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CONSULTATION DOCUMENT

**First phase consultation of Social Partners under Article 154 TFEU on a consolidation
of the EU Directives on information and consultation of workers**

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1. INTRODUCTION

The purpose of this document is to consult the social partners, in accordance with Article 154(2) TFEU, to obtain their views on the possible direction of European Union action concerning a consolidation of the EU Directives on information and consultation of workers.

A recent 'fitness check'¹ found that three Directives² on information and consultation of workers at national level³ are broadly 'fit for purpose', i.e. they are generally relevant, effective, coherent and efficient (the benefits they generate are likely to outweigh the costs).

The 'fitness check' brought also to light, however, a number of gaps and shortcomings. Certain aspects related to the practical operation of the Directives have been questioned, in particular in terms of effectiveness and coherence as regards wording and definitions of certain concepts of the Directives.

As a follow-up, the Commission announced that it would launch the consolidation of the three directives on information and consultation, subject to the results of a consultation of social partners⁴, as part of the REFIT initiative to simplify, reduce regulatory costs and consolidate legislation.

2. EU DIRECTIVES ON INFORMATION AND CONSULTATION (I&C)

The right to I&C within the undertaking constitutes a fundamental social right enshrined in the Charter of Fundamental Rights of the EU, in particular its Article 27, as well as in the 1989 Community Charter of the fundamental social rights of workers, in particular its Section 17.

The exercise of this right at national or company level is currently regulated by the following three Directives: Directive 98/59/EC on collective redundancies, Directive 2001/23/EC on transfers of undertakings (Article 7), and Directive 2002/14/EC establishing a general framework for informing and consulting employees.

Since 1975, European legislation in this area has been adopted with different legal bases and responding to different historical circumstances. In anticipation of the consequences of company restructurings on employees within the newly created internal market, the first Directives aimed primarily at providing greater protection for workers across the European Community in specific critical situations (collective redundancies) or change of employer

¹ 'Fitness check' on EU law in the area of information and consultation of workers. Its results have been published in a Commission Staff Working Document, SWD (2013)293 final of 26.7.2013.

² In particular, Directives 98/59/EC on collective redundancies, 2001/23/EC on transfers of undertakings and 2002/14/EC on a general framework relating to information and consultation of workers.

³ The 'Fitness check' exercise did not include acts which deal with I&C at transnational level for the reasons set out in the SWD on the fitness check (in particular its Section 1).

⁴ See Commission communication on '*Regulatory Fitness and Performance (REFIT): Results and Next Steps*' (COM(2013) 685 final).

(transfers of undertakings) while establishing a more level playing field for companies within the internal market. The persistence of gaps in national laws and practices led to the adoption of another Directive in 2002 (the framework Directive) complementing the previous ones and establishing at EU level a general, permanent and statutory system of I&C, with a view to promoting workers' involvement and anticipation of change through information and consultation at the workplace.

The first two Directives (on collective redundancies and on the transfer of undertakings) date back to the 70's. Each Directive has been amended once (in 1992 and 1998 respectively) and later consolidated (in 1998 and 2001 respectively). Directive 2002/14/EC is the most recent and has not undergone any changes.

While the aforementioned Directives deal with information and consultation of workers in companies at national level, other EU acts focus on information and consultation at transnational level. In particular, the recast Directive 2009/38/EC on European Works Councils concerns information and consultation in Community-scale undertakings and Community-scale groups of undertakings⁵, while other Directives are concerned with the involvement of employees in specific European legal forms for companies and cooperatives⁶.

The European Commission and the European Parliament have considered in the past the possibility to consolidate the Directives in the area of I&C. The Commission 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 study⁷ published in 2007 encouraged the Commission to 'pursue the consolidation of Community I&C legislation to identify potential benefits and costs, and clarify the practical options and implications as a basis for consultation'.

