

| EVALUATION AND FITNESS CHECK (FC) ROADMAP | | | |
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| TITLE OF THE EVALUATION/FC | <i>Evaluation on the implementation of Directive 2009/38/EC 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.</i> | | |
| LEAD DG RESPONSIBLE UNIT | EMPL B2 | DATE OF THIS ROADMAP | 01/2016 |
| TYPE OF EVALUATION | Evaluation Interim | PLANNED START DATE | 02/2015 |
| | | PLANNED COMPLETION DATE | Note: The evaluation was launched before the adoption of the Better Regulation Guidelines. 07/2016 |
| | | PLANNING CALENDAR | 2015/2016 |
| This indicative roadmap is provided for information purposes only and is subject to change. | | | |

| A. Purpose |
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| (A.1) Purpose |
| <p><u>Historical background of European Works Council (EWC) :</u></p> <p>The right to establish a EWC or a procedure for informing and consulting employees was introduced by Directive 94/45/EC¹ in Community-scale undertakings employing in total more than 1,000 employees within the Member States and at least 150 employees in each of at least two Member States and in community-scale groups of undertakings employing at least 1,000 employees within the Member States and at least one group undertaking with at least 150 employees in one Member State and at least one other group undertaking with at least 150 employees in another Member State².</p> <p>In 2006 and 2007, two resolutions referring to EWCs were adopted by the Parliament: (i) the Resolution on Restructuring and employment³ reiterated its request for the Commission to submit a proposal to amend Directive 94/45/EC and called on the Commission to launch a specific second-stage consultation of the social partners on the revision of the Directive; (ii) the Resolution on Strengthening European legislation in the field of information and consultation of workers⁴ called on the Commission to update this legislation in order to ensure a coherent and efficient framework of law, guarantee legal certainty, improve the linking of social dialogue at national and European levels, and present a timetable for the</p> |

¹ Council Directive 94/45/EC of 22.09.1994, OJ L254 of 30.09.1994, p.64, as amended by Directives 97/74/EC of 15.12.1997, OJ L10 of 16.01.1998, p.22 and 2006/109/EC of 20.11.2006, OJ L363 of 20.12.2006, p.416

² Article 1(1)&(2) Directive 94/45/EC.

³ PA_TA (2006)0088 Report J.L. Cottigny.

⁴ PA_TA (2007)0185 joint motion.

'long-awaited revision of the Directive on European works councils'.

After consulting the European social partners, an impact assessment⁵ concerning the envisaged review of the Directive 94/45/EC was finalised by the Commission in 2008 and concluded to some practical application issues.

Consequently the new Directive 2009/38/EC⁶ was adopted by the European Parliament and the Council⁷ on 6 May 2009, with some amendments mainly suggested by the European social partners⁸.

Once elapsed the transposition deadline (June 2011), the existing Directive 94/45/EC (as amended by Directives 97/74/EC and 2006/109/EC) was repealed and replaced with the Recast Directive 2009/38/EC⁹. Despite delays in the transposition of the Directive in most of the Member States¹⁰, the Directive has been finally transposed into their national legal order either by law (mainly through amending existing legislation) or agreement between social partners.

Evaluation purpose:

The purpose is to evaluate the impact(s) of the implementation of the 2009/38/EC Directive, more specifically those deriving from the changes made to Directive 94/45/EC hereafter referred as 'new rules' (described below in B.3 section). The evaluation should support the work of the Commission in the preparation of the report due by mid-2016 to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary¹¹.

The evaluation will conclude on the Directive's new rules' effectiveness, efficiency, coherence, relevance and EU added value. It will provide recommendations on how the problems identified could be remedied, either by additional processes or through amending the directive, if needed.

Note: The evaluation was launched before the adoption of the Better Regulation Guidelines¹².

(A.2) Justification

The Commission project stems from the Article 15 of the Directive, the evaluation should support the

⁵ Impact Assessment of the Revision of the European Works Council Directive, SEC (2008) 2166. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=SEC:2008:2166:FIN:EN:PDF>

⁶ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works council or a procedure in Community-scale undertakings and community-scale groups of undertakings for the purpose of informing and consulting employees, OJ 16.5.2009 p.28.

⁷ 2008/0141 (COD)

⁸ Joint advice of 29.08.2008

⁹ Art.17 of 2009/38/EC.

