Variations on a theme? The implementation of the EWC Recast Directive

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Preface

Sweeping European integration in recent decades has brought with it new opportunities and new challenges. As early as the 1970s, it was recognised by policy-makers and trade unions alike that with respect to workers' participation rights, the centralisation and decentralisation dynamics within transnational companies has increasingly raised the need to strengthen, integrate, and balance the roles of the actors and processes involved in information and consultation at all levels.

The trailblazing EWC Directive of 1994 already set its sights on the right target: its preamble recognises that existing information and consultation procedures 'are often not geared to the transnational structure of the entity which takes the decisions affecting those employees'. According to the preamble, the Directive sets out to establish appropriate mechanisms for transnational information and consultation, in order to ensure 'that the employees of Community-scale undertakings are properly informed and consulted when decisions which affect them are taken in a Member State other than that in which they are employed.' It soon became clear that while the 1994 EWC Directive represented a major breakthrough in the development of transnational information and consultation, its pioneering approach of establishing the primacy of negotiated solutions in lieu of universally applicable rules left many gaps and loopholes.

The 2009 Recast EWC Directive set out to close at least some of those gaps and loopholes. Chief among these was a more robust and above all generally applicable definition of transnational information and consultation, thus insulating these fundamental rights from the vagaries of national implementation and company-level negotiations. The transnational competence of the EWC was defined in such a way as to enable the EWC to fulfill its transnational role flexibly and appropriately with-

in the shifting context of transnational company-level decision-making, while at the same time protecting the autonomy of the national and local levels. Key principles in defining the resources of the EWC, from its legal capacity to its practical means of working, were also more clearly defined. Some attempt was also made to improve the enforceability of rights.

While certainly not all trade unions' demands were met with the Recast, a number of key improvements were made, which promise to enhance the capacity of EWCs to fulfil the role for which they were intended all along provided these provisions are properly transposed, taken up by the actors, and enforced. As always, the implementation of Directives into national law lands squarely in the middle of the ever-present European policy-making dilemma: How much uniformity is required to achieve the effectiveness objectives of the Directive, how much differentiation is permissible to meet the requirements of subsidiarity, in this case both in terms of national and company-level specificity?

This book draws upon international legal expertise to assess in detail the ways in which key improvements brought about by the Recast EWC Directive have been implemented in national legislation. Detailed and precise overviews provide insight into the origins and possible consequences of some of the differences and similarities identified. The findings are examined in the light of some of the key debates in European law, thus opening up new fields of inquiry and contributing to existing ones. Four years after the Recast EWC Directive came into force in 2011, and on the eve of its scheduled review by the European Commission, this topical and timely analysis can be expected to inform the debates in policy, practice and research.

Aline Hoffmann, ETUI
August 2015

Executive summary

Introduction

The introductory chapter provides general information relevant for understanding the specific character and importance of proper implementation of the EWC Recast Directive. First, it briefly recalls some key facts about the climate pertaining to the process of adopting the directive. It goes on to present basic information about the process (and timing) of implementation of the directive into national law and provides an overview (in tabular form) of national implementing measures. The chapter then explains the origin and rationale for the study leading up to the present volume. Specifically, it explains the study's importance and timely relevance as an impartial evaluation of the quality of national transpositions on the eve of the official European Commission implementation study foreseen for mid-2016. It concludes by explaining the need for ensuring, in the process of reviewing national implementations of the EWC Recast Directive, its interlinkage and consistency with the general framework of information and consultation in EU law. This requirement is reinforced by explaining its anchorage in the newly introduced goal of improved articulation between EWC rights and their counterparts at other levels.

Chapter 1

Chapter 1 deals with the question of the most fundamental principles set out in the EWC Recast Directive. It focuses on the right to information and consultation as the core of the EWC directive(s). The core rights of EWCs are discussed in terms of:

- the definitions of information and consultation (in all their breadth[1] as stipulated in the body and preamble of the directive), including references to and considerations of the general principle of effectiveness;
- the definition of the transnational character of matters that EWCs are competent to get involved in;
- articulation (linking) between various levels of information and consultation (mainly between the European and local levels);

This chapter analyses implementation of these aspects of the directive in the legal systems of individual member states, first by considering the general framing of information and consultation within the EU *acquis*. It then analyses national implementation measures concerning information and consultation, including the effectiveness and confidentiality of information and consultation. Finally, it considers assorted aspects of articulation between various levels of information and consultation, including the notion of 'transnationality' delimiting the translational competence of EWCs as opposed to purely national matters (and thus considered in the part on articulation), considerations on timing and priority between various levels, as well as workers' representatives' obligation to report back to their constituencies. The chapter concludes by pointing out that implementation of core rights has too often been a copy/paste from the directive, as well as being of mixed quality and too cursory. These obstacles may hinder the expected real boost in the transparency and efficiency of these rights.

Chapter 2

Chapter 2 analyses implementation of the new provisions of the EWC Recast Directive with regard to setting up new EWCs. It highlights the importance of these modifications for one of the main objectives of the directive, which is to increase the number of EWCs. The chapter starts by explaining the difficulties encountered by workers' representatives in setting up EWCs, making reference to the jurisprudence of the Court of Justice of the European Union. It goes on to present data on implementation of the new requirement imposed on managements by the EWC Recast Directive to provide information necessary to prepare a request for setting up a Special Negotiating Body. In this context it scrutinises the scope of '*parties concerned*', that is, those entitled to receive information and make requests. Particular attention is paid to the role of social partners – and specifically trade unions – whose role in the process of setting up EWCs was recognised in the Recast Directive for the first time. The specific role of social partners was to collect information on the creation of new EWCs; the chapter looks at the implementation and practical functioning of this new obligation to inform the recognised social partner organisations about the commencement of negotiations as a tool for better monitoring of EWC development. Finally, the question of modification (renegotiation) of existing EWC agreements with the purpose of ensuring the application of the new rights from the EWC Recast Directive is reflected upon. The chapter looks at implementation of

1 An analysis of the means required to allow EWCs to engage in information and consultation is presented in Chapter 4.3.

Articles 13 and 14 of the Recast Directive that deal with the so-called 'adaptation clause', which makes it possible to renegotiate agreements in force in the event of significant structural changes in a company's structure. The chapter concludes by stating that in (too) many member states only formal, as opposed to substantial and effective, implementation has taken place. At the same time, even if one applies only the criterion of presence/absence of provisions on implementation of the Recast Directive in national systems as a qualifier of proper transposition not all member states have passed the test.

Chapter 3

Chapter 3 of the book is devoted to analysing implementation of modifications of the Recast Directive that have an impact on the functioning of existing EWCs. The chapter starts by explaining the context of the Recast Directive's modifications for improving the functioning of European information and consultation procedures. It goes on to discuss extended competences, including the principle of information and consultation at a time and with a content that allow EWC members to perform an in-depth assessment in order to formulate an opinion on the envisaged measures; the broadening of different aspects of assistance and of means (for example, more regular and more frequent meetings), the right to extraordinary meetings and follow-up, the presence and operation of the select committee within the EWC, access to experts (and expertise) and training, and access to modern means of communication (including translation and interpreting services). Subsequently, implementation of selected key provisions at national level is analysed, which includes the requirement to ensure balanced representation of various categories of workers in EWCs, the right to obtain a reasoned response from management, workers' representatives' protection and right to training, means to collectively represent the interests of workers, the duty to report back to constituencies and, finally, access to expertise. The main conclusion of the chapter is that, again, implementation of the modifications of the Recast Directive varies significantly across the EU. Despite the positive message that most countries have embraced the changes and integrated them into national law, this transposition is in many respects only formal and limited to a copy/paste from the text of the Recast Directive itself; moreover, some novelties were introduced only as options. It therefore remains a matter of local interpretation and practice how some of these changes will be inserted in agreements, which is regrettable and counter-productive as it pushes responsibility for clarification onto the parties negotiating EWC agreements.

Chapter 4

Chapter 4 complements the analysis of the implementation of new rights provided by EWC Directive 2009/38/EC with an examination of enforcement frameworks. To this end selected aspects of enforcement frameworks and their implementation at national level are scrutinised:

– collective (EWCs) and individual (workers' representatives') legal status and capacity (*locus standi*) in courts;
– costs of legal proceedings applicable in EWC court cases;
– sanctions for breach of EWC rights and provisions.

The chapter looks at the significant diversity of national solutions in the area of enforcement. While the authors find this diversity justified and natural due to the differing industrial relation traditions they highlight the consequences of such (excessive) variation of enforcement standards across the EU. The chapter discusses the far-reaching implications of specific national solutions and shows how negligence in providing effective and accessible enforcement tools impinges upon the functioning of EWCs. The chapter also draws attention to the need to ensure EWCs adequate resources to allow them to seek justice in the event of insurmountable differences of opinion with management. It also brings into the debate on implementation of the Directive the 'taboo' question of effective, dissuasive and proportionate sanctions and shows the stark contrast between the standard of the Directive and national laws. The chapter emphasises that implementation of the procedural enforcement provisions of the Directive is thus not merely a subsidiary technical complement to substantive rights provided to EWCs, but an important ingredient of the overall fundamental principle of '*effet utile*' and has a vital impact on the exercise of the core rights to information and consultation in everyday practice.

Introduction

Romuald Jagodzinski

Revision of the European Works Councils Directive 94/45/EC was a long-awaited, hard fought and significantly delayed process compared with trade union expectations and the obligation under Art. 15 of the Directive that set the deadline for 1999 (for more information see (Dorssemont and Blanke 2010; Blanke et al. 2009; Dorssemont 2009; Jagodzinski 2009b; Jagodzinski 2010). Once it was officially announced in the European Commission's Work Programme for 2008 hopes of an improved legal framework increased among labour representatives, only to give way to the hard reality of difficult (pre)negotiations between the social partners. This was followed by disillusionment concerning the possible outcome of the review process, brought about by political compromises and sacrifices on the long list of issues reported as problematic by workers' representatives, trade unions and experts (Jagodzinski 2009a). The official negotiations to which the social partners were invited by the European Commission were, in a dismaying and dramatic move, dictated by the requirements of a narrow window of opportunity, rejected by the ETUC. The process stalled and verged on collapse when the European Commission found itself pursuing an extremely controversial cause, to be saved by a mid-summer deal between the ETUC and BusinessEurope. The revision – which in the meantime, due to political pragmatism, was recoined into a 'recast' – was saved. With the official publication of the text of the new Recast Directive 2009/38/EC on 6 May 2009 the job was done and all interested parties could sigh with relief.

All that remained was the 'technical' process of transposing the directive into national law, an exercise theoretically easy enough for both the national authorities and the European Commission. The latter provided guidance in the form of Expert Group meetings, which resulted in a (non-binding) Report (European Commission 2010a) that contained the results of (non-binding) commonly agreed conclusions

concerning a harmonised approach to implementing the transposition.[1] This thus seemed to be a mere formality of lesser importance.

