NATIONAL REPORT – IRELAND (Draft 1)

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1 Introduction

The Irish Congress of Trade Unions (ICTU) has been involved with partners in three European-funded study projects co-ordinated by the Confederation of Independent Trade Unions in Bulgaria (CITUB), with the support of the Bulgarian Industry Association (BIA), since 2009. The first two projects were INFORMIA I (2009-10) and INFORMIA II (2011-2012). This latest project, INFPREVENTA (2014-2015), builds on the findings from the two previous projects in investigating the extent and effectiveness of workplace information and consultation rights enshrined in EU and Member State legislation. It is estimated that there are some twenty-five further Directives with varying degrees of information and consultation rights in, for example, the area of occupational health and safety, enterprise re-structuring, working conditions and the European Commission's corporate governance agenda.

This paper is one of the contributions of the ICTU to the INFPREVENTA project. The paper reviews the findings from the two INFORMIA projects and, following on from these, investigates, in the current project, the relationship between information and consultation rights and the employment relationship, in particular how are workplace disputes influenced by employee involvement structures.

INFORMIA I investigated the nature and extent of information and consultation arrangements in four EU Member States and one candidate country - Bulgaria; France; Ireland; and Italy. Croatia also participated in the project and was, at the time, an accession country, it is now, of course, a EU Member State. This project was followed by INFORMIA II in 2011/2012 when there was a specific focus on local/national information and consultation fora and on how European Works Councils (EWCs) operate, in particular the operation and implementation of the EWC Recast Directive (2009/38/EC) through a series of case studies in a number of selected business sectors common in the participating Member States. The participating Member States in INFORMIA II were: Bulgaria; Cyprus; Italy; Ireland; and the UK. Croatia was also a partner country. Croatia became the 28th EU Member State on 1 July, 2013.

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The plan of this paper is as follows: Section 2 outlines the structure of Irish industrial relations and collective bargaining evolution and systems. Section 3 reviews the INFORMIA I and INFORMIA II projects, as they related to the Irish situation, and, building on the findings of these studies, Section 4 looks at information and consultation rights in EU corporate governance legislation, in particular the Takeover Bids Directive (Section 5) and the Cross-border Mergers Directive (Section 6). As a demonstration of how these rights work in practice, Setion 7 provides a case study of the unsuccessful bids by Ryanair to takeover Aer Lingus, demonstrating how the information and consultation rights in the Takeover Bids Directive operate in practice. Some conclusions from the paper are outlined in Section 8.

2. The Structure of Employment Relations in Ireland

2.1 Brief outline of Irish Industrial Relations

The ICTU contributions to the INFORMIA studies were undertaken within the historical and traditional framework of Irish industrial relations. Because of the close ties between the British and Irish trade union movements, going back to the nineteenth century when they were united under one Trade Union Congress, the Irish system of industrial relations has evolved from the British voluntarist model, based on an adversarial problem-solving approach. Indeed, for many years after Ireland gained its independence in 1922, both systems of industrial relation and the scope of legal powers given to trade unions were governed by the same set of UK 19th and early 20th century statutes.

The legacy of the industrial and political upheavals in the first decades of the twentieth century are still, to some extent, reflected in the trade union structures today. The ICTU represents trade unions in both parts of the island of Ireland, therefore, it operates under two different legal jurisdictions and two distinct political and economic entities. Indeed, ICTU is unusual in that it also has foreign (UK) unions as affiliated members, operating both in the Republic of Ireland (RoI) and Northern Ireland (NI). Many of these unions and, indeed, unions registered in RoI, have members in both parts of the island. It is also important to note that NI has evolved its own structures and particular system of industrial relations.

The approach of business and management to industrial relations has also been dominated by the substantial trade links with Great Britain since long before Irish independence, links that are still strong today. With these close business ties and with many subsidiaries of UK companies operating in Ireland, the traditional adversarial model of employment relations, with the emphasis on collective bargaining, has been the dominant system. This system has been re-enforced in recent decades by the establishment of subsidiaries of US companies, in particular non-union electronic, software and social media companies, in Ireland.

The State, for its part, supported this system by encouraging the 'voluntarist' model and, consequently, it took a minimalist approach to regulating the employment relationship through legislation. The State, however, does provide the dispute resolution machinery and these institutions, such as the

Labour Court and the Labour Relations Commission (LRC), strive to maintain industrial peace within parameters agreed at the national level. [1]

In the past, information and consultation structures, therefore, have not been central to the Irish system of industrial relations. However, there has been some change in this since Ireland became a member of the EU in 1973, with the emergence of more consensual employment relations, influenced by a series of legal instruments agreed at the EU-level, but the precept of negotiating 'in a spirit of co-operation' found in all EU information and consultation Directives is not an integral part of Irish industrial relations. So, where information and consultation structures, such as works councils, have been introduced, more often than not, they operate in parallel to the adversarial collective bargaining process.

2.2 Collective Bargaining

While National Wage Agreements had, on and off, been the norm since the late 1960s, a series of National Social Partnership Agreements provided a continual framework for centralised collective bargaining since 1987. These agreements were negotiated between the unions, employers, farming organisations and Government. They were not legally binding but were widely observed.

The National Social Partnership Agreements provided pay guidelines for both the Private and Public Sectors, but also covered broader economic and social issues. The scope of the agreements was extended over the years with an additional focus on tackling poverty, social exclusion and promoting social partnership. Community and Voluntary organisations participated in the negotiations and signed up to the agreements from 1997 on. The last such agreement was Towards 2016 (T16), ratified in September, 2006, which covered pay, pensions, compliance with labour standards and work-life balance issues.

In the light of the deteriorating economy environment, T16 was reviewed in 2008 and, after what were considered the most difficult set of negotiations to date, a transitional agreement was eventually reached in September, 2008, (T16 Review and Transitional Agreement 2008-2009) which included a pay agreement, in three phases, for 21 months. This Transitional Agreement also covered a range of additional issues, such as the management of change, training and skills levels and pensions. There was also a commitment by the Government to enact legislation to set up a new State agency to ensure the implementation and enforcement of statutory employment rights, the National Employment Rights Authority (NERA). [2]

Almost as soon as this interim agreement was signed, it ran into difficulties as Ireland was hit by a tsunami of economic, financial, banking, fiscal and

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[1] New legislation published by the Government in July 2014 proposes a re-structuring of these State services by merging five agencies, including the LRC, the Rights Commissioner Service and NERA, into a new Workplace Relations Commission

[2] ibid

employment problems. Following a series of unilateral actions by Government, such as cutting the pay and pensions of Public Sector employees, increased taxation for all workers and the significant cutting of Public Services, including social benefits, both ICTU and the employers' organisation, IBEC, joined forces to try to persuade the Government to re-engage with them on a national recovery plan which would urgently address rapidly increasing unemployment levels, which doubled in a year, and the credit and cash-flow crisis for enterprises. The series of National Social Partnership agreements finally broke-down in December, 2009, when the Government rejected the social partners' proposals for a recovery plan and 'walked away' from a proposed Public Sector agreement.

However, agreement was eventually reached in the summer of 2010 with the Public Service Committee of the ICTU on reform of the Public Services, including the civil service, health, education, local authorities and the security services. The agreement included commitments to a reduction in Public Service employment, redeployment within and across the Public Service and a redesign of how services are delivered. The Government, for its part, agreed not to make any further reductions in the pay of serving Public Servants during the period of the agreement. [3]

3 Two European Commission-funded Study Projects

There was no statutory system for permanent employee representation in the Private Sector in Ireland. Those who worked in unionised workplaces – about one-third of the total – had representation though the trade unions. In most cases, employees are either represented through their unions, or not represented at all. [4] However, new legislation to facilitate such arrangements was introduced as a result of the EU Information and Consultation Framework Directive (2002/14/EC). Unfortunately, there are no recent definitive studies providing information on how many, if any, company-level agreements have been concluded as a result of this legislation.

However, within the Irish Public Sector, State agencies and State-owned companies do have statutory works council type bodies for information and consultation – so-called sub-board or partnership structures – as part of a general framework of participation, but, again, these function parallel to the adversarial industrial relations arrangements.

3.1 INFORMIA I Survey

This study analysed, not just information and consultation procedures arising from the transposition of the Information and Consultation of Employees Directive (2002/14/EC) in the participating countries, which was transposed into national legislation by the Employees (Provision of Information and Consultation) Act, 2006, but also more long-standing arrangements, such as

[3] *Public Service Agreement, 2010-2014* (Known as the 'Croke Park Agreement'), June 2010. This agreement was revised by the 'Haddington Road Agreement' in 2013, see http://www.per.gov.ie/haddington-road-agreement.

[4] *Informing and Consulting with the Workforce - What the New Directive means for Ireland's Voluntarist Tradition* O'Mara C (2003) Commercial Law Practitioner 15 at 16

the European Works Councils (EWCs) and the rights to information and consultation on occupational health and safety issues within workplaces.

As part of this project, the ICTU undertook a limited survey of Irish workplaces and the findings of this survey, taken together with the findings of the National Workplace Survey [5] and the European Foundation's European Company Survey (ECS) results for Ireland, [6] indicated that there was a long way to go before information to and consultation of workers in the policies and strategies of the companies and organisations on which they work would be the *modus operandi* of Irish employment relations.

The indications from this survey were that the worker director system in Irish State-owned companies and agencies works well but that the political environment in Ireland has shifted against such employee involvement arrangements. Second, with regard to occupational health and safety structures, these are not given the same weight by the trade unions and management, as an information and consultation process, as when the various pieces of framework legislation were introduced and possibly needs to be re-energised. Third, company-level information and consultation arrangements were not widespread in the Private Sector or effective in Irish workplaces and, where there were information and consultation structures operating at different levels within workplaces, there was a lack of connection or co-ordination of these different structures, with employee representatives operating independently of each other within enterprises and organisations. [7]

The survey showed that information and consultation arrangements, in the workplaces of respondents, breakdown as follows:

Table 1 Type of Information and Consultation Arrangement in Organisation (%) [8]

Health and Safety Committees	55.2
Works Council or similar (e.g. Partnership arrangements)	35.2
Worker Directors (i.e. Board-level representatives)	22.4
European Work Councils	6.4
Others	4.0

The survey also showed that information and consultation arrangements were incorporated into 77% of company collective agreements.

