Articulating workers’ participation

Introduction

Since the adoption of the Recast European Works Council (EWC) Directive in 2009, a new word has entered the discourse of European industrial relations. The word is ‘articulation’ and it is a term applicable in the fields of both policy-making and practice. ‘Articulation’ refers to what is arguably the most significant innovation in the 2009 Recast EWC Directive, namely, a remarkably consistent recognition throughout the revised text that transnational information and consultation needs to be systematically linked to information and consultation at the local and national levels. While the actual term ‘articulation’ is not to be found in the Recast EWC Directive, it is much used in the ensuing debate to refer to the action or manner of joining or interrelating these complex processes and actors. The implicit metaphor is that of a hinge or a joint, a construction enabling two things to be joined in such a way as to permit movement of each which is nevertheless not entirely independent of the other.

This chapter explores the current state of play of the articulation potential in the field of workers’ participation, from local and transnational information and consultation in the laws and the founding agreements, through board-level employee representation, and health and safety representation, to workers’ rights as enshrined in company law.

Topics

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In its 2010 work programme, the EU Commission launched a pilot exercise called the Fitness Check (see also ETUI and ETUC 2011:90-91), in which three rather different Directives related to information and consultation were examined: the General Framework Directive on information and consultation; the Collective Redundancies Directive; and the Transfer of Undertakings Directive (also known as the Acquired Rights Directive).

The aim of this exercise was to identify any excessive burdens created by the legislation, as well as to pinpoint any overlaps, gaps or inconsistencies which might have emerged since the adoption of these three EU Directives. The Fitness Check also sought to assess the cumulative impact of the legislation, using a highly controversial methodology based on a cost/benefit analysis.

In 2013, after several reports, studies and meetings with stakeholders, these information and consultation Directives were officially found to be ‘fit for purpose’; they are deemed ‘generally relevant, effective, coherent and mutually reinforcing’. Furthermore, it is found that ‘the benefits they generate are likely to outweigh the costs’ (European Commission 2013a).

However, in relation to the scope and application of the Directives a number of weaknesses were identified. In particular, the exclusion of small businesses, of public administration employees, and of seafarers means that a significant share of the European workforce is not covered by their provisions. Furthermore, the final report emphasised the need to promote an ‘information and consultation culture’ among social partners, in particular via collective agreements, to strengthen institutions, as well as to disseminate good practices and ensure sound enforcement at national level.

In August 2013, the European Commission launched the ‘REFIT – Fit For Growth programme’ or ‘Regulatory Fitness and Performance Programme’ (European Commission 2013a). As part of its attempts to boost competitiveness, the European Commission intends to screen, repeal or withdraw legislation that it deems no longer ‘fit for purpose’.

Despite the fact that the Fitness Check unequivocally concluded that no legislative action was required on these particular information and consultation Directives, the European Commission intends to further examine and discuss their scope and operation following a consultation of the European social partners (European Commission 2013a).

Although the Commission announced that it was considering consolidating these three Directives, it is actually doubtful whether they even lend themselves to such consolidation: not only does each have a different legal basis (and thus different legislative procedures and competences) but each deals, what is more, with a highly specific situation that can hardly be generalised without losing its specificity in terms of definition, scope, and impact.

The requisite Social Partner consultation, which was expected by September 2014, has not yet been launched at the time of writing. It is now expected in Spring 2015, over five years after the launch of the Fitness Check. Little information on the content of the consultation has been divulged so far, leaving minimal scope for trade unions and employers’ associations to prepare for formal consultations.

Since 2013, further information and consultation rights have been subjected to Fitness Checks and/or the REFIT programme (see next page), all of which amounts to an unprecedented review of the legal acquis communautaire in particular in social matters.
Refitting information and consultation rights

The social acquis: feeling the squeeze of the wrong method

With the aim of eradicating unnecessary administrative and regulatory costs, the Commission has also extended the fitness check approach to other areas; it has launched an evaluation of the framework Directive on occupational health and safety (OHS) and the 24 related individual and specific directives for which it provides a framework. Further information and consultation rights are next in the queue for the REFIT. These include participation rights laid down in company law, as well as employment law directives regarding posting of workers, working time, data protection, equal treatment in social security regimes, part-time, temporary agency work and professional qualifications, and employer obligations relating to employment contracts.

