

Mitbestimmungsförderung

Report | Mai 2014

Isabelle Schömann, Europäisches Gewerkschaftsinstitut (ETUI)

Guter Klang, aber schlechte Folgen für Europas Arbeitnehmerschaft

Wie die EU-Kommission mit REFIT Etikettenschwindel betreibt

Autorin

Isabelle Schömann

Europäische Arbeitsrechtsexpertin,
Arbeitnehmerbeteiligung in Europäischen
Richtlinien
Europäisches Gewerkschaftsinstitut
(ETUI), Brüssel
ischoema@etui.org
www.etui.org

Ansprechpartner

Dr. Norbert Kluge

Hans-Böckler-Stiftung
Abteilung Mitbestimmungsförderung

Hans-Böckler-Straße 39
40476 Düsseldorf
Tel.: 0211 / 77 78 198
Fax: 0211 / 77 78 4198

Norbert-kluge@boeckler.de
www.boeckler.de

Auf einen Blick ...

- Beteiligung am Arbeitsplatz ist in Europa ein Grundrecht. Mit der Europäischen Rahmenrichtlinie zur Unterrichtung und Anhörung werden dazu Standards in den EU-Mitgliedsstaaten gesetzt.
- Mit dem sogenannten "REFIT for Growth" will die EU-Kommission ihr politisches Ziel von „Better Regulation“ und „Simplification“ umsetzen. Vorgeblich sollen vor allem Klein- und Mittelunternehmen Europas von unnötigen bürokratischen Regelungen entlastet werden.
- Eine Studie des Europäischen Gewerkschaftsinstituts (ETUI) zeigt, dass diese Größenklasse gar nicht übermäßig von dieser „Last Arbeitnehmerbeteiligung“ betroffen ist.
- Deshalb liegt auch eine andere Bewertung von REFIT nahe: Die EU Kommission will unter falschem Etikett die Mitwirkungsmöglichkeiten von Arbeitnehmerinnen und Arbeitnehmern zurückdrängen- ein weiterer Anschlag auf das sowieso schon immer geringer werdende Vertrauen der Bürgerinnen und Bürger in das Soziale Europa!

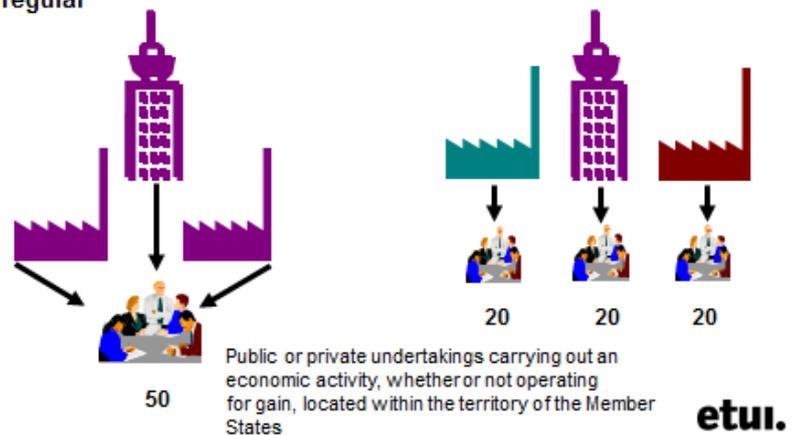
Introduction

Workers' participation at the work place is a fundamental social right in Europe. Since the mid 70s, an impressive number of directives has been adopted to secure information and consultation rights as well as co-determination rights in the undertakings.

The framework Directive on information and consultation (2002/14/EC) sets a range of minimum standards in the Member States: workers must be informed and consulted in undertakings employing at least 50 employees in any one Member States and in establishments employing at least 20 employees in any one Member State.

Community law on information and consultation Directive 2002/14/EC: main clauses

- A general statutory framework for informing and consulting employees in the European Union: effective, permanent and regular



In 2010, a 'Fitness Check' initiative has been launched by the European Commission as a pilot programme in order to identify excessive administrative burdens, overlaps, gaps, inconsistencies and or obsolete measures. In the social policy field, three directives which contained (rather different) provisions on information and consultation were placed under scrutiny: collective redundancies, transfers of undertakings, and the framework Directive on information and consultation.