In this context, responding to the perceived need to promote consistency among all Directives in the area of I&C, the Commission examined the option of a recast⁸. However, taking into account the reluctance of consulted stakeholders in particular of government representatives who did not consider appropriate to reopen the debate at national level on this sensitive matter a short time after the transposition of the 2002 Directive, the Commission decided to give priority to revising the European Works Councils Directive, widely perceived as necessary for reasons of effectiveness, legal certainty and coherence. This led to the adoption of recast Directive 2009/38/EC.

In a resolution of 19 February 2009, the European Parliament called upon the Commission to consider the need to coordinate the EU Directives in the I&C area, namely Directives 94/45/EC, 98/59/EC, 2001/23/EC, 2001/86/EC, 2002/14/EC, 2003/72/EC and Regulation

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 In particular, Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to involvement of employees (OJ L 294 of 10.11.2001, p. 22), and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to involvement of employees (OJ L 207 of 18.8.2003, p. 25).

⁷ IP/A/EMPL/ST/2006-07, PE 358.646, available at: <http://www.europarl.europa.eu/activities/committees/studies/download.do?file=17333>

⁸ See, in this regard, Section 2 of SWD(2013) 293.

2157/2001⁹, with a view to determining what changes might be required in order to eliminate any duplications or contradictions.

The European Economic and Social Committee in its opinion of 20.3.2013¹⁰ called for a more effective formulation of I&C rights in European law, and suggested that serious consideration be given to the extent to which consolidation in a single European framework directive could at least ensure greater standardisation of the various definitions of information and consultation and, where applicable, participation in company boardrooms as well. The EESC cited in this regard Directives 98/59/EC, 2001/23/EC, 2002/14/EC, 2009/38/EC, 2001/86/EC and Regulation 2003/72/EC¹¹.

More generally, it is also worth noting the more recent Commission initiative in the area of restructuring, i.e. the EU Quality Framework for anticipation of Change and Restructuring (QFR)¹². The QFR builds on the existing EU law in the area of I&C at company level, but goes beyond this legislative framework through establishing a set of (non-binding) principles and good practices addressing to a multitude of actors (companies, workers' representatives, social partners, public employment services, public administration and authorities, etc.) at different levels (European, national, regional, sectoral and organisational). Thus, the QFR offers to the above actors guidance aiming at anticipating and managing restructuring processes in a socially responsible and economically efficient way. The Commission announced that it will monitor the application of the Quality Framework and report by 2016 on whether further action is necessary in this area, including a possible legislative proposal.

3. ISSUES RELATING TO THE SCOPE OF APPLICATION OF THE EU DIRECTIVES ON I&C

Some issues discussed in the fitness check exercise relate to **the scope of application** of the three I&C Directives.

3.1. The two following issues are already dealt with in the context of other processes or initiatives:

With regard to **SMEs**, the fitness check pointed to research highlighting the limits of legislation in some respects in particular as regards the threshold for setting up I&C bodies and noted the need to look more in depth at the issues related to social dialogue in SMEs taking into account the specific situation and needs of the latter. It found that there is no clear link between the level of thresholds and the actual degree of workers representation. It mentioned the general tendency for the incidence of formal I&C arrangements to decline with decreasing company size, almost irrespective of the level at which formal thresholds are set. As regards social dialogue in small companies, recent research carried out by Eurofound¹³ showed that it is heavily influenced by the national legal frameworks, cultures and traditions of industrial relations. However, the decisive factor influencing social dialogue in small companies is the leadership and management culture of the company, rather than legal and

⁹Respectively, Directives on European Works Councils, collective redundancies, transfers of undertakings, employees' involvement in the European Company, general framework for informing and consulting employees, employees' involvement in the European Cooperative Society and Regulation on the Statute of a European Company.

¹⁰ Own-initiative opinion on 'Employee involvement and participation as a pillar of sound business management and balanced approaches to overcoming the crisis', SOC/470 (Rapporteur: Wolfgang Greif).

