agreement, rather the substantive remedy of compulsory arbitration. It seems that tactics such as ‘surface bargaining’, entering into negotiations without an open mind to the possibility of agreement, would not be contrary to the legal duty to bargain. The Government has set itself against extending the bargaining agenda to cover a wider range of subjects (such as pensions and equal opportunities) until there is evidence that this reflects voluntary practices. Current evidence indicates that recent voluntary recognition deals are tracking the limited statutory agenda; other topics such as training, pensions, equal opportunities, and new technologies are much more likely to be the subject of consultation or information provision if they are discussed at all.³⁰ The Government’s stance indicates the law should mirror rather than shape existing voluntary practices. Whether this is a coherent position is debatable for it seems as likely that the limited contours of recent voluntary arrangements are themselves simply reflective of the statutory minima. If this is so there may be a persuasive case for using the law to steer voluntary arrangements indirectly by bolstering the scope and depth of the statutory duty through the fashioning of good faith bargaining duties.

In accordance with the British tradition of voluntarism the principal method of recognition is *voluntary* in nature. The concept of voluntary recognition is based upon employer consent. The statutory definition identifies recognition as ‘the recognition of the union by an employer...to any extent, for the purposes of collective bargaining’.³¹ In turn, collective bargaining encapsulates ‘negotiations relating to or connected with’ a range of specified subjects. This includes ‘the terms and conditions of employment, or the physical conditions in which any workers are required to work’, ‘engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers’, ‘allocation of work or the duties of employment’, and ‘matters of discipline’.³² The frontiers of joint regulation envisaged by the statutory definition of collective bargaining are broadly conceived. Nevertheless, as the historical experience indicates, the social practice of voluntary collective bargaining in Britain is sufficiently fluid as to defy reduction into formal legal categories. As such, it is necessary to adopt a sociological rather than juridical perspective in order to grasp the contours of the social practice of voluntary recognition.

Sociological analysis indicates a procedural transformation in the nature of collective bargaining over the last four decades. This has corresponded to a spectacular dilution of the union’s regulatory function within the enterprise. In procedural terms, joint regulation has been progressively eroded and this has been substituted by greater unilateral control of the employment relationship by employers. This has been manifested in two tendencies. First, the scope of dialogue has contracted significantly. Whereas in the mid-1960s joint regulation extended to issues such as work distribution, recruitment and the implementation of new technologies, more recent research points to ‘a very substantial decline in union representative involvement in the regulation of employee obligations and work organization aspects of the employment contract.’³³ In tandem with this, dialogue with unions is increasingly assuming a consultative character. This shift to consultative interaction leaves the managerial prerogative intact. The ‘shallowness’ of voluntary collective bargaining is most vividly reflected in the erosion of union influence over pay bargaining. Even where unions are recognized, payment mechanisms are often arranged on the basis of performance-related pay. As pay awards

³⁰ S Moore, S McKay and H Bewley, *DTI Employment Relations Research Series No. 43: The Content of new voluntary trade union recognition agreements 1998-2002, Volume 2* (2005)

³¹ TULRCA 1992, s 178 (3)

³² TULRCA 1992, s 178 (2)

³³ Brown et al, above n 15 at 617

increasingly track individual appraisals, the extent of union involvement is diminished. The widespread exclusion of recognized unions from the core activity of pay determination is emblematic of their social weakness in voluntary arrangements.³⁴ The most recent empirical work suggests that voluntary recognition arrangements prompted by the statutory procedures have involved genuine negotiation on core bargaining topics such as pay; however, other non-core topics such as training, pensions and equality of opportunity are most likely to be subject to consultation, if they are discussed at all.³⁵ This still indicates a very substantial gap between legal definition and social reality in the sphere of voluntary collective bargaining.

II. Non-union Representation of Employees in Collective Bargaining within the Firm

I. Non-union representation of employees within the firm: its reasons and forms

The historical pattern of worker representation in the UK was based upon the single channel approach. Worker representation was channelled through independent unions and this was achieved principally through enterprise-level collective bargaining. There was no concept of statutory works councils functioning as a complementary second channel within the enterprise. The single channel approach has now been superseded in legal policy terms. This demise was precipitated by European influences.³⁶ The right to consultation in European law envisaged universal provision of employee representation to ensure compatibility with its requirements; the single channel technique of confining representational rights to recognized unions alone was inconsistent with this aspiration since in the absence of a recognized union there would be no provision for consultation with employee representatives. This aspiration to universality is quite natural given the democratic rationale of consultation procedure. Democratic rights within the workplace should be guaranteed to all employees affected by workplace decision-making rather than confined to areas covered by union recognition. Consequently there are now two distinct approaches to the designation of employee representatives in statutory consultation procedures. First, specific consultation measures, such as those related to collective redundancies, accord representational priority to recognized unions.³⁷ In the absence of a recognized union, however, consultation procedure is channelled either through existing non-union employee representative structures such as a joint consultative committee, or alternatively employee representatives are selected through a statutory ballot procedure.³⁸ Employee representatives selected through ballot procedure are also accorded a range of rights to facilitate their representational role, including protection from discriminatory victimization by an employer and rights to reasonable paid time off to enable them to fulfil their statutory functions.³⁹ Secondly, the general information and consultation framework has no such priority rule for recognized unions. Instead, under the standard information and consultation procedures specified in the Information and Consultation of Employees Regulations 2004 (ICER) employee representatives are to be

³⁴ S Oxenbridge, W Brown, S Deakin and C Pratten, 'Initial Responses to the Statutory Recognition Provisions of the Employment Relations Act 1999' (2003) 41 *British Journal of Industrial Relations* 315, 327

³⁵ Moore, McKay and Bewley, above n 30

³⁶ See Case C – 383/92 *EC Commission v United Kingdom* [1994] IRLR 412, discussed by P L Davies, 'A Challenge to Single Channel' (1994) 23 *ILJ* 272

³⁷ There are specific consultation duties related to collective redundancies, transfer of undertakings, health and safety, and before contracting out of the state earnings related pension scheme. For general discussion of these contexts, see S Deakin and G Morris, *Labour Law* (4th ed, 2005) 860-896. For the purposes of analysing specific consultation measures, we shall focus on collective redundancies consultation procedure in this chapter.

