

# **Bangor Business School Working Paper**



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**BBSWP/15/10**

**Weak regulation, game theory and ineffectiveness of the EU Information &  
Consultation Directive in liberal economies**

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**October 2015**

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# **Weak regulation, game theory and ineffectiveness of the EU Information & Consultation Directive in liberal economies**

## **Abstract**

*This article provides theoretical and empirical insights relating to impact of the European Information and Consultation Directive (ICD). While existing research on the ICD offers important empirical insights, there is a need for further theoretical analysis to explain ineffectiveness of the regulations in liberal market economies (LMEs). Drawing on data from 16 case studies, the article uses game theory and the prisoner's dilemma framework to explain why national implementing legislation is ineffective in diffusing mutual gains cooperation in two LMEs: UK, Republic of Ireland. Three theoretical propositions advance understanding of the ineffectiveness of national information & consultation regulations in LMEs.*

## **1. Introduction**

This article considers the impact of the transposition of the European Union Directive (2002/14/EC) - commonly called the "Information and Consultation Directive" (ICD) - in the Liberal Market Economies (LMEs) of the United Kingdom (UK) and Republic of Ireland (RoI). The impact of the ICD on employer decision-making powers and employee voice rights is an important and under-researched area. The article advances theory and empirical contributions concerning policy and practice, utilising the prisoner's dilemma concept in game theory. The few existing studies of the ICD offer substantial empirical insights about diffusion and emerging practice (Taylor et al., 2009; Authors1; Hall et al., 2013a&b). But extant research does not provide sufficient theoretical conceptualization to explain why the

Directive has been ineffective in LME contexts. This article seeks to fill that knowledge gap, assessing the extent to which transposed national employee voice regulations have failed to generate sustainable mutual gains cooperation at micro level, as intended by the European Directive. Three theoretical propositions are advanced to explain why minimalist macro regulatory design has inhibited mutual gain outcomes at workplace level.

The article is structured as follows. The literature review advances three ‘theoretical propositions’: (P1) regulatory design faults with employee information and consultation regulations in LME contexts restricts power-sharing in voice provision; (P2) the extent of mutual gains outcomes is likely to be minimal owing to such institutional design faults, and game theory is scrutinised to help understand why this is so; and (P3), perceived uncertainty of outcomes means that mutual gains cooperation is likely to be too much of a high risk strategy for management and employees to engage in enduring power-sharing voice regimes. These three propositions are tested in section 4 with data from sixteen case study organisations, using insights from game theory and the prisoner’s dilemma concept in labour economics (Leibenstein, 1982; Marsden and Canibano, 2011; Trif and Brady, 2013). In exploring game theory to assess choices and power-relations among industrial relations actors, we offer alternative analysis to the often hard science positivist approach of labour or personnel economics (Lazear, 2000a&b). Arguably, orthodox econometric approaches using game theory provide insufficiently nuanced analysis of social relations at work, of conflict and power, and the contextual conditions shaping agency (Spencer, 2012). Instead, we present a sociology of economics approach; incorporating game theory into a context sensitive sociological and industrial relations analysis, which recognizes that workplaces are contested terrains with complex power relations (Edwards, 2012). Finally, the discussion

assesses the empirical data against the propositions, and identifies implications for (re)regulation of I&C rights.

## **2. Weak regulation of I&C in liberal economies**

### **The Information & Consultation Regulations**

The European Commission had three explicit rationales underpinning the ICD: to establish minimum standards of I&C enshrined in legislation across the EU; to strengthen the efficacy of national I&C legislation (stemming from the Renault Vilvoorde case); and finally, to improve synergies with other related Directives, such as European Works Councils and collective redundancies (European Commission, 1997). It is the first which forms the focus of this article, because there was a perception that the ICD would have greatest impact in the UK and RoI as they were the only two European Union (EU) member states at the time of its inception lacking general legislation on employee voice rights (Authors<sup>4</sup>; Hall et al., 2013a&b). Other EU states had a history of statutory backing for works councils and co-determination, yet the Commission were explicit that even here, an EU Directive might increase their efficacy. Indeed, even in regulated economies like Germany, there is debate over pressures facing works councils and opinions that they are more fragile and less encompassing of workers than before (Hassel, 2012).

The Directive (2002) was introduced with the express intention to encourage social dialogue and shared decision-making in order to generate mutual trust in labour-management relations (European Commission, 2013). It required member states to introduce permanent general arrangements to encourage management support for workplace dialogue in three broad areas: i) provide ‘*information*’ pertaining to the economic situation of companies; ii) enable ‘*information and consultation*’ concerning threats to employment; and iii), ‘*inform and*

*consult employees, with a view to reaching agreement*', on decisions linked to changes in work organisation or contractual arrangements.

In its design, there is a notable distinction between intent of the Directive at European level, and its transposition into national regulations. In part, this is because EU-led regulation gravitated from 'harder' laws (such as equal pay and health & safety) towards 'softer' lighter touch measures allowing member states greater latitude to transpose arrangements fitting national cultures (Streeck, 1995; Gold, 2010). What distinguishes emerging EU social policy is its 'low capacity to impose binding obligations on market participants, and the high degree to which it depends on various kinds of voluntarism .. in the name of self-regulation' (Streeck, 1995: 45-49). Therefore, both the UK and Irish governments transposed the ICD in a manner fitting their national customs (voluntarism). In the UK, while the Confederation of British Industry opposed collective worker rights, transposition was relatively uncomplicated: for the first time, a tripartite agreement was struck between the UK government, CBI and Trades Union Congress (TUC) (Hall et al., 2013a&b). In the RoI, however, events were more controversial, because employers and government wanted to prevent legislation advancing mandatory collective voice systems perceived to jeopardize inward investment by (non-union) US multinationals, upon which the country is heavily reliant (Lavelle et al., 2010).

The UK and RoI legislation is similar but not identical. The ICE Regulations (2004) in the UK, and the Employees (Provision of Information and Consultation) Act (2006) in RoI, are both light-touch procedures, for two main reasons. First, direct (individualised) I&C is encouraged despite the Directive explicitly favouring indirect (collective) dialogue via 'employee representatives', which is often associated with deeper power-sharing. Second, the transposed legislation defines employee rights to I&C as an elective and not automatic right

available to all workers. Thus, management do not need to take action or change policy unless 10% of their employees actively ‘trigger’ statutory procedures (in Ireland this is capped at 100 employees and 2500 in the UK). The elective process is in practice a hurdle many employees will find difficult to jump, especially for those already denied access to union protection, and/or fearing employer reprisals (Authors3). In reality it appears easy for employers to circumvent statutory procedures by customizing their own organisation-specific I&C practices; including direct communications.

