



European Directives on employee involvement: From fitness to purposive review

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Menu

- ▶ Lexical Issue : Fitness check , Impact assessment, review, recast, revision
- ▶ Worker involvement
- ▶ Directives related to Worker Involvement
- ▶ Review clauses and Review procedures
- ▶ How to design an EU review of involvement procedures?
- ▶ How to improve involvement procedures through bargaining?



Menu



- Crucial issues of INVOLVEMENT procedures (including in relation to digitalisation)
- Crucial issues of digitalization OUTSIDE involvement procedures



Submenu :

Crucial issues of INVOLVEMENT procedures (including in relation to digitalisation)

- ▶ *Setting Goals*
- ▶ *Defining WI Tools*
- ▶ *Rights or Duties ?*
- ▶ The object of WI
- ▶ The actors of WI : Management and Rep's
- ▶ Involving Trade Unions in Worker Involvement
- ▶ Facilitating Workers' representatives
- ▶ Worker Involvement in absence of representatives
- ▶ Strengthening Coverage
- ▶ Alleviating restrictions
- ▶ Enforcement of WI



Lexical Issue

► Fitness check :

Cf. Commission Working Programm (2010) :

'fitness checks' in order to keep current regulation 'fit for purpose'. The goal is to identify excessive burdens, overlaps, gaps, inconsistencies or obsolete measures which may have appeared over time since the EU law at issue was first adopted and implemented : **Threat of Deregulation ?**

“Some stakeholders initially expressed misgivings about the fitness check of the I&C Directives. They were concerned that its purpose might be deregulation in the social area. On the contrary, the fitness check aims rather at improving the quality of regulation and at ensuring that it remains relevant despite significant changes in demography, work patterns and technology (in particular against the background of the crisis)” (Commission)



Lexical Issue

- Impact assessment

“Impact assessments examine whether there is a need for **EU action** and analyse the possible impacts of available solutions. These are carried out during the preparation phase, before the Commission finalises **a proposal for a new law**. They provide evidence to inform and support the decision-making process”

“The impact assessment report must include a description of:

the environmental, social and **economic** impacts, including impacts on small and medium enterprises and **competitiveness**, and an explicit statement if any of these are not considered significant

who will be affected by the initiative and how

the consultation strategy and the results obtained from it”



Lexical Issue

- Review : An examination to assess whether there is a need to revise
- Revision : a modification of a EU Directive through the ordinary legislative procedure
- Codification : Integrating revision directives within the original directive → consolidated text
- Recast : a direct modification of an EU Directive, repealing the older one, with a limited role for the EP as co-legislator (Parliament cannot propose amendments to provisions which are not being revised)



Worker involvement

- ▶ “any mechanism, about the identity of the participating companies, concerned including information, consultation and participation, subsidiaries or establishments, and the number of their through which employees’ representatives may exercise employees, to start negotiations with the representatives of the an influence on **decisions** to be taken within the company(SE)



Directives related to Worker Involvement

- ▶ D **98/59** : Licenciements collectifs- Collective Redundancy **(1975)**
- ▶ D **2001/23** : Transfert d'entreprise-Transfer of Undertaking (maintien des droits-acquired rights) **(1977)**
- ▶ D **2009/38** : Comités d'entreprises européens- European Works Councils **(1994)**
- ▶ D **2001/86** *Societas Europaea* **(2001)**
- ▶ D **2002/14** : Directive Cadre Info Consultations- Framework on Information and Consultation **(2002)**
- ▶ D **2003/72** *Societas co-operativa europaea* **(2003)**

A body of directives which has been updated, consolidated, made coherent, recasted : NO formal codification of the directives as a whole (but rather of the case law*)

CR, TU, IC and EWC have been made subject to a fitness checks



Review clauses and Review procedures

- ▶ Both the EWC (1994) and EWC Recast Directive (2009) provide clauses on the review contrary to CR

- ▶ Article 14 D 94/45:

“Not later than 22 September 1999, the Commission shall, in consultation with the Member States and with management and labour at European level, **review** its operation and, in particular examine whether the **workforce size thresholds** are appropriate with a view to proposing suitable amendments to the Council, where necessary.