³⁸ TULRCA 1992, s 188 (1B)

³⁹ ERA 1996, s 47 and 61

elected by the whole workforce in a statutory ballot procedure scrutinized by an ‘independent ballot supervisor’.⁴⁰ In common with the framework related to specific consultation procedure, employee representatives are also accorded protective and facilitative rights to enable them to perform their consultative functions effectively.⁴¹

2. *Objective of non-union representation within the firm: a partner for information and consultation or also a party to collective bargaining*

In legal terms there is a broad procedural distinction between non-union and union representation. Legal provision for non-union representation is largely confined to statutory consultation mechanisms.⁴² While recognized unions also have preferential rights with respect to specific consultation procedures the principal function of the recognized union is to conduct collective bargaining on behalf of the bargaining unit. In practice, however, there is some blurring of this procedural division. Given the fluidity of dialogue procedures in the UK such categorical distinctions are rarely watertight. With respect to non-union representation it seems possible that consultative arrangements formed under ICER 2004 may evolve into bargaining relationships; there seems to be no legal bar preventing employee representatives from engaging in bargaining as opposed to consultative functions.⁴³ This is a concern if the representational structure falls within the statutory definition of a ‘trade union’ since voluntary recognition for negotiating purposes of a non-independent trade union currently blocks the operation of the statutory recognition procedure.⁴⁴ With respect to union representation, we have already seen how voluntary collective bargaining often resembles consultation in practice, particularly where union density is low and the ability to mobilize social pressure is correspondingly diminished.

3. *Non-union representation of employees in collective bargaining within the firm in the light of national experience: the form(s) of non-union representation, scope and procedure of bargaining*

Broadly speaking, there are two forms of consultation procedure in British law. Both forms have been given legislative impetus by the EU. First, consultative obligations may be triggered in specific circumstances such as collective redundancies or transfers of undertakings. This was the first wave of consultation measure that emerged in the 1970s in

⁴⁰ ICE Regulations 2004, Regulation 19 and Schedule 2

⁴¹ ICE Regulations 2004, Regulations 27-37

⁴² This is subject to three qualifications. First, *ad hoc* non-union representatives sometimes engage in bargaining with an employer but the incidence of this kind of arrangement is rare: see Cully et al, above n 19 at 103. Secondly, non-independent unions may be voluntarily recognised by employers in which case an independent union is barred from bringing a claim for statutory recognition with respect to the same group of workers. Thirdly, there is scope for non-union representatives to participate in the bargained adjustment of certain statutory norms through the mechanism of a ‘workforce agreement’ as in the case of working time regulation: for discussion, see P L Davies and C Kilpatrick, ‘UK Worker Representation After Single Channel’ (2004) 33 ILJ 121

⁴³ ICER 2004, Regulation 21 does impose a duty upon the parties to ‘work in a spirit of cooperation’. It is unclear whether this duty might be interpreted as excluding bargaining functions from the consultation procedure.

⁴⁴ On the definition of a trade union see TULRCA 1992, s 1 (a). It seems unlikely however that consultative committees would be so characterised: see *Frost v Clark and Smith* [1973] IRLR 216, and the discussion in Deakin and Morris, above n 37 at 754-757

the UK.⁴⁵ Secondly, recent legislative initiatives envisage general information and consultation procedure as an ongoing process of dialogue between employer and employee representatives.⁴⁶ Given the historical context in the UK, this second wave of general consultation procedure is an exciting point of departure for the representational landscape in British law. In its most developed form this might extend to the emergence of ‘works council’-type structures as a complementary second channel alongside collective bargaining through recognized unions. The broad outline of first and second wave consultation procedure will now be discussed in turn.

With respect to first wave consultation procedure, there are two matters that may be distinguished. First, what is the procedural nature of the legal duties specified in the legislation? Is it a form of consensus-based codetermination involving a genuine encroachment on managerial prerogative, or merely a duty on the employer to consider the viewpoint of employee representatives before unilaterally implementing its decision? A related issue is whether consultation procedure is concerned mainly with mitigating the effects of managerial decisions or allowing employee representatives a democratic opportunity to shape the decision itself. Secondly, what is the nature of the non-union representative structures designated by the legislation? Do non-union representatives have sufficient independence and expertise to enable them to function effectively as representatives? Or are non-union channels inevitably vulnerable to employer domination and interference thus compromising their representational efficacy?

In assessing the democratic potential of first wave consultation, the procedural dimension involves four distinct aspects: the statutory definition of consultation; the timing of consultation; the scope of consultation; and remedies for breach of consultation procedure. The *statutory definition of consultation* specifies this as being ‘with a view to reaching agreement with the appropriate representatives.’⁴⁷ As a matter of law, sham dialogue does not satisfy the statutory obligations placed on an employer. This seems to inject a requirement of good faith dealing into the process. At a minimum the employer is required to engage in ‘conscientious consideration’ of the representatives’ submissions at a formative stage in the process.⁴⁸ As such, ‘surface’ consultation where the employer enters dialogue with a closed mind as to the outcome of that dialogue would be unlawful. Pre-determined decisions by an employer are wholly inconsistent with the statutory vision of a reflective employer participating in a dialogical exchange of reasons. This seems to be a natural corollary of the statutory phrase ‘with a view to reaching agreement’. While this falls short of co-determination it also ensures some measure of potential democratic influence by employee representatives. As an aspect of good faith dealing, the *timing* of consultation assumes considerable importance, and in this respect there is a certain tension within the legislative structure. Consultation is triggered where an employer is ‘proposing to dismiss as redundant’ although it is also required to ‘begin in good time’.⁴⁹ As the courts have pointed out, the statutory formulation is fundamentally different from the Directive’s formulation of the trigger as ‘contemplating collective redundancies’.⁵⁰ Where collective redundancies are

⁴⁵ Council Directive 75/129 (collective redundancies); Council Directive 77/187 (transfers of undertakings)

⁴⁶ Directive 2002/14/EC. The concept of the European Works Council lies beyond the scope of this work: for discussion, see Deakin and Morris, above n 37 at 910-917

⁴⁷ TULRCA 1992 s 188 (2) (c)

⁴⁸ See *Middlesbrough Borough Council v TGWU* [2002] IRLR 332

⁴⁹ TULRCA 1992, s 188 (1) and s 188 (1A)

⁵⁰ See Council Directive 98/59/EC Article 2 (1). The disjunction between ‘propose’ and ‘contemplate’ is criticised in *R v British Coal Corporation, ex p Vardy* [1993] IRLR 104. See also *MSF v Refuge Assurance Ltd* [2002] IRLR 324, paragraph 42

‘proposed’ there is an element of pre-determination that is lacking from ‘contemplation’. This seems inconsistent with the statutory insistence on employer open-mindedness as an aspect of ‘genuine and meaningful’ dialogue. In this respect it is strongly arguable that the Regulations have failed to implement the Directive properly. It also serves to entrench rather than democratize managerial prerogatives in this context thereby neutralizing the democratic potential of the statutory definition of consultation.