Despite the regular two-year deadline for transposition the national implementation process with the deadline 6 May 2011 was not completed on time by all member states. Delays (sometimes only minor) in transposition of the directive occurred in the Cyprus, the Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, the Netherlands, Poland, Romania and Slovenia (that is, 18 out of the 31 EU and EEA member states – see Table 1). In July 2011, the Commission sent letters of formal notice to the 17 member states that had not complied with their obligations. Of these cases of infringement, eight were closed by 24 November 2011[2] (Slovakia, Cyprus, Czech Republic, Finland, Hungary, Ireland, Lithuania and Slovenia) and five cases were closed soon afterwards as the member states completed the transposition process. A little more time was taken by the Commission with regard to some remaining countries due to delayed parliamentary procedures (France, Poland, Romania, Belgium, United Kingdom), but eventually these member states transposed the EU directive into national law within several months of receiving the 'reasoned opinion' request. In November 2011 the European Commission requested that Greece, Italy, Luxembourg and the Netherlands transpose new legislation on European Works Councils (recast of EU Directive on European Works Councils) into national law. The request was issued in the form of a 'reasoned opinion' under EU infringement procedures. The demand was that if Greece, Italy, Luxembourg and the Netherlands did not bring their legislation into line with EU law within two months, the Commission could decide to refer these member states to the Court of Justice of the European Union. With regard to Iceland the EFTA Surveillance Authority delivered a reasoned opinion concerning late implementation of Directive 2009/38/EC and on 26 June 2013 a final warning was issued, with the possible consequence of submitting the case to the EFTA Court.[3]

Eventually, none of the member states was disciplined by the launch of an official Treaty infringement procedure. Nevertheless, the fact that a significant number of the member states transposed the directive either hastily to meet the final deadline or even beyond the allowed due date might have had an impact on the quality of national transpositions. Hasty legislative work and limited inclusion of social partners in national debates (see Table 2) preceding law-making procedures may partly explain why in various aspects national laws simply reproduced the wording of the directive without attempting to implement it in national systems.

In the context of the method used for completing transposition an interesting and relevant factor potentially bearing on the quality of implementation was the conduct of pre-implementation consultations with the national social partners and/or general stakeholders. Table 2 depicts various consultation methods applied in selected EU member states. As can be clearly seen, in the majority of member states

1 Throughout this publication 'implementation' and 'transposition' are used interchangeably.
2 See Press Release of the European Commission of 24/11/2011 (European Commission 2011).
3 Source: EFTA Surveillance Authority PR(13)58, http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/2012, accessed on 22/02/2015.

Table 1 **National implementing measures transposing Directive 2009/38/EC (state: February 2015)**

Country	Means of transportation	Remarks
Austria	Federal Law N° 601 OF 17 October 1996 amending the Labour Constitution Act (Arbeitsverfassungsgesetz), the Labour and Social Courts Act (Arbeits- und Sozialgerichtsgesetz) and the Federal Law on Employee Representation in the Post Office (Bundesgesetz über die Post-Betriebsverfassung)	
Belgium	1. Collective agreement no. 101 of 21 December 2010 on workers' information and consultation in Community-scale undertakings and groups of undertakings and review of CCT N° 62 (December 2010), made generally applicable by Royal Decree (March 2011) 2. Transnational collective agreement 62 quinquies 3. Loi modifiant la loi du 23 avril 1998 portant des mesures d'accompagnement en ce qui concerne l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs, MB 17.2.2012 p 11419 4. Loi modifiant la loi du 23 avril 1998 portant des dispositions diverses en ce qui concerne l'institution d'un comité d'entreprise européen ou d'une procédure dans les entreprises de dimension communautaire et les groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs, MB 17.2.2012 p11421	
Bulgaria	Decree No 55 'Act amending the Act on informing and consulting employees in multinational undertakings, groups of undertakings and European companies', State Gazette No/year: 26/2011	Related binding law: Law on information and consultation with employees of multinational (community-scale) undertakings, groups of undertakings and companies, promulgated in the State Gazette No 57 of 14.07.2006
Cyprus	Law No. 106(I)2011 on the Establishment of a European Works Council, No 4289, of 29.7.2011	
Croatia	Decision promulgating the Law on European Works Councils, which the Croatian Parliament adopted in session on 15 July 2014 (Class: 011-01 / 14-01 / 111; No: 71-05-03 / 1-14-2)	
Czech Republic	Act of 8 June 2011 amending Act No 262/2006, the Labour Code	
Denmark	Act No. 281 of 6 April 2011 amending the European Works Councils Act (Lov om ændring af lov om europæiske samarbejdsudvalg)	
Estonia	Community-scale Involvement of Employees Act (with amendments of, among other things, the act adopted on 16.06.2011, published in RT I, 04.07.2011, entered into force on 14.07.2011)	
Finland	Act 620/2011 amending the Act on cooperation in Finnish groups of undertakings and Community-scale groups of undertakings	

Table 1 **National implementing measures transposing Directive 2009/38/EC (state: February 2015) (cont.)**

Country	Means of transportation	Remarks
France	1. Decree No 2011-1414 of 31 October 2011 concerning the composition of the special negotiating body and of the European Works Council 2. Ordinance No 2011-1328 of 20 October 2011 transposing Directive 2009/38/EC	
Germany	Second Act amending the Act on European Works Councils transposing Directive 2009/38/EC on a European Works Council (2. EBRG-ÄndG) of 14 June 2011	
Greece	Law No. 4052 (promulgated in: Government Gazette 41 of 01-03-2012), Art. 49 ff.	Infringement procedure launched by the European Commission[4]
Hungary	Act CV of 2011 amending Act XXI of 2003 on EWCs (July 2011)	Denmark
Ireland	Statutory Instrument No. 380 of 2011 (transnational information and consultation of employees Act) (amendment) Regulations 2011	Denmark
Italy [2]	Legislative Decree No. 113 of 2012. Published in OJ on 27 July 2012 and entered into force on 11 August 2012	1. Preceded by and based on Joint Declaration in favour of the implementation of Directive 2009/38/Ec Of 6 May 2009 of 12 April 2011 of: CONFINDUSTRIA, ABI, ANIA and CONFCOMMERCIO – Imprese per l'Italia and CGIL, CISL, UIL; 2. Infringement procedure launched by the European Commission[5]
Latvia	Law on informing and consulting employees of Community-scale undertakings and Community-scale groups of undertakings" of 19.05.2011 ("LV", 82 (4480), 27.05.2011.) [entered into force on 06.06.2011]	
Lithuania	Law amending the Law of the Republic of Lithuania on European Works Councils of 22 June 2011, No XI-1507	
Luxembourg	Act of 26/12/2012 modifying the Labour Code (Loi du 26 décembre 2012 portant modification du Titre III du Livre IV du Code du travail, Publication: Au Mémorial A n° 294 du 31.12.2012)	Infringement procedure launched by the European Commission[6]
Malta	L.N. 217 of 2011 Employment and Industrial Relations Act (CAP. 452) European Works Council (Further Provisions) Regulations	
Netherlands	521 Act of 7 November 2011 amending the European Works Councils Act	Infringement procedure launched by the European Commission[7]
Poland	1265 Act of 31 August 2011 amending the Law on European Works Councils	
Portugal	Law No. 96/2009 of 3 September 2009 on European Works Councils	
Romania	Law No. 186 of 24 October 2011	

4 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).
5 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).
6 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).
7 Source: http://europa.eu/rapid/press-release_IP-11-1421_en.htm (accessed on 22/02/2015).

Table 1 **National implementing measures transposing Directive 2009/38/EC (state: February 2015) (cont.)**

Country	Means of transportation	Remarks
Slovenia	European Works Councils Act - 2011 (ZESD-1) (Official Gazette of the Republic of Slovenia No. 49 of 24 June 2011)	
Spain	Law 10/2011 of 19 May amending Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation	
Sweden	Act (2011:427) on European Works Councils	
United Kingdom	Statutory Instrument No. 1088 of 2010 'Terms and Conditions of Employment. The Transnational Information and Consultation of Employees (Amendment) Regulations 2010'	Infringement procedure launched by the European Commission (concerning inclusion of Gibraltar in the scope of transposition)[8]
EEA[9]		
Iceland	n/a	The EFTA Surveillance Authority delivered a reasoned opinion to Iceland on the late implementation of Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting workers. On 26.6.2013 a final warning was sent to Iceland (EFTA Surveillance Authority PR(13)58).
Liechtenstein	Abänderung des Gesetzes vom 16. Juni 2000 über Europäische Betriebsräte (LGBl. 2000 Nr. 162, LR 822.12)	
Norway	Supplementary Agreement VIII 'Agreement regarding European Works Councils or equivalent forms of cooperation'	

Note: Countries in grey: delayed transposition after 06/06/2011.
Source: Compiled by Romuald Jagodzinski, 2015.

the legislative technique chosen was negotiations, official tripartite/bipartite consultations or consultation at the level of relevant ministries. In a significant number of countries, however, only some substandard forms of public consultation took place: informal consultation with the social partners or a broad public consultation (which has the inherent weakness of treating all comments equally and underweighting opinions from collective partners such as trade unions or professional organisations). In the worst scenario no consultation about the implementation of the EWC Recast Directive took place at all. Based on the above evidence we propose the hypothesis that the quality of pre-implementation consultations with the social partners and other stakeholders had an important impact on the quality of transposition laws in those countries. In cases of substandard pre-implementation

8 Source: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1207&furtherNews=yes
9 For the EEA countries the directives should have been implemented by 1 November 2012 (source: http://www.eftasurv.int/press--publications/press-releases/internal-market/nr/2012, accessed on 22/02/2015).

consultations the risk has always been that either important interests, experiences and comments from the most relevant stakeholders (in the case of EWCs the trade unions and employer organisations) are not taken into consideration, or, equally bad, that one of the primary stakeholders has more influence and impact on the shape of concrete provisions in its favour and at the expense of its counterparts. Consequently, power imbalances in industrial relations can be preserved or even further amplified, thereby compromising the overall quality of national social dialogue at company level.

Official negotiations between the social partners or dialogue within the framework of bipartite or tripartite negotiations are by no means the only guarantee of quality laws, but if the former are lacking or of poor quality the laws are prone to be implemented only formally, without paying sufficient heed to the practicalities and effectiveness of statutory provisions. Cases in points might be Portugal (implementation approach based on a copy/paste from the Directive) or the United Kingdom (significant problems with the implementation of definitions of information and consultation[10] or confusion with regard to the right to training without loss of pay – see the relevant chapters).

Once the lagging member states provided explanations (mainly delays in the legislative agendas of national parliaments resulting from late introduction by the respective ministries) and finally transposed the Directive implementation as a whole seemed done and dusted. The last minor hurdle of a purely technical nature would still be the formal requirement imposed on the European Commission to provide an implementation report/study to be drawn up by 2016 (Recast Directive Art. 15), but it would represent only a formality that could be dealt with easily.

The process in question could look like the above description if the process of transposition of the original EWC Directive 94/45/EC was taken as the model and benchmark. Because the draft EWC Directive was contested by some member states (mainly the United Kingdom) and long-fought for (since the late 1970s) the European Commission showed significant political courage in advocating the introduction of a European directive in 1994. As a result of this political climate and the lack of agreement about the future EWC framework among the European social partners the original EWC directive was a compromise. As such it needed to be general enough on some issues for the member states to stomach and accept into national industrial relations (legal) frameworks. With limited experience of the functioning of EWCs prior to 1994, numerous loopholes and highly abstract provisions of the EWC directive 94/45/EC were subsequently implemented at national level, often without much reflection on their practical capacity to provide for stable, transparent and clear rules on workers' transnational information and consultation. In 2000 the European Commission prepared the Implementation Report (European Commission 2000) that reflected this laxness or a conviction that social dialogue is not a hard-core issue that requires stringent observation of hard legal norms. The Implementation Report therefore recorded significant diversity in solutions and provisions implemented by the member states in various areas. Generally, the Eu-

10 Initially the definitions of information and consultation were transposed (in draft implementation act) as 'obligations', but after heavy criticism by experts changed into 'definitions'.