¹¹ Respectively, Directives on collective redundancies, transfers of undertakings, general framework for informing and consulting employees, European Works Councils, employees' involvement in the European Company, and employees' involvement in the European Cooperative Society.

¹² COM(2012) 882 final of 13.12.2013.

¹³ See 'Social dialogue in micro and small companies', Eurofound 2014.

other forms of regulation. In that context, and given the fact that the differences in the thresholds triggering the application of the three I&C Directives are notably due to the different scope of the Directives, the Commission does not aim at revising those thresholds.

With regard to **seafarers**, the Commission presented on 18.11.2013 a proposal for a Directive with a view to lifting the exclusion of seafaring workers from the personal scope of application of a number of EU labour law directives¹⁴.

3.2. A third issue with regard to the scope of application of EU Directives relates to the extent to which **public sector** is covered or not. While the I&C Directives apply to public undertakings carrying out an economic activity¹⁵, whether or not operated for gain, they do not cover the public administration¹⁶. The three Directives use different wording for similar provisions in this regard¹⁷. The European Court of Justice clarified the interpretation of a number of provisions, most recently in its judgement in the Nolan case where it pointed out that Directive 98/59/EC does not cover activities of the public administration which fall within the exercise of public powers¹⁸.

The fitness check pointed out that more research¹⁹ is needed on the extent to which I&C rights are exercised in the public administrations of the EU Member States, in particular in the context of the public sector restructurings which are taking place in several countries.

In most Member States the public sector goes through important reforms aimed at increasing efficiency, sometimes under stringent budgetary constraints. Often such reforms lead to massive restructurings with consequences in terms of redundancies and changes in working conditions²⁰. The employment relationship of public sector workers is also in process of changing, becoming more and more like a private sector contract. The distinction between civil servants and employees is now increasingly blurred. In view of these developments and taking into account the importance of an effective and innovative public sector in the EU Member States, the Commission called on the latter to consider applying the Quality Framework on Restructuring (QFR) to public sector workers regardless of the nature, statutory or contractual, of their employment relationship²¹.

In this context, it is opportune to consider whether the I&C Directives need to be reviewed, in order to clarify whether public administration should be included in their personal scope of application or whether the wording of the provisions of the different Directives regarding the

¹⁴ Proposal for a Directive on seafarers amending Directives 2008/94/EC, 2009/38/EC, 2002/14/EC, 98/59/EC and 2001/23/EC, COM(2013) 798 final.

¹⁵ See, in this regard, in particular, Articles 1(1)(c) of Directive 2001/23/EC and 2(a) of Directive 2002/14/EC.

¹⁶ This is mainly due to the legislator's will. In particular, the European Parliament's amendment to extend the scope of application of the Commission proposal, which would lead to the adoption of Directive 2002/14/EC, to the 'public sector' (thus including 'civil service and public services') was not acceptable to the Council.

¹⁷ See, in this regard, Article 1(2)(b) of Directive 98/59/EC in comparison to Article 1(1)(c) of Directive 2001/23/EC and Article 2(a) of Directive 2002/14/EC.

¹⁸ See judgement of 18.10.2012 in case C-583/10, Nolan.

¹⁹ Cf., for example, Eurofound's research on industrial relations and working conditions in the public administration.

²⁰ See, among other, 'Industrial Relations in Europe 2012' available at: <http://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=7498&type=2&furtherPubs=yes>.

²¹ See Commission Communication of 13.12.2013 on an EU Quality Framework for anticipation of change and restructuring, COM(2013) 882, final.

exclusion of the public administration needs to be aligned in order to improve coherence and legal clarity in line with the ECJ case-law²².

4. ISSUES RELATING TO THE COHERENCE AND SIMPLIFICATION OF THE EU DIRECTIVES ON I&C

4.1. Overall the Commission fitness check pointed out²³ that 'the three I&C Directives as amended appear coherent and mutually reinforcing'. There is no evidence of any duplications or contradictions resulting in problems in their practical implementation.

