

Unit 1

Overview

Aim

This advice is intended to help you to reach agreements under the Information and Consultation of Employees (ICE) Regulations in force from 6 April 2005. It covers the refreshing and renewing of existing arrangements as well as the putting in place of agreements for the first time.

In highlighting the key practical issues you will need to tackle, it draws on two major sources

- existing Acas advisory booklets (*Employee communications and consultation* and *Representation at work*) and codes (*Time off for trade union duties and activities* and *Disclosure of information to trade unions for collective bargaining purposes*)
- recent cases studies and research involving Acas front-line advisers, plus participants' comments at the roundtables, workshops and training events that Acas has held across the country to discuss the Regulations' implications.

The advice comprises this Overview and eight supporting Units.

Background

The Information and Consultation of Employees Regulations

The UK Government's ICE Regulations implement the EC directive giving employees rights to be informed and consulted about the business they work for, including the prospects for employment, and substantial changes in work organisation or contractual relations. They are based on a framework agreed in discussions between the DTI, CBI and TUC representatives and are being introduced in the following stages:

- 6 April 2005 - undertakings with at least 150 employees
- 6 April 2007 - undertakings with at least 100 employees
- 6 April 2008 – undertakings with at least 50 employees

An 'undertaking' is a legal entity such as a company, a co-operative or a partnership 'carrying out an economic activity, whether or not operating for gain'. Many public service organisations will therefore be covered. The Cabinet Office will also be issuing a code effectively extending the Regulations to civil servants, with local government employers being encouraged to follow the Regulations' general thrust.

A key role for agreements

The Regulations make the most of the flexibility the Directive gives member states in its implementation. In particular, they put considerable emphasis on enabling organisations to tailor arrangements to suit circumstances and preserve the best of what they have already. As the Secretary of State put it in opening the consultation on the proposed Regulations, the aim is to encourage people 'to develop their own arrangements tailored to their particular circumstances, through voluntary agreements'.

The Regulations provide for both 'pre-existing' and 'negotiated' agreements. Box 1.2 and Box 1.3 in the Annex at the end of this unit compare their main features and show how they fit with the Regulations' overall framework and their 'standard provisions'.

Despite the differences, you will see that both types of agreement allow very considerable flexibility in deciding the subject matter of information and consultation, along with the methods and structures of their delivery. In particular, they allow you to match arrangements to suit the organisation's structure – the arrangements can deal with individual establishments or groups of undertaking. Arrangements under the 'standard provisions' are expected to be at undertaking level.

The Regulations are also very flexible in the arrangements they allow for the approval of agreements. So there can be separate approval for different agreements covering different parts of the workforce, which can also be demonstrated in different ways and at different times from each other. It is also possible to seek employee approval of several agreements together, for example, in a single ballot of the workforce or by agreement with representatives of all the employees in the undertaking. In the case of agreements covering more than one undertaking, employees can be asked to demonstrate their approval together or undertaking by undertaking.

If you are happy with your existing information and consultation arrangements, you may wonder why you have to do anything. The chances are that some of your existing arrangements are not written down. It could be too that management introduced them without the approval of employees. It is also likely that the existing arrangements do not cover all employees. Don't forget the IT section, for example, or head office staff. It may be too that there are no formal arrangements covering managers - their involvement is critical to the effectiveness of information and consultation more generally. If any of these circumstances prevail, your organisation could be open to a challenge from a group of employees exercising their right to trigger negotiations to change the existing arrangements.

Getting started

Where employee representatives already exist, it would be good practice for them to be consulted about the issues needing to be resolved. Where there are no employee representatives, management will need to inform and consult with employees directly about these issues. This could be done in face-to-face meetings or in writing or some combination of the two, using this overview as the basis of an agenda for discussion.

Information and consultation – the subject matter

You need to ask yourself 'what' your organisation should be informing and consulting about before you decide 'how' to inform and consult. A list of possible subjects appears in the Subject Matter Unit.