Table 2 **Approaches to pre-implementation consultations in selected member states**

	Negotiations	Tripartite-bipartite organisations	Government/ Ministry-level consultation	Informal consultation	Public consultation	Questionnaire	No consultation	N/A
Austria	X							
Belgium	X							
Finland	X	X						
Bulgaria		X						
Denmark	X		X		X			
Cyprus			X					
Czech Republic							X	
France			X			X		
Germany			X	X				
Greece				X				
Hungary				X				
Ireland			X					
Italy	X							
Luxembourg			X					
Netherlands		X						
Poland		X						
Portugal					X			
Romania							X	
Slovakia								X
Slovenia		X						
Spain		X	X					
Sweden			X					
UK					X	X		

Source: Romuald Jagodzinski based on ETUC/SDA Survey amongst affiliated trade unions 'The role of social partners in transposing the recast directive 2009/38/EC on European Works Councils (EWCs)'.

ropean Commission assessed the quality of implementing measures as 'clearly very positive' (point 2.1, ibid.) stipulating that 'In a significant number of cases those issues have been solved or will be solved by the parties concerned'; some potential for conflict and the necessity for courts to intervene was foreseen ('In other cases (…) they can best resolved by the courts'; ibid.), but no further consideration as to how or by what means, for example, this should happened was offered.

Living in a perfect world

As a direct result of overall approval of the quality of transpositions and the fact that no specific problems or failures to transpose the directive were identified on part of

member states no corrective actions were required or pursued. The natural conclusion from this Implementation Report was that the national legal frameworks were precise and transparent enough to provide for the efficient and unhindered operation of EWCs.

Sadly, the above conclusions based on analysis of the Implementation Report 2000 were not observed with regard to the operational practice of EWCs. As demonstrated by research evidence by leading researchers collected in the ETUI publication Memorandum European Works Councils (Jagodzinski, Kluge and Waddington 2009) there have been numerous problems with the operation of EWCs since the introduction of the legal framework in 1994. Arguably, the most pivotal and consequential one is the low quality and inadequate timing of information provided to and consultation with EWCs, as documented by Waddington (Jagodzinski, Kluge and Waddington 2009: 23–24).

Some of the identified shortcomings have been addressed (for example, definitions of information and consultation have been improved, along with the right to training without loss of pay) or at least partially dealt with (for example, sanctions, transnational competence of EWCs, recognition of trade union role and stake in the operation of EWCs) by the recast of the EWC directive.

Importantly, several of crucial provisions and clarifications are laid out in the preamble to the recast EWC directive, rather than in the actual body of the Recast Directive. In the preamble, the rationale for the directive, the legislator's intentions, objectives, and limitations of the Recast EWC Directive are laid out in 49 paragraphs. While it is true that the member states are not (explicitly) required to transpose the content of directives' preambles into their legislation—and indeed, in the case of the EWC Recast Directive most did not this does not mean that the principles laid down in the preamble do not apply; on the contrary, any court asked to rule upon a dispute in EWC and SNB matters must explicitly take into account not only the wording of the Directive, but also the spirit of the Directive and the European lawmaker's intentions. This spirit and intent of the law is described in the preamble making the latter a crucial and indispensable part of any directive

One of the clearest examples of this concerns one of the major innovations of the EWC Recast Directive: the clarification of EWCs' transnational competence. Chapter 3 covers this issue in more detail; here, we seek merely to emphasise that in order to properly apply and fully appreciate the significance of new provisions on EWCs' transnational competence it is necessary to understand relationship between provisions found in the preamble and those found in the body of the directive and apply them jointly. In the body of the directive, Article 1.3 defines the competence of the EWC as being limited to transnational issues, and Article 1.4 presents a brief and primarily geographically defined conception of 'transnational'. Several recitals, however, shed valuable light on the intentions of the legislator by introducing elements of decision-making hierarchy rather than geography as part of the definition of 'transnationality'. Recital 12 mentions as a criteria the impact on workers of a decision taken in a different member state other than the one in which they are employed. Recital 14 states that 'only dialogue at the level at which directions are prepared and effective involvement of employee representatives make it possible to an-

ticipate and manage change'. Recital 15 posits an essential division of competence between the national and transnational institutions of employee interest representation, and, crucially, identifies the notion of the 'relevant' level of management and representation, respectively. Finally, the rather laborious wording of Recital 16 somewhat obscures its main thrust: that the essential criteria defining whether or not an issue is transnational depends not so much on a geographical conception of levels, but of a hierarchical one instead. Put differently, it is not so much in which country the responsible level of management is physically located which matters. It is instead the fundamental recognition that national-level employee representatives who may be affected by a decision taken by central management may not otherwise have access to relevant decision-making actors, processes and relevant information on these, since these are acting at the transnational level, whose more appropriate counterpart is the EWC. Crucially, the EWC is expected to fill this gap, whether or not any other country is affected by the measure. Furthermore, it is only in the preamble's Recitals 16 and 42 where the crucial rule for determining transnational character of a matter is defined. Recital 16 stipulates that in addition to the level of management involved in decision-making it is the matter's *potential* effects that render it transnational. Recital 42 reiterates the principle that it is the *possible* impact of managerial decisions. The crucial question *who* determines the 'potential effects' of a matter can only be replied by looking at the body of the Recast Directive where in Art. 10 it is the EWC that is defined as the body that '*represents collectively the interests of the employees*'. The intention of the original 1994 EWC Directive had already been to meet the challenge of company internationalisation by bridging the gap between national and transnational information and consultation; however, the reliance on an awkward geographical conception not (fully) reflecting reality as a shorthand formula in practice led to substantial legal uncertainty and disagreements in practice about the very role and competence of the EWC. The provisions of the recast EWC directive, in particular the explanations provided in the preamble, go some way towards clarifying this dynamic question. It is thus clear that the Recast Directive's meaning and impact in the case of EWCs' transnational competence (but also in other aspects) can be fully appreciated only by reading the provisions in body in conjunction with the relevant recitals of the preamble. This is why it is a significant shortcoming of national authorities not to have implemented also these important rules from the Directive's preamble, which may have important implications for the EWC practice and the Directive's *effet utile*.

Helpfully, the 2010 Report by the group of experts on the implementation of recast EWC directive (European Commission 2010a) also unequivocally makes this point, citing next to the various provisions of the recast directive also at some length the ideas developed in the Impact Assessment Study of 2008 (European Commission 2008). Reference is also made to the discussion in the informal Trialogue in December 2008, in which the then recent case of a closure of a plant in Germany which had been decided by central management beyond the reach of the national-level institutions of information and consultation was explicitly brought forward to illustrate just what the recast of the EWC Directive was aiming to clarify with its definition of transnational competence. The report also refers to the standard rules of the SE, in which the criteria of transnationality is explicitly defined as 'questions (…) which exceed the powers of the decision-making organ in a single member state.' The expert report also usefully highlights that the potential impact which

would warrant involvement is not limited to negative impacts, but is instead much broader than that. In this way, it is clarified that even workforces which stand to benefit from a decision or measure are also concerned and have the right to information and consultation on those matters.

The abovementioned problems with applying the original directive in practice were not just theoretical claims on the part of researchers or criticisms from trade unions and workers' representatives: they have been confirmed by hard-core evidence involving over 60 court cases before both national courts and the Court of Justice of the European Union (see Jagodzinski, Kluge and Waddington 2008: 16 ff; Part II of Dorssemont and Blanke 2010).

The combined weight and gravity of the above-listed evidence of various kinds leaves no doubt concerning the shortcomings of national legal frameworks concerning European Works Councils. The stark contrast between the enthusiastic findings of the Implementation Report 2000 (European Commission 2000) and the (sometimes) grim reality is too significant to ignore or shove under the rug. There are at least two underlying reasons for this state of affairs:

(i) lack of a comprehensive analysis of national legislation, combined with an absence of thorough reflection on the implications of particular legal solutions (including what they fail to generate);
(ii) the lax, 'anything-goes' approach of the European Commission, which means that all legal solutions applied in the process of implementing the Directive, no matter how diverse, can be accepted under the universal, extremely flexible and capacious label of 'diversity of national industrial relations'.

If the intentions of at least some of the new provisions are laid out so clearly, and if they are furthermore so obviously informed by an understanding of the shortcomings of the implementation of the 1994 EWC directive, then clearly the notion of useful effect is of key relevance in assessing the quality and consistency of the transposition of the recast EWC directive. There is an undeniable tension between the need to lend useful effect to the new provisions, while at the same time respecting the principles of subsidiarity. These tensions are explored more fully throughout this study.

Learning from past experiences

The post-recast reality in which EWCs are currently living is, however, radically different from the pre-2009 world under the regime of the 'old' 1994 Directive. The provisions of the new EWC Recast Directive became more specific and precise. We have new definitions of information and consultation, as well as new rights. Added to that there is the heritage of combined national and European jurisprudence that is well documented and familiar to stakeholders. Another important difference is the currently available vast knowledge on EWCs resulting from extensive research by experts, academics and institutions over almost two decades. Thanks to the above-described changed context there is simply no excuse for another Implementation Report that is as cursory and undemanding as that of 2000.

Origin, relevance and goals of the study

The report presented here is the outcome of several expert meetings of the authors under the aegis of continuous research on EWCs conducted at the ETUI. The idea of conducting the study was born soon after the hype over the adoption of the Recast EWC Directive subsided and gave way to reflections about the practical application of the newly modified rights for workers. Because it is well known that, generally, directives do not apply directly to individuals it was clear that the decisive impact on the functioning of EWCs, their members and the contents of newly (re)negotiated agreements on information and consultation would be exerted by national laws. This fact seemed to be overlooked or disregarded by some stakeholders who, while celebrating the victory of adopting the new EWC Recast Directive 2009/38/EC, considered the battle for improved legal frameworks for EWCs won once the Directive was adopted.

The present study represents an attempt to contribute to the research on EWCs by emphasising the importance of the legal frameworks within which they function. While these legal frameworks are not the sole determinant of the quality of EWC operations or their effectiveness – other important factors include, for example, the agreements between EWC and management, national industrial relations traditions, corporate governance model and social dialogue culture within the company – they do represent an important backbone, a basis for more precise arrangements in EWC agreements. As the authors have previously demonstrated (ETUC and ETUI 2014), the quality of these frameworks (both of the EU Directive and national transpositions) has significant standard-setting influence on the content of EWC agreements: the legal provisions are often directly copied into EWC agreements and over time we observed a 'gravitation' of negotiated arrangements towards standards solutions laid down by the law.