Health and safety experts have already demonstrated the inappropriateness of the methodology of the Standard Cost Model to assess the relevance of OHS legislation (Vogel and Van den Abeele 2010:13-18).

Further, a critical scrutiny of the methodology raises issues that go beyond OHS and indicates inconsistencies inherent in the method ‘whenever law-making aims to achieve general objectives by putting in place arrangements for information, analysis or consultation’ (Vogel and Van den Abeele 2010:13-18).

Finally, the method, which was originally developed in the US and further adapted in Europe in the late 1980s and 1990s, focuses on a deregulatory approach in which the potential benefits of legislation, in particular its social and environmental impacts, cannot be accurately addressed; it therefore reduces the evaluation of legislation to a simplistic estimation of costs.

Indeed, the lack of a qualitatively accurate social impact assessment remains a major concern, and not for stakeholders alone; the Impact Assessment Board set up by the Commission in 2006 as a quality control and support function has also raised this issue recurrently (European Commission 2013b:4).

Clearly, the understanding or definition of what may indeed be necessary regulatory burdens should be addressed in the same manner and should deserve the same attention and weight in decision-making as the current discourse in which all regulation is assumed to amount to an unnecessary burden. First Commission Vice-President M. Timmermans, who is also in charge of the Better Regulation dossier, has not yet clarified how the new Commission intends to address these concerns.

Finally, NGOs and social partners, in particular the ETUC (ETUC 2014), as well as representatives of SMEs, have raised concerns about the most controversial propositions made by the so-called High Level Group on administrative burdens appointed by the Commission in 2006 and 2010 (High level group 2014). Among its conclusions, the group proposed that SMEs should be exempted from legislation on accounting and auditing rules, from the REACH regime and, as far as possible, from other EU obligations. Furthermore, the simplistic ‘one in, one out’ proposition, according to which, for any piece of legislation adopted, another should be eliminated, finds no sound or scientifically based justification in evaluation projects. These concerns were vindicated by a dissident position taken by four members of the High Level Group who contend that the official conclusions of the Group fail to reflect the outcomes of compromises reached in the course of its work and that they are clearly deregulatory in purpose. The dissidents’ claim is further underscored by the image of the High Level Group’s work as non-transparent, non-representative, non-accountable and highly disrespectful of the interests of European civil society.

Figure 4.2. Refitting information and consultation rights

- company law
- posting of workers
- working time
- data protection
- equal treatment in social security
- part-time/ fixed term work
- professional qualifications
- temporary agency work

Source: ETUI own research.
Transnational information and consultation

Figure 4.3. Transposition of key provisions related to articulation in the recast EWC Directive

<table>
<thead>
<tr>
<th>Art. 6.2</th>
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EWCs and SE-WCs at the heart of a participation network

2015 will be an important year for European Works Councils (EWC) and, by extension, for SE-Works Councils (SE-WC): the 2009 Recast EWC Directive stipulates that the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee, by June 2016, on the implementation of the Directive, making appropriate proposals where necessary.

The main goal of the Recast EWC Directive was to make EWCs more effective (Recitals 7, 9, 14), especially by improving operational and hierarchical links between the national and European levels (Recitals 21 and 37).

Clearly, EWCs and SE-WCs are ideally placed to function as centrepieces for information and consultation networks across multinational companies. With the prerogative for transnational information and consultation processes, these bodies have many opportunities to cooperate with the national/local works councils, local trade union organisations, and, where applicable, employee representatives on the supervisory board. Indeed, the Recast EWC Directive recognises the need for the EWC to expand upon its role within a network. Art. 6.2 c) obliges the parties to include in agreements _the arrangements for linking information and consultation of the European Works Council and national employee representation bodies_; in case the parties should fail to do this (adequately), the Member States are obliged to provide for standard provisions (Art. 12) that should prioritise the EWC or at least treat it equally (Recitals 29 and 37).

This process is not as straightforward as it might seem. Firstly, transnational decisions are likely to have national consequences and involve both levels of representation. This raises the thorny issue of whether the national-level or European-level employee representation should be consulted first.

The Recast Directive does not provide much guidance on this issue: it calls upon the negotiating parties to include arrangements for linking the national and European levels. The Member States are instructed to design fallback provisions on linking the levels of representation that would apply only if the negotiating partners should fail to define this issue adequately.

