

**EXECUTIVE COMMITTEE**

ETUC\EC206\EN\8

**Agenda item 8 - Revised version**

**Stop the Deregulation of Europe: Rethink Refit**

- a) Draft resolution
- b) Draft position on the proposed consolidation of the three Directives on Information & Consultation, Collective Redundancies and Transfer of Undertakings

Annex to the draft position: Synopsis - Definitions of information - consultation & participation

The Executive Committee are invited:

- c) to adopt the resolution "Stop the deregulation of Europe: Rethink Refit".
- d) to adopt the position on proposed consolidation of the three Directives on Information & Consultation, Collective Redundancies and Transfer of Undertakings

## **Stop the Deregulation of Europe: Rethink Refit (draft resolution)**

1. With the publication of REFIT (Regulatory Fitness and Performance: Results and Next Steps) on 2 October 2013, the Commission took yet another step in a process aimed at the deregulation of Europe, the dismantling of legislation protecting workers' rights and the weakening of social dialogue.
2. The Council decision in December 2011 to exclude micro-enterprises from the scope of the new legislation, unless it could be demonstrated they should be covered, only triggered the next step, which was Top Ten, the infamous Commission consultation where small companies were invited to complain about EU legislation.
3. Incidentally, the Commission suggested companies complain about directives protecting workers' rights such as the directives on workers' health and safety including, not only REACH (Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals), the Posting of Workers, Working Time, Temporary Agency Work, but also the social partners' Framework Agreement on Parental Leave.
4. As if this was not bad enough, the Commission is using the results of the consultation to underpin calls for further deregulation. The directives, preselected by the Commission, are now presented as the most burdensome pieces of EU legislation according to SMEs. The Top Ten consultation has created a self-fulfilling prophecy.
5. This deregulatory drive also seeks to change our perception of the law. Legislation has become synonymous with administrative burdens. Another example is the idea of gold-plating. Member States going beyond the minimum level when implementing a directive are accused of gold-plating. This undermines legislation in the area of social policy and workers' health and safety. They are all minimum directives – that is the whole point. Governments agree on minimum standards, a minimum floor that nobody should go below, but preferably beyond. If having higher standards is seen as gold-plating, there can be no social progress in Europe.
6. Some policymakers even treat regulation as a zero-sum game by setting net targets for legislation or adhering to the principle of "one in, one out", so that a new piece of legislation, regardless of how important it is, can only be introduced if another one is removed.

### **Regulatory Fitness and Performance (REFIT)**

7. According to the Commission, the purpose of REFIT is to systematically review EU legislation to ensure that "aims are being met in the most efficient and effective way, to detect regulatory burdens and to identify opportunities for simplification".
8. In practice, it means that the Commission is withdrawing its proposal for a directive on musculoskeletal disorders and the revision of the Carcinogens Directive - the two key legislative challenges regarding workers' health and safety. According to the European Working Conditions Survey (2010), the gap between national situations is particularly worrying for a large number of indicators. The divide is even sharper within countries. When asked if they will be able to do their current job when they are 60 years old, less than 60% of workers thought they would.
9. The overall situation has deteriorated for all manual workers. The ETUC urges the Commission to change its policy and to follow the indications proposed by the European Parliament for revitalising EU health and safety policy. To claim that the crisis renders the adoption of a new strategy pointless is a flawed argument. The experience of other crises shows that they actually force working conditions down so

that health and safety at work policies are essential to offset the harm. We urge the Commission to adopt a strategy on health and safety at work before the end of 2013 and to present, without further delay, proposals on the protection of workers against work-related cancers and musculoskeletal disorders.

