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## Employee Participation Rights During Company Restructuring: Lessons Learned from the “Capability for Voice” in British Law

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### ABSTRACT

*In the current economic context, marked by a growing number of company restructuring processes as well as a rising unemployment rate, it seems important to address the employee's issue of job security as well as the need to reduce the negative impacts that some restructuring processes have on businesses and employees. One solution in this regard is to ensure that employees are heard during the restructuring process. Since the Quebec and the federal Canadian legal frameworks on the subject offer insufficient protections, the author's goal is to find solutions in order to strengthen the existing frameworks as well as to suggest different ways of adopting other legal information and consultation procedures applicable to company restructuring in general. To this end, the author is interested in whether a process of information and consultation of employees in restructuring matters, similar to what exists in the European Union, is possible in Canada, in light of the British experience. In fact, the United Kingdom's case is particularly interesting for Canada, because this country originally applied a collective laissez-faire approach to employee participation rights during company restructuring which was similar to the North American one. It was only because of mandatory directives of the European Union on the subject that the United Kingdom has set up information and consultation procedures recognized by law. In order to perform this study, we have used the method of comparative law and as a theoretical framework we have applied the capability for voice, developed by Amartya Sen, which provides a method for assessing the impact and relevance of Parliament acts that recognize extended participation rights to employees in regard to a company's economic decisions. In doing so, we assess the extent that the British*

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*statutory instruments, related to the subject matter under study, meet the conditions of the capability for voice, which are prerequisites to pass from the involvement stage of the employees in company decisions to their real influence on such issues.*

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**KEY-WORDS:**

*Company restructuring, information, consultation, participation, decision, employee, Canada, United Kingdom, European Union, directives, Act respecting labour standards, Canadian Labour Code, collective redundancies, globalization.*

**RÉSUMÉ**

*Dans le contexte économique actuel, marqué par l'augmentation du nombre des restructurations et des licenciements collectifs qui en découlent, il semble important de s'intéresser au besoin de sécurité d'emploi des salariés et à la manière de diminuer les conséquences négatives que certaines restructurations non réfléchies peuvent avoir sur les entreprises. L'une des pistes de solution consiste en ce que les salariés puissent se faire davantage entendre lors des processus de restructuration. Étant donné que les cadres juridiques québécois et canadien au palier fédéral sont peu développés dans ce domaine et que les protections à cet égard restent insuffisantes, l'objectif de l'auteure consiste à chercher des solutions afin de renforcer ces cadres existants. Le présent texte vise aussi à examiner la possibilité d'adopter d'autres procédures légales d'information et de consultation applicables aux restructurations en général. À cet effet, l'auteure s'intéresse à la question de savoir si un processus d'information et de consultation des travailleurs lors d'une restructuration entraînant des licenciements collectifs, semblable à celui qui existe au sein de l'Union européenne, serait envisageable au Canada compte tenu de l'expérience britannique. Le cas du Royaume-Uni est particulièrement intéressant pour le Canada et le Québec, puisqu'au départ, ce pays avait, comme en Amérique du Nord, une approche de laissez-faire collectif en matière de droit de participation des salariés lors des restructurations. Ce n'est qu'en raison des directives impératives de l'Union européenne sur le sujet que le Royaume-Uni s'est doté de procédures d'information et de consultation. Pour la présente étude, nous avons utilisé la méthode du droit comparé et, comme cadre théorique, nous avons appliqué la « capacité de pouvoir s'exprimer », concept mis au point par Amartya Sen, comme moyen pour évaluer les conséquences et la pertinence des lois reconnaissant des droits élargis aux salariés en matière de participation dans les décisions économiques de l'entreprise.*

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**MOTS-CLÉS :**

*Restructurations, information, consultation, participation, décision, salariés, Canada, Royaume-Uni, directives de l'Union européenne, Loi sur les normes du travail, Code canadien du travail, licenciements collectifs, mondialisation.*

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INTRODUCTION

In the current economic context, marked by an increasing number of company restructuring processes and collective redundancies, due to COVID-19<sup>1</sup> and the globalization constraints in general, it seems

1. Airbus is one of the companies which are proceeding with a historical restructuring, involving thousands of job cuts as its production is reduced and its output will be held down by 40% in the next 2 years, due to the negative impacts of COVID-19. “Airbus Close to Slashing Jobs as CEO Confirms 40% Output Drop”, *The Guardian* (29 June 2020), online: <[www.theguardian.pe.ca/business/reuters/airbus-ceo-sees-production-down-40-over-the-next-two-years-467253/](http://www.theguardian.pe.ca/business/reuters/airbus-ceo-sees-production-down-40-over-the-next-two-years-467253/)>. Between 2003 and 2010, some authors identified 3 388 restructuring events in all sectors of activity and regions in Quebec: Patrice Jalette, “Les restructurations d’entreprise au Québec 2003–2010: ampleur, nature et logiques” in Patrice Jalette & Linda Rouleau, eds, *Perspectives multidimensionnelles sur les restructurations*, coll Travail et emploi à l’ère de la mondialisation (Québec: Presses de l’Université Laval, 2014) 13 at 22–23.

important to reflect on the issue of employment security.<sup>2</sup> One of the solutions to this phenomenon is to allow employees to participate in company restructuring decisions.<sup>3</sup> In fact, not only employees, but also many companies regret having proceeded with restructuring without priorly consulting the unions and their most experienced employees.<sup>4</sup> The general term *participation* refers to any type of element of industrial democracy ranging from information, consultation, collective bargaining, to codetermination in the employer's economic decisions regarding the company.<sup>5</sup>

The current Quebec legal framework as well as the Canadian one at a federal level regarding employee participation rights during workplace restructuring offer very little protection to employees as it will be explained further in this text. For this reason, and considering the

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2. Thierry Lemasle & Pierre-Éric Tixier, eds, *Des restructurations et des hommes* (Paris: Dunod, 2000) at 73–79.

3. Jalette, *supra* note 1. Jean-Michel Bonvin & Philippe Badan, "La responsabilité sociale de l'entreprise à l'aube des restructurations" (2007) 109 *Travail et emploi* 59 at 59–60.

4. Deepak Datta et al, "Causes and Effects of Employee Downsizing: A Review and Syntheses" (2010) 36 *Journal of Management*, 281. Louis Uchitelle, *The Disposable American: Layoffs and their Consequences* (New York: Vintage Books, 2007) at 194. James Shaw & Elain Barrett-Power, "A Conceptual Framework for Assessing Organisation, Work Group, and Individual Effectiveness During and After Downsizing" (1997) 50 *Human Relations* 109. One recent example showing the importance of employee participation during a company restructuring decision is the case of Ryanair where its pilots accepted a 20% salary reduction in order to avoid 260 job cuts, which were initially planned by the employer before discussing with the employees. "Ryanair Pilots Agree to 20% Pay Cut in Attempt to Limit Job Losses", *The Guardian* (1 July 2020), online: <[www.theguardian.com/business/2020/jul/01/most-ryanair-job-losses-can-be-avoided-if-staff-take-pay-cut-says-michael-oleary#:~:text=Ryanair%20have%20agreed%20to%20accept,aim%20to%20protect%20those%20too](http://www.theguardian.com/business/2020/jul/01/most-ryanair-job-losses-can-be-avoided-if-staff-take-pay-cut-says-michael-oleary#:~:text=Ryanair%20have%20agreed%20to%20accept,aim%20to%20protect%20those%20too)>.

5. The term "information" involves a unilateral act as it refers to the employer's obligation to provide relevant information to employees in order to enable them to ask questions and require explanations. "Consultation" involves a bilateral act, as it also allows employees to give their opinion to the employer regarding the process of restructuring or the collective dismissals. The "consultation" stage often resembles to collective bargaining for the conclusion of a collective agreement. However, consultation differs from collective bargaining because unlike the latter, it does not involve a joint decision-making process between employees and the employer in order to reach an agreement between the parties involved. "Consultation" does not affect the power of the employer to make the restructuring decisions alone while listening to the views of the workers. "Codetermination" corresponds to employee participation in the company strategic decision-making process, particularly in the event of restructuring. This participation is exercised within internal company structures such as various boards or committees, and is regulated by laws or collective agreements. Catherine Barnard, *EC Employment Law*, 2nd ed (New York: Oxford University Press, 2000) at 510–513. Jacques Vandamme, *L'information et la consultation des travailleurs dans les entreprises multinationales*, coll "Institut de recherche et d'information sur les multinationales" (Genève: IRM, 1984) at 28–30. Manfred Löwisch, "Job Safeguarding as an Object of the Rights of Information, Consultation, and Co-Determination in European and German Law" (2005) 26:3 *Comparative Labour Law & Policy Journal* 371 at 371–374.

negative impacts that restructuring has on both employees and companies, our goal is to seek solutions in order to strengthen the existing Quebec and Canadian legal frameworks. To this end, it should be noted that, contrary to Quebec and Canada at a federal level, given the importance of employee participation, there is an increased interest in respect of employee rights to information and consultation, particularly in Europe.<sup>6</sup> The European enterprises, like the rest of the world,<sup>7</sup> constantly resort to various types of restructuring which involve considerable expenses and many times can lead to failures.<sup>8</sup> For this reason, to help better control and manage corporate restructuring, some European countries, as well as the European Union, have traditionally favoured a community framework of social-interventionist restructuring, which is the product of both collective autonomy and State intervention.<sup>9</sup> Indeed, European Union Labour Law has instituted a system of social approach in which the State intervenes in order to recognize extended legal rights to employees so that they can be informed and consulted during company restructuring.<sup>10</sup> However, before the adoption of European directives regarding employee participation in company restructuring, unlike most Western European countries which had already adopted domestic laws on the matter even prior to the adoption of the directives, the United Kingdom (UK) used to regulate these employee rights in accordance with the principle of voluntarism.<sup>11</sup> For this reason, we have chosen the British legal framework for our study on the subject, and not those of other European States which already existed. In fact, similarly to Canada, British governments have traditionally supported the creation of trade unions

6. Löwisch, *ibid* at 371–380.

7. Michel Lafougère, *L'Europe face au défi de la mondialisation: les conséquences sociales de la restructuration des économies en Europe* (Strasbourg: European Council, 1998) at 7.

8. Lemasle & Tixier, *supra* note 2 at 9. Eckhard Voss, *Les restructurations, l'anticipation du changement et la participation des travailleurs à l'aune du monde numérique*, Report to the attention of CES, February 2016, online: <[www.etuc.org/sites/www.etuc.org/files/publication/files/visiting-restructuring-fr.pdf](http://www.etuc.org/sites/www.etuc.org/files/publication/files/visiting-restructuring-fr.pdf)>.

9. Michel Coutu, “Licenciements collectifs et fermetures d’entreprise au Québec: un cas d’absentéisme juridique?” (2007) 109 *Travail et emploi* 39 at 39–49. Sylvaine Laulom, “Le cadre communautaire des restructurations” in Claude Didry & Annette Jobert, eds, *L’entreprise en restructuration: dynamiques institutionnelles et mobilisations collectives*, coll “Économie et société” (Rennes: Presses universitaires de Rennes, 2010) 77.

10. *Council Directive 75/129/EEC* [1975] OJ L 48, 22.2 1975, on the approximation of the laws of the Member States relating to collective redundancies [*Council Directive 75/129/EEC*].

11. Roger Blanpain, *Systems of Employee Representation at the Enterprise: A Comparative Study* (Croydon Wolters Kluwer, 2012), at 181. Mark Hall, “EU Regulation and the UK Employee Consultation Framework” (2010) 31:4 *Economic and Industrial Democracy* 55 [Hall, “EU Regulation”].

and collective bargaining as a preferred means of establishing working conditions such as the employees right to participate during restructuring decisions, and as a general rule, they have not sought to regulate labour relations directly through legislation.<sup>12</sup> Therefore, similarly to Canada, before the adoption of European directives on the subject and their transposition in the UK, employees in that country had no legal right to ask to be informed and consulted during company restructuring in cases where collective agreements did not provide for such a right or when there was no union in the workplace. As a result, similarly to Canada, employers in the UK were not legally obliged to inform and consult employees prior to a final decision related to corporate restructuring substantially affecting work conditions.<sup>13</sup> Unlike Canada, today, the situation in the UK is more complex since a number of Parliament acts recognizing employees some information and consultation rights regarding restructuring have been adopted, mainly as a result of the strong pressure exerted by the European Community.<sup>14</sup> The European directives on the matter became applicable in the UK despite the fact that the British government has strongly opposed their adoption and has temporarily exercised its right of veto for the application of the *Council Directive 75/129/EEC*.<sup>15</sup> Therefore, it is particularly interesting to analyze whether the European directives regarding the employee information and consultation rights, which had become applicable to the UK before Brexit, have increased the employees' power to influence the employer's decisions during company restructuring by limiting the employer's power to act unilaterally during such decisions, which affect both the interests of the employees and their workplaces. An analysis of all the European directives applicable on the matter, and of all the British acts of Parliament transposing these directives, have been carried out in order to identify certain legislative solutions to strengthen the Quebec legal framework and the Canadian legal framework at a federal level related to employee participation rights during company restructuring.

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12. Ruth Dukes, "Otto Kahn-Freund and Collective Laissez-Faire: An Edifice Without a Keystone?" (2009) 72:2 *Modern Law Review* 220.

