

EVALUATION AND FITNESS CHECK (FC) ROADMAP			
TITLE OF THE EVALUATION/FC	<i>REFIT evaluation of Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (Written Statement Directive).</i>		
LEAD DG RESPONSIBLE UNIT	EMPL B2	DATE OF THIS ROADMAP	01 / 2016
TYPE OF EVALUATION	Ex-post evaluation	PLANNED START DATE	04/2014
		PLANNED COMPLETION DATE	10 / 2016 (adoption of the Staff Working Document) NOTE: the evaluation started prior to the adoption of the Better Regulation Guidelines
		PLANNING CALENDAR	2015
This indicative roadmap is provided for information purposes only and is subject to change.			

A. Purpose
(A.1) Purpose
<p>On 14 October 1991 the Council of the European Communities adopted Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. The Directive states that each employee must be provided with a written document containing information on the essential elements of his/her contract or employment relationship, not later than two months after the commencement of employment.</p> <p>These essential elements cover at least a number of items listed in the Directive such as the description of the work, the date of its commencement, its duration (if it is temporary), the amount of paid leave and the working time. Additional information is foreseen for expatriate employees. In a nutshell, each employee should know for whom he works, where he works and what are the basic conditions of his/her job.</p> <p>The Commission intends to evaluate the Directive 91/533/EEC. More precisely, the Commission will assess the compliance, relevance, effectiveness, efficiency and coherence of the Directive and thus also addressing its EU added value. The evaluation will include an examination of any amendments to the Directive or other actions that prove to be necessary in order to achieve the objectives assigned to the Directive.</p> <p>The evaluation of Written Statement Directive is foreseen as part of the 2016 Commission Work Programme (Annex II on REFIT initiatives).</p>
(A.2) Justification

The Commission project stems from two types of considerations.

First, an evaluation¹ of the Directive is justified by the Commission evaluation policy as such.

Indeed, the Commission should proportionally evaluate all spending and non-spending activities addressed to third parties².

Three implementation reports of the Directive were drafted in 1999, 2007 and 2009 (see below under section D.2). However, these reports are not fully-fledged evaluations as they only describe the transposition rules adopted by the Member States. Therefore, they do not really assess the relevance, effectiveness, efficiency, coherence and EU added value (on these concepts see above section A.1) of the Directive, even if they bring some short comments on the completeness and adequacy of the transposition rules adopted by Member States.

Therefore, Directive 91/533/EC was never thoroughly evaluated and it seems appropriate to do so at present. Moreover, within the **REFIT programme**, the Commission considered on 2 October 2013³ that an evaluation of legislation regarding information obligations for employers in relation to employment contracts is necessary. Regarding the aim of simplification, the High Level Group on Administrative Burdens⁴ stated for instance that "*the Commission should consider extending the deadlines [contained in the Directive] in combination with giving companies the choice of means on how to inform their employee in the meantime. Furthermore, the Commission should examine the possibility to exempt micro entities from the written obligation following the principles of the Small Business Act without damaging the protection of employees*"⁵.

The second justification for the evaluation relates to the fundamental changes that have occurred both on the labour market and at the level of EU law over the last twenty years. Those changes have had a clear impact on many aspects of the organisation of work, including information rights of employees.

Regarding the labour market, the variety of employment relationships has increased. On top of fixed-term and part-time work, new forms of employment have appeared or developed such as telework, temporary

¹ An evaluation is defined as "an evidence-based judgement of the extent to which an intervention has been (i) effective and efficient (ii) relevant given the needs and its objectives (iii) coherent both internally and with other EU policy interventions and (iv) achieved EU added-value", Better Regulation Guidelines, SWD(2015) 111 final, p. 49.

² Communication of the Commission "Focus on results: strengthening evaluation of Commission activities", SEC(2000)1051

³ "Communication on Regulatory Fitness and Performance (REFIT): Results and Next Steps", COM (2013) 685. See also Annex 3 to the Commission Work Programme 2015, COM (2014) 910, p. 6, REFIT action n°26.