Second, in line with a commitment made in T16, the National Centre for Participation and Performance (NCPP) commissioned the second in a series of national attitudinal surveys of employers and employees - the

[5] National Centre for Partnership and Performance (NCPP) (2010) *The National Workplace Surveys 2009, volumes 1 (Employers) and 2 (Employees),* Dublin

[6] European Foundation for the Improvement of Living and Working Conditions, Dublin (2009) *Implications of proposed EU Information and Consultation Directive in Ireland* (Results for IE from the 2013 ECS were not available at the time of writing)

[7] The findings of the INFORMIA survey should be treated with caution as they are indicative, because of the small number of responses

[8] Totals are more than 100%, as some workplaces had multiple information and consultation arrangements in place.

National Workplace Survey, 2009. The survey comprises three separate research questionnaires: a) for almost 2,700 employers in Private Sector enterprises; b) 360 Public Sector managers; and c) for over 5,100 employees and staff in both the Public and Private Sectors. The responses to these questionnaires collectively form the most comprehensive survey of workplace attitudes undertaken in Ireland.

It is worth noting that the employee responses to the existence of 'formal partnership agreements' in the Public Sector were, at forty-one per cent, some fifty-five-percentage points below the responses from Public Sector managers (see Table 2). The level of partnership agreements in the Public Sector indicate that, where there were legal requirements to have partnership structures, there was a greater likelihood of such arrangements been in place, but there was a communications and information gap between those involved as employee representatives and fellow staff members.

Table 2 Formal partnership arrangements (%)

Formal Partnership arrangements	Public Sector	Private Sector
Employers' survey	96	16
Employees' survey	41	16

Employers in the Private Sector and managers in the Public Sector stated that they engaged with employees and staff, with over three-quarters of respondents in both the Public and Private Sectors saying that they inform and consult on changes in the workplace, (see Table 3).

Table 3 Employee Involvement (Employers' survey) (%)

Forms of employee involvement	Public Sector Mangers	Private Sector Employers
Information/consultation on workplace changes	75	80
Information/consultation on business context	88	70
Direct employee involvement in decision-making	72	63
Employee discretion in carrying out work	44	67
Arrangements for work-life balance	98	56

On the other hand, the findings relating to information and consultation arrangements, involving both representative and direct participation, were that almost half of respondents indicate that they were regularly communicated with about changes that would impact on their work, while thirty-six per cent of employees and staff in both the Public and Private Sector say they were informed, for example, of changes to the organisation of work, (see Table 4), indicating a difference of perception between managers and workers on the effectiveness of internal communications.

Table 4 Information communicated by employer/manager (Employees' survey) (%)

Private Sector						
	Plans to develop new products/ services	Plans to introduce new technology	Plans to re-organise the firm	Plans to change work practices	Sales, profits, market share information	Plans to reduce staff numbers
Regular information	44	37	30	36	36	25
Hardly never receive information	22	26	31	27	43	35
Public Sector						
	Budgets	Plans to introduce new technology	Plans to improve services	Plans to re-organise delivery of services	Plans to change work practices	Plans to reduce staff numbers
Regular information	33	34	41	34	36	29
Hardly never receive information	46	28	23	28	24	36

3.2 INFORMIA II

INFORMIA II undertook a series of case studies on how European Works Councils (EWCs) operate, in particular the implementation and operation of the EWC Recast Directive (2009/38/EC). The EWCs selected were in companies operating in a number of selected business sectors common in the participating Member States, for example, financial services, food and drink and pharmaceuticals. The EWCs studied in Ireland were Coca-Cola Hellenic Bottling Company (CC HBC) and the Coca-Cola Company (TCCC) Europe Group, GlaxoSmithKline (GSK) and AVIVA Insurance.

The key findings of these case studies were that:

1. Members of EWCs did not get sufficient support from their trade unions in terms of training. However, some trade unions (for example, UNITE) and European level industrial federations (for example, UNI-Finance and Federation of Trade Unions in the Food, Agriculture and Tourism (EFFAT)) did support and advise EWC members
2. While, in general, management of the companies studied were positive towards EWCs and the transmission of information was better at the EWC level than was the case through national information and

consultation fora. Therefore, EWCs were considered a good source of information for the national level trade unions on future company strategies, how these might impact on Irish workers and, therefore, were considered useful for developing policies to protect members, jobs and working conditions and for collective bargaining negotiations

3. While the 2009 EWC Recast Directive came into force during this INFORMIA II project, the relationship between EWCs and local information and consultation arrangements were examined and it was found that this was very much up to the individual EWC member to organise a dissemination of information. This, however, was made more difficult by the multi-location structure of three of the companies investigated in Ireland
4. The annual EWC general meetings were considered ineffective, but were useful as a way of meeting company colleagues from other Member States, in particular during the pre-meeting, in understanding their national/local concerns and identifying common issues across the EU sites that could be raised at the general meeting. However, where they were in place and effective, the EWC Select Committees were where the power lies, because they meet frequently, have detailed consultation with management and are seen to achieve results.

4 Corporate Governance in the EU

4.1 INFPREVENTA Project

Building on the findings of the previous two projects, INFPREVENTA set out to assess the impact information and consultation arrangements have on the employment relationship, in terms of conflict and workplace disputes by posing the question:

> *Does good employee involvement arrangements improve industrial relations?*

To study this hypotheses, and having studied the various forms of employee involvement under the information and consultation EU Directives and subsequent transposition into national laws, the partners in this third project agreed to focus on other Directives which provide legal rights for employees to information and consultation, in particular in corporate governance legislation. [9]

4.2 European Union Company Law Action Plan

In response to the corporate scandals of the early 2000s in the US (e.g. Enron, Tyco, WorldCom) and in companies operating within the EU (e.g. Parmalat, MG Rover), the European Commission set up a High Level Expert Group on Company Law and following this group's report and proposals, it launched, in 2003, a Company Law Action Plan designed to address the

[9] The INFPREVENTA partner organisations are: CITUB (Project co-ordinator) Bulgaria; BIA, Bulgaria; SEK, Cyprus; ICTU, Ireland; IRES Roma Italy; and Royal Holloway College, UK.

shortcomings of existing corporate governance controls within the EU. The main objectives of the Action Plan were:

- *To strengthen shareholders' rights and protection for employees, creditors and the other parties with which companies deal, while adapting company law and corporate governance rules appropriately for different categories of company*
- *To foster the efficiency and competitiveness of business, with special attention to some specific cross-border issues.*

To achieve these objectives, the Commission proposed the following:

- *The introduction of an Annual Corporate Governance Statement. Listed companies would be required to include in their annual documents a coherent and descriptive statement covering the key elements of their corporate governance structures and practices*
- *The development of a legislative framework aimed at helping shareholders to exercise various rights, for example, asking questions, tabling resolutions, voting in absentia, or participating in general meetings electronically*
- *The adoption of a Recommendation aimed at promoting the role of (independent) non-executive or supervisory directors. Minimum standards on the creation, composition and role of the nomination, remuneration and audit committees would be defined at EU level and enforced by Member States, at least on a "comply or explain" basis*
- *The adoption of a Recommendation on Directors' Remuneration. Member States would be invited to put in place an appropriate regulatory regime giving shareholders more transparency and influence, including detailed disclosure of individual remuneration*
- *The setting up of a European Corporate Governance Forum to help encourage co-ordination and convergence of national codes and of the way they are enforced and monitored.*

Other corporate governance initiatives proposed in the Action Plan were:

- Better information on the role played by institutional investors in corporate governance
- Giving further effect to the principle of proportionality between capital and control
- Giving listed companies the choice between having a one-tier or a two-tier board structure
- Enhancing directors' responsibilities for financial and key non-financial statements.

The Action Plan noted that there is a strong medium to long-term case for aiming to establish a real *shareholder democracy* and that the Commission proposed a study on the consequences of such an approach.

The Action Plan outlined a range of proposals for *Regulations, Directives* and *Recommendations* intended to strengthen shareholders' control of how companies were managed, including improving the quality of auditing; to

facilitate the transfer of the seat of a company from one Member State to another; to introduce actions against the abuse of 'pyramid' structures by company groups; build on the legislation for SEs and SCEs by introducing other new EU-level legal forms, such as European Private Companies, European Co-operatives, European Associations and European Mutual Societies. [10]

These proposals also included a plan to introduce a Directive to regulate how takeover bids are conducted and a proposal for amendments to Directive EEC/78/855 on mergers of public liability limited companies, to facilitate cross-border mergers. When introduced, both these new Directives incorporated rights to information for employees of the involved companies when a takeover bid is made or when a cross-border merger is proposed. They also provided for employees, through their representatives, to give an *opinion* on the takeover bid or merger.

