

FIRST PHASE CONSULTATION ON A CONSOLIDATION OF THE EU DIRECTIVES ON INFORMATION & CONSULTATION OF WORKERS – ETUC ANSWER

As a preliminary remark, the ETUC wishes to recall its attachment to the three information and consultation Directives targeted by the consultation paper. Directive 2002/14/EC sets a European framework for workers to exercise their fundamental right to be informed and express their views on companies' decisions. The collective redundancies Directive (98/59/EC) and the transfer of undertakings Directive (2001/23/EC) play a vital role in strengthening workplace democracy and helping workers' representatives to manage change in the company. The ETUC rejects a merger of the three Directives into a single instrument as this would create an unacceptable risk of regression in workers' rights.

The ETUC supports an improvement of the effectiveness and application of each of these Directives. An upward alignment of some of their provisions with regard to the scope, enforcement, information definition, liability in the value chain etc. would constitute an improvement. Furthermore, these three Directives are essential to anticipate and deal with change but they really represent a bottom line and could be usefully improved to ensure a more pro-active anticipatory agenda. .

An alignment of the notion of information in each of the three Directives could only be envisaged if it does not affect Article 2.3 of Directive 98/59/EC and Article 7 of Directive 2001/23/EC which set high standards on the content and purpose of the information to be given by management. An alignment of the notion of consultation cannot be envisaged under any circumstance.

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

Despite the stated intentions of the Commission in the accompanying letter to the consultation to strengthen social dialogue and give the European social partners an increased role in the shaping of social policy at EU level, the consultation paper almost exclusively focusses on the desirability of consolidating the three Directives on information & consultation ('I&C'). The ETUC strongly disagrees that consolidation should be regarded as an end in itself. Convergence between the three Directives should be envisaged only to the extent that it contributes to the improvement of the EU framework on information and consultation. In this regard, it should be underlined that the references in the consultation document are incomplete and insufficient.

In the European Parliament Resolution of 19 February 2009, the call on the Commission to consider the need to coordinate I&C Directives comes only at the end of a lengthy list of demands to strengthen the process of informing and consulting employees within the EU, and to implement and improve the measures transposing Directive 2002/14/EU. In particular, Parliament refers to the need to make available to the Member States a range of possible sanctions against employers that fail to comply with I&C rights. Parliament also calls for consideration to be given to issues linked to scope (including thresholds), calculation of workforce numbers and confidentiality clause.

Similarly, the EESC's call in favour of a consolidation of the provisions on employee involvement seems to be taken out of context. The opinion of 20.3.2013 describes how possibilities for employee involvement in the strategic orientation of businesses should become a universal element of European company law. The EESC considers that the provisions on obligatory employee involvement should be consolidated and applied

generally in EU law on the basis of standards already achieved, and in particular definitions of information, consultation and board level participation.

In its staff working document on the fitness check of the three Directives¹ the European Commission claimed that it is necessary not only to consolidate but also to address the shortcomings of the 2002/14/EC Directive such as the exclusion of a large number of the 14.8 million public administration employees from its scope and of a large number of the companies covered which do not have I&C bodies: only 1.3% of the total number of undertakings are covered. The Commission also noted that none of the three I&C Directives contains an obligation to attain a certain result, for example preparing “anticipative and forward-looking plans on employment and skills needs or social plans in the event of restructuring. Nor do the I&C Directives provide for any requirement redundancies to be made only as a last resort”². The Commission recalled that the proposal “that workers are informed even in the event that there are no workers’ representatives” was not upheld in the Council. All these points and others are left out in the descriptive of the consultation document.

In addition, the ETUC stresses that the Quality Framework on Restructuring, a soft law instrument, is not sufficient to build upon in order to properly tackle company restructurings which become a permanent feature in company life. It should also be underlined that the European Parliament has adopted several resolutions calling for workers not only to be informed and consulted, but also to have the right to participate in decisions concerning issues such as the introduction of new technology, changes in the organisation of work, production and economic planning of the company.

The consultation document identifies two issues for a possible recast/ revision: the scope and the definitions of information and consultation.

(1.1) Scope

SMEs

The fitness check pointed to the need to look at the issues related to social dialogue in SMEs taking into account the specific situation and the needs of the latter. The consultation document underlines that formal I&C arrangements decline with decreasing company size, irrespective of the level at which formal thresholds are set. As a result, the Commission does not aim at revising those thresholds.