⁴ This High Level Group, chaired by Mr Edmund Stoiber, was set up in late 2007 to advise the Commission on the Action Programme for reducing administrative burdens for businesses in the EU. Its main task is to provide advice on administrative burden reduction measures. See http://ec.europa.eu/smart-regulation/refit/admin_burden/high_level_group_en.htm

⁵ Fifth opinion of the High Level Group on Stakeholders' suggestions of 12 November 2009, see http://ec.europa.eu/smart-regulation/refit/admin_burden/docs/enterprise/files/hlg20091112_offline_opinion_fifth_batch_en.pdf

agency work, freelance contracts, on-call contracts or zero-hours contracts. In addition, in several Member States, some forms of employment are neither classified as a standard employment relationship, nor as a self-employment status. It is therefore useful to examine whether these new forms of employment should be considered as falling within or outside the scope of Directive 91/533/EC and whether they require amendments to its provisions in the light of the objective of protecting employees.

In parallel, regarding EU law, several directives related to labour law were also adopted or modified over the last two decades. Among these, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services⁶ is to be underlined. There are several conditions for a valid posting of workers to take place and the written document requested by Directive 91/533, in conjunction with its Article 4 on additional information for expatriate employees, constitutes a monitoring instrument for Member States⁷. Furthermore, in some Member States, the obligation of information through a written document is seen as a way of preventing undeclared work, whose reduction has become a priority in the policy agenda of the EU and of the Member States⁸. Moreover, the EU is also promoting written agreements in order to improve the quality of traineeships⁹. Furthermore, regarding working time, it would be useful to examine whether the written document required by Directive 91/533 plays a role as a record of the use made by employers and employees of the possibility allowed under Article 22(1) of Directive 2003/88¹⁰ not to apply the limit to average weekly working time of 48 hours (in Member States having chosen to allow this possibility). Finally, the Charter of Fundamental Rights of the European Union became a source of primary law from the entry into force of the Lisbon Treaty. Some provisions of the Charter are indeed clearly linked to labour law¹¹.

The Commission finds it useful to examine if, and if so to what extent, changes in the labour market or other relevant developments (e.g. regarding the operation of the internal market and the cross-border

⁶ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ, 21.1.1997, L 18/1.

⁷ This is specifically recognised in Article 9 (1) (b) of Directive of 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ, 28.5.2014, L 159/11.

⁸ See the recent Proposal of the Commission for a Decision of the European Parliament and of the Council on establishing an European Platform to enhance cooperation in the prevention and deterrence of undeclared work, COM (2014) 221final. According to Article 2 of the Proposal, the Platform "*shall contribute to better enforcement of EU and national law, to the reduction of undeclared work and the emergence of formal jobs, hence avoiding the deterioration of quality of work, and to promote integration in the labour market and social inclusion*".

⁹ See Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships, OJ, 27.3.2014, C 88/1.

¹⁰ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ, 18.11.2003, L 299/9.

¹¹ See Article 27 - Workers' right to information and consultation within the undertaking, Article 29 - Right of access to placement services, Article 30 - Protection in the event of unjustified dismissal and Article 31 - Fair and just working conditions. On the links between EU Directives and the Charter, see Explanations relating to the Charter of Fundamental Rights of the European Union, (2007/C 303/02) Official Journal of the European Union, C 303, 14.12.2007, pp. 17-35. Other relevant Charter rights could also be taken into account such as Article 15 - Freedom to choose an occupation and right to engage in work and Article 47 - Right to an effective remedy and to a fair trial.

¹² Together with Directive 2014/67/EU.

provision of services) justify improvements or amendments to the Directive 91/533. The Commission will also keep in mind the necessary coherence between Directive 91/533, Directive 96/71/EC (posting of workers)¹², the EU support to the fight against undeclared work, the EU recommendation for written traineeship agreements and the Directive 2003/88 on working time.