According to the analysis undertaken as part of an ongoing ETUI project on the transposition of the EWC Recast Directive (see Figure 4.4):  

- Nine Member States fail to provide any fall-back solutions to be applied should the EWC agreement fail to include arrangements on articulation.
- Nineteen Member States have implemented some sort of statutory fall-back provisions.
- However, of these 19, 11 Member States’ transposition laws are silent on the question of the timing or sequence of information and consultation at the transnational vs national/local level.
- Nineteen Member States make no reference to Recital 37, which reiterates the general principle that the EWC is to be informed and consulted earlier or at the same time as the national levels.
- Eight Member States have clearly laid down that, in the absence of other arrangements in the agreements, the national and transnational levels are to be informed and consulted at the same time.

Clearly, the national transposition laws have not merely failed to take up the Commission’s imprecise lead; rather than exercising their competence to develop the most appropriate solutions, they have merely reproduced the uncertainty left by the Recast EWC Directive. As a result, legally at least, national and European procedures are still viewed as independent of each other, rather than iteratively linked and articulated with one another. Corrective actions may have to be taken by the Commission.

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Since the entry into force of the Recast EWC Directive, parties to new EWC agreements are required to include arrangements on articulation between the different levels. The absence of such a requirement in the past meant that the work of EWCs has often run the risk of remaining procedurally separate from information and consultation processes at the local and national levels.

While it is clearly too soon to expect to find these developments widely reflected in the EWC and SE-WC agreements in the ETUI’s database, it is worth looking to see whether and how agreements have thus far addressed this issue.

Our analysis differentiates between, on the one hand, the opportunities for exchange and collaboration amongst actors, and, on the other, systematic or conceptual links between processes.

Beginning with the articulation between processes, the analysis of agreements in force in 804 EWCs and SE-WCs yields the following findings:

- At least 63% of EWC and SE-WC agreements in force contain a standard subsidiarity clause stating that the agreement does not impinge on the existing rights and procedures of information and consultation in place at the national level. The issue here is one of competence and autonomy. The intention of such provisions is of course to ensure that local autonomy is not ceded to the European level—a common concern amongst members of Special Negotiation Bodies.

  When considered alongside provisions that also outline the competence of the European level, however, the effect is less one of defending autonomy than of seeking to establish order.

In this sense, the EWC and SE-WC agreements were already – well before the Recast EWC Directive developed its more sophisticated conception of the specific competence of the European level – seeking solutions to the fundamental questions of allocation of authority over levels.

Another difficulty relates to the question of prioritising the European over the national level or vice versa. The dilemma of sequencing information and consultation between the national and European level has been a balancing act in practice and the subject of several court cases at national level (Alstom and Altadis in 2003, STI Microelectronics in 2006, Alcatel in 2007; see Blanke and Rose 2010: 348 and Brihi 2010). In French case law in particular the notion of the ‘useful effect’ of consultation at the one or the other level was developed as the decisive criterion for determining whether the national or transnational level was to be informed and consulted first; in other words, rather than categorically prioritising one level over the other, the sequence was to be determined on a case-by-case basis. (Blanke and Rose 2010: 348 ff.).

The Recast EWC Directive seeks to resolve this dilemma by explicitly assigning the matter to the negotiating parties, while nonetheless defining a default provision according to which information and consultation is to take place at the same time at the national and transnational levels (see also Figure 4.3).

It should therefore come as no surprise that only 10% of the EWC and SE-WC agreements analysed have addressed the question of sequence, timing, or prioritisation of one level over the other, nor that this is more frequently to be found in agreements signed after January 2009.
When considering the means of articulation amongst the actors involved in information and consultation, it should be noted that the primary agents of articulation amongst the national and transnational level are of course the SE-WC and EWC members themselves; after all, these persons are as a rule members of the local employee representation.

Turning now to the analysis of agreements in force in 804 EWCs and SE-WCs, these yielded the following means of articulation amongst actors. 76% of the currently valid EWC and SE-WC agreements analysed contained provisions for some form of communication about EWC meetings: usually described as a formal report or communiqué. In rare cases, it is the official minutes which are to be disseminated. In some cases, an oral report at workplace assemblies is foreseen.

The target audience may be defined as the entire workforce, the employee representatives and/or trade union representatives across the company, and local management.

