

European Added Value Assessment

on a EU legislative instrument on information and consultation of workers, anticipation and management of restructuring processes

ANNEX IV

Aspects relating to necessity of intervention at European level

Research paper
by Isabelle Schömann

Abstract

This assessment note intends to demonstrate the need for European legal activism in order to better guarantee the information and consultation rights of workers in case of anticipation and management of restructurings. Based on a critical assessment of the impact of measures in place at the European and national levels, this note evaluates the added value of a new European directive in particular to reinforce trust and time in the anticipation, the management and the monitoring of restructuring. It also stresses possible alternatives focusing on the improvement of existing directives as well as on a new directive on transnational company agreements.

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LINGUISTIC VERSIONS

Original: EN

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Manuscript completed in **October 2012**

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ISBN 978-92-823-3966-4

DOI 10.2861/52651

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List of abbreviations

AGIRE	Anticipation for innovative management of restructuring in Europe
CJEU	Court of Justice of the European Union
ELLN	European Labour Law Network
EMCC	European Monitoring Center on Change
ERM	European Restructuring Monitoring
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EWC	European Works Council
MIRE	Monitoring Innovation Restructuring in Europe
SE	European Company (Europea Societa)
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
TRACE	Trade Union anticipating change in Europe

Executive summary

Restructurings are highly complex and diversified processes, the nature and rhythms of which have evolved, combining in a particular manner accidental – and hence unforeseeable – events with permanent managerial strategic decisions. Restructurings cause significant permanent risks and dangers for workers (in terms of their health, employment, income, and social integration), for regions (in terms of growth, employment, social cohesion, attractiveness for investment, demography), and for undertakings (in terms of their productivity, profitability, and their survival). Such risks and dangers have in so many cases materialised and taken on crisis proportions that resistance to change has very much increased as a result. Two essential, complementary factors, namely, trust and time, appear to be the key angles from which restructuring processes can be addressed in a socially responsible manner. The need, in other words, is to jointly anticipate, to manage and to monitor restructuring.

Trust, on the one hand, is translated into the need to observe and promote social dialogue throughout the whole process of restructuring, with a focus on a timely, high-quality and transparent approach to the information and consultation of workers and their representatives. Such approach would guarantee the compliance with European values as stated in Art. 27 of the Charter of Fundamental Rights as well as in recital 9 of Directive 2002/14/EC. The involvement of local, regional and national authorities as parties to restructuring processes is a recurrent additional and essential feature stressed by recent research studies. The time factor, on the other hand, is characterised by the necessity to anticipate restructuring in such a way that the inevitably ensuing changes, breaks and discontinuities do not turn into crises that threaten workers' livelihood, disregard their rights and endanger the economy and social cohesion of regions.

As the European Union continues to promote and facilitate business transfers and related financial transactions on the internal market by means of various programmes and directives, it is necessary, with regard to both legality and legitimacy in a social market economy, as stated in the Lisbon Treaty, to also guarantee employees' participation rights in a clear and consistent manner, in a mainstreamed way (Art. 9 TFEU). Information and consultation with the view to reaching agreements on the social consequences of restructuring as well as on anticipative measures is not, however, something that can be taken for granted. The best-practices approach, in place since a decade, has failed to serve as appropriate incentives. Insofar as it requires specific rules, an appropriate regulatory framework is key to its success. An approach along these lines would benefit companies as well as workers, as it would allow for a more effective risk-assessment and risk-management policy in order to better adapt to market demands. In this way, workers would be helped to raise their employability through training schemes; to raise their involvement and understanding of business strategy; and also to improve (but not guarantee) their job security as a result of better controlled transitions in case of restructuring. By these means, the risk of workers becoming unemployed when affected by restructuring could well be reduced, and this is particularly the case when local and regional authorities, as well as national governments, become involved in the anticipation of change, so as to facilitate a forward-looking approach likely to foster the economic and social dynamism of a

region, on the one hand, or of sectors of activity of particular importance in terms of investment and employment, on the other hand.

Alternatives to legal activism – in terms of addressing, specifically, information and consultation in anticipating and managing restructuring – would be better monitoring of the implementation of the relevant social directives, combined with the review of Directive 2001/23/CE on the transfer of undertakings, so as to ensure its adaptation to the commercial environment of today, as well as to revive the 2004 Commission proposal on an optional legal framework for transnational company agreements.

General information

Managing restructuring in the European Union has become a major challenge for European institutions as well as for national governments, in particular due to the rapid changes in the world economy, not least the financial and economic crisis the world currently faces and its dramatic consequences for labour markets. The impact of globalisation on structural change in undertakings, although not a new phenomenon, has increased in scale and nature, developing as a new challenge to be dealt with in terms of greater openness of low-cost countries to foreign investments, a more diffuse international division of labour and enhanced tradability of goods and services. The development of new forms of management structures, such as networks of firms, as well as the recourse to subcontractors and supply chains, not to mention offshoring production¹ and the shift to constant restructuring of undertakings make restructuring more complex than ever and more difficult to be addressed under current legislation. Part of the policy concern is related to the negative effect of restructuring on the labour market in terms of job destruction for the regions and the sectors at stake (employment dynamics, impact on regional and sectoral industrial policy) but also in terms of consequences for the workers concerned (impact of job displacement on earnings, labour market position in terms of lower employment or higher unemployment and timeline of the impact: during the transition period and in the long term, the impact on specific groups, such as young workers, older workers, women, workers on atypical employment contracts; cutback in social integration and alterations in health status) (Lefresne and Sauviat 2009). Restructurings become a permanent risk for undertaking, workers and the region(s) involved. This is the materialisation of these risks and their consequences that make restructuring a major challenge for all actors involved. Studies point out the need to address the anticipation as one of the key answers to better tackling any restructuring processes, clearly showing that the treatment of the social impact of restructuring require the mobilisation of significant resources and actors (Projects AgirE, Mire and Trace for example), given that the range of European social directives at stake (dealing with collective redundancies, transfer of undertakings or the establishment of a European Works Council, the establishment of information and

¹ When domestic (European) production is replaced by foreign production due to a decision by a producer to cease or reduce domestic production (in Europe) in order to purchase or outsource (subcontract) production abroad.

consultation of workers or the European Company Statute cannot currently provide for a sufficient framework to tackle such risks.

Furthermore, these projects show that the anticipation of change needs to be based on a medium- and long-term strategy on the part of undertakings in order to develop adaptation and ensure the employability of workers, especially appropriate training schemes and lifelong learning initiatives. Qualitative time management is a decisive factor in successful restructurings, in combination with the active participation of all stakeholders and in particular of workers. The rights to information and consultation of workers in the European Union is anchored in primary and secondary European legislation so that the timeline and the quality of information and consultation of workers, together with the possibility of negotiating changes, better tackling anticipation of changes and contributing to the management of the social aspects of restructuring should be at the heart of any process of restructuring at company level (cf. Art. 27 of the Charter of Fundamental Rights of the European Union and recital 9² and Art. 4 (e) of Directive 2002/14/EC). However, studies reveal an increasing asymmetry of resources between the actors of restructuring processes and the inadequacy of the legislative answers to such processes (Battut and Moreau, 2008; Lesfresne and Sauviat 2009; Moreau 2010; Bruun 2010).

Furthermore, projects as well as research studies show that (i) restructuring processes usually lack any anticipatory management measures in respect of the workforce. Restructuring processes, although planned on a medium- and long-term basis by top management, are in most cases based on economic value (oriented towards shareholders) and do not include social and employment components in terms of anticipatory training needs and lifelong learning schemes, and do not include workers as relevant stakeholders. (ii) Workers' involvement is reduced to legal formalities of compliance with rather than to ensure an active and responsibility-sharing involvement on the part of the workers in restructuring processes, not to mention the lack of timely and qualitative information and consultation of the workforce and their representatives. In general, most CJEU case law on information and consultation rights deals with non-compliance with information and consultation procedures in case of restructuring (concerning EWC complaints: Carley and Hall 2006; for a broader look at complaints: Jagodziński 2010). (iii) Consequently the resulting low employability of workers causes irreversible damage in terms of the (re)employment of those laid off but also in terms of the employment dynamics of the sector(s) and of the region(s) in question, leading to many detrimental spill over effects on the local, regional and national labour markets. (iv) Restructuring processes remain a bilateral matter between the management and the workforce, although studies provide evidence that interaction take place at various levels (Blas, 2008) and that public services should be better involved; currently, there is a lack of participation on the part of public authorities.