Each of the 'specific' Directives on collective redundancies and on the transfer of undertakings has been amended once to promote clarity and coherence (in 1992 and 1998 respectively), and subsequently consolidated (in 1998 and 2001 respectively). They both contain, besides procedural, material law provisions. While the three I&C Directives at issue present a number of similarities, they differ from each other in terms of thresholds, scope of application, provision of I&C directly to workers, regulation of the detailed content of I&C, and possibility of social partners to provide for different I&C arrangements. Such differences are mainly due to their different scope and the EU legislators' will.

However, stakeholders at company level hold a more critical opinion about uncertainties or inconsistencies, gaps and practical problems relating to I&C legislation and express the view that some effort of simplification and consolidation might be justified. While some of these issues may go beyond the 'coherence' of the three I&C Directives²⁴ or may relate to the Directives' transposition in the Member States²⁵, nevertheless, such concerns deserve serious consideration and further discussion.'

4.2. A recurrent issue in discussions on I&C rights in EU law²⁶ relates to **the definitions** of the concepts 'information' and 'consultation' in the I&C Directives.

Directives 98/59/EC and 2001/23/EC (on collective redundancies and on the transfer of undertakings respectively) do not provide for specific definitions of the concepts 'information' and 'consultation'. In contrast, Directive 2002/14 contains such definitions. However, these are relatively succinct in comparison to the more extensive ones stipulated in the recast EWC Directive 2009/38/EC and the European Company Directive 2001/86/EC²⁷.

The fitness check pointed out that the differences in definitions are mainly due to the legislators' will²⁸. It pointed also to differences in the legal drafting technique²⁹ which do not necessarily imply less protection of workers in practice.

²² See footnote 18 above.

²³ See in particular Section 6.4.c of SWD on the fitness check.

²⁴ They may touch upon other evaluation criteria, particularly on 'relevance' and 'effectiveness', which were also discussed in the SWD on the fitness check.

²⁵ A number of alleged shortcomings (for example, difficulties in identifying employees' representatives or overlaps/duplication with regard to the representation bodies which have to be informed and consulted) relate to the Directives' transposition and should be examined at national level.

²⁶ See, most recently, in particular EESC opinion of 20.3.2013; Resolution of ETUC Executive Committee of 22-23 October 2013 on 'Strengthening information, consultation and participation rights for all workers'.

²⁷ See table of definitions in Annex.

²⁸ Preparatory work leading to the adoption of Directives 2002/14/EC and 2009/38/EC show the important role of the EU legislators in defining these terms.

²⁹ Article 2(f)(g) of Directive 2002/14/EC should be read in conjunction with Article 4(3)(4) of the same Directive; compare, in this regard, with Article 2 1(f)(g) of Directive 2009/38/EC. Although Directives 98/59/EC and 2001/23/EC do not provide for specific definitions of the concepts 'information' and 'consultation', they lay down specific related obligations in Articles 2 and 7 respectively (see Annex).

However there are calls to bring Directive 2002/14/EC as well as Directives 98/59/EC and 2001/23/EC in line with the allegedly better standards in terms of definitions contained in Directives 2009/38/EC and 2001/86/EC.

The addition of specific provisions defining the concepts 'information' and 'consultation' in the three I&C Directives under consideration would enhance legal clarity and awareness. Furthermore, adopting an extensive definition of these concepts, in line with the Directives on European Works Councils and/or on European Company, would improve consistency and coherence among the I&C Directives. It would also align these definitions to those endorsed by the European Social partners in their joint advice prior to the adoption of the recast EWC Directive. Standardized definitions are likely to render the application of the Directives easier and simpler and contribute thus to a more effective exercise of the rights and obligations of all actors concerned, i.e. employers, workers and public administrations.