Finally, the agreements usually stipulate who is responsible for dissemination: this may be either the employee representatives or the employer; in some cases, the only communication foreseen is a joint communiqué from management and the employee representatives. Specific reference is sometimes also made to the use of the company’s own internal media, such as company newspapers or the intranet.

Agreements are becoming more specific; however: in texts signed after January 2009, the requirement that the EWC shall report back on the ‘outcomes of information and consultation’ to the national or local level, appears more and more often. It is not surprising that this specific wording, which is close to that of the Recast EWC Directive, began to appear only once the (draft) Recast EWC Directive’s provisions were known.

The EWC and SE-WCs may also open their doors to other information and consultation actors: agreements in force and analysed contained provisions for some form of communication about EWC meetings: usually described as a formal report or communiqué. In rare cases, it is the official minutes which are to be disseminated. In some cases, an oral report at workplace assemblies is foreseen.

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In addition to these more or less standard practice provisions, other forms of horizontal articulation amongst actors can be found in the agreements analysed.

Agreements in 50% of currently active EWCs and SE-WCs specifically provide for the attendance as guests of trade union or local works council members, or other staff members, such as for example when the EWC meets on site. Often this facility is used to ensure the participation of the expert acting on behalf of the employee side.

Agreements in 15% of EWC/SE-WCs provide their members with access to company premises; obviously this can be an important means of engaging at site level with the information and consultation procedures at EWC level, especially where no local employee representation is in place (Picard 2010: 88). Access is provided for the entire EWC or select committee, for individual EWC or select committee members, and most frequently for the EWC member from the particular country in question.
Articulation with other forms of workers' participation

Alongside the vertical dimension of articulation, which refers to the links between national-level and European-level information and consultation, articulation can also have a horizontal dimension: how can and do European Works Councils (EWCs) and SE-Works Councils (SE-WC) cooperate with other forms of worker representation, such as employee representatives sitting on company boards or health and safety representatives?

With regard to links with board-level employee representatives (BLER), some EWC and SE-WCs agreements in force contain provisions linking the EWC to worker representatives on boards. These provisions range from regular exchanges of information between EWCs or Select Committees and employee representatives on the supervisory boards, the participation of board-level employee representatives in EWC/SE-WC meetings, the EWC/SE-WC receiving the agenda and documents provided to supervisory board members, and, in the case of many SEs, to the right of SE-WCs to nominate the employee representatives on the board.

An openness to seeking links between board-level representation and the EWCs is more prevalent in SE-WCs (38% compared to 3% of EWCs), clearly because both forms of representation were the subject of SE negotiations.

On the other hand, a still relatively poorly exploited potential for EWCs is links to the networks of health and safety representatives operating in individual companies.

As will be seen in the next section, occupational health and safety representatives (OHS representatives) are actually quite widespread in European workplaces.

Health and safety is also a well-established issue for workers' participation at the European level. At least 44% of the currently active EWCs and SE-WCs whose founding agreements have been analysed by the ETUI specifically include health and safety matters within the remit of the EWC. Whether or not companies launch explicit company-wide policies in this area, the existence of a legal corpus of common European standards (see next section) underscores the feasibility of cross-border cooperation on these issues across the company.

Furthermore, whether or not OHS is listed as a topic for which the EWC or SE-WC has the right to information and consultation, the Recast EWC Directive strengthens the basis on which they can demand such involvement in any company policies which have their origin at the European management level.

EWCs and SE-WCs can thus serve as a potentially useful and productive nexus between European-level participation and coordination and local action. EWCs can draw upon an additional, independent and institutionalised source of information about local health and safety conditions by seeking contacts with statutory health and safety representatives. In this way, real problems, threats to workers' health, as well as ideas for solutions and initiatives can be brought directly to the attention of central management.

On the other hand, national health and safety representatives could benefit greatly from information from EWCs/SE-WCs on the transnational dimension of the challenges facing them in their workplaces. These dynamics are just as important in manufacturing or industry, where workers are exposed to serious health and safety challenges, as in retail and services, where psychosocial risks are on the rise.

By seeking information exchange and collaboration with other employee representatives in the company, such as BLER and OHS representatives, EWCs and SE-WCs can strengthen the capacity of all workers' representatives to build upon the European dimension of their work.