These findings feed into the rationale for analysing national frameworks. It is thus not only a technically interesting legalistic exercise, but concerns many practical aspects and asks important questions. First, analysing the quality of the national transpositions of any directive (and the EWC Directive in particular due to grave differences of opinion among the social partners and the consequently complicated and time-restricted political process[11]) poses the question of the ratio between input and output, as well as costs and benefits: how many of the valuable improvements laboriously achieved at the EU level trickle down to the intended beneficiaries – workers – at national or even plant level? Second, the question of the coherence of EU-wide law arises: how are *transnationally* driven, exercised and relevant workers' rights to *transnational* information and consultation to be effectively realised and enjoyed when *national* laws are so different and incoherent? While relevant generally, these questions are particularly pertinent for EWCs as a form of transnational interest representation introduced – or, arguably, imposed – by the European Union into national industrial relations systems as a new (or, arguably, foreign) element. In this case, understandably, the responsibility of the European authorities – in particular, the European Commission as the Guardian of

11 For details, see, for example, Jagodzinski 2008.

the Treaties[12] – is significantly greater than in case of, for example, a simpler technical harmonisation of national provisions.

By analysing national implementation laws transposing the EWC Recast Directive this publication strives to raise the above questions by pointing to concrete issues and cases in which the discrepancies between the Directive and the final output – national provisions applicable to workers – are problematic and stark. In this way the research presented in this volume aims to contribute not only to a better understanding of the legal frameworks for EWCs, but – via the link shown by the ETUC and the ETUI (2014: 98) – also to a large body of knowledge on conditions that affect the practical functioning and effectiveness of EWCs.

To achieve that, the study aims to provide an initial comparative insight into national laws transposing the EWC Recast Directive and evaluate the quality of their provisions. Two questions constitute the red thread running through the analysis: first, the question of whether the national transposition laws are genuinely implementing measures or merely 'prosthetic', imitating real transpositions and in fact just a copy/paste from the Directive.[13] If national implementation measures simply repeat a Directive's goals without specifying the method of achieving them and procedures to guarantee the rights enshrined therein they cannot and should not be recognised as proper transposition. In this context, the second overarching question asked in the present analysis was whether the available national provisions are adequate to ensure the goals of the Directive?

The present report does not claim to be fully comprehensive. It merely flags up issues that require attention and thorough analysis by the European Commission (or, in fact, by any external body given the task of conducting such an analysis) when preparing the next implementation report. Due to limited resources our study used only selected research methods and is subject to limitations with regard to the profundity of its analysis. Thus it can make only a modest contribution to an official implementation study that should ideally comprise, among other things, the following methods and elements:

– A formal review and analysis of national provisions transposing the Directive in terms of both satisfying the formal technical requirements and ensuring effective achievement of the Directive's goals. The latter should take place with regard to the overarching objective(s) of the Directive, but should also cover whether realisation of the objectives of individual provisions is effectively ensured. In this regard reference should be made to common arrangements agreed between representatives of national authorities in the form of the Expert Report on the Implementation of the EWC Recast Directive (European Commission 2010).
– Analysis of the ways of effectively enforcing the rights provided to workers and their representatives (see Chapter 4 in this report). Analysis of this aspect should not be limited to a formal analysis, but should take into account the

12 Art. 258 TFEU.
13 EU directives lay down certain goals or end results that must be achieved in every member state. They (usually) do not prescribe specific measures to achieve these goals. National authorities have to adapt their laws to meet these goals, but are free to choose the method.

specific characteristics of EWCs as worker representation structures in transnational settings, but embedded in national legal orders. This specific set-up requires proper transposition by the member states, but also supervision of harmonisation and, if needed, corrective adjustments by the European Commission which, in contrast to individual member states, has a European perspective (especially with regard to levels of sanctions). Where relevant, the implementation study should identify key problems with enforcement of the new rules of the Directive and explore the causes of such problems.
- Articulation (linking) of the EWC legislation with other laws on workers' representation already in place in national law. In this context analysis of the consistency of the new rules introduced by the EWC Recast Directive with existing instruments and policies should be undertaken.
- Based on a thorough analysis of the above aspects and with the ultimate principle of *effet utile* in mind the implementation study should formulate conclusions and recommendations for corrective actions and adjustments, at both national and European levels (with possible further changes to the Directive).
- It might be expected that the implementation study explore national specificities with regard to questions such as the reasons for the existence or the absence of EWCs as one of the main goals of the Directive (Recital 7).

Consistence with general frameworks

Despite its obvious focus on EWCs the implementation audit should be conducted while keeping in mind congruency and reference to more general frameworks and strategies in the area of worker information and consultation.

The first framework of this kind is the general framework laid down by the EU's 2020 Strategy, which advocates smart, sustainable and inclusive growth. According to the framework the EU has an important role to play in supporting and complementing member states' activities in this connection, including working conditions, such as information and consultation in the workplace. Although the 2020 Strategy does not sufficiently emphasise and integrate worker representation the national legislation implementing the EWC Directive should still be in line with its guidelines (ETUC and ETUI 2011).

Second, the European Commission's fitness check of the three directives on information and consultation of employees at national level (as part of the Smart Regulation Agenda and the Regulatory Fitness and Performance Programme, REFIT) also touches on the essence of the EWC Directive. Because, according to various declarations on the subject, the fitness check programme is the 'expression of the Commission's ongoing commitment to a simple, clear, stable and predictable regulatory framework for businesses, workers and citizens' (European Commission 2013) these standards should be observed when analysing the implementation of the EWC Recast Directive. Also, the attainment of goals pursued by the fitness check programme should be ensured by the European Commission when conducting the study on transposition of the EWC Directive.

Last but not least, the recently adopted ETUC resolutions 'Towards a new framework for democracy at work' (October 2014) and 'Towards a legal framework for TCAs' represent important points of reference and guidelines for evaluating the quality of national transpositions of the EWC Directive. The 'Democracy at work' resolution calls to mind that the right to information and consultation is a fundamental right recognised in particular by the Charter of Fundamental Rights and the revised European Social Charter. It also argues that more worker involvement is an element of social justice and good corporate governance. Furthermore, it emphasises the importance of proper articulation between the levels and institutions of worker information and consultation, stating that they are likely to work better in companies in which there is workers' board-level representation, which normally allows privileged access to early information. The resolution also points out that, currently, EU company law is characterised by a minimalist approach based on restrictive regulation and a strong mutual recognition principle. These principles are manifested in EU action that are limited solely to removing barriers to cross-border business rather than promoting a European model for corporate governance that would include strong workers' rights. The ETUC resolution also points out that the earlier mentioned Refit Agenda of the European Commission demonstrates this extreme deregulation approach characterised by treating workers' involvement solely as a potential 'burden' to businesses rather than as an asset. Such an approach fosters the understanding among company managements that they have carte blanche to misuse European law to minimise their obligations under national law.

A remedy against such abuses, according to the ETUC resolution, would be a single directive encompassing various workers' involvement rights. The resolution makes an important point concerning articulation between various levels and instances of information and consultation. It argues that horizontal standards on information, consultation and workers' board-level participation would address the gaps, loopholes and inconsistencies in the EU *acquis*, reducing incentives for abuse and circumvention. In the context of ensuring coherence between national legislations the ETUC points out that the EU legislator must not be complacent and assume merely a coordinative role between different national company statutes, based on the country of origin approach. Quite the opposite: because transnational companies have emerged as key players at the European level, benefitting from and in turn shaping European market integration, the European Union needs to send strong signals that it seeks to promote a business model based on social justice and sustainability. This concerns EWC and SE legislation as a possible inspiration for such a general framework, with a strong requirement of transparent and efficient mechanisms for linking various levels of information and consultation (including the emerging instrument of transnational company agreements[14]). The ETUC resolution emphasises, among other things, the importance of early information and stronger consultation prerogatives as elements of workers' capacity to manage change. A particularly important demand with regard to implementation of the EWC Recast Directive (see Chapter 4) is that effective and dissuasive sanctions should be put in place.

14 In this context the resolution also makes the point that the member states should be responsible for collecting and transmitting to the European Commission information about transnational company agreements (TCAs). As the ETUI argued on the eve of the launch of revision of the EWC Directive (Jagodzinski, Kluge and Waddington 2009: 5, 21, 51) the same demand applies to agreements on workers' transnational information and consultation.

Articulation between various levels and forms of information and consultation

A specific instance of reference to and embeddedness in broader frameworks is the articulation of the right to transnational information and consultation in EWCs with other levels (vertical articulation) and forms of employee participation (horizontal articulation). Both aspects of articulation are included in the EWC Recast Directive itself (for example, Recitals 21, 37 and 46 of the Preamble; Art. 1.3, Art. 10.2) which stipulates, among other things, that '[f]or reasons of effectiveness, consistency and legal certainty, there is a need for linkage between the Directives and the levels of informing and consulting employees established by Community and national law and/or practice' (Recital 37).

In its vertical dimension, as already pointed out, the EWC Recast Directive 2009/38/EC provides only a half-way improvement on the previous situation: it is welcome and useful that it deals with the question of articulation, but, in doing so, it does not decisively – in the body of the Directive – define the standard solution and impose an obligation to define the arrangements to parties to EWC agreement. Although it might be in line with the principle of subsidiarity to leave this question to be resolved by the parties this shifts responsibility for providing a systemic solution to a common systemic challenge from the national law-making authorities to individual bargaining parties. Consequently, it creates a potential myriad of solutions in which one EWC might choose to go about articulation very differently from other EWCs. No less importantly such a legislative strategy also potentially impinges on the competences of another statutory body, the works council, which, arguably, should not be a competence of EWCs.

Unfortunately, the report of the Expert Group (European Commission 2010a) is rather tellingly helpless in this regard. Across the document, the exact wording of the EWC Recast Directive on the issue of articulation and sequence of information and consultation processes is stoically repeated verbatim without any attempt to provide more far-reaching explanations or to explore alternatives. Clearly, this iron was too hot to touch.

Last but not least, confidence that parties to EWC agreements will be willing to negotiate on such matters is based on hopes or assumptions that find no corroboration in practice: few EWC agreements contain arrangements on the timely priority of access to information and consultation between EWCs and national/local level works councils. Admittedly, in the ongoing analysis of EWC agreements the question about arrangements concerning the priority of information and consultation between the levels was not asked explicitly. Nevertheless, within the framework of the analysis the author did examine agreements with regard to some aspects of articulation. First, only 103 agreements were listed as containing some sort of arrangements on priority of information and consultation.[15] Second, on a more posi-

15 The ETUI database of EWCs contains two pillars of analysis: regular analysis and a subset of data containing examples from EWC agreements (examples remarkable in either a positive or a negative way). The latter does not pretend to provide complete statistical evidence on the occurrence of specific provisions, but provides a sample of them. Therefore we can say that in the case of articulation there are 'at least' 103 agreements that contain provisions in this respect.

tive note, 65.2 per cent of agreements analysed to date contain some form of arrangements on the dissemination of information about the outcome of EWC work to the workforce (however, the level of precision differs significantly). Furthermore, at least 57.2 per cent of the agreements analysed provide for a 'subsidiarity clause' stating that the EWC agreement and rights do not limit or modify the rights to information and consultation stipulated by other pieces of legislation. A far smaller number of EWC agreements contain more substantial provisions on linking the levels: only around 27.6 per cent of currently active agreements analysed provide for a seat (most frequently as observers) for representatives of national works councils and/or a member of the national trade union organisation from one or more countries (usually the country of a company's headquarters). An even smaller proportion of agreements (15.4 per cent of analysed agreements) provide for access to company premises, for individual members of the EWC, the Select Committee or the entire EWC. All in all, even if these aspects of articulation are covered by some agreements their overall share is fairly low and contractual arrangements on articulation relatively rarely are comprehensive enough to cover these various aspects of interlinkage between the levels. One can thus conclude that the new obligations of the Directive are not being observed in EWC agreements to a satisfactory degree and that it was probably too optimistic on the part of European law-makers to assume a common, comprehensive and qualitatively satisfactory uptake of articulation into negotiated agreements.[16]

At the same time, Recital 37 read in conjunction with Recital 38, which excludes any prejudice to other pieces of legislation on worker representation, frames the articulation of the EWC Recast Directive with other instruments and thus introduces the horizontal dimension of articulation. These provisions impose the need to provide for, on the one hand, interaction with and, on the other hand, respect for other directives in the domain of worker involvement.