- ▶ Article 15 D 2009/38:

“No later than 5 June 2016, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.”



Review clauses and Review procedures

- ▶ See also Article 10 Directive 2001/23

The Commission shall submit to the Council an analysis of the effect of the provisions of this Directive before 17 July 2006. It shall propose any amendment which may seem necessary.

- ▶ Article 12 Directive 2002/14

Not later than 23 March 2007, the Commission shall, in consultation with the Member States and the social partners at Community level, review the application of this Directive with a view to proposing any necessary amendments



Review clauses and Review procedures

- ▶ How to review Directives adopted on the basis of Article 114 TFEU ? (TU, CR) as opposed to Article 152 TFEU provisions?
 - a) Unanimity or qualified majority?
 - b) Social Dialogue or outside SD



Substance and Strategies for the review

► How ?

a) Examination of Implementation in MS

b) Examination of case law (CJEU and MS Courts)

c) Integration of *recitals* into the body of the Directive

b) Integration of the SR into the body of the Directive (eg : obtain a response, and the reasons for that response)

d) Formulation of more default rules (EWC)



Substance and Strategies for the review


- e) More and other SR (see additional subject matters, like CSR)
- f) Elucidating obscure provisions

How to improve involvement procedures through bargaining?

- ▶ EWC : better agreements, but how to get rid of bad agreements?
- ▶ IC Directive : in pejus bargaining ?
- ▶ Article 5

Information and consultation deriving from an agreement

“Member States may entrust management and labour at the appropriate level, including at undertaking or establishment level, with defining freely and at any time through negotiated agreement the practical arrangements for informing and consulting employees. These agreements, and agreements existing on the date laid down in Article 11, as well as any subsequent renewals of such agreements, may establish, while respecting the principles set out in Article 1 and subject to conditions and limitations laid down by the Member States, provisions which are different from those referred to in Article 4.”



Crucial issues of INVOLVEMENT procedures (including in relation to digitalisation)

- ▀ Setting goals

Directives need to clarify their aims in order to facilitate teleological interpretations (good practice : Directive 2002/14 and Directive 2009/38)

What about *ratio legis* of IC ?

- ▀ Defining WI Tools

Information and Consultation

No definitions in CR, TU Directives

Weak definition of consultation in IC Directive

Strong definitions in Recast Directive

Generalizing « with a view to reaching an agreement » (TU, CR and IC)

Generalizing « Consultation shall take place

(d) in such a way as to enable employees' representatives to meet the employer and obtain a response, and the reasons for that response, to any opinion they might formulate" (IC Directive)



Crucial issues of INVOLVEMENT procedures (including in relation to digitalisation)

- “information” means transmission of data by the employer to the employees’ representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees’ representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings (RecastEWC)



Crucial issues of INVOLVEMENT procedures (including in relation to digitalisation)

« Consultation »

« means the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such **time**, in such **fashion** and with such **content** as enables employees' representatives to express an opinion on the basis of the information provided about the **proposed** measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings; (REWC)



Crucial issues of INVOLVEMENT procedures (including in relation to digitalisation)

► *Rights or Duties ?*

-Few Directives refer to an obligation of the employer to INFORM and CONSULT
(CR and TU)

-In case of restructuring , directives should provide an obligation to Inform and consult



Crucial issues of INVOLVEMENT procedures (including in relation to digitalisation)

- ▶ The Object of WI
- a) Topical WI directives : CR and Transfer of Undertaking : definition of CR is subject to criticism
- b) Generic approach of « exceptional circumstances » needs to be precise and broad
- c) Generic approach to recurring WI needs to be precise and broad
- **What about Business Strategy or Economic Policy?**

Generic approach to « exceptional circumstances »

Precise

(c) information and consultation on decisions likely to lead to **substantial changes in work organisation or in contractual relations, including those covered by the Community provisions referred to in Article 9(1).**

(Wi Directive)

Vague

Where there are **exceptional circumstances or decisions affecting the employees' interests to a considerable extent, particularly in the event of relocations, the closure of establishments or undertakings or collective redundancies**, the select committee or, where no such committee exists, the European Works Council shall have the right to be informed.