Figure 4.6. EWCs and SE WCs with health and safety competence (% of total)

Out of 804 EWC/SE WC bodies…

- EWC 753
- SE WC 50
- 38%
- 3%... of EWCs and SE WCs have agreements containing provisions linking the EWC to employee representatives on boards.
- 40% of EWCs and SE WCs have explicit competence to address health and safety issues.

Source: ETUI, European Works Councils database (www.ewcdb.eu).
Health and safety representation in European workplaces

A potential European network of health and safety protection

Workers in the EU have long held wide-ranging rights to information and consultation on health and safety issues; indeed, since the adoption of the Community Charter of Fundamental Social Rights for Workers in 1989 (cf. Article 19) these rights form part of the general framework of workers’ rights.

Accordingly, the 1989 Framework Directive on health and safety at work requires all Member States to ensure that employees and their representatives are informed and consulted about occupational health and safety (OHS) matters in the workplace. Employees and their representatives can voice their opinion on health and safety issues, and are also entitled to submit their own proposals for improvements and changes. Furthermore, as is essential for any interest representatives, the Directive makes it clear that these representatives must have appropriate rights and safeguards.

The 1989 Framework Directive on Health and Safety at work has provided the context for 24 more detailed and targeted Directives, in which a specific participative role is foreseen for employee representatives in addressing issues such as handling heavy loads, chemical agents, or drilling equipment, or in improving the situation of specific groups of workers (see also ETUI and ETUC 2014: Chapter 7).

A recent ETUC study (Agostini and Van Criekingen 2014) identified widespread incidence of health and safety representation; despite a great variety of models in practice, there are significant analogous or comparable features across the different systems: as a rule, safety representatives are employed by the company, and legitimated by the workforce and/or the trade union; they are equipped with robust rights of information and consultation on specific issues; they reflect an obvious European consensus on the need to involve employee representatives in rule-making and rule-keeping processes, rather than by unilateral regulation.

According to conservative estimates, there are over one million safety representatives (Menéndez et al. 2009). These representative structures are overwhelmingly workplace-based; only seldom are structures in place that cover more than one site. Yet the local safety representatives still represent nodes for a potentially powerful network of cross-site cooperation on issues that are clearly not limited to individual workplaces.

For example, OHS representatives have the right to ask the employer to take appropriate measures and to submit proposals to mitigate hazards for workers. Wherever the same hazards are present on different sites, there is scope for cooperation between the safety representatives. There may also be a strong case in favour of the company developing and implementing one policy for the whole company rather than approaching the issue site by site.

This is where the EWC or SE-WC could play a key role. The EWC or SE-WC could provide a platform or framework within which the local safety representatives could exchange and collaborate in the exercise of their existing (local) information and consultation rights. These local rights are easily complemented by making use of the EWC and SE-WC’s rights to transnational information and consultation (see section 4.6, above). As demonstrated in the ETUC study (Agostini and Van Criekingen 2014), there is more commonality than difference in the different systems of health and safety representatives.

More and more areas of company decision-making are centralised across borders yet decentralised in their implementation and occupational health and safety could indeed prove to be a field in which the company’s interest in efficiency and the workforce’s interest in high standards could fruitfully coincide.
Board-level employee representation

The creeping europeanisation of board-level employee representation

The European legal instruments which can result in the europeanisation of board-level employee representation are perhaps better-known than are their counterparts in national law: when a company chooses to ‘go European’ by either merging across borders, or by adopting the European Company (SE) or European Cooperative Society (SCE) legal status, any existing mechanisms for employee involvement should follow suit. The ‘before and after’ principle applies, whereby board-level employee representation should be maintained if it previously existed in the participating companies. However, such forms of representation must now be opened up to the Europe-wide workforce of the newly established company. This is usually achieved by allocating board seats according to the proportion of workers in each Member State.

In the case of SEs, this europeanisation has led to a diversification of the population of board-level employee representatives, who come from no less than 16 different countries, including countries like Belgium, the United Kingdom, Romania, and Italy where board-level employee representation is unknown at the domestic level (see also ETUI and ETUC 2014: 107). While the uptake of the SCE statute remains limited (European Commission 2012), that of the cross-border merger Directive is, on the contrary, clearly resulting in a further europeanisation of employee representation on company boards (see next page).