² Recital 9 of Directive 2002/14/EC states: 'Timely information and consultation is a prerequisite for the success of the restructuring and adaptation of undertakings to the new conditions created by globalisation of the economy, particularly through the development of new forms of organisation of work'

Surveys indicate a significant increase in workers' sense of job insecurity in case of restructuring expressed not only as 'increased risk of job loss' but also well as a rise in 'the expected negative consequences of job loss' (Storrie 2006). Additionally, the European Commission recognised in its 2005 communication the difficulties associated with the negative effects of restructuring, not only for workers but also for countries and local and regional economies that share a sense of insecurity prompted by fears that jobs will be transferred elsewhere (European Commission 2005). Furthermore, studies and press reports provide evidence of the serious negative impacts of restructuring on workers' health in the form of stress, depression leading to suicide, and subsequent adverse labour market and general welfare outcomes of employees who lost their jobs due to restructuring (Storrie 2006; Mire project, 2007; Vogel 2011; ETUI Monthly Forum: Restructuring and health 2012).

One of the main characteristics of European Commission initiatives to tackle restructuring processes in the EU since the early 2000s has been to provide for a 'good practice' path, promoting the involvement of many actors such as public authorities, employers and trade unions at the European and national level (Moreau 2008 and 2010). Furthermore, the European Commission has been organising thematic forums on restructuring for a couple of years to encourage innovative practices (Toolkits for restructuring). However, no European policy on restructuring has been elaborated so far; the European Commission has refused to take any legislative action, assuming that the existing social directives provide for the protection of workers affected by restructuring processes (Moreau 2010) and despite the fact that the 2002 tentative to adopt a legal framework on restructuring via the European social dialogue has failed and that the 2003 "orientations for reference" negotiated in the framework of the European social dialogue was never formally adopted by ETUC. Confronted with this weak document, the ETUC has been strongly expressing its will for a European framework on anticipation and restructuring since then (ETUC 2012).

However, after a decade, this soft law or 'peer learners' approach has reached its limits, as best practices rarely serve as incentives and the expected peer learning effect does not function. Restructuring processes remain sporadic, largely limited to minimum legal requirements in terms of information and consultation of workers. On the other hand, the so-called social directives do not provide an appropriate legal framework for tackling restructuring processes either because their scope is too narrow (transfer of undertaking, collective redundancies, SE) or because it is too broad and not specifically related to permanent restructuring processes (EWC, general information and consultation). Furthermore, member states show a clear reluctance to properly implement certain aspects of the relevant social directives.

Comprehensive studies show the need to move from good practices to a legal framework to treat restructuring processes as such, independently of where the effects take place. Furthermore, studies show the necessity to restore workers and citizens as the focus of restructuring processes and European policies (Battut and Moreau 2008) to evolve towards a European social citizenship in terms of which citizens and particularly workers see that the European Union contributes to their protection in terms of involvement in the 'a highly competitive social market economy, aiming at full

employment and social progress, and a high level of protection and improvement of the quality of the environment' as stated in the values of the European Union (see Art. 3 para. 3 TEU), with the guarantee of having access to education and training (Art. 14 of the Charter of fundamental rights) with the guarantee to be informed and consulted in good time (Art. 27 of the Charter of fundamental rights). This would hopefully restore confidence in the EU.

Methodological approach

The methodological approach is twofold: on one hand, a large literature review has been carried out in order to include the latest and most relevant research outcomes necessary to the Assessment Note. On the other hand, a review of recent transnational projects on the issue of restructuring in combination with information and consultation rights has been undertaken so that the main relevant outcomes of these projects are taken into account. This twofold approach guarantees a qualitative as well as a quantitative dimension to the Assessment Note.

Literature review

The literature review embraces topical publications in the form of books, book chapters, papers and contributions to conferences on the issue of the treatment of social aspects of restructuring in relation to the information and consultation rights of workers in a transnational and national context. Besides the European Commission's documents, such as its communications on the issues at stake and its implementation reports on the social directives, the Assessment Note takes into account additional research work and studies carried out on behalf of or with the financial support of the European Commission (such as the European Labour Law Network, ELLN). Studies and reports stemming from the European Parliament are also included. Additionally, references have been made to topical research centres on transnational industrial relations, including the research work of the European Foundation for the Improvement of Living and Working Condition and the research work of the European Trade Union Institute.

Projects review

The literature review includes further references to the outcomes of specific projects on the issue of restructuring and information and consultation rights in the European Union. A selection of the most relevant includes:

Eurofound's European Restructuring Monitor (ERM)

Following the European Monitoring Centre on Change (EMCC) set up in 2001 as proposed in the European report by Gyllenhammar in 1998, the ERM was launched in 2002 with the aim of monitoring the extent of restructuring in Europe and the consequences of this for employment (ERM report 2009). On an annual basis, it delivers analytical reports on data collection on restructuring, allowing for a quantitative analysis of their consequences for job losses and job creation, as well as for the mobility

of economic activities in the European Union. Coupled with Eurostat statistics, this database could make it possible to focus better on sectoral developments, for example. Since 2006, the ERM annual reports provide an overview of restructuring activities in the EU and focus on a particular topic. The 2006 ERM report 'Restructuring and employment in the EU: concepts, measurements and evidence' (Storrie 2006) addressed the issue of the measurement of employment effects of restructuring at EU level and analysed the employment shares by sector and EU member state. The 2009 ERM report addressed restructuring in times of recession; the 2010 ERM report focused on the potential of short-time working schemes; while the 2011 ERM report is devoted to analysis of public instruments for supporting restructuring in Europe, extending its database with public and social partner-based support measures to anticipate and manage restructuring in the EU.

Monitoring Innovative Restructuring in Europe (MIRE)

This project is part of a range of research projects financed by the European Commission on the basis of Art. 6 of the European Social Fund. From 2004 to 2007 the multidisciplinary and transnational project (including five EU member states: Germany, the United Kingdom, Belgium, France and Sweden) sought to identify processes and social innovations to better manage restructuring, with a particular focus on their impacts on working life and workers' health, on one hand, and on the balance and development of regions, on the other. The outcomes are manifold: (i) the need to promote long-term anticipation within the framework of social dialogue at enterprise level; (ii) the impact of restructuring on the health of (former) workers with the support of public authorities; (iii) the need to develop multi-actor-oriented dialogue and concerted solutions involving public authorities in the regions at stake, based on a private-public partnership; (iv) recourse the need to use professional transitions; and (v) the lack of analysis of restructuring processes.

Anticipation for innovative management of restructuring in Europe (AgirE)

This project is part of a range of research projects financed by the European Commission on the basis of Art. 6 of the European Social Fund. This multidisciplinary project covers 26 case studies of restructuring in six EU member states over the period November 2005 to February 2008. The aim of the project was to propose an analysis of restructuring processes in the European Union on a microeconomic level, identifying the main changes in the European economy and their translation into restructuring decision-making processes. The hypothesis on which the project was based is that the European Union bears a strong responsibility in the management, control and acceleration of restructuring processes, so that it should not only offer member states facilitative paths or support voluntary initiatives by enterprises to solve economic and social setbacks resulting from restructuring. The project proposes a typology of restructuring at European level, coupled with a quantitative analysis, leading to an analytical and instrumental framing of restructuring adapted to decision-makers with a focus on strategic and operational anticipatory and innovative managerial instruments. The project concludes with a range of proposals for both the enterprise level and the EU policy level.

Trade unions anticipating change in Europe (TRACE)

The Trace programme, financed by the European Structural Fund (Art. 6 on innovative measures) was aimed at analysing the ways in which trade union in Europe can better support and promote workers' rights in restructuring processes. Gathering together 19 European and national trade union federations from 10 member states from 2004 to 2006, academics and researchers reflected on the proactive role of trade unions in anticipating, preparing and monitoring restructuring processes. The outcomes of the project are manifold and are described in the *Handbook on Restructuring* (2006). Three key actions guided the project: (i) to work out the cognitive assumptions underlying restructuring processes in Europe; (ii) to set up and coordinate trade unions networks to better tackle restructuring; and (iii) to develop information materials and guides for the attention of trade unions to better identify restructuring processes and develop trade union strategies (but also including European works councils).

Fitness check in the area of information and consultation

Addressing the specific issue of information and consultation, the European Commission launched, as part of its 2010 Work programme, a review of the body of EU legislation in selected policy fields. The methodological approach was a 'fitness check' to keep current regulations fit for purpose, thus identifying excessive burdens, overlaps, gaps, inconsistencies and obsolete measures. The 2010 fitness check was a pilot exercise taking place in four areas: employment and social policy, environment, transport and industrial policy. DG Employment decided to carry out its fitness check in the area of information and consultation and in particular on three directives: Directive 98/59/EC on collective redundancies, Directive 2001/23/EC on safeguarding employees' rights in the event of transfers of undertaking and Directive 2002/14/EC on information and consultation. The review of the three directives relies on an evidence-based approach and includes the legal, economic and social effects of the existing legislation. In addition, 'stakeholders' (representatives of member state labour ministries and EU social partners) have been involved and invited to participate in working groups to help gather relevant information, discuss the different studies, bring out the different national experiences regarding implementation of the directives at stake and express views on actions that the Commission may undertake in this area. The EU Commission is looking for (i) concrete findings on the effectiveness, efficiency, relevance and added value of the *acquis* in the areas under scrutiny, (ii) to serve as a basis on which to draw policy conclusions, whereby, as a result of this exercise, items of legislation could be withdrawn or amended and new instruments proposed to complement legislation. The overall results gathered by DG Employment during the fitness check exercise should be presented in a Commission communication in 2012 outlining the key conclusions and next steps. This communication will be accompanied by a staff working paper setting out in detail the evidence by member state and the positions of stakeholders.