¹⁰ CZ, DE, EE, IE, EL, FR, IT, CY, LT, HU, NL, PL, RO, SI, ICE, LIE, LU.

¹¹ Article 15.

¹² http://ec.europa.eu/smart-regulation/guidelines/toc_guide_en.htm

work of the Commission in the preparation of the report due in 2016 to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

B. Content and subject of the evaluation

(B.1) Subject area

Labour law, collective rights, European works council.

(B.2) Original objectives of the intervention

Directive 2009/38/EC aims, in particular, at ensuring the effectiveness of employees' transnational information and consultation rights, at favouring the creation of new EWCs, while enabling the continuous functioning of existing agreements, remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked.

Improving the efficiency of European Works Councils was one of the objectives of the Action Programme for Reducing Administrative Burdens in the EU¹³. The adoption of the Recast Directive 2009/38 was one of its key actions.

(B.3) How the objectives were to be achieved

Substantive changes have been made into the Recast Directive compared to the Directive 94/45/EC in order to achieve its objectives and remediate to the practical application issues identified by setting up the following provisions:

- First, the definition of the notion of 'information' has been introduced in the Recast Directive. Directive 94/45/EC only referred to this term in but without providing a clear definition. As a result, Directive 2009/38/EC aimed to bring clarity and reinforce the obligation for the management to inform employees by providing guidance on the steps to follow. It states for instance that information must 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' meaning that a certain procedure must be respected.
- Another change relating to definitions is the attempt to provide a clarification of what was meant by 'consultation' in the Directive. The Recast Directive 2009/38/EC brought more details to this definition which now attempts to clarify the consultation process by adding for instance that this must enable employees' representatives to express an opinion on the basis of the information provided. This attempts to reinforce the information and consultation rights of EWCs which appear as two different procedures but which are nonetheless strongly interrelated.
- One of the main changes was also the insertion of a definition of 'transnational matters'. This clarified the scope of matters EWCs should deal with in opposition with national matters that should be dealt at national level. The criterion used is that it is the potential effects of the subject that should determine whether this is an EU-level or national-level subject. This aims at making

¹³ COM(2009) 544 final of 22.10.2009 and its annex C

easier the identification of the relevant level that needs to deal with the issue.

- The new rules also attempted to reinforce both the role of the social partners and employees' representatives. Indeed, social partners must now be informed of the composition of the Special Negotiating Body when this was required in the former Directive. Directive 2009/38/EC gives a mandate to employee representatives in the EWC to collectively represent the employees. It also introduces the obligation for the management to provide the EWC with means necessary to perform this function and the right to training without loss of wages.
- New provisions also include the provision of new facilities to the Special Negotiating Body such as the possibility to have pre- and post- meetings, or the presence of experts in the negotiation meetings.

C. Scope of the evaluation/FC

(C.1) Topics covered

The geographical scope of the study is the European Economic Area, i.e. the European Union in its present composition of 28 Member States plus Norway, Liechtenstein and Iceland. The time span to be covered is the period starting following art.18 of Directive 2009/38/EC¹⁴.

A baseline situation mapping the state-of-play in 2009 should be established. The analysis should cover the legal and socio-economic dimension and be conducted across the range of different economic sectors concerned. A focus on specific sectors (including metal, chemicals, food, HORECA, agriculture, building and woodwork) and specific countries (including Germany, France, United Kingdom) is required as in these cases a concentration of EWCs is observed. The reasons of the absence of EWCs in certain countries or certain sectors should also be assessed.

(C.2) Questions/issues to be examined

The evaluation will assess the compliance, effectiveness, efficiency, relevance, coherence and EU added value of the Directive 2009/38. More precisely, the following questions will be addressed:

For the compliance:

- To what extent is the transposition of the new rules correct at national level?
- What are the main issues/aspects of the Directive that remain or have emerged as recurrent problematic or contentious issues at national and European levels or in their articulation?

For the effectiveness :

- In what respect/to what extent does the Directive – the 'new rules' – bring a new impetus to consultation and dialogue in transnational companies, in particular as regards the opening and process

¹⁴ Except for Croatia, where the date of the accession to the EU (July 2013) is the relevant date.

of the negotiations, the enhanced role of trade unions and employers' organisations, the new concepts of information and consultation?