B. Content and subject of the evaluation

(B.1) Subject area

The evaluation will assess the Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (Written Statement Directive). For assessment of coherence with other policies the following will be particularly taken into account: the Directive 96/71/EC on posting of workers¹³, the EU support to the fight against undeclared work, the EU recommendation for written traineeship agreements, the Directive 2003/88 on working time, the Charter of Fundamental Rights of the European Union and the Community Charter of the Fundamental Social Rights of Workers.

(B.2) Original objectives of the intervention

The aim of the Directive, as stated by its preamble, is twofold: **to provide employees with improved protection against possible infringements of their rights and to create greater transparency on the labour market.**

The Explanatory Memorandum accompanying the Commission proposal¹⁴ entails important provisions related to these aims:

"This Commission proposal, which will contribute to ensuring the greater transparency of the labour market, specifically concerns those workers who have neither a written contract of employment nor a letter of appointment explaining the elements of the employment relationship or referring to a collective agreement or any other easily accessible written document. [...] [T]he intention is to ensure that each worker knows for whom he works, where he works and what the basic conditions are.

[...]

This will do a lot towards improving the transparency of the Community labour market, while at the same time giving workers more security, a better idea of their rights and more mobility within the Community".

¹³ Together with Directive 2014/67/EU.

¹⁴ COM (90) 563 final, "Proposal for a Council Directive on a form of proof of an employment relationship".

The Directive is also to be read in conjunction with Article 9 of the Community Charter of the Fundamental Social Rights of Workers according to which: "The conditions of employment of every worker of the European Community shall be stipulated in laws, in a collective agreement or in a contract of employment, according to arrangements applying in each country".

(B.3) How the objectives were to be achieved

In order to fulfill its goals, the Directive states that every employee must be provided with a written document containing information on the essential elements of his contract or employment relationship, not later than two months after the commencement of employment. These essential elements shall at least cover the items listed under Article 2 (2) of the Directive, in short: identities of the parties, place of work, description of the work, date of its commencement and duration (if it is temporary), the amount of paid leave, the arrangements for either side to give notice, the initial basic pay and the other components of the remuneration, the working times and the collective agreements governing the employee's conditions of work.

In accordance with Article 5, the employee must be provided with information on any change in the essential elements of the contract or employment relationship. The Directive also mentions (Article 4) that additional information must be provided to expatriate employees (e.g. the duration of the employment abroad and the currency to be used for the remuneration) before his/her departure.

C. Scope of the evaluation/FC

(C.1) Topics covered

The geographical scope of the evaluation is the European Economic Area, i.e. the European Union in its present composition of 28 Member States plus Norway, Liechtenstein and Iceland. The scope of application in time starts for each country at the date on which the transposition of the Directive was made or became mandatory for this country, the earliest of these dates being chosen.

The analysis will cover the legal and socio-economic dimension and be conducted across the range of different economic sectors. See also section A.2.

(C.2) Questions/issues to be examined

The evaluation will assess the **compliance, relevance, effectiveness, efficiency, coherence** and **EU added value** of the Directive 91/533/EEC. More precisely, the following questions will be addressed:

For the compliance

The evaluation shall contain an examination of the national legislations transposing the Directive and an analysis of the relevant national case-law. It shall present a general view on the **level of compliance** ensured by Member States of the EEA. This analysis shall include:

- a. an identification of potential incomplete or incorrect **transposition rules**;
- b. an identification, to the extent possible, of the existence of repetitive or systematic **infringements** to the principles of the Directive in certain Member States, in certain economic sectors or in relation to certain categories of employees;
- c. an assessment of the **enforcement** of rights before the labour inspection authorities and/or courts as well as the imposition of **sanctions**. This will include an assessment of whether the sanctions were effective, proportionate and dissuasive;
- d. an assessment of how Member States made use of the **margins of discretion** or options allowed by the Directive ;
- e. an assessment of the level of **awareness** of the rules deriving from the directives by the employees and by the employers, including a focus on SMEs and micro enterprises;
- f. an assessment of whether the **new forms of employment** mentioned under section A.2 above are subject to the Directive;
- g. an assessment of whether **national law went further** than requested by the Directive in terms of providing for improved information for employees;

Finally, the evaluation will summarize

- e. the **key problems** identified with the compliance of the Directive and expose the causes for such problems.