Perhaps less well known is the fact that, in at least three countries, the europeanisation of employee representation is allowed for by law. In Norway (since 1976), Denmark (since 2010) and France (since 2013), domestic law enables workers in foreign subsidiaries to be, under certain conditions, directly represented on the board of their parent company.

Furthermore, europeanisation of board-level employee representation might take place not only where the law specifically provides for it, but also in case where the eligibility criteria for individuals or the definitions of the scope of companies covered are so loose that they can be interpreted in a way which allows for the appointment of individuals from outside the home country company’s workforce.

In Germany, for instance, board mandates which are reserved for external trade union officers can and have been taken up by non-German representatives (Krause 2012). In Sweden, meanwhile, the lack of a specific regulation does not in practice prevent employees of non-Swedish subsidiaries from being represented on the board of their (Swedish) parent company (Hagen and Mulder 2013).

Accordingly, the gradual europeanisation of board-level employee representation as described here, particularly if it is marked by close cooperation with other bodies such as EWCs and SE-WCs, can be expected to be a key driver of the europeanisation of industrial relations.

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The creeping europeanisation of board-level employee representation

The europeanisation of workers’ participation via information, consultation and negotiation processes at the European company level is a well-established phenomenon in research and practice.

A less studied aspect has been, however, the gradual europeanisation of employee representation within the governance structures of companies.

European and national laws have combined to open up supervisory or management boards — long a bastion of single-country representation — to representatives of workforces from outside the company’s home country. This development not only brings workers’ participation into the locus of decision-making in MNCs but also contributes to the diversification of board members’ profiles in line with the good corporate governance practices aimed at avoiding the bias of ‘groupthink’ on strategic decisions.

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The creeping europeanisation of board-level employee representation

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<th>via EU law</th>
<th>via national law</th>
</tr>
</thead>
<tbody>
<tr>
<td>a European Company (SE) Directive 2001/86/EC</td>
<td>Workers in foreign subsidiaries might be represented on the board of the parent company if...</td>
</tr>
<tr>
<td>a European Cooperative Society (SCE) Directive 2003/72/EC</td>
<td>Norway (1976)</td>
</tr>
<tr>
<td>a company resulting from a cross-border merger Directive 2005/68/EC</td>
<td>Denmark (2010)</td>
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<td>France (2013)</td>
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**Board-level employee representation**

**Figure 4.9. The impact of cross-border mergers on board-level employee representation**

How was the internationalisation of board-level participation addressed in the course of cross-border mergers?

![Diagram showing the impact of cross-border mergers on board-level employee representation]

- **21** merger plans inconclusive about whether and how any impact would be managed
- **20** companies intended to apply the standard rules without negotiations
- **10** companies set up an SNB and intended to conclude an agreement

Source: T. Biermeyer and Lexidale 2014. Data available for 51 out of 51 mergers found in which the CBM could be expected to lead to an internationalisation of board-level employee representation.

**It’s not just about SEs anymore**

The Cross-Border Mergers (CBM) Directive (2005/56/EC) was intended to promote cross-border activity and restructuring in Europe by creating a legal framework allowing companies registered in different Member States to merge. Like the SE and SCE, the CBM Directive allows for the possibility of multinational employee representation on the board of the new company. Yet unlike the SE Directive, there is no provision for an EWC-type body. However, the threshold for the application of the before-and-after rule to safeguard board-level employee participation on the board of the new company is higher than in the SE Directive. One of the biggest departures from the SE legislation is that management may apply the ‘standard rules’ on participation unilaterally without starting a negotiation process. If negotiations are entered into, the procedures for worker participation (SNB, Standard Rules, etc.) draw very heavily on the SE Directive.

In an effort to map the effects of the CBM on the composition of employee representations on the board, the ETUI analysed the official cross-border merger plans submitted to the authorities in fourteen EU Member States.

The analysis identified 51 cases in which the merger could be expected to have an effect on the continued existence and national composition of employee representation on the board.

Of these 51 cases, only 10 companies actually convened or planned to convene a special negotiation body. As many as 21 companies decided unilaterally to forgo negotiations entirely and opted to apply the fallback rules contained in the Directive on board-level employee representation. In the remaining 21 cases, either there are some indications that negotiations could have or should have happened to address the existence and composition of the employee bench on the board, or there is no information provided at all.