This very formal approach does not provide a satisfactory answer to the challenges raised by SMEs. As the Commission stresses in the Staff Working Document, only one out of three employees in SMEs is covered by an I&C body. Considering that SMEs employ an estimated 40% of the EU workforce, an extremely high number of workers do not benefit from I&C rights. The ETUC also recalls the Deloitte study which reports that employers in some countries breaking up or re-defining enterprises in order to keep them under the size thresholds and that there are issues concerning the definition of establishments³. I&C is a fundamental right, and as such must be enjoyed by all EU workers regardless of the size or the leadership of the company.

The provisions of Directive 2002/14/EC are fundamental principles and the ETUC therefore questions the very need of thresholds in this Directive. The obligation to inform and consult workers should apply to all companies, regardless of the size of the company, the sector (public or private), or the employment status. In parallel, the Commission must together with the social partners explore additional avenues to foster the necessary change of culture in smaller sized companies.

¹ SWD (2013) 293 final of 26.7.2013

² P. 27-28

³ Evaluation study on the operation and effects of the information & consultation Directives, p 126

Seafarers.

The ETUC supports the lifting of the exclusion of seafaring workers from the rights provided for in the three I&C Directives.

The ETUC notes and welcomes the agreement reached in the meeting of 6 May on a compromise text regarding the Commission proposal COM (2013) 798 final, on the inclusion of seafarers in the scope of five labour law directives. A consolidation exercise that would include any of those directives should fully respect that agreement which has received the support of the relevant social partners (ETF and ECSA).

Public administration.

The ETUC welcomes that the Consultation raises the question of whether public administration should be included in the scope of the Directives. It is an opportunity for the ETUC to reiterate its call for their inclusion in the scope of the Directives, as supported by the European Parliament. It is unacceptable that today millions of public sector workers do not benefit from EU common minimum standards on information and consultation.

First, as stated above, the fundamental right to information & consultation should apply to all. Second, as stated in the Consultation, as a result of common restructuring and reforms, including job losses, pay freezes or cuts, transfers of staff, etc the employment relationship of public sector workers is becoming more and more like the private sector, this is particularly true with regard to job security. Third, as recognised by the Commission itself, most of public sector restructuring has been imposed with no information and consultation of employees concerned, a situation that must be redressed. Fourth, unlike when the Directives were adopted, there is now a strong EU dimension to public sector restructuring via the EU Semester and country related administrations that lay much emphasis on public administration reforms on the one hand, and on fiscal consolidation on the other which itself triggers restructuring in the public sector.

Last, the 2002 Directive does apply to public administration in a limited number of countries (transposition via collective agreements or domestic legislation). This further justifies the need for a level playing field in this sector across the EU.

With regard to the extension of the scope of the Directives to public administration, a single "extension" directive, modelled upon the proposal for a Directive for seafarers which is currently being discussed, could therefore provide a simple and effective way of lifting the current exclusions from the personal scope of the three directives. Such a proposal should be further discussed with the social partners concerned.

The ETUC notes that its European Federation of Public Services, EPSU, has opened negotiations, under TFEU Article 155, with the employers (EUPAE) in the framework of the EU Social Dialogue Committee for central government, with a view to establish a general EU framework on common minimum standards on workers' rights to information and consultation including regarding restructuring. The ETUC recognises that the principles of the three Directives apply to public administrations workers and that a negotiated agreement can ensure that the implementation meets the specificities of the sector. If the negotiations fail, the European Commission should ensure that all workers benefit from information and consultation rights.

(1.2) Definitions

A central issue in the consultation document relates to the different definitions of the concepts of 'information' and 'consultation'. According to the Commission, standardised definitions in the three Directives is likely to render the reading of the law easier.

According to the consultation document, “care should be taken to avoid that alignment of the definitions brings about an unjustified regression of workers’ protection”. The ETUC disagrees with this subjective assessment, allowing a difference between ‘justified’ and ‘unjustified’ regression in workers’ protection. From our perspective, there is no justification for the regression of workers’ rights, no matter what interests on the company side would be taken under consideration.

It should be stressed that an apparently easier reading does not automatically contribute to a more effective exercise of the rights and obligations of all actors concerned. A case by case legal analysis has to be carried out for each Directive to ensure that a change in the wording does not lead to regression in workers’ rights. It should also be stressed that the three Directives by their content are aimed at different targets, making it difficult to merge them – primarily because the different purpose of the respective Directive risks being diluted.