With respect to the *scope* of consultation this is inclusively defined as ‘ways of – avoiding the dismissals, reducing the numbers of employees to be dismissed, and mitigating the consequences of the dismissals’.⁵¹ The crucial question here is whether this reflects a conception of decisional or effects-based consultation. On the one hand, the courts have insisted it is mandatory to consult on ways of avoiding the dismissals; the employer cannot simply discharge consultative obligations by consulting over the mitigation of the effects of its pre-determined decision to implement collective redundancies.⁵² This seems to envisage some form of decisional consultation. On the other hand, the anticipatory potential of the procedure is limited by the fact that an employer is not required to consult on the economic reasons underlying the redundancy situation.⁵³ This shifts the statutory conception back towards a form of effects-based consultation. This is a major weakness of specific consultation measures more generally. Only where there are standing and general consultative structures engaged in ongoing dialogue can such decisions be genuinely subject to democratic influence. Finally, procedural effectiveness is ultimately determined by the *remedial framework*. This is limited in two important respects. First, the exclusive remedy is financial rather than procedural in nature. This corresponds to a ‘protective award’ accruing to affected employees but enforceable by employee representatives.⁵⁴ The measure of the protective reward must be commensurate with the severity of the employer’s breach.⁵⁵ There is no provision for injunctive relief to force the employer to consult, nor are collective redundancies implemented without consultation legally null and void. The remedial position has been described as ‘wholly inadequate’, permitting employers to disregard democratic rights as a cost of doing business.⁵⁶ Secondly, the legislation allows employers a defence of ‘special circumstances’ to a claim for breach of consultation procedure.⁵⁷ Although it has been interpreted restrictively by the courts, such that foreseeable financial disaster lies beyond its scope, there is no corresponding provision for this defence in the Directive.⁵⁸

The democratic potential of first wave consultation is also inextricably tied to the determination of non-union employee representatives. With the ECJ repudiation of single channel this has been an issue of considerable controversy in British law. The current legislative framework adopts a recognized union priority rule.⁵⁹ In the absence of a recognized union there are two alternative mechanisms for the designation of employee representatives. First, the employer may choose to consult with ‘employee representatives appointed or elected by the affected employees otherwise than for the purposes of this section, who...have authority from those employees to receive information and to be consulted about

⁵¹ TULRCA 1992 s 188 (2)

⁵² *Middlesbrough Borough Council v TGWU* [2002] IRLR 332

⁵³ *Securicor Omega Express Ltd v GMB* [2004] IRLR 9

⁵⁴ TULRCA 1992, s 189 (2)-(3)

⁵⁵ *Susie Radin Ltd v GMB* [2004] ICR 893

⁵⁶ Deakin and Morris, above n 37 at 886

⁵⁷ TULRCA 1992, sections 188(7) and 189 (6)

⁵⁸ *Clarks of Hove Ltd v Bakers’ Union* [1978] IRLR 366

⁵⁹ TULRCA 1992, s 188 (1B) (a)

the proposed dismissals on their behalf'.⁶⁰ This is of potentially enormous scope, seemingly extending to a variety of employer-initiated joint consultative committees within the firm subsidized and supported by the employer. There is no requirement that these employee representatives be insulated from employer domination or control. Alternatively, the employer may choose to arrange for the direct election of employee representatives. Subject to the statutory insistence that the ballot arrangements are 'fair',⁶¹ the employer is accorded a large degree of discretion in deciding the relevant constituencies, the number of representatives to be elected, and their term of office. In addition, the ballot procedure is not subject to external scrutiny by an independent third party. The employer is simply required to ensure the votes are 'accurately counted.'⁶² Elected employee representatives are given statutory protection from employer victimization in the exercise of their functions.⁶³ Furthermore, they are also granted a right to reasonable paid time off to enable them to discharge their functions.⁶⁴ This may include time off for training purposes but there is no duty to ensure such representatives do in fact receive appropriate training. In addition, the employer is required to provide representatives 'facilities as may be appropriate'.⁶⁵ In this way, there is statutory warrant here for employers to proffer various forms of support, financial or otherwise, to employee representatives engaged in consultative tasks. There is no serious analysis of when 'facilities' provision or employer financial support compromises the ability of employee representatives to act independently of the employer's whims. In the absence of legal criteria for identifying and outlawing employer-dominated representational arrangements, the specification of the non-union channel in these first wave consultation measures is indefensible.

In response to these shortcomings, the recent emergence of second wave consultation measures was timely. The effect of the Directive on National Level Information and Consultation was potentially very radical in its departure from single channel. It envisaged a *minimum framework* for information and consultation of employee representatives in undertakings or establishments. In procedural terms this can be contrasted with the traditional conception of collective bargaining. First, it seemed aligned with a continental tradition of statutorily mandated works councils as general and permanent representative structures within the workplace. Secondly the range of consultation penetrates aspects of managerial prerogative left intact by collective bargaining. This consultative duty encapsulates 'the situation, structure and probable development of employment...and on any anticipatory measures envisaged' and 'decisions likely to lead to substantial changes in work organization or in contractual relations'.⁶⁶ Thirdly, the procedures are more deliberative and cooperative in tone than the traditional pluralist emphasis on conflict of interest in the employment relation. The translation of this European measure into a British idiom has been most interesting. Most striking is the influence of voluntarism in the shaping of the ICE Regulations 2004 implementing the Directive. In this respect there are some important similarities to the regulatory approach adopted in the Schedule A1 recognition procedure.⁶⁷ As with the statutory recognition procedure, the priority of voluntarism may not be an unalloyed virtue.