Information needs to be about relevant issues. It does not help if management bombards employees with information, especially if they are given no training in how to interpret it. Information should also help meaningful consultation to take place. The 'timing, method and content' of the information have to be 'appropriate' for the purpose of consultation.

The next step is to agree the nature and extent of consultation. Consultation means managers seeking and considering the views of employees *before* decisions are taken. It involves reaching acceptable solutions to problems through a genuine exchange of views and information.

Consultation is often confused with communications, on the one hand, and collective bargaining, on the other. The dividing line is not clear-cut, but the following should help to clarify the differences.

Communications is concerned with the interchange of information and ideas.

Consultation goes beyond this and involves managers actively seeking and then taking account of the views of employees before making a decision.

Collective bargaining is the process by which employers and recognised trade unions seek to reach agreement through **negotiation** on issues such as pay and terms and conditions of employment. It is quite different from consultation where the responsibility for decision making remains with management.

The subject matter and the level of consultation are very much linked. For example, individual concerns will be a matter for employee and their manager in the first instance. Discussion of business strategy is likely to take place at head office or division level, with implementation featuring at workplace level.

Where consultation involves the common interests of employees, you should try to ensure that topics are central to the needs of the organisation and relevant to employees' concerns. Critically, they should include major organisational changes. 'Tea and toilet' issues should not dominate – where they are being pushed, it usually means that local managers are not dealing with them.

In terms of the range, it is important to strike a balance. The agenda should be comprehensive, but not overwhelming. The same goes for who is consulted. "Asking everybody about everything" can mean that nothing gets resolved.

As for the timing of consultation, much will depend on the issue. If an exercise in consultation is to be 'genuine', it is important for managers to involve employees as early as possible.

'Consulting' on issues that have already been decided will result in suspicion and mistrust.

Managers should not try to consult before they have given some thought to how they will be approaching a subject, however. If they do, they may simply unsettle employees.

To ensure consultation takes place early, you could consider basing your discussions around options. Typically, managers will consider four or five possibilities when confronted with an issue. At one extreme, management can simply put their preferred option on the table and look to discuss the fine detail. At the other, they can put the four or five options on the table and invite discussion around these. They can even go further and ask employees to add to the list.

You need to remember, though, that consultation does not remove the right of managers to manage – they are responsible for the final decision. What it does impose is an obligation to seek the views of employees and consider them before taking decisions. Consultation also doesn't mean that managers will always act on employees' views, since there may be good practical or financial reasons for not doing so. In these circumstances, though, managers should fully explain why.

Handling restructuring

Information and consultation involve a wide range of issues. Handling restructuring is likely to be amongst the most sensitive, especially if it means collective redundancies.

You have two options for dealing with the potential overlap between the ICE Regulations and the regulations covering collective redundancies and business transfers:

- have different sets of arrangements to deal with the different pieces of legislation, or
- have a single set of arrangements with provisions built in for handling collective redundancies, pensions and business transfers respecting the specific Regulations.

In most cases, it makes sense to take the second option. Handling restructuring should be seen as an integral part of the on-going process of informing and consulting with employees. You will find further details in the relevant section in the Subject Matter Unit.

Confidentiality

You see from the Annex to this Unit that, under the Regulations, employers may withhold information if disclosure would seriously harm the functioning of undertaking. Representatives are also prohibited from disclosing information provided in confidence.

In the circumstances, it makes sense to use the agreement to clarify the issue of confidentiality. Expecting employees and, in particular, their representatives to treat all the information they are given as confidential is not appropriate and would undermine the effectiveness of the arrangements. The onus is on management to indicate what it regards as confidential.

If felt necessary, you can formalise an obligation of confidentiality for employee representatives, even extending it to apply after the representative's term of office expires. There can even be arrangements providing for sanctions in the event of breaches. The relevant section in the Subject Matter Unit has further details.