13. *Ibid.*

14. Thilo Ramm, "Laissez-Faire and State Protection of Workers" in Bob Hepple, ed, *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (New York: Mansell Publishing, 1986) 73 at 76–77.

15. *Council Directive 75/129/EEC*, *supra* note 10. Bulletin No 4 of the Institute for Labour Relations of the University of Leuven, (1973), at 171–203. Mark Freedland, "Employment Protection: Redundancy Procedures and the EEC" (1976) 5:24 *Industrial Law Journal* 24.

For the purpose of this article, one British general statutory framework will be analyzed, which is an important component that secures legal rights to employees in order for them to participate in company restructuring at a national level. This statutory instrument is named *The Information and Consultation of Employees Regulations* (ICE).<sup>16</sup> Although the *Trade Union and Labour Relations (Consolidation) Act 1992* (TULRCA)<sup>17</sup> is the first Parliament Act that sets the premises of British employees’ participation legal rights in the case of collective dismissals, ICE went even further by guaranteeing such rights of information and consultation with regard to all types of company restructuring in general, and not only in cases of company transfers and collective dismissals.<sup>18</sup> This study is important, considering the lack of literature and research in the field of employee participation rights during company restructuring in Canada, even though the number of employees being dismissed after company restructuring is considerably increasing. There are several types of restructuring. Among these, we can mention business closings, downsizing, mergers/acquisitions, subcontracting as well as technological changes.<sup>19</sup> All these types of restructuring are likely to substantially affect work conditions and lead to collective redundancies.<sup>20</sup> This study aims at identifying solutions in order to strengthen the Quebec legal framework and Canadian legal framework at a federal level on employee participation rights during company restructuring for all types of restructuring substantially affecting work conditions and job security. In order to draw lessons and assess the

16. *The Information and Consultation of Employees Regulations*, SI 2004/3426/ [ICE], online: <[www.legislation.gov.uk/ukxi/2004/3426/made](http://www.legislation.gov.uk/ukxi/2004/3426/made)>.

17. *Trade Union and Labour Relations (Consolidation) Act 1992*, c. 52 [TULRCA].

18. Due to the word count limit for the article, we will not present our analyses on the protections provided by other British laws such as *The Transfer of Undertakings (Protection of Employment) Regulations* (TUPE), SI 1981/1794 (UK), and *Trade Union and Labour Relations (Consolidation) Act 1992*, *ibid*. These Laws are presented and analyzed in detail in the doctoral thesis of the author, Migen Dibra, *Le droit de participation des salariés canadiens lors des restructurations d’entreprises: le cadre législatif britannique comme source d’inspiration pour le Canada. Une étude de droit comparé: Québec, cadre juridique fédéral canadien, Union européenne, Royaume-Uni*, Montreal, Faculty of Law, University of Montreal, 2016 [*Le droit de participation des salariés canadiens*].

19. Michel Coutu & Julie Bourgault, “Le droit du travail et les restructurations industrielles au Canada: une pluralité normative?” in Claude Didry & Annette Jobert, eds, *L’entreprise en restructuration: dynamiques institutionnelles et mobilisations collectives*, coll “Économie et société” (Rennes: Presses universitaires de Rennes, 2010) at 107–119.

20. Patrice Jalette & Mélanie Laroche, *Organisation de la production et du travail* in Patrice Jalette & Gilles Trudeau, eds, *La convention collective au Québec*, 2nd ed (Montréal, Gaétan Morin Éditeur, 2011), 219 at 219–252.

impact and relevance of the British acts of Parliament, which recognize extended rights to employees in the field of participation in company economic decisions, and in order to propose an improved model of such statutory instruments for Canada and its provinces, we have used as an analytical framework, the *capability approach*, developed by Amartya Sen.<sup>21</sup> In doing so, we assessed the extent to which the British law respects Sen's *capability for voice*, criteria which are prerequisites for advancing from the involvement of employees in company decisions to a real influence on these decisions, as it will be explained further in this text.<sup>22</sup>

## I. THE CURRENT CANADIAN LEGAL FRAMEWORK REGARDING EMPLOYEE PARTICIPATION RIGHT

The current Quebec legal framework and Canadian legal framework at a federal level regarding employee participation rights during workplace restructuring offers very little protection to employees since in Quebec and at the Canadian federal level, when the collective agreement does not provide for any employee rights to participate in company restructuring decisions affecting job security, the employer has the right to act alone and is not required to negotiate the exercise of this right with the certified association, even if the working conditions of employees are substantially modified. Furthermore, there are no consultation or negotiation legal rights recognized to employees regarding company restructuring in cases where there is no union in the company. Regarding existing Canadian and Quebec laws in this area, with the exception of the introduction of new technological changes, no notice is required by the *Canadian Labour Code* or the *Act Respecting Labour Standards* during company restructuring, such as mergers, acquisitions and subcontracting. Therefore, in such cases of company restructuring affecting job security and work conditions, the employer can act alone without informing or consulting employees, when there is no union in the company or when the collective agreements do not recognize any right for employees to participate and be heard during such decisions affecting their interests as well as the

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21. Jean-Michel Bonvin, "Individual Working Lives and Collective Action. An Introduction to Capability for Work and Capability for Voice" (2012) 18:1 *Transfer* 9 at 9–10.

22. Jean-Michel Bonvin & Éric Moachon, "Assessing Employee Voice in Restructuring Processes Against the Capability Approach. A Case Study in the Swiss Metal Sector" (2012) 23:2 *The International Review of Management Studies*, 158 at 158–160.



companies they work for. In addition, the legislative measures provided for by Quebec and Canadian laws in the event of collective redundancies are very weak and do not offer unions and employees the opportunity to be heard and influence the decisions of employers.<sup>23</sup>

Furthermore, a comparative analysis of the employment laws of industrialized Organization for Economic Cooperation and Development (OECD) countries<sup>24</sup> revealed that Canada ranks among the countries where the law on collective dismissals is the least restrictive, similar to South Korea. According to another study, published by the *Revue multidisciplinaire sur l'emploi, le syndicalisme et le travail* (REMEST) in 2010, Quebec has the least restrictive laws on collective redundancies, compared to the laws in the rest of Canada, the OECD European countries as well as the United States and Mexico.<sup>25</sup>

Given that the Quebec legal framework and the Canadian legal framework at a federal level offer very little protection on the subject, our goal is to seek solutions in order to strengthen the existing Quebec and Canadian frameworks in order to help unions and employers develop negotiating strategies that balance employment relationships. In this regard it is important to note that only 40% of the employees in Quebec are unionized, and 60% of the Quebec employees are not covered by a collective agreement. It was also noted during our study that the majority of collective agreements in Quebec do not provide for any type of employee participation rights

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23. Guylaine Vallée & Dalia Gesualdi-Fecteau, “La constitutionnalisation du droit du travail: une menace ou une opportunité pour les rapports collectifs de travail?” (2007) 48:1-2 *Les Cahiers de droit* 153 at 169. *Re United Steelworkers of America v Russelsteel Ltd*, (1966) 17 LAC 253. *Canada Labour Code*, LRC (1985), c L-2 [Cct], arts 51–55; *Act Respecting Labour Standards*, CQLR c N-1.1. Paul Weiler, “The Role of the Labour Arbitrator: Alternative Versions” (1969) 19 *Toronto Law Journal* 16 at 44. Urwana Coiquaud, “Le droit du travail québécois et les restructurations d’entreprise: un encadrement et un contrôle juridique anorexiques?” (2008) HS Management International 51. Detailed comparisons between the Canadian and the British legislations on the matter as well as the hazards and benefits of *legal transplants* have been analyzed in detail in the author’s doctoral thesis. The Canadian legal framework regarding employee participation rights during restructuring, as well as the development of the British collective *laissez-faire* constitutes a chapter of the author’s doctoral thesis: Dibra, *Le droit de participation des salariés canadiens*, *supra* note 18.

24. OECD, *Réglementation relative à la protection de l’emploi et performance du marché du travail*, Perspectives de l’emploi de l’OCDE 2004, online: <[www.oecd.org/fr/els/emp/34847005.pdf](http://www.oecd.org/fr/els/emp/34847005.pdf)>. Martine Poulin & Daniel Prud’homme, “Les protections sociales des travailleurs dans le cas des licenciements collectifs au Québec” (2010) 5:2 *Revue multidisciplinaire sur l’emploi, le syndicalisme et le travail* 4.

25. *Ibid.*

during company restructuring decisions.<sup>26</sup> For this reason, the British experience can serve as an example in order to improve the Canadian laws on the field. This analysis will allow us to determine whether the information and consultation rights applicable in British law can serve as an example for improving the Canadian and Quebec legal frameworks in light of the *capability for voice*, although the protection offered by the British Parliament acts on the matter was negatively affected by the opposition of the British government to the European directives.

## II. THE OPPOSITION OF THE BRITISH GOVERNMENT TO THE ADOPTION OF *INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS (ICE)*

The *Directive 2002/14/EC*,<sup>27</sup> which has been transposed into UK law by ICE,<sup>28</sup> has introduced, for the first time in the UK, a generally applicable legal framework giving employees the right to be informed and consulted not only regarding collective redundancies and company transfers, but also about a variety of employment and corporate restructuring issues.<sup>29</sup> The adoption and transposition of this directive<sup>30</sup> was strongly opposed by the British Government.<sup>31</sup>

The decision of the British Government to oppose not only the *Directive 2002/14/EC*, but all the directives on the matter, was based

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26. Speech of Jacques Létourneau, President of the Confédération des syndicats nationaux—CSN, 22 May 2015, CRIMT International Congress; Alexis Labrosse, “Coup d’œil sur la présence syndicale au Canada et dans ses provinces, 2010 à 2014”, online: <[www.travail.gouv.qc.ca/fileadmin/fichiers/Documents/presence\\_syndicale/Coup\\_d\\_oeil\\_presence\\_syndicale\\_2010-2014.pdf](http://www.travail.gouv.qc.ca/fileadmin/fichiers/Documents/presence_syndicale/Coup_d_oeil_presence_syndicale_2010-2014.pdf)>. Dibra, *Le droit de participation des salariés canadiens*, *supra* note 18.

27. *Directive 2002/14/EC*, OJ L 80, 23.3.2002, at 29–34, of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community—Joint declaration of the European Parliament, the Council and the Commission on employee representation, arts 1, 7 and 9 [*Directive 2002/14/EC*].

28. ICE, *supra* note 16.

29. Mark Hall, “A Cool Response to the ICE Regulations? Employer and Trade Union Approaches to the New Legal Framework for Information and Consultation” (2006) 37:5 *Industrial Relations Journal* 456 [Hall, “A Cool Response”]. Roger Blanpain, *European Labour Law*, 9th ed (London: Kluwer Law International, 2003) at 636. Simon Deakin, “Restructurations et gouvernance d’entreprise en Grande-Bretagne: la vente de Rover” (2007) 109 *Travail et emploi* 51.

30. ICE, *supra* note 16, arts 1, 7, 9.

31. Pascale Lorber, “National Works Councils: Opening the Door on a Whole New Era in United Kingdom Employment Relations?” (2003) 19:3 *The International Journal of Comparative Labour Law and Industrial Relations*, 297 [Lorber, “National Work Council”].

on economic and political considerations.<sup>32</sup> Thus, during the 1970s and 1980s, British Governments resisted the European Community's proposals to adopt directives on information and consultation of employees because they saw these proposals as incompatible with the principle of *collective laissez-faire* and the traditional approach of the British employers, which was increasingly leaning towards the power of the employer to decide unilaterally. In fact, the Conservative Government was concerned that the European directives on information and consultation would help to strengthen union representation, which was declining, especially since 1980, when the Conservative Government came to power. This government, under the leadership of Margaret Thatcher, was given the mandate to not only limit State intervention, but also stimulate the power of entrepreneurship and free competition, while weakening union power and collective bargaining.<sup>33</sup>

However, the European directives regarding the employee information and consultation rights have become applicable to the UK despite the fact that the British Government has strongly opposed their adoption and has temporarily exercised its right of veto for the application of *Council Directive 75/129/EEC*.<sup>34</sup> During the European Commission's discussions regarding the adoption of *Directive 2002/14/EC*, the UK Government was very active in its proposals to give member States as much flexibility as possible in transposing the Directive.<sup>35</sup> The continued opposition of the British Government not only delayed considerably the adoption of *Directive 2002/14/EC* from the year 1998 until 2002, but it was also reflected in the adoption of British national Parliament acts, which do not fully comply with the directives and transposed them in a very minimalist way.<sup>36</sup> This situation poses a problem in terms of expanding the ability of employees to influence managers' decisions during restructuring, since, as it was explained in

32. Hall, "EU Regulation," *supra* note 11 at 1–15.

33. David Blanchflower & Richard Freeman, "Did the Thatcher Reforms Change British Labour Market Performance" in Ray Barrell, ed, *The UK Labour Market: Comparative Aspects and Institutional Developments* (Cambridge: Cambridge University Press, 1994) at 51–53. Hall, "EU Regulation," *supra* note 11 at 1–15.

34. *Council Directive 75/129/EEC*, *supra* note 10. Freedland, *supra* note 15 at 24.27.