In this context it should not be forgotten that, on top of the Charter of Fundamental Rights of the European Union, in the EU there are currently 27 directives on information, consultation and participation of workers, covering general information and consultation for workers and information and consultation in specific circumstances, such as in case of transfer of undertakings, mergers and takeovers, as well as health and safety (ETUC and ETUI 2008). Out of this large body of legislation some items are more directly linked to worker rights in the EWC Recast Directive. First, at company level, Directive 2002/14/EC establishes a general framework for informing and consulting employees in the European Union,[17] Council Directive 98/59/EC concerns collective redundancies and the right of workers' representatives to be informed and consulted[18] and Art. 7 of Council Directive 2001/23/EC concerns the safeguarding of employees' rights in the event of the transfer of undertakings, providing for information and consultation of employees by the transferor and/or the transferee.[19]

16 For more on this issue see Chapter 1 of the present report. See also ETUC and ETUI 2015.
17 OJ L 80 of 23.3-2002, p. 29.
18 OJ L. 225 of 12.8.1998, p. 16.
19 OJ L 82 of 22.3.2001, p. 16.

There are three other directives that, besides information and consultation rights, provide for the involvement of employees – participation – in the supervisory board or board of directors in enterprises adopting the European Company Statute[20] or the European Cooperative Society Statute[21] or deriving from a cross-border merger.[22]

All of this legislation lays down specific obligations on management to inform and consult their workforces, sometimes generally, sometimes very specifically. The legislation at European and national/local levels confers rights on employee representatives to be involved, informed and consulted or even engage in bargaining, whether it be in the monitoring of health and safety measure at the workplace, negotiating a social plan, or giving an opinion on an proposed takeover bid, to name just a few examples.

Indeed, it is in an intelligent and case-by-case linking of these actors and processes that the ultimate goal of the EWC Recast Directive can be achieved: an integrated, articulated system of information and consultation which can keep pace with decision-making in today's highly integrated multinational companies. If articulation is achieved, it has the potential to strengthen the capacity of all parties at both the local/national and transnational levels to fulfil their respective roles. It is the lower levels in particular that stand to be strengthened; with access to full information about the rationales and potential impacts of cross-border measures, information asymmetries are reduced, and they are better equipped to address any local repercussions.

The intended operationalisation of this need for articulation between both actors and processes has the potential to make the impact of this particular provision one of the most far-reaching of all the new provisions. At its basis lies also an understanding that articulation of information and consultation is essentially an iterative process: it is not a one-off information and consultation event for one body at one level and then another body at another level, but rather an ongoing, issue-driven process between actors and across levels that continues to move back and forth until all information and consultation processes have run their respective courses. That the actual provisions in the directive and its transposition are unfortunately rather inadequate does not mean that the horizontal (between various actors) and vertical (between various levels) articulation will not happen, but we must expect it to be fuelled to a great extent by the pressures of practice, power asymmetries, and general trial and error. In the absence of clear rules, conflicts will arise, and shared interpretations may well need to be threshed out.

Because the EWC Recast Directive recognises the need for horizontal and vertical articulation of information and consultation, any analysis of implementing laws should take this requirement imposed on the member states into account. Specifically, it should examine whether and how articulation between various forms of

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20 Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

21 Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees.

22 Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies.

worker representation is ensured by national legislation transposing the new EWC Directive in terms of access to information (including timely priority and scope) and means of ensuring effective and genuine exchange and linkage between these levels that results in tangible improvement of previous practices.

Meaningful implementation study: high or normal expectations?

We emphasise the importance of meaningful implementation of employees' information and consultation rights not just for the sake of proper respect for the law and against diluting European directives by sub-standard national implementation. Far more important is the practical significance of the ultimate standard of the EU *acquis*, namely the principle of effectiveness. In other words, the most important reason for demanding a thorough review of national implementation laws is the need to ensure that workers have the requisite legal instruments and means to exercise their rights as part and parcel of their work activities. As obvious as it might seem, it is worth ensuring that this important value does not get lost in the legal(istic) pursuit of correct transposition. This test of the practical effectiveness of individual national provisions should thus be the 'lens' through which expectations of the implementation study are evaluated. From this point of view whatever provision or demand to modify national legislation ensures the real effectiveness of workers' rights to transnational information and consultation should be seen as normal, even if critics argue that these expectations are too high or far-reaching.

From the point of view of workers, reportedly, the pivotal and most critical moments are as follows (Jagodzinski, Kluge and Waddington 2009):

(i) Establishment of a Special Negotiating Body (SNB) and an EWC. This initial phase comprises multiple actions, resources and efforts needed to set up a EWC.
(ii) The very process of receiving information and preparing for consultation. This is particularly difficult in relation to the most common circumstances in which it usually occurs: company restructuring. Anticipating company restructuring and minimising its impact on workers and social conditions were outlined in December 2013 by the European Commission in the form of an EU Quality Framework for Anticipation of Change and Restructuring.[23] The Quality Framework underlines the role of EWCs whose main function is to respond to increased transnational restructuring by establishing a direct line of communication between representatives of workers from all European countries in large multi-nationals and top management. It has been widely accepted since the introduction of EWCs that they play an important role in facilitating industrial change.[24] The reality of company restructuring (and the nature of EWCs' involvement in managing these processes via Transnational Company Agreements) has grown in complexity and thus modified national frameworks need to ensure that EWCs can continue to provide this contribution with appropriate, modified means and tools.

23 COM(2013) 882 final.
24 See Communication 'For a European Industrial Renaissance' (COM/2014/014 final).

(iii) Conflicts between EWCs and management in which all amicable solutions have been exhausted and the only way of ensuring respect for legally guaranteed rights is recourse to the courts.

With regard to points (i) and (ii) the Directive admittedly introduced changes, not least due to rulings of the Court of Justice of the European Union and some national courts. The obligation imposed on all local managements to obtain and provide information on company structure and workforce distribution to make it possible to set up an SNB/EWC was an acclaimed improvement of the Recast Directive. Similar acclaim greeted the introduction of the definition of information and modification of the definition of consultation. The welcome clarification of the transnational competence, as well as more robust criteria to determine it, is another crucial innovation and improvement. Where the Recast Directive failed to deliver was enforcement of these rights, namely instruments that would clearly provide workers' representatives with effective, easily applicable and immediate leverage against obstruction or abuses of law. The silence of the Directive over these issues was officially justified by the general principle of subsidiarity (see (Jagodzinski 2015 (forthcoming)) and caused in practice by the limitations of the political context and process in which the Recast Directive was adopted (Jagodzinski 2008).

The lack of specific requirements in the EWC Recast Directive with regard to enforcement (Art. 11.2 of the EWC Recast Directive) has been very consequential with regard to the quality of national frameworks, especially in the dimension of their practical effectiveness. Because, as we demonstrate in Chapter 4, the quality (accessibility of recourse to justice, levels and types of sanction) of national enforcement frameworks (see point (iii) above) that provide hard-law leverage and often represent the last resort for workers is not satisfactory, it is more difficult for workers' representatives to exercise their right to set up an EWC and to qualitative and timely information. It is an interrelated system of dependent elements and, obviously, shortcomings in one area will have detrimental effects on others. Because the Recast Directive remained conservatively general on the issue of enforcement because the European Commission argued in favour of the principle of subsidiarity, in this respect one can expect that the latter will be consistent in its approach and will examine the national implementation laws from the point of view of the real-life effectiveness of national judicial and administrative measures and their practical availability to workers' representatives.

Concerning enforcement issues some important legal lacunas should not be forgotten. These lacunas originate, in part, from the general character of the obligation to ensure appropriate judicial and administrative provisions, combined with the laxness of the previous implementation report on Directive 94/45/EC from 2000 (European Commission 2000). For these two reasons some situations in which SNBs/EWCs (or workers' representatives before establishing an SNB) can find themselves remain outside the scope of legal frameworks and beyond the national court systems that could help to enforce workers' rights. First and foremost is a scenario in which either no action has been taken within the statutory six months after the initial application to the management to launch negotiations, or no agreement has been concluded within three years of negotiations. In both situations the process reaches a stalemate and no national law provides for a procedure to apply

the provision smoothly and transparently, stipulating an automatic setting up of an EWC de jure, based on subsidiary requirements. In such circumstances workers' representatives, deprived of financial and legal means (financial resources are supposed to be provided by management; see also Chapter 4) do not find any remedy in national law because the latter does not contain clear instructions concerning the authority (court, ministry of labour) tasked with declaring that an EWC should be set up and issuing injunctions obliging the management to recognise this body and finance its operations.

Second, the problem of the availability of clear procedures allowing verification of SNB and EWC mandates has not been (transparently) regulated at national level (as required by Art. 5.2 in conjunction of Art. 10.1 of the EWC Recast Directive). As reported by practitioners (ETUFs, EWC and SNB members) it is not uncommon that legitimate questions are raised with regard to the legality of the mandates of some members. In situations in which such doubts are justified – for example, with regard to the participation of members of management nominated by the company rather than elected by the workforce – the SNB or EWC is often confronted with lacunas in national laws that prevent them from excluding such members.

Third, another problematic area of implementation is the obligation to inform recognised competent European trade union and employers' organisations about the commencement of negotiations to establish an EWC (Recital 26 and Art. 5.2 (c) of the EWC Recast Directive). The silence of the vast majority of national implementation laws on the obligation to inform about the launch of negotiations (see Table 7 in Chapter 3.2) reflects the general wording of the body of the EWC Recast Directive itself, which does not mention any concrete organisation (there is reference to organisations specified in Art. 138 of the Treaty only in the Preamble). Nevertheless, these organisations (and procedures) were specified to all the parties (representatives of the member states) in the official guidelines (Expert Report) to implementation of the directive (European Commission 2010a) and thus should be known to them and implemented. Of course, the guidelines on implementation are not binding for either party, but it should not be possible for the European Commission to ignore any member state breach of obligation to implement this provision.

The latter conclusion can be extended to the whole implementation study: we expect that the European Commission, by means of the research partner conducting the implementation study, will use the guidelines and recommendations of the Expert Report (European Commission 2010a) as point of reference for evaluating the quality of national transposition acts. The Expert Report contains the results of a deepened analysis and conclusions aimed at ensuring coherent application of the Directive's provisions. The resources and collective expertise invested in the workings of the Expert Group are simply too precious to be 'dismissed' such as a series of interesting meetings with minutes as a petty by-product (as was the case with similar proceedings concerning the original Directive 94/45/EC in 1995). Quite the opposite is the case: national authorities who affirmed the recommendations of the Working Party should be held accountable for deviations between the agreement recorded in the Expert Report and the contents of national laws. If the implementation report finds discrepancies between the two enquiries possible corrective actions should follow. Such decisiveness by the European Commission would help

prove that the goals laid down in the Better Regulation agenda really serve to improve the quality of legal frameworks and not only their simplification and reduction at the expense of workers.