More convergence in the concept of ‘information’ in the three Directives has the potential to bring about some improvements. The EWC recast Directive provides some useful clarifications having regard to the timing and the quality of the information. In particular, Directive 2002/24/EC contains a relatively succinct definition of information compared to the EWC Recast. Directive 2001/23/EC could also benefit from more details on the essential qualities of information, as long as Article 7 - which details the content of the data to be transmitted in the specific context of a transfer - is not affected. Similarly, a reference to the timing and quality of the information could usefully be inserted in Directive 98/59/EC. This, however, must not affect the material content of the data to be transmitted which is listed in Article 2.3. Both Article 7 of Directive 2001/23/EC and Article 2.3 of Directive 98/59/EC contribute to a high level of protection, which should not be affected by any future consolidation measure.

As far as the concept of ‘consultation’ is concerned, a standardisation of definitions should not be contemplated. Directive 2002/14/EC sets up a general mechanism for information & consultation procedure to be provided on a regular basis. Directives 98/59/EC and 2001/23/EC address a specific moment in the life of the company and as a result take a functional approach to consultation. Article 2 of Directive 98/59/EC foresees that consultations shall cover at least “ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures”. This has proved a vital tool to ensure the retention of skills and reduced unemployment in the recession.

Furthermore, both Directives 98/59/EC and 2001/23/EC stipulate that consultations are to be conducted “with a view to reaching an agreement” on the envisaged measures. The latter point is particularly important for trade unions across Europe for the protection of workers’ interests through collective bargaining. In the Junk ruling (C-188/03), the European Court of Justice has made it clear that such consultations are akin to negotiations.

To sum up, a one size fits all approach with regard to information and consultation could significantly dilute the added value of Directives 98/59/EC and 2001/23/EC.

(1.3) Missing issues from the consultation document

The consultation document focusses on standardising definitions in the three I&C Directives but fails to analyse whether other issues might contribute to a more effective EU I&C legislation. As highlighted above, the ETUC does not share the view that convergence should be an absolute target for better regulation. The overall objective must be a better application and improvement of the I&C framework. Merely touching upon the issues of scope and definitions will not be sufficient to reach that goal. A number of additional issues should be added to the agenda.

In addition to the above remarks about enlarging the scope, the following issues would allow upwards convergence between the three Directives:

- Enforcement. The three Directives merely rely on the Member States to determine effective and dissuasive sanctions in case of violation of I&C rights. This is insufficient as the legal obligations to inform and consult in good time are frequently not respected in practice. Failure to respect the Directives must consistently be sanctioned in all the Directives. For example, it should be considered that in case of grave and/or persistent violation of EU law, the challenged decision is suspended until the applicable I&C procedures are completed.
- I & C obligations in the three Directives must involve the whole value chain: upstream supplier, subcontractors, dependent companies downstream. Mechanisms such as joint & several liability between the relevant companies in the value chain should be explored. Directive 2001/23/EC could usefully foresee an I&C obligation upon the transferee company as well as joint meetings between workers' representatives in the transferor and the transferee companies.
- The three Directives would benefit from additional rights to expertise for workers' representatives paid by the employer, including expertise from trade unions, as well as dismissal protection.

In addition, it is a long standing ETUC demand that the scope of Directive 2001/23/EC is extended to include change of ownership in case of mergers, take overs and public procurement. The ETUC deplores that an employee who is the subject of the transfer under the Directive is better off than his counterpart in a similar situation but where the legal personality of the company has not been changed (i.e. In the case of a shares sale). This is particularly worrying in a context of increasing financialisation of investments, as aggressive job cutting and frozen wages are often the price to pay for the excessive debt burden undertaken by a leveraged buy out. Similarly, the concept of "economic entity" should be clarified in a way to extend the benefits of Directive 2001/23/EC to workers in case of calls for tender or partial loss of activity.

Furthermore, the instrument of a prepared bankruptcy with restart is more and more used as an instrument for by-passing the purpose of Directive 2001/23/EC (by continuing the undertaking, meanwhile ending the employment or terms and conditions of workers) as well as those of Directive 2002/14/EC (by not informing and not consulting employees' representatives about the preparation of a bankruptcy with restart). And so a new instrument for cheap and easy restructuring has found its way in practice.

Directive 2002/14/EC should be improved with regard to anticipatory management of employment and competences. Mid and long term corporate strategies should be addressed for instance via an annual reflection on the strategic development of the company in 5 or 10 years to prepare the change.