This Commission Action Plan and, indeed, the follow-up Plan in 2012, placed the emphasis of EU corporate law on the 'shareholder-value' model, rather than the wider 'stakeholder-value' approach. [11] In adopting this former model, the Commission undermined the legislative advances made in providing workers with rights to involvement and a say in the formulation of policies and strategies within their places of employment. The European trade unions have argued that the recent recession and economic and financial crisis was the result of the failure of the shareholder-value model and poor corporate governance, that this model has failed and that there is now a need for other stakeholders, in particular workers, to have a voice through legislation:

> *Workers, in particular, have a long-term interest in the sustainability of their companies, as opposed to many financial investors who pursue short-term financial profits. Changes in company law which could help increase the voice of stakeholders include:*
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> - *Defining an obligation of company directors to take into account the interests of stakeholders, not just shareholders*
> - *Strengthening workers' participation rights in addressing the implementation and consequences of re-structuring situations, such as takeovers and mergers*
> - *Obliging companies to provide comprehensive and detailed information on social and environmental performances.* [12]

[10] European Commission Communication *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward* (COM(2003)284) For a discussion on the Action Plan see *How did we end up here? The rise of shareholder value in EU corporate governance regulation* L Horn, in *The Sustainable Company: a new approach to corporate governance* eds S Vitols and N Kluge, ETUI, Brussels (2011). Ch 2

[11] European Commission Communication *Action Plan: European company law and corporate governance - a modern legal framework for more engaged shareholders and sustainable companies* **(**COM/2012/0740)

[12] *Benchmarking Working Europe 2014* ETUI, Brussels (2014), Ch 7

5 Takeover Bids Directive (2004/25/EC)

The idea of a Directive to regulate company takeovers and to harmonise rules across the EU was first suggested in the 1970s when the European Commission commissioned a report. The resulting Pennington Report, which included draft proposals for a Directive that had some provisions for employee information and consultation. [13] However, the focus of the report was on protecting the interests of shareholders and bondholders, with a 'neutrality role' for the enterprise board members (the board neutrality rule). The report and draft Directive were heavily influenced by the code of the UK Takeover Panel (called the 'City Code'), which had been established in 1968.

After consideration of the report, the Commission included a proposal for a Takeover Bids Directive in its 1985 White Paper on the completion of the internal market. A draft Directive, which was published in 1989 and revised in 1990, followed closely that proposed by the report. [14]

Consultation with the Council of Ministers on this draft highlighted the differences in business cultures and corporate governance traditions across the then Member States. The Commission subsequently amended its proposals and re-introduced a draft in 1996 (with further amendments in 1997 and 1999). [15] Eventually, agreement having been reached between the Commission and Council, a text was sent to the European Parliament (EP). The ensuing debate resulted in a fundamental clash of corporate cultures, with the 'liberal market economies', such as the UK and Ireland, on the one side and 'co-ordinated market economies', such as Germany and France, on the other side and a number of amendments not acceptable to the Council and Commission were proposed by the EP. [16]

Many major German companies, for example, Volkswagen and DaimlerChrysler, and the German trade unions were opposed to this 1999 draft, which they considered as a way of introducing Anglo-American, shareholder based forms of law, governance and economic organisation on enterprises, in contrast to the continental stakeholder model. [17]

Commissioner Bolkestein also contributed to this debate with a stinging criticism of trade unions:

> *Trade unions cling to traditional rights as though these were valid forever, regardless of economic conditions. They want to remain within the comfortable and secure boundaries of what has been referred to as the Rhenish model of capitalism, where stakeholders are pampered instead of shareholders and where consultations take place on numerous round tables. However, if Europe really wants to become the*

[13] *Report on Takeovers and Other Bids* RR Pennington (COM Doc XI/56/74) (1974)
[14] Official Journal, OJ No C 64/1989 page 8 and Official Journal , OJ No C 240/1990 page 7
[15] Official Journal, OJ No C 162/1996 page 5
[16] Official Journal, OJ No C 23/2001 page 1 and Official Journal, OJ No C 232/2001 page 18
[17] See *The Takeovers' Directive – A Meaningful Contribution to Stakeholder Rights in Europe?* B Clarke, TCD, University of Dublin, ETUI GOODCORP Project forthcoming) 2015

most competitive and most modern economic area, it must leave the comfortable setting of the Rhenish model and subject itself to the harsher conditions of the Anglo-Saxon form of capitalism where the rewards, but also the risks, are higher. [18]

As there was no meeting of minds on the different approaches to these corporate governance traditions, the vote in the EP was tied and, consequently, the proposed Directive was rejected.

Following this set-back, the European Commission and the European Council (Heads of Government) still considered such a Directive essential to meet the objectives set out in the Lisbon Strategy, agreed in 2000, *to make Europe, by 2010, the most competitive and the most dynamic knowledge-based economy in the world*. [19] The Commission brought together yet another group of experts charged with making recommendations to resolve the impasse. The resulting Winter Report reiterated much of what had been included in the rejected Directive, including the rights of employees, which it considered 'adequate'. [20]

However, it proposed that if there were continuing concerns about the interests of employees, then a separate Directive might be introduced providing protection of information and consultation rights in the event of a takeover leading to re-structuring. It also reiterated the right of shareholders to make the final decision on a takeover bid to be a key principle of EU company law, with the board acting in a neutral role in the process, as set out in the earlier Pennington Report.

Based on the recommendations of this High Level Group, a revised draft Directive was published by the Commission in 2002. At the debate of the Council of Ministers, the Portuguese Presidency proposed a number of compromises, including allowing the 'board neutrality rule' to be optional for Member States in transposing the Directive into national legislation. [21] This compromise Directive was finally adopted in 2004, with a transposition date of 2006, after some thirty years of debate.

5.1 Employee Information and Consultation Rights

Article 3 of the Directive sets out six 'general principles' for the implementation of the Directive, ensuring that all holders of equity in the company that is the target of the bid (the 'offeree') are treated equally; that the board of the offeree

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[18] As quoted in *European Integration and the Clash of capitalisms: Political Cleavages of Takeover Liberalisation* H Callaghan and M Höpner in Comparative European Politics Vol 3 (2005). Palgrave Macmillan, UK, and quoted by Clarke op cit.

[19] Presidency Conclusions, Lisbon European Council, 23 and 24 March, 2000.

[20] *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids* (2002) See: http://europa.eu.int/comm/internal_market/company/takeoverbids/indeex.en.htm

[21] In 2012, the European Commission appointed Marccus Partners (a French-based international Law Firm) to undertake a comprehensive study of how the Directive functions in practice. The resulting study (*Study on the Application of Directive 2004/25/EC on Takeover Bids* (2012)) found that nineteen of the twenty-seven Member States included the 'board neutrality' rule in its legislation. See: europa.eu/internal_market/company/docs/takeoverbids/study/study_en.pdf

company must act in the interests of the company as a whole; that the company making a takeover offer (the 'offeror') can fulfil its bid in full; and that the business of the offeree company is not unduly hindered for longer than is reasonable. [22]

In general, the Directive provide employees, in both the offeror company and the offeree company, with certain rights to information, and the right of the employees and/or their representatives of the offeree company to provide an 'opinion' on a propose takeover of the enterprise in which they are employed.

With regard to the protection of employment and employee rights, the five key Articles of the Directive are:

- 3.1 (b): Deals with the requirement of the board of the offeree company to give its views on the effects of implementation of the bid on employment, conditions of employment and the locations of the company's places of business
- 6.1: As soon as a takeover bid has been made public, the boards of both the offeree and offeror companies are required to inform the representatives of their respective employees or, where there are no such representatives, the employees themselves
- 6.2: When the offer document has been make public, the boards of both companies shall communicate it to the representatives of their respective employees or, where there are no such representatives, the employees themselves
- 6.3(i): The offeror company is required to set out its intentions in its bid document with regard to the future of the business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of jobs of their employees and management, including any material change in the conditions of employment, and in particular, the offerors' strategic plan for the two companies and likely repercussions on employment and the locations the companies' places of business
- 8.2: Requires national legislation to ensure that all information and documents are both readily and promptly available to the representatives of the employees of the offeree and offeror companies, or, where there are no such representatives, to the employees themselves
- 9.5: Requires the board of the offeree company to set out its views on the effects of the implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree and the likely repercussions on employment and the locations of the companies' place of business as set out in the offer document. The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the board of the offeree company receives in

[22] The European Court of Justice has ruled that these 'general principles' are 'guiding principles' for the implementation of the Directive and are not independent general principles in Community law. See EJC Case C-101/08

good time a separate *opinion* from the representatives of its employees on the effects of the bid on employment, that *opinion* shall be appended to the document

- 14: Ensures that the Directive is without prejudice to existing information and consultation legislation and, where Member States provide co-determination with the employees of the offeror and the offeree companies governed by the relevant national provisions, and in particular those adopted following the introduction of Directives 94/45/EC, 98/59/EC, 2001/86/EC and 2002/14/EC.[23] The purpose of this Article is to confirm that the close and effective involvement of the companys' employees is an important factor not only for the success of the operation but also for proper consideration of the different interests that may be affected by the takeover. [24]

The general thrust of the Directive still remains shareholder, rather than stakeholder, focused. Consequently, the role for employees, as stakeholder, is minor and subsidiary to that of shareholders. As can be seen from the above, while the Directive provides for employees and/or their representatives to be kept informed during the takeover process, 'consultation' is restricted to submitting an *opinion* on the bid documents, for attachment to the advise from the board of the offeree company to its shareholders, who are free to disregard it in making their decision to keep or sell their shares. Of course, in the event of a takeover offer been made, the interests of employees and those of the shareholders in the offeree company do not generally concur.

5.2 Review of the Directive

A perception survey undertaken as part of the Marccus Report for the European Commission found that of the stakeholders (supervisors, stock exchange representatives, investors, stakeholder associations, etc.) interviewed, 73% were of the view that employee rights in the Directive were sufficient, while 100% of employee representatives interviewed strongly disagreed, arguing that the information on employment is not always adequate.[25] Indeed, the European Commission, in its report in response to the Marccus Partner review, states that one of the objective of the Directive is the protection of the interests of shareholders, in particular minority shareholders, and of employees and other stakeholders through transparency and information rights, when a company is subject to a takeover bid or change of control and, when consulted through the Marccus perception survey, the Commission recognised that representatives of employees are not satisfied with how the Directive safeguards the interests of employees, noting that

> *In particular, they expressed the view that the Directive does not sufficiently protect employees against the risk of change in working conditions or redundancies after the takeover… and the required information is not always given in time, or is inadequate and that takeover*

[23] Respectively, the original EWC Directives (replaced by the Recast Directive, 2009); the SE Directive and the Framework Information and Consultation Directive

[24] Clarke op cit

[25] Marccus Partners' Report (2012) op cit

offers have a significant impact on working conditions and redundancies. Moreover, after the bid, they claim that there is no control over whether the offeror will do as he stated in the information disclosed in the offer procedure.