35. Hall, "EU Regulation," *supra* note 11 at 4.

36. Paul Gollan & Adrian Wilkinson, "Implications of the EU Information and Consultation Directive and the Regulations in the UK—Prospects for the Future of Employee Representation" (2007) 18:7 *The International Journal of Human Resource Management* 1145 at 1149. Dibra, *Le droit de participation des salariés canadiens*, *supra* note 18.

one of our articles and according to our framework of analysis, the directives are themselves inadequate and lack some essential requirements to this effect.<sup>37</sup>

### III. THE GENERAL LEGAL FRAMEWORK OF UNITED KINGDOM EMPLOYEES' RIGHT TO PARTICIPATE DURING COMPANY RESTRUCTURINGS: *INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS (ICE)*

Before ICE came into effect, the British legal framework on the subject consisted only of fragmented protections offered in cases of collective dismissals and company transfers by the *Trade Union Labour Relations (Consolidation) Act 1992* (TULRCA) and the *Transfer of Undertakings (Protection of Employment) Regulations 2006* (TUPE). Considering the existence of this weak and fragmented employee participation legal framework in the UK before the adoption of ICE, we wonder whether the latter, being a statutory instrument of general application, provides employees with a real opportunity to express themselves and influence employers' decisions regarding restructuring.

Employers' decisions can be influenced in two ways: first, the employee intervention can have the greatest effect when the Information & Communication (I & C)<sup>38</sup> forums are able to change the substance of the employers' decision. Secondly, a more limited effect occurs when the implementation of a business decision is modified following the intervention of the I & C forums.<sup>39</sup>

In order to conduct this analysis, we will first briefly present the scope of the rights and obligations recognized by ICE, and then we will proceed with an in-depth analysis of this statutory instrument and its

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37. Migen Dibra, "Le droit de participation des salariés lors des restructurations : des leçons apprises par la capacité de pouvoir s'exprimer en droit européen" (2019) 52:1 RJT 1 [Dibra, "Le droit de participation des salariés lors des reconstructions"].

38. The information and consultation forums, rights and agreements, created in the light of ICE, *supra* note 16, will be referred as "I & C forums," "I & C rights" and "I & C agreements."

39. Paul Marginson et al, "The Impact of European Works Councils on Management Decision-Making in UK and US-Based Multinationals: A Case Study Comparison" (2004) 42:2 British Journal of Industrial Relations 209 at 211.

implementation in light of the *capability approach*.<sup>40</sup> This will allow us to determine whether the UK employees can express themselves and whether these opinions are taken into account in order to bring changes to the employers' decisions in regard to company restructuring.

### A. The scope of ICE and the various types of employee representation

ICE came into force on 6 April 2005 and applies to companies located in the UK<sup>41</sup> which have at least 50 employees.<sup>42</sup> In terms of application, ICE recognizes a lot of flexibility to the employer and the I & C rights do not automatically apply to companies that fall under ICE's application threshold. In order for I & C rights to apply, a group of employees or the employer must initiate procedures for triggering the application of ICE to their companies.<sup>43</sup> Studies show that approximately 37 000 UK companies reach the threshold to fall under the application of ICE.<sup>44</sup> The majority of these companies have between 50 and 99 employees.<sup>45</sup> In 2005, ICE was applicable to 75% of British employees.<sup>46</sup> In this regard, it should be noted that there is no generalized study that determines the total number of companies that have decided to apply ICE to their companies in the UK.<sup>47</sup> However,

40. *Capability approach*, developed by the famous economist and philosopher Amartya Sen between the years 1992 and 1999, as a means of assessing the impact and relevance of laws that recognize employees expanded rights to participate in the company's economic decisions.

41. DTI Guide 2006, online: <[www.webarchive.nationalarchives.gov.uk/20090703143206/www.berr.gov.uk/files/file25934.pdf](http://www.webarchive.nationalarchives.gov.uk/20090703143206/www.berr.gov.uk/files/file25934.pdf)> [DTI Guide 2006].

42. ICE, *supra* note 16, art 3, Schedule 1.

43. *Ibid*, arts 7, 11.

44. Mark Hall, "How Are Employers and Unions Responding to the Information and Consultation of Employees Regulations" (2005) 77 *Warwick Papers in Industrial Relations* 4. [Hall, "How Are Employers"].

45. Mark Hall, "Assessing the Information and Consultation of Employees Regulations" (2005) 34:2 *Industrial Law Journal* 103 at 103–109 [Hall, "Assessing the Information"].

46. Howard Gospel & Stephen Wood, "Dilemmas in Worker Representation: Information, Consultation and Negotiation" in Howard Gospel & Stephen Wood, eds, *Representing Workers: Trade Union Membership and Recognition in Britain* (London: Routledge, 2003) at 3.

47. According to an extensive study that the author conducted for the purposes of her PhD thesis, the only data that is linked to the information and consultation mechanisms come from Workplace Employment Relations Study (WERS) 2011, but in this study, managers respond on joint advisory committees which sometimes may be similar to the I & C mechanisms introduced by ICE, but sometimes not. This was also confirmed by John Purcell of the University of Bath during a personal written communication. Duncan Adam, John Purcell & Mark Hall, "Joint Consultative Committees Under the Information and Consultation of Employees Regulations:

between 2003 and 2006, significant changes occurred on existing employee I & C mechanisms among 40 of the companies to which ICE is applicable.<sup>48</sup> To this end, studies show that the number of I & C agreements has increased in the UK since the adoption of the *Directive 2002/14/EC*.<sup>49</sup>

With respect to those responsible for representing employees during I & C procedures under ICE, it is necessary to distinguish between employee representatives that deal with the negotiation of I & C agreements and employee representatives that are responsible for the implementation of I & C procedures. The former must be appointed or elected regardless of whether there may be an union in the company.<sup>50</sup> As for the representatives responsible for conducting the I & C procedures with the employer, ICE provides that the parties negotiating have the choice to decide in their agreements either to nominate or elect such representatives, or to give to the employer the choice to inform and consult with the employees directly.<sup>51</sup> It is important to note that ICE also does not refer to unions as employee representatives for the purpose of information and consultation during restructurings, and the government has not opted for a permanent consultative committee within the corporation in regard to ICE procedures.<sup>52</sup> Today, it seems that almost all of the I & C agreements provide for the formal election of employee representatives for the purposes of I & C. Mixed forums that include union and non-union members are growing and are the most effective.<sup>53</sup> Indeed, it appears that managers

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A WERS Analysis", Ref: 04/14, (2014), online: <[www.ACAS.org.uk/media/pdf/3/c/0414-Joint-consultative-committees-under-the-Information-and-Consultation-of-Employees-Regulations-A.pdf](http://www.ACAS.org.uk/media/pdf/3/c/0414-Joint-consultative-committees-under-the-Information-and-Consultation-of-Employees-Regulations-A.pdf)>.

48. Mark Hall et al, Department for Business Innovation & Skills (BIS), *Information and Consultation Under ICE Regulations: Evidence from Longitudinal Case Studies*, No 117, 21 (2010) 117 Employment Relations Research Series at 2, 10 [Hall et al., "BIS"].

49. Hall, "How Are Employers," *supra* note 44 at 11. Confederation of British Industry (CBI), *Employment Trends Survey 2004* [CBI Trend Survey].

50. ICE, *supra* note 16, art 14.

51. *Ibid*, arts 2, 16(1), 16(1)(a), (f)(ii).

52. Mark Cully, Department of Trade & Industry, 1998 Workplace Employee Relations Survey (1998), online: UK Data Archive <[doc.ukdataservice.ac.uk/doc/3955/mrdoc/pdf/3955-volume1.pdf](http://doc.ukdataservice.ac.uk/doc/3955/mrdoc/pdf/3955-volume1.pdf)>; Howard Gospel & Paul Willman, *High Performance Workplaces: The Role of Employee Involvement in a Modern Economy Evidence on the EU Directive Establishing a General Framework for Informing and Consulting Employees* (2003), online: ResearchGate <[www.researchgate.net/publication/30527540\\_High\\_performance\\_workplaces\\_the\\_role\\_of\\_employee\\_involvement\\_in\\_a\\_modern\\_economy\\_evidence\\_on\\_the\\_EU\\_directive\\_establishing\\_a\\_general\\_framework\\_for\\_informing\\_and\\_consulting\\_employees](http://www.researchgate.net/publication/30527540_High_performance_workplaces_the_role_of_employee_involvement_in_a_modern_economy_evidence_on_the_EU_directive_establishing_a_general_framework_for_informing_and_consulting_employees)>.

53. Hall, "EU Regulation," *supra* note 11 at 55–69.

are more respectful of union members for fear of reprisals, such as the initiation of a strike.<sup>54</sup> However, employees can also represent themselves directly to the employer.<sup>55</sup>

As the Labour Party wanted to avoid a one-size-fits-all approach<sup>56</sup> in order to allow a lot of flexibility to the employer, ICE encourages the negotiation of I & C agreements between employers and employees, as it will be explained below.<sup>57</sup>

## B. Several scenarios of information and consultation agreements

ICE provides for three types of I & C agreements which consist of the *newly negotiated I & C agreements*, the *pre-existing agreements* and the *agreements imposed by ICE's standard provisions*. First, the newly negotiated I & C agreements are the ones that are negotiated when there is no pre-existing agreement in place. In this case, ICE allows employers and employees to negotiate their own agreements recognizing employees' rights of I & C applicable in cases of corporate restructuring. Negotiations for this agreement may be initiated by the employer or by the employees if they represent 10% of the employees hired by the company.<sup>58</sup> The 10%-employee requirement is subject to a minimum of 15 employees and a maximum of 2 500 employees. This means that the threshold for triggering the application of ICE will be higher than 10% in companies that have fewer than 150 employees.<sup>59</sup>

Second, ICE allows the pre-existing agreements containing I & C procedures to remain in place within the company. The benchmark for considering an agreement as a pre-existing one is not the entry into force of ICE, but the date when the 10%-employee requirement applies to trigger the application of ICE to their company.<sup>60</sup> This agreement

54. Elain Bull, Amanda Pyman & Mark Gilman, "A Reassessment of Non-Union Employee Representation in the UK: Developments Since the ICE Age" (2013) 55:4 *Journal of Industrial Relations* 546 at 558.

55. ICE, *supra* note 16, arts 2, 16(1).

56. DTI, 2003, *supra* note 52.

57. Hall, "Assessing the Information," *supra* note 45 at 103. ICE, *supra* note 16, arts 7–17. DTI Guide 2006, *supra* note 41. CBI Trend Survey, *supra* note 49.

58. ICE, *supra* note 16, arts 11, 7(2) and (3).

59. Mark Hall & John Purcell, *Consultation at Work* (Oxford: Oxford University Press, 2012) at 83.

60. ICE, *supra* note 16, does not predict by what majority the agreement must have been approved, but the DTI Guide 2006, *supra* note 41, specifies that it must be a simple majority of

must meet certain conditions to comply with ICE. Thus, pre-existing agreements must be written, cover all employees, be approved by employees, and establish the terms of the I & C procedures to be applied in the company.<sup>61</sup>

The most important case regarding pre-existing agreements is *Stewart v Moray Council*.<sup>62</sup> In this case, the Central Arbitration Committee (CAC) and the Employment Appeal Tribunal (EAT)<sup>63</sup> established the principle that, where there is more than one agreement in place, all these agreements together can constitute a pre-existing agreement according to ICE, provided that they cover all the employees of the workplace and that each of these agreements respects the four legal conditions required by ICE as enumerated above. Thus, pre-existing agreements of I & C may be found in existing collective agreements, provided that the unions decide together with the employer to extend it in order to include the I & C procedures required by ICE and amend it to meet the four conditions listed above, including that of covering all employees of the company.<sup>64</sup> Pre-existing agreements are more advantageous to employers because they are subject only to the four conditions of validity listed above.<sup>65</sup>

The third method of establishing an agreement is by applying the legal standard provisions provided by ICE. Thus, in the event that negotiations do not begin after an application has already been made by the employees or the employer or in case that the current negotiations fail, the standard provisions of ICE apply.<sup>66</sup> Since we are interested in finding solutions to improve the Quebec legal framework and Canadian legal framework at a federal level, it is of great interest to know that because ICE does not specify the rights that the parties will have during a company restructuring process, studies show

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50% plus 1. Keith Ewing & Glynis Truter, "The Information and Consultation of Employees Regulations: Voluntarism's Bitter Legacy" (2005) 68:4 *The Modern Law Review* 626 at 631.

61. ICE, *supra* note 16, art 8.

62. *Stewart v Moray Council IC/3/* (2005) (CAC), [2006] IRLR 592 (UKEAT); *Stewart v The Moray Council*, [2006] IRLR 168 (CAC).