1. Assessing the impact of the measures in place at EU level

1.1. How has the question of restructuring and workers' involvement been dealt with at European level?

Restructuring is not a new issue on the European agenda. We can distinguish two paths of action: the legislative and the non-legislative.

Elaboration of European legislation (1975-2002)

Concerning the legislative path, since the end of the 1960s/beginning of the 1970s the question of collective redundancies within the framework of industrial restructuring has been on the European social agenda with a view to guaranteeing the information and consultation of workers (Bethoux 2007). In short, and in a first phase, two main legislative paths have been developed: first in labour law, with the adoption of information and consultation rights in the specific situation of collective redundancies (Directive 75/129/EC reviewed both in Directive 92/56/EC and finally in Directive 98/59/EC); with regard to transfers of undertakings (Directive 77/187/EC reviewed both by Directive 98/50/EC and finally in Directive 2001/23/EC) and insolvency (Directive 80/987/EC reviewed in Directive 2002/74/EC); and second in competition law, establishing control of mergers (in Regulation 4064/89 reviewed in Regulation 139/2004). Comparing the two paths the dichotomy between a clear focus on workers' rights in case of collective redundancies, transfer of undertaking and insolvency, and the lack of attention paid to the information and consultation rights of workers is striking. These rights are conditional on the opening of an inquiry procedure on request to the European Commission in case of a risk of distortion of competition (Art. 18 of the Regulation), although mergers are part of restructuring processes in which information and consultation rights should be respected (Brihi 2004).

In a second phase, while the importance of workers' involvement is reiterated with an explicit reference to restructuring in Article 17 of the Community Charter of the Fundamental Rights of Workers of 1989, the European legislator extended workers' information and consultation rights to more general transnational situations (Directive 94/45/EC on European Works Council and its recast Directive 2009/38/EC; Directive 2001/86/EC on the European Company). The latest Directive, Directive 2002/14/EC on general information and consultation rights, was adopted 'in reaction to the blatant violation by some undertakings of national law on informing and consulting employees (European Parliament 2008), with undertakings using legal loopholes to circumvent any information and consultation rights for workers (see the analysis of the case law Renault Vilvorde in Schömann, Clauwaert and Warneck 2006).

Three main adjustments characterise the evolution of European legislation in dealing with workers' involvement in case of restructuring: (i) the extension of workers' rights from specific situations of restructuring to more general aspects of the economic and social life of the undertaking, including restructuring; (ii) the extension of the scope of workers' rights from multinationals to undertakings with 50 or undertakings with 20 employees; (iii) the change of focus in EU legislation on information and consultation

rights from the protection of workers (see for example, Recital 3, Art. 2 (a) and Art. 4, para. 1 of Directive 2001/23/EC on transfers of undertakings) to the promotion of restructuring using information and consultation rights to facilitate anticipation of risks, to make work organisation more flexible and to ease workers' access to training schemes (Recitals 7 and 9 of Directive 2002/14/EC on general framework for informing and consulting employees).

The non-legislative path (2002–2012)

Concerning the non-legislative path, particularly dominant in the past decade (Social Agenda 2005–2010 and the European Agenda 2020), much of European policy has been designed to encourage structural change as a fundamental economic rationale for the creation of the single market (single market legislation, trade, competition, industrial policies). The European Commission's vision endorsing structural change in industry and its focus on globalisation and enlargement is laid down in its Communication entitled 'Fostering structural change: An industrial policy for an enlarged Europe' of 2004 (European Commission 2004). In its 2005 Communication 'Restructuring and employment - Anticipating and accompanying restructuring in order to develop employment: the role of the European Union' (European Commission 2005), the European Commission developed its two main action paths to tackle restructuring in the European Union: (i) Developing policies reviewing the European strategy for employment (European Employment guidelines proposed by the Commission and approved by the Council, presenting common priorities and targets for national employment policies, on one hand, and supporting industrial policy with a focus on particular sectors (the objective being to shift labour out of declining sectors and into expanding ones), on the other hand. (ii) Developing, on one hand, financial instruments to secure labour market adjustment via structural funds (in reviewing structural funds and the European social fund in creating the European Globalisation Adjustment fund (Storrie 2006) and, on the other hand, to support the research and monitoring of restructuring processes in establishing monitoring bodies such as the European Monitoring Centre on Change in 2001 and the European Monitoring on Restructuring in 2002, as well as in financing research projects (see Part B of the methodology section of the introduction to this note).

The negative consequences of restructuring are dealt with in the social directives mentioned above and in discussion forums, such as the Task Force on Restructuring since 2005, the Restructuring Forum in 2005 and a range of Communications on, for example, corporate social responsibility as well in soft law measures, such as the European employment guidelines and the creation of structural funds. Since early 2000, it is striking that the European Commission's approach has been to promote good practice, with a rather low level of success (Moreau 2008 and 2010). However, no policy on restructuring has been elaborated so far and no European legislative act has been adopted, as the European Commission takes it for granted that the existing social directives provide for the protection of workers affected by restructuring processes (Moreau 2010) and despite the fact that the 2002 attempt to adopt a legal framework on restructuring via the European social dialogue failed (ETUC 2012). However, as things developed later on (see 1.2), the legal framework of redundancy procedures and other

social directives directly or indirectly covering restructuring processes provide for minimum standards that are not fully implemented by the member states, although their relevance is fully recognised, according to the latest outcome of the study on the 'fitness check' (European Commission 2012). After the failure of the 2003 European social dialogue negotiations on the issue of restructuring, the European Commission published its staff working paper 'Restructuring and employment: the contribution of the European Union' (European Commission 2008) and in October 2010 announced, in the Europe 2020 Flagship initiative on industrial policy, its intention to launch a second stage social partner consultation on restructuring in 2011. Unfortunately, this initiative has been repackaged as a 2012 Green Paper (European Commission 2012), leading to a public consultation rather than to a specific consultation of the social partners, as foreseen in Art. 154–155 TFEU.

While structural funds, and in particular the European Globalisation Fund operating since 2005, are seen as a crisis response mechanism promoting a long-term preventive approach (Storrie 2006), the relevance and effectiveness of the Restructuring Task Force of the European Commission to coordinate the different European policies in relation to restructuring may be questioned. Without any institutional and transversal basis throughout the European Commission's DGs, the social consequences of restructuring cannot be dealt with in a mainstreaming way. As a consequence, the workforce remains an adjustment parameter in restructuring processes, with little or no attention given to the situation of workers and of the region affected by restructuring. For example, in the event of merger control procedures, DG Competition should be obliged to take into account employment and industrial policy aspects and use workers' involvement as a parameter. There is a clear need to put aside 'palliative' social policy measures and develop a more anticipatory and innovative treatment of the social impact of restructuring (Battut and Moreau 2008). To do so, the European Commission could combine hard law to secure robust solutions and deal with long-term anticipatory restructuring measures and soft law to deal with short-term and more flexible aspects of restructuring, combined with financial structural funds (as developed in Section 3 of this Note).

1.2. What are the challenges impeding European action?

1.2.1. The difficult exercise of defining restructuring

Restructurings are processes (Mire project, 2007) that arise when the company structure is brought into question. They have the specific characteristic of organising abrupt break-ups in the undertaking's organisation, well knowing that such sudden break-ups pose significant risks and dangers for the undertaking, the workers, the region involved. Restructuring is seen as an 'active process' initiated by employers to maintain or enhance profitability (Storrie 2006) and to adapt to the internationalisation of trade, to the transformation of production and organisation of goods and services and the financialisation of markets (Battut and Moreau 2008). Such restructuring is no longer just an indication of the end of industrialisation but much more the concretisation of sophisticated strategies that use globalisation to quicker and better localise their activities and change their internal and international organisation in terms of product

lines, change their managerial mode with regard to global sectors or markets, businesses and units, as well as networks of undertakings without limits on time and space. However, actors at the enterprise and the national level remain bound to local and national contexts and legal frameworks. This is leading to an increasing asymmetry of power and means of actions between transnational management and workers' representatives, on one hand, and management and public authorities, on the other (Lefresne and Sauviat 2009). The asymmetry reveals a disconnection between central management at transnational level, where strategic decisions are taken, and at the national level, where legislation applies in respect of labour and business law, resulting, among other things, in the segmentation of social dialogue at the enterprise level. Restructuring or the reallocation of resources to more productive uses can take very diverse forms, ranging from job creation in new companies to massive job destruction due to the downsizing or closure of plants or enterprises. In all cases, restructuring processes have an impact on employment levels and job quality, although job losses can be attributed not only to structural changes but also to the business cycle (cyclical unemployment).