In the light of the findings by the Marccus Partners report, the Commission undertook to pursue its dialogue with employee representatives with a view to exploring possible future improvements to the Directive. [26]

5.3 The Transposition of the Directive into Irish law - Irish Takeover Panel

The Irish Takeover Panel Act, 1997, established the Takeover Panel as a limited company. Prior to its establishment, the UK Takeover Panel acted on behalf of Irish businesses in the event of takeover bids.

The board of the Panel consists of seven members, representatives of:

1. The Consultative Committee of Accountancy Bodies, Ireland
2. The Law Society of Ireland
3. The Irish Association of Investment Managers
4. The Irish Bankers Federation
5. The Irish Stock Exchange.

The Governor of the Central Bank has the powers to appoint the Chairperson and Deputy Chairperson of the Panel. There are no representatives of trade unions or workers and there was no requirement in this legislation for the Panel to inform employees of either the offeror or offeree companies when a takeover bid is made.

In undertaking hearings into takeover bids, the Panel has quasi-judicial powers. It has the powers, rights and privileges of the High Court to require the attendance of witnesses and to examine them under oath. A witness before a Panel enquiry is entitled to the same immunities and privileges as if he or she were a witness before a Court and any witness that obstructs the work of the Panel, gives evidence that he or she knows to be false or does not believe to be true or who doesn't produce relevant documents when requested by the Panel to do so is considered to have committed an offence and can be referred to the High Court for a judicial review.

5.4 SI 255 of 2006

Statutory Instruments (SI) are a legal mechanism for the introduction of secondary legislation without having to take primary legislation through all legislative stages in the two houses of the Oireachtas (parliament) and are defined by the Statutory Instruments Act, 1947, as being "an order, regulation, rule, scheme or bye-law made in exercise of a power conferred by statute". A SI sets out legislation through a series of 'Regulations'. They are available to

[26] *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2004/25/EC on takeover bids*, COM (2012) 347 final

members of the Oireachtas for scrutiny for 21 days and become law when signed by the relevant minister and published in the Official Journal of the State (*Iris Oifigiúil*).

SI 255, 2006, amends the Irish Takeover Panel Act, 1997, and transposes Directive 2004/25/EC into Irish legislation. The Schedule to the SI amends the relevant parts of the Takeover Panel Rules. Other articles of the Directive were transposed directly into Irish company law.

With regard to the Directive articles related to employee rights, the relevant Takeover Panel Rules are amended as follows:

- In line with Articles 3.1 (b) and 6.3 (i) of the Directive, Rule 24.1 covers the impact of the bid on employment, conditions of employment and the locations of a company's places of business. [27]

  INTENTIONS REGARDING THE OFFEREE, THE OFFEROR AND THEIR EMPLOYEES:
  An offeror shall inform the shareholders of the offeree of the following matters in the offer document:
  (a) its intentions regarding the future business of the offeree and its subsidiaries;
  (b) its strategic plans for the offeree ***and their likely repercussions on employment*** *and on the locations of the offeree's places of business;*
  (c) its intentions regarding any redeployment of the fixed assets of the offeree and its subsidiaries;
  (d) the long-term commercial justification for the offer; and
  *(e****) its intentions with regard to safeguarding the employment of the employees and management of the offeree and of its subsidiaries, including any material change in the conditions of employment****.*
  Where the offeror is a company and insofar as it is affected by the offer the offeror shall also disclose in the offer document the information set out in paragraphs (a), (b) and (e) in relation to itself. [28]

- The disclosure of information to employees of both the offeror and offeree companies and/or their representatives (Article 8.2, and Article 9.5): New Rule 2.6 (c) and (d) states that:

  (c) after publication of an announcement made pursuant to Rule 2.5, both the offeror and the offeree shall make that announcement or a circular summarising the terms and conditions of the offer readily and promptly available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves; and
  (d) where, following an announcement made pursuant to Rule 2.5, a

[27] The original Takeover Panel Rule 24.1 (d) also dealt with the offeror's intensions for employment, but not in such detail as the new Rule 24.1 – the previous text read: the offeror*'s intensions with regard to the continued employment of the employees of the offeree and its subsidiaries.*

[28] Bold lettering added by author for emphasis

circular summarising the terms and conditions of the offer is sent to shareholders or employee representatives or employees, the offeree shall make the full text of the Rule 2.5 announcement readily and promptly available to them,

In the event of a revised offer, the provision of the revised offer document to employees and/or their representatives is covered by an amendment to Rule 32, by inserting a new sub-section 6 as follows:

32.6 INFORMING EMPLOYEES

(a) When any revised offer document is despatched to shareholders of the offeree, both the offeror and the offeree shall make that document readily and promptly available to the representatives of their respective employees or, where there are no such representatives, to the employees themselves

(b) When the offeree board despatches to its shareholders a response circular containing its opinion under Rule 25.1(a)(i) on a revised offer, it shall make that circular readily and promptly available to its employee representatives or, where there are no such representatives, to the employees themselves.

- The right of employees of the offeree company and/or their representatives to give an *opinion* on the offer (Article 9.5) is covered by an amendment to Rule 30 by the insertion of sub-section 3, as follows:

(a) Except with the consent of the Panel, the offeree board shall advise the shareholders of the offeree of its opinion on the offer in a circular (the "first response circular") which it shall despatch to those share-holders within 14 days after the date of despatch of the offer document

(b) The offeree board shall append to the first response circular a separate opinion from the representatives of its employees on the effects of the offer on employment, provided such opinion is received in good time before the despatch of that circular

(c) Simultaneously with the despatch of the first response circular under paragraph (a), the offeree shall make the circular readily available to the offeree's employee representatives or, where there are no such representatives, to the employees themselves.

In the event of a revised offer, the attachment of the opinion of the employees' and/or their representatives to the response document from the offeree company is covered by an amendment to Rule 32, by inserting a new sub-section 5 as follows:

32.5 (b) The offeree board shall append to the response circular containing its opinion on a revised offer a separate opinion from the representatives of its employees on the effects of the revised offer on employment, provided such opinion is received in good time before despatch of that response circular.

Articles 10 and 11 of the Directive (with the exception of Article 11.5 concerning compensation for holders of securities and voting rights), including 10 (e) on information regarding a system of control of any employee share schemes, where the control rights are not exercised directly by the employees, have not been included in the amendments to the Takeover Panel Rules, but are transposed directly into Irish company law.

6 Cross-border mergers of limited liability companies (Ltds)

The second Directive of interest to the INFPREVENTA study is the Cross-border Mergers Directive (2005/56/EC). The history of this Directive also dates back some thirty years, to 1984, when the Commission adopted a proposal for a 10th Company Law Directive on the cross-border mergers of companies. Several committees of the European Parliament (EP) examined this proposal. However, the EP never deliver an opinion because of the fear that companies would use cross-border mergers to circumvent their obligations under employee participation rules in some Member States. Consequently, movement on this Directive became associated with progress on the proposal for a European Company Statute, which lasted more than 15 years.

With the re-assessment of European Company Law in 2001, the work of the expert group and the Action Plan, the Commission withdrew its first ideas for the 10th Directive with a view to presenting updated proposals. With the adoption of the Regulation establishing a European Company Statute (SE) and the complementary Directive on worker involvement, the idea of standard rules for worker participation in cases where managers and employee representatives do not reach agreement on employee involvement arrangements was established in company law. [29] This opened the way to a new proposal on cross-border mergers, based on similar principles.

The Commission published new proposals for a Directive in December 2003, which was adopted by the Council and EP by May 2005, with the requirement for European Economic Area (EEA) Member States to transpose the new Directive into national legislation by December 2007.

The objective of this Directive is to co-ordinate EU legislation that is to apply in the event of a merger between a number of companies operating in different EEA Member States. When a new company has been established following such a merger (successor company), then a single body of national legislation applies, i.e. that of the Member State in which the new enterprise is registered.

The Directive applies to mergers of LTDs that:

- Are formed in accordance with the law of a Member State
- With their registered office, central administration or principal place of business within EEA countries

[29] Regulation (EC) No 2157/2001 and Directive 2001/86/EC on the European Company (SE)

- If at least two LTDs are governed by the laws of different Member States.

In undertaking a merger, Article 4.2 of the Directive requires the protection of creditors, holders of debentures, securities and shares and the rights of employees of the merging companies, apart from '*those governed by Article 16'.*

6.1 Procedures governing cross-border mergers

The management or administrative organ of each of the merging companies is required to draw up *Common Draft Terms* for the cross-border merger**.** The Directive contains a list of the twelve compulsory particulars that constitute the minimum content of the Common Draft Terms and these must be published as set out in the legislation of each Member State and in accordance with Article 3 of Directive 68/151/EEC on disclosures by LTDs. The Common Draft Terms must be published at least one month before the date of the general meetings of shareholders of the companies proposing to merge, called to approve the merger. However, the company is not obliged to publish these draft terms if they are made available to the public on the companies' websites, or on a website designated by the Member State concerned, one month before the date of the general meetings. [30]

With regard to employee involvement, the Common Draft Terms should include:

> *… where appropriate, information on the procedures by which arrangements for the involvement of employees in the definition of their rights to participation in the company resulting from the cross-border merger are determined pursuant to Article 16* (Article 5 (j))

The management or administrative organs of the merging companies are required to prepare a report on the proposed cross-border merger for the members (shareholders) and creditors explaining the legal and economic aspects of the cross-border merger and its implications (Article 7). This report must also be made available to the employees of the merging companies and to their representatives.