63. The Central Arbitration Committee will be cited as "CAC" and the Employment Appeal Tribunal will be cited as "EAT".

64. DTI Guide 2006, *supra* note 41.

65. ICE, *supra* note 16, art 8; DTI Guide 2006, *supra* note 41.

66. ICE, *supra* note 16, art 18.



that very few I & C agreements are formulated according to ICE’s standard provisions.<sup>67</sup>

### C. Information and consultation procedures provided by ICE and its applicable sanctions

Although ICE recognizes freedom to the parties to negotiate the terms and conditions of the employee information and consultation rights, it still contains certain rules commonly applicable to all workplaces that are subject to ICE. First, these common rules define very broadly the terms “information” and “consultation,” but they do not limit the freedom of the parties to decide the matters that must be subject to these two procedures and the way these processes will unfold.<sup>68</sup> ICE’s definition of “information” refers to data transmitted by the employer to I & C representatives, or directly to employees, in order to allow the representatives or the employees to study and appropriate the subject of this data. In addition, ICE contains some common restrictions on the disclosure of information.<sup>69</sup>

ICE requires that “consultation” be a process of exchange of views and a dialogue between employee representatives and the employer or, in the case of negotiated agreements, between employees directly and the employer.<sup>70</sup> Consultation, as defined by ICE does not constitute a process of negotiation or co-decision.<sup>71</sup> ICE requires the parties to negotiate agreements and follow I & C procedures in a spirit of cooperation and with respect to the mutual rights of the parties, thus taking into account the rights of employees and businesses.<sup>72</sup> ICE does not require the achievement of a specific outcome after consultation procedures, but it does require that these I & C procedures take place and operate in an appropriate manner. Moreover, unlike the negotiation procedures, during consultation procedures, the last word belongs to the employer.<sup>73</sup> Parties must also demonstrate that consultation is

67. Mark Hall et al, “Implementing Information and Consultation in Medium-Sized Organisations”, Department for Business Enterprise & Regulatory Reform (BERR), Employment Relations Research Series No 97, 2008 at 3 [Hall et al., “BERR”].

68. ICE, *supra* note 16, art 2.

69. ICE, *supra* note 16, art 25.

70. ICE, *supra* note 16, arts 2 and 16(1)f)(ii).

71. DTI Guide 2006, *supra* note 41.

72. ICE, *supra* note 16, art 1.

73. Hall et al, “BIS”, *supra* note 48 at 45.

conducted in good faith.<sup>74</sup> With the exception of these common rules, there are no other requirements of ICE regarding the content of negotiated agreements.

The employer and employee representatives are entirely free to decide themselves on important issues such as the nature, topics or timing of information and consultation.<sup>75</sup> It is only when ICE's subsidiary provisions are applicable, in the scenarios we have explained earlier, that it imposes more specific requirements on employers as to the terms of information and consultation.<sup>76</sup> However, the majority of the I & C agreements differ from ICE's standard provisions.<sup>77</sup>

Third, in the event of non-compliance with the I & C procedures provided for in the agreements or the standard rules of ICE, the parties have the right to seek the sanctioning of such violations from the CAC with a right of appeal to the EAT if it concerns a question of law.<sup>78</sup> However, the sanctions that ICE imposes seem to follow this policy of giving the employer a great deal of flexibility, as the CAC cannot suspend or cancel the actions undertaken by the employer in violation of I & C procedures, unless the parties recognize such a power to the CAC in their I & C agreement.<sup>79</sup> In addition, the CAC may impose to the employer a fine not exceeding £75,000.<sup>80</sup> In the *Susie Radin Ltd (appellants) v GMB*<sup>81</sup> case, the court decided that when the employer does not comply with the consultation procedures, it must order him to pay the maximum amount of the fine. However, this amount would be reduced if the employer is able to provide the necessary evidence justifying his decision not to proceed with I & C procedures. In the event of non-compliance with the I & C procedures, the sanctions

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74. DTI Guide 2006, *supra* note 41.

75. Ruth Dukes, "The ICE Regulations: Pre-Existing Agreements and Standard Provisions: A Warning to Employers" (2007) 36:3 *Industrial Law Journal* 329, at 329, 331. DTI Guide 2006, *supra* note 41.

76. ICE, *supra* note 16, art 8(6).

77. Aristeia Koukiadaki, "Reflexive Law and the Reformulation of EC-Level Employee Consultation Norms in British Systems of Labour Law and Industrial Relations" (2009) 5:4 *International Journal of Law in Context* 393 at 403.

78. ICE, *supra* note 16, art 35(6).

79. *Ibid*, art 22(9).

80. *Ibid*, art 23.

81. *Susie Radin Ltd v GMB* [2004] IRLR 400.

provided for by ICE do not apply to pre-existing agreements.<sup>82</sup> The sanctions that apply in such situations are the ones provided for in the pre-existing agreement itself, and in case that the pre-existing agreement does not contain any sanctions, then the employer will not be penalized for violating the I & C rights provided for by the same agreement.<sup>83</sup>

The volume of ICE-related complaints received by the CAC appears to be quite low.<sup>84</sup> Between April 2005, when the act came into force, and the end of 2011, only 40 applications related to 22 organizations were received by the CAC, an average of just 6 cases per year. The highest annual total was 10 complaints, in 2009. By the end of 2011, only 22 of the 40 applications had resulted in a decision by the CAC. Some authors believe that this low rate is caused by the lack of interest among the unions and the employees.<sup>85</sup> The majority of cases brought before the CAC involve complaints about the employer’s failure to hold elections for I & C representatives when standard provisions are applicable or the I & C agreements provide for. All of these complaints were upheld either by the CAC or by the EAT when the CAC had dismissed the complaint at trial. On some cases, the CAC and the EAT imposed fines on employers, but all of these fines were lower than the £75,000 fine that is allowed by ICE.<sup>86</sup> In the case of *Amicus v Macmillan Publishers Limited*,<sup>87</sup> the penalty was £55,000 and in the other cases, the fine was lower.

With regard to cases where employees allege that the employer does not comply with the I & C procedures provided for in the I & C agreements or in the standard provisions of ICE, the CAC has not allowed any complaints.<sup>88</sup> In *Darnton v Bournemouth University*<sup>89</sup> and *Mitchel v Wincanton Container*,<sup>90</sup> the CAC decided that the employer’s failure to inform and consult had occurred prior to ICE’s standard

82. ICE, *supra* note 16, arts 22 (1), 7.8. DTI Guide 2006, *supra* note 41.

83. *Ibid.*

84. Jimmy Donaghey et al, *National Practices of Information and Consultation in Europe* (Dublin: Eurofound, 2013) at 34. Hall & Purcell, *supra* note 59 at 103.

85. Donaghey et al, *supra* note 84.

86. Hall & Purcell, *supra* note 59 at 104–105.

87. *Amicus v Macmillan Publishers Limited*, (2006), Case No IC/04/ (2005) 22 February 2006, Case No. IC/8/ (2006)16 February 2007; *Rathbone and Roche Ltd v Madureira*, [2020] UKEAT 0185.

88. Hall & Purcell, *supra* note 59 at 106–107.

89. *Darnton v Bournemouth University*, (2008), IC/19/2008.

90. *Mitchel v Wincanton Container Logistic*, (2011), IC/39/2011.

provisions becoming applicable to the company. Furthermore, in the *Gale v Bournemouth University*<sup>91</sup> case, the CAC decided that the proposed dismissal of 12 employees could not be considered as a substantial change since the University had 1,300 employees. Accordingly, the CAC concluded that the employer's decision was not subject to consultation under ICE's standard provisions.

In the following section, we will undertake an analysis of ICE's effectiveness in increasing employees' ability to express their voice and influence employers' decisions during restructurings in order to improve their job security.

#### IV. UNITED KINGDOM EMPLOYEES' ABILITY TO EXPRESS THEMSELVES AND INFLUENCE EMPLOYERS' DECISIONS UNDER *INFORMATION AND CONSULTATION OF EMPLOYEES REGULATIONS* (ICE)

In this section, the extent to which ICE recognizes UK employees an ability to express themselves and influence the employers' decisions during company restructuring will be analyzed. For this purpose, we will use as framework analysis the *capability approach*, developed by the famous economist and philosopher Amartya Sen. Between the years 1992 and 1999, Sen pioneered in developing the *capability approach* as a means of assessing the impact and relevance of legislation that recognizes expanded rights to employees to participate in the company's economic decisions.<sup>92</sup> According to Amartya Sen, the *capability approach* is not about what employees are doing in the present, but about what they are able to do.<sup>93</sup> For this reason, Parliament should use its regulatory power to help individuals reach their full potential

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91. *Gale v Bournemouth University*, (2009), IC/28/2009.

92. Bonvin, *supra* note 21 at 9–10. Amartya Sen, "Development as Capability Expansion" in Sakiko Fukuda-Parr & Shiva Kumar, eds, *Readings in Human Development* (New Delhi and New York: Oxford University Press, 2003) at 41–54 [Sen 2003]. For further reading on the subject please see, Amartya Sen, *Inequality Reexamined* (Oxford: Clarendon Press, 1992), and Amartya Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999). Brian Langille, *The Capability Approach to Labour Law* (Oxford: Oxford University Press, 2019). Bonvin & Moachon, *supra* note 22 at 160.

93. Bonvin, *supra* note 21 at 9. Sen 2003, *supra* note 92 at 41–54. Simon Deakin & Aristeia Koukiadaki, "Capability Theory, Employee Voice, and Corporate Restructuring: Evidence from UK Case Studies" (2012) 33 *Comparative Labour Law & Policy Journal* 427 at 428.

in order to choose the activity that they should reasonably prefer.<sup>94</sup> In order to ensure the real freedom to choose the job and activity they are interested in, individuals should enjoy freedom of process or so-called *capability for voice*.<sup>95</sup> This implies that, when employers are designing and implementing decisions that have an impact on a community of employees, the individuals concerned must be able, firstly, to express their views freely and, secondly, to make sure that their opinions are taken into account by employers. Amartya Sen developed this approach in the context of studying poverty in developing countries.<sup>96</sup> In recent years, the *capability approach* has been used in Europe by several researchers in studies on collective redundancies.<sup>97</sup> To this end, we will use one of Sen’s *capability approach* components, which is the capability for voice as a framework of analysis in order to assess whether ICE has contributed to improving the ability of employees to express their voices and influence employers’ company decisions on restructuring.<sup>98</sup> In order to carry out this analysis, we will determine whether ICE meets the four conditions of the *capability for voice*, which are prerequisites in order to move from the degree of employee involvement in company decisions to a real influence on those decisions.<sup>99</sup> These four conditions are: the availability of political resources; the availability of cognitive resources; the rights and remedies recognized by legislation; and the willingness of employers and shareholders to listen to employees.

## A. The availability of political resources

As the first condition to Sen’s *capability for voice*, it is necessary that ICE provides employees with the needed *political resources*, by enabling them to form groups of representatives or strategic alliances capable of influencing the decision-making process and mobilizing adequate means of action in order to counter the employer’s power over restructuring.<sup>100</sup> The variables that we will analyze in order to determine whether ICE provides employees with adequate political resources are

94. Bonvin, *supra* note 21 at 9.

95. *Ibid* at 9–16. Sen 2003, *supra* note 92 at 41–54.

96. *Ibid*.

97. Bonvin, *supra* note 21 at 16. Bonvin & Moachon, *supra* note 22 at 166–168.

98. Bonvin, *supra* note 21 at 9–16. Bonvin & Moachon, *supra* note 22 at 158.

99. *Ibid* at 158–162.

100. Bonvin, *supra* note 21 at 9–16.

the composition and the ability of the employee representatives to express themselves during the phase of strategic development of the restructuring decision.<sup>101</sup> We will also analyze how these variables were put into practice in the case of ICE, based on the available data.

In this regard, first of all, it should be noted that ICE is a statutory instrument that excludes the mechanism of indirect representation of employees, because it allows employees to be directly self represented in two respects: first, ICE allows employees to represent themselves in case they decide to demand the application of ICE to their companies,<sup>102</sup> and second, it allows the parties to stipulate in their I & C agreements that the employer can inform and consult with employees directly during restructurings.<sup>103</sup>

Thus, regarding the triggering of the application of ICE's procedures, it should be noted that it seems unlikely that individual employees would be aware of their legal right to establish an I & C agreement in their companies. Studies show that almost all of the employees' representatives interviewed were either completely unaware of the existence of ICE or had heard of it only after an I & C agreement had already been established in their respective workplaces.<sup>104</sup> In fact, even if the employees were aware of the existence of this statutory instrument, many of them would have neither the courage nor the necessary training to be able to ask to negotiate an I & C agreement with their employer in order to apply ICE to their workplaces.<sup>105</sup> This is reflected in the small number of known cases in which employees have initiated negotiations to trigger the application of ICE to their workplaces.<sup>106</sup>

In addition, the fact that ICE gives employer and employee representatives the freedom to enter into an arrangement that would allow

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101. Bonvin & Moachon, *supra* note 22 at 150–162.

102. Negotiations for the I & C agreement may be initiated by the employer (ICE, *supra* note 16, art 11) or by the employees if they represent 10% of the employees hired by the company (*ibid*, art 7(2), (3)). In addition, in the case of pre-existing agreements the request must be initiated by at least 40% of the employees to negotiate a new agreement (*ibid*, art 8(1), (2)).

103. *Ibid*, arts 7, 16(1)(f)(ii). Paul Davies & Claire Kilpatrick, "UK Worker Representation After Single Channel" (2004) 33:2 *Industrial Law Journal* 121.

104. Hall et al, "BIS," *supra* note 48 at 18.

105. Pascale Lorber, "Implementing the Information and Consultation Directive in Great Britain: A New Voice at Work" (2006) 22:2 *International Journal of Comparative Labour Law and Industrial Relations* 231 [Lorber, "Implementing the Information"]. Gospel & Wood, *supra* note 46 at 121.