The themes of *degree*, *level* and *scope* of employee information and consultation are validated instruments that will be drawn upon to test Proposition 1 below (Marchington and Suter, 2013). *Degree* of I&C considers the extent to which employees and/or their representatives influence and share management decisions, ranging from basic one-way information provision and two-way communication at one end to codetermination at the other end of an escalating scale. Most I&C gravitates towards the bottom of the escalator; often a mix of information dissemination, two-way communication, and possibly elements of informal consultation (Authors5). *Level* refers to where I&C occurs: task, team, workplace, establishment, division, headquarters. Marchington and Suter (2013) note that while I&C can exist at corporate headquarters level in multinationals – worker directors on boards, for instance – it mostly occurs at lower levels. *Scope* refers to the range of issues over which employees have some say (Authors5). This may vary considerably from quite trivial ‘tea and toilet’ type issues (canteen menus, office layout), up to sharing power over strategy at board level.

Research assessing the design and transposition of I&C regulation is still not widespread.

Comparative research on employee participation across Europe found that flexibilities built

into the ICD varied according to national legislation and particular customs (Hall and Purcell, 2011). Further, using international comparative data, Brewster et al., (2013) express concern about the functionality of liberal varieties of capitalism to generate effective workplace partnership. This liberal regulatory approach, coupled with narrow *scope*, low *level* and shallow *depth* of I&C practices, means the Directive's impact is likely to fall short of its transnational (European) intent. This is potentially most evident in the UK and RoI, where there is little uptake of I&C arrangements, legal rights for workers have to be triggered, and there is great scope for enterprise-variable direct communication, as opposed to deeper forms of representative participation. Hall and Purcell (2011) note that countries with higher coverage of I&C bodies - Austria, Belgium, Denmark, France, Germany, Netherlands - tend to have mature embedded I&C systems that can be technically mandatory.

Much existing literature suggests that minimalist institutional design of implementing legislation at national level in voluntarist economies has limited functionality of I&C at micro-level, in terms of capacity to diffuse power-sharing voice (Taylor et al., 2009; Koukiadaki, 2010; Hall et al., 2013a&b; Brewster et al., 2013). However, such studies do not offer theoretical explanations of why national legislation fails to generate mutual gains. Hall et al., (2013a) show that, following implementation of the UK's ICE Regulations, employee voice in British firms has been designed primarily on managements' terms: while a minority of cases were categorized as 'active consulters', most were 'communicators'. Beyond providing a catalyst for managerial moves to introduce I&C, impact of the UK ICE Regulations was deemed largely peripheral and diluted. Elsewhere, Taylor et al., (2009) question the capacity of the ICE Regulations to influence redundancy outcomes, while Koukiadaki (2010:366) concludes that 'much work remains to be done on the ways in which such information and consultation arrangements can evolve as effective mechanisms for the

exercise of the ‘voice’ rights that the Directive confers’. Proposition 1 has been formulated from the discussion above:

*P1: The intent of the ICD is to diffuse power-sharing for mutual cooperation. However, the ‘degree, level and scope’ of employee voice falls short of this power-sharing intent because of minimalist design of the transposed national I&C laws in LMEs.*

### **Game theory and asymmetric outcomes**

In relation to proposition two, the discussion next considers how regulatory design faults in LMEs associated with restricted power-sharing may inhibit mutual gains outcomes, and how this can be conceptualized. When considered in the LME contexts of the UK and RoI, the prisoner’s dilemma problem in game theory shows why two parties might not cooperate in pursuit of mutual gains outcomes, even if it *actually* might be mutually beneficial to do so (Leibenstein, 1982; Aoki, 1984; Freeman and Lazear, 1995; Marsden and Canibano, 2011; Trif and Brady, 2013). Albert Tucker ‘officially’ coined the term ‘prisoner’s dilemma’, with the following example of prison sentence outcomes (see Poundstone, 1992): two suspects from a criminal gang are imprisoned on a bank robbery charge. The police do not have enough evidence to convict the pair on the principal charge, but plan to sentence both to one year in prison on a lesser charge. However, the police offer each prisoner a deal simultaneously: if they testify against their partner, they will go free, but the partner will get ten years in prison on the main charge. But there is a catch. If both prisoners decide to testify against each other, both will receive a five year sentence. The crux of the theory is whether cooperation and trust between the partners in crime can generate more mutually beneficial win-win outcomes collectively (e.g. one year sentence each). However, if there is mistrust of the others’ perceived intentions, then pursuing individual self-interest will prevail, causing



both prisoners to betray the other, the result being a lose-lose outcome (e.g. five year sentence each).

Applying the prisoner's dilemma concept to employment relations, the combination of decisions by the two parties as to whether to cooperate or not by sharing power and information can influence perceived outcomes and expected benefits for both parties – in terms of the degree to which their material interests are realized. Management decisions tend to be linked to the desired outcome of maximizing profit, while employee decisions are linked to more multi-faceted outcomes like pay, work conditions and voice (Leibenstein, 1982; Aoki, 1984; Trif and Brady, 2013).

Leibenstein (1982) applied game theory and the prisoner's dilemma concept to cooperative workplace relations, identifying frequent adversarial outcomes in liberal market regimes due to problems of mistrust with regard to dominant choices of employer-employee non-cooperation; at the expense of reducing mutual gains. According to Leibenstein, sharing information and productivity gains would generally seem to be an area of mutual benefit. Yet in reality it often involves a prisoner's dilemma, due to uncertainty about the other parties' intentions. That is to say, in LME contexts particularly, either or both individual parties may pursue maximization of their own short-term self-interest rather than choose collective longer-term mutually beneficial options; especially where there are power imbalances. For example, in relation to voice, employees may be reluctant to share their discretionary knowledge with employers if they perceive that there would be no gain in doing so, or even that to do so might harm their interests. Employee withholding of effort and knowledge can damage productivity because employment contracts are incomplete and indeterminate: employers cannot precisely specify and control all employee contributions (Baldamus, 1961).