10. The workers' right to information and consultation is also targeted by REFIT. The Commission is envisaging a consolidation of the three directives Framework for Information and Consultation, Collective Redundancies and Transfer of Undertakings, which were subject to a so-called fitness check.
11. The ETUC considers that the (European) minimum standards laid down in the three directives constitute a floor, and not a ceiling, of rights, and continues to be sceptical about a consolidation exercise since the three Directives serve different purposes, a general one (establishing a framework for I&C) and specific situations such as mass redundancies and the transfer of undertakings. Furthermore, the three Directives have different legal grounds. The ETUC supports the strengthening of information, consultation and participation rights and is not convinced that this would be achieved by merging the three Directives.<sup>1</sup>
12. Not only is REFIT used as an excuse to get rid of various pieces of legislation, but it is also a serious attempt to destroy the social dialogue. By refusing to present the social partner agreement on the Protection of Occupational Health and Safety in the Hairdressing Sector to the Council, the Commission is not fulfilling its function as the guardian of the treaties. It should promote the role of the social partners and respect their autonomy.
13. Furthermore, President Barroso has himself declared that safety norms for hairdressers are not an issue to be regulated at European level. His personal view is, however, of little relevance. His job is to ensure that social partner agreements are implemented at the joint request of the signatory parties by a Council decision on a proposal from the Commission (Article 155, TFEU).
14. The deregulatory agenda is also driven and supported by the European Council. In its conclusions of October 2013, the Council welcomed REFIT and demanded further ambitious steps to make the EU regulatory framework lighter. It will return to this issue at its meeting in June 2014. Meanwhile, the Competitiveness Council is meeting on 2 December 2013 to finalise its conclusions on smart regulation demanding a roadmap to reduce the overall regulatory burden over the next five years.

### **Trade union actions**

15. The ETUC together with its affiliates will have to step up efforts to expose the fact that smart regulation is really about deregulation. It is not about making legislation more effective or making sure that directives are properly implemented in EU Member States. Nor does it consider the benefits of legislation to society at large. Smart regulation is rather, an attempt at rolling back the role of the state in the belief that companies can self-regulate. This has to be stopped.
16. The ETUC will pursue its "Rethink Refit" campaign at the European level. However, the pressure to deregulate also stems from the national level. A number of governments, including the UK, have taken the lead in pushing for further deregulation. Activities at the national level are particularly important. Affiliates are encouraged to use the ETUC graphics and to organise events with politicians including workers affected by legislation that is under threat, stalled or withdrawn

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<sup>1</sup> Cf. ETUC draft position paper on page 5

17. In view of the upcoming elections to the European Parliament in May 2014 and the ETUC manifesto, we should inform the candidates of the ETUC position and convince them to support our fight against deregulation. We will also have to engage our members so that they make use of their right to participate in the elections and vote for those candidates that defend workers' rights.
18. At the same time, it should be emphasised that the ETUC is in favour of making regulation more effective. We therefore call on the Commission to divert its focus from reducing legislation and improve the quality. The Commission and Council should consider how rules and regulations can best be designed to meet their objectives and, in particular, take measures to ensure that EU legislation is properly implemented in the Member States.

## ETUC Position on the proposed consolidation of the three Directives on Information & Consultation, Collective Redundancies and Transfer of Undertakings

1. The ETUC Executive Committee considers the (European) minimum standards laid down in the three directives as a floor of rights and not as a ceiling of rights and continues to be sceptical about a consolidation exercise as the three directives serve different purposes, a general one (establishing a framework for IO&C) and specific situations as mass redundancies and transfer of undertakings. Furthermore, the three directives have different legal grounds. The ETUC supports the strengthening of information, consultation and participation rights and is not convinced that this would be achieved by merging the three directives.
2. On the Directive on a general framework for information and consultation (**2002/14/EC of 11 March 2002**), further to the demands laid down in the resolution “Strengthening information, consultation and participation rights for all workers” (including the demand to strengthen the representation of workers on company boards where appropriate)<sup>2</sup>, the ETUC asks
  - as a first step the lowering of threshold for a) undertakings employing at least 50 employees down to 30 and b) establishments employing at least 20 employees down to 5;
  - special dismissal protection for employee representatives;
  - the concretisation of efficient sanctions.
3. On the Directive on transfer of undertakings (**2001/23/EC of 12 March 2001**), the ETUC demands
  - the application to public administration;
  - the extension of the scope to cases of shares sales, division of companies, mergers of public limited liability companies;
  - grant employees’ representatives a right to expertise
  - the clarification that employee representatives in Art. 2 includes trade unions;
  - the setting up of a joint meeting between the worker representatives of the involved companies (transferor and transferee), in particular the works councils, the EWCs and the worker representatives in the respective company boards (where appropriate), stronger information and consultation rights for EWCs and/or national works councils and stronger participation rights for workers representatives in supervisory and/or administrative boards, where trade unions want it,
  - the concretisation of efficient sanctions.