In terms of mergers and acquisitions, note that Stock Exchange rules do *not* preclude employee representatives from being informed and consulted in advance where collective redundancies are planned in connection with a takeover. Further details will also be found in Subject Matter.

Information and consultation - methods and structures

The methods of information and consultation can be 'face-to-face' or 'arms-length'. 'Face-to-face' methods involve meetings, which may be one-to-one, small group or general assemblies of employees. 'Arms-length' methods involve a range of written and electronic media including video-conferencing, intranets, videos and information points, as well as notice boards and circulars. You will find further details in the [Methods and structures](#) Unit.

In practice, your arrangements will almost inevitably involve a mix of these methods, depending on the subject matter, the levels and the organisation. For example:

- **personal matters** such as appraisal or training and development will almost invariably involve a one-to-one meeting
- **specific tasks** are likely to involve people working together in some kind of problem-solving activity such as a continuous improvement team
- a dialogue about the **state of the business** will probably mean a series of small group meetings and/or a general assembly meeting
- **surveying employee attitudes** might involve completing a questionnaire that will be distributed and returned in either electronic or written form

Where employees have a fixed workplace, most activity is likely to take place in meetings; where employees are dispersed or mobile, electronic or written forms will be more important.

As well as using these methods to inform and consult with employees directly, managers can also agree that employees have an opportunity to elect representatives to act as intermediaries on their behalf. These can be representatives of trade unions or other bodies such as company councils or forums. You will find further details in the [Employee representation](#) Unit.

The benefits of representatives

In small organisations, it is possible to envisage consultation arrangements based exclusively on direct methods, managers meeting with employees in small groups or general assemblies. Employees could be given information at one meeting with an opportunity to give a considered response at the next.

Generally, however, it makes sense to think in terms of consultation involving both direct *and* representative methods. Meetings between individual employees and managers can handle personal matters such as performance or training and development. Task forces or working parties can handle specific issues. But discussion of major matters of common interest is very time consuming using only direct methods. This is why larger organizations tend to have some kind of representative council or committee. Such a body can benefit management – it acts as a single channel for consulting large numbers of employees, it enables senior managers to see if

corporate messages from board level are reaching the organisation and get the considered views of employees directly, and it helps to order employee priorities.

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

There are two other practical reasons for having representatives:

- there is a requirement to consult with representatives in the event of a collective redundancy or business transfer. Being involved in an on-going dialogue means that these representatives will be better able to develop the necessary knowledge or expertise to make a meaningful contribution.
- Stock Exchange Listing Rules differentiate between employees and employee representatives - price-sensitive information may be given to employee representatives on a confidential basis, but not to employees in general.

Informing and consulting with employee representatives does not stop management from communicating directly with employees. Management should make sure, though, that it doesn't do so in ways that undermine employee representatives. It makes sense to agree which information will be communicated directly and which will be given to representatives in the first instance.

'Mixed constituencies'

A critical issue for organisations with representative arrangements based on trade unions is likely to be how to cope with a mixture of union and non-unionised groups. This is because few UK organisations these days have 100 per cent trade union membership and/or coverage of collective bargaining. For example, a trade union may have collective bargaining rights in respect of a group of employees, but the levels of union membership may be extremely low. Or some parts of an organisation may be highly unionised, e.g. manufacturing or warehousing, whereas others, such as head office or individual retail outlets, have no representative structures of any kind.

You will find further suggestions for resolving these issues in the Employee representation and Methods and structures Units. You will also find there discussion of a closely-related issue - whether to have structures that embrace consultation **and** collective bargaining or deal with them separately.

Multi-tiered structures

A larger organisation may have several divisions and/or workplaces under its control. Or it could itself be one of a number of undertakings under the control of an even larger entity.

In these situations, you should set arrangements at the levels that suit the particular circumstances. Take multiple retailers, for example. While day-to-day operational matters have to be dealt with at store level, most issues of policy and direction are determined more centrally at head office level. Having arrangements at the two levels is an effective way of handling different issues. If there were arrangements only at store level, headquarters managers would have to become involved whenever issues outside the competence of local managers were raised.