In short, the nature and rhythms of restructuring have changed from accidental and unforeseeable events to more permanent situations (Degremont 2004; Mire project, 2007; AgirE project 2008), from responses to clear economic difficulties to strategic initiatives in times of good economic health (Lefresne and Sauviat 2009), making restructuring processes more complex, multi-faceted and multi-featured (Battut and Moreau 2008). Restructuring become a permanent risk. Furthermore, restructuring processes are multileveled, involving, besides the enterprise level, the regional, national, European and international levels. Actors such as the workers and public authorities have therefore to adapt to such multileveled processes, as well as to the involvement of various actors, besides management. Restructuring processes lead to the necessary articulation of different levels of regulation, as well as of political action.

Currently, restructuring is unsatisfactorily regulated at national level (see Section 2.2). European law generously frames restructuring as far as economic freedoms are concerned, while the CJEU provides a generous interpretation of them in comparison to its restrictive reading of fundamental social rights. Furthermore, these directives deal with different situations at the enterprise level, as this fragmented Community system provides for the right of employees to be informed and consulted in special situations in the life of their enterprise, and they only partly cover the diverse forms of restructuring as developed in Section 1.2. Furthermore, and as far as those directives apply to restructuring situations, a range of shortcomings has been identified, leading to legal uncertainty and potential revision of the legal framework in question, as developed in Section 1.3. In particular, EU legislation does not tackle in a coherent and comprehensive way the issue of anticipation of change (Kerbouc'h 2007; Lecomte 2008), understood as sharing information on the strategy of multinationals and on the consequences of restructuring for employment (Lefresne and Sauviat 2009). In short, the existing legal framework cannot cover all restructuring situations, there is no legal framework tackling treatment of the consequences of restructuring in terms of workers' involvement and protection in a transnational context, in particular when innovation and anticipation of change are concerned.

1.2.2. Legal loopholes in existing EU social directives hinder the full exercise of information and consultation rights in case of restructuring

As demonstrated in Section 1.2.1 the nature and rhythms of restructuring processes have changed drastically and most of the current social directives do not cover the broad range of restructuring situations. As a consequence, they cannot guarantee information and consultation rights. For example, the catch-all definition in Directive 98/59/EC of the reasons for collective redundancies states 'for one or more reasons not related to the individual workers concerned', for which employers have seldom to prove economic hardship or to document a lack of work to motivate dismissals. Collective redundancies are therefore defined according to two criteria: thresholds and timeframe (at least 10 redundancies in establishments employing between 20 and 100 workers, at least 10 per cent of the workforce in establishments employing between 100 and 300 workers, at least 30 redundancies in establishments employing 300 workers and more or at least 20 redundancies over a period of 90 days regardless of the number of workers employed.). On the other hand, when redundancies fall below the mentioned thresholds, they are not defined as collective redundancies under to the Directive but may well result from restructuring. In this context, no particular legislation deals with lay-offs deriving from restructuring.

With regard to time, the European legal framework on redundancy procedures (Directive 98/59/EC) mainly consolidates the national legislation of the Member States, besides the Directive 2001/23/EC of March 2001 on the harmonisation of Member State national legislation on the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings and businesses. The Directive on the establishment of a European Works Council or a procedure in community-scale undertakings and groups of undertakings for the purpose of informing and consulting employees (recast of 2009/38/EC) provides for a coherent framework to all member states in respect of information and consultation in transnational undertakings. Directive 2002/14/CE is a substantial contribution towards the consolidation of European Community social law, as this is the first EU directive to establish a general obligation to inform and consult employees on special situations in the life of their undertaking. It has been dubbed the 'Renault Vilvorde' directive, as it was adopted following a decision to instigate massive restructuring by Renault in Belgium, in which Renault's management misused the loopholes of existing labour law, playing on the fact that the transnational nature of the decision to restructure was at the time not covered by Community law, with transnational restructuring not being subject to the law on employee information and consultation, and finally (mis)-using the opportunity afforded by Article 13 of the Directive on European works councils: it played on the fact that the agreement it had signed with workers' representatives – an agreement that existed before the Directive – made no provision for consultation prior to a decision (Schömann, Clauwaert and Warneck 2006; Schömann 2010). Finally, the European Company (SE Directive 2001/86/EC and EC 2157/2001) has added additional facets to mandatory workers' involvement at European level, particularly by including – for the first time – participation rights at board level (ETUI 2012).

However, after the implementation phases in the member states, a range of shortcomings have been identified within the framework of implementation reports carried out by the European Commission (for example the 2008 Review of the application of Directive 2002/14/EC in the EU³ or the 1999 Report on the implementation of the Directive on collective redundancies⁴, or the 2007 Report on the directive on transfer of undertaking⁵) including the synthesis report on the 2002/14/EC Directive establishing a general framework for informing and consulting employees in the European Community (Ales 2007)⁶ and other actors such as the ETUI implementation reports (Schömann, Clauwaert and Warneck 2006) and the ELLN thematic reports (ELLN 2010 and 2011). Interestingly, the current 'financial and economic crisis did not reveal any hidden problems (...) rather it shed additional light on problems which existed before' (ELLN 2010). Putting the focus on three directives (Directive 98/59/CE on collective redundancies, Directive 2001/23/CE on transfers of undertaking and Directive 2002/14/CE on information and consultation), four main issues have been identified: (i) incorrect implementation, (ii) avoidance of the provisions of the Directives, (iii) uncertainty about key definitions and concepts and (iv) enforcement difficulties. Mainstreamed issues throughout the Directives 98/59/CE on collective redundancies and Directive 2001/23/CE on transfers of undertaking concern domestic dismissals protection law, insolvency-bankruptcy, collective agreements, enforcement mechanisms, employees' benefits and pensions. Thus, the definition of the concept at stake remains one of the major sources of legal uncertainty. Implementation of Directive 2002/14/CE is still not optimal as far as the timing and content of the information delivered and the consultation carried out are concerned. Practical arrangements as well as the protection of workers' representatives exercising their rights reveal loopholes in domestic implementation provisions.

Concerning the rather timid recourse to the possibility given by Directive 2001/86/EC to use the new and optional legal European undertaking statute as facilitator in case of transnational restructuring may be linked to the obligation to create a transnational workers' representation body with information, consultation and participation rights, in particular at supervisory and executive board levels (Kluge 2006, ETUI workers' participation website⁷).

Finally, none of these directives tackle specifically and in an appropriate way the need for information and consultation of workers to deal with anticipation and adaptation to changes at the enterprise level. As demonstrated in case studies (for example, Kerbouc'h 2007; Battut and Moreau 2008), collective redundancies taking place as the consequence of restructuring processes are often based on the alteration of job requirements: any professional training to adapt to new business needs or reclassification often comes far

³ <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=210>

⁴ <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=215>

⁵ <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=208>

⁶ There is no recent study on the implementation of 98/59/CE Directive on collective redundancies except the one of 1999 and a range of studies on the termination of employment relationships, thus not specifically on collective redundancies.

<http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=215>

⁷ <http://www.worker-participation.eu/>

too late to allow for further employment. Furthermore, often European and national legislation do not tackle the anticipation of skill needs and adaptation to change for workers as a social risk to be dealt with pro-actively but rather treat the symptoms than the causes, adopting ad hoc measures in urgent cases and compensation measures in a medium- and long-term perspective so that such legal measures are inefficient in preventively identifying training needs and proposing adequate training schemes. The same applies to the need to adapt to new technologies, for example, or the reclassification of workers. As a consequence, workers laid off as a result of restructuring usually face long-term unemployment. Additionally, the lack of coercive measures to propose anticipatory professional training schemes and reconversion of workers, together with the rather limited efficiency of social plans to guarantee the employability of workers made redundant (Lefresne and Sauviat 2009) show that current European and national legislation in general does not provide a legal framework that would make it possible to tackle anticipation and adaptation to change in restructuring processes successfully. Indeed, most social plans turn out to be means of reabsorption of surplus staff based on competition criteria rather than on skills needs (Lecomte 2008). Key measures to better guarantee anticipatory treatment of the social consequences of restructuring depend in the first place on the political will to set anticipation as a priority and to create the necessary incentive mechanisms to valorise professional lifelong learning schemes. This first priority should include proper implementation of the information and consultation rights of all stakeholders, including workers. Information and consultation should take place between the management representatives who took the strategic decision to restructure (and not just the local management that implements restructuring decisions) and local workers' representatives. Furthermore, information and consultation should make it possible to address the economic grounds on which restructuring takes place (Lefresne and Sauviat 2009). Second, coercion and dissuasive sanctions should prevent the reluctance of enterprises to deliver relevant information on time to workers' representatives (Waddington 2007; European Parliament 2009) and penalise any circumvention of legal obligations, in particular false information. Indeed, sanctions resulting in damages are not dissuasive enough when the objective is reclassification and compensation for loss of qualifications is at stake for the workers but also for the region.