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<sup>2</sup> ETUC Executive Committee Resolution adopted on 23 October 2013: “Strengthening information, consultation and participation rights for all workers”. The ETUC suggests the following concrete proposals for a revision of the general framework directive 2002/14: the ETUC calls for application to all workers including public service workers, civil servants and seafarers; the ETUC calls for bringing the Directive 2002/14 in line with the better standards (definitions etc.) contained in the EWC Recast (2009/38) and the SE Directive (2002/86/EC). Importance of stronger consultation rights with a view to reach an agreement via a meaningful dialogue before any decision can be finalised; the information-consultation must imply the value chain: upstream suppliers, subcontractors, dependent companies downstream; the Directive should grant employees’ representatives a right to expertise; the ETUC calls for anticipatory management of employment and competences and to address mid- and long-term corporate strategies aimed at reinforcing internal and external employability: for instance, an annual reflection on the strategic development of a company (or public service) in 5, 10 years to prepare for the change; strengthening workers’ board-level representation (where applicable) to receive complete information on strategic choices before the decisions are taken, and to increase the control and influence workers have on the strategic decision-making process within a company or public service; effective and strong sanctions in case of serious violation of information and consultation rights.

4. On the Directive on collective redundancies (98/59/EC of 20 July 1998), the ETUC demands
  - an information obligation towards employees also in cases where no employee representation exists;
  - timely information and consultation (without delay after notification to the public authorities);
  - the concretisation of efficient sanctions.

### **Background**

5. Three directives on the Framework for Information & Consultation (**2002/14/EC of 11 March 2002**), Collective redundancies (98/59/EC of 20 July 1998) and Transfer of undertakings (**2001/23/EC of 12 March 2001**) were under “Fitness check” inspired by the Stoiber Group in the framework of the better regulation agenda. The ETUC participated in a Commission working group on the “Fitness check” which at its last meeting in 2012 concluded that the three directives were “generally fit for purpose”. This conclusion was driven by ETUC which nevertheless pointed to several possibilities to improve the existing directives (by better definitions of information, consultation etc.) as well as the Member States and Business Europe.
6. During the summer break a Staff working document of the Commission on the “Fitness check” of the three directives concerned (26 July 2013) still supporting the conclusion that the directives are “broadly fit for purpose” proposed in parallel a “consolidation”. A few weeks later another staff working document on REFIT (1st August 2013) and even more explicitly a Commission communication (2nd October 2013) no longer supported the joint conclusion on “fit for purpose” but pleaded for a “consolidation of the three directives” into a single one. No explanation was delivered why the Commission changed mind.
7. The Commission focussed the “Fitness check” on “information and consultation (I&C) of workers”. The Commission upholds as consequence drawn from this “Fitness check” in its Staff working document the following analysis covering the mainly I&C topics:
  - “50% of employees representatives replied that they see uncertainties/inconsistencies in the I&C legislation”; 62% are “in favour of a rationalisation of existing legislation” (“rationalisation’ may imply more regulation for employees”) and 40% express strong support for “additional legislation”;
  - “ETUC considered that it would be useful to examine the possibility of a recast by taking the definitions of the Directives on European Works Councils or SE, which they perceive to be better”;
  - “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”; “such concerns deserve serious consideration and further discussion”;
  - address shortcomings as a large number of the establishments covered do not have I&CF bodies: only 1.3% of the total number of undertakings are covered (due to the threshold of 50 or more employees making up only 1.3% of the total across the EU27);
  - the exclusion of SMEs (only one out of three employees in small establishments is covered by a formal I&C body), gaps/inconsistencies relating to the scope of application, regarding namely the public administration and seafarers;
  - “the effective protection of employees’ rights through the nullity of employers decisions taken in breach of the I&C requirements”
  - the promotion of consistency among all Directives in the area of I&C;