Independent expert reports on the merger must also be drawn up for each company. However, while the expert reports and the proposed cross-border merger report should be made available at least one month before the date of

[30] Articles of the Directive have been amended twice since its adoption, first by Directive 2009/109/EC (on reporting and documentation requirements in the case of mergers and divisions) and, second, by 2012/17/EU (on the interconnection of central, commercial and companies registers).

the general meetings to approve the merger, this procedure can be dispensed with if all shareholders in the proposed merging companies agree (Article 8).

On the basis of these documents, the general meetings of each of the merging companies must decide on the approval of the Common Draft Terms of cross-border merger (Article 9).

6.2 Scrutiny of legality

Each Member State must designate a competent authority for scrutinising the legality of cross-border mergers as regards that part of the procedure that concerns each merging company, including the approval of the Common Draft Terms, subject to its national law. The authority is required to issue a pre-merger certificate attesting to the proper completion of the legal pre-merger requirements and formalities. This designated authority is also responsible for the procedures that concern the completion of the cross-border merger and, where appropriate, the formation of a new company, where that company is subject to the national legislation of that Member State.

The laws of the Member State, where the new merged company (successor company) will be registered, will set out how the date on which the cross-border merger will take effect is determined and the arrangements for publishing the completion of the merger by the company register office of that Member State. That national registry office will then notify the national registries in which each of the companies involved in the merger were required to file documents, that the cross-border merger has taken effect. This exchange of information will be made using the system of interconnection of central, commercial and companies (available from 2014), established by Directive 2009/101/EC (on the protection of the interests of members and third parties of LTDs) (Article 11).

The outcomes of a cross-border merger are the following:

- The companies been acquired or the merging companies will cease to exist
- All the assets and liabilities of the merging companies concerned are transferred to the new merged enterprise (either to the acquiring company or to the new company);
- The members of the companies been acquired become members of the successor enterprise.

Where the laws of the Member States require the completion of special formalities before the transfer of certain assets, rights and obligations by the merging companies becomes effective against third parties, the successor company resulting from the cross-border merger will be responsible for carrying out those formalities.

6.3 Employee Participation in the Cross-border Mergers Directive

In addition to the requirement in Article 5 to outline arrangements for employee involvements in the Common Draft Terms, the Directive sets out a

number of information, consultation and participation rights for the employees of the merging companies who will be transferred to the successor company, following the merger. The general principle is that the employee involvement laws of the EEA Member State where the successor company is registered will apply and, in general, any employee involvement rights in the pre-merged companies are transferred to the successor company (see Article 16 below).

A number of other Articles in the Directive set out these rights, as follows:

- Article 7 requires that the reports of the management or administrative organs of each of the proposed merging companies explaining and justifying the merger and the implications for members (shareholders), creditors and employees. These reports must be made available to employees and their representatives at least one month before the date of the shareholders' general meetings to decide on the proposed merger. The employees' representatives can give written *opinions* on the report, which, if received in good time, must be appended to the management report for consideration at the general meetings.
- Article 9.2 gives the general meetings of the proposed merging companies the power to reserve the right to make the merger conditional on ratification by the general meetings of the employee participation arrangements in the successor company.
- Article 16 sets out the following exception to the general principle referred to above:

    - The rules for employee participation in the Member State where the successor company is registered shall not apply, where at least one of the merging companies has, in the six months before publication of the Common Draft Terms, an average number of employees exceeded 500 and was operating under an employment participation system, as defined by Article 2(k) of the SE Directive (2001/86/EC), [31] or where the legislation in the Member State where the successor company's registered office is located, does not:
        - provide for at least the same level of employee participation as operated in the merging companies, measured by reference to the proportion of employee representatives who are members of the administrative or supervisory organ of the company, that covers the profit units of the company, subject to employee representation
        - provide for employees in subsidiaries of the successor company in Member States, other than the Member

[31] Article 2 (k) reads *'participation' means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of:*

- *the right to elect or appoint some of the members of the company's supervisory or administrative organ*
- *the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ*

State where the company is registered, the same entitlement to information, consultation and participation rights as those enjoyed by the workforce employed in the Member State where the company is registered.

In the event of the application of the Standard Rules under Article 7.2.(b) of the SE Directive, the minimum threshold for applying the employee participation provisions in a SE established by a merger, is set at 25%. However, in the Cross-border Mergers Directive this threshold is increased to one-third of the total number of workers in the merging companies that have operated under any form of employee participation. These provisions on employee participation apply to any further domestic merger subsequent to a cross-border merger for a period of three years after the cross-border merger has taken effect. The increase in this threshold dilutes these rights under the SE Directive in the Cross-border Mergers Directive.

Recital 12 of the Directive sets out how employee information and consultation rights under the range of acquired rights legislation should continue to apply to the newly merged company. [32] While Recitals 13 and 14 set out in detail how employee participation rights are to be protected and how the SE Directive is to be taken as the basis for employee involvement rights, even with modifications because of Member State national laws. Recital 13 calls for a 'prompt start to negotiations' on employee involvement rights, as set out in Article 16, so as not to 'unnecessarily' delay a merger. [33]

6.4 Transposition of Directive into Irish law

SI 157 of 2008 transposed Directive 2005/56/EC into Irish law. This SI has been subsequently amended to take account of further EU Directives on company mergers, such as Directive 2009/109/EC (on reporting and documentation requirements in the case of mergers**)** and Directive 2012/17/EC (for 'the interconnection of central, commercial and companies registers').

The SI divides the legislation into three parts:

- Part 1 deals with, what are called, 'Preliminary and General' issues, which include terms and definitions used in Parts 1 and 2
- Part 2 deals with company law to be followed and adhered to during a merger process. Parts 1 and 2 are incorporated into Irish company Law and are to be taken together with the Companies Act, 1963 to 2006

[32] Recital 12 lists the following Directives as protecting employee information and consultation rights:
- Collective Redundancies (98/59/EC)
- Transfer of Undertakings (2001/23/EC)
- General Framework for Informing and Consulting Employees (2002/14/EC)
- EWC Directives (94/45/EC; 97/74/EC; and (presumably) 2009/38/EC)

[33] It should be noted that the Recitals do not have a legal standing, but set out the general principles of the legislation and are considered as guidelines for the transposition of a Directive into national legislation.

- The Regulations in Part 3 (Employee Participation) are a 'stand-alone' set of laws relating to employee involvement.

In general, the text of the SI follows closely the wording in the Directive. For example, with regard to the 'Common Draft Terms' document the text is exactly the same, including Article.5.(d) of the Directive on the '*likely repercussions of the cross-border merger on employment'* – this is reproduced as Regulation 5.(2).(d) in the SI, while Article.5.(j) is transposed as Regulation 5.(2).(i), with reference to *'arrangements for the involvement of employees … are determined under Part 3'*.

A significant difference from the Directive is in relation to the reports to be drawn up by the management or administrative organs of the merging companies (Article 7). The SI requires the Directors of the Irish company involved in a merger to draft this report, thus putting the legal onus on the members of the company board, rather that management, for preparing such a report.

The Common Draft Terms, the Directors' report and an 'expert's report' (if any) are to be made available for '*a period of one month immediately preceding the general meeting of an Irish merging company …* (by) *the members of the company and its employee representatives (or, if there are no representatives, the employees) shall be permitted, free of charge, to inspect at its registered office during business hours …* (for) *a period of no less than 2 hours in each day …'.* (Regulation 9.(1))

While in Article 7 of the Directive, employee representatives are entitled to provide an *opinion* on the proposed merger to be appended to the report of the management or administrative organ, this is not incorporated as a right in the SI and is only referred to the Regulation 9.(1).(b), which states – '*the directors' explanatory report together with the opinion thereon, if any, received from the employee representatives'.*

Under Article 9, having noted these reports, general meetings of the proposed merging companies are required to approve '*the common draft terms of the cross-border merger'*. [34] The approval of the general meetings is subject to the '*express ratification of the arrangements decided on with respect to the participation of employees in the company resulting from the cross-border merger'* (Article 9.2). This sub-article is incorporated into the SI by Regulation 10.(2).(a), which again refers to the arrangements as set out in Part 3.

Articles 10 and 11 require each Member State '*to designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger* …' and the Irish legislation designates the High Court, which incorporates the Commercial Court (Regulation 4), and the Competition Authority (Regulation 16.(1)) as the competent bodies. The Competition

[34] An exception to requiring the holding of a general meeting is set out in Article 8 of Directive 2011/35/EC, that repealed Directive 78/855/EC referred to in Article 9 of Directive 2005/56/EC.

Authority already had responsibility for scrutinising mergers under the legislation setting it up in 2002. [35]

In the case of the successor company been registered in Ireland, the High Court may make an order confirming that all the legal procedures have been completed, including any arrangements for employee participation in the successor company, as set out in Article 11.1 of the Directive (Regulation 14.1). Such an order can only be made, however, when the Competition Authority confirms that the merger conforms to the terms of the SI and other existing national and EU legislation on mergers and takeovers, including the Takeover Panel Act, 1997, (Regulation 16).

Regulation 17 requires the order of the High Court to be sent to the Company Registrar, who will then publish it in the CRO Gazette within 14 days and the Irish company involved in the merger must also notify the Registrar, within 14 days of receiving the High Court order, the date on which the cross-border merger will take effect.

The Registrar is also required to inform the company registry authorities in the other EEA Member States of the companies involved in the merger under the terms of Directive 2012/17/EC (for 'the interconnection of central, commercial and companies registers'). This also operates conversely, i.e. it is the duty of the Registrar to remove an Irish company from the CRO register if the successor company is to be located in another EEA Member State, on notification of that registration of the successor company from the company registry authority of that Member State (Regulation 18).

Regulation 19 transposes Article 14. While the text is similar, there are some small differences in phraseology, for example:

- Article 14.1.(c) states: *the company being acquired shall cease to exist*
- Regulation 19.(1).(c) states: *the transferor companies are dissolved*

With regard to Article 14.4 on the transfer of '*the rights and obligations of the merging companies arising from contracts of employment or from employment relations …*' into the terms of employment of the employees of the successor company, this is incorporated in Regulation 19.(1).(f). However, this Regulation only refers to contracts of employment and does not mention any obligations arising from '*employment relations'*.