2. Assessing the impact of the measures in place in the Member States

While multinationals operate worldwide, including massive restructuring in the public sector the applicable standards on worker participation in corporate strategy and restructuring are still largely shaped by national laws. However, the few European tools on information and consultation rights are poorly implemented and national law cannot embrace the complexity of multinational organisations and in particular the very flexible and transnational decision-making models, leading to a growing asymmetry between transnational management decision-making power and the national limitation of managerial obligations to treat the social consequences of restructuring. While the national scope for implementing good practices has been investigated in successive social dialogue projects on restructuring in the EU27 (see the European social partners 2008 Joint study on the role of the social partners in restructuring in ten countries in the “EU15”⁸ and 2010 Joint Study on Restructuring in the EU9), as well as in national trade unions’ own projects, it seems that no lessons have been learned that would make it possible to move ahead.

2.1. Poor implementation of EU social directives

Typical of the Directive, in contrast to the European Regulation, is to leave significant room to manoeuvre to the national legislator to implement the principles adopted in the Directive. In this context, it is essential that (i) member states respect the deadline of implementation and transpose the letter and spirit of the Directive in national law and/or in national extended collective agreements, (ii) the European Commission supervises transposition in the member states, having regard to the general principle of useful effect.

As mentioned by a range of studies (Schömann, Clauwaert and Warneck 2006; Ales 2007; ELLN 2010 and 2011), a range of member states have put little effort into ensuring good implementation of EU social directives guaranteeing information and consultation rights at the enterprise level, in particular in case of restructuring processes. Grounds for such poor implementation are manifold and can range from a lack of existing or functioning industrial relation systems and a lack of social dialogue culture at the enterprise and sectoral level to a political will to provide just the minimum protection for workers or to deliberately formulate vague obligations (European Parliament 2009), as well as by making a ‘shopping list’ of the provisions of the directives to be or not to be implemented in national law (for example, in the case of Directive 2002/14/EC the failure to take account of young workers, women in part-time work or workers on fixed-term contracts in the calculation of thresholds in order to reduce the actual number of workers employed and therefore to circumvent legal obligations triggered by thresholds (European Parliament 2009). Such bad practices in implementing EU law should be

⁸ http://resourcecentre.etuc.org/linked_files/documents/IP2%20%20-%20Synthesis%20Report%2010EU15%20-%20June%202008%20-%20EN.pdf

⁹ http://resourcecentre.etuc.org/linked_files/documents/RestrFinalEN.pdf

eradicated by thorough and regular monitoring of implementation law by the European Commission.

The lack of political activism is also found in member states invoking subsidiarity to justify not meeting their obligations to legislate sufficiently, for example in refusing to adopt rigorous sanctions to dissuade employers from breaching legal obligations regarding information and consultation of workers (European Parliament 2009). Furthermore, implementing EU law may also drastically change the existing national system of industrial relations and this may lead to resistance on the part of public authorities, as well as on the part of the actors concerned (see, for example, the United Kingdom in implementing Directive 2002/14/EC in Schömann, Clauwaert and Warneck 2006; Ales 2007; ELLN 2010). Furthermore, rigorous and regular reviews of the implementation processes of EU directives, and when necessary leading to injunctions should be carried out by the European Commission to allow for proper monitoring of the implementation of directives in national law.

2.2. National treatment of the social aspects of transnational restructuring

As mentioned in Section 1, EU law provides for substantial recognition of the economic freedoms and in particular for the freedom of establishment. As a consequence, the CJEU applies strict control of national legislative measures that might obstruct this fundamental economic freedom (Bücker and Warneck, 2010). This encourages multinationals to shop for the least binding legal system in EU member states and to easily switch or restructure to another (member) state with lower fiscal obligations, putting different plants in the EU in competition with one another and leading to delocalisation of production from one member state to another, even outside the European Union. Transnational fiscal and economic grounds guide such restructuring processes, leaving the social and human dimension of restructuring to the national level: the undertaking and remedies provided by national law, leaving aside any transnational liability of and coordination within the multinational (Moreau 2010). According to BusinessEurope, action on labour markets is mostly needed at national level to boost job creation and facilitate labour market transitions, so that even when people face redundancy they can feel confident that opportunities exist in other jobs or sectors. However, this position is rather naive, as it leaves the national authorities to deal with transnational private management restructuring decisions that affect the national labour market and local economy in such a way that there is little chance for workers to get a job, in particular when there has been no investment to guarantee their employability and adaptation of their qualifications and skills to business needs (Moreau 2010; ERM 2006–2011).

As demonstrated by Lefresne and Sauviat (2009), while multinationals define and carry out strategies at transnational level, restructuring processes are influenced by corporate governance modelled by local and national industrial relations systems, as well as by national law, in particular in relation to workers' involvement. However, national law is currently not in a position to tackle the consequences of the complexity of multinational organisations and in particular of the very flexible and transnational decision-making models, in particular because such models impact directly on workers' rights guaranteed by

national law. One solution would be to adapt the national legal definition of 'employer' so as to embrace the complexity of multinationals' decision-making models and ensure that the social consequences of restructuring processes are borne by the same decision-making body at the multinational level that takes the economic and financial restructuring decision, and that the obligation of information and consultation, as well as the obligation of tackling the social consequences of restructuring are borne by both the multinational and the undertaking.

Furthermore, studies provide evidence of the growing asymmetry between transnational management decision-making power and the national limitation of managerial obligations to provide information to workers' representatives. This leads to the restriction of information of a transnational nature to local workers' representations (and sometimes to the local subsidiary) that would make it easier to understand the multinational's strategy and restructuring decisions. Art. 1.(4) of the EWC recast Directive 2009/38/EC leaves some scope for an extensive interpretation (to allow for the *effet utile* of the directive) of the obligation to provide information to EWC on national decisions with transnational consequences (in the prolongation of CJEU C- 440/00 Kuehne and Nagel and C-44/08 Akavan).

Additionally, the case law of national labour tribunals (and to some extent that of the CJEU) on the interpretation of the information and consultation rights of workers in the case of restructuring deriving from the social Directives and their implementation at national level is characterised by considerable heterogeneity and in some instances by inconsistencies when dealing with the same issue, for example on the concomitance or primacy of EWC information and consultation over national instances of workers' representation (Bethoux 2006 Pulignano and Kluge, 2007). The recourse to judicial action by workers and their representatives. Furthermore, the the articulation of procedures of information and consultation at national and European level impacts on the outcome of restructuring processes. Indeed, the recourse of the EWC may well postpone collective redundancies at the national and local level, allowing for additional consultation and negotiation.

Finally, the 2011 ERM report gives a first-hand analysis on national public and social partner based support instruments (rather than regional and local measures) as well as on main programmes. Although this database is not exhaustive, it gives a range of first ideas about national's measures taken in the treatment of (social) aspect of restructuring processes. The report shows that such instruments are usually not explicitly planned to support restructuring processes and therefore are rarely used on time to tackle anticipation of change and restructuring. Frequently, they are not included in policy discussion. As mentioned in other studies (Battut and Moreau 2008), the involvement of local, regional to national authorities would provide for a better understanding and anticipative treatment of the consequence of restructuring for the local, regional and national labour market. This is particularly true when forecasting training needs for a particular sector of activities, or when securing the economic dynamism of a region. Furthermore, the 2011 ERM report shows that, in several countries, 'reluctance by both employees and employers to invest in skill development is still prevalent' (ERM Report 2011). Finally, the complexity and lack of transparency of the system of public support instruments leads to the little recourse to such support systems by companies and employees' representatives.

3. What can be done to remedy loopholes?

Information and consultation rights, which are at the heart of the European social model, in particular in case of restructuring, should be understood and implemented to provide a procedure enabling employers, workers and public authorities 'to anticipate as effectively as possible the economic and social consequences of changes to the business environment' (European Parliament 2008). In doing so, all undertakings in the European Union should have at their disposal the same anticipation and preparation tools as their competitors, promoting healthier competition among them in accordance with the rules of the internal market.

According to the AgirE project, restructuring processes are conditioned by three main factors: (i) the corporate governance approach at the undertaking, (ii) the degree of internationalisation of the group of undertakings at stake and its relation to local undertakings and workers and (iii) the form and location of management decision-making, which may lead to the erosion of workers' rights and fragmentation of the stakeholders, if the decision centres are remote. For switching from restructuring processes to more dynamic and anticipatory adaptation to change, five variables have been identified: (i) the structure of management; (ii) the involvement of workers; (iii) local social dialogue culture involving timely and qualitative information of workers' representatives; (iv) coordination of workers' representation (trade union, works councils and EWC); (v) coordination of different private and public partnerships, in particular to secure the employment of people in the region affected by restructuring.