In multi-establishment manufacturing companies, by contrast, more issues of policy and direction are likely to be under the control of local managers. Two tiers may still be necessary, but the balance between them is likely to be different from retail, reflecting the greater policy involvement of managers locally.

Box 1.1 shows how an information and consultation structure might look in the larger organisation. You will find further details on multi-tiered organisations in the [Methods and structures](#) Unit.

Resolving disputes

You may think that it is anticipating the worst, but differences are likely to arise. It could be over the interpretation of the agreement or a specific issue such as confidentiality. It makes sense, therefore, to make arrangements to resolve any differences. An internal procedure is recommended in the first instance, with resort to a third party such as Acas if the matter cannot be resolved. The [Resolving disputes](#) Unit has more details.

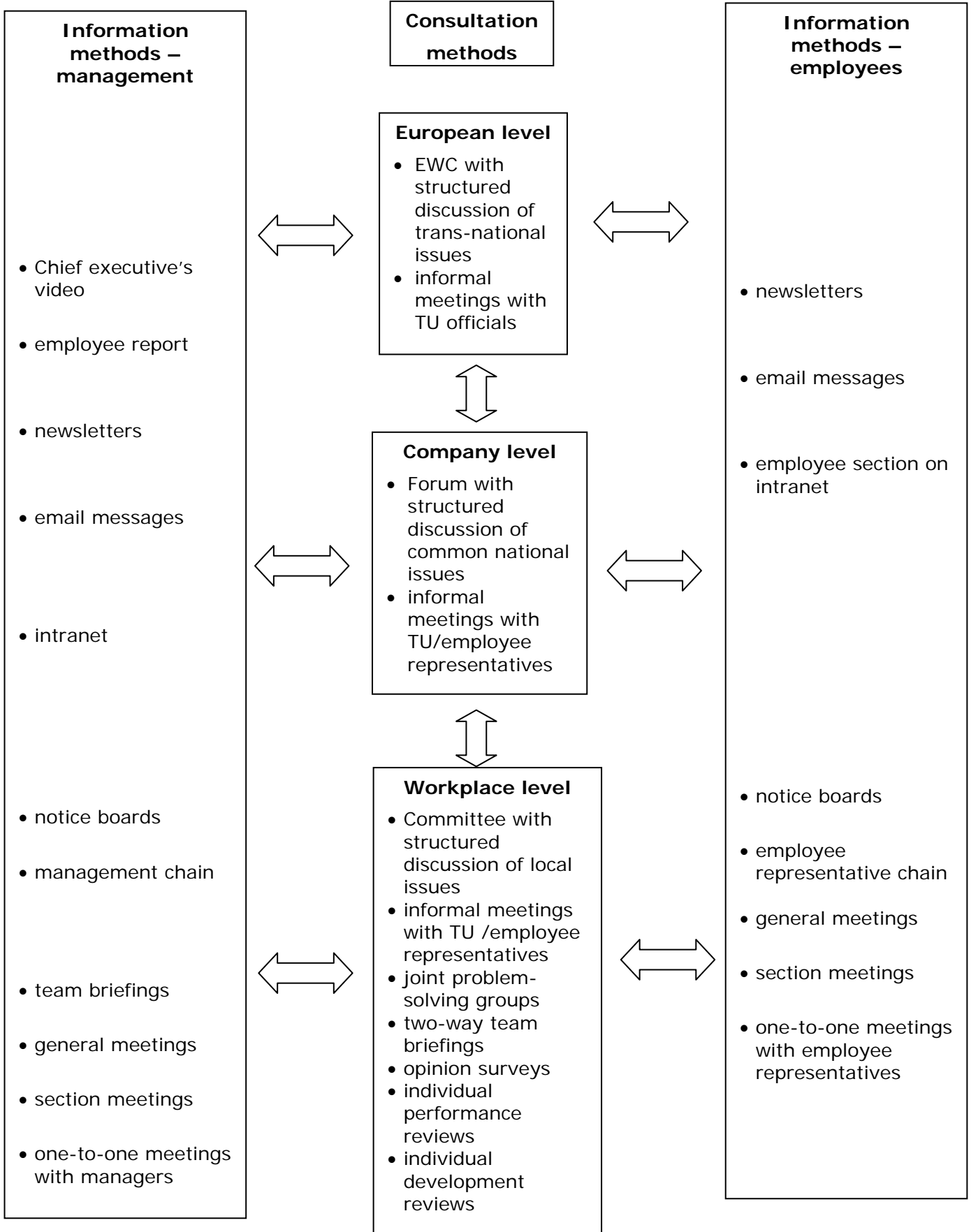
Back to the starting point

The agreement

The core of the agreement might take the form of a statement of principles and intentions with appendices dealing with the subjects outlined in this overview. The degree of detail will largely depend on the size and complexity of activities.

You should find the discussion in the [Maintaining effectiveness](#) Unit a useful starting point for your statement of principles. You should also find that the basis of the appendices already exists

Box 3.1 An information and consultation structure



within the organisation in the form of existing agreements, exchanges of correspondence and management statements.

You can build in a review of pre-existing agreements after, say, the first year or eighteen months. This means you won't have to worry so much about resolving every single detail at the first attempt. Maintaining effectiveness should be helpful in undertaking a review. You will have to be more careful about your drafting of negotiated agreements, though, because their interpretation could be the subject of appeal to the CAC.

Getting employee approval

You need to remember that, under the proposed Regulations, agreements must involve an opportunity for employees to signify their approval. Box 1.2 in the Annex sets out the ways in which this might be done for the two types of agreement.