While this ETUI report, due to limited resources, might not be sufficiently comprehensive and detailed with regard to the exploration of national laws beyond the transposition acts implementing Directive 2009/38/EC, at least it may point out problematic areas or individual examples of improper transposition in certain member states in the hope that the actual Implementation Report to be published in future by the European Commission will scrutinise those instances and deal with the matters more systematically and comprehensively.

1

Fundamental principles of EWC Directive 2009/38/EC

Sylvaine Laulom and Filip Dorssemont

1. Introduction: scope and structure

The undisputable core of the EWC Directive(s) has always been information and consultation rights. To exercise these rights, some fundamental principles and notions of the Directive need to be observed. These comprise:

- the definition of information and consultation (in all their breadth[1] as stipulated in the body and preamble of the Directive), including references to and considerations of the general principle of effectiveness;
- the definition of the transnational character of matters that EWCs are competent to get involved in;
- articulation (linking) between various levels of information and consultation (mainly between the European and local levels).

This chapter analyses the implementation of these aspects of the Directive in the legal systems of individual member states, within the following structure:

- considerations with regard to the general framing of information and consultation within the EU *acquis*;
- analysis of national implementation measures on information and consultation, including consideration of the effectiveness and confidentiality of information and consultation; and

1 Analysis of the means required to allow EWCs to engage in information and consultation processes is presented in Chapter 4.3.

– assorted aspects of articulation between various levels of information and consultation, including the notion of 'transnationality' delimiting the translational competence of EWCs in contrast to purely national matters (and thus considered in the part on articulation), as well as considerations of timing and priority between various levels and workers' representatives' obligation to report back to their constituencies.

2. Information and consultation: conceptual framing and the provisions of the Directive

As is well known, the main objectives of the Recast EWC Directive include improving the effectiveness of employees' transnational information and consultation rights, favouring the creation of new European Works Councils (EWCs) and ensuring legal certainty in their setting up and operation (Recitals 7, 14, and 21 of Preamble, Directive 2009/38/EC). To help in achieving these goals the Recast Directive included new definitions of information and consultation. Adding a definition of 'information' that was missing from the first Directive of 1994 (94/45/EC), and clarifying the definition of consultation were indeed necessary in order to ensure coherence with definitions in more recent directives concerning the information and consultation of workers. The adoption of two other directives after 1994 that also concern information and consultation of workers' representatives, the Directive on worker involvement in the European Company (Directive 2001/86/EC) and the Directive establishing a general framework for information and consultation (Directive 2002/14/EC) necessitated the adoption of common definitions in order to achieve coherence.[2] The new definitions of information and consultation were also necessary to enhance the role and effectiveness of EWCs.[3]

The effectiveness of EWCs can be measured in many ways, but it predominantly depends on EWCs' being provided with information and opportunities to express their opinion. Very often these conditions are not met: EWCs are not sufficiently informed and consulted when restructuring occurs and are therefore not 'up to the task of playing their full role in anticipating and managing change and building up a genuine transnational dialogue between management and labour'[4] (Waddington 2003; Waddington 2010). Based on Waddington's research on the quality of information and consultation in the course of discussions on the eve of adopting the new Recast Directive, better definitions of information and consultation – including the concepts of appropriate time, means and content – were considered and advocated as a means of ensuring better involvement in these processes on the part of workers' representatives (ETUC 2008b) see also (Jagodzinski, Kluge and Waddington 2009). Indeed, the question of the timing of information and consultation is critical with regard to the extent to which transnational information and consultation

2 Preamble of the Recast Directive, Recital 21. In the same vein, the Explanatory Memorandum of the Proposal of the Recast Directive [COM (2008) 419 final], No. 6.

3 According to the Explanatory memorandum 'the right to transnational information and consultation lacks effectiveness as the European Works Council is not sufficiently informed and consulted in the case of restructuring' (COM (2008)419 point 4.

4 Explanatory memorandum of proposal, COM(2008)419 point 5.

bodies are effective in contributing their views.[5] A precise definition of consultation is also essential in order to clarify the role and competences of workers' representatives in general, and in restructuring in particular. Moreover, it is also important to distinguish consultation from negotiation or collective bargaining, which have recently been attracting growing numbers of EWCs (Schömann et al. 2012).

To achieve these objectives, the Recast EWC Directive gives now a definition of the notion of information and consultation. According to Art. 2.1 of the Directive,

> 'Information means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.'

Recital 22 also indicates that the definition of

> 'information needs to take account of the goal of allowing employees representatives to carry out an appropriate examination, which implies that the information be provided at such time, in such fashion and with such content as are appropriate without slowing down the decision-making process in undertakings.'

The consultation is defined as

> 'the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without prejudice to the responsibilities of the management, and within a reasonable time, which may be taken into account within the Community-scale undertaking or Community-scale group of undertakings.'

According to Recital 23,

> 'the definition of consultation needs to take account of the goal of allowing for the expression of an opinion which will be useful to the decision-making process, which implies that the consultation must take place at such time, in such fashion and with such content as are appropriate.'

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5 Waddington shows that, overall, EWCs are not functioning very well. Very often the quality of information and consultation with regard to EWCs is poor and the right timing is not observed, particularly during restructuring (see Waddington 2010).

In defining the competences of the EWC, set up in the absence of agreement between the parties, Art. 1(a) of the subsidiary requirements adds another element to the consultation process that cannot be found in the general definition of the concept of consultation. According to this Article,

> 'The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express.'

Overall, the definition of the concepts of information and consultation in the Recast Directive is very similar – though not identical – to the one found in the Information and Consultation Framework Directive 2002/14/EC and in the SE Directive 2001/86/EC. There is one important difference: both the Information and Consultation Directive and the SE Directive make reference to consultation 'with a view to reaching an agreement' on decisions likely to lead to substantial changes in work organisation.[6]

The new definitions are designed to clarify the role and effectiveness of EWCs. In accordance with the general principle of 'useful effect' (*effet utile*), the Recast EWC Directive makes it clear that the information and consultation procedure should not be a mere formality but fully part of the decision-making process (Picard 2010a). However, in stating, for example, that information and consultation must be carried out 'without calling into question the ability of undertakings to adapt' (Recital 14), or that information must be provided 'without slowing down the decision-making process in undertakings', the Recast Directive makes reference to external 'modifiers' that might influence the timing of information and consultation. What is of the utmost importance, however, is to emphasise at this stage that by making such reference the Directive does not in any way set a hierarchy of values or priority between information and consultation and the timeliness of managerial decision-making processes. Indeed, too lengthy information transition processes that might slow down decision-making processes would be incompatible with the Directive; at the same time, however, the transition of information depends mainly on the management and it is the management's responsibility to transfer the relevant information early enough to avoid slowing down company decision-making (see Art. 2.1 f). By the same token, while too lengthy consultation would be incompatible with the Directive, the Directive does speak of 'reasonable time' (Art. 2.1 g) required to undertake an in-depth analysis of information provided and to prepare an opinion. Thus, once again, there is a hierarchy here: the possible need for rapid decision-making is not more important than the right to obtain and analyse information and prepare an opinion; the latter should simply not take unreasonably long to a point at which it could adversely impact the *normal* tempo of decision-making processes.

Furthermore, the emphasis placed on the need to implement information and consultation so as 'to ensure their effectiveness' and to ensure the '*effet utile*' of the provisions of the Directive enables us to conclude that information and consultation must occur before the relevant decisions are taken, as not to do so would

6 On interpretation of the meaning of this expression, see Dorssemont 2010: 40.

be to deprive information and consultation of its '*effet utile*'.[7] In other words, the best way for management to guarantee that information and consultation does not slow down a restructuring process is to inform and consult at an early stage (Picard 2010a). If management fails to do so, it will not be in a position to invoke its entitlement to ensure the 'ability of companies to adapt' (Recital 14). At the same time the coverage of the principle of '*effet utile*' also includes the requirement that before the process enters into its consultation stage the information stage must have come to completion. The latter, according to the new Directive, is not a simple transmission/reception of data between management and workers' representatives, but, on top of time, fashion and content requirements, must include sufficient time for the EWC 'to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations'. Clearly, the processes of information and consultation are distinct and considered separate stages (see also Picard 2010a; Dix and Oxenbridge 2003).

In contrast to other parts of Directive 2009/38/EC, the recitals do not add new elements to the definitions given, but stress precisely the need to interpret the definitions in order to ensure the full effectiveness of the information and consultation procedure.

3. Implementation of information and consultation provisions in the member states

Looking at the national transpositions of the Recast Directive, it is essential to analyse how the member states have implemented these definitions. In view of the above considerations a number of questions present themselves. Are the national definitions the same as those of Directive 2009/38/EC? Have the above considerations been taken into account when transposing the Directive? Have the member states at all adapted their national definitions to the new European ones? Can we find in national legislation the distinction made by the Directive between the definition of consultation and the competences of the EWC set up in the absence of an agreement? Also, do the national definitions go beyond the minimum laid down in the Directive or do they include the right to receive a reasoned response from the management and an explanation of the reasons if a management decides not to take the EWC's opinion into consideration?

In our view, the meaning of effective information and consultation must be defined in terms of worker involvement. In line with postulates to align the concepts of workers' rights across various directives (see Introduction, (ETUC 2014) it is thus worth referring to the concept of worker involvement as defined in Art. 2 SE Directive 2001/86. This definition indicates that worker involvement concerns 'any mechanism, including information, consultation and participation, through which

7 See Picard 2010a: 'While the EWC is meant to be fully involved in enterprise decision-making, it is not formally part of the supervisory or administrative board. Nonetheless, it is clear from the Directive that the responsibilities of management also include an obligation to conduct a meaningful information and consultation procedure. Consultation cannot be bypassed or shortened to the point that a constructive dialogue can no longer take place' (p. 47). See also European Commission 2010a: 16.

employees' representatives may exercise an influence on decisions to be taken within the company'. Hence, information and consultation will be ineffective insofar as the timing, fashion and content preclude that such influence can be exercised (Picard 2010a).

The above questions refer to the belief that consideration of the effectiveness and other basic characteristics of the right to (and definitions of) information and consultation is necessary in order to evaluate national transpositions of the definitions of the EWC Recast Directive (Table 3).

Table 3 **Implementation of information and consultation definitions of the EWC Recast Directive 2009/38/EC**

	Similar definition of information and consultation	EWC has a right to a response (in the absence of agreement)	Broader definition of information and consultation	Reference to effectiveness	Transposition of Art. 1.2 (ensure effectiveness + effective decision-making)	Workers' right to information and consultation on possible impact (Art. 2.1 f) and Recital 42)
Austria	yes[8]	yes	no	no	no	yes[9]
Belgium	yes	yes	no	yes	yes	yes[10]
Bulgaria	yes	no	no	no	no	yes[11]
Cyprus	yes	yes	no	yes	yes	yes[12]
Croatia	yes	yes	no	yes	yes	yes[13]
Czech Republic	yes/no (negotiations aimed at reaching agreement)	yes	yes	yes	yes	yes[14]
Denmark	yes	yes	no	no	no	no
Estonia	yes	yes	yes	no	no	yes[15]

8 On this issue, see the general remarks by Cremers and Lorber (Chapter 3) which highlight that few implementations have in fact reiterated the objectives.