106. Hall et al, "BIS," *supra* note 48 at 2.10. Hall & Purcell, *supra* note 59 at 112. Hall et al, "BERR," *supra* note 67 at 53.

the employer to inform and consult employees directly during restructurings<sup>107</sup> does not allow employees to have the adequate political resources to represent them and face the employer collectively in relation to I & C procedures during restructuring.<sup>108</sup> Some authors believe that the ability of employers to inform and consult directly with employees not only would minimize the institution of employee representation, but it is also very difficult to be effectively put into practice in companies that have a large number of employees.<sup>109</sup> In fact, individual employees would not be able to adequately challenge employers’ decisions, and perhaps, this is the reason why ICE’s initiative to allow direct representation has been very well received by UK employers.<sup>110</sup> Furthermore, authors suggest that direct representation is exceptionally weak and should only be allowed in cases where employees choose not to use their legislative right of electing I & C representatives.<sup>111</sup> Managers, who are reluctant to engage in serious consultations with employee representatives, use methods of direct communication with employees because of the fear of losing their prerogatives and having to explain their decisions.<sup>112</sup> A study conducted in 2010 on small- and medium-size enterprises in the Kent and Medway regions of southeast England, shows that 92% of their managers have a preference for direct employee self-representation.<sup>113</sup> Moreover, because ICE allows direct self-representation of employees, it would be very difficult to really trust that the I & C procedures carried out with single employees would be effective, since employees

107. ICE, *supra* note 16, arts 2, 16(1).

108. Lorber, “Implementing the Information,” *supra* note 105.

109. Employee representation, or the *indirect participation*, refers to the collective representation of the interests of employees to the employer. Participation mainly takes an indirect form where representatives, such as trade unions or other representative bodies, are called upon to defend workers’ rights. David Lewin & Daniel Mitchell, “Systems of Employee Voice: Theoretical and Empirical Perspectives” (1992) 34:3 *California Management Review* 95. Bonvin & Moachon, *supra* note 22 at 158–172. Isabelle Schömann et al, “L’information et la consultation des travailleurs dans la Communauté européenne: transposition de la Directive 2002/14/CE” Report No 97, Institut syndical européen pour la recherche, la formation et la santé et sécurité (ETUI — REHS), financed by the European Commission, Bruxelles, 2006 at 21.

110. Lorber, «Implementing the Information», *supra* note 105. Hall, “Assessing the Information,” *supra* note 45 at 114.

111. Davies & Kilpatrick, *supra* note 103. Lorber, “Implementing the Information,” *supra* note 105.

112. John Purcell & Mark Hall, “Voice and Participation in the Modern Workplace: Challenges and Prospects”, ACAS Future of Workplace Relations discussion paper, series, Advisory, Conciliation and Arbitration Service (ACAS), March 2012.

113. Elain Bull et al, “The Contours of Employee Voice in SMEs: Implications for Performance and HRM Theory”, Working Paper No 199 (Chatam (UK): Kent Business School, January 2010).

generally lack training and are vulnerable towards the employer.<sup>114</sup> In practice, the direct employee self-representation as permitted by ICE has proven more symbolic than practical, with very few reported agreements providing for direct self-representation as the only means of employee representation in the case of restructurings.<sup>115</sup>

Second, ICE does not contain any provision that provides for how employee representatives should be elected or appointed. This causes a real problem in the composition of the I & C forums, because where there is no union present, employers tend to appoint themselves as representatives sitting on the I & C forums.<sup>116</sup>

Third, ICE only requires that employee representatives be appointed or elected by the employees, without recognizing any specific role to the most experienced employees or the unions. However, in practice, union representatives are very often elected to be part of such forums. This situation leads to the presence of many hybrid I & C representation groups in the UK.<sup>117</sup> As a result, the degree of effectiveness of I & C representatives as political resources differs from company to company, as union representatives are better trained and enjoy a greater degree of independence than non-union members.<sup>118</sup>

Fourth, in order to build adequate political resources, employee representatives must act very early in the decision-making process related to restructuring, in order to allow employees adequate representation before a final decision affecting their interests is taken by the employer. To this regard, it should be noted that authors distinguish four stages in the development of the restructuring decision: the first is that during which management considers a restructuring procedure; the second is the one where the restructuring decision is made, but some debates remain in progress to refine the details of its implementation; the third is that during which the two decisions are taken, that of restructuring and its implementation, but not yet executed; and the fourth stage is that of implementation. It seems that employee

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114. Davies & Kilpatrick, *supra* note 103.

115. Hall, "Assessing the Information," *supra* note 45 at 103, 126. Koukiadaki, *supra* note 77 at 393, 406.

116. Mark Hall & Michael Terry, "The Emerging System of Statutory Worker Representation" in Healy et al, eds, *The Future of Worker Representation* (Palgrave: Macmillan, 2004) at 214.

117. Aristeia Koukiadaki, "The Establishment and Operation of Information and Consultation of Employees Arrangements in a Capability-Based Framework" (2010) 31:3 *Economic and Industrial Democracy* 365.

118. Lorber, "Implementing the Information," *supra* note 105. Davies & Kilpatrick, *supra* note 103.



representatives must be informed and consulted during the first stage or at least during the second stage in order to be able to offer suggestions and influence employers' decisions.<sup>119</sup> In this regard, ICE does not appear to be making a significant contribution, as it allows employers and employees to freely negotiate and decide together the timing when the I & C procedures should take place.<sup>120</sup> Thus, it should be noted that due to a lack of legislative requirements as to the priority of I & C procedures in regard to the final restructuring decisions, many I & C agreements concluded after the ICE came into force do not make any reference to the timing when the I & C procedures should take place in the decision-making process of restructuring.<sup>121</sup> In a study conducted in 2007, it was noted that, of the 25 companies studied, only 5 of them had formally specified in their agreements that consultations had to take place before any decision to proceed with restructuring was finalized.<sup>122</sup>

It is only when ICE's standard provisions apply that the employer has a legislative obligation to proceed with the information process at an appropriate time that would allow representatives, first, to properly analyze the issues under consideration and, second, to prepare for consultations.<sup>123</sup> ICE's standard provisions seem like a good example to be taken into consideration to this regard. However, as the studies confirm, in the UK, the creation of the I & C agreements is mainly dominated by the employers and, as a result, the majority of agreements do not refer to the requirement of ICE's standard rules.<sup>124</sup>

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119. Marie-Ange Moreau, "Restructurations et comité d'entreprise européen", EUI Working Papers, European University Institute (EUI), Department of Law, (2006) at 2. Dibra, "Le droit de participation des salariés lors des restructurations," *supra* note 37. Mark Carley & Mark Hall, *European Works Councils and Transnational Restructuring* (Luxembourg: Office des publications officielles des Communautés européennes, 2006) at 18, 63, 75, online: <[www.eurofound.europa.eu/publications/report/2007/industrial-relations/european-works-councils-and-transnational-restructuring](http://www.eurofound.europa.eu/publications/report/2007/industrial-relations/european-works-councils-and-transnational-restructuring)>. John Storey, "Employee Information and Consultation: An Overview of Theory and Practice" in John Storey, ed, *Adding Value Through Information and Consultation* (New York: Palgrave Macmillan, 2005) 90 at 91. Donaghey et al, *supra* note 84 at 12.

120. ICE, *supra* note 16, arts 11, 7(2), (3).

121. Bull, Pylman & Gilman, *supra* note 54 at 546–564.

122. Donaghey et al, *supra* note 84. Mark Hall et al, "Implementing Information and Consultation: Early Experience Under the ICE Regulations", Report to the Department for Business, Enterprise and Regulatory Reform (DBERR), in partnership with Advisory, Conciliation and Arbitration Service (ACAS) and the Chartered Institute of Personnel and Development (CIPD), 2007.

123. ICE, *supra* note 16, art 20(2).

124. Hall et al, "BIS," *supra* note 48 at 2, 21.

According to some studies, employers inform and consult employees only after a final decision to carry out restructurings has been reached and this, particularly in cases when the restructuring procedures would have serious consequences for employees, such as large-scale collective dismissals.<sup>125</sup> Thus, in the majority of cases, the topics presented by employers on the consultation agenda pertain to decisions that have been already made by employers.<sup>126</sup>

However, according to a study carried out between 2006 and 2010, the authors Hall et al have noted that when employers submit questions about corporate restructuring to I & C representatives before making a decision that affects them, and when the employers are genuinely willing to discuss these issues with I & C forums in order to reach an agreement, on many occasions these I & C forums have been able to influence employers' decisions regarding restructuring itself and the resulting collective redundancies.<sup>127</sup> Further, it has been observed that a timely I & C process resulted in a decrease in the number of dismissed employees in some UK companies that amended their pre-existing agreements to comply with ICE.<sup>128</sup>

The second condition of the *capability for voice* requires that in order for the I & C forums to be efficient, cognitive resources must be available to employees as well.

## B. The availability of cognitive resources

The second condition of the *capability for voice* requires that employees have the available *cognitive resources* in order to assert their right to express their opinion, as well as to ensure that this opinion is taken into account by employers during their restructuring decisions. In order to respect the criteria of *cognitive resources*, before starting any consultation sessions, ICE recognizes employees a right to have access to all the necessary information about restructuring as well as the possibility of generating their own information and knowledge

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125. Donaghey et al, *supra* note 84. Aristeia Koukiadaki, "The Establishment and Operation of Information and Consultation of Employees Arrangements in the UK: Case Study Evidence", Cornell-Warwick Doctoral Symposium, School of Industrial and Labour Relations, Cornell University, 4 May 2007.

126. Hall et al, "BERR," *supra* note 67. Bull et al, *supra* note 113.

127. Hall et al, "BIS," *supra* note 48 at 5, 6, 48. Hall & Purcell, *supra* note 59 at 138–146.

128. Deakin & Koukiadaki, *supra* note 93.

about a particular situation regarding the company.<sup>129</sup> To examine ICE on this point, we will first analyze whether the employees' representatives or the employees themselves have the necessary skills to initiate adequate I & C procedures.<sup>130</sup> Second, we will look at the content of the information provided by the employer, and finally, we will try to determine whether representatives or employees have the capacity to generate their own information and whether this cognitive ability is translated into a power to influence employers' decisions.

First, it should be noted that ICE does not set any requirements for the training of employee representatives in order to carry out the I & C procedures.<sup>131</sup> In addition, ICE does not provide for the right of employees to take time off work in order to attend training courses.<sup>132</sup> Related to this issue, some studies show that, even when training sessions are offered, they must be ongoing, or otherwise the representatives would not have the competence to adequately represent the employees during I & C procedures.<sup>133</sup> Nevertheless, despite this lack of a legal requirements for training, some studies show that, in practice, the provisions of the I & C agreements that provide training requirements for representatives are quite frequent, if not universal. However, it appears that training sessions are rarely provided to employee representatives in practice.<sup>134</sup>

This lack of training is directly related to the attitude of the I & C representatives during the information and consultation procedures. Thus, members of the I & C forums are unable to interpret the complex information they receive from employers and therefore they easily agree to closures and consider that the employer's decision is justified.<sup>135</sup> Further, some studies show that members of the I & C forums do not take the initiative to ask employers the necessary information regarding restructuring and therefore they remain generally passive because of the lack of training.<sup>136</sup> On the contrary, according to a study conducted between March 2008 and July 2009 on two UK-based

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129. Bonvin & Moachon, *supra* note 22 at 158–172.

130. Bonvin, *supra* note 21 at 9–16.

131. Deakin & Koukiadaki, *supra* note 93.

132. Hall, "Assessing the Information," *supra* note 45 at 116.

133. Koukiadaki, *supra* note 117.

134. Hall, "EU Regulation," *supra* note 11. Hall et al, "BERR," *supra* note 67.

135. Deakin & Koukiadaki, *supra* note 93.

136. Bull, Pylman & Gilman, *supra* note 54 at 546–564.

manufacturing companies, it was observed that in these companies where the training took place, the employees interviewed during the study stated that this process helped them to better understand their role, as well as to better prepare for the I & C sessions.<sup>137</sup>

Also, in the majority of cases, managers have control over the agenda, in particular because of the lack of adequate training of employees, and some studies show that important topics, such as restructuring, are added to the agenda by managers and not by employee representatives who appear unable to do so due to a lack of training.<sup>138</sup> Therefore, only in a minority of cases, managers submit restructuring-related issues to the agenda.<sup>139</sup> The agenda, which is generally determined by the employers includes, in a majority of cases, social issues, such as employee motivation, and very little information related to restructuring, since employers believe that employees are unable to understand such information.<sup>140</sup> It seems that mandatory and adequate training is an immediate necessity for employee representatives.