Finally, it must be pointed out that there are much deeper incoherencies elsewhere in EU law than in the three Directives selected for the purpose of the refit exercise. European company law is full of loopholes, gaps, and discrepancies that go well beyond the issue of definitions. The level of rights and obligations achieved in the SE Directive 2001/86/EC is regularly put into question in subsequent instruments. For instance, the cross-border merger Directive 2005/56/EC refers to the SE Directive only in so far as board-level representation rights are concerned. Information and consultation rights are explicitly excluded. Another example is the proposed Directive for a single-member private limited liability company (the 'SUP'), which removes almost all references to the EU acquis on workers' rights. A similar problem was created by the proposed SPE Regulation in 2008.

In this regard, the ETUC calls for a Directive introducing a new and integrated architecture for workers' involvement in European company forms. Building on the existing EU acquis, the Directive should set high standards on information and consultation, and introduce ambitious minimum standards on workers' board level representation as an additional source of workers' influence. The Directive would become the overarching reference on workers' rights to information, consultation and board level representation for all European company forms, thereby contributing to more coherence and better regulation⁴.

(2) 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?

Above all, the ETUC stresses that the prerogatives of the social partners under the European Treaty must be respected. If social partners do decide to open negotiations, the issue of recast/ ordinary revision becomes irrelevant. The social partners will, in full autonomy, decide on the agenda of their negotiations concerning the three I&C Directives.

Assuming that social partners do not agree to negotiate, or that negotiations fail, the limitations of the recasting technique as a revision method cannot be ignored. It raises considerable questions with regard to the scope of the revision and its impact on the specific existence of the three Directives.

The ETUC considers that there is significant room for improvement of the three I&C Directives and would welcome an initiative to revise each of them separately with a view to improve their effectiveness and application.

As highlighted in paragraphs 22-27, an initiative to amend the three I&C Directives cannot be limited to issues of definitions and scope. Proposals must also be made at least with regard to enforcement (sanctions), extending I&C obligations through the value chain, and prerogatives of workers' representatives.

The consultation document is raising the question of choice of method for legislative revision. The Commission marks a preference for the recasting technique over an ordinary revision procedure.

Contrary to an ordinary revision procedure, the recasting technique grants the Commission almost unilateral power to decide on the scope of legislative amendments. The European Parliament is indeed not able to draft amendments to parts of the Directive which have not been explicitly addressed by the Commission's proposed recast. At the same time, the ETUC understands that the use of the recasting technique would prevent the reopening of the entire acquis, and enables the EU institutions to concentrate their attention on innovative amendments to the existing framework.

Consequently, the ETUC needs some reassurance that a recast initiative would address meaningful issues to improve the application of the three Directives. A revision process limited to the issue of definitions will have an extremely limited impact on the actual effectiveness of the Directives. More worryingly, it would bear the risk of an unacceptable lowering of workers' protection.

Furthermore, one of the possible consequences of a recast seems to be that the three Directives would be merged into a single instrument. The ETUC firmly opposes this as this will lead to a regression of workers' rights. As highlighted under question 1, it is vital

⁴ 'Towards a new framework for more democracy at work', ETUC Resolution 21-22 October 2014

to retain the specificities of each of the three Directives and this cannot be secured by blurring the three I&C procedures into one standardised legal provision. Furthermore, an entirely new legal instrument would create considerable legal uncertainty as the extensive body of ECJ case law on Directives 2001/23/EC and 98/59/EC would be put into question.

Another possibility, however, would be that the Commission publishes a respective recast of the three Directives. The ETUC is open to such a possibility under the following conditions:

- The recast is not limited to definitions and addresses the scope and additional issues such as enforcement, value chain etc. (see above section 1.3)
- The recast does not lead to a regression in workers' rights. In particular, the content and the purpose provided for in Art 2.3 of Directive 98/59/EC and Art 7 of Directive 2001/23/EC cannot be affected. Similarly, the notions of consultation in each of these two Directives cannot be affected.
- The three Directives will retain their separate existence after the legislative process has concluded

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

The ETUC responds positively to the option of negotiating with the European employers on these issues provided that it is accepted that the negotiations will not lead to a regression in workers' protection, as currently provided in the three Directives.

The ETUC recalls the terms of Article 154 TFEU, which distinguishes between "possible directions of Union action" and "content of the envisaged proposal". According to this Article, management and labour shall be consulted by the Commission at both stages. Should the Commission consider advisable to pursue European Union action on the issues described in this first phase consultation, a second phase consultation of social partners is indispensable. The issues at stake are legally complex and of high relevance to trade unions across Europe. The European social partners must imperatively be given the opportunity to comment and provide concrete recommendations on the detailed content of the envisaged proposal.

18 June 2015
CM/SP/bb