SR Reactst Directive

(c) Where there are exceptional circumstances affecting the employees' interests to a considerable extent, particularly in the event of relocations, transfers, the closure of establishments or undertakings or collective redundancies, the representative body shall have the right to be informed. The representative body or, where it so decides, in particular for reasons of urgency, the select committee, shall have the right to meet at its request, the competent organ of the SCE or any more appropriate level of management within the SCE having its own powers of decision, so as to be informed and consulted **on measures significantly affecting employees' interests.**

(SR SCE Directive)

Generic approach to recurring WI needs to be precise and broad

Precise

- The meeting shall relate in particular to the structure, economic and financial situation, the probable development of the business and of production and sales, initiatives with regard to corporate social responsibility, the situation and probable trend of employment, investments, **and substantial changes concerning organisation, the introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.** (SCE Directive)
- The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of **employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.** (SR Recast EWC Directive)

Weak

(b) information and consultation **on the situation, structure and probable development of employment within the undertaking or establishment and on any anticipatory measures envisaged, in particular where there is a threat to employment;**

(Wi Directive)



The actors of WI : Management and Rep's

- ▶ The WI Directive provides INFO and CONSULTATION « at the appropriate » level : establishment or undertaking at the choice of the Member States
- ▶ The choice does not guarantee that at a level of the establishment as well as at the level of the undertaking information and consultation will take place → **We need establishment- undertakings and groups to be covered**
- ▶ In case of a EWC which is controlled outside the European Union, there is a free choice to appoint a representative?

Does this freedom need to be restricted?



Involving Trade Unions in Worker Involvement

-WI Directives define the notion of workers' representatives by means of reference to the law of Member States

-The EWC Directive institutes a body of workers' representatives but this could potentially undermine the position of trade unions in the group of undertakings

BUT

The competent European workers' organisation is informed of the composition of the SNB

Representatives of the Community level trade union organisation can serve as experts for the SNB

What about a role of these representatives as experts of the EWC?



Facilitating Workers' representatives

- **Generalisation of a right to training for workers representatives**
(Not just EWC, also WI Directive during working time and financed by management and organised autonomously)
- **Generalisation of experts**



Worker Involvement in absence of representatives

- ▶ There is a formal obligation to institute a system of Workers' representatives
- CJEU, 8 June 1994, Commission v UK, C-382/92 and CJEU, 8 June 1994, Commission v UK, C – 383/92
- ▶ In case of absence of workers' representatives , a default scenario is provided in case of Transfer of Undertaking
- **Quid in case of CR?**
- **Quid in case of other issues covered by WI Directive?**



Strengthening Coverage

- ▶ There is a problem of coverage of IC rights due to the lack of European Works Councils despite thresholds
- ▶ There is a problem of coverage when a collective redundancy does not meet the thresholds required

Solution : **CR is CR when it meets the requirement of at least one scenario**
Extending the period of 90 days to 6 months



Alleviating restrictions

- ▶ The EU directives tended to contain restrictions *ratione personae* in relation to sefarers, but this have been lifted due to Directive 2015/1794 (CR, TU, WI, EWC)
- ▶ The EU directives are not applicable to workers of central administration
- A collective agreement to complement these directives, has not been implemented by means of a directive, despite a joint request, and a subsequent procedure to challenge the refusal at the General Court
- ▶ Rules regarding secrecy and confidentiality are not relevant in case of CR and TU, but hamper communication of information outside these scenario's
- a) **It should be stressed that in exceptional circumstances, information is always obligatory**
- b) **It should be stressed that confidentiality only relates to third parties**



Enforcement of WI

- ▶ EU Directives on WI do not contain any enforcement sanctions contrary to other directives in the field of labour law
 - ▶ **Restructuring operations in disrespect of IC should be suspended until IC rights have been respected**
- e/g. a collective redundancy which has not been notified properly since no genuine information and consultation took place, could not take effect



Crucial issues of digitalization OUTSIDE involvement procedures

- The EU legislator need to tackle the right of training
- The EU legislator need