- the European Economic and Social Committee in its “opinion of 20.3.2013 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”;
  - differences among certain definitions of the three I&C Directives in comparison to the Directives on EWC or SE;
  - “an extensive definition of the concepts ‘information’ and ‘consultation’ in Directive 2002/14/EC, in line with the transnational I&C Directives on European Works Councils and European Company, would arguably improve consistency among all I&C Directives”
  - updating of the Directives 2001/23 and 98/59;
  - setting up the framework for the anticipation and management of corporate restructuring;
  - address limited, bureaucratic or formal involvement, particularly with respect to consultation on employers’ decisions involving contractual flexibility and restructurings;
  - the use of different wording for similar provisions;
  - Directive 2002/14 merely lays down procedural standards, there is no obligation to attain a certain result, for example preparing “anticipative and forward-looking plans on employment and skills need or social plans in the case of restructurings”;
  - there is no “requirement for redundancies to be made only as a last resort”;
  - the Commission’s original proposal “that workers are informed even in the event that there are no workers’ representatives” not upheld by the Council;
  - “the three I&C Directives are broadly fit for purpose”, “this general conclusion is consistent with the view of the European social partners and Member States’ positions expressed in the ad hoc Working Group on ICW”;
  - the promotion of transnational company agreements (following the Commission Staff Working Document on “Transnational Company Agreements: fresh perspectives for social dialogue” and the report in the European Parliament); etc.
8. In the United Kingdom a policy paper “Cut EU red tape: Report from the Business Taskforce” (published 15 October 2013) made a strong plea that existing legislation on I&C “should not be extended to micros, and no new proposals or changes to existing legislation should be made”, as “further action in this area would be costly to business, without adding any real value”. This statement against change was addressed to the European Parliament which asked for new legislation to better tackle restructuring. Furthermore, the Acquired Rights Directive (transposing the Transfer of undertakings Directive into UK law) was assessed in the UK policy paper as “going too far” with the recommendation to allow “more flexibility to change contracts following a transfer”. The paper regrets explicitly that changing the terms of staff who are transferred in a less favourable direction “is not permitted”.
9. The ETUC Executive Committee of 23 October 2013 while protesting against the violation of information and consultation directives in the case of the shutdown of the Greek public radio and television ERT (which building was stormed by security forces on 7 November 2013) opposed steps in the wrong, deregulatory direction and made some constructive proposals for steps in the right direction, with a view to strengthen information, consultation and participation rights. However, it was not yet possible to react on the two other directives. Therefore, the ETUC had to come back to these missing parts.
10. In the meantime, the Commission announced that a social partner’s consultation on the proposal for consolidation will take place in the first trimester 2014. The

Commission informed on its intention at meeting of the Social Dialogue on 8 October (European Sectoral Social Dialogue Committee for the central government administrations, EUPAE) and 15 October 2013. The ETUC working group on 13 November had a first exchange of views on the issue and charged the ETUC secretariat to prepare for such a consultation. Therefore the ETUC complements its demands in view of a possible consolidation exercise.



