

## **Better regulation and the social acquis: Is the REFIT fit for purpose?**

*Sylvaine Laulom (Université Lumière Lyon 2)*

This article, which introduces and analyses the EU's Regulatory Fitness Programme (REFIT), and its application in the field of social policy, was published in the *European Labour Law Journal* in 2018 (volume 9, issue 1).

### Abstract:

The aim of this paper is to focus on a specific part of the Better Regulation procedures: the Regulatory Fitness and Performance programme (REFIT). Within the Better Regulation process, the REFIT programme is, more specifically, focussed on evaluating existing legislation. The REFIT programme began in 2010 when the European Commission announced that it would be reviewing EU legislation in selected policy fields through 'fitness checks' in order to keep current regulation 'fit for purpose'. This included identifying 'excessive regulatory burdens, overlaps, gaps, inconsistencies and/or obsolete measures which may have appeared over time. Pilot exercises began in 2010 in four areas: employment and social policy, environment, transport and industrial policy.' In employment and social policy, the fitness check exercise was launched in the area of informing and consulting workers on the national level, with the evaluation of three Directives. The Commission then included Occupational Safety and Health (OSH) in the REFIT Programme. The third area evaluated was the Written Statement Directive. The paper analyses the REFIT as applied to the social field, through an evaluation of the REFIT Programme in the three areas where fitness checks have already been carried out. Our main conclusion is that the REFIT Programme has certainly legitimised the European Commission's lack of action and has fulfilled its social agenda. However, at the end of the evaluation programmes, the REFIT has not yet led to deregulation. On the contrary, some gaps have been identified which have led the Commission to begin a legislative review process.

### Introducing the REFIT programme:

- The article focuses on a specific part of Better Regulation, the Regulatory Fitness and Performance Programme (REFIT), which is concerned with evaluating existing legislation. The programme was launched in 2010, when the Commission announced that it would be reviewing EU legislation in selected policy fields through 'fitness checks' in order to keep current regulation 'fit for purpose'. This includes a focus on regulatory burdens, gaps, overlaps and inconsistencies.
- The REFIT Programme has faced heavy criticism for its assessment of costs and underlying assumptions, as well as its likely consequences, as it could lead to a deregulation of social fields.

### REFIT and the EU's social agenda:

- The paper analyses the REFIT as applied to the social field. It describes three fitness check case studies.
- The first covers three EU Directives on informing and consulting workers at the national level. The exercise concluded that the Directives were fit for purpose, and that the benefits they generate are likely to outweigh their costs. Therefore, contrary to what had been feared, the REFIT process did not justify a deregulatory initiative in the social field, and it confirmed the legitimacy of the European intervention in this area. It identified some weaknesses in the existing framework, notably concerns that a significant proportion of

the workforce is not covered due to the exclusion of smaller SMEs, public administration and seafarers from the scope of application of the Directives. Moreover, reflecting on its own methodology, the fitness check suggests that evaluation is very difficult, resting on assumptions more than scientific results. It also recognises that it is not possible to fully evaluate the costs of the Directives.

- The second case study covers the REFIT of the Occupational Safety and Health Directives (OSH), the most debated of the cases. The REFIT evaluation had a significant scope, focusing among others on all Directives dealing with health and safety issues, and took more than five years to complete. The evaluation highlights again the limits of its own process, which rests on hypotheses rather than specific results. Despite these limits, the general conclusion is ‘that the overall structure of the EU occupational safety and health acquis [...] is generally effective and fit-for-purpose’. However, during the entire period of the REFIT, the Commission avoided making any legislative proposals in the area of health and safety, until the evaluation of the entire body of EU OSH legislation had been completed. Several legislative proposals were thus blocked, and it is here that Laulom identifies the threat posed by REFIT.
- The final case study analyses the REFIT process of one single Directive, the Written Statement Directive. Again, the conclusion was that the Directive is fit for purpose, and that there was no evidence of less costly approaches. Responding to the identification of barriers to realising the directive’s full effectiveness, however, the Commission launched the first phase consultation of Social Partners on a possible revision of the Written Statement Directive on the same day as it published the REFIT evaluation.

#### Conclusions:

- In sum, the Directives were deemed fit for purpose in every one of the studied exercises and Laulom concludes that, somewhat paradoxically, the REFIT legitimises current European legislation on social rights and future legislation. In the case of the EU Directive on informing and consulting workers, the Commission launched the first phase of a consultation on its consolidation in 2015 (though this had disappeared from the 2017 Work Programme). In the REFIT of the OSH directives, the evaluation points to specific provisions that have become outdated or obsolete, calling for their revision; Laulom concludes that impact of the whole process seemed limited. Finally, in the case of the Written Statement Directive, the evaluation led to the identification of possible improvements to strengthen the legislation’s effectiveness.
- Crucially, however, the article also identifies tangible evidence of the risk of delay, and the possibility for the Better Regulation agenda to be used (intentionally) or act (unintentionally) as a barrier to progressing social legislation.
- The paper concludes that doubts may be raised as to whether the REFIT in action in employment and social policy has proven to be an efficient method of evaluation. The paper argues that the choice of directives that have been assessed is far from neutral and transparent. Furthermore, the methods used to evaluate the ‘effectiveness, efficiency, relevance, coherence and EU value’ of the directives must be questioned, as reports highlight evaluations based on opinions. More fundamentally, and referring particularly to the Written Statement Directive, Laulom questions whether it is necessary (or a good use of resources) to evaluate the cost of a basic, fundamental employment right, whose practical burden is very minimal. The risk posed by REFIT is that it mandates that ‘every social right has to be justified, while the main emphasis should be upon the fulfilment of social rights’.