Employers, meanwhile, are unlikely to share sufficient information and power to provide optimum employee voice unless compelled to do so, choosing to preserve managerial prerogative. Liebenstein (1982) observes that a prisoner's dilemma is a zero-sum game (one parties' gain equals the other's loss) if the equilibrium falls where all individual players (employers and workers) are worse off than they would be if they cooperate collectively for mutual gains purposes.

Given the limitations of applying positivist scientific personnel economic approaches to labour relations (Spencer, 2012), it is important to note that the prisoner's dilemma concept cannot exhaustively predict that complex social relations in organizations will definitively produce particular (and consistent) choices and outcomes, because there are a multitude of causal contextual variables shaping outcomes. Nevertheless, it offers a useful analytical tool for understanding *tendencies* towards or away from cooperative choices of actors under particular contextual conditions, and provides a benchmark against which real practice can be assessed (cf. Edwards, 2003:22). Accordingly, Table 1 below is intended to illustrate ideal-type patterns or tendencies towards cooperative and non-cooperative outcomes for employers (E) and workers (W), while recognizing that in reality patterns may be mixed and changeable given the complexities of managing the contradictions of conflict and cooperation (Edwards, 2003, 2012; Spencer, 2012). Table 1 draws on Leibenstein's (1982) prisoner's dilemma pay-off matrix, adapting it for this article. Pay-offs from all four general patterns/tendencies are shown in the boxes, with gains and losses for employers (E) and workers (W).

*Box 1-mutual gains cooperation:* Both employers and workers have chosen to cooperate collectively for mutual gains. Employers behave in a 'golden rule' cooperative manner, provide robust employee voice and good pay and employment conditions, and do not pursue

profit maximization to its extreme. Employees also behave reciprocally in a 'golden rule' manner, being committed to the firm and willing to release discretionary information to management.

*Box 2-employer adversarialism:* Employers choose to pursue their individual utility of cost minimization and/or profit maximization at the expense of workers, who follow the golden rule in the (mistaken) belief management will reciprocate with cooperation. Here employers choose an individualist adversarial approach to maximize power advantage, emphasize effort intensification, provide weak voice and drive down pay and conditions. Management gains at workers' expense.

*Box 3-worker adversarialism:* Workers choose to maximize their interests at the expense of employers who follow the golden rule. Here, workers may see little point in sharing information or cooperating with management. Thus workers gain at management's expense.

*Box 4-mutual losses:* Both employers and workers choose to maximize their own separate interests, and neither follow the golden rule of mutual cooperation, in the belief the other side will fail to reciprocate and instead will seek individual gain. This is the prisoner's dilemma zero-sum outcome, because if both parties choose to maximize their own interests, mutual losses often result from reciprocal non-cooperation.

Box 1 is the only possible route to Pareto optimal cooperative mutuality. Given it is a zero-sum game no one can be made better off without making the other worse off by moving to boxes 2, 3 or 4. Proposition 2 below advances the idea that the minimalist power-sharing design of national I&C regulations in LMEs will tend to encourage maximization of

employer gains (box 2) or mutual losses (box 4), rather than mutual cooperative gains (box 1). In other words, the dominant options in the direction of adversarial individual self-maximizing behaviours reduce scope for win-win mutual cooperation (Leibenstein, 1982).

TABLE 1 HERE

*P2: Game theory and the concept of the prisoner's dilemma is useful for explaining why minimalist design of national I&C laws in LMEs continues tendencies at workplace level towards employer gains or mutual losses, more than mutual gains.*

### **Uncertainty, risk and sustainability**

Proposition three relates to how uncertainty of outcomes associated with game theory/the prisoners dilemma in LME contexts often renders I&C as high risk and unsustainable. In relation to how outcomes in the four boxes in Table 1 above are influenced by different national institutional contexts, various scholars question the capacity of market-driven economies with voluntarist systems like the UK to nurture and sustain cooperative partnerships in the long-run (Authors2; Brewster et al., 2013). In voluntarist systems, employees are reliant on managerial goodwill to both develop and sustain cooperative arrangements, and this will only continue as long as employer interests are met. In comparison, notwithstanding debate about destabilizing pressures and dualities confronting coordinated market economies like Germany (Hassel 2012), CMEs still institutionalize robust voice rights for many workers, provide more symmetrical access to information sharing between management and labour and more supportive conditions for preserving cooperation over long-term time horizons relative to LMEs (Streeck, 1997; Authors2; Goergen et al., 2012; McLaughlin, 2013). For example, Leibenstein (1982:96-97) argues that in CMEs (say

Germany) adversarial prisoner's dilemma tendencies are reduced, because the institutional framework 'shocks' parties into repeatedly cooperating in longer-term productivity coalitions:

... the latent prisoners' dilemma possibilities are held in abeyance by conventions, institutions, and laws ..... If the adversarial options are absent, then the mutual choice is the optimal position...an effective low-cost system of laws which enforces contracts may minimize the inducement to use other types of adversarial behavior.

However, workplace cooperation in LMEs (say the UK or RoI) is more often a short-term 'one-off game' and entails higher risk of uncertainty because it is easier for parties to exit cooperation, especially in an era of unstable financialized capitalism (Martinez-Lucio and Stuart, 2005; Brewster et al., 2013; Thompson, 2013). Streeck (1997:201) warns that employer defections, even temporarily, from cooperative bargains with employees can lead to mistrust as workers question managements' credibility: 'the mere possibility of defection, as is by definition inherent in any voluntary arrangement, can dilute the positive effects of workplace cooperation'. Such perceptions of uncertainty of outcomes is exacerbated by the fact that access to information in LMEs for one side (employees) is often more limited and asymmetrical than for the other (employers) (Broome, 1989). Therefore, institutional context matters greatly for distributing gains and losses, and shaping the risks and lifespan associated with cooperation. Given the balance of power in LMEs typically favours employers, boxes 2 or 4 will be common (short-termist) outcomes, with box 1 (long-term outcomes) being uncommon and unsustainable.

*P3: Perceived uncertainties of outcome associated with the prisoner's dilemma mean that in LME contexts I&C arrangements will be too high risk over the long-term for management and employees to sustain genuine mutual gains.*

The above literature review has generated three theoretical propositions: P1 considers ‘design faults’ with I&C legislation in the context of limited power-sharing support; P2 predicts continuing failure to generate mutual gains outcomes arising from such minimalist regulatory design, using game theory; and finally, P3 tests for ‘risk and sustainability’ of I&C arrangements in a context of uncertainty in LMEs. Theorising around these propositions offers a useful new schematic benchmark against which to test and present empirical data, summarised in Table 2.