⁶⁰ TULRCA 1992 s 188 (1B) (b) (i)

⁶¹ TULRCA 1992, s 188A (1) (a)

⁶² TULRCA 1992, s 188A (1) (I) (ii)

⁶³ ERA 1996, s 47

⁶⁴ ERA 1996, s 61

⁶⁵ TULRCA 1992, s 188 (5A)

⁶⁶ Directive 2002/14/EC, Article 4 (2) (b)-(c)

⁶⁷ M Hall, 'Assessing the Information and Consultation of Employees Regulations' (2005) 34 ILJ 103; K D Ewing and G M Truter, 'The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy' (2005) 68 *Modern Law Review* 626

The latitude for organizational flexibility permitted by the Regulations belies any promise of statutorily mandated works councils underpinned by strong co-determination rights. The Regulations are based on the primacy of voluntary agreement. This is reflected in the hierarchy of regulatory techniques set out in the legislation. Somewhat perversely, this hierarchy corresponds to a progressive dilution of the consultative duty, with the least onerous formulation taking priority in the regulatory scheme. At the apex of this hierarchy is the concept of a 'pre-existing agreement'.⁶⁸ This relates to agreements that are in writing, cover all of the employees in the undertaking, have been approved by the employees, and 'set out how the employer is to give information to the employees or their representatives and seek their views on such information.'⁶⁹ Such agreements may be displaced in favour of more substantive consultative procedures through a ballot mechanism, but the high thresholds specified in the legislation ensure that only where there is significant discontent will the default position be shifted.⁷⁰ In practice the 'pre-existing agreement' is likely to be very 'sticky' indeed. While the Directive permits arrangements to be set autonomously by the social partners it is questionable whether this degree of fluidity is consistent with the principle of 'effectiveness' in Article 1 (2). The range of consultation is left unspecified, direct method of information and consultation is permitted, and the employer's consultative duty is merely a duty 'to seek their views' on information provided. Such arrangements are unlikely to resemble works councils in form or operation.

The intermediate tier in the scheme is the 'negotiated agreement' between 'negotiating representatives' and the employer. This is triggered by a valid employee request by 10 percent of employees to initiate negotiations for a consultation procedure.⁷¹ The Regulations are not prescriptive with respect to the identity of 'negotiating representatives'; while they may be trade union representatives there is no requirement that they should be so. It is left to the employer to make arrangements for their 'election or appointment' although it is strongly arguable that by-passing the recognized union will entail that not 'all employees' (i.e. those who are union members) are represented in negotiations.⁷² Neither are the Regulations prescriptive regarding the content of valid 'negotiated agreements'. They must cover all employees in the undertaking, be in writing, set out the circumstances in which the employer must inform or consult, and be approved by the negotiating representatives/workforce.⁷³ Nevertheless this gives the parties creative license in formulating procedures, allowing for direct method of information and consultation and limited consultation scope. Furthermore, while the consultation duty goes beyond that permitted in 'pre-existing' agreements, defined in this context as 'the exchange of views and establishment of a dialogue', this need not be 'with a view to reaching an agreement'. Certainly there is clear distance between this and the co-determination procedures characteristic of the German system.

The third tier is the standard blueprint for an information and consultation procedure in the event of a failure to reach 'negotiated agreement'. Experience with Schedule A1 suggests reliance on the standard provisions is likely to be rare, although we might also expect the 'shadow effect' of the fall-back position to exert some influence on the content of voluntary arrangements. In many respects the standard framework augments consultation procedure in

⁶⁸ ICER 2004, Regulation 8

⁶⁹ ICER 2004, Regulation 8 (1) (d)

⁷⁰ The legislation specifies a 50 percent threshold plus 40 percent of those entitled to vote voting to endorse the initiation of negotiations for a negotiated agreement: see ICER 2004, Regulation 8 (6)

⁷¹ ICER 2004, Regulation 7

⁷² ICER 2004, Regulation 14 (1) – (2)

⁷³ ICER 2004, Regulation 16

the UK. Informational obligations extend across a wide frontier of managerial prerogative including ‘the recent and probable development of the undertaking’s activities and economic situation’.⁷⁴ Furthermore, the employer is under a duty to commit to ‘the exchange of views and establishment of dialogue’ with respect to ‘the situation, structure and probable development of employment within the undertaking and on any anticipatory measures envisaged’.⁷⁵ In its most developed form consultation must be ‘with a view to reaching agreement on decisions within the scope of the employer’s powers’ in the event of ‘decisions likely to lead to substantial changes in work organization’.⁷⁶ The possibility of direct information and consultation is also excluded. Instead consultation must take place with ‘information and consultation representatives’ designated by a statutory ballot procedure.⁷⁷ There is no priority rule for union representatives although in practice unions with a strong organizational foothold are likely to be elected as employee representatives.

The interesting question is whether these measures will reorient the representational landscape in a radical fashion. This must be doubtful. First, it would be misleading to interpret this as precipitating the emergence of works council structures in the UK. Even the standard fallback framework is ‘extremely “minimalist” in infrastructural terms’.⁷⁸ However, a defining mark of works councils is that they are ‘institutionalized bodies for representative communication’ supported by a strong legal underpinning.⁷⁹ This barely fits the most substantive tier of arrangement and we might expect a greater degree of fluidity still in arrangements forged within the context of pre-existing and negotiated consultation agreements. It remains to be seen whether the tradition of voluntarism will prove to be a virtue or a vice. There is a concern that, in the absence of collective countervailing power, voluntarism may legitimate the emergence of diverse procedural arrangements posing no threat to managerial prerogative. It should be recalled the Directive sets out ‘minimum requirements’ for the right to information and consultation. The danger is the rather modest fallback provisions in the ICE Regulations will become a ceiling rather than a floor relative to voluntary practices.