6.4 Employee Participation – Article 16

Part 3 of the SI transposes Article 16. However, rather than just refer to the relevant articles of the SE Directive (2001/86/EC), as in Article 16.2 and 16.3.(a) to (h), Part 3 reiterates in detail the rights and obligations set out in that Directive. It requires any successor company registered under Irish legislation to establish the participation of employees in accordance with the

[35] The Competition Authority was merged with the National Consumers Agency to form the Competition and Consumers Protection Commission (CCPC) on 1 October 2014.

Regulations in Part 3 (22 to 44), plus Schedules 1 and 2, and '*the rules in force in the State concerning employee participation, if any'.* However, Regulation 23, setting out this general principle, is qualified by sub-regulation (3) that transposes Article 16.2 of the Directive. Furthermore, sub-regulation (4) transposes, almost 'word-for-word, Article 16.3 (on the regulation by the Member States of employee participation in the successor company).

Regulation 22 outlines the definitions of terms used in this Part 3, including the following, all of which closely follow the definitions in the SE Directive:

- *'Consultation', means the establishment of dialogue and exchange of views between the representative body or the employees' representatives (or both) and the competent organ of the successor company at a time, in a manner and with a content which allows the employees' representatives, on the basis of the information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision making process within the successor company*
- *'Employee participation' means the influence of the representative body or the employees' representatives (or both) in the affairs of a company by the way of (a) the right to elect or appoint some of the members of the company's supervisory or administrative organ, or (b) the right to recommend or oppose, or both to recommend and oppose, the appointment of some or all of the members of the company's supervisory or administrative organ*
- *'Information' means the informing of the representative body or the employees' representatives (or both), by the competent organ of the successor company on questions which concern the company itself and any of its subsidiaries or establishments situated in another EEA State or which exceed the powers of the decision-making organs in a single EEA State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the company*
- *'Involvement of employees' means any mechanism including information, consultation and employee participation, through which employees' representatives may exercise an influence on decisions to be taken within the company.*

6.5 Chapter 2 - Negotiations and the Special Negotiating Body (SNB)

As soon as possible after the publication of the Common Draft Terms for a merger, the management or administrative organ of each company that proposes to be involved in the merger is required to take the necessary steps to start negotiations with the representatives of the employees of that company on arrangements for the involvement of those employees in the successor company. To begin negotiations through a SNB, the company(s) must provide the employee representatives with information about the identity of the other merging companies, the number of employees in each (identified according to the EEA Member State in which they are located) and the number of employees covered by an existing employee participation system

(Regulation 24).

In giving effect to Article 16.4.(b), Regulations 25 to 31 set down, in detail, the rules regarding the SNB, including:

1. The allocation of members in proportion to the involved EEA Member State
2. Those employees who are qualified to be appointed/elected, including the right of trade union officials from a union recognised by the company and nominated by at least two employees
3. The conduct of the elections for national representatives
4. Its remit to negotiate a written agreement with management of the merging companies
5. The voting procedures for decision-making, which includes a 'double-lock' procedure, i.e. a majority of members of the SNB and a majority of employees in the involved companies represented by the members of the SNB (if at least 25% of the overall number of employees are covered by existing employee participation rights and the result of the negotiations would result in a reduction of these rights)
6. In approving a final agreement for employee involvement in the successor company, a 'triple-lock' procedure is required, as follows:
    - two-thirds of the members of the SNB voting in favour
    - votes in favour representing at least two-thirds of the total workforce of the merging companies
    - including the votes of SNB members representing at least two EEA Member States
7. The right to engage experts, including from EU/EEA-level trade union organisations (European trade union industrial federations)
8. The right to inform relevant organisations, including trade unions, of the negotiations
9. Expenses for the SNB are to be covered by the merging companies.

All of these follow closely Article 3.2 to 3.7. of the SE Directive (2001/86/EC).

6.6 Chapter 3 - Negotiations and Agreement

Regulation 32 closely follows Article 4 of the SE Directive, including negotiating *'in a spirit of co-operation'.*

With reference to the content of an agreement, Regulation 33 sets our, word-for-word Article 4.2 of the SE Directive covering:

- The scope of the agreement
- The arrangements for employee participation, including '*the number of members of an administrative or supervisory body of the successor company whom the employees will be entitled to elect, appoint, recommend or oppose'*
- The procedures for election/appointment of these employee representatives

- The date on which the agreement comes into force, its duration and the procedures for its re-negotiations.

Regulation 34 transposes Article 5 of the SE Directive with regard to the duration of the negotiations. It also transposes Article 3.6 on the termination of negotiations and the voting requirements for such a decision, which are the same as those set out in the SE Directive (see point 6 above (page 26). [36]

6.7 Chapter 4 – Supplementary Issues

The SI is completed by the addition of a number of ancillary Regulations, such as:

- Regulation 37 (transposing Article 16.7 of the Cross-border Mergers Directive) on the protection of employee participation rights, requires companies registered in Ireland and operating an employee participation arrangement, to ensure that those rights are protected in the event of a domestic merger for a period of three years after the merger has come into effect
- Article 10 of the SE Directive, on the protection of members of the SNB or a representative body and employee representatives undertaking functions, or in the event of his/her dismissal or other actions by management that are '*prejudicial to his or her employment'*, including selection for redundancy, is set out in Regulation 39
- The provision of 'reasonable' facilities for members of the SNB and employee representatives to undertake their duties under the SI. However, while these facilities are not defined, they should not impair the '*efficient operation of the company'*
- Disputes between the company and employees and/or their representatives on any of the Regulations in Part 3 may be referred to the Conciliation Service of the Labour Relations Commission (LRC) and, if no resolution to the dispute is reached at the LRC, to the Labour Court. [37]

Regulation 38, which deals with the issue of confidential information, follows closely the conditions set out in Article 8 of the SE Directive. Article 8.4 requires Member States to provide for an administrative or judicial appeal procedure in the event of a dispute regarding the withholding of information that management of a company deems to be 'confidential' and Regulation 39.(5) and (8) sets out how the Labour Court, on hearing all the evidence, should deal with such a dispute, including assistance from a panel of experts to decide on what constitutes 'confidential information'.

Schedule 2 of the SI also allows for a dispute relating to Regulation 39, involving an individual employee, to take a case to the Rights Commissioner

[36] Article 3.6 of the SE Directive states that *the majority required to decide not to open or to terminate negotiations shall be the votes of two thirds of the members representing at least two thirds of the employees, including or members representing employees employed in at least two Member States.*

[37] See Note 2

Service for resolution. Failure to implement a determination of the Labour Court or a decision of a Rights Commissioner can be brought to the Circuit Court as a complaint and that Court can make an order directing the offending party to carry out the determination of the Labour Court or the decision of a Rights Commissioner. This order can be appealed by either party to the dispute to the High Court on a point of law. This is in accordance with the normal industrial dispute procedures of the State. [38]

6.8 Schedule 1 - Standard Rules

Schedule 1 and the Standard Rules follow closely the rules set out in the Annex to the SE Directive. Part 1 (Composition of Body Representative of Employees) details how such a representative body (i.e. a European Works Council) in the successor company is to be constituted; its members elected or appointed; the allocation of seats; and the setting up of a select committee.

This representative body can decide, after 4 years, to re-open negotiations on an agreement, or decide to continue to operate under the Standard Rules. If it decides to re-open negotiations, then a new SNB must be established. However, if this new SNB still cannot reach agreement, then the Standard Rules of the SI will continue to apply.

While Schedule 1 set out the Standard Rules in detail, Regulation 33.2 states that unless the agreement reached by the SNB provides otherwise, a negotiated agreement is not subject to these Rules. However, Regulation 35.(1) states that the Standard Rules will apply to a successor company registered in Ireland, from the date of registration, if:

a) The SNB agrees
b) The management of the merging companies decide to accept the Standard Rules
c) The SNB fails to reach agreement, as set out in Regulation 29 (2) (point 5 on page 26 above).

Part 2 outlines the Standard Rules for information and consultation. In these, the representative body has the right to:

- Be informed and consulted
- Receive reports on the progress of the business of the successor company, including
  - The economic and financial situation
  - Probable development of the business
  - Trends in employment
  - Investments
  - Substantial changes to the business, including organisation, introduction of new work practices, cut-backs, closures, and collective redundancies
- Meet management at least once a year

[38] ibid

- Receive agenda for meetings of the administrative, management and supervisory organs and documents submitted to general meetings of shareholders
- Be informed in the event of relocations, transfers, closure of establishments or undertakings, or collective redundancies 'significantly' affecting employees and in a situation of urgency, the right of the Select Committee to request a meeting with management
- Be assisted by experts of its choice (this also applies to the Select Committee)
- Training, without lose of income, to enable members to fulfil their duties as members of the representative body.

If the management of the successor company decides to ignore the opinion of the representative body and/or the Select Committee on a proposed measure, the representative body has the right to request a further meeting with management with a view to reaching agreement. For such meetings, the members of the representative body who represent employees affected by the proposed measures have a right to join with the Select Committee members and to hold a pre-meeting, without management representatives been present.

Part 3 of the Schedule deals with Standard Rules for employee participation. Referring back to Regulation 35 (6), which states that it is possible to reach agreement to limit the proportion of employee representatives on the administrative or supervisory organs of the successor company. However, where one of the merging companies already has a two-thirds employee representation on the administrative or supervisory board, then Regulation 36 (7) requires any proposed limit to be agreed by the representative body, again on the principle of 'double-lock' voting, i.e. a majority of at least two-thirds of employees, including employees in two Member States; or two-thirds of the members of the representative body, representing at least two-thirds of the total workforce of the successor company, including the votes of members representing employees in two Member States.