These variables are conditioned by industrial relations systems, national and European labour law, business law, administrative and constitutional law. Furthermore, the legal notion of group of undertakings or multinational should be adapted to take into account the liability of the group that takes restructuring decisions in assuming responsibility for dealing with the social consequences of its strategic decisions at the subsidiary level. Currently, EU and national labour law obligations are addressed to the local employer (subsidiary) on the grounds of the legal autonomy of moral entities. Competition law, however, sees no problem in linking multinational and subsidiary liability despite the distinct legal personality. According to the CJEU, 'the conduct of a subsidiary may be imputed to the parent company in particular when, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links which tie those two legal entities. That is the case because, in such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking which enables the Commission to address a decision imposing fines on the parent company, without having to establish the personal involvement of the latter in the infringement' (CJEU 10.9.2009 in C-97/08 Akzo Nobel NV, para. see paras 58-61, summary of the judgment, point. 4). This pragmatic approach could be of use to the EU legislator.

In order to better understand the transnational dimension of restructuring and to adapt or create appropriate tools, there is a need to jointly treat the causes and effects of restructuring in order to characterise the link between the transnational nature of restructuring and its national consequences and treatment. The geographic scope and the timeline of restructuring impact the choice of instruments made by the actors.

Following the previous developments and based on the outcomes of recent studies on the issue of restructuring and the involvement, a range of relevant initiatives can be identified to remedy the spotted loopholes, and amongst them: (i) the improvement of existing instruments and in particular the better implantation and monitoring of relevant social directives, up to the revision of the directive on transfer of undertaking; (ii) two main propositions that could be classified as legal activism: on one hand, the proposition of a legal framework on restructuring in order to better tackle anticipation of change and innovation in European law in combination with information and consultation rights; and on the other hand, the proposition of a legal framework for transnational company agreements to address, amongst other issues, the transnational dimension of restructuring processes and secure a transnational treatment of the social consequences of restructuring. This proposition would follow an early, aborted proposition of the European Commission for an optional framework for transnational collective bargaining (European Commission, 2005a); (iii) as well as a range of alternatives at the EU and national levels to European legislative action.

3.1. Improvement of existing instruments: better implementation and monitoring of the relevant social directives

3.1.1. Directive on general information and consultation (2002/14/EC)

The general obligation to transmit relevant information in a timely fashion to workers' representatives, to consult with a view to negotiating, as laid down in Directive 2002/14/EC is one of the basics for securing the involvement of workers in restructuring processes and their active participation in anticipating and adapting to changes within undertakings. Relevant information should demonstrate the real strategy of the undertaking and at the group level, including national and European financial, economic, strategic, organisational and social data, as already interpreted by the courts in some member states. Such information should be addressed to the national as well as to the European workers representation structures so as to guarantee the *effet utile* of the Directive. This would make it possible to better balance the means of information and actions of all actors. It would therefore lead to the better management of anticipation and innovation based on the active involvement of workers. The proper implementation of Directive 2002/14/EC at the national level should respect both the letter and the spirit of the Directive so as to allow for better ownership of restructuring processes by employers and workers and to lead to more socially acceptable solutions. Coordination of the information and consultation obligations between national and transnational workers' representation and management representatives should be ensured in a way that these obligations are complementary and not put into competition. This latter interpretation of the Directive would allow for more concordance between the information and the addressees (Battut and Moreau 2008).

The social risk stemming from restructuring processes should be addressed within the framework of anticipation of and adaptation to change in the undertaking in terms of qualifications and skills. This needs to become a joint responsibility of management and workers, as well as the public authorities. As Lefresnes and Sauviat show (Lefresne and Sauviat 2009), intervention with regard to the diagnosis itself and not only the social consequences of restructuring, with management that not only implement the strategic decision but can influence the course of restructuring, would allow workers' representatives to develop shared anticipatory restructuring measures that could lead to a better appropriation of the processes of restructuring.

In this respect, while public authorities should be more involved in the elaboration and monitoring of employability schemes for workers in the case of restructuring, the obligation for information and consultation should be understood as key to the realisation of negotiations, as developed by Advocate General Mengozzi in his Opinion of 22.4.2009 on CJEU case Fujitsu Siemens. Therefore, Art. 2 of Directive 98/59/EC on collective redundancies should be interpreted as putting the obligation on the multinational to allow for consultation at local level before taking any strategic decisions involving collective redundancies and to inform the subsidiary (Vernac, 2010). While Directive 98/59/EC does not provide for any obligation for the multinational to inform its subsidiary of any envisaged redundancies, and therefore to the workers' representatives at the local level, recast Directive 2009/38/EC on the EWC has adopted this obligation of transversal information in its Art. 4 para. 4, giving meaning to the *effet utile* of the Directive (following the CJEU judgement in C-440/00 Kuehne and Nagel of 13.01.2004). This has resulted in a lack of coherence between the two directives.

Furthermore, negotiations should be mandatory, as in Germany (Kerbouc'h, 2007) and in case of negotiations on a social plan, it should lead to a collective agreement rather than to a unilateral decision of the employer (Lecomte 2007). This would indeed be more in line with the spirit of the Directive 2002/14/EC making workers' representatives actors in dealing with the social consequences of restructuring and of anticipation of and adaptation to changes. Compelling European companies to negotiate social plans is in line with the European Commissions' mission to support and promote social dialogue and would make it possible to respect the different ways in which Member States organise support for workers affected by restructuring. Currently, sanctions have no impact on improving the qualifications of workers, nor do they have any impact on their further chances of getting a job or obtaining access to relevant reconversion schemes.

Besides qualitative information, the timing of information is of the utmost importance. Article 4 para. 3 of Directive 2002/14/EC should be interpreted so that the information of workers' representatives must be prior to the restructuring decision.

3.1.2. Directive on Transfers of undertakings (2001/23/CE)

Prof. Niklas Bruun stressed in his report to the ELLN annual conference 2010 (Bruun 2010) that the commercial environment in which the Directive 2001/23/CE operates today is very different from that of the 1970s. Although it was revised in 1998 and 2001,

most restructuring processes are nowadays 'driven by mergers and acquisitions following the transformation of capital markets and the invention of new mechanisms of corporate finance and credit instruments allowing for financing of take-overs and other forms of restructuring (for example, pre-packs) to which the Directive probably does not apply' (Barnard 2010). This evidence should lead to the revision of the Directive in order to be conceptually clearer, to deal adequately with situations of bankruptcy and insolvency, and to apply also to new forms of business transfers, where employees' information and consultation rights are needed'.

3.1.3. Directive on Collective redundancies (98/59/EC)

Prof. Francois Gaudu stressed in his report to the ELLN annual conference 2010 (Gaudu 2010) that according to the CJEU in its case law *Fujitsu Siemens* of 10 September 2009, in its interpretation of Art. 2 of Directive 98/59/EC on collective redundancies in case of restructuring, while information and consultation of workers is the sole obligation of the local undertaking implementing the strategic decision of the multinational to restructure, consultation should be seen, in its essence, as functional to the realisation of negotiations. As a consequence, the obligation to consult already starts with the strategic decision of the multinational to restructure in an already identified subsidiary. In conclusion Francois Gaudu considers that strengthening the application of EU social directives should be prioritised rather than reforming them and that there is a need to dissociate collective redundancies from the issue of transition and flexicurity leading to the deregulation of collective redundancies.

Finally, and in a general way, there is a need to define the personal scope of the employment directives more clearly and not simply by reference to national law. Inspiration might be drawn from the Court's case law on Art. 45 TFEU, the decision in the equal pay case, *Case C-256/01 Allonby* and the working time case, *Case C-428/09 Union syndicale Solidaires Isère*.

In addition, in order to prevent the poor implementation of the social directives at stake, a suggestion would be to introduce an anti-avoidance clause in each directive along the lines of Article 35 of the Citizens Rights Directive 2004/38/CE (Barnard 2009).

3.2. Legal activism: a legal framework for restructuring

Anticipation and adaptation to change remain a difficult but not insurmountable joint exercise in the face of the gap between the short-term and urgent approach of management for the purpose of dealing with market competition, not to mention their reluctance to disclose any information ahead of restructuring processes, on one hand, and the need for a medium- to long-term and negotiated approach on the part of workers' representatives when dealing with organisational changes with regard to the skill needs, employment prospects, training and employability of the workforce. Legislation is usually referred to, in particular by employers, as imposing burdens. This position is partly true but it is not the whole story: legislation should be seen as establishing obligations and models of action at the same time (Jeammaud 1993).