9 Art. 15 of Federal Law No. 101: Amendments of the *Arbeitsverfassungsgesetz* [Labour Constitution Act], the *Post-Betriebsverfassungsgesetz* [Post Office Employee Representation Act] and the *Landarbeitsgesetz* 1984 [Agricultural Labour Act 1984] refer to the 'possible impact' of 'planned measures': 'The information shall be provided at such time, in such fashion and with such content as are appropriate and as enables the works council to undertake an in-depth assessment of the possible impact of the planned measure and to express an opinion on that planned measure'.

10 Art. 3.5 of Collective Agreement No. 101.

11 Art. 1.17 of Additional Provisions in the Law on Information and Consultation with Employees of Multinational (Community-Scale) Undertakings, Groups of Undertakings and Companies Promulgated in the State Gazette No. 57 of 14.07.2006, in force from the date of enforcement of the Accession Treaty of the Republic of Bulgaria to the European Union. Art. 7 c) (New, SG No 48/2006) of the Labour Code speaks of the employees' right 'to assess possible implications'.

12 Art. 2 of Law 106(I)/2011.

13 Art. 3.2 of the Decision promulgating the Law on European Works Councils, which the Croatian Parliament in session on 15 July 2014.

14 Art. 15 of Act 185 of 8 June 2011 amending Act No. 262/2006, the Labour Code, as amended, speaks of 'any impact': 'Account shall be taken, when assessing whether transnational information and consultation applies, of the scale of any impact and the level of management and representation of employees'.

15 Sections 3 and 45 of Community-scale Involvement of Employees Act with subsequent amendments.

Table 3 **Implementation of information and consultation definitions of the EWC Recast Directive 2009/38/EC (cont.)**

	Similar definition of information and consultation	EWC has a right to a response (in the absence of agreement)	Broader definition of information and consultation	Reference to effectiveness	Transposition of Art. 1.2 (ensure effectiveness + effective decision-making)	Workers' right to information and consultation on possible impact (Art. 2.1 f) and Recital 42)
Finland	yes	yes	no	no	no	yes
France	yes	yes	no	no	no[16]	yes[17]
Germany	yes	yes	yes	no	no	yes[18]
Greece	yes	yes	no	yes	yes	yes[19]
Hungary	yes	yes	no	yes	yes	yes[20]
Iceland	Transposition not yet available					
Ireland	yes	yes	no	yes	yes	yes[21]
Italy [2]	yes	yes	no	yes	yes	yes[22]
Latvia	yes	yes	no	yes	yes	yes[23]
Lithuania	yes/no[24] (negotiations)	yes	yes	no	no	no
Luxemburg[25]	yes	yes	no	no	yes	yes[26]
Malta	yes	yes	no	yes	yes	yes[27]
Netherlands	yes	yes	no	no	no	no
Norway	yes	no	no	yes	yes	yes[28]

16 But there is a reference in the preamble of the Act.
17 Art. L. 2341-6: 'Information: The information shall involve (…) transmitting data to the employee representatives so that they are able to familiarise themselves with the subject and examine it (…) at a time, in a manner and with content which are appropriate (…) and allow [them] to conduct an in-depth assessment of the possible impact and prepare to consult.'
18 Art. 1.1 of the Second Act amending the Act on European Works Councils transposing Directive 2009/38/EC on European Works Councils (2. EBRG-ÄndG).
19 Art. 51 of the Act on Workers' right to information and consultation in Community-scale businesses talks of business in compliance with Directive 2009/38 / EC / 6.5.2009.
20 Art. 56 of Amendment of Act XXI of 2003 on the establishment of the European Works Council and on the establishment of the procedure for informing and consulting employees.
21 Section 3 of the European Communities (Transnational Information and Consultation of Employees Act 1996) (amendment) Regulations 2011.
22 Art. 2(1) of the Joint declaration in favour of the implementation of Directive 2009/38/EC of 6 May 2009 (Decreto Legislativo 22 giugno 2012, no. 113).
23 Section 4.4 of the Law on informing and consulting employees of Community-scale undertakings and Community-scale groups of undertakings.
24 'Art. 13. Protection of the rights and guarantees of employees' representatives. 1. Members of the European Works Council or of the committee of the European Works Council, as well as members of the special negotiating committee (…) shall be enabled to attend meetings of the European Works Council or the committee of the European Works Council, the special negotiating committee, as well as joint meetings with the central management or any other level of management and negotiations with the central management (…).'
25 Based on the draft Bill 6373/5, 6 July 2012.
26 Art. 1.2 of the Projet de loi portant modification du Titre III du Livre IV du Code du Travail. This is the draft LU legislation on EWC Recast Directive, to be passed (6/2012).
27 Art. 2 of the L.N. 217 of 2011 Employment and Industrial Relations Act (CAP. 452).
28 Art. 2 of the Supplementary Agreement VIII Agreement regarding European Works Councils or equivalent forms of cooperation.

Table 3 **Implementation of information and consultation definitions of the EWC Recast Directive 2009/38/EC (cont.)**

	Similar definition of information and consultation	EWC has a right to a response (in the absence of agreement)	Broader definition of information and consultation	Reference to effectiveness	Transposition of Art. 1.2 (ensure effectiveness + effective decision-making)	Workers' right to information and consultation on possible impact (Art. 2.1 f) and Recital 42)
Poland	yes	yes	no	no	no	yes[29]
Portugal	yes	no	no	no	no	?[30]
Romania	yes	yes	no	yes	yes	yes[31]
Slovakia	yes/no (negotiations)	yes	yes	yes	yes	no
Slovenia	yes	yes	no	yes	yes	yes[32]
Spain	yes	yes	no	yes	yes	yes[33]
Sweden	yes	yes	no	yes	yes	yes[34]
United Kingdom	no	no	no	no	no	yes[35]
Liechten-stein	yes	yes	no	yes	yes	yes[36]

Source: Author's compilation, 2015.

29 Poland: Art. 5a Law on EWCs: 'information' means transmission of data by the employer to the employees' representatives; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to acquaint themselves with the subject matter, examine it, undertake an in-depth assessment of the possible impact on the employees' rights and obligations and, where appropriate, prepare for consultations with the competent body of the Community-scale undertaking or Community-scale group of undertakings.'

30 Art. 10.1a) speaks of 'the rights to information and consultation on transnational matters likely to significantly affect employees' interests and, in this case, other rights'.

31 When defining the transnational competence of EWCs, Art. 2 of Law No. 186 of 24 October 2011 stipulates '(4) The transnational character of an issue shall be determined by taking account, regardless of the number of Member States involved, of the level of management and representation that it involves, and the scope of potential effects on the European workforce or which involve transfers of activities between Member States.'

32 Slovenia: Art. 3 of the 2352. European Works Councils Act (ZESD-1) Act stipulates: 'information' means transmission of data by central management or any more appropriate level of management to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it. Information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the management of the undertaking or group of undertakings in the Member States.'

33 Sec. I. P. 50433 two of the Law 10/2011 of 19 May amending Law 10/1997 of 24 April on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation.

34 Section 2 of the Act (2011:427) on European Works Councils.

35 Section 10 of the 2010 Terms and Conditions of Employment Act No. 1088.

36 Art. 2 of the Vernehmlassungsbericht der Regierung betreffend die Abänderung des Gesetzes über Europäische Betriebsräte (Umsetzung der Richtlinie 2009/38/EG) Neufassung.

With the exception of the Czech Republic[37] (and preliminary attempts by the United Kingdom[38]), all member states have adopted a definition of the concepts of information and consultation very similar to the European ones. Member states have not sought to adapt the European definitions to national concepts of information and consultation, certainly because European Works Councils are not national structures of employee representation. It is also possible to argue that member states have to follow the exact wording of the Directive, which does not leave any room for national adaptations on this issue. Sometimes, national legislation simply reproduces the wording of the definitions of the Directive precisely. This is the case, for example, in Belgium, where the definitions of information and consultation are exactly the same as those in the Recast Directive. Sometimes the wording is modified slightly, but all the important elements of the Directive's definition are present. For example, the Portuguese legislation defines information as 'the transmission of data by the administration or equivalent to the workers' representatives, in a time, fashion and with content that will allow them to know and assess the impact of the matters in question and to prepare consultation on them'. One important aspect of transposition of the information definitions on which some member states deviated was the transfer of information on the basis of which an assessment by EWC would be undertaken concerning possible impacts of managerial decisions. Denmark, Lithuania, the Netherlands, Portugal and Slovakia did not include this reference in their transpositions, which casts doubt on whether the exact quality of the Recast Directive's definitions (Art. 2.1 (f) and Recitals 16 and 42) and its insistence on the fact that not only factual, but also possible/potential impacts on workers' interests are enough to validate the EWCs' right to be informed and consulted has been reproduced in these countries. If national definitions do not reflect this important modification of the Recast Directive workers' rights to information of sufficient quality and extent may be compromised.

In all national definitions the reference to the timing of information suggests, as in Art. 2 of Directive 2009/38/EC, that enough time must be given to the employees' representatives to understand and assimilate the information ('undertake an in-depth assessment') and to prepare for consultations. It is therefore clear that information should precede consultation; that the two procedures are distinct; and that the process of transferring information from the management to employee representatives, in-depth analysis of the information provided by the EWC and consultation (meaning preparation of an opinion by the EWC) cannot take place at the same meeting.[39] The quality of information is also taken into account within the framework of the definition. Consultation is generally defined as the expression of an opinion about the measures envisaged by the management that could be taken into account by the central management in the decision-making process. As in the EWC Recast Directive, the general wording of national regulations supports the

37 There are no definitions of the concepts of information and consultation in the Czech bill.

38 The UK draft transposition bill implemented the definitions of information and consultation as 'obligations', which was, however, corrected after heavy criticism before the bill was submitted to Parliament. The obvious reason for demanding the definitions remain definitions and not obligations was that the Recast Directive in Art. 14 stipulates that such obligations shall not apply to existing EWCs; consequently, the major improvement of the Recast Directive would not be available to all EWCs.

39 See Picard 2010a, op.cit. p. 46: 'It is clear from the new formation of Art. 2.1(g) that information and consultation are two distinct procedures, which must be carried out one after the other. Consultation takes place based on the earlier information procedure'.

interpretation of the anteriority of information and consultation vis à vis the decision of employer.[40]

If the national definitions are the same, very few member states have embraced the opportunity of the implementation of the Recast Directive to adopt a broader definition of the concept of consultation, in the sense of a more formalised, multi-stage procedure in which:

– workers' representatives have the time and resources – for example, adequate expert assistance – to formulate an opinion based on an 'in-depth assessment of the possible impact' in a stage that is distinctly separate (in terms of procedure and time) from the following consultation phase; and
– the employer has to deliver a reasoned response to workers' representatives opinion, including explanation of the reasons if the EWC's opinion is rejected (not taken into consideration).

Concerning the former aspect, none of the national implementation acts emphasises, specifies or makes a formal distinction between the information phase (data transmission, assessment) and consultation. With regard to the latter facet of the process in the Directive, the right to obtain a motivated response to any opinion an EWC might express, is recognised only for EWCs set up in the absence on an agreement, that is, on the basis of Subsidiary Requirements (Annex to the Directive). This could be seen as an incoherence which is not without consequences for national implementation of the Directive. In Estonia, Germany and Lithuania, the general definition of consultation also implies an obligation for the central management to provide a reasoned response to the EWC's opinion. While three countries have integrated this element in the general definition of the concept of consultation, five have not transposed the Directive correctly on this point: Bulgaria, the Czech Republic, Norway, Portugal and the United Kingdom do not provide this right to obtain a motivated response even in the absence on an agreement.