The cumulative effect on the Europeanisation of industrial relations of two decades of multinational, multicultural EWC negotiations and over a decade of SE negotiations is undeniable. In many cases the European Trade Union Confederations has been thrust into the limelight, at the same time unearthing a new awareness of the European dimension amongst trade unions and their members. The most striking finding of the CBM study is that trade unions and employees were not even given the chance to negotiate. The primacy of negotiations, formerly the linchpin of all EU legislation on workers participation for over a quarter of century, is being eroded.

Furthermore, the short-sighted but heavy reliance of the CBM implementation on the provisions of the previous SE Directive has given rise to several worrying gaps in the legal regulation of board-level employee representation in particular. For example, with respect to the nomination of board-level employee representatives in the absence of a negotiated agreement, the national transposition legislation merely refers to the relevant SE legislation. In the SE legislation, however, the fallback solution is that the SE-WC nominates the board members. How this rule is to be applied in the case of a cross-border merger where no EWC-type structure is present is entirely unclear.

In summary, the arbitrary and illogical experience with the implementation and practice of the CBM lends much weight to the ETUC’s demand for a common European standard on workers’ participation. Clearly it can be in no stakeholder’s interest that workers’ participation should be so inconsistent, so fragmented, and frankly, so arbitrary.
In 2004, the EU adopted the Takeover Bids Directive (2004/25/EC) designed to make it easier for companies listed on European stock markets to be taken over. An underlying assumption was that restructuring through takeovers is generally beneficial for the European economy and for workers. However, research conducted by the ETUI’s GOODCORP network of corporate governance and company law experts indicates that many if not most takeovers result in job losses; furthermore, the inadequate provision for workers’ rights in the Directive increases the risk that workers will be negatively impacted by takeovers.

Inadequate workers’ rights in EU takeover bids

In 2004, the EU adopted the Takeover Bids Directive (2004/25/EC) designed to make it easier for companies listed on European stock markets to be taken over. An underlying assumption was that restructuring through takeovers is generally beneficial for the European economy and for workers. However, research conducted by the ETUI’s GOODCORP network of corporate governance and company law experts indicates that many if not most takeovers result in job losses; furthermore, the inadequate provision for workers’ rights in the Directive increases the risk that workers will be negatively impacted by takeovers.

The Takeover Bids Directive does define some nominal rights for workers. Firstly, workers’ representatives are entitled to see the bidder’s ‘offer document’ which, among other things, states the planned impact of the takeover on employment and production locations covered by the takeover. Secondly, worker representatives in the target firm are entitled to inform shareholders of their opinion of the effect of the takeover. However, experience shows the inadequacy of these rights in practice. One weakness is that the worker rights provided for by the Directive come late in the takeover process. In many cases, particularly where companies are controlled by a large shareholder, the takeover is already, by the time the official bid is made, a ‘deal concluded’ between the bidder and the management of the target company. Workers need to be involved much earlier in the process, when the bidder management is considering the takeover or when management of the target company has been informally approached by the bidder.

A second weakness is that the Directive defines rights for workers of the takeover target, but not for workers in the bidding company. Studies show that employment losses after the takeover is completed are frequently more severe in the bidding company than in the takeover target. Thus the need for information and consultation rights during the takeover process is at least as great for employees of the bidder company as for those of the company to be taken over.

A third weakness is that the Directive does not define penalties for successful bidders who fail to keep their promises regarding employment and production locations. This became painfully obvious in case of the 2010 takeover of the UK firm Cadbury, in which, shortly after the takeover, the bidder company Kraft failed to honour its promises to keep open a key factory employing 400 persons. Public outcry over this spurred a revision of the UK takeover code, which made statements in offer documents legally binding for a limited period of time.

Experience from countries with formally stronger workers’ rights shows that workers in these countries do succeed better in defending their interests in takeover situations. For example, in a number of countries, worker representatives are involved at an earlier stage in the takeover process in companies in which they are represented on the board, or where works councils or local union representatives have extensive rights in restructuring situations. These rights exist for worker representatives both in the target and the bidding company. The EU Takeover Bids Directive should be revised to create such rights for workers in all EU countries, and to also define penalties for violations of statements made in offer documents. Worker rights could also be strengthened through a revision of EU competition policy to explicitly include social and environmental impacts in the criteria for approving or disapproving mergers.
Workers’ participation – taken to encompass information, consultation, and negotiations at all levels of the company – must be understood as a multi-level system, in which the processes and actors are intricately and flexibly articulated with one another. In carefully understanding and managing these links and interchanges, and in enabling an operationalisation of subsidiarity, workers’ participation can be fully developed as a genuinely European process.