Subject to these qualifications, employees of the successor company and/or their representatives

> *have the right to elect, appoint, recommend or oppose the appointment of a number of members of the administrative or supervisory body of the company, equal to the highest proportion in force in the merging companies concerned before registration of the successor company.*

The representative body can decide on the allocation of seats on the administrative or supervisory organ, proportionate to the numbers of employees in the EEA Member States involved, ensuring that there is representation from all the Member States the successor company operate in. These members have the same rights and obligations as members representing shareholders, including the right to vote.

However, if none of the merging companies had employee participation arrangements before the merger, then the successor company is not required to provide for employee participation after the merger.

7 Case Study - Takeover Bids by Ryanair for Aer Lingus

The following case study on the three takeover bids by Ryanair for control of Aer Lingus between 2006 and 2011, demonstrates the application of Directive 2004/25/EC in Ireland.

Aer Lingus is the 'flag-carrier' airline of the Irish State. It was set up by statute in 1936. In September 2006, the Government decided on an Initial Public Offering (IPO) of the company shares, but retaining 25.1% of the equity in State ownership. It also granted the employees a share holding of 14.2% through an Employee Share Ownership Trust (ESOT). On flotation, the Irish Airline Pilots Association (IALPA) pension fund, purchased 2.2% of the available shares and Ryanair, a rival Irish airline, 'snapped up' some 16% of the shares, quickly increasing its holding to over 26%. This shareholding further increased, in stages, to 29.82% by July 2008. [39] The Aer Lingus board and management have consistently maintained that this minority shareholding by Ryanair is damaging to the company's interests.

Ryanair was founded in 1985 and successfully pioneered the low-cost / low-budget business model and has become the biggest airline operating in Europe. In the year ended March 2013, it carried 79.3 million passengers, through some 1,500 routes in 28 countries across Europe, including flights from Ireland to 12 airports in Great Britain.

7.1 First Bid

Shortly after the flotation, Ryanair launched a bid to buy Aer Lingus, on the basis, according to its CEO, Michael O'Leary, that it was a unique opportunity to form a major Irish airline. He envisaged that this 'new' airline would carry over 50 million passengers a year. On the same day Aer Lingus rejected Ryanair's takeover bid. There were immediate concerns with the bid, as it would mean little competition on the Dublin-London route, one of the busiest in Europe. [40]

The European Commission also expressed its concerns that such a takeover and the merging of the two airlines would reduce consumer choice and increase fares. In December 2006, Ryanair withdrew its bid, but stated its intention to launch another bid after the European Commission had finished its investigations. The Commission finally announced its decision, in June 2007, to block the bid on competition grounds saying that the two airlines controlled more than 80% of all European flights to and from Dublin airport. [41]

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[39] Under Irish company law, acquiring control of 30% or more of the issued share capital of a listed company, obliges the purchaser to make a general offer for that company and this offer must not be subject to any conditions.

[40] For the Ryanair offer see http://www.ise.ie/app/announcementDetails.aspx?ID=1311919
For the Aer Lingus rejection see http://www.ise.ie/app/announcementDetails.aspx?ID=1312507

[41] See http://www.rte.ie/news/2013/0227/369827-aer-lingus-ryanair/

7.2 Second Bid

Two years later, in December 2008, Ryanair launched a second takeover bid for Aer Lingus, making an all-cash offer of €1.40 per share, valuing the company at approximately €748 million. In making this bid, Ryanair said that Aer Lingus, as a small, stand alone, regional airline has been marginalised and bypassed as most other EU flag carriers consolidate. Its intension was for the two airlines to operate separately and its plans for Aer Lingus would result in 1,000 new jobs. [42]

Again, Aer Lingus rejected the offer and advised its shareholders not to respond, stating that the company is in a strong financial position with total cash reserves of €1.3 billion and net cash of €803 million and noting that the Ryanair offer valued the company at €525 million, thus seeking to acquire control of this €1.3 billion cash balance. [43] The Government also considered the Ryanair offer as undervaluing the airline and reiterated its concerns that such a merger would have a significant negative impact on competition in the industry and on the Irish consumer.

The employees' Central Representative Council (CRC), which includes all trade unions representing the 3,500 strong Aer Lingus workforce, sent an 'open letter' to all shareholders, including the Government, setting out its arguments against acceptance of the offer. These were:

- The undervaluation of Aer Lingus and poor value for shareholders (which included the ESOT)
- Concerns with Ryanair controlling 80% of air traffic out of Ireland, which would result in higher fares for the travelling public and serious consequences for Irish aviation policy
- The impact on collective bargaining, taking into consideration Ryanair's track record shows a blatant disregard for the rights of workers to join and be represented by a trade union … it would use its position to force down conditions of employment in the aviation sector in general
- The credibility of the commitment in the offer document to create 1000 new jobs, noting that in its first bid it promised to cut 1000 jobs in Aer Lingus
- The CRC did not believe that the European Commission would approve the bid. [44]

The offer was finally rejected by a majority of the other shareholders, combining the Government's, the ESOT's and IALPA Pension Fund share holding and the shares of other like-minded investors, which came to in excess of 45% of the equity.

Ryanair eventually withdrew its offer in 30 January 2009. Following this failed second bid Ryanair stated that another bid was very unlikely.

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[42] For the Ryanair offer see http://www.ise.ie/app/announcementDetails.asp?ID=2035516)

[43] For the Aer Lingus rejection see http://www.ise.ie/app/announcementDetails/asp?ID=2053562)

[44] *An Open Letter to the Shareholders of Aer Lingus* Aer Lingus CRC, 22 December 2008

7.3 UK Competition Commission Investigation

Aer Lingus management and Board had a continuing concern that the 29.82% Ryanair stake was an impediment to the normal day-to-day commercial operations of the company.

This unease was shared by the UK Office of Fair Trading (OFT) as there was the possibility that the shareholding could be a constraint on competition on twelve overlapping routes of the two airlines between Ireland and Great Britain. In October 2010 the OFT announced that it had instigated an examination of this shareholding.

In its submission to the OFT examination Aer Lingus outlined its commercial concerns:

> *Aer Lingus submitted that Ryanair's continual (since 2007) blocking of the disapplication of pre-emption rights amounts to material influence over its commercial policy relevant to its behaviour in the marketplace. A disapplication of such rights would allow Aer Lingus to:*
>
> - *Offer new shares to the wider market, equivalent to five per cent of issued share capital*
> - *Obtain a single cash injection in the company for an equity stake*
> - *Issue new shares for cash equivalent to approximately 33 per cent of its issued share capital where this is done as part of a rights issue for all ordinary shareholders, with the exception of these shareholders with registered addresses outside Ireland.*
>
> *…. By blocking the disapplication of pre-emption rights, Ryanair is denying Aer Lingus one of the normal mechanisms available to listed companies to raise fresh capital.* [45]

In July 2011 the case was referred to the Competition Commission, which undertook to assess whether the shareholding had resulted in a merger and, if so, if such a merger had resulted or could result in a substantial lessening of competition (SLC).

In referring the case to the Competition Commission, the OFT stated that:

> *The first potential detrimental effect of the acquisition on rivalry is that it may cause Aer Lingus to become a less effective actual or potential competitor for UK air passengers. We have identified three distinct mechanisms that could lead to this outcome:*
>
> *(a) the rights held by Ryanair as a result of its shareholding could*

[45] *Completed Acquisition by Ryanair Holdings plc of a minority interest in Aer Lingis plc* UK Office of Fair Trading ME/4694/10, (OFT reference document to the UK Competition Commission) 5 July, 2012

enable Ryanair to weaken Aer Lingus or restrict its ability to follow certain competitive strategies, including its ability to form relationships with other airlines or join airline alliances;

(b) Ryanair's shareholding could deter other airlines, or other parties, from investing in Aer Lingus, preventing Aer Lingus from realising the benefits associated with potential takeovers or outside investments;

(c) The acquisition could alter Aer Lingus's incentives such that it takes the effect of its actions on Ryanair's profitability into account when making decisions about its offering, diminishing competition between the companies.

Furthermore, it also saw the shareholding as having a potential detrimental effect on Ryanair, causing it to become *a less effective actual or potential competitor.* Third, it expressed the view that there was an increased likelihood that the two airlines might avoid competing with each other, or co-ordinate their actions, *on some aspects of their services to the companies' mutual advantage*. [46]

In August 2013, the Competition Commission found against Ryanair and ordered it to divest its share holding in Aer Lingus down to 5%. [47]

7.4 Third Bid

In May 2012, the Irish Government stated it had decided to sell its 25.1% stake in Aer Lingus, *at an appropriate time*. This was part of the requirements imposed by the Troika (European Commission, European Central Bank and the International Monetary Fund) for the Government to sell State assets, as a condition of the financial 'bail-out'. Not withstanding its earlier statement that a third bid was unlikely, following the Governments statement, Ryanair announced it would, after all, do so, this time valuing Aer Lingus at €694 million. Again, Ryanair stated that, if successful, it would operate the two airlines separately.

The Aer Lingus board again rejected this third offer and advised its shareholders not to take any action in relation to the bid. In its detailed document rejecting the offer, the company pointed out that any offer from Ryanair was unlikely to be concluded due to, a) the 2007 decision of the European Commission to block the first Ryanair bid on competition grounds was still relevant and b) the UK Competition Commission's ruling after its investigation of Ryanair's minority stake in Aer Lingus. Furthermore, the statement said that the Aer Lingus board believed that the offer undervalued the company, considering the airline's profitability and balance sheet, including cash reserves in excess of €1 billion (as of end-March 2012).