You are strongly advised to appoint a so-called 'qualified independent person' to supervise any employee ballots. This will help to ensure that the electoral process is both fair and seen to be fair. A 'qualified independent person' is a lawyer or auditor or organization such as Electoral Reform Services or the Involvement and Participation Association. Further details can be obtained from the CAC (www.cac.org.uk).

End notes

It is the spirit in which you practice information and consultation that will make the difference. The more you focus on the issues important to the organisation and its employees, and the more trust you build, the less important the formal structures will be.

It is also for this reason that, while trying to be as comprehensive as possible in its coverage of the issues you need to take on board, this advice deliberately avoids offering model clauses or constitutions. You really do need to work through the issues and come to mutually acceptable outcomes – adopting an off-the shelf model is unlikely to bring the ownership and commitment necessary for long-term effectiveness.

Annex 1.1 Overview of the ICE Regulations

The Regulations provide for two types of agreement: 'pre-existing' and 'negotiated'. Box 1.2 outlines their main features. Box 1.3 shows how they fit with the Regulations' overall framework. The rest of this Annex gives an overview of the Regulations based on the DTI Guidance.

Trigger. The requirement to inform and consult employees does not operate automatically. It is triggered either by a valid **employee request** for an information and consultation agreement or by **employers** choosing to start the process themselves.

Pre-existing agreements. Where the employer already has arrangements in place that have been agreed with employees prior to a valid employee request for new arrangements, the employer may ballot the workforce to determine whether it endorses the employee request, or whether it is happy with what it has. Only if the workforce endorses the request would the employer come under the obligation in the Regulations to negotiate a new agreement, otherwise the pre-existing agreement continues to apply. A 3-year moratorium on further employee requests applies where a pre-existing agreement has been upheld.

Negotiated agreements. Where employees make a request, or employers start the process themselves, there would normally be a period for drawing up and agreeing the on-going information and consultation arrangements to be put in place. Employers and employees are free to agree arrangements and structures tailored to their individual circumstances. A 3-year moratorium on further employee requests applies where a negotiated agreement is reached.