As demonstrated earlier, the soft law approach has reached its limits, as it fails to translate best practices into more coherent and effective incentives for multinationals. Furthermore, the soft law approach does not guarantee effective and sufficient involvement and protection for the workforce facing restructuring. In this respect, current European and national legislation only partly covers restructuring and, while identified loopholes should be addressed, restructuring as a permanent economic instrument to deal with global adaptation to change needs to be addressed in a more rational, comprehensive and specific way, based on the European values of social market economy, integration and social dialogue.

A range of studies have addressed the role of EWCs in the anticipatory treatment of restructuring and adaptation to change. They show that EU legislation should address the need for clarification of the coordination between workers' representative bodies at different levels so as to strengthen their complementary function instead of exacerbating their differences and putting them in accord (Battut and Moreau 2008; Lefresne and Sauviat 2009). Furthermore, the difficulties related to the exercise of anticipation by EWCs reveal the need to set up economic and social rules at other levels than that of the undertaking or group of undertakings (multinationals) (Lefresne and Sauviat 2009).

3.2.1. European legal context: shared competences and their exercise by the EU and/or the member states

The Treaty of the European Union (TEU) defines in Article 5 three fundamental principles on which delimitation of competences between the European Union and the member states is based: the principle of conferral that forms the boundaries of competences, the subsidiarity principle and the principle of proportionality, that define the exercise of competences. According to Art. 5 TEU, by virtue of the subsidiarity principle, the Union does not take action (except in the areas that fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. The principle of subsidiarity only applies when the European Union and member states both have competences (shared competences). It is closely bound up with the principle of proportionality, which requires that any action by the Union should not go beyond what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued.

Following the entry into force of the Treaty of Lisbon on 1 December 2009, the Protocol (No. 2) annexed to the Treaties on the application of the principles of subsidiarity and proportionality now requires the principle of subsidiarity to be respected in all draft legislative acts and allows national parliaments to object to a proposal on the grounds that it breaches the principle, as a result of which the proposal may be maintained, amended or withdrawn by the Commission, or blocked by the European Parliament or the Council. The Treaty of Lisbon clarifies the division of competences between the Union and the Member States. Alongside the principles of subsidiarity and proportionality, it includes the principle of conferral according to which the Union shall act only within the limits of the competences conferred upon it by the Member States in specified areas.

Applied to the issue at stake, information and consultation of workers' rights fall under the particular objective of the European Union to promote social dialogue, while being a shared competence with the member states: Art. 151, para. 1 TFEU states: 'The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion'. Further, Art. 153, para. 1 states: 'With a view to achieving the objectives of Article 151, the Union shall support and complement the activities of the Member States in the following fields (...) the information and consultation of workers (Art. 153, para. 1 (e)). When applying the principle of subsidiarity, the question is, who is to exercise the competence, the EU or the member states? According to Art. 5 TEU, two conditions must be fulfilled for EU action: the insufficient action by member states with regard to the objectives proposed and the better achievement by the EU by reason of the scale or effects of the proposed action. The principle of subsidiarity appears to be an ambiguous concept that can be invoked to foster the community wide pooling of certain competences or on the contrary to renationalise others (Degryse 2011). Clearly, the question posed is relative and 'the allocation of competences depends on a reliable assessment of relative sufficiency' (Bercusson 2009: 162). Subsidiarity remains a relative test as between levels of actions, but should be understood as allowing both actions in a complementary way and not as an exclusive allocation of competence (Bercusson 2009).

As demonstrated earlier in this note, whereas multinationals operate worldwide, the applicable standards on workers' participation in corporate strategy and restructuring are still largely shaped by national laws. National legislators, however, have poorly implemented EU social directives and they show, in some member states, great difficulty in adapting to the complexity of multinationals' organisation and in particular to the very flexible and transnational decision-making models. The growing asymmetry between transnational management decision-making power and the national limitations of managerial obligations to treat the social consequences of restructuring would benefit from a community-wide answer that would guarantee respect for information and consultation rights in restructuring processes with a focus on the anticipation of changes, thus making mandatory best practices identified within the framework of the different European and sector-related projects.

3.2.2. To better tackle anticipation and innovation in European law

According to the AgirE project (Battut and Moreau 2008), anticipation is socially a must for workers as well as for the region(s) at stake, so as to allow adaptation to global markets but also - in parallel - to secure a vital equilibrium between the economic needs of undertakings and regions and social requirements. Anticipatory initiatives should therefore involve all actors and should range from consultation to bilateral and tripartite negotiation. This requires a forum in which the stakeholders and in particular workers'

representatives can act, as well as a timeframe in which they have access to necessary and useful information and finally the need to have a shared and anticipatory approach towards adaptation to change so as to build economic and social compromises. Such initiatives range from internal changes at the undertaking level to the adaptation of the different competences and skills of workers, the need for new qualifications that can be acquired via training. A high level of qualifications is a prerequisite for a high employment rate in the European Union while securing the social and economic dynamism of the regions. Qualitative information and consultation of workers and their representatives, provided in good time and using existing structures such as works councils and European works councils or trade union coordination is at the heart of such anticipatory and innovative initiatives with a view to concluding new types of agreements, for example on long-term professional transitions with institutional and local actors. Furthermore, innovative negotiations usually take place at a different level than that of the restructuring undertaking, being at the sectoral level, the national level or the European sectoral level (for example, using so-called transnational company agreements). Anticipation and innovation should clearly deviate from existing restructuring measures that lead to the exclusion of workers from the labour market and where professional transitions are far from being generalised.

3.2.3. To propose an optimal regulatory framework for transnational company agreements

In recent years, negotiations on transnational restructuring have developed within the framework of transnational company agreements, as no legal framework has been set up at international or European level to support transnational collective bargaining at company level. A large part of those agreements address the issue of restructuring (European Commission 2012). Although the European Commission back in 2004 favoured an optional legal framework (European Commission 2004a, European Commission 2005a), no further legal initiative has been taken, leaving the whole issue to corporate social responsibility, based on the promotion of best practices (Schömann 2011; Schömann, Sobczak, Voss and Wilke 2008). However, the lack of a legal framework to secure their implementation, which currently depends on the goodwill of the parties at stake, shows that there is no real incentive for employers to meet their commitments: recently, the rapidity with which the management of multinationals has disregarded their obligations in such agreements demonstrates their weakness (ETUC 2012). Finally, such transnational company agreements on restructuring can hardly, in the present stage, provide for a reliable framework (in form of best practices) to tackle restructuring in small and medium undertakings within broader supply chains and regional economies, as well as restructuring in the public sector.

3.2.4. To propose a regulatory framework on information and consultation of workers, anticipation and management of restructuring processes

The European Parliament draft report (2012/2061(INI)) contains recommendations to the European Commission on the information and consultation of workers, anticipation and management of restructuring. The added value of the proposal is manifold:

1. The proposal makes it possible to expand the bipartite relations between employer and workers' representatives in the case of restructuring and to involve the public authorities. This first point is of great relevance, as restructuring affects not only the workforce of the undertaking at stake but has a major impact on the local and regional economic and social environment. Furthermore, the involvement of all stakeholders will better ensure the monitoring of the measures decided within the framework of the treatment of the social consequences of restructuring in respect of employment, professional training and reinsertion of workers. However, workers and their representatives are not 'any relevant stakeholders' and the draft report should make a clear distinction so as to make sure that information and consultation rights of workers are not diluted or reduced to the explanation of the restructuring decision by management to any relevant stakeholders. That the proposal includes information for the suppliers is of added value in comparison to the current situation.
2. The proposal insists on the need for dissuasive sanctions in the case of circumvention or non-compliance with legal obligations on the information and consultation rights of workers, which is in line with the outcomes of studies on the implementation of the social directives. This proposal puts the liability for restructuring back on the management, which has based its actions on public subsidies. Leaving the responsibility for dealing with the social problems of restructuring, which is the result of a private actor's decision, to the public authorities cannot be in line with the values of the European Union. In this respect, the draft reports call upon the involvement of regional authorities and national governments.
3. The proposal creates a subjective right to education, which is a novelty, as part of the objectives stated in Art. 3 TEU 'the Union shall work (...) to promote a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment'. However, the interaction with this 'new' right to training and existing rights and agreement should be clarified.
4. The proposal creates the conditions to guarantee that anticipation of change in the case of restructuring take place within the framework of the social dialogue and that it should be based on a long-term strategy. All in all, the proposal makes it possible to get from the best practices approach to active legal mechanisms to guarantee better and comprehensive involvement of all stakeholders in restructuring processes with the focus on their joint action towards the anticipation of changes, making the management of restructuring a more democratic and proactive part of corporate governance.
5. Imposing on companies the need to monitor on a permanent basis the psychological and social health of employees affected by restructuring is in line with the outcomes of recent studies that have again been confirmed by the suicides of employees facing particularly badly managed restructuring and job losses.