## **Annex: Definitions of information – consultation & participation**

SE Directive (2001/86/EC of 8 October 2001)	EWC recast (2009/38/EC of 6 May 2009)	Framework I&C (2002/14/EC of 11 March 2002)	Collective redundancies (98/59/EC of 20 July 1998)	Transfer of undertakings (2001/23/EC of 12 March 2001)	
"information" means the informing of the body representative of the employees and/or employees' representatives by the competent organ of the SE on questions which concern the SE itself and any of its subsidiaries or establishments situated in another Member State or which exceed the powers of the decision-making organs in a single Member State at a time, in a manner and with a content which allows the employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare consultations with the competent organ of the SE;	"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 (Art. 2)	"information" means transmission by the employer to the employees' representatives of data in order to enable them to acquaint themselves with the subject matter and to examine it (Art. 2)		The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following: - the date or proposed date of the transfer, - the reasons for the transfer, - the legal, economic and social implications of the transfer for the employees, - any measures envisaged in relation to the employees. The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out. The transferee must give such information to the representatives of his employees in	Definition of information

				good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment. (Art. 7.1)	
"consultation" means the establishment of dialogue and exchange of views between the body representative of the employees and/or the employees' representatives and the competent organ of the SE, at a time, in a manner and with a content which allows the employees' representatives, on the basis of information provided, to express an opinion on measures envisaged by the competent organ which may be taken into account in the decision-making process within the SE;	"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 (Art. 2)	"consultation" means the exchange of views and establishment of dialogue between the employees' representatives and the employer (Art. 2)	consultations with the workers' representatives in good time with a view to reaching an agreement (Art. 2) - consultations shall, at least, cover 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 aimed, inter alia, at aid for redeploying or retraining workers made redundant - the employers shall in good time during the course of the consultations: (a) supply them with all relevant information and	Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of this employees in good time on such measures with a view to reaching an agreement. (Art. 7.2) The information and consultations shall cover at least the measures envisaged in relation to the employees. The information must be provided and consultations take place in good time before the change in the business as referred to in the first subparagraph is effected. (Art. 7.3)	Definition of consultation

			(b) in any event notify them in writing of: (i) the reasons for the projected redundancies; (ii) the number of categories of workers to be made redundant; (iii) the number and categories of workers normally employed; ...		
"participation" means the influence of the body representative of the employees and/or the employees' representatives in the affairs of a company by way of: - the right to elect or appoint some of the members of the company's supervisory or administrative organ, or - the right to recommend and/or oppose the appointment of some or all of the members of the company's supervisory or administrative organ.					Definition of participation
employee transnational information and consultation	Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale				transnational

	<p>group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States. (Art. 1)</p> <p>(transnational information and consultation of employees) shall relate in particular to transnational questions which significantly affect workers' interests (Art. 6)</p>				
					cross-border
'SE' means any company established in accordance with Regulation (EC) No 2157/2001	<p>'Community-scale group of undertakings' means a group of undertakings with the following characteristics:</p> <ul style="list-style-type: none"> <li>— at least 1 000 employees within the Member States,</li> <li>— at least two group undertakings in different Member States, and</li> <li>— at least one group undertaking with at least 150 employees in one Member State and at least one other</li> </ul>	<p>This Directive shall apply, according to the choice made by Member States, to:</p> <ul style="list-style-type: none"> <li>(a) undertakings employing at least 50 employees in any one Member State, or</li> <li>(b) establishments employing at least 20 employees in any one Member State. (Art. 3)</li> </ul>	<p>For the purposes of this Directive:</p> <p>(a) 'collective redundancies' means dismissals effected by an employer for one or more reasons not related to the individual workers concerned where, according to the choice of the Member States, the number of redundancies is either, over a period of 30 days:</p>	<p>This Directive shall apply to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. (Art. 1)</p> <p>This Directive shall apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. An administrative</p>	Scope & thresholds & exceptions

	group undertaking with at least 150 employees in another Member State;		<ul style="list-style-type: none"> <li>- at least 10 in establishments normally employing more than 20 and less than 100 workers,</li> <li>- at least 10 % of the number of workers in establishments normally employing at least 100 but less than 300 workers,</li> <li>- at least 30 in establishments normally employing 300 workers or more,</li> </ul> (ii) or, over a period of 90 days, at least 20, whatever the number of workers normally employed in the establishments in question; (Art. 1)	reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive. (Art. 1)  This Directive shall not apply to seagoing vessels. (Art. 1)	
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