



## Amicus section

### **Unite Amicus Section response to the Consultative Document on European Company Law and Corporate Governance (Implementation of Directive 2005/56/EC on Cross Border Mergers of Limited Liability Companies) March 2007**

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**This response is submitted by Unite Amicus Section. Unite is the UK's largest trade union with 2 million members across the private and public sectors. Our members work in a range of UK and European owned companies in sectors including manufacturing, financial services, print, media, construction, local government, education and not for profit.**

#### **Introductory Comments**

- 1.1 The primary aim of the proposed legislation on cross border mergers, as with other legislation relating to the European Company Statute, is to offer to companies operating in EU member states the flexibility to adapt quickly and efficiently to the current and emergent opportunities in the internal market. Making a success of these opportunities is contingent on cooperation with company workforces, by consultation with them prior to merger and ongoing participation and involvement of workers in company structures.
- 1.2 The elements of the consultation on cross border mergers that propose the introduction of Special Negotiation Bodies and standard rules are welcomed but unfortunately they will not bring the UK fully into line with the Directive on worker involvement, nor will they tackle the negative elements of UK business culture that are distrustful of worker participation.
- 1.3 It is disappointing that the cross-border mergers directive as adopted starts to cut the legal standards established in the European Company Statute, mainly concerning the potential application of general rules on workers' participation. Moreover, inadequate safeguards for workers' participation in cases of subsequent domestic mergers of only three years could encourage managers to plan a mid-termed strategy to circumvent strong workers' influence.
- 1.4 The right of employees to nominate or elect representatives to the Board of Directors or to a company Supervisory Board currently exists in 18 of the 25 EU member states. Though the extent of this right and its specific characteristics differ a great deal from country to country, it is obvious that in many EU member states statutory participation rights at board level constitute an essential element of the national corporate governance system. In the UK there is no such requirement due to a business culture that acts in the sole interest of company shareholders and advances the rights of management.

- 1.5 In UK Company Law the decisions and actions of company directors are accountable to shareholders only. There is no legal provision for employee representation on company boards, nor are there any legally sanctioned structures to channel worker involvement in the running of the company. In the absence of provisions allowing employees to become company directors the definition of a company stakeholder should be widened to include employees and the communities within which firms operate.
- 1.6 UK law is limited to the obligation on companies to consult and inform workforces on a defined set of issues and through correlative structures rather than through permanent works councils. There is an obligation to inform and consult on issues of collective redundancy, transfer of undertakings, health and safety, occupational pension schemes and where European Works Councils or collective agreements apply.
- 1.7 Beyond these issues there is no automatic or universal right to or responsibility for the establishment of information and consultation structures. At the moment the right to establish information and consultation arrangements is restricted to undertakings of 100 or more employees with a reduction to 50 or more employees from April 2008. These rights are also latent and must be enacted either by employee request or through employer initiation. In many cases information and consultation processes are only implemented in workplaces where there is a trade union presence or as a mechanism to undermine existing trade union structures or prevent them being established.
- 1.8 Structures and legislation dealing with information and consultation vary across EU member states. In many countries rights to information and consultation are more robust than in the UK and unions have more influence over the remit, composition, election and workings of information and consultation bodies.
- 1.9 In the UK unions have faced difficulties in reaching information and consultation agreements, in part due to employer resistance and also through disputes over the existence of pre existing agreements and employee requests for information.
- 2.0 Unite Amicus Section is concerned that the employee participation system recommended in this consultation is also not sufficiently robust. Where Special Negotiating Bodies are to be set up the consultation does not propose much needed measures to inhibit employers abusing exemptions from disseminating confidential information.
- 2.1 There should also be provisions to enable trade union representatives and EWC members a fair chance to participate in elections to the SNB without having to first seek the permission of management.
- 2.2 Furthermore, the special information rights referred to in article 7 of the directive are not mentioned in the DTI's consultation or the attendant draft regulations.
- 2.3 The penalties for non compliance with rights to information and consultation which also apply to SNBs and the cross border merger process are also not a substantial enough deterrent. Penalties for non compliance should be related to and represent an appropriate proportion of company turnover.

**Question 6: The Government proposes the following options to address the situation at paragraph 5.12, and invites respondents' views accordingly:**

2.4 Unite Amicus section recommends that an SNB be established to determine the type of employee participation system to be applied in the new company. Full participation in the decision-making process should be given to workers representatives from all countries and concerned enterprises. Unite Amicus Section therefore recommends:

Option 1: To set up an SNB whose sole purpose will be to determine which type of employee participation system shall be adopted in the newly formed company;

**Question 7: With reference to paragraph 5.13 and where draft Regulation 36(4) (i) applies, how do you think the form of participation should be decided?**

2.5 In this case the decision should be taken by the Board of Directors, taking into account the number of workers covered by each form of participation. Regardless of who makes the final decision on the form of participation, in the absence of a decision being made by the SNB there should be a duty to maximise worker involvement in the decision making process. In the case of the SE the unions view is that the highest form of participation should apply.

**Question 8: Do you agree with the Government's intended approach in relation to Employee Participation?**

2.6 Unite Amicus Section does not believe that the Government's approach to employee participation is rigorous enough, based on accumulated experience of the application of existing rules on information and consultation.

**Question 9: If not, how do you think the Government should implement the Employee Participation provisions?**

2.7 There should also be provisions to enable trade union representatives and EWC members a fair chance to participate in elections to the SNB without having to first seek the permission of management. The need to acquire permission from management to stand for election represents a step backwards from the provision in the *Transnational Information and Consultation of Employees Regulations 1999*, in which UK SNB candidates must be "any UK employee, or UK employees' representative, who is an employee of or an employees' representative in, the Community-scale undertaking" (emphasis added). If trade union officials have a right to stand as SNB representatives for negotiating European Works Councils, there is no justification for making this subject to management approval for SNBs negotiating worker participation in the case of a cross-border merger.

2.8 Furthermore, the special information rights referred to in article 7 of the Directive are not mentioned in the DTI's consultation or the accompanying draft regulations. The management or administrative organ of each of the merging companies must draw up a common draft plan on the cross-border merger. This draft must include information on the likely repercussions of the cross-border merger for employment (Art. 5 lit. d).

- 2.9 The management or administrative organ of each of the merging companies must also draw up a report explaining and justifying the legal and economic aspects of the cross-border merger, including the implications of the cross-border merger for the employees (Art. 7 I). This report must be made available to the employees' representatives or to the employees themselves not less than one month before the general meeting, which approves the merger (Art. 7 II).
- 2.10 These provisions force the management to take into account the employment consequences of the merger at an early stage, and allow employees to anticipate and prepare for the proposed merger. Moreover, the employees' representatives can be given the right to append an opinion to the merger report of the management or the administrative organ. Inclusion of this right in the regulations would demonstrate commitment to worker information and consultation in the UK.

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**1<sup>st</sup> June 2007**

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