Secondly, the regulatory framework might contribute to enhancing workers’ democratic voice within the enterprise. Within the fallback structure, the scope of consultation extends democratic influence beyond the *effects* of decisions, as with the specific consultation provisions relating to redundancies and transfers, to shaping of the decision itself. This avoids an ‘excessively a posteriori approach to the process of change’ criticized in recital 13 of the Directive. This is enhanced by the specification that certain categories of consultation must be ‘with a view to reaching agreement’, thereby narrowing the gap between negotiation and consultation. In practical terms, however, effective democratic influence ultimately depends upon equilibrium of social power. This necessitates strong union organization at local level. The failure to prescribe an integrated statutory scheme of union structures and consultative structures may ultimately serve to mute the potential for effective democratic voice presented by these measures. Thirdly, the deliberative aspirations of this measure are likely to be unfulfilled in the absence of employee representatives with sufficient expertise. One of the justifications for ‘works council’ type structures is the greater potential for co-operative

⁷⁴ ICER 2004, Regulation 20 (1) (a)

⁷⁵ ICER 2004, Regulation 20 (1) (b)

⁷⁶ ICER 2004, Regulation 20 (4) (d)

⁷⁷ The ballot procedure is set out in ICER 2004, Schedule 2

⁷⁸ Hall, above n 67 at 115

⁷⁹ J Rogers and W Streeck, ‘The Study of Works Councils: Concepts and Problems’, in J Rogers and W Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (1995) 6

deliberation between employer and employee representatives as a counterpoint to the distributive conflicts mediated by collective bargaining. However, deliberative procedures based on reasoned dialogue depend upon appropriately qualified representatives. In the German system, for example, works council integration with local union structures ensures this deliberative procedure is enabled through ‘an intense exchange of material support’.⁸⁰ There is no comparable platform for union integration in ICER 2004. The minimal rights of employee representatives to reasonable paid time off are a poor substitute in the realization of deliberative procedures.⁸¹

III. Prospects for Employees’ Representation in Collective Bargaining within the Firm

1. Importance of a proper employees’ representation within the firm in the light of the trend to decentralization of collective bargaining

The British position can be understood as a fusion of two different conceptions of employee representation. Historically the single channel conception was dominant as a social practice. This came under increasing pressure due to its democratic deficits. In particular, the logic of democratic rights implied their universality, and it was in this regard that the single channel was deficient. With the steep decline of collective bargaining over recent decades the problem of democratic deficit has increased in prominence. The European conception of dual channel representation countered this democratic deficit by extending participatory opportunities to all employees through legally mandated consultative structures with employee representatives. This confluence of British and European representational conceptions has not, however, fully resolved the problem of democratic deficit. One of the most pressing challenges now facing the evolving system of employee representation is how to ensure the independence, expertise and integrity of non-union representative structures while at the same time honouring the democratic principle of universality. As it stands, there is a very real possibility that many non-union consultative structures will be compromised by employer domination and control. Worse still, non-union channels may operate in practice as a technique of union substitution by employers who wish to retain effective control of consultation procedures. Given the centrality of enterprise level bargaining in the UK, the potential for a substitution effect is heightened by the fact that the two channels occupy the same regulatory space. The future trajectory of this fusion experiment remains uncertain. Much will depend upon the degree of integration that can be achieved in coordinating these two representational conceptions.

2. Employees’ freedom to choose the form of their representation in collective bargaining within the firm

British law displays a curiously ambivalent attitude towards the principle of worker free choice between different representative forms. On the one hand, the statutory recognition procedure is predicated upon the allocation of bargaining rights on the basis of majority consent. A similar reliance on this consent-based model can be found in the consultation procedures specified in the ICE Regulations 2004. This is reflected in the increasing prominence of democratic ballot procedures as a mechanism for gauging worker consent as a

⁸⁰ W Streeck, ‘Works Councils in Western Europe: From Consultation to Participation’, in J Rogers and W Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (1995) 337

⁸¹ ICER 2004, Regulations 27-29

prelude to legally valid worker representation. On the other hand, voluntary recognition is based upon employer rather than worker consent. If the employer confers voluntary recognition upon a union, thereby designating it as bargaining representative, this conferral is legally effective *irrespective* of worker consent. This is regardless of the fact that there may be another union with significant worker support within the bargaining unit. Given the primacy of voluntary recognition in British law this gives employers considerable scope for shaping bargaining arrangements within the firm. Each mode of designation raises specific problems that will be discussed in turn.

The 'worker consent' model of representation is aligned with the legal concept of freedom of association in British law. Workers are free to join any union of their choice, and are also free to refrain from joining any union.⁸² Accordingly, individual worker free choice is sovereign in relation to union membership. The statutory recognition procedure is the collective analogue of this approach. Bargaining rights are allocated through the principle of majority rule. This is demonstrated either through majority membership in the bargaining unit or through a statutory ballot procedure administered by the CAC. The requisite support thresholds in the ballot procedure are set high to guarantee genuine majority consent. Not only must a majority of those participating in the ballot procedure vote in favour; forty percent of those entitled to vote in the bargaining unit must also support the union's claim.⁸³ The 'worker consent' model that informs Schedule A1 may be challenged from two perspectives. The first perspective suggests genuine consent may be protected imperfectly by the statutory procedure. This is reflected in four significant design weaknesses. First, there is a 'small firm' exclusion from the statutory procedure's scope of application.⁸⁴ Unions cannot bring statutory claims against firms if they employ less than 21 workers, although the proposed bargaining unit may be smaller than this figure. This has the effect of excluding approximately 31 percent of the workforce from the statutory procedure's coverage. This was justified by the Government on the basis that voluntary recognition was less common in small firms and that the statutory procedure should mirror the contours of social practices. This is vulnerable to the criticism that law can sometimes be usefully deployed to shape rather than mirror existing social practices if there is a normative justification for so doing. It is not clear that the law should be any less solicitous of worker consent in virtue of the relative size of the enterprise.