TABLE 2 HERE

### **3. Research Methodology**

The empirical data is derived from a multiple case study design (Yin, 2009). Sixteen organizations located in different economic sectors that utilised a variety of employee voice mechanisms and displayed awareness of changes arising from European regulations for employee information and consultation were studied over a two year period. Sectors of the economy covered manufacturing, retail, hospitality, and services. Of the 16 organizations, 8 had operations in both Irish jurisdictions, which provided for institutional comparability. In addition, a further 4 had operations in the RoI exclusively, and the same sectors were matched with another 4 cases that had NI-only operations. This provided for between and within regulatory jurisdictional variability across two LMEs. A total of 33 sites were visited across the 16 cases. Only organizations which employ over 50 workers were selected as this was the threshold application of the ICD. The cases are a mix of union and non-union, multinational and indigenous firms.

Case study findings were based largely on semi-structured interviews with management, union representatives, non-union representatives, and employees at each site. In all 33 sites, a minimum threshold of one senior manager, one HR manager, one line manager, two employee representatives and six employees were interviewed. In many organizations, a higher level of access was granted, and a total of 334 interviews were completed. The research involved multiple visits to companies during a two-year period. Documentary sources were also collected at each organization, notably data on I&C practices and general HR policies.

The interview schedules were designed to collect empirical data relating to the three propositions. Questions about 'level, scope and perceived depth' of workforce consultation provided data in relation to proposition 1. For proposition 2 several questions sought respondent 'knowledge and awareness of the ICE regulations'. In particular, multiple respondents were probed concerning the degree of possible mutuality from company arrangements for information-sharing and workforce consultation. Finally, for proposition 3, several questions explored respondent 'experiences of related issues that affected I&C diffusion', including external market pressures and internal issues concerned with employee trust and levels of participation. Taken together, the research design provided qualitative data to capture possible degrees of risk associated with I&C arrangements over a sustained period of time - from the perspectives of local managers, union and non-union representatives, and employees themselves.

#### **4. Findings**

This section presents examples of empirical data to test and support earlier propositions.

## **Power-sharing and employee voice**

*P1: The intent of the ICD is to diffuse power-sharing for mutual cooperation. However, the 'degree, level and scope' of employee voice falls short of this power-sharing intent because of minimalist design of the transposed national I&C laws in LMEs.*

Influenced by minimalist design of national I&C provisions, the generalised finding for P1 is that in most cases efficacy of regulations to support power-sharing at micro level fell short of the Directive's intent and impact was limited. In most workplaces, it was clear that management were intent on managing unilaterally and restricted power-sharing. This general finding is evidenced across the jurisdictions of the UK (NI) and RoI, in different sectors of economic activity, and among both union and non-union organisations (although power-sharing tended to be greater at some union sites compared to non-union sites). Findings are elaborated from case examples below in relation to *degree, level and scope* of voice provision.

### *Degree of I&C voice*

*Degree* of I&C voice across the sixteen cases mainly amounts to either 'one-way' and/or 'two-way' information-sharing. Robust consultation, with a view to reaching agreement, was evident in a couple of cases with union presence, but uncommon overall. For example, *BookCo*, a long-established family-owned unionized company did not respond to the I&C legislation, preferring to rely on pre-existing collective bargaining and direct informal information-sharing channels, with little provision for consultation over workplace change. *BritCo*, a large employer in the services sector, operates on an all-island basis, but its depth of voice regimes differed across the two jurisdictions. In NI there is a history of unionised collective bargaining and joint consultation arrangements, whereas in ROI, where it acquired



a non-union firm in 2000, a new non-union employee representative (NER) forum was created in 2005 partly in response to the ICD. This NER forum offered ad hoc consultation, but was mostly an information sharing channel. In interviews, *BritCo* senior management admitted the NER forum was essentially a ‘tick the box exercise’ to be seen to comply with regulatory requirements. The forum was largely defunct by 2006 as no meetings were held subsequently. From early 2007, unrest amongst *BritCo* employees in the Republic arose over corporate restructuring, culminating in a union organizing campaign. Management responded by re-calibrating and strengthening the previously defunct NER forum (rebranding it *Vocal*), while opposing union recognition.

At a large multinational, *ConcreteCo*, there was clear duality in degree of voice regimes between ROI (unionised and elements of joint consultation) and NI (non-union and limited top-down information sharing). In NI, management simply did not consult workers:

I think the word ‘consultation’ is a misnomer, it is very much communication... Consultation implies there is a party with information, there is opportunity to give feedback on that information, feedback is listened to, and as a result decisions are taken. That does not happen here (*ConcreteCo* HR Manager, NI).

In the ROI, compared to *ConcreteCo*’s NI operations, unions had more influence over power-sharing owing to pre-existing multi-union bargaining and consultation: something the senior HR manager called a ‘good system of information and consultation’.

*HolidayCo* is a public sector organization in the hospitality industry that is partially unionized in ROI, and non-union in NI. Informal direct communications dominate voice provision in NI. In ROI, there is a union Joint Consultative Council (JCC) meeting four times a year. HR management said pre-existing arrangements conformed with I&C legislation. *HomeCo*, a

British-owned retail chain, has a long history of internal NER voice forums known as *Bottom-Up*, influenced by the company's non-union paternalism. Whilst senior management said *Bottom-Up* was designed to stimulate consultation, employee representatives believed that voice was restricted:

You have an opportunity to voice an opinion, but whether any heed will be taken of that is another thing altogether. (HomeCo Employee representative, NI)

Evidently, NER forums were also a means of union avoidance/substitution:

With the Forum, it was never explicit, but the company is not a unionised company . . . The Forum is a way of saying that we operate the type of culture that we would never want people to think they'd need a union. (HomeCo HRM Director, ROI).

*WindowsCo* is a medium-sized family-owned firm in Northern Ireland, manufacturing window blinds. A non-union company, it initially had no formal voice system aside from individual grievance procedures. When seeking accreditation from Investors in People (IiP), the Northern Ireland Labour Relations Agency (LRA) helped the company establish a non-union 'Employee Forum' in 2005/6. However, the 'Employee Forum' did not develop a consultative depth.