For the relevance

The evaluation shall assess the extent to which the two objectives of the Directive (protection of employees and transparency of the labour market) **correspond to the needs of the stakeholders** (employers, employees, companies, public authorities...) in the EU economy.

- a. Regarding the first objective (protection of employees), the evaluation shall assess the link between individual information given to employees on the essential elements of their employment contract/relationship and improved protection against possible infringements of their rights. It shall collect and assess the stakeholders' views on the necessity and usefulness of this type of information. It shall assess the specificities and advantages of this protection mechanism for employees in comparison to other

protection mechanisms (e.g. labour inspectorates, trade unions...).

b. Regarding the second objective (transparency of the labour market), the evaluation shall further develop the concept of transparency of the labour market and assess the need to increase this transparency in the EU economy. It is to be underlined that the concept of transparency of the labour market is not defined by the Directive. In view of the Explanatory Memorandum and the content of the Directive, the Commission services understand this concept as referring to the possibility for employees, employers, companies and public authorities to know what types of working conditions exist on a specific labour market within which sectors or for the execution of which works.

Finally, the evaluation shall assess the extent to which the Directive might **respond to other needs** in the EU economy.

For the effectiveness

The analysis under this heading shall include, among others, the following:

- a. To which extent has the Directive **provided employees with improved protection** against possible infringements of their rights?
- b. To which extent has the Directive created **greater transparency** on the labour market?
- c. How could the two objectives set by the Directive be **better achieved**?

If some problems of compliance have been identified, the evaluation will propose **potential solutions** and assess to which extent they will improve the effectiveness of the Directive.

For the efficiency

The efficiency analysis will at least cover the following questions:

- a. What are the costs and benefits generated by the Directive for **employees, employers, society and the economy** at large?
 - How did the transposition of the Directive affect the companies' costs and their allocation? To what extent are costs stemming from national provisions not directly imposed by the Directive?
 - To which extent is it possible to reduce the costs identified without damaging the benefits brought to the employees? To the contrary, to which extent is it possible to increase the benefits brought to the employees without increasing the costs?
 - How did the transposition of the Directive affect the costs/benefits for employees?

b. Which national best practices seem to reduce the burden for the **undertakings**?

c. To what extent are the **deadlines** contained in the Directive appropriate?

For the coherence

The evaluation will have to assess the **internal and external** coherence of the Directive. The internal coherence refers to the structure of the Directive and the mutual complementarity of its provisions. The external coherence of the Directive refers to its links to other pieces of EU legislation, in particular: the Directive 96/71/EC on posting of workers, the EU support to the fight against undeclared work, the EU recommendation for written traineeship agreements, the Directive 2003/88 on working time, the Charter of Fundamental Rights of the European Union and the Community Charter of the Fundamental Social Rights of Workers.

For the EU added value

Based on the assessment of the above criteria conclusions will be made also on the EU added value of the Directive. European added value may be the results of different factors: coordination gains, legal certainty, greater effectiveness, complementarities... In the social policy field, the EU added value may also result of the instituting of minimum standards, preventing a detrimental race between Member States to the lowest working conditions.

(C.3) Other tasks

The Commission evaluation report will be supported by an external evaluation study. Note: The external contract was signed before the entry into application of the BR Guidelines.

An open public consultation will be carried out.

D. Evidence base

(D.1) Evidence from monitoring

The Directive 91/533/EEC does not contain any specific monitoring/ reporting obligation (other than the Member State's duty to inform the Commission of the transposition rules adopted before the end of the transposition period). However, several implementation reports are available (see below under D.2).

(D.2) Previous evaluations and other reports

Transposition of the Directive was scrutinized for each EU Member State (except Croatia), either by the Commission itself or by means of studies commissioned by the Commission:

- Commission Staff Report (1999) on the implementation of Directive 91/533/EEC under <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=202> - the report presents the transposition rules adopted by the 15 members of the EU at that time;

- Studies (2007 and 2009) on the implementation of Directive 91/533/EEC under <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=202> - the 2007 study presents the transposition rules adopted by the 10 new EU members of 2004 and the 2009 study presents the transposition rules adopted by Romania and Bulgaria;

- Croatia was not covered by any specific report or study but the correct transposition of the Directive was scrutinized during the accession process.

These reports will be used as a basis for the evaluation of the **compliance** (see definition above under A1).

(D.3) Evidence from assessing the implementation and application of legislation (complaints, infringement procedures)

There is currently one request for clarifications ongoing that was sent to a Member State having recently amended its transposition rules. Otherwise, no Member State was ever found by the EU Court of Justice not having fulfilled its obligation under the Directive 91/533/EEC. The Court however replied to several preliminary questions¹⁵. In particular, in the case *Kampelmann*, the Court ruled that the notification referred to in Article 2(1) of the Directive enjoys the same presumption as to its correctness as would attach, in domestic law, to any similar document drawn up by the employer and communicated to the employee. The same judgment states that the mere designation of an activity cannot in every case amount to even a brief specification or description of the work done by an employee, as required by the Directive. In *Lange*, the Court ruled that the obligation for an employee to work overtime whenever requested is an essential element of the contract or employment relationship that must be notified to the employee.

(D.4) Consultation

Consultation steps

During the evaluation, several sources of data will be used (with the help of the external contractor). In the chronological order, the following consultation steps are:

- a thorough literature review;
- a thorough legal assessment done at national level by experts of each country of the European Economic Area;
- about 12 interviews of key EU-level stakeholders (e.g. European institutions, European Social Partners);
- a specific focus on 8 Member States (SE, UK, DE, FR, HU, IT, BU, PL); this implies (regarding the selected countries) further research, additional interviews and a panel survey among employers;
- a workshop of half to one day with key experts and stakeholders on the basis of the interim results of the

¹⁵ See C-253/96 and C-258/96, *Kampelmann*; C-350/99, *Lange*; C-306/07, *Andersen*. See also from the EFTA Court, case E-10/12, *Hardarson*.

evaluation, this workshop will enable to discuss the logical links of the analysis of the external contract;

The Commission Services will carry out an open public consultation that will feed into the final evaluation report together with the conclusions of the external contract. The public consultation is expected to be launched in January 2016 and will last 12 weeks (relevant website:

<http://ec.europa.eu/yourvoice>). The questionnaire will be available in (at least) the 23 languages of the EU.

Identification of stakeholders

Contributions from employers (all sizes, all sectors), workers (in all types of businesses, all sectors, all forms of employment) and their representatives are particularly sought as they are the ones primarily affected by the Directive. Contributions from public authorities will also be collected as they are responsible for labour inspection and for the fight against undeclared work. Citizens will also have the opportunity to give their opinion on the general performance of the Directive.

The table below shows how different stakeholders will be consulted.

<i>Targeted stakeholder</i>	<i>Consultation method</i>
<i>Employers (with appropriate attention to micro, small and medium enterprises)</i>	<i>Interviews at national level Survey to employers Public consultation</i>
<i>Employers' representatives</i>	<i>Interviews at national level Interviews at EU level Public consultation Workshop</i>
<i>Employees</i>	<i>Public consultation</i>
<i>Employees' representatives</i>	<i>Interviews at national level Interviews at EU level Public consultation Workshop</i>
<i>Public authorities</i>	<i>Interviews at national level Interview at EU level Public consultation Workshop</i>
<i>All citizens & interested stakeholders</i>	<i>Public consultation</i>

(D.5) Further evidence to be gathered

n.a.

E. Other relevant information/ remarks

The Commission services will be assisted by an external consultant.

The present evaluation has started before the Better Regulation Guidelines entered into application.

Therefore, the feedback received on the roadmap will feed into the evaluation but – due to the progress already achieved in the evaluation – will not be used to further define its scope or the evaluation questions as mentioned above.