With regard to the future of Aer Lingus staff, in its bid document Ryanair stated that *it expected to continue to safeguard the existing employment rights of the management and employees in accordance with statutory*

[46] Statement of the Competition Commission, 6 March, 2013.
[47] See End-note 1

requirements. However, it also stated that Ryanair would *help Aer Lingus to increase the productivity of its staff through a mixture of efficiency increases and growth.* [48]

The Aer Lingus rejection document stated that it was the believe of its board *that Ryanair would seek to impose significant changes to Aer Lingus' existing arrangements*, cutting payroll costs and unit costs, *having an adverse effect on the terms and conditions of employment for existing employees.* [49]

In February 2013, the European Commission published its decision prohibiting this third bid. [50]

7.5 Opinion of Employee Representatives

In line with the requirements of SI 255, 2006, the Aer Lingus board and management formally advised the employee representatives (CRC) of the Ryanair offer. The CRC then set out its objections to the offer in a detailed *Opinion*, which was appended, as envisaged by Article 9.5 of the Takeover Bids Directive and the Rules of the Takeover Panel, to the formal rejection of the offer by the Aer Lingus board. [51]

The CRC *Opinion* included such issues as:

- The financial strength of Aer Lingus with net cash reserves of almost €500 million
- The under valuation of the company in the offer, including the value of the 23 landing/take-off slots in London Heathrow Airport (LHR)
- The anti-competitiveness issue that concerned the European Commission had not gone away
- Doubts about the credibility of Ryanair's stated intensions for Aer Lingus, including its intentions for leasing the LHR slots, as stated in its 2007 offer document.

The CRC also expressed the concerns of the workforce about, first, the Ryanair plans for staff and collective bargaining arrangements and, second, the implications for future staff pension entitlements. With regard to the first, the CRC expressed scepticism about the Ryanair statement in the offer document that it would *grow the employment numbers of pilots, cabin crew and engineers in Aer Lingus,* as there was no information in the bid documents as to how this would be achieved. Nor did the CRC believe that Ryanair would

> *… respect and safeguard the existing employment rights of the management and employees … in accordance with statutory requirements. It is widely known that Ryanair do not recognise trade*

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[48] For Ryanair offer see http://www.ise.ie/app/announcementDetails.aspx?ID=11267949

[49] For Aer Lingus rejection see http://www.ise.ie/app/announcementDetails.aspx?ID=11268702

[50] Ryanair is appealing this European Commission ruling to the European Court of Justice

[51] *Aer Lingus Staff Should Reject This Ryanair Offer* CRC, August, 2012.

unions for collective bargaining purposes and has a history of opposing trade union recognition. The history of Ryanair's actions towards employees at Buzz following its 2003 take over, would cause concern to Aer Lingus workers.

The CRC *Opinion* drew attention to the existing flexible working relations between staff and management in Aer Lingus that has *contributed significantly to its ability to adapt to the much-changed circumstances in the Irish aviation sector over the last 3 years. … Aer Lingus workers believe Ryanair will undo much of this good work if the takeover goes ahead.*

Second, the *Opinion* noted that there is no information in the bid document about Ryanair's intensions regarding the Aer Lingus pension schemes, but it notes that, in the past, Ryanair had threatened to sue Aer Lingus if any additional funds were injected into the pension fund.

Finally, the *Opinion* states that, from a staff point of view, the offer document is highly selective. [52]

7.6 Preparation of the CRC Opinion

In preparing the staff response to the Ryanair offer, the CRC sought and got legal and political advise from a number of sources, including the ICTU and a number of Irish MEPs. When requested by the CRC, the European Commission, DG Competition, clarified a number of aspects of the Council Merger Regulation (EC No. 139/2004) and Council Regulation implementing the Mergers Regulation (EC 802/2004). In particular, it confirmed that the CRC could be granted, on application, third party status, and then could be invited to attend any public hearings to give its opinion on the impact of the takeover, if the European Commission was to proceed with such hearings.

Interestingly, Aer Lingus management had legal advice from a UK legal firm, hired to advise it in drafting the rejection document, not to engage with staff during the takeover period. Consequently, all formal meetings between the CRC and management were suspended and there was no formal assistance given by Aer Lingus management to the CRC in the preparation of its *Opinion*. It is not clear why this recommendation was given or what was the legal basis for this advice.

7.7 Aer Lingus ESOT

The Aer Lingus Employee Share Ownership Trust (ESOT) was established to administer the 14.2% employees' equity in the company, on behalf of the workforce, as part of the deal with the Government at the time of the IPO. However, the ESOT ran into financial difficulties when the Aer Lingus share price fell in 2007/08. As a result, the company injected €25.3 million into the ESOT funds as a full and final payment to the Trust. This covered the ESOT's existing borrowings. The Trust was then wound up in December 2010, and its

[52] ibid

remaining shares in the company (then 12.5% of the Aer Lingus share capital) were distributed to 4,700 current and former employees.

The CRC estimates that in 2012 some 10% of the shares were still held by individual staff members and retirees. Unfortunately, these employees do not use the voting rights vested in these shares, as only 171 employees exercised their votes at the 2011 company AGM.

7.8 Key Findings of the Case Study

1. The transposition of Directive 2004/25/EC into Irish legislation by Statutory Instrument (SI) 255, 2006 was straightforward and its relevant articles were incorporated in the Rules of the Irish Takeover Panel. These do not go beyond those contained in the Directive and there are no 'enhanced rights' to information in the Statutory Instrument.

2. Under the Directive, employee representatives have a legal right to give an opinion when a takeover offer is made, by appending its formal view to any rejection document. In the case of the third Ryanair offer, the employee representative body of Aer Lingus, the CRC, drafted a formal *Opinion* that was appended to the rejection document from the Aer Lingus Board. However, the Takeover Panel did not see this *Opinion* when the rejection document was submitted to the Panel, as required by its Rules. In fact, this is the only occasion known to the Takeover Panel that a formal employees' *Opinion* has been prepared for attachment to a rejection document.

3 The Aer Lingus CRC played a significant role in putting together a 'coalition' of shareholders to vote down any possible takeover by Ryanair. This coalition included the ESOP's 14.2%; the Irish State's 25.1%; the IALPA pension fund's 2.2%; and a number of corporate and individual shareholders who opposed the Ryanair bids.

4 One significant staff concern with any takeover of Aer Lingus was the future of the pension scheme. Because of historical reasons, the pension fund is a multi-company fund, which also includes Dublin Airport Authority and the Shannon Airport Authority staff. Only Aer Lingus pilots are not included in this pension scheme, as they have their own pension arrangements through the IALPA Pension Scheme. A shortfall in the pension scheme had been the basis of an on-going dispute between Aer Lingus and its staff representatives for five years, a dispute which was finally resolved in November 2014.

5 The Board of Aer Lingus is of the view that the continued share holding of close to 30% by Ryanair is a form of commercial harassment and that it has a 'detrimental effect' on the company's commercial strategy and operations.

End-note 1:
Ryanair appealed the ruling of the Competition Commission to the UK Supreme Court, stating that the Commission's investigation was unlawful as it over-lapped with the investigation of the European Commission. The Supreme Court rejected the Ryanair appeal and referred the case to the Competition Appeals Tribunal, which heard the case in February 2014. Its judgement on 7 March, 2014, rejected all the Ryanair arguments. The company has now appealed the Appeals Tribunal ruling to the UK Court of Appeal and the case was heard in November 2014, with a judgement scheduled for February, 2015.
See: http://www.catribunal.org.uk/238-8404/Judgment-.html

End-note 2:
The International Aviation Group (IAG) made two, as yet unsuccessful, take-over bids for Aer Lingus on December 2014 and January 2015.

6 Conclusions

A number of key findings can be drawn from this study. First, within the Irish employment relation structures, formal information and consultation arrangements don't impact greatly on the long established volunterist, adversarial approach to dispute resolution. Where information and consultation arrangements are in place, both aspects of the workplace relationship appear to operate in parallel. Indeed, trade union officials see access to information through formal employee involvement structures as useful in getting access to company plans and data that can be used in any future industrial relations negotiations. However, there is the on-going suspicion that any such information flow, through formal information and consultation structures, is controlled and filtered by management to suit its business agenda. Overall, the inclusion of the legal requirement in EU information and consultation, and included in the transposed Irish legislation, to '*negotiate in a spirit of co-operation'* doesn't work in practice in Irish industrial relations.

The Aer Lingus case study demonstrates that these structures can operate well in parallel. For example, both the company board, management and the CRC worked in tandem to resist the external threat of the three Ryanair takeover bids, while, at the same time, a number of internal disputes were is progress, for example on difficulties with the staff pension scheme and on cabin crew work rosters. [53]

Second, there is a lack of an information flow between the different forms of structures, such as EWCs, national/local works council type arrangements, health and safety committees, etc. Indeed, management and employees have different perceptions of how effective these various structures are.

Third, with regard to employee rights in corporate governance legislation, such as the Takeover Bids Directive and the Cross-border Mergers Directive,

[53] Aer Lingus cabin crew staged two one-day stoppages in a dispute with the airline over changes to their rosters

workers' representatives, including trade union officials, are either not aware of these rights or do not consider them as a priority in their day-to-day contacts with management. According to the Irish Takeover Panel, the Aer Lingus case is unique in that it is the first time that the formal *opinion* on the third Ryanair bid was drafted and submitted by the Irish trade unions under the Takeover Panel rules.

Fourth, a major challenge for the European trade union movement is the current lack of political support for employee involvement rights in corporate governance legislation and this is reflected in the Irish situation. The focus of the European Commission Action Plans and their implementation through legislation is on the shareholder-value approach, rather than the strengthening of the alternative stakeholder-value model. This is reflected in the transposition of the Takeover Bids Directive into Irish law. In contrast, however, the SI that transposes the Cross-border Mergers Directive does provide robust rights to employee participation in the event of an Irish company been involved in a cross-border merger, including the right of employees in these companies to be informed *as soon as possible* after the publication of the Common Draft Terms for the merger and for a SNB to be established to begin negotiations on information and consultation arrangements in the successor company, if that company is to be registered in Ireland. How these rights have been used by trade unions whose members have been involved in such cross-border mergers is not clear and is the focus on on-going research.

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