3.1 Effectiveness of information and consultation procedures: implementation of Art. 1.2

It is possible to argue that the ultimate goal or requirement of the Directive with regard to information and consultation is expressed by the general principle of effectiveness expressed in Art. 1.2. By this token, arguably, it all boils down to verifying whether the member states have transposed Art. 1.2 of the Directive defining its objectives and according to which 'the arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively'. The key elements in this provision, as well as in the general concept are: effectiveness of arrangements for informing and consulting the employees and effectiveness of decision-making processes. Arguably, this Article is not without ambiguity, as effectiveness for the workers could contradict effectiveness for the employers. On one hand, effectiveness of the rights of EWCs supposes the

40 See: Sachs-Durand 2010, p. 318.

anteriority of information and consultation vis à vis the employers; decision. On the other hand, effectiveness for the employers supposes, as it is expressed in the Recast Directive, that the employer can take decisions effectively (Art. 1.2 of the Directive), that the procedure of information and consultation does not slow down 'the decision-making process in undertakings' (Recital 22) and that the consultation leaves the responsibilities of the management intact (Art. 2(g)). The stress put on the need to preserve managerial prerogatives is not without ambiguity as it could be used erroneously to interpret the Directive in a narrow way, for example in restricting information and consultation rights when the central management claims that a very quick decision must be taken. In our view, it should be clearly stated that the principle of the effectiveness of the information and consultation procedure requires that the management design its decision-making processes (including their timing) in such a way as to include information and consultation with workers as an integral part of it. According to the trade union guide to Directive 2009/38/EC (Picard 2010a), 'the management has a responsibility to provide adequate information at an early stage so as not to slow down the decision-making process'. It is important to highlight that Art. 1.2 does not establish any hierarchy between the effectiveness of workers' rights to information and consultation and the effectiveness of managerial decision-making: the requirement to ensure effectiveness concerns both these goals to the same extent and does not prioritise one over another.[41]

In this context the pivotal question arises of what effective information and consultation and decision-making are. In general, effective means 'successful, and working in the way that was intended' (Longman Online Dictionary). Although the EWC Recast Directive uses the term extensively it does not define or specify what it means. There are only a few hints, sometimes indirect, available in the Expert Report 2010 ((European Commission 2010a):

- 'Anticipation, as a key element in the effectiveness and positive economic and social impact of EWCs, should be promoted' (European Commission 2010a);
- when considering what conditions enable the select committee to operate on a regular basis the Expert Report finds that '[a]ccording to the specific situations at stake, these conditions could include time off, travel facilities, the possibility of face-to-face meetings several times a year, translation and interpretation, communication facilities and secretariat' (European Commission 2010a).

We will not pursue any further deliberations on the effectiveness of EU law generally and EU directives specifically, as it is a vast and separate question (see, for example, Snyder 1993), but it is important to recall the obvious: that this doctrine is widely developed in EU law and applies, without doubt, to the EWC directive.

For the above reasons, interpretations of the concepts of information and consultation can be shaped by the reference in the national regulation to the need to ensure the effectiveness of the EWC's rights. In this respect, fifteen member states have implemented Art. 1.2 of the Directive. Failure to implement this provision of

41 Compare Picard 2010a: 18) regarding Art. 1.2: 'This means that where several readings of the same provisions may conflict with each other, the emphasis must be on the improvement of the right to information and to consultation.'

the Directive in some member states is regrettable because it represents a missed opportunity to clarify one of the ambiguities of the Recast Directive. In some member states implementation of Art. 1.2 was only partial: in Portugal there is no reference in the legislation to the need to preserve managerial prerogatives. This does not mean, of course, that the Portuguese conception of consultation limits the employers' ability to take decisions effectively. It follows from the definition of consultation itself that managerial prerogatives (in the sense of the binding effect of the outcome of consultation) are not substantially limited by this procedure (but need only respect timing).

Despite the common approach to implementation of reproducing the wording of Art. 1.2 in national laws (see above) many member states did not transpose the principle of Art. 1.2 (Austria, Bulgaria, Denmark, Spain, Finland, France, Germany, Lithuania, the Netherlands, Poland, Portugal, the United Kingdom). The question remains open whether some other acts in national legal systems ensure fulfilment of this requirement of the Directive (and thus mean that the Directive was properly transposed with regard to its goals). An alternative question is whether Art. 1.2 contains a specific requirement or a more general requirement of a less explicit character, which can be assessed by taking into consideration the entirety of the implementing laws. It is also unclear what bearing the absence of an explicit statement of the requirement to make these rights effective might have for workers' rights. If, for instance, a dispute becomes a lawsuit and is tried before a court of justice will this court interpret workers' rights to information and consultation with the principle of '*effet utile*' in mind; will it not take it into account; or will it be obliged to apply this principle due to the superior general requirement of effectiveness stemming from EU-made law? Whatever the reply to this question and the reason for the lack of an explicit transposition of Art. 1.2 such a situation negatively affects the transparency of law and endangers coherent application of EU law.

All in all, in many member states, Art. 1.2 has been reproduced with its ambiguity. Unfortunately, unless the European Commission, following the implementation review, does not require the member states to transpose Art. 1.2 explicitly the ambiguity will probably have to be clarified in the courts. The most probable clarification by national courts is obviously not a solution at all (apart from in the United Kingdom, courts are not bound by legal precedents and judgments of other courts) unless it is the Court of Justice of the European Union that issues an official interpretation of this question. A balance will have to be found between effectiveness of information and consultation for workers and of the decision-making process for employers. As already mentioned, the emphasis placed on the need to implement information and consultation so as 'to ensure their effectiveness' and to ensure the '*effet utile*' of the provisions of the Directive makes it possible to conclude that information and consultation must occur before the relevant decisions are taken because not to do so would be to deprive information and consultation of its '*effet utile*'. *In sum, it is the responsibility of the central management to start information* and consultation at a sufficiently early stage to allow workers' representatives to express their opinion on the decision. Such an interpretation is in fact in line with standing case law developed by domestic courts prior to the adoption of the Recast Directive.[42]

42 See Dorssemont 2010.

To conclude, we can say that implementation of the Recast Directive regarding the definition of information and consultation could improve the functioning of EWCs. Unfortunately, the member states have transposed the definition of information and consultation without important modifications. On the positive side, there is now at least a harmonised definition of these concepts that are central for defining the competences of EWCs. Most member states have also introduced in their legislation the notion of 'effectiveness', which again is central for the interpretation of information and consultation.

3.2 Confidentiality of information as a constraining factor

The EWC directives' provisions on confidentiality were included in the legislation to protect the legitimate interest of companies that might be compelled to discuss company secrets or company-specific information whose broad dissemination could harm corporate interests. The EWC Recast Directive stipulates in Art. 8 stipulates that the member states shall provide that members of SNBs or of European Works Councils and any experts who assist them are not authorised to reveal any information that has expressly been provided to them in confidence. Moreover, '[t]hat obligation shall continue to apply, wherever the persons referred to in the first and second subparagraphs are, even after the expiry of their terms of office.' Each member state should provide to management of companies the possibility to be exempted from the general obligation to transmit information 'when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertakings concerned or would be prejudicial to them.'

These provisions are of particular practical importance for workers' representatives dealing with information and consultation because, reportedly, the confidentiality clause with all its implications is commonly used by company managements. It is often, according to reports from EWCs and ETUFs, (ab)used to limit dissemination of information in a way that cannot be justified by 'objective criteria' as potentially harmful to the undertaking. Therefore the manner in which this right is transposed at national level and whether there are safeguards that allow access to requisite administrative or judicial authorities (see Art. 8.3 of the Recast Directive) is of paramount importance for the execution and efficiency of the right to information and consultation as also has implications for the transmission of information about the outcome of information and consultation to national level (articulation).

Table 4 presents the results of an analysis of national frameworks on confidentiality of information. It is interesting that only 18 out of 31 EEA countries covered by the EWC directives have modified their laws on confidentiality of information in the aftermath of adoption of the EWC Recast Directive. In other words, by implication one can conclude that the remaining 13 member states considered their pre-Recast legal regulations on confidentiality as satisfying the requirements of the EWC Directive(s). From this group of 12 countries in which no modifications were introduced Denmark, Germany, Hungary, Italy and the United Kingdom do not seem to provide easily identifiable regulations on the possibility of seeking adjudication in case of confidentiality disputes from state agencies, such as courts, labour inspectorates and/or mediation or arbitration authorities. Such a situation is not

a violation of the Recast Directive's Art. 8, but significantly limits the prerogatives and effectiveness of workers' access to information. Among the countries that have modified their confidentiality regulation since the Recast Directive, referring the matter to courts (or some other administrative procedure) is not available (at least directly in EWC transposition acts) in Austria, Croatia, Estonia, Finland, Latvia, the Netherlands, Slovakia, Slovenia, Spain, Sweden and Liechtenstein; in other words, in a total of 16 countries (see Table 4). At the same time, among the countries not providing workers with the right to challenge the application of confidentiality clauses Austria, Croatia, Estonia, Finland, Hungary, Italy, Slovakia, Slovenia, Spain, Sweden, the United Kingdom and Liechtenstein, in line with Art. 8.2 of the Recast Directive, provide the right for management to withhold information that 'according to objective criteria, would seriously harm the functioning of the undertakings concerned or would be prejudicial to them'. Two questions arise, as a result: (i) if the criteria to assess the potential serious harm to the company are supposed to be 'objective' why cannot they be submitted to the objective and impartial assessment of courts; and (ii) why are company interests put above the right of employees to verify the objectivity and validity of reasons for which management has decided to apply the confidentiality clause? The latter question also concerns the effectiveness of the Directive itself, because when no judicial review of such decisions is permitted, the possibilities that the confidentiality clause will be abused are increased.

According to reports from ETUFs instances of abuse of confidentiality clauses by management are not uncommon. This comes as no surprise, admittedly, if one considers the imbalance in the legal framing of responsibility for violations of confidentiality by workers' representatives and the similar responsibility for management for abuses of confidentiality. On one hand, at least 15 out of 31 member states provide for sanctions for employee representatives violating confidentiality in transposition laws. These sanctions vary from financial penalties and civil damages for potential harm inflicted on the company to penal sanctions, including imprisonment. It should not be forgotten that due to the magnitude of possible sanctions (civil liabilities, penal sanctions) and the awareness of corporate access to the best lawyers workers' representatives are often effectively discouraged from dealing with confidential information in any way that entails even the remotest chance of exposing them to suspicions of violating confidentiality of information. It is a serious practical obstacle in their work, forcing the European Commission to ask questions about the golden mean between the need to protect company interests and the effectiveness of information and consultation regulations.

On the other hand, it seems that only a few national EWC regulations foresee some form of responsibility on the part of management for such abuses. It seems that only in France is an intentional abuse of confidentiality clauses by management sanctioned by a fine (of between 251 and 3,750 euros) (Art. L-433-8). In four other member states some legal remedies to challenge confidentiality are available, but nowhere are sanctions foreseen for management who abuse the clause. In Lithuania the law stipulates only that during attempts by workