

INFORMATION NOTE

'Fitness check'

on EU acts in the area of Information and Consultation of Workers

1. Background

As part of the 2010 Work Programme¹, the Commission has started to review the body of EU legislation in selected policy fields through "fitness checks" in order to keep current regulation 'fit for purpose'. The goal is to identify excessive burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time. The purpose of the fitness check is not deregulation or less regulation but rather better / smart regulation and making EU legislation more responsive to current and future challenges.

The fitness check of legislation is a rolling programme running for the entire mandate of the Barroso II Commission. The exercise should produce concrete findings on the effectiveness, efficiency, relevance and added value of the *acquis* in the area under review. It will serve as a basis for drawing policy conclusions that could be subject to orientation debates by the College. The exercise should include consultations of different constituencies that are interested in or affected by the legislation in question. It could also serve to raise awareness about the need to enhance effectiveness and relevance of EU legislation in certain areas. As a result of this exercise, some pieces of legislation could be withdrawn or amended, new instruments could be proposed to fill certain gaps and new tools complementing legislation could be developed.

Pilot exercises have begun in 2010 in four areas: employment and social policy, environment, transport and industrial policy. EMPL has decided to carry out its fitness check exercise in the area of Information and Consultation of Workers (ICW).

This document describes the spectrum of activities that are proposed to be undertaken in carrying out the DG EMPL 'Fitness Check'.

2. General Approach

Our aim is to carry out a robust review of the family of Directives associated with the theme of ICW. These are:

- Directive 98/59/EC on collective redundancies².

¹ Commission Work Programme 2010, COM (2010) 135 final, page 10.

² Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies. OJ L 225 of 12.8.98, p.16.

- Directive 2001/23/EC on transfers of undertakings, focusing on Article 7³.
- Directive 2002/14/EC establishing a general framework relating to information and consultation of workers in the EC⁴.

While concerned with ICW in a transnational context, the newly recast Directive 2009/38/EC on European Works Councils⁵ will be excluded from the fitness check exercise for several reasons: a) it is too recent (and the new amendments are not yet been transposed into national law by Member States); b) its adoption was preceded by a comprehensive and rigorous ex ante impact assessment; and c) it will be subject to a specific ex post evaluation later on as imposed by the Directive itself.

Nor will the fitness check include Directives 2001/86/EC (European Company) and 2003/72/EC (European Cooperative Society). In fact, these Directives concern specific types of companies the review of which is linked to that of the related EU Regulations regarding the Statutes of such companies.

The fitness check will rely on an evidence based approach and integrate legal, economic and social effects of the existing legislation. There is already an extensive set of studies in this area which will be complemented, where necessary, by additional research and stakeholders' consultations.

(i) Already existing evidence

This includes:

- Studies examining transposition and implementation of the ICW Directives in EU-25 (within a wider exercise encompassing the whole body of employment legislation) commissioned in 2005 and concluded in 2007.
- A study examining implementation in Romania and Bulgaria (2009).
- A European Parliament study on the "impact and assessment of EU Directives in the field of Information and Consultation" (2007).
- A Eurofound report on the implementation of Directive 2002/14 (2009)⁶.

³ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, OJ L 82 of 22.03.2001, p.16. Article 7 deals with information and consultation of workers' representatives in cases of transfers of undertakings.

⁴ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community. OJ L 80 of 23.3.2002, p. 29.

⁵ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 (OJ L 122 of 16.5.2009, p. 28.) recasting Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

⁶ <http://www.eurofound.europa.eu/eiro/studies/tn0710029s/index.htm>

- A second Eurofound report on the information and consultation practice across Europe five years after Directive 2002/14 (2011)⁷.

(ii) Additional evidence to be gathered over an extended period from a variety of sources

This will include:

- (a) Appropriate consultation with the national governments and the Social Partners through the life-cycle of the exercise
- (b) A new study evaluating the operation and achievements of the ICW Directives
- (c) Technical seminars and conferences with legal experts

For further details in relation to specific evidence gathering activities see section 4 below.

(iii) Presentation of overall results

It is envisaged that the overall results of DG EMPL's fitness check will be presented in a Commission communication in 2012 outlining the key conclusions and next steps. This communication will be accompanied by a staff working paper setting out in detail the evidence by Member State and the positions of stakeholders.

3. ICW Directives: historical background

(i) Since 1975, several Directives have been adopted in the policy area of ICW with different legal bases and responding to different historical circumstances. Against the background of increasing number of restructurings as a result of the development of the internal market, the first Directives aimed primarily to afford to workers across the European Community enhanced protection in specific critical situations (collective redundancies) or change of employer (transfers of undertakings). The realisation of existing gaps in national laws and practices⁸ led to the adoption of another Directive in 2002 (the framework Directive) complementing the previous ones and establishing a general, permanent and statutory system of ICW at EU level, in order to promote anticipation of change and information and consultation at the workplace.

(ii) It should be recalled that the right to ICW within the undertaking constitutes a fundamental social right enshrined in the Charter of Fundamental Rights – Article 27.

(iii) The exercise of this right at national/company level is currently regulated by three directives: Directive 2002/14/EC establishing a general framework for informing and

⁷ <http://www.eurofound.europa.eu/eiro/studies/tn1009029s/tn1009029s.htm>

⁸ Cf. Renault-Vilvorde case.

consulting employees, Directive 98/59/EC on collective redundancies and Article 7 of Directive 2001/23/EC on transfers of undertakings.

(iv) The Directives on collective redundancies and on transfer of undertakings date back to the 70's, have been amended once (in 1992 and 1998 respectively) and later consolidated (in 1998 and 2001). The third one (Dir 2001/14) is the most recent and has not undergone any change.

(v) The need to assess the operation of the Directives and the effects they are producing has been expressed several times, by the Commission and the European Parliament. The Social Agenda 2005-2010 provided that "in the context of better regulation, as outlined in the Lisbon mid-term review, the Commission will propose the updating of Directives 2001/23/EC (transfers of undertakings) and 98/59/EC (collective redundancies), and the consolidation of the various provisions on worker information and consultation." A European Parliament study was published in 2007 and encouraged the Commission to pursue the consolidation of Community ICW legislation in order to identify potential benefits and costs, and clarify the practical options and implications as a basis for consultation.

(vi) In response to the perceived need to promote the coherence between all Directives in the area of ICW, the Commission examined the option of an eventual recast. However, having consulted stakeholders on that option, it decided to give priority to the revision of the European Works Councils Directive which led to the adoption of recast Directive 2009/38/EC.

(vii) Whilst the Commission examined the legal transposition of all Directives in the Member States, only Directives 2001/23/EC and 2002/14/EC were subject to a review of their application and effects (the older Directive 98/59/EC was not).

(viii) In a resolution of 19 February 2009, the Parliament called upon the Commission to consider the need to coordinate the EU Directives in the ICW area with a view to determining what changes may be required in order to eliminate duplications and contradictions. It also requested the submission of an evaluation report on the results achieved through the application of Directive 2002/14/EC.

(ix) More recently, with the sweeping increase in the number of company closures and restructurings prompted by the financial and economic crisis, the exercise of ICW rights has become subject to greater challenges as social dialogue at company level gained a more crucial role. This created a further need for the relevant legal provisions to be tested in practice with respect to their relevance, effectiveness and the level of protection afforded to the workers concerned. Finally, it is important to identify any unnecessary administrative burdens and other difficulties of application that EU legislation, or the national measures of transposition, may be causing for businesses, national authorities or workers' representatives.

4. Milestones and individual evidence gathering activities

A practical programme of evidence gathering is described below:

(i) Individual evidence gathering and analytical activities

(a) **Study on evaluation** of the operation and effects of information and consultation directives in the EU/EEA countries. In particular, it is expected to assess, in both

quantitative and qualitative way, the social and economic costs and benefits related to employees' information and consultation at national level. The final report is expected at the beginning of 2012).

(b) The **European Foundation for the Improvement of Living and Working Conditions** (Eurofound) is closely involved (2 reports above on Directive 2002/14; findings and ongoing secondary analysis of European Company Survey).

(c) The **European Labour Law Network**⁹ prepared a thematic Report as well as some papers on this topic in the framework of its Legal Seminar (see below under ii).

(ii) Stakeholders' involvement

Thematic discussions involving stakeholders are a very important element in the fitness check exercise.

The first event in this regard, i.e. a **European Labour Law Network Seminar**¹⁰, was held in the Hague on 11-12 November 2010. It brought together labour lawyers and academics as well as Member States' and social partners' representatives.

A second step is the setting up of an ad hoc **Working Group on ICW**¹¹ bringing together Member States' and Social partners' representatives. Its mandate is to examine and discuss the different studies and bring out the different national experiences with the operation of the Directives, as transposed in the Member States. The first meeting was held on 17 February 2011; the second on 26 September 2011.

Stakeholders will also be involved in the course of preparing the aforementioned evaluation study (through interviews, case-studies etc)

⁹ Non-governmental expert network of legal experts supported by DG EMPL in the framework of Progress.

¹⁰ See, in this regard, [Useful links](#), Section 2 (below the present [Information note](#)).

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