Secondly, there is some evidence of employer 'unfair practices' interfering with workers' free choice of the bargaining representative. These tactics include the use of captive audience meetings, threats or 'predictions' of closure or relocation in the event of a successful recognition claim, and the victimization of union activists.⁸⁵ The Government has now enacted an 'unfair practice' provision outlawing, amongst other things, 'undue influence' on a worker entitled to vote in the ballot.⁸⁶ It remains to be seen whether this innovation will avoid the perennial interpretive difficulties that have beset similar regulatory techniques in the North American statutory procedures, though institutional differences augur well for the British provision. Specifically, Schedule A1 avoids the complex and layered institutional arrangements in the US, and there is no right of appeal to the ordinary courts from CAC decisions. Thirdly, unions face significant organizational obstacles in mustering sufficient

⁸² TULRCA 1992, s 137 (1), 146 (1) (c), 152 (1) (c)

⁸³ TULRCA 1992, Schedule A1 paragraph 29 (3)

⁸⁴ TULRCA 1992, Schedule A1 paragraph 7 (1)

⁸⁵ K D Ewing, S Moore and S Wood, *Unfair Labour Practices: Trade Union Recognition and Employer Resistance* (2003)

⁸⁶ TULRCA 1992, Schedule A1 paragraph 27A (2); discussed in A L Bogg, 'Employment Relations Act 2004: Another False Dawn for Collectivism?' (2005) 34 ILJ 72, 78-81

support within the bargaining unit as a precursor to a statutory claim. Union rights of organizational access to the employer's property are only triggered once the recognition claim has been accepted by the CAC and the ballot ordered,⁸⁷ but in order for the claim to be accepted the CAC must be convinced that majority support within the bargaining unit is likely.⁸⁸ This absence of a collective right to organize in British law, with free-standing rights of access to the employer's property for organizational purposes, has the practical effect of placing many groups of unorganized workers beyond the reach of the statutory procedure. Finally, as we have already seen, statutory recognition claims are blocked by voluntary recognition arrangements with either independent or non-independent unions. This applies regardless of whether the blocked applicant union enjoys majority support within the bargaining unit.

The second perspective challenges the stringency of the 'worker consent' model informing the statutory procedure. The principle of majority rule embodied in Schedule A1 is in certain respects a faulty translation of the North American principle of bargaining exclusivity. Majority rule is a natural corollary of union exclusivity in the North American system, where individual rights are wholly subordinated to the collective agreement.⁸⁹ Individual bargaining is completely superseded by the normative authority of the collective agreement; the union similarly controls the grievance and arbitration procedures through which individual entitlements are enforced. This concept of bargaining exclusivity has no counterpart in the British legal structure. The normative effect of collective agreements is determined by the intentions of the individual contracting parties; neither is individual contractual negotiation precluded by the collective agreement. On the contrary, the statutory framework explicitly allows latitude for individual contracts to depart from the normative aspects of the collective agreement.⁹⁰ As such, the relation between individual contract and collective agreement is a striking reversal from that which obtains in the North American context. For this reason, the insistence on majority rule under Schedule A1 seems unduly strict given the possibilities for individual dissentients to revoke their consent through individual contract. Allocation of bargaining rights on the basis of a substantial proportion of support, say 30 percent, would seem justifiable in the light of the British system's broader rejection of full-blooded union exclusivity.

The 'worker consent' model also underpins the ICE Regulations 2004, reflected in the centrality of democratic ballot procedures to the regulatory scheme. First, the process for negotiating an information and consultation procedure is only triggered if a specified threshold of employees makes a valid request either directly to the employer or indirectly through the CAC. This threshold is set at 10 percent of the employees in the undertaking, subject to a minimum of 15 and a maximum of 2500 employees.⁹¹ Secondly, if there is a 'pre-existing agreement' in place this may only be displaced if a majority voting and at least 40 percent of those entitled to vote elect to initiate negotiations.⁹² It is also specified that a 'pre-existing agreement' must be 'approved by the employees' in the first instance,⁹³ although there is no specification of how such approval is to be demonstrated by an employer. Thirdly, negotiated agreements must be approved either through the endorsement of all negotiating

⁸⁷ TULRCA 1992, Schedule A1 paragraph 26 (3)

⁸⁸ TULRCA 1992, Schedule A1 paragraph 36 (1)

⁸⁹ C Summers, 'Exclusive Representation: A Comparative Inquiry into a "Unique" American Principle' (1998) 20 *Comparative Labor Law and Policy Journal* 47

⁹⁰ TULRCA 1992, s 145B

⁹¹ ICER 2004, Regulation 7 (2)

⁹² ICER 2004, Regulation 8 (6)

⁹³ ICER 2004, Regulation 8 (1) (c)

representatives or, in the absence of this, through simple majority in a ballot procedure.⁹⁴ In formal terms this scheme is based on employees' free choice. In practical terms, however, free choice is constrained by what economists have identified as an 'incumbency' effect.⁹⁵ Default arrangements have a tendency to be 'sticky' such that they are only likely to be displaced if there is a significant measure of discontent. Otherwise, preferences are often adaptive to the status quo. This gives a pronounced tilt to the employer's initiative in shaping that status quo, particularly through the medium of 'pre-existing agreements'. The employee support thresholds in the regulatory scheme might well have the effect of denying effective consultation in many of the undertakings within the scope of the Regulations.

By contrast, it is an 'employer consent' model that underpins voluntary recognition arrangements. Voluntary recognition may be express or implied from a course of dealing between the parties. The fluidity of voluntary recognition means that in many circumstances it will be difficult to ascertain whether the union is in fact recognized for negotiating purposes by the employer. Recognition for the purposes of processing individual grievances, for example, may not be sufficient.⁹⁶ The 'employer consent' model in voluntary recognition is also acutely problematic in its interaction with the 'worker consent' model in the statutory recognition procedure. Voluntary recognition has priority over statutory recognition. Where there is a voluntary recognition arrangement an application for statutory recognition is inadmissible. This is so even if the voluntarily recognized union has no members within the bargaining unit. There is evidence that some employers are striking voluntary 'single union' deals with unrepresentative unions to block statutory claims by independent unions with substantial levels of support within the bargaining unit.⁹⁷ In these situations there is a strong possibility that the voluntarily recognized union is anointed by the employer because it is less likely to be robust in defending workers' interests. This has prompted some commentators to call for the introduction of a legal concept of 'representative' union tied to a minimum threshold of membership density.⁹⁸ This envisages greater legal regulation of the bargaining process than the tradition of voluntarism has been accustomed to permitting. Nevertheless, there is a strong argument that this would strike an appropriate balance between the conflicting models of 'employer consent' and 'worker consent' at the intersection of voluntary and statutory recognition.

3. *Double channel of employees' representation in collective bargaining within the firm*

a) Double channel of employees' representation in collective bargaining within the firm: a need or superfluity?