#### *Level of I&C voice*

In terms of *level*, data indicates that I&C exchanges mainly occur at lower organizational levels, typically mainly at task level, but with some examples of higher level worksite and company-wide communications. At *BookCo* most information disseminated to employees occurred informally and directly in 'walk and talk' type situations on the shopfloor, with union representatives having little consultative influence at corporate headquarters level. In comparison, NER *Vocal* representatives at *BritCo* experienced some higher company level

voice through meetings with the Chief Executive and HR Director. In *ConcreteCo*, the limited information sharing in the non-union NI locale was mainly restricted to individual task level, whereas union representatives in ROI experienced periodic consultation at company level. Meanwhile, at *HolidayCo*, presence of the union JCC in RoI meant union representatives were periodically consulted at company level. In the non-union NI site, informal direct communications overwhelmingly occurred at task level. At *HomeCo*, there were supposed to be quarterly sequences of *Bottom-Up* NER forum meetings at multi-levels (store, regional, divisional, national): so that, where necessary, issues can be passed up the pyramid to national company level. In reality meetings were sporadic.

#### *Scope of I&C voice*

Finally, *scope* of decision-making is mainly restricted to basic operational issues (like canteen menus, workplace layout), rather than ‘bigger’ strategic or employment contract related issues. In *BookCo*, informal ‘walk and talk’ information exchange by managers mostly concerned day-to-day operational matters like book promotions. Confirming lack of scope for power-sharing, a shop manager was dismissive about company I&C provision, commenting that ‘no such systems exist’. Instead he described ‘The BookCo Way’, whereby senior management communicate informally on a ‘need to know basis’. Sometimes he felt Directors leaked proposals to see if they would ‘fly’. This manager felt there were downsides to ‘The BookCo Way’, notably lack of openness in senior managerial circles about big issues like budgets, strategy, and trading difficulties. Meanwhile, at *BritCo*, for a time the revamped NER forum in the Republic appeared to offer potential scope for more power sharing than hitherto: NER representatives were elected, monthly meetings occurred, and Vocal representatives received business updates from the HR Director and Chief Executive.

However, the reality was that management provided better information updates to representatives for a short time, but did not imbue power sharing in any meaningful sense.

In *ConcreteCo*, there is little scope for I&C at the non-union NI operations. In contrast, I&C in the unionized ROI periodically focuses on employment issues like redundancies, working time, and working conditions in specific sites. But meetings are ad hoc and issue-driven: they ‘only occur when something arises’ (manager, ROI). Further, union representatives said management often presented decisions as a *fait accompli*, restricting scope of consultative power-sharing:

You get the sense that decisions are already made at a higher level, then the unions are told. Unions don’t have real influence, say if new machinery or work practices come in. (ConcreteCo Union Steward, ROI)

*HolidayCo* provided an occasional joint consultative role for union representatives on operational and work organization matters (e.g. flexible working) in RoI. In contrast, at the non-union NI site there was less consultative power-sharing. *HomeCo* redesigned elements of its Bottom-Up NER forums from 2001 to pre-empt the Directive: providing formal election by secret ballot for employee representatives. Formal training allowances were also introduced for representatives and time allocated for forum duties. Yet the reality was that NER forums were widely viewed as ‘information download’ and as a union avoidance insurance policy. It was suggested that the ‘Employee Forum’ at *WindowsCo* was based on the standard provisions of the UK ICE Regulations. The HRM team admitted that, in its early years, the NER Forum played a negligible role in company governance, limited to health and safety considerations. The NER was later reinvigorated, influenced by what the Chief Executive called an ‘aggressive’ union recognition campaign, and management

acknowledged that underlying grievances existed. Yet scope for consultative power-sharing remained shallow.

### **Game theory and unequal outcomes**

*P2: Game theory and the prisoner's dilemma concept are useful for explaining why minimalist design of national I&C laws in LMEs continues tendencies at workplace level towards employer gains or mutual losses, more than mutual gains.*

Confirming proposition two, the selected case examples below illustrate that micro-level I&C arrangements tended to generate adversarial non-cooperative outcomes (as in Table 1 earlier): usually gains only for management (box 2), or mutual losses (box 4). In the few instances where mutuality occurred (box 1), it was constrained mutuality, and was usually restricted to unionized workplaces where workers were collectively organized. In short, outcomes tend to be asymmetrical and unequal, with employees often experiencing limited gains.

At *BookCo*, there was a mix of management only gains (box 2) focused on profit maximization, as well as mutual losses (box 4), which were starkly evident when senior management introduced new technology (a picking and dispatch machine) in a warehouse without consulting or seeking input from employees or unions. Senior management believed that new technology would improve efficiency. Yet it was a disaster on introduction with numerous teething problems and external technicians had to be brought on site for 6 months 'tweaking' the machine, at considerable cost. At *ConcreteCo* NI, employees experienced losses, bemoaning the lack of say, but employers gained because the lack of I&C saved costs. Management had negative opinions of I&C:

We know about the kinds of structures you could have but from an employer's point of view, what is the benefit? I know the cost that would arise from them. The

structures that we have are negligible. (HR Manager, Concrete Co NI)

At *HomeCo*, management only gains in terms of profit maximization, or mutual losses for management and employees, were more evident than mutual gains. For instance, a RoI HRM Director felt Bottom-up generated few business gains:

Does Bottom-Up improve the business? I don't think in its current format it truly does. If you look at improving the business as not having problems, then it does in some way do that. It prevents something else from being created that could hinder the business. But it is quite downlody, business-led and almost management having responses in advance of what the questions are.

Although *HomeCo* senior management did evince aspirations that NER forums might become a space where employees could contribute ideas on sales or customer service, in reality, they were largely used for conflict displacement rather than collaborative problem-solving. Store level managers complained that employees mainly used forums 'negatively' to advance grievances on issues like store-level heating. Yet, employee representatives at *HomeCo* were sceptical of the NER scheme's utility for even resolving grievances, describing, in particular, problems with excess heat in stores that had been raised repeatedly at all forum levels. But management reportedly refrained from acting until employees referred the matter externally to the Health and Safety Authority (HSA), which issued the company with an enforcement notice.