In addition, ICE does not anticipate neither the frequency that the employee representatives must meet with each other, nor the frequency that they should meet with the employers in the event of a restructuring process.<sup>141</sup> However, some I & C forums have themselves established internal rules regarding the exchange of information between representatives. These rules have proven to be very successful in improving the functioning of I & C forums. In cases where I & C forums themselves have not been able to establish such rules, the employer has stepped in and established strict and inadequate rules.<sup>142</sup>

Second, the content of information provided by employers presents several challenges. In fact, ICE includes a very vague and imprecise definition of the term "information."<sup>143</sup> According to ICE, the term "information" refers to a one-way transmission of data by the employer to employees, or their representatives, and ICE does not impose an

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137. *Ibid.*

138. Deakin & Koukiadaki, *supra* note 93. Hall & Terry, *supra* note 116.

139. Hall et al, "BERR," *supra* note 67.

140. Deakin & Koukiadaki, *supra* note 93. Koukiadaki, *supra* note 117. Bull et al, *supra* note 113.

141. Hall, "Assessing the Information," *supra* note 45 at 115. Koukiadaki, *supra* note 117.

142. Koukiadaki, *supra* note 117.

143. ICE, *supra* note 16, art 2. Lorber, "Implementing the Information," *supra* note 105.

obligation on the employer to follow any minimum requirements.<sup>144</sup> As a result, the parties are free to decide for themselves what constitutes necessary information to be transmitted relating to restructuring decisions, and to negotiate information disclosure procedures that are much less demanding than ICE’s standard provisions which are applicable only in cases where an agreement cannot be reached.<sup>145</sup> Studies show that the majority of negotiated I & C agreements do not define what constitutes an information procedure.<sup>146</sup> This means that information rights vary from company to company. Thus, in some companies, the ability of employees to obtain information about employers’ decisions may be quite important, while in other cases, it is extremely low.<sup>147</sup> Nevertheless, according to one study, the provisions of the I & C agreements with regard to the content of the information are considered satisfactory by employees, and highly influenced by ICE’s standard provisions with the exception of those related to restructurings.<sup>148</sup> In fact, according to a study, it seems that, in the majority of cases, important issues that affect job security and company restructuring do not even appear on the agenda of the annual meetings of representatives with management, even if these topics are included in the I & C agreements.<sup>149</sup> Some authors are of the opinion that, even in the case of negotiated agreements, ICE should specify the subjects to be covered during information and consultation procedures, because the absence of legislative requirements on this matter means that many employers do not give the necessary details concerning essential information in regards to restructuring.<sup>150</sup>

Third, in order to strengthen cognitive resources, employees must have the possibility to generate their own information and knowledge concerning a particular situation affecting the company. The term “generating their own information” refers to the ability of the employees to obtain additional necessary information on the subject by using

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144. Blanpain, *supra* note 11 at 188.

145. Ewing & Truter, *supra* note 60 at 631.

146. Bull, Pylman & Gilman, *supra* note 54.

147. Blanpain, *supra* note 11 at 188. ICE, *supra* note 16, art 16. Lorber, “Implementing the Information,” *supra* note 105 at 231–258.

148. Deakin & Koukiadaki, *supra* note 93. Koukiadaki, *supra* note 117.

149. Deakin & Koukiadaki, *supra* note 93. Brigid Van Wanrooy et al, “First Findings”, *The 2011 Workplace Employment Relations Study*, Department for Business, Innovation & Skills 54 [Van Wanrooy et al., “WERS 2011”].

150. Storey, *supra* note 119. Koukiadaki, *supra* note 117.

the help of experts and by having the necessary time and ability to conduct a research on the subject.<sup>151</sup>

In this regard, it seems that the I & C forums are weak bodies because, firstly, ICE does not provide for the compulsory presence of experts, at least on subjects for which the employee representatives do not have the necessary competence to understand the information obtained. In fact, certain studies show that, when employee representatives are not assisted by experts, they may experience certain difficulties in fully understanding the complex information provided by the employer, in particular with regard to the financial aspect and business strategy.<sup>152</sup> Furthermore, the authors are of the opinion that the absence of experts does not allow employee representatives to assess the consequences of restructuring and to propose alternative measures.<sup>153</sup> Currently, in the UK, the presence of experts during the restructuring issues depends on the I & C agreement. Thus, some agreements provide that employee representatives can be advised by experts of their choice, while others limit the presence of these experts.<sup>154</sup> In addition, besides the absence of experts, the duration and the mode of conducting the meetings, which are organized over one or two days, do not allow representatives to do additional research in order to be able to suggest alternative measures to the employer or to ask for expert advice.<sup>155</sup>

In what follows, we will analyze whether ICE respects the third condition in order to ensure a *capability for voice* to employees during restructuring, by granting them legislative rights and remedies.

### C. The rights and remedies recognized to employees and their representatives

The third condition in order to ensure a *capability for voice* to employees during restructuring is the fact of granting them rights and remedies recognized by legislative measures. In this part, we will focus on the rights and remedies provided by ICE in order to support and

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151. Koukiadaki, *supra* note 117.

152. *Ibid.*

153. Élodie Béthoux, "Vers une représentation européenne des salariés. Les comités d'entreprise européens face aux restructurations" (2009) 51 *Sociologie du travail* 478 at 483.

154. Koukiadaki, *supra* note 117.

155. Donaghey et al, *supra* note 84. Hall, "EU Regulation," *supra* note 11 at 55–69.

promote the employees' power to influence employer's decisions concerning restructuring.<sup>156</sup> To carry out this analysis, we will consider the following variables: first, we will examine the legal remedies provided by ICE to the employee representatives or to the employees themselves regarding the implementation of their I & C rights, and second, we will consider the scope of the participation rights of the I & C representatives with regard to decisions concerning restructuring.

First of all, the general sanctions provided by ICE apply only in cases of newly negotiated agreements as well as where the standard provisions of ICE apply. However, they do not apply to pre-existing agreements.<sup>157</sup> Thus, unless the pre-existing agreement provides for sanctions in the event of a violation of the I & C procedures by the employer, the latter, contrary to standard ICE rules, can decide unilaterally all the matters regarding corporate restructuring and collective redundancies without informing and consulting the employees prior to the restructuring measures. In fact, the employer can even completely exclude information and consultation on certain matters considered important for restructuring procedures. These employers would contravene ICE, but their violation will not be punishable. Some authors consider that this limits the ability of employees to express themselves and to influence employers' decisions on the subject.<sup>158</sup>

In practice, pre-existing agreements do not always provide for coercive measures.<sup>159</sup> According to a study carried out in 2011 concerning companies which adopted I & C mechanisms during the years 2004–2006, the authors Deakin and Koukiadaki observed that in cases where an I & C agreement existed before the request was made by employees to initiate a new I & C agreement in respect of ICE, the employers have closed businesses, followed by mass redundancies without informing and consulting employee representatives' forums prior to these restructuring procedures.<sup>160</sup> In doing so, these employers did not contravene ICE because, as we have seen above, the pre-existing agreements are not subject to sanctions provided by it. According to studies, almost all the I & C forums as well as the unions

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156. Bonvin & Moachon, *supra* note 22 at 158–172.

157. ICE, *supra* note 16, arts 8, 22(1). Hall, "How Are Employers," *supra* note 44.

158. Deakin & Koukiadaki, *supra* note 93 at 427–457, 433–436, 446.

159. COM/2008/0146, Communication de la Commission au Conseil, au Parlement européen, au comité économique et social et au comité des régions sur l'examen de l'application de la *Directive 2002/14/CE* dans l'Union européenne (UE) (SEC (2008) 334)\*COM/2008/0146 final\*.

160. Deakin & Koukiadaki, *supra* note 93.

of the companies that were studied underline that the impossibility of sanctioning the violation of the I & C rights provided for in the pre-existing agreements, unless these agreements themselves provide for sanctions to this regard, did not allow these agreements to be used as elements of development of the employee participation right, as intended by ICE.<sup>161</sup>

The second reason is that, although ICE provides for legal measures aimed at penalizing employers' non-compliance with I & C procedures, these measures do not seem to be dissuasive.<sup>162</sup> In fact, ICE does not provide for an injunction procedure applicable to employers who carry out restructuring in violation of the right of the employees to be informed and consulted.<sup>163</sup> That is why, in such cases, the CAC cannot give an order to suspend the employer's decision until it complies with the I & C procedures and cannot issue any orders that delay or suspend employers' decisions.<sup>164</sup> This means that employee representatives are left completely helpless in cases where managers act unilaterally, and their restructuring decisions have harmful repercussions on employees.<sup>165</sup>

Third, the £75,000 penalty payable to the public treasury is the only means available to penalize employers who fail to comply with I & C procedures. This sum is considered to be very small to dissuade employers and, moreover, employees are not interested in wasting their time and filing complaints with the CAC if this sum does not go to them, but to the treasury. In fact, the fines imposed on employers by the CAC following complaints of contraventions of ICE were all below the £75,000 limit and very few cases are referred to the CAC.<sup>166</sup> This lack of initiative on the part of employees gives employers the opportunity to violate the I & C agreements and the standard provisions of ICE where they apply.

As for the extent of the right of employee participation in the economic decisions of the company, it should be noted that the very purpose of ICE is obviously to increase the intensity of the employee

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161. *Ibid.*

162. Ewing & Truter, *supra* note 60 at 636.

163. Bull et al, *supra* note 113

164. ICE, *supra* note 16, art 22(9).

165. Hall & Terry, *supra* note 116.

166. Hall & Purcell, *supra* note 59 at 104–105. Dukes, *supra* note 75.



participation so that they can influence employers’ decisions regarding restructuring.

In this regard, it should be noted that, although ICE can be interpreted as an important cognitive resource due to the fact that it ensures a certain level of transparency of employers’ decisions related to restructuring in general, the fact remains that this resource, even limited, does not seem to enable representatives in order to influence employers’ decisions.

This conclusion is imposed for the following reasons: first, the intensity of participation is directly linked to the extent of the rights granted to employees in decisions concerning restructuring. The rights of employees during restructuring according to ICE are limited to simple information and consultation procedures without any right of co-decision with the employer.<sup>167</sup> The absence of the recognition of a co-decision right by ICE’s provisions certainly reduces the intensity of participation, as co-decision provides a higher possibility of influencing employer’s decisions than the right to consultation.<sup>168</sup>

Second, the term “consultation” is also very loosely defined by ICE, which uses it to imply a two-way process, so that the employer not only transmits data, but also considers the employees’ suggestions regarding the given information.<sup>169</sup> Indeed, the way this statutory instrument is designed, it does not provide any instruction on, or a model of how the consultation procedures should be undertaken. However, the standard provisions of ICE offer certain standards in this regard, but even in this case, the provisions offer little guidance on how the consultation procedure should proceed.<sup>170</sup> Consequently, ICE leaves full freedom to employers and employees to decide in an I & C agreement the content of the consultation, the manner in which it will be carried out as well as all the details linked to this procedure, such as the number of times employees should be consulted and when this procedure should take place. Furthermore, ICE does not impose any obligation on the employer to follow certain minimum requirements for pre-existing agreements with regard to consultation procedures.

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167. Deakin & Koukiadaki, *supra* note 93.

168. DTI Guide 2006, *supra* note 41. Jeremy Waddington, *European Works Councils: A Transnational Industrial Relations Institution in the Making* (New York: Routledge, 2011).

169. Blanpain, *supra* note 11 at 188. ICE, *supra* note 16, arts 2, 20(4)(d).

170. Hall & Purcell, *supra* note 59 at 164.

As a result, the parties are free to negotiate much less demanding consultation procedures than the standard provisions of ICE.<sup>171</sup>

This great freedom has several negative consequences. Thus, some studies show that consultation procedures are not defined in the I & C agreements in the majority of cases, and this creates confusion for the employers and the employee representatives.<sup>172</sup> Further, empirical studies show that there are differences between employers and employees over the interpretation and definition of the term “consultation.”<sup>173</sup> Due to the ambiguities of the I & C agreements, employers see consultation either as a procedure where the necessary efforts must be made to incorporate the interests of employees in the decision-making process, or as a procedure in which employee representatives must participate and provide feedback to employers on decisions already made.<sup>174</sup> In addition, since the I & C agreements vary from company to company, it follows that the voice of the employees can be quite strong in some companies and extremely weak in others. Consequently, despite the fact that the UK Government believes that it is good practice to allow the parties freedom to decide themselves the arrangements regarding consultation, the fact remains that this practice is confusing for the parties, and even employers complain that they are not guided more clearly by law as to how they should consult employees.<sup>175</sup>

In addition, the standard provisions of ICE require the establishment of a dialogue as well as a consultation in order to reach an agreement, but this is not required in the case of pre-existing agreements and in practice, very few I & C agreements specify that consultations must take place in order to reach an agreement.<sup>176</sup> Only a few agreements follow ICE in relation to the nature and extent of the consultation.<sup>177</sup> Studies show that the degree of employee involvement in the consultation process still depends on the goodwill of employers. In fact, they

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171. Ewing & Truter, *supra* note 60 at 631.