The democratic base of employees' representation within the firm suggests that in principle the double channel approach is a need rather than a superfluity. There are three main arguments that warrant this conclusion. First, sole reliance on voluntary and statutory recognition entails a substantial democratic deficit in the industrial sphere. This union representation gap is a consequence of bargaining structure. It is difficult to ensure high levels of collective bargaining coverage where bargaining units are predominantly located at

⁹⁴ ICER 2004, Regulation 16 (3)

⁹⁵ See C Sunstein, 'Switching the Default Rule' (2002) 77 *New York University Law Review* 106

⁹⁶ *USDAW v Sketchley Ltd* [1981] IRLR 291

⁹⁷ *R (on the application of the NUJ) v CAC and MGN Ltd* [2005] IRLR 28

⁹⁸ Davies and Kilpatrick, above n 42

company or plant level.⁹⁹ Consequently, there is no union recognition in the majority of British firms. As a democratic right, collective voice should be universally guaranteed for all workers. It is this consideration that precipitated the eclipse of single channel in *Commission v UK*. Secondly, the limited bargaining agenda in both voluntary and statutory recognition arrangements also entails a democratic deficit. Collective bargaining is now largely confined to issues such as pay and working time. It rarely penetrates core aspects of managerial prerogative such as ‘the situation, structure and probable development of employment within the undertaking’.¹⁰⁰ This can be contrasted with the richer consultation agenda in the standard provisions in ICER 2004. This has the potential to expand the frontiers of worker influence, moving away from the mitigation of effects of managerial decisions towards the shaping of the decisions themselves. Thirdly, ICER 2004 responds to another source of democratic deficit. Plant level bargaining is sometimes limited in democratic potential because its structure is out of alignment with structures of managerial decision-making. Similar criticisms were made of the redundancy consultation provisions.¹⁰¹ Where the decisional autonomy of local employer representatives is constrained by higher levels of management, the scope for effective democratic influence is correspondingly limited.¹⁰² However, the standard provisions in ICER 2004 provide that consultation must be conducted ‘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’.¹⁰³ This increases the possibilities for genuine democratic influence by employee representatives.

b) Conflict or cooperation between union and non-union representation within the firm?

Controversy over the relation between union and non-union representation within the firm is ubiquitous in the UK. The organizational risk at the heart of the ‘union substitution’ dilemma is well articulated by Ewing: ‘The danger with mandatory consultation through works councils or enterprise committees is that employers would be happy to create such institutions which would simply be another way to undermine trade union organisation...For rather than encourage the growth of trade unionism, such devices may serve only to chill support.’¹⁰⁴ It is certainly true that employers have used works councils ‘paternalistically’ as union substitution devices, and continue to do so with a degree of success.¹⁰⁵ However, a comparative perspective enables a more precise appreciation of factors tending to heighten ‘union substitution’ effects. European systems of industrial relations exhibit a high degree of convergence in fixing upon a dualistic pattern of worker representation. The institutional detail displays a rich variety, but in general terms this dualism corresponds to a functional division between union representation and works council representation. Distributive conflicts are channelled through the trade union mechanism of collective bargaining; this operates in tandem with works council institutions designed to facilitate the cooperative resolution of production-related matters at enterprise level. In predicting substitution effects, the critical issue lies in the degree of co-ordination and integration between the two channels.

⁹⁹ See J Hendy QC, *The Future of Employment Law* (2004)

¹⁰⁰ See formulation in ICER 2004, Regulation 20 (1) (b)

¹⁰¹ Deakin and Morris, above n 37 at 886

¹⁰² See W Brown (ed), *The Changing Contours of British Industrial Relations* (1981) 34-35

¹⁰³ ICER 2004, Regulation 20 (4) (c)

¹⁰⁴ K D Ewing, ‘Trade Union Recognition: A Framework for Discussion’ (1990) 19 ILJ 220-221

¹⁰⁵ Ewing, Moore and Wood, above n 85 at 12-18

European experience indicates a broad spectrum of possibilities. In Germany the relation between unions and works councils is highly symbiotic. External unions provide technical expertise, training and advice to works councillors thereby ensuring the effective implementation of co-determination procedures. In turn, works councils function as 'union workplace organizations that operate within the legal form... Works councils also provide for easy *de facto* union recognition and are used by unions as a convenient device for recruiting members.'¹⁰⁶ The institutional base of the works council has contributed to the organizational resilience of enterprise unionism.¹⁰⁷ By contrast, the failed attempt in France to emulate this representational symbiosis is striking. Its variant of the works council system is now widely regarded as having deepened 'an ongoing *crise du syndicalisme* (crisis of unionism).'¹⁰⁸ One effect of the *Auroux* reforms in 1982 was to have works council-type structures and enterprise-level collective bargaining located in the same regulatory space. With an ideologically fractured union movement unable to exploit the new institutional opportunities, and works council structures vulnerable to employer domination due to relatively weak juridical guarantees of consultation rather than co-determination, the organizational base of French enterprise unionism has suffered spectacular and unprecedented erosion.¹⁰⁹ The resulting organizational vacuum at enterprise level has been colonised by a variety of employer-led individualized modes of worker participation such as quality circles that are less threatening to managerial prerogative. The comparative lesson is clear: 'without the constraints of autonomous collective bargaining, managerial prerogative can turn consultation into a highway for "personalised contracts".'¹¹⁰ Similar 'union substitution' effects have also occurred, albeit less dramatically, in the Netherlands and Spain.¹¹¹

Works councils, then, are no panacea for strong enterprise unionism; the German success story is certainly not typical. How might this success be replicated? First, much depends upon the history, structure and values of a country's union movement. Union substitution tends to occur in those countries with an ideologically pluralist union movement, as in France, Spain and the Netherlands. Centralized and unitary union structure minimises inter-union competition leaving unions better placed to utilise works councils as an organizational platform in the enterprise. Secondly, the juridical form of the works council's procedural rights matter to union substitution. Legally guaranteed co-determination rights are less vulnerable to employer domination than weaker consultation rights. Further, substitution is avoided where works councils are excluded from bargaining functions. Finally, the stronger the degree of institutional separation, the less likely that substitution will occur. This 'bright line' differentiation often manifests itself as a difference in regulatory level. In Germany, distributive conflicts are channelled predominantly through national level collective bargaining, while representative consultation is channelled through enterprise level council structures. Strict demarcation ensures regulatory mechanisms do not compete for the same regulatory space. As such, decentralized collective bargaining is strongly associated with