At *WindowsCo*, both management and employees described the NER as a downward communicative rather than a consultation forum. The NER amounted to management acting on grievances rather than parties collaborating to improve quality of joint solutions. For example, employee representatives had no input into devising a new bonus scheme, apart from raising the old bonus scheme as a grievance at the NER. Indeed the CEO and HRM

team complained that employees saw the forum as a ‘dumping ground’ for grievances and articulated a desire that employees would contribute ideas to ‘add value’ to the business, such as improving product quality. There were elements of information-sharing on the firm’s financial circumstances. Here, management saw the benefit of counteracting inaccurate employee rumours. Nonetheless, workers expressed cynicism about management’s claims. On balance, outcomes at WindowsCo were characterized by employer only gains (box 2) and mutual losses (box 4).

Yet employer gain or mutual loss is not the total picture across all the cases. There was evidence of small pockets of periodic mutually beneficial consultative power-sharing outcomes (box 1); albeit a constrained mutuality. For example, at *HolidayCo*, mutual gains occurred through the unionized JCC in RoI. Indeed, both management and union representatives recognized the value of proactive consultation with a view to reaching agreement. JCC union representatives were consulted and had real influence designing mutually beneficial new flexible work practices (flexi-time, time off in lieu), subsequently implemented across the organization:

People can end up working long hours, so we put in place, in full consultation, measures to manage working hours. We did that through a whole range of working time arrangements..flexi hours, time off in lieu..Policies were drawn up in consultation with the JCC and wider staff. (HR manager, ROI)

At *BritCo*, there was initially partial evidence of cooperative mutual gains through the reconfigured NER *Vocal* forum; albeit a constrained mutuality distributing limited independent power to employee representatives. Partial harmonization of company redundancy terms in RoI relative to NI was the main mutual gain; namely that aspects of Northern Irish redundancy terms were replicated in the Republic: including parity of

redundancy payments, and a redundancy pool wherein employees at risk of losing their jobs were given opportunities to secure new positions within BritCo. Management benefited insofar as it enabled them to draw the sting from a contentious issue behind union organising, thereby facilitating union avoidance. For employees, articulating concerns over redundancy and being afforded a consultative role, improved redundancy outcomes.

### **Risk, uncertainty and sustainability**

*P3: Perceived uncertainties of outcome associated with the prisoner's dilemma mean that in LME contexts I&C arrangements will be too high risk over the long-term for management and employees to sustain genuine mutual gains.*

In line with proposition three, rare instances of mutual gains cooperation (box 1) like those at *BritCo* and *HolidayCo* were not sustained in voluntarist contexts. At *BritCo*, the union was adamant that the NER Vocal forum in the Republic was driven by 'a tried and tested union avoidance formula'. Given this industrial relations climate, cooperative mutuality did not endure, with cooperation soon dissipating into reciprocated mistrust and adversarialism. Indeed, once the momentum of the union campaign subsided, mutual gains arising from Vocal narrowed after a brief time-span. Many employee respondents felt Vocal degenerated into an ineffective 'talking-shop', dealing with trivial 'tea and toilet' type decisions rather than offering consultation over more substantive issues. Three employee representatives subsequently resigned from Vocal, believing it had become 'toothless'. As proposition 3 theorises, this union avoidance strategy meant that mutual adversarialism supplanted mutual cooperation.



In *BookCo*, significant levels of risk and adversarial mistrust militated against information sharing and cooperation in the long-run, exemplified by fall-out from failure to consult about new technology. It was clear that the company management had little interest in developing a more cooperative type of employment relations and the workforce seemed relatively powerless to change this. In *HomeCo*, growing dissatisfaction meant many employees bypassed NER forums, instead raising grievances with line managers, or external institutions. At *WindowsCo*, competitive pressures and associated uncertainties of outcome after the 2008 recession were a barrier to embedding mutual gains. This sharply impacted on shopfloor I&C practice:

Horrible pressure, loads of stress, targets. It feels that management couldn't care less about their workforce or their views or opinions, just as long as their targets are being met. (Production employee, WindowsCo)

Intense pressure to meet tighter targets impacted sustainability of NER at WindowsCo, even curbing its functionality as a grievance-raising channel. Employee representatives reported difficulties in securing 'points' from employees, and employees disliked being called to meetings with representatives, considering them a distraction from intensified work obligations. Representatives themselves had less time to devote to forum duties as they had to prioritize extra work targets. Perceived lack of progress in addressing concerns eventually fuelled employee cynicism and disengagement. Indeed, the NER forum was increasingly displaced by what some employees saw as a more effective problem-solving lubricant at the point of production: the immediate supervisor. Therefore, because I&C at WindowsCo did not deliver sufficient gains for management, and particularly employees, its functionality eroded over time.

These examples confirm proposition three and illustrate that uncertainties of outcome linked to low trust prisoner's dilemma tendencies in LMEs means that cooperative I&C arrangements are high risk and hard to sustain in voluntarist contexts, with reversion to adversarialism a common occurrence. Examples of empirical case findings are summarized in table 3.

TABLE 3 HERE

## **5. Discussion and conclusion**

While offering important empirical insights, previous studies assessing impacts of the European I&C Directive in liberal economies (Taylor et al., 2009; Hall et al., 2013a&b) have lacked a theoretical perspective to explain regulatory ineffectiveness. This article fills that gap by offering important theoretical and empirical contributions, including using game theory and the prisoner's dilemma concept to explain why the implementing legislations have been ineffective in diffusing mutual gains cooperation in the United Kingdom (Northern Ireland) and Republic of Ireland (RoI). Three propositions have been tested and verified, and related implications are now discussed.

### **Institutional design matters**

The first proposition raises implications concerning the importance of institutional design. Negligible impact of I&C legislation in the UK and RoI is not an accident. As the ICD has been transposed in a minimalist manner at national level, the efficacy of I&C legislation to support power-sharing through employee voice rights has fallen short of the intent of the Directive itself. Minimalist transposition of the Directive was influenced by repeated employer lobbying, and governments' were receptive to upholding managerial choice given

explicit political endorsements of flexible deregulated labour markets. National unions, meanwhile, largely vacated the regulatory space, partly because they saw I&C regulations as potentially being used to undermine collective bargaining. The upshot was that employers ‘captured’ the I&C legislative agenda and ensured their preferences were not unduly endangered by what they saw as alien regulatory interference and collectivism. Hall et al., (2013b) also observe that the UK ICE regulations have not really altered employer I&C arrangements and union engagement is limited.