- How many agreements are still not ruled by the Recast Directive because of the derogations foreseen in its Article 14? How many agreements apply the subsidiary requirements?
- How is the new right for employees' representatives to benefit from training without loss of salary implemented in practice?
- To what extent has the role of EWCs increased in the negotiation, implementation and monitoring of transnational company agreements?
- What is the specific effect of the recast against the prevailing economic context?
- Against the baseline situation (2009), what is the impact of the Directive on the creation or the absence of EWCs in their various contexts (companies/ sectors/ countries) as well as the reasons for this?
- How many EWC agreements were concluded or renegotiated during the reference period (5 June 2009 – 5 June 2011)?
- What are the current main characteristics of the EWCs: composition, number of meetings, existence of select committees and of working groups?

For the efficiency:

- How did the transposition of the new rules of the Directive, including the new right for training, affect the benefits and costs for workers and for companies?
- How did the recast simplify administrative burden?

For the relevance :

- To what extent do national laws reflect similar or provide for more protective conditions for workers than the Directive's improved information and consultation rights for employees?
- What are the effects on legal certainty and clarity resulting from some of its provisions, like the adaptation clause or the definition of transnationality, or the absence of certain provisions, like on a clear articulation between national and European information and consultation procedures?
- In particular how does it impact on the enforcement of rights by the courts? What is the quantitative and qualitative dimension of litigation or complaints and debates in the Member States? What is the impact of the new competence of the members representing the employees on the EWC to represent the employees of the undertaking or group of undertakings?

For the coherence :

- To what extent is the Directive coherent with other EU legislation addressing workers' information and consultation rights, notably with the Article 27 of the EU Charter of Fundamental Rights?

For the EU added value:

The Directive 2009/38 on the establishment of European Works Council has a genuine EU specificity as

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| EWCs are transnational bodies representing employees of companies established in at least two Members States. |
| Based on the assessment of the above criteria, conclusions will be made notably on the coordination gains, legal certainty and ensuring minimum rights of the workers in terms of information and consultation of employees via the EWCs. |
| (C.3) Other tasks |
| <i>n.a</i> |

| D. Evidence base |
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| (D.1) Evidence from monitoring |
| As mentioned above, the Directive 2009/38 contains reporting obligation in its Article 15, also several implementation reports have been issued (see below under D.2). |
| (D.2) Previous evaluations and other reports |
| <p>Transposition of the Directive was scrutinized for each EU Member State, either by the Commission itself or by means of studies commissioned by the Commission:</p> <ul style="list-style-type: none"> - Commission Report (2000) - on the application of the Directive 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 COM (2000) 188 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52000DC0188 - Preparatory study for an impact assessment of the European Works Council Directive, EPEC GHK (2008) http://ec.europa.eu/social/BlobServlet?docId=2421&langId=en <p>An impact assessment has been carried out with a report on the implementation of the directive :</p> <ul style="list-style-type: none"> - Impact assessment on the revision of the European Works Council Directive SEC (2008) 2166 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008SC2166 - Report of the Group of Experts (December 2010) on the implementation of Recast Directive 2009/38/EC on European Works Councils - Report of the Group of Experts (December 2010) |
| (D.3) Evidence from assessing the implementation and application of legislation (complaints, infringement procedures) |
| There are currently few complaints or infringements related to the application of Directive 2009/38 in the Members States however the monitoring of the transposition is ongoing. |
| (D.4) Consultation |
| <p>During the evaluation process several consultation activities – targeted consultations – will be carried out:</p> <ul style="list-style-type: none"> - 83 interviews (telephone and face-to-face) of concerned EU-level stakeholders (e.g. European Social |

Partners, sectoral and cross-sectoral), national social partners, EWC representatives (employer and employee) will be carried out; support tools include dedicated topic guides; written and on-line survey via a SNAP platform;

- 34 surveys (questionnaires) and case studies will be conducted according to a defined panel of EWCs representatives.

- a survey to all members states representatives via a questionnaire.

- the European Labour Law Network and the European Industrial Relations Observatory correspondents will be consulted (email/online)

- a workshop with key experts and stakeholders will also be held on the basis of the interim results of the evaluation.

(D.5) Further evidence to be gathered

n.a.

E. Other relevant information/ remarks

The Commission services will be assisted by an external consultant.

The present evaluation has started before the Better Regulation Guidelines entered into application. Therefore, the feedback received on the roadmap will feed into the evaluation but – due to the progress already achieved in the evaluation – will not be used to further define its scope or the evaluation questions as mentioned above.