While many ideas and practices are in place, the articulation process itself has yet to function smoothly and effectively. Vertical articulation refers to the procedural and institutional links between national and transnational information and consultation which lie at the heart of the Recast EWC Directive’s repeated attempts to define this relationship. The Recast EWC Directive provides more clear definitions of the competences, roles, and rights of the EWC, but what about the information and consultation at the local and national level which are meant to be linked to these strengthened transnational rights? Unfortunately, the Commission’s REFIT exercise targets precisely those local rights which are meant to be articulated with those of the EWC: day-to-day information and consultation, as well as in cases of restructuring, both of which have clear transnational implications.

Restructuring in multinational companies is seldom limited to individual countries; on the contrary, when whole divisions of a company are split off or shut down, information and consultation processes may be invoked in several countries at once. In line with the Recast EWC Directive’s new definitions, the cross-border implications of these processes put them squarely on the agenda of the EWC.

Furthermore, an examination of the transposition of those key provisions in the Recast EWC Directive that are meant to foster articulation yields some worrying gaps and omissions. While there may be a legal consensus that, in cases of doubt, the provisions of the Recast EWC Directive apply even if they have been inadequately transposed, the fact remains that strictly speaking, in the national legislation, domestic information and consultation is still considered completely separate from its transnational counterpart.

It is too early to expect the Recast Directive’s requirement that the EWC agreements define the arrangements for linking information and consultation at the transnational and national levels to be reflected in the ETUI’s database of EWC and SE-WC agreements. However, there is already a range of other provisions found in the EWC agreements that can contribute to more systematic linkages between levels. Since many of the gaps remaining in agreements have been closed in practice, it is safe to conclude that the toolbox of vertical articulation is fairly well stocked; more and better practice in actually using the tools contained therein still remains to be developed, though.

Turning now to what can be called horizontal articulation, the potential to forge new linkages between EWCS and SE-WCs and board-level employee representatives at the peak of the company on the one hand, and workplace health and safety representatives on the other hand, was explored. Bringing the voice of workers to the highest level of strategic and operational decision-making within companies is an important source of information and influence that can also be brought to bear on information and consultation processes at all other levels, both formally and informally. It remains to be seen how systematically transnational information and consultation can be linked to board-level employee representation even when only one country is represented on the board.

Linked to this, the gradual europeanisation of the employee bench on the boards of companies represents an entirely new chapter in the europeanisation of industrial relations, for two reasons: firstly, the actors concerned are confronted with the multi-nationality of the company’s workforce, and secondly, opening up the board to employee representatives from different countries enhances the possibility for board-level employee representation to be more systematically articulated with more countries and sites. Analysis of the application of the Cross-Border Mergers (CBM) Directive showed, on the one hand, that it had led to an unprecedented europeanisation of the employee side of the boards of the companies concerned, but also that the CBM legislation and its transposition into national law has left some baffling legal gaps and loopholes. The other horizontal articulation that deserves to be actively developed further is that between transnational information and consultation and workplace health and safety (OHS) representatives. The widespread incidence of OHS representatives across European workplaces amounts to a potentially powerful, well-resourced, trade-union-oriented network of activists at the company level. Multinationals are increasingly centralising policy areas, including health and safety protection, and the introduction of new technologies and new working methods across companies also raises new questions in the area of health and safety. Where these developments have cross-border implications, the EWC is competent to be involved in information and consultation at the European level, yet it is the local health and safety representatives who will be confronted with that policy. All the more reason to better link up those implementing it with those who have early, comprehensive and transnational information and consultation rights.

Another source of information and consultation rights which can and should usefully be articulated with those of the EWC and SE-WC is to be found in company law. For the Takeover Bids Directive, however, there are several important weaknesses in the current arrangements which mean both that information and consultation are provided far too late in the process, and also that they risk not getting any real purchase on the key issues.

Overall, we can conclude that while many of the parts of the whole are in place, some are more developed than are others. Between the national-level and the European level, and between them and employee representation rights in the area of health and safety and on the board, there remains much work to be done to build robust but flexible links.