The findings were intended to provide a basis for drawing policy conclusions and in the case of the three information and consultation directives, the conclusion clearly states that those three EU directives on information and consultation are broadly fit for their purpose, i.e. are deemed generally relevant, effective, coherent and mutually reinforcing.

Benefits they generate are likely to outweigh the costs. Yet, the conclusions further identify shortcomings in the national implementation measures of the directives and propose non-legislative action at national level to improve the practical effectiveness of the existing information and consultation legislation.

However, the European Commission does not seem to follow the conclusion of the fitness check: further examination and discussion on the scope and operation of the three information and consultation directives should lead to their consolidation after consultation of the European social partners scheduled in Autumn 2014 (European Commission 2013: 293). The current aim is to combine all 3 directives in a new directive, whereby little attention is paid to the specificity of the situations at stake: the particular situation faced in case of collective redundancies and in case of transfers of undertakings, versus a general framework for information and consultation, in practical terms (definition, scope and impact) as well as in legal terms (legal basis, legislative procedures and competences), that hardly lend themselves to generalization. The latest Commission's proposal falls within the REFIT programme.

1 | What is the REFIT about?

The established deregulatory approach of the European Commission towards EU social legislation has recently taken another turn with the launch of the REFIT initiative (Regulatory Fitness and Performance Programme (REFIT)), via the Communication on the EU Regulatory Fitness 2012 (COM (2012)746). The objective is to strengthen various smart regulation tools (impact assessment, evaluation, stakeholder consultation) and to simplify or withdraw EU laws, to ease the burden on businesses and to facilitate implementation. The Staff Working Document (2013)401final) of 1st August 2013 identifies two steps to be followed: 1. the mapping and screening of the entire EU legislative stock to identify burdens, gaps and inefficient or ineffective measures and 2. The review and setting up the next steps in Regulatory Fitness Policy and Programme towards legal amendments.

Moreover, the REFIT aims at implementing the outcomes of a Commission consultation focusing on SMEs 'Top 10 most burdensome pieces of EU legislation' (COM(2013) 446 final): over a period from 28.09.2012 to 21.12.2012, the Commission organized a consultation via a new created webpage to identify the TOP 10 EU legislative acts considered to place burdens on micro companies and SMEs. The methodology is striking, and in particular the questions steer the outcomes: participants are invited to tick boxes of their appreciation of the most burdensome regulation. A pre-selection of legislation is provided and opens the possibility to qualify the selected legislation as burdensome only, the idea of valuing the regulation is excluded from the onset. No explanation for the choice is provided. All options proposed are negative towards a given legislation (too costly, unnecessary, too restrictive, too complex, lacks transparency). As to the last category "lacks protection", little explanations is given and the given explanations are not instructive. The aim of regulation is totally negated.



Source: ETUI (2014) Benchmarking Working Europe 2014': 94.

The aim has been to use the replies to this communication to 'make focused and tailor-made revisions of these legislative acts as part of the Commission's REFIT'. In October 2013, the Commission published the follow up Communication 'Regulatory Fitness and Performance (REFIT): Results and Next Steps' COM(2013) 685 final. A large range of social laws, and in particular a range of directives dealing directly or indirectly with information and consultation rights, are concerned: Alongside eight company law directives, the evaluation of labour law legislation on the information obligations for employers in relation to employment contracts, as well as on temporary agency work, part-time work and fixed-term work is foreseen. The 1989 framework directive on health and safety and its more than 20 related directives as well as the REACH regulation (regulation addressing the production and use of chemical substances), are also to be examined in the REFIT programme.

Where does the REFIT come from?

In general, the roots of the REFIT can be traced back to the SLIM Agenda on the simplification of legislation in the Internal Market of 1996, followed by the Codification of the *acquis communautaire* in 2001 and in particular the Better Law Making of 2002 and the Inter-institutional Agreement of 2003. This later agreement between the European Parliament, the Council and the European Commission of 9th Oct. 2003 is of at most importance as it intends to improve the quality of law making by means of a series of initiatives and procedures 'in order to make community law easier to read and to apply'. The 3 institutions agree 1. 'To update and condense existing legislation and, 2. To significantly simplify it. Legislation will be updated and condensed inter alia through the repeal of acts which are no longer applied and through the codification of recasting of other acts' OJEU, C321/1 of 31.12.2003:4-5).