172. Bull, Pylman & Gilman, *supra* note 54 at 546–564. Hall, “Assessing the Information,” *supra* note 45 at 116.

173. Deakin & Koukiadaki, *supra* note 93.

174. Koukiadaki, *supra* note 117.

175. Hall, “Assessing the Information,” *supra* note 45 at 116.

176. Ewing & Truter, *supra* note 60 at 631. Hall et al, “BERR,” *supra* note 67 at 36.

177. *Ibid.*

decide the content of the information to be given to the employees and the questions to be included on the consultation agenda.<sup>178</sup>

Third, ICE does not require the achievement of a specific outcome after consultation procedures. The right to consultation is not intended to compel the employer to adopt the views expressed by employee representatives. Indeed, what this term means is that the employer has an obligation to hear and consider the opinion of employees without any obligation to conclude an agreement. On this aspect, the Department of Trade and Industry (DTI) Guide specifies that consultation under ICE is neither a negotiation nor a co-decision procedure.<sup>179</sup> Thus, the employer keeps the last word, and he retains the power to make decisions, because the consultation process as provided by this statutory instrument and the agreements in practice do not require the employer to side with the opinions expressed by employee representatives. As a result, managers can invite employees to consultation procedures, but employees have no guarantee that the consultation procedure is real and effective or that their opinions will be taken into account. Therefore, it seems that the effectiveness of consultation is left to the employer's discretion.<sup>180</sup> In this regard, it seems that there are no cases where the consultations were initiated by the employees or the union, and in most cases, employers tend to restrict the consultation process and act unilaterally, especially when their decisions have unpleasant consequences for employees.<sup>181</sup> Furthermore, quite often, consultation procedures are dominated by employers and are used to justify employers' decisions without really seeking any employee counterproposals.<sup>182</sup> For all these reasons, it seems that contrary to ICE, if a similar statute was to be adopted in Canada, it should at least allow for the achievement of a specific outcome after the consultation procedures in order to give a real meaning to this process.

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178. Elain Bull, *The Impact of the Information and Consultation of Employees Regulations on Medium Sized Firms*, Unpublished PhD thesis, Kent Business School, University of Kent, 2010. Peter Cresey & John Macinnes, "The Relationship Between Economic Recession and Industrial Democracy", Glasgow, Centre for Research in Industrial Democracy and Participation, University of Glasgow, 1984, Unpublished paper, cited in Mick Marchington, "Joint Consultation in Practice" in Keith Sisson, ed, *Personnel Management in Britain* (Oxford: Basil Blackwell, 1989) at 378.

179. DTI Guide 2006, *supra* note 41. ICE, *supra* note 16, art 2.

180. Blanpain, *supra* note 11 at 189. Gollan & Wilkinson, *supra* note 36 at 1152.

181. Hall, "EU Regulation," *supra* note 11. Koukiadaki, *supra* note 117. Bull et al, *supra* note 113.

182. Bull, Pylman & Gilman, *supra* note 54. Hall et al, "BERR," *supra* note 67.

Fourth, with regard to the agreements reached during the consultation procedures, it should be noted that in the UK these procedures have quite rarely led to formal agreements between representatives and employers with regard to restructuring. In fact, in a study carried out in 2007 by Donaghey et al, concerning 25 companies which had established I & C forums between 2000 and 2007, the authors noted that consultation procedures take place only in a limited number of companies and have rarely reached formal I & C agreements with regard to restructuring. This was confirmed by another study in 2008.<sup>183</sup> In cases where agreements have been reached, certain studies carried out on samples of companies, particularly between 2008 and 2010, show that consultation has made it possible to change the position of employers with regard to the way in which these restructuring and collective redundancies have been implemented. However, these consultation procedures did not make it possible to change the employer's strategic plans, including the decision whether or not to proceed with restructuring.<sup>184</sup> Indeed, it seems that British employers are ready to agree to consult the employees on the measures regarding the implementation of the restructuring decisions, but they are against the idea of consulting them on the substance of the restructuring decision itself.<sup>185</sup>

In a study carried out between March 2011 and June 2012, and pertaining to 2,680 business managers, 1,002 employee representatives and 21,981 employees, the authors Wanrooy et al noted that 52% of the employees consider managers to be "very good" in collecting their views, but these employees were less likely to rate managers as "very good" or "good" in responding to their suggestions.<sup>186</sup> However, in 2011, there was a small increase in the three assessments since 2004.<sup>187</sup> Thus, employees who considered that employers allowed them to influence their decisions had increased from 32% in 2004 to 35% in 2011. The proportion of employees who have positive opinions on how managers seek to involve them in the decision-making process is

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183. Donaghey et al, *supra* note 84. Hall et al, "BERR," *supra* note 67

184. Donaghey et al, *supra* note 84 at 2. Koukiadaki, *supra* note 117 at 381. Ewing & Truter, *supra* note 60 at 634–636. Deakin & Koukiadaki, *supra* note 93 at 433–436, 446. Storey, *supra* note 119 at 4. Bull et al, *supra* note 113. Koukiadaki, *supra* note 117 at 381.

185. Ewing & Truter, *supra* note 60 at 634–636.

186. Van Wanrooy et al., "WERS 2011" *supra* note 149.

187. *Ibid.*

slightly higher, going from 40% in 2004 to 43% in 2011.<sup>188</sup> Therefore, it can be concluded that ICE did not significantly improve the employees' ability to express themselves and influence employers' decisions, and that employers did not significantly change their traditional approaches regarding employee participation in their decisions concerning restructuring resulting in collective redundancies.

Fifth, ICE does not offer bargaining rights on the subject of restructuring decisions. Even if, according to the standard provisions of ICE, sometimes the consultation must take place with the aim of reaching an agreement, this does not grant a right to negotiate,<sup>189</sup> but simply an additional effort on the part of the employer to consider the employees' concerns and try to settle issues with them.<sup>190</sup> As a result, the importance of employee involvement in the decision-making process as provided by ICE is quite limited, because the official powers of the I & C representatives extend to consultation, but they stop well below negotiation and there is still no provision for any form of arbitration.<sup>191</sup> Since bargaining is neither included nor excluded by ICE, and employers have no obligation to reach an agreement regarding restructuring, employers have been able to limit employee participation only to the two forms mentioned by ICE, namely information and consultation, and they exclude negotiation.<sup>192</sup> In fact, without recognizing to employees a legal right of negotiation in cases of corporate restructuring, applicable especially when the collective agreements do not provide for such rights, the employees are left without any protection facing the possibility for the employer to act unilaterally when he wishes to do so. The willingness of employers and shareholders to listen to the employees is another important aspect that we will see below.

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188. *Ibid.*

189. Consultation is different from negotiation because it involves an effort to make joint decisions between employees and the employer with a view to reaching an agreement between the parties involved. Conversely, the consultation leaves intact the power of the employer to make the decision that seems appropriate while having listened to the views of the workers. Vandamme, *supra* note 5.

190. Blanpain, *supra* note 11 at 188. ICE, *supra* note 16, arts 2, 20(4)d).

191. Peter Butler, "Non-Union Employee Representation: Exploring the Riddle of Managerial Strategy" (2009) 40:3 *Industrial Relations Journal* 198 at 207.

192. Deakin & Koukiadaki, *supra* note 93.

#### D. The willingness of employers and shareholders to listen to employees

Finally, the last condition for employees to have freedom of process or a *capability for voice* is the willingness of employers and shareholders to listen to them. This does not depend solely on the willingness of employers and shareholders to listen to employees, but rather on the existence of legislative constraints in this regard. Thus, in the case of corporate restructuring, it is necessary to look at the legal obligations of the interlocutors with regard to the I & C process.<sup>193</sup>

First, ICE grants a lot of flexibility to the employer at the expense of the employees' right to be informed and consulted in a real and effective way.<sup>194</sup> Thus, unlike TULRCA and TUPE, ICE does not apply automatically to companies.<sup>195</sup> Therefore, in the event that employees find it difficult to establish the application of ICE to the company, the field remains free for the employer to act unilaterally or to do nothing in this regard.<sup>196</sup> Furthermore, employers can even block the establishment of I & C procedures in cases where they can demonstrate that the request is made by less than 10% of the employees in the case of newly negotiated agreements, or by less than 40% of the employees in the cases when a pre-existing agreement is already in place within the company.<sup>197</sup>

In addition, employers can keep their pre-existing agreements when they consider it unlikely that employees will ask to modify or replace them with other I & C agreements.<sup>198</sup> These pre-existing agreements can be designated by employers alone without being negotiated with employee representatives, because ICE does not make such a request. Indeed, it only requires that the pre-existing agreement be approved by the employees. Further, employers have a great deal of flexibility in regards to the content and structure of pre-existing agreements and newly negotiated agreements, because ICE does not set up a mandatory benchmark model for information and consultation on which the I & C agreements the participants are preparing should be based on.<sup>199</sup>

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193. Bonvin, *supra* note 21 at 9–16.

194. Hall, "A Cool Response," *supra* note 29 at 459.

195. ICE, *supra* note 16, arts 11, 7(2), (3), (6).

196. Hall, "A Cool Response," *supra* note 29 at 459, 470.

197. ICE, *supra* note 6, arts 7(2), 8(1).

198. Hall, "Assessing the Information," *supra* note 45 at 118.

199. Storey, *supra* note 119 at 31. Hall, "A Cool Response," *supra* note 29 at 456.

Furthermore, in the case of pre-existing agreements where the request must be initiated by at least 40% of the employees to negotiate a new I & C agreement, the employer must organize a voting process so that employees can vote for this purpose.<sup>200</sup> In this case, ICE does not require that this process be done under the supervision of a qualified and independent person. Employers are therefore free to intimidate employees several times during the voting process.<sup>201</sup>

In addition, since ICE does not impose any formal meetings with employers on I & C forums, the frequency of these meetings varies according to the agreements which provide for them. It seems that employers and employee representatives regularly hold meetings which address the economic situation of the company, the employment situation and restructuring.<sup>202</sup> However, formal meetings between employers and employee representatives for I & C purposes seem to be on the way out, giving way to informal and *ad hoc* communications. Thus, the most common forms of communication which are currently used by managers are “team briefings.”<sup>203</sup>

Also, ICE provides that the employer and employee representatives must conclude an I & C agreement within six months. However, the employer as well as a majority of employee representatives can indefinitely postpone the duration of negotiations by mutual agreement.<sup>204</sup> This fluid deadline could give way to abuse by employers who are not legally obliged to respect the six-month deadline. However, despite this complete absence of legislative constraints for employers to listen to employees, studies show that employers regularly participate in meetings of I & C forums with employees, which can mean that, senior employers, who know the company well and the importance that employees have in relation to the level of production, find it beneficial to listen to employees. In general, these meetings are chaired by directors and not by an employee representative, as the law does not impose any obligation on them to include employee representatives in leadership roles in respect of I & C procedures.<sup>205</sup>

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200. ICE, *supra* note 16, art 8(1), (2).

201. *Transport and General Workers Union (TGWU) v King Asia Foods Ltd*, 18 January 2002, case TUR1/111/(2001).

202. Deakin & Koukiadaki, *supra* note 93.

203. Bull et al, *supra* note 113.

204. Lorber, “Implementing the Information,” *supra* note 105.

205. Hall et al, “BERR,” *supra* note 67.

Indeed, it seems that in practice, ICE has only had a minimum effect on the managers' approaches to information and consultation procedures.<sup>206</sup> In fact, during the studies carried out by certain authors before the entry into force of ICE, that is to say when the information and consultation rights of employees during restructuring were regulated solely by collective *laissez-faire*, they noticed that the level of employee involvement in company restructuring decisions was quite low.<sup>207</sup> However, according to studies carried out in 2011, with regard to the way employers make their restructuring decisions after ICE, it seems that the latter did not significantly influence the employers' approach to I & C procedures compared to 2004.<sup>208</sup> Thus, in a study carried out in 2010 on the impact of ICE on small- and medium-size businesses in the UK, which represent 99.8% of all businesses in the country and employ 48% of the workforce, 83% of managers contacted said they would rather save their corporate leadership prerogatives and make decisions unilaterally.<sup>209</sup> Employee participation in the UK was taking place and is still taking place in a hostile environment created by employers, even after the entry into force of ICE.<sup>210</sup>

As a result, some authors believe that, in a period of union-weakening and increased power for employers, the latter are not interested in establishing effective I & C mechanisms unless they are forced by legislation.<sup>211</sup> It seems that due to the absence of legislative constraints even after ICE, managers decide, according to their managerial culture, whether employees will have a voice in the company, and it is managers and not employees who decide which mechanisms to use in order to recognize employees an ability to express themselves and influence the employers' restructuring decisions.<sup>212</sup>

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206. Mark Hall et al, "Promoting Effective Consultation? Assessing the Impact of the ICE Regulations" (2013) 51:2 *British Journal of Industrial Relations* 355 at 376. Hall et al, "BIS," *supra* note 48 at 2.

207. Hall, "Assessing the Information," *supra* note 45 at 121.

208. Donaghey et al, *supra* note 84 at 2. Van Wanrooy et al., "WERS 2011" *supra* note 149.

209. Storey, *supra* note 119 at 4. Bull et al, *supra* note 113.

210. Hall & Purcell, *supra* note 59 at 179.

211. Aileen McColgan, *The Future of Labour Law* (London: Cassell, 1996) at 55, 60.

212. Tony Dundon et al, "The Meaning and Purpose of Employee Voice" (2004) 15:6 *International Journal of Human Resource Management* 1149.