In our cases, the transposed regulations were too weak to pressure employers to change their behaviour. The case examples show that while in some instances employers were cognizant of complying with the ICD (e.g. *BritCo*, *HomeCo*, *HolidayCo*), they were able to carve their own preferred organizational-specific I&C bodies given the minimal mandatory reach of national implementing laws. Further, presence of I&C legislation was apparently often a secondary factor driving redesign of workplace I&C, with union avoidance considerations prominent in some cases (e.g. *BritCo*, *WindowsCo*, *HomeCo*). Various case organizations claimed to have pre-existing arrangements which management felt did not require modification in response to the ICD (e.g. *ConcreteCo (RoI)*, *HolidayCo*), and others simply ignored the regulations (e.g. *BookCo*). Overall, efficacy of national regulations to support power-sharing across the cases, as measured by the themes of *degree*, *level*, and *scope* of I&C voice, did not match the intent of EU Social Policy. Firstly, aside from isolated ad hoc examples of issue-based consultation (e.g. *BritCo*, *HolidayCo*), the *degree* of employee voice mainly consisted of managerial controlled information-sharing. Secondly, I&C mainly occurred at lower organizational levels. Finally, apart from some cases where there was consultation over employment-related issues (e.g. *BritCo*, redundancy; *HolidayCo*, flexible working), the *scope* of issues on which employees could articulate interests was largely confined to basic operational matters like canteen menus or workplace layout. There was

limited robust consultative power-sharing with a view to reaching agreement over 'big ticket' strategic issues.

### **Game theory and non-cooperative outcomes**

In advancing the second proposition, we illustrated theoretically and empirically that minimalist design of the implementing I&C legislation in the permissive voluntarist economies of the UK and RoI facilitated adversarial employer gains and/or mutual losses, much more than cooperative mutual gains outcomes, across the case organizations (see tables 1, 2 and 3). In terms of theoretical contribution, game theory/the prisoner's dilemma concept shows why two parties might not cooperate in pursuit of mutual gains choices and outcomes, even if it *actually* might be mutually beneficial to do so. This article illustrates why and how prisoner's dilemma tendencies are common in LME contexts, which results in adversarialism and mistrust dominating over mutuality (Leibenstein, 1982; Trif and Brady, 2013). When combined with sociological and industrial relations analysis, game theory/PD can provide a benchmark to illustrate key processes shaping choices that may encourage *tendencies* towards particular outcomes (employer gains/mutual losses/non-cooperation/adversarialism) more than others (mutual gains/cooperation).

This analysis applies to outcomes in union and non-union contexts. Confirming proposition two, therefore, the selected case examples illustrated that micro-level I&C arrangements tended to generate adversarial non-cooperative outcomes: either gains for managers at the expense of losses for employees (box 2), or mutual losses for both parties (box 4). The prisoner's dilemma problem was most clearly exemplified in case organizations by instances when mutual losses resulted from mutually reciprocated adversarialism. Serious lose-lose outcomes resulting from senior management's unilateral introduction of new technology at

*BookCo* without consulting or informing workers was a stark example. This culminated in a spiral of deteriorating adversarial non-cooperation and distrust.

The data is also illustrative of weaknesses in labour or personnel economics' application of ideas like game theory, which seek to quantify and reduce complex human agency choices to so-called scientific measures or econometric models (Lazear, 2000a&b; Edwards, 2012; Spencer, 2012). In contrast, we advance a more sociological industrial relations strain of analysis to game theorising processes capturing actor choice over voice, reflecting ambiguities of power, tensions between conflict and cooperation, and the many dimensions of employee representation. We therefore contextualise game theory/the prisoner's dilemma in a more nuanced qualitative way to illustrate why low trust lose-lose outcomes, and/or employer only gains, tend to be much more common in reality in LME contexts than idealised high trust win-win mutual gains – as initially intended by those who designed the EU I&C Directive.

We further advance game theory in this broader way by exploring choices and pressures leading to outcomes in non-union contexts; areas of unorganised worker dissent that are often neglected in much extant industrial relations scholarship. Arguably, power disparities in non-union workplaces would indicate, *prima facie*, that the most likely outcome is that either employer's win and employees lose or there are mutual losses. However, that does not mean there are no choices for employees, and non-union forms of worker dissent have been shown to influence management policy (Author6). Evidence from our cases suggests that even weakly organized workers in non-union workplaces can deploy resources to leverage choices to some extent: for example, withdrawing from representative forums, withholding knowledge and discretionary effort, staying silent, withdrawing trust and consent, seeking

unionization, reciprocating perceived adversarial behaviour by management, resisting management in various ways, and so forth.

### **Voluntary mutuality is high risk and unsustainable**

The third proposition raises implications about long-term sustainability of voice practices and the trajectory of employment regulation policy in LMEs. Proposition three argues that in LME contexts where there is perceived uncertainty about future outcomes, there is high probability that I&C arrangements will be very risky for employers and/or employees and often not sustainable over the long-term (Martinez-Lucio and Stuart, 2005); despite intentions to the contrary by designers of the EU social dimension/the ICD. That is to say, in voluntarist contexts, either or both parties will eventually be encouraged to pursue maximum (individual) short-term self-interest rather than (collectivist) longer-term mutuality. Rare instances of mutual gains cooperation (box 1 in table 1) evident in our cases (e.g. *BritCo*, *HolidayCo*) were isolated examples of ‘constrained mutuality’ that were not repeated and/or sustained over time.

What are the implications for the ICD and national implementing legislation? Labour is too weak and the ICD is clearly ineffective in LME contexts to rectify this. Therefore, re-regulation of I&C laws would be a necessary (albeit partial) solution to the prisoner’s dilemma through external institutionalization of hard ‘beneficial constraints’ by the state to absorb the risks of collaborating and compel parties to share information and cooperate over longer-term time horizons (Streeck, 1992, 1997; McLaughlin, 2013). Streeck (1992:323-328) is clear that a voluntary political and industrial order by definition lacks capacity to ‘sustain equitable cooperation between capital and labor’. Rather, sustainable cooperation requires the state to impose non-voluntary legally binding constraints and publically enforceable obligations on parties for the good of society, while constraining freedom of private choice to

some extent. Otherwise there is insufficient trust and cooperation often unravels, especially if employers, like some of our case organizations (e.g. *WindowsCo*, *TransportCo*, *EngineerCo*), can easily defect in response to short-term market fluctuations and competitive pressures that are especially acute under disconnected financialized capitalism (Thompson, 2013).