It is followed by the Simplification of the regulatory environment of 2005 to which reference is made in the Social Agenda 2005-2010 that 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.' In 2007, the Better Regulation initiative and in 2009 the Smart Regulation have led to the launch of the Fitness check as pilot project between 2010 and 2013.

What is the aim?

In its Communication 2012 on the EU Regulatory Fitness (COM(2012)746), the European Commission states that the REFIT aims at:

- Strengthening various smart regulation tools (impact assessment, evaluation, stakeholder consultation)

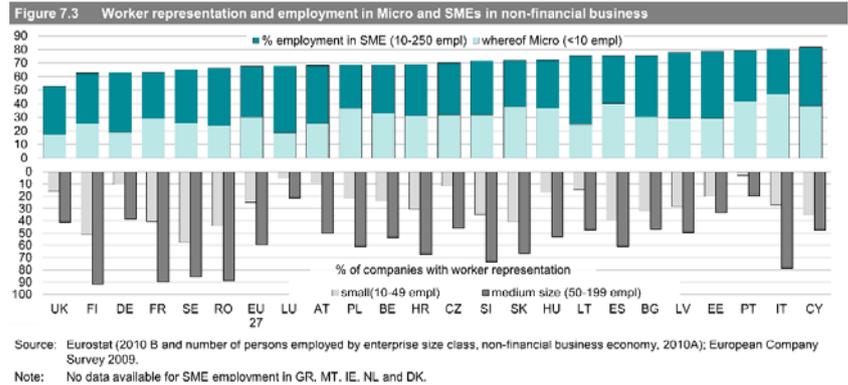
- Simplifying or withdrawing laws, ease the burden on businesses and facilitate implementation.

The Staff Working Document (2013)401final) of 1st August 2013 further develops this initiative with the launch the Regulatory Fitness and Performance Programme (REFIT), which, as starting point of the REFIT, intend to:

- Map and screen the entire EU legislative stock to identify burdens, gaps and inefficient or ineffective measures
- To review and set up the next steps in Regulatory Fitness Policy and Programme towards legal amendments

2 | SMEs as vectors to weaken Workers' Rights

The Benchmarking Working Europe 2014 shows that the so-called burden workers' participation would represent for SMEs does not resist a sound investigation.



Source: ETUI (2014) Benchmarking Working Europe 2014: 95.

The latest initiative has been to open consultation on regulatory and administrative framework on tourism businesses, public administrations, and other tourism stakeholders in the EU to examine the 'roots of regulatory and administrative burden on tourism businesses, which may impede their capacity of growth and their competitiveness, as well as burden hindering the effectiveness of tourism policies at national, regional or local level, through their compliance with EU, national, regional or even local regulations, both legislative or not'.

The scope of the consultation is overwhelming: it covers social policy, legislation on public procurement, company law, data protection, consumer protection, energy, environment, product requirements, tourism, transport, taxation and statistics. On employment and social issues, the following areas are included: health and safety at work, organization of working time, social security and taxation, work contracts and unemployment.

The aim, in the medium and long term, is to exempt SMEs and micro businesses from EU regulations, as part of the Commission's competitiveness-boosting plans, via the screening, repealing and withdrawing of EU legislation in particular in the social field. Clearly these large-scale and fundamental initiatives put massive pressure on workers' information and consultation rights, putting them at risk in particular in small and medium-sized companies, where they are already much challenged and where their proper implementation is a daily issue.

As concluded in the Benchmarking Working Europe, 'far from improving existing information and consultation rights, the REFIT approach weakens workers' rights to involvement in the improvement of working conditions and in health and safety protection; it diminishes their ability to contribute to safeguarding jobs and ensuring the development of tailor-made social measures at the company level. SMES are target as particularly in need of relief from bureaucracy and administrative burdens. For anyone thinking that this would affect only a handful of companies and a fraction of the total European workforce, figures show that it will affect between 53 and 82% of the European workforce that is employed in SMES' (ETUI, 2014:94) .

In addition, the Commission has released a draft directive for *Societas Unitas Personae* (SUP) as a second try after the failure of the 2008 proposal to create a European private company statute. The aim is to set up a single-member private limited liability companies and making it easier for businesses, especially for SMEs, to carry out cross-border activities. Alike the 2008 proposal, the new directive would facilitate the creation of a single-member private company by any "natural person" via online registration, within three working days and with a minimum capital of one euro.

