

Briefing paper series on the Company Law Package — Analysis of the proposed Directive on Cross-Border Conversions (CBC), Mergers (CBM) and Divisions (CBD) with respect to the links to the *acquis* on information and consultation rights.

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What's the problem?

- Company law impacts workers' rights, many of which are already captured in the EU *acquis*. Yet rather than to firmly anchor this company law package in the context of workers' rights *acquis*, this proposal skirts and ignores these rights.

Relevant Acquis	
Fundamental Rights texts	
• Council of Europe European Social Charter	Art 21., Art. 29
• European Pillar of Social Rights	Principle 8
EU Primary Law	
• TFEU	Article 153
• Charter of Fundamental Rights in the EU	Article 27
• Community Charter of Fundamental Social Rights	Points 17 & 18
EU secondary law	
• EWC Directive	2009/38/EC
• SE Directive	2001/86/EC
• CBM Directive	2017/132 (Was 2005/56)
• I&C Framework	2002/14/EC
• Collective Redundancies	98/59/EC
• Transfer of Undertakings:	2001/23/EC

- **Consistency and coherence**
 - Consistency with the Acquis above is the minimum which we should demand of CBC, CBM, & CBD, particularly with respect to Directives which already have a cross-border dimension, like EWC and the SE.
- **Close loopholes and legal vacuums**
 - Case law already shows that rights are currently not respected, so clear and unambiguous wording is all the more important.
 - Case studies of CBM and Takeover Bids Directives show that information obligations do not function as intended.
- **Foster upwards convergence**
 - The EPSR is geared towards “upward convergence”—i.e., proposals should not downgrade existing rights.
 - Over the course of the relevance I&C Acquis, each successive act has in effect improved upon the acts which preceded it. Although this will not solve all problems, this leapfrogging approach to consolidating and strengthening I&C rights should be continued with the Company Law Package. Incremental improvement and coherence is better than none.

What is in the proposed Directive?

- Information obligations and opportunity to append an opinion across CBC and CBD with (partial) reference to SE Directive; CBM stays below this.
- However, receiving an official report and opportunity to develop and publish an opinion is not “information and consultation” as we understand it in EU acquis. It lacks the definition of what constitutes adequate and timely information and consultation which is found in other acts in the EU Acquis.
- Frequent references to “employee representatives” but without specifying who that is.
- “without prejudice to...” EU Acquis: this is important, but insufficient.

Provision	CBC	CBM* <i>Check CBM Dir text.</i>	CBD
Draft terms publically available	86d	123	160e
Report to shareholders to be made “similarly available to employee reps”	86e (3)	124	160g (3)
Right to waive report to shareholders (and on what basis?)	86e	124	160g
Report for employee reps	86f	124a	160h
“W/O prejudice to...”	I&C / EWC	ToU/I&C/EWC	
Employee reps’ right to comment	86h /86f (4) / 86p(s)	124a (4)	160j(4)(1) c
Board-level representation “Participation” negotiations and fallback rules	86l	-:- ref SE	160o, 160p, 160r
Information about “what happened to BLER ?”	86m (4), 86n	No?	
Employee reps access to expert report/Assessment leading to decision whether to issue certificate’?	?	?	Check: 160i, 160j?
Legal redress mechanism	To be checked	To be checked	To be checked

What are the shortcomings & what could be done to fix them?

- **Anchoring of I&C Acquis**

- a) *Problem:*

- i) too vague, not specific enough to clearly protect employees' rights to be informed about the proposed changes nor to be consulted about them.
 - ii) "Without prejudice to..." important to protect those rights, but does nothing to ensure that the specific cases of CBC/CBM/CBD will be subject to proper I&C.
 - iii) It's about articulation: No assurance that employee representations at all levels are informed and consulted (local, national, group, European and BLER at national level where applicable)

- b) *Solutions:*

- i) Refer to specific information and consultation procedures and definitions for each case CBC, CBM, CBD
 - ii) Refer explicitly to the I&C Acquis throughout, "*Provisions ABC of XYZ apply mutatis mutandis*"
 - iii) "Without prejudice to..." should read "*...information and consultation rights instituted at national level AND following the transposition of [I&C framework, EWC, SE-D, ToU, CollRed, etc.]*"
 - iv) What about confidentiality requirements?

- **CBC/CBM/CBD and ToU Directives:**

- a) *Problem:* unclear link to ToU / Acquired rights. ToU provides for I&C about the process **AND** secures the retention of acquired rights.
 - b) *Solution:* Specifically link to ToU provision that employment rights (including collective agreements) must be maintained after the Conversion/Merger/Division, since this is part of the acquis.

- **CBC/CBM/CBD and Collective Redundancies Dir** : Similar approach as for ToU, above

- **Conversion means slicing off the top layer and I&C counterpart & legal basis for I&C**

- a) *Problem:* No solution proposed for cases in which a conversion, division, or merger effectively deprives existing employee representation (i.e., local, central, group or European/SE works council of their I&C counterpart).
 - b) *Solution:* propose solution "*Real Administrative seat* " and their obligations are retained for I&C purposes.

- **Applicable law / Continuity:**

- a) *Problem:* If company transfers its seat, what does that mean for the applicable law of its negotiated EWC or SE-WC?
 - b) *Solution:* New negotiations? Old applicable law retained?

- **Partial & specific reference to SE Directive for fall back rules and negotiations**

- a) *Problem:* only covers board-level, not transnational I&C
 - b) *Solution:* add to list of references or copy paste in full.