However, in a recent ‘fitness check’ on EU information and consultation laws, the European Commission (2013) acknowledged some shortcomings with regard to effectiveness (including lack of coverage of I&C bodies and limited consultation, notably where employees have to apply for I&C rights), yet stopped short of proposing ‘harder’ re-regulation that might make I&C rights more robust and enduring, especially in LMEs.

In sum, existing I&C legislation in LMEs is too weak to prompt employers to embed enduring cooperative mutuality and support more stable and equitable risk sharing relationships between capital and labour, as our case data shows. Adversarialism and non-cooperative outcomes will probably continue to dominate local choices over employee I&C in voluntarist economies. Given the grip of neo-liberal orthodoxy, few politicians or employers in LMEs appear receptive to any re-regulation of industrial democracy interpreted as challenging managerial prerogative (Wright, 2004). Moreover, re-regulation of the ICD is likely to be ineffective as a standalone intervention given the wider political economy context of financialized capitalism, which is not conducive to cooperative mutuality (Thompson, 2013). To compete in liberalized political economies like the UK, cost reduction is often the default profit accumulation approach of many employers, who simply may not require high levels of sustained cooperative mutuality and pluralism to achieve this (Godard, 2004).

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**Table 1 – Game theory and the prisoner’s dilemma: losses & gains from I&C**

	<i>Employer: Golden Rule</i>	<i>Employer: Individual Maximization</i>
<i>Worker: Golden Rule</i>	Box 1: Mutual gains cooperation.  Win (E) Win (W)	Box 2: Non-cooperation - gains for employer, workers lose.  Win (E) Lose (W)
<i>Worker: Individual Maximization</i>	Box 3: Non-cooperation - gains for workers, employers lose.  Win (W) Lose (E)	Box 4: Non-cooperation - Mutual losses for all. Prisoner’s dilemma.  Lose (E) Lose (W)

(adapted from Leibenstein, 1982)

**Table 2 – Framework to assess impacts of I&C regulations on workplace I&C**

<b>Design of I&amp;C</b>	<b>Outcomes</b>	<b>Timeframe (durability) and risk</b>	<b>Contextual and regulatory supports or barriers</b>
Power sharing elements of I&C  Degree Level Scope	Mutual losses to mutual gains (boxes 1-4 in table 1)	Short to longer-term  Low to high risk	<i>Internal</i> voluntarist employer initiated voice versus <i>external</i> regulated beneficial constraints.  Competitive factors: extent of uncertainty/turbulence, cost competition or quality competition.  General IR climate/ union presence/ management style.

**Table 3 – Empirical examples from case studies**

Design of I&C	Outcomes	Timeframe and risk	Contextual & regulatory supports or barriers
<p>Power sharing elements of I&amp;C</p> <p>Degree, Level Scope</p>	<p>Mutual losses to mutual gains</p>	<p>Short to longer-term</p> <p>Low to high risk</p>	<p>Voluntarism versus regulated beneficial constraints, Competitive factors</p> <p>IR climate</p>
<p><b>Case examples</b></p> <p><i>BookCo</i>: Ignored I&amp;C laws, informal information-sharing on ‘need to know basis’ (‘The BookCo Way’)</p> <p><i>BritCo</i>: reacted to I&amp;C laws, unionised I&amp;C in NI, non-union in South (Vocal NER forum)</p> <p><i>ConcreteCo</i>: pre-existing I&amp;C: traditional union I&amp;C in ROI, weak non-union direct communications in NI.</p> <p><i>HolidayCo</i>: partially unionized JCC in ROI, non-union informal direct communications in NI.</p> <p><i>HomeCo</i>: multi-level NER forums. Reacted to I&amp;C laws but not robust consultation/ power-sharing. Mainly information provision.</p> <p><i>WindowsCo</i>: non-union NER, mainly downward communications, not robust consultation.</p>	<p><b>Case examples</b></p> <p>Employer gains, employees lose. Also lose-lose outcomes from debacle of introducing new technology.</p> <p>Employer gains, employees lose. Elements of mutual gains over redundancy, but one-off example: ‘constrained mutuality’</p> <p>No benefits associated with I&amp;C in NI. Employer gain from low cost of I&amp;C, employees lose.</p> <p>Some mutual gains under JCC in ROI: union reps consulted over, helped design new flexible working arrangements. Both parties saw benefit to good I&amp;C. But ad hoc ‘constrained mutuality’</p> <p>Mix of employer win-employees lose, and mutual lose-lose</p> <p>Mainly employer win, employees lose, or lose-lose.</p>	<p><b>Case examples</b></p> <p>High risk, no cooperation to sustain.</p> <p>High risk. Cooperation not sustainable. Mutual gains narrowed over short time-span.</p> <p>High risk, no cooperation to sustain in NI.</p> <p>JCC sustained over quite long time, but consultation intermittent.</p> <p>High risk. NER sustained for a long time, but was waning because not delivering for employees, or employer.</p> <p>High risk. Not sustainable – forum apparently displaced by employee recourse to line managers.</p>	<p><b>Case examples</b></p> <p>Voluntarism. Severe competitive pressures/cost competition. Unionized, but little power.</p> <p>Voluntarism. NER forum: employer response to union campaign in ROI (union avoidance).</p> <p>Voluntarism. Competitive pressures in construction industry. Union presence in ROI gave stronger voice than NI.</p> <p>Voluntarism. Positive IR climate. Union legacy in ROI.</p> <p>Voluntarism. Paternalist history. Union avoidance.</p> <p>Family firm. Severe competitive pressures, work intensification. Union avoidance.</p>

**Appendix 1**

<b>SECTORS</b>	<b>RoI</b>	<b>NI</b>	<b>ALL ISLAND</b>	<b>ALL ISLAND</b>	<b>SITES VISITED</b>
Retail	ShopCo (x1)	Department Store (x1)	BookCo (x3)	HomeCo (x2)	7
Manufacturing	EngineerCo (x1)	WindowsCo (x1)	ConcreteCo (x3)	TechnologyCo(x2)	7
Services	InsuranceCo(x1)	Financial Services Inc (x1)	BritCo (x3)	TransportCo (x2)	7
Hospitality	South Hotel (x1)	North Hotel (x1)	HolidayCo (x2)	CateringCo (x8)	12
<b>TOTALS</b>					<b>33</b>