¹⁰⁶ J Rogers and W Streeck, 'Workplace Representation Overseas: The Works Councils Story' in R B Freeman (ed), *Working Under Different Rules* (1994) 97, 117

¹⁰⁷ R Adams and C H Rummel, 'Workers' participation in management in West Germany: impact on the worker, the enterprise and the trade union' (1977) 8 *Industrial Relations Journal* 4

¹⁰⁸ B E Brown, 'The Rise and Fall of *Autogestion* in France', in M Donald Hancock, J Logue and B Schiller (eds), *Managing Modern Capitalism* (1991) 195, 209

¹⁰⁹ R Tchobanian, 'France: From Conflict to Social Dialogue?' in J Rogers and W Streeck (eds), *Works Councils: Consultation, Representation, and Cooperation in Industrial Relations* (1995) 115

¹¹⁰ Lord Wedderburn, 'Consultation and Collective Bargaining in Europe: Success or Ideology?' (1997) 26 *ILJ* 1, 32

¹¹¹ For a comparative overview, see M Terry, 'Workplace Unionism: Redefining Structures and Objectives', in R Hyman and A Ferner (eds), *New Frontiers in European Industrial Relations* (1994)

union substitution by works councils. Decentralized bargaining structures are characteristic of the UK and North America. The US provides an illuminating comparison in assessing the threat posed to unions' organizational strength by enterprise level consultative structures under a system of enterprise level collective bargaining.

The most striking feature of the US pattern of worker representation is its repudiation of dual channel. This is reflected in one of the cornerstones of the statutory edifice, the section 8 (a) (2) ban on 'company unions'. Thus, it is an 'unfair labor practice' for an employer to 'dominate or interfere with the formation of any labor organization, or contribute any financial or other support to it'; the statutory elucidation of 'labor organization' is likewise correspondingly broad.¹¹² At the time of its enactment, section 8 (a) (2) was considered an inseparable corollary of the statutory guarantee of employee free choice of bargaining representative. During the inter-war period 'the company union had become firmly established as an alternative to collective bargaining with self-organized employee associations.'¹¹³ These consultative committees proved highly durable and effective devices of union substitution, offering the promise of collective voice within the enterprise but without the 'costs and risks associated with collective bargaining. Consequently, they hold an allure against which it is difficult, if not impossible, for conventional unions to compete.'¹¹⁴ Recent research lends further empirical weight to these historical concerns with union substitution by workplace consultative committees; Freeman and Rogers' wide-ranging analysis of worker preferences demonstrates that 'employee involvement' schemes significantly 'reduce interest in unions by giving workers more say at the workplace outside the union venue.'¹¹⁵ Accordingly section 8 (a) (2) was critical in eliminating anti-union employers' weapon of choice against workers' right to self-organization. In so doing, section 8 (a) (2) sealed the fate of dual channel as a viable pattern of worker representation, embodying instead a preference 'for the private ordering of the employment relationship that is based on collective bargaining through self-organized and autonomous employee associations.'¹¹⁶

Comparative experience strikes a strong cautionary note in the British context. Given the similarities in bargaining structure, the absence of a functional equivalent to section 8 (a) (2) in British labour law is remarkable. Without legal substantive criteria of domination, ICER 2004 leaves consultative structures vulnerable to employer control. This might precipitate the spread of employer-dominated representative consultative structures leading to union substitution at enterprise level. This is exacerbated by the consultative character of many union-based voluntary recognition arrangements in the UK. As such, it rather misses the point to insist that 'works council'-type arrangements be excluded from bargaining functions to minimise union substitution effects in the UK, along the lines of the German approach. The real problem is that bargaining arrangements are in social practice increasingly consultative in nature. It is this peculiar procedural convergence that poses a genuine substitution threat to British unions.

¹¹² 29 USC 158 (a) (2) (2000)

¹¹³ T C Kohler, 'Models of Worker Participation: The Uncertain Significance of section 8 (a) (2)' (1986) 27 Boston College Law Review 499, 523

¹¹⁴ Note, 'Collective Bargaining as an Industrial System: An Argument against Judicial Revision of section 8 (a) (2) of the National Labor Relations Act' (1983) 96 Harvard LR 1664, 1679

¹¹⁵ R B Freeman and J Rogers, *What Workers Want* (1999) 113

¹¹⁶ Kohler, above n 113 at 533

IV. Other Remarks of the National Reporter Concerning the Subject of the General Report

The future remains uncertain for employee representation in the UK. Whether the recent shifts towards dual channel representation can escape the dilemmas that have been identified remains an open question. What is more certain is the continuing influence of voluntarism on the contours of the new representational terrain. This is perhaps not surprising. The contemporary 'shape' of a system of labour law is inextricably bound up with its past, and is reflective of the history, structure and values of its labour movement. Thus, Davies and Freedland observe that the historical development of British labour law 'should be understood as being intimately bound up with the destiny of collective *laissez-faire* policy.'¹¹⁷ Historically, at least, voluntarism proved to be one of the cardinal industrial relations virtues from the perspective of organized labour. Looking forward, however, some re-assessment of its legal legacy seems warranted. In particular, the case for enactment of an 'unfair practice' provision to address the problem of employer-dominated 'company unions' seems compelling. Also, given the shallowness of many voluntary collective bargaining arrangements, there also seems to be scope for experimentation with the idea of 'legally regulated bargaining',¹¹⁸ as a way of ensuring collective bargaining equates with genuine joint regulation. This might be achieved by the fashioning of substantive legal good faith duties, in contrast to the excessive proceduralism of the current statutory duty to bargain. In its essentials this reappraisal is not anathema to the historical values of industrial voluntarism. Those values 'place autonomous trade unions at the centre of a democratic society'.¹¹⁹ From this perspective, 'there is no objection whatever in principle in our traditional labour law to compulsory arbitration and legal enforcement so long as it is balanced against the values of autonomous trade unionism, which are at the core of collective *laissez-faire*.'¹²⁰

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¹¹⁷ P L Davies and M R Freedland, *Labour Legislation and Public Policy* (1993) 640

¹¹⁸ Davies and Freedland, above n 117 at 666

¹¹⁹ Lord Wedderburn, *Labour Law and Freedom* (1995) 37

¹²⁰ Wedderburn, above n 119 at 11