On the other hand, the European Parliament draft report (2012/2061(INI)) seems to place little emphasis on the core information and consultation rights, instead of which it sets mechanisms for the anticipation of change and management of restructuring. In this respect, the title generates some confusion about the real purpose of the draft report. Additionally, the draft report is intended to apply to transnational as well as to national restructuring processes and will, as such, impact on existing national legal instruments as well as on national and local collective bargaining systems. The draft report should therefore seek the right balance in addressing the issue of information and consultation rights, and the anticipation of change and restructuring, so as to strengthen social dialogue and collective bargaining at the national and local levels. In particular, the draft report should mention that more favourable law and collective agreements cannot be undermined via the proposed directive and, in particular, via recourse to agreements stipulating derogations or agreements on anticipation of change. In the same vein, the draft report should place more emphasis, not least in terms of the terminology used, on the promotion of social dialogue and collective bargaining.

Finally, the draft report gives rise to some confusion in turning the right to education and access to training (Article 14 of the Charter of fundamental rights in combination with Art. 166 TFEU) for workers into a duty, such that employees have to accept relevant training offers. This latter aspect would appear to be contrary to the European value enshrined in the European Union.

3.3. What would be the alternative at the EU and national levels to European legislative action?

At the European level, alternatives in the case of a lack of legal activism on the part of the European Commission to set up an information and consultation framework in the case of restructuring and adaptation to change would include: (i) ensuring a European legal framework on transnational collective bargaining that would allow for a transnational, optional framework addressed to multinationals and tackling – among other things – restructuring processes (ETUC 2011a); (ii) securing equal access to education and training for workers, in particular for those who need training most and addressing tools focusing on future skills needs and the upgrading of skills, through social dialogue on workforce planning and multiannual plans on employment skills development, while supporting lifelong learning schemes in all undertakings and in all sectors of industry (ETUC 2010).; (iii) establish a stronger and sustainable European industrial policy agenda in order to create and maintain jobs through significant public and private investment in research and development, innovation and infrastructure (ETUC Resolution April 2011). Furthermore, the key role should be devoted to active labour market policies, social protection and support measures for those who fall victim to economic changes. In principle, these alternatives can be also be carried out in parallel with European legislation on information and consultation, anticipation and management of change.

While there is a need to restore business confidence (BusinessEurope Position 2012), this has to be combined with the need to regain the trust of the workforce and secure job creation instead of job destruction, in particular when managing restructuring processes. Such trust can only be based on respect for and promotion of the European Union's values that guarantee information and consultation, also in the case of restructuring, in particular to deal with anticipation of changes in terms of access to training and lifelong learning schemes for the employability of workers, thereby answering the need for high employment in Europe. In this respect, the refusal of BusinessEurope to comply with European values shows the extent to which the right of employees to information and consultation needs to be strengthened in the European Union, on the basis of its recognition at international (Article 21 of the European Social Charter (revised) and European level (Chapter IV, 'Solidarity', of the Charter of Fundamental Rights of the European Union, Article 27 and the Community Charter of the Fundamental Social Rights for Workers of 1989, Art. 17 to which the second recital of Directive 2002/14/EC contains a direct reference).

At the national level, the implementation of the letter and spirit of European social directives should be a priority for the member states. Furthermore, the 2011 ERM report on the database on public and social partner based support measures to anticipate and manage restructuring in the EU27 and Norway, although not exhaustive, shows that national instruments are usually not specifically designed to support restructuring processes and are often not the object of policy discussion. The involvement of local, regional to national authorities amongst the stakeholders would help to master the implication of restructuring for the local, regional and national labour market. Additionally, the collection of micro economic and labour market data and information remain a challenge, so that undertakings as well as workers and public authorities have little recourse to them to forecast training needs in a sector, at local or regional level. Furthermore, in several countries, awareness-raising measures to skill development and lifelong learning might be necessary, 'as reluctance by both employees and employers to invest in skill development is still prevalent' (ERM Report 2011). Finally, little support measures address explicitly restructuring, the system of public support instruments is multi-layered and complex and hence not very transparent for companies and employees, so that a more institutional restructuring support system would be helpful, in particular with a focus on an anticipative (i.e. before redundancies) information on the activities provided by public employment services in terms of training for example.

Conclusion

Restructurings are highly complex and diversified processes, the nature and rhythms of which have evolved, combining in a particular manner accidental – and hence unforeseeable – events with permanent managerial strategic decisions. Restructurings cause significant permanent risks and dangers for workers (in terms of their health, employment, income, and social integration), for regions (in terms of growth, employment, social cohesion, attractiveness for investment, demography), and for undertakings (in terms of their productivity, profitability, and their survival). Such risks and dangers have in so many cases materialised and taken on crisis proportions that resistance to change has very much increased as a result. Two essential, complementary factors, namely, trust and time, appear to be the key angles from which restructuring processes can be addressed in a socially responsible manner. The need, in other words, is to jointly anticipate, to manage and to monitor restructuring.

Trust, on the one hand, is translated into the need to observe and promote social dialogue throughout the whole process of restructuring, with a focus on a timely, high-quality and transparent approach to the information and consultation of workers and their representatives. The involvement of local, regional and national authorities as parties to restructuring processes is a recurrent outcome of the projects referred to in this note. The time factor, on the other hand, is characterised by the necessity to anticipate restructuring in such a way that the inevitably ensuing changes, breaks and discontinuities do not turn into crises that threaten workers' livelihood, disregard their rights and endanger the economy and social cohesion of regions.

As the European Union continues to promote and facilitate business transfers and related financial transactions on the internal market by means of various programmes and directives, it is necessary, with regard to both legality and legitimacy in a social market economy, as stated in the Lisbon Treaty, to also guarantee employees' participation rights in a clear and consistent manner (Bruun 2010; Barnard 2010). Giving workers a voice and a place in strategic decision-making processes at company level is a prerequisite for socially responsible restructuring, via the recognition and respect of information and consultation rights, with a view not only to negotiating agreements that make appropriate provision for dealing with the social consequences of restructuring but also to fostering anticipation schemes and measures that will facilitate adaptation to change, in particular when addressing training needs and securing the employability of workers. Negotiation is not, however, something that can be taken for granted. Insofar as it requires specific rules, an appropriate regulatory framework is key to its success. Furthermore, the effectiveness of negotiating rules is dependent on full acknowledgement of the actors' entitlement to adequately defend their interests throughout the restructuring process (Mire project 2007; Trace project 2007).

An approach along these lines, to be introduced preferably via a regulatory framework, would benefit companies as well as workers, as it would allow for a more effective risk-assessment and risk-management policy in order to better adapt to market demands for trained workers. In this way, workers would be helped to raise their employability

through training schemes; to raise their involvement and understanding of business strategy; and also to improve (but not guarantee) their job security as a result of better controlled transitions in case of restructuring. By these means, the risk of workers becoming unemployed when affected by restructuring could well be reduced, and this is particularly the case when local and regional authorities, as well as national governments, become involved in the anticipation of change, so as to facilitate a forward-looking approach likely to foster the economic and social dynamism of a region, on the one hand, or of sectors of activity of particular importance in terms of investment and employment, on the other.

The added value of a regulatory frame, as compared with soft law measures or a best-practices approach, is manifold: a European legal framework would provide minimum standards applicable to restructuring processes throughout the European Union and would, in this way, increase workers' security in terms of both their employability and the involvement of the workforce in the anticipation and management of restructuring. For undertakings, such standards would provide for more adequate risk management of restructuring processes and would strengthen anticipative paths in terms of better adaptability to change, in particular when anticipating training needs, while possibly leading also to less distortion of competition. Over the past decade, the soft law measures and 'peer learners' approach favoured by the European Commission have not delivered the expected mainstream of good practices amongst undertakings and multinationals. Restructuring processes remain erratic, largely reduced to minimum legal requirements in terms of information and consultation of workers, in those cases when even these are not somehow circumvented. Additionally, the social directives currently in force hardly provide an appropriate legal framework for tackling restructuring processes, particularly given member states' lack of enthusiasm when it comes to transposing the content of these directives and implementing the resulting legislation in accordance with the deadline.

Furthermore, Art. 9 TFEU – which states that 'In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health' – should apply in the interests of better mainstreaming of information and consultation obligations, in particular in European policies, as well as so as to guarantee that the European Commission, which is in charge of monitoring mergers and takeovers, ensures that the rules laid down in national and Community law are complied with when decisions on mergers and takeovers are being taken.

Finally, one of the main (but not sufficient in itself) alternatives to legal activism – in terms of addressing, specifically, information and consultation in anticipating and managing restructuring – would be better monitoring of the implementation of the relevant social directives, combined with the review of Directive 2001/23/CE on the transfer of undertakings, so as to ensure its adaptation to the commercial environment of today, which is very different from that of the 1970s when the Directive was adopted, an aspect that was not dealt with in the course of the revisions carried out in 1998 and 2001.

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