Interestingly, the 2008 proposal failed, amongst other due to the lack of unanimity required to adopt the draft directive and it has been withdrawn by the Commission, in October 2013, as part of the REFIT programme.

The 2014 proposal is based on a different legal basis (Article 50 TFEU) that empowers the co-legislators to adopt directives so as "to attain freedom of establishment as regards a particular activity" through the ordinary legislative procedure. So there is no need for unanimity this time.

However, the 2014 proposal is similar to the 2008 one in respect of the 3 main problematic provisions that had additionally led to its failure: the location of the registered office, employee participation and the minimum capital requirement, to which Germany and Sweden were strongly opposed.

Clearly, the objective is to exempt most SMEs and micro enterprises from large parts of labour law in particular from collective labour law including workers' representation and participation. However, a large number of SMEs and most, not to say all micro enterprises are already discharged from applying certain labour standards. The question therefore arises whether the REFIT is a means to weaken workers rights of information and consultation rather than a tools to simplify and rationalize EU law.

What are the social consequences of the REFIT?

With a particular focus on SMEs 'Top 10 most burdensome pieces of EU legislation' the REFIT will affect a large series of workers protection and rights, such as health and safety at work and working time, temporary agency work but also the issue of posting of work-

ers, public procurement, recognition of professional qualifications, data protection. Company law will also be affected in respect of the protection of workers in case of merger control and directives in company law for example on the division of public limited liability companies, on cross-border mergers of limited liability companies and on mergers of public limited liability companies and on the safeguards by the formation of public limited liability company.

Although serious concerns have already been expressed about the impact of such initiatives on workers' rights in terms of lowering core labour standards (Vogel 2009), the Commission maintains the cost benefit analysis as the methodology to be used throughout the whole comprehensive regulatory check. Yet, such method does not provide for a sound evaluation of the benefits of social legislation.

Additionally, such large-scale initiatives put huge pressure on workers' information and consultation rights in particular in SMEs where it is already difficult for workers and their representatives to be informed and heard. The REFIT initiative gives no guaranty that existing worker' rights to involve in order to improve working conditions and health and safety protection will be maintained. Worse, it may lead to the erosion of workers' rights in small and medium-sized companies and limits the ability of workers representatives to contribute to the safeguard of jobs as well as to ensure the development of tailor-made social measures at the company level.

ETUC urges Commission to 'Rethink Refit'

As mentioned in the previous WP News bulletin, the Commission has launched a fairly comprehensive deregulatory agenda called REFIT that touches on, among other things, the information and consultation directives. In the meantime, the ETUC Executive Committee at its meeting of 3–4 December 2013 adopted a resolution asking the Commission to stop the deregulation of Europe and to 'Rethink REFIT'. In the eyes of the ETUC, REFIT is not only 'used as an excuse to get rid of various pieces of legislation, but it is also a serious attempt to destroy the social dialogue and the whole social acquis'. The resolution is available on the ETUC website.

Weiterführende Informationen

- ETUC and ETUI (2014) Benchmarking Working Europe 2014. Brussels: European Trade Union Institute (ETUI). See chapter 7 on 'Chipping away at workers' participation rights' Section on 'Information and consultation rights'; 91-113.
- Isabelle Schömann (2014) Collective labour law under attack: how anti-crisis measures dismantle workers' collective rights: <http://www.etui.org/Publications2/Policy-Briefs/European->

Economic-Employment-and-Social-Policy/Collective-labour-law-under-attack-how-anti-crisis-measures-dismantle-workers-collective-rights

- Isabelle Schömann (2014) Labour law reforms in Europe: adjusting employment protection legislation for the worse?: <http://www.etui.org/Publications2/Working-Papers/Labour-law-reforms-in-Europe-adjusting-employment-protection-legislation-for-the-worse>
- Carole Lang, Isabelle Schömann and Stefan Clauwaert (2013) Atypical forms of employment contracts in times of crisis. <http://www.etui.org/Publications2/Working-Papers/Atypical-forms-of-employment-contracts-in-times-of-crisis>
- Carole Lang, Stefan Clauwaert and Isabelle Schömann (2013) Working time reforms in times of crisis <http://www.etui.org/Publications2/Working-Papers/Working-time-reforms-in-times-of-crisis>

Schömann, Isabelle, ETUI Senior Researcher