It has been observed that this flexibility recognized to the employers by ICE has given them the opportunity to choose to have more or less active I & C forums in their companies.<sup>213</sup> Thus, employers with a culture of supporting active consultation were more likely to engage with workers' representatives on major organizational change issues, and the rest brought issues of daily concern to the consultation table.<sup>214</sup> Thus, according to a study carried out between 2006 and 2010 on 25 companies, the authors Hall et al have noticed two distinct types of I & C forums with a varying power to influence employers' decisions, depending on the employer's approach. Thus, these authors first observe the so-called *active consultants*.<sup>215</sup> In this case, the employers recognize extensive powers to these I & C forums, by submitting them questions about the company's strategic decisions, such as planned restructuring, which affects the interests of employees, and they expect these I & C forums to discuss these issues with the employers in order to reach an agreement.<sup>216</sup> The employers present important questions to the I & C forums before they have made a decision that concerns employees.<sup>217</sup> Managers consulted these forums during an early stage in the restructuring process and provided them with the training they needed to acquire the skills to make significant proposals and counterproposals during the consultation procedures. These groups have been able to reach agreements with employers and influence employers' decisions regarding the employer's strategic plans, including the decision whether or not to proceed with restructuring.<sup>218</sup> Groups of *active consultants forums* are rare in the UK and they are mostly found in companies which go through multiple significant restructuring procedures.<sup>219</sup>

The second group of the I & C forums that exist in the UK is the so-called *communicators*. The main role of this group, as decided by the employers, is to explain the employer's decisions to the employees and

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213. Bull et al, *supra* note 113. Tony Dundon & Paul J. Gollan, "Re-Conceptualizing Voice in the Non-Union Workplace" (2007) 18:7 *The International Journal of Human Resource Management* 1182 at 1186.

214. Donaghey et al, *supra* note 84 at 2. Hall et al, "BIS," *supra* note 48 at 4.

215. *Ibid* at 1.

216. Hall & Purcell, *supra* note 59 at 137.

217. Hall et al, "BIS," *supra* note 48 at 6.

218. *Ibid* at 5, 48.

219. Donaghey et al, *supra* note 84 at 23. Tony Dundon et al, "The Management of Voice in Non-Union Organisations: Managers' Perspectives" (2005) 27:3 *Employee Relations* 307 at 318.

to allow them to give their opinion to the employer in order to improve the performance of the company. In this case, employers restrict the role of I & C forums so that they only serve as communication mechanisms between employers and employees. It is rare for employers to submit questions on strategic restructuring plans to such forums, and even when they do, it is after the decision has been made. Information is generally given to *communicators* only a few hours before announcing it to the public. In these cases, when managers have important decisions to discuss, they prefer to do so directly with the employees concerned and not with the *communicators*. The *communicator groups* have been unable to influence employers' decisions regarding restructuring.<sup>220</sup>

According to some studies carried out by Bull et al, some UK employees declare that they are happy with the way information and consultation procedures have been carried out after ICE came into force; however this has not been confirmed by other authors.<sup>221</sup>

## CONCLUSION

The increasing number of companies restructuring and job losses in the context of constraints imposed by COVID-19 and globalization, as well as the lack of literature on the matter, reveal the importance of studying the legal framework surrounding the employee participation in company restructuring. In this text, we have studied the right of UK employees to participate in company restructuring decisions, in order to improve the Canadian legal framework on the subject.

This is the first in-depth study that presents the UK employee's capability of expressing themselves and influencing employer's restructuring decisions after the adoption and implementation of ICE, in light of the *capability for voice* criteria. Analyzing whether ICE respects the conditions of the *capability for voice*, which are prerequisites in order to move from the degree of employee involvement in company decisions to a real influence on those decisions, has allowed to determine its strong points as well as its problems and shortcomings, which have

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220. Hall et al, "BIS," *supra* note 48 at 1, 5, 137, 53. Hall & Purcell, *supra* note 59 at 34, 137, 153. Dundon et al, *supra* note 219 at 312. For a detailed description of the functioning of the *active consultants* and *communicators*, see Dibra, *Le droit de participation des salariés canadiens*, *supra* note 18.

221. Bull et al, *supra* note 113.

made us able to propose improvements to be applied to ICE itself and to be taken in consideration by other countries that would like to follow this model. However, this work was carried out primarily in order to be able to adopt a better model for the Canadian legal framework in light of the *capability for voice* applied to ICE.

The above analyses show that the British legal framework on the subject, as it is, does not provide a perfect model to follow in order to improve the Canadian legal framework on the matter. In fact, the strong opposition of the British Government to the European directives was reflected in the adoption of British national legislative instruments which do not fully comply with the directives and transpose them in a very minimalist way.<sup>222</sup> This situation poses a problem in terms of expanding the ability of employees to influence managers' decisions during restructuring, since, as it was explained in one of our articles and according to our framework of analysis, the directives are themselves inadequate and lack some essential requirements to this effect.<sup>223</sup>

However, our analyses show that after the transposition of the European directives in the UK, contrary to Canada and Quebec, the degree of involvement of the British employees in corporate decisions regarding restructuring, became higher than that of Canadian employees. To this end, it should be noted that although ICE's formal text as well as the issues raised during its implementation do not appear to contain the essential elements in recognizing employees a real ability to express their views and influence employers' decisions, ICE constitutes a statutory instrument which is a novelty for the UK. In fact, before it came into effect, similarly to Canada, the UK had no national legislative mechanisms that required employers to inform and consult employees during company restructuring, with the exception of business transfer cases and collective redundancies.<sup>224</sup>

This study is important for Canadian and Quebec labour laws, because as we have seen above, at the federal level in Canada and in Quebec, when the collective agreement does not provide for employee rights to participate in company restructuring decisions affecting job security, the employer has the right to act alone and he is not required

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222. Dibra, *Le droit de participation des salariés canadiens*, *supra* note 18.

223. Dibra, "Le droit de participation des salariés lors des restructurations," *supra* note 37.

224. Lorber, "National Works Councils," *supra* note 31.

to negotiate the exercise of this right with the certified association, even if the working conditions of employees are substantially modified. Furthermore, there are no consultation or negotiation legal rights recognized to employees regarding company restructuring in cases where there is no union in the company. Thus, contrary to the Canadian and Quebec labour laws on the matter, ICE not only introduces a general protection of the right to information and consultation for employees in all cases of restructuring, but it extends this general framework to employees regardless of whether there is a recognized union in the company or not.<sup>225</sup> As a result, contrary to the Canadian and Quebec legislations that allow the employer to act alone where there is no union in the company, it appears that since the adoption of ICE, the number of non-union employees who are informed and consulted by employers has increased significantly.<sup>226</sup> As some authors have pointed out, the impact of statutorily recognized I & C rights is greater in the UK, particularly in companies where there was no recognized union.<sup>227</sup> Further, contrary to the Canadian legislation, thanks to the appropriate I & C procedures established by ICE, on many occasions, decisions regarding restructuring were not implemented without priorly explaining its impact to employees, regardless whether the collective agreements provided for such rights or not. Thus, the employer could not act alone without informing and consulting his employees prior to implementing or sometimes even considering a restructuring decision.<sup>228</sup>

Further, ICE increased the employers' awareness towards employee I & C rights and this gave rise to the creation of the *active consultants* I & C forums, which were able to influence the employers' decisions on the substance of the restructuring itself. In fact, the *active consultants*, which depend on the employer's approach at the present time, may serve as a good model to be followed in the future in order to improve our Canadian legal framework, by adopting new legal procedures that help to follow this kind of approach during restructuring cases in general. These changes in the UK labour relations make ICE's legal measures a real asset to be considered and improved, regardless of the UK's Brexit from the European Union. In addition, our analyses of applying

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225. Hall et al, "BERR," *supra* note 67.

226. Hall, "Assessing the information," *supra* note 45. Hall, "How Are Employers," *supra* note 44.

227. Hall & Terry, *supra* note 116.

228. Lorber, "Implementing the Information," *supra* note 105. Bull et al, *supra* note 113. Deakin & Koukiadaki, *supra* note 93.

the *capability for voice* to ICE offer guidelines on how to improve the current Canadian and Quebec legal frameworks on the subject, by analyzing on which points this British statutory instrument violates the conditions of the *capability for voice* and thus making some proposals on how to improve them in the light of ICE’s implementation in practice, and the way it was received by the various interested parties of the world of labour.

Although empirical studies of the practical effects of ICE are based on corporate samples, it is understandable that, while this statutory instrument has improved cognitive resources, it does not appear to be able to strengthen the employees’ capability to express themselves and significantly influence the employer’s decisions regarding restructuring.<sup>229</sup> This happens firstly because the political resources provided by ICE present many problems. In fact, ICE goes as far as allowing employees to be directly self-represented in front of the employer, whether during the procedures initiating the application of ICE to their companies or during the implementation of I & C procedures in cases of restructuring. Given that direct self-representation of employees has been increasing in the UK since Thatcher’s trade union-weakening reforms, ICE seems to further strengthen this type of representation and thus leave the employees without any political resources.<sup>230</sup> This situation should be rectified in the light of the *capability for voice* requirements.

Furthermore, ICE does not appear to allow employee I & C forums to intervene at an early stage of a decision regarding restructuring resulting in collective dismissals. As a result, it appears that ICE’s information and consultation procedures are being implemented too late in the decision-making process. Thus, their only use would be to validate the decisions taken by employers without informing the I & C representatives beforehand. They are only able to mobilize the appropriate means in time to influence the decision-making process on restructuring only when the I & C agreements provide for it. This type of good practice should be followed by as many enterprises as possible in order to strengthen the political resources, especially in the cases of restructuring at the Canadian federal level and in Quebec.

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229. Bonvin & Moachon, *supra* note 22 at 158–172.

230. ICE, *supra* note 16, arts 7, 16(1)f)(ii).

Moreover, while ICE appears to facilitate the flow of restructuring information compared to previous laws, it appears that its terms do not allow employees to develop adequate cognitive abilities to be able to transform them into the ability to influence employers' restructuring decisions. Indeed, it appears that the lack of training and skills of the I & C representatives, as well as the absence of a legislative requirement to determine the frequency of meetings scheduled for I & C sessions on restructuring decisions, impair the cognitive abilities of employee representatives, leaving the field open to managers to determine the content of the information to be given to employee representatives. All these parameters should be provided by law or clearly stated in I & C agreements or collective agreements in order to improve the cognitive resources in cases of company restructuring. In fact, the vast flexibility that ICE allows to employers with regard to information and consultation procedures negatively impacts the employee's rights to participation. Some authors are of the opinion that, given the high degree of flexibility that ICE recognizes for employers, the UK would have never granted employees the right to information and consultation if it had not been forced to do so by the *Directive 2002/14/EC*.<sup>231</sup>

That is why the scope of statutory rights and remedies is quite weak and ICE does not even extend to pre-existing agreements the application of the sanctions for non-compliance with information and consultation procedures. Moreover, the lack of a precise definition of "consultation" has allowed employers and employee representatives to determine themselves this procedure in their own agreements. Such a consultation procedure that varies from one agreement to another and the absence of minimum standards for the agreement negotiation procedure, as well as the weak obligational content of the I & C agreements in these respects, seem to dilute the scope, usefulness and purpose of the general I & C framework established by ICE.<sup>232</sup>

Furthermore, since the employees' participation is limited to I & C only, it appears that a full and timely consultation on restructuring would not allow them to change the substance of employers' restructuring decisions, due to the employer's power to have the last word.

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231. Hall, "EU Regulation," *supra* note 11 at 66.

232. Lorber, "Implementing the Information," *supra* note 105.

ICE does not provide for a negotiating mechanism for restructuring.<sup>233</sup> Without this right or the possibility of sanctioning the compromises reached with the employer during the consultation process, it might be impossible to think that these representatives would have adequate capacity for action and be able to influence the employer's decisions. However, it would in some cases change employers' decisions regarding the implementation of restructuring procedures.

In conclusion, the fact that ICE allows employees and the employer to provide for information and consultation procedures in agreements,<sup>234</sup> the fact that this statutory instrument does not set specific conditions on the content of these agreements,<sup>235</sup> as well as the fact that it does not automatically apply to the parties, and that one of them must take the initiative to negotiate an I & C agreement<sup>236</sup> might lead us to conclude that in the UK, the I & C procedures during restructuring are still generally governed by the principle of *collective laissez-faire*. However, the actors have changed in that the negotiator of the I & C agreements with the employer is not the union, but the representatives elected by the employees, which can include union members if they are elected.

Because of all of the above, ICE seems, in several respects, to have only a peripheral influence on the willingness of employers to listen to employees when making restructuring decisions, unlike TULRCA, which is largely respected because of its mandatory nature and the significant penalties it imposes in the event of a contravention. Therefore, and depending on how ICE provisions are drafted, they serve as a barrier to effective implementation of this statutory instrument.<sup>237</sup>

On the other hand, despite broader issues that need to be discussed during consultation procedures surrounding restructuring, studies have shown that TULRCA has been much more effective than ICE in the cases when the consequences of a restructuring procedure are only collective dismissals, considering the large number of consultations that have taken place during the cases of collective

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233. Stephen Hardy & Nick Adnet, "Breaking the ICE: Workplace Democracy in a Modernised Social Europe" (2007) 17:6 *The International Journal of Human Resource Management* 1021.

234. ICE, *supra* note 16, arts 7–17.

235. *Ibid*, art 16(1).

236. *Ibid*, arts 11, 7(2), (3), 8(6).

237. Hall & Purcell, *supra* note 59 at 163.

dismissals.<sup>238</sup> However, although the information and consultation procedures imposed by TULRCA are applicable only in cases of collective dismissals, it may be wiser to target specific circumstances of different types of restructuring rather than confer general rights of information and consultation, as ICE provides.<sup>239</sup> This remains to be evaluated.

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238. Blanpain, *supra* note 11 at 195.

239. Donaghey et al, *supra* note 84.