However, care should be taken to avoid that the alignment of the definitions brings about an unjustified regression of workers' protection. Indeed, arguably Directive 2002/14/EC goes further than the EWC Directive or the European Company Directive as regards 'consultation', since it provides for consultation 'with a view to reaching an agreement' while the latter Directives state that the opinion of workers' representatives 'may be taken into account' by the employer. The different focus of, on the one side, the three I&C Directives and, on the other side, the EWC Directive and the European Company Directive, with the former focusing on information and consultation at national and the latter at transnational level, should also be taken into account in this context.

5. POSSIBLE APPROACH TOWARD A MORE COHERENT AND EFFECTIVE EU INFORMATION AND CONSULTATION LEGISLATION

In line with the better regulation policy, it is necessary to ensure the establishment of a simpler, more accessible and more coherent body of Union law, which would increase transparency, readability, awareness of rights and obligations, and make life easier for all actors concerned.

In this context, a targeted revision of the three Directives would allow addressing issues as identified but could fall short of expectations in terms of clearer, simpler and more effective EU law.

A further step towards simplification could be the consolidation of the EU I&C Directives through a '**recast**'. Recasting implies the adoption of a new legal act which incorporates in a single text both substantive amendments to (an) earlier act(s) and the unchanged provisions of that act(s). The new legal act replaces and repeals the earlier act(s)³⁰.

Such recasting of the three Directives on I&C at national level in a synthesized act would present a number of advantages. In particular, it would:

make the existing body of EU law in this specific area simpler, more accessible and more readable;

contribute to enhanced coherence and consistency;

bring about better awareness of the stakeholders concerned and eventually promote better effectiveness and compliance.

³⁰ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002Q0328:EN:HTML>

It could pursue notably the following objectives:

aligning in particular the definitions of key concepts (i.e. 'information' and 'consultation');

rendering more coherent and clear the wording of certain provisions, in particular those regarding the exclusion of the public administration from the scope of application of the three Directives³¹.

In sum, the recasting of the three Directives would mainly imply that their text should be virtually taken up in a single act, with some possible improvements of wording, more coherent definitions and improved structure in terms of common provisions.

Bearing in mind that the Directives were found to be broadly 'fit for purpose', such an exercise should not jeopardise the legitimate objectives pursued under the existing Directives, nor lead to any unjustified regression in relation to the existing situation.

The recasting should not affect the differences between the Directives which are justified by their different scope and specific objectives³². The Directives do not exclusively deal with I&C of workers. For example, Directive 2001/23/EC establishes also material rights of employees while Directive 98/59/EC provides for a notification procedure to a public authority and includes provisions on the timing of entry into effect of the redundancies. It should be further considered whether these provisions which go beyond I&C of workers *stricto sensu* should also be included in the recast Directive. Arguably, the objectives stated above, namely simplification, accessibility and readability, would speak in favour of such inclusion.

Lastly, it could be opportune to clarify in the revised or recast legislation that any processing of personal data in the framework of the application of this legislation has to be carried out in accordance with EU data protection law.

6. AIM OF THE CONSULTATION

Under Article 154(2) TFEU, before submitting proposals in the Social Policy field, the Commission must consult management and labour on the possible direction of Union action.

The Commission will examine the views expressed, and will then decide whether there is a case for EU action. If the Commission decides that there is, it will launch a second-phase consultation of the social partners at EU level on the content of any proposal for action, in accordance with Article 154(3) TFEU, after appropriate analysis of the envisaged proposal.

The questions on which the Commission consults the social partners are:

Do you consider the description of the issues in this paper correct and sufficient?

Do you think that the Commission should launch an initiative to revise or recast the three Directives on I&C of workers at national level? If so, what should be its scope?

³¹ Section 3.2 above.

³² For example, thresholds, procedural arrangements, enumeration of detailed elements of I&C. See in particular Section 2.c of SWD on the fitness check.

Would you consider initiating a dialogue under Article 155 TFEU on any of the issues identified in this consultation?