Standard provisions. Where no agreement is reached, the 'standard provisions' set out below will apply, along with 3-year moratorium on further employee requests:

- The employer is obliged to provide **information** to elected employee representatives (one representative for every 50 employees up to maximum of 25) on:
 - a) the recent and probable development of undertaking's activities and economic situation;
 - b) the situation, structure and probable development of employment within undertaking and any anticipatory measures envisaged, in particular, where a threat to employment;
 - c) decisions likely to lead to substantial changes in work organisation or in contractual relations, .
- This information must be given at such time, in such fashion and with such content as are appropriate to enable representatives to conduct adequate study and, where necessary, prepare for consultation
- Employers must **consult** representatives on the matters referred to in (b) and (c) above:
 - in such a way that its timing, method and content are appropriate on the basis of information supplied by employer and any opinion expressed by representatives
 - in such a way as to enable representatives to meet employer at relevant level of management depending on subject, and to obtain a reasoned response to any opinion they give
 - in relation to substantial changes in work organisation or in contractual relations, with a view to reaching agreement on decisions within the scope of employer's powers

Confidential information. Information may be given to employee representatives on a confidential basis to protect the interests of the undertaking or withheld altogether where disclosure would seriously harm or prejudice the undertaking.

Employee protections. Employees exercising their legal rights under the Regulations enjoy protection from unfair dismissal or detriment.

Enforcement. Applications and complaints about negotiated agreements and standard provisions can be made to the CAC, who may involve Acas in conciliation. Where CAC upholds complaint, it may order defaulter to comply (but not order to suspend or alter effect of any act or agreement). Where a complaint is upheld against employer, there is the possibility of application to the EAT, which could lead to a penalty of up to £75,000.

Box 1.2 'Pre-existing' and 'negotiated' agreements

	'Pre-existing' agreements	'Negotiated' agreements
Basic requirements	<ul style="list-style-type: none"> • be in writing • cover all the employees of the undertaking • set out how the employer is to give information to the employees or their representatives and to seek their views on such information • be approved by employees 	<ul style="list-style-type: none"> • be in writing, dated and signed by employer • cover all the employees of the undertaking or group of undertakings • set out the circumstances in which employers will inform and consult their employees • be approved by employees
Frequency, timing, subject matter	<ul style="list-style-type: none"> • up to parties 	<ul style="list-style-type: none"> • up to parties
Who can reach agreements	<ul style="list-style-type: none"> • Employer and employees or employee representatives 	<ul style="list-style-type: none"> • Employer and employee representatives
Methods & structures	<ul style="list-style-type: none"> • up to parties 	<ul style="list-style-type: none"> • provide either for the appointment or election of employee representatives or for information and consultation directly with employees
Term	<ul style="list-style-type: none"> • open-ended (unless they are challenged and upheld in a ballot – in which case a three year moratorium applies) 	<ul style="list-style-type: none"> • open-ended, but a three year moratorium applies if parties cannot agree about re-opening
Enforcement	<ul style="list-style-type: none"> • not enforceable unless parties agree 	<ul style="list-style-type: none"> • enforceable through the CAC
Failure to agree	<ul style="list-style-type: none"> • parties consider their options 	<ul style="list-style-type: none"> • 'standard provisions' come into force
Ways in which employees can demonstrate approval	<p>DTI suggests following options:</p> <ul style="list-style-type: none"> • a majority of those who vote in a ballot of the workforce • a majority of the workforce expressing support through signatures • agreement of employee representatives who represent a majority of 	<p>Agreement must cover all employees and be:</p> <ul style="list-style-type: none"> • signed by employer and • approved by all employee representatives or by a majority and approved either: <ul style="list-style-type: none"> (i) in writing by at least 50% of employees; or (ii) by 50% of employees who vote in a ballot.

	the workforce	
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Box 1.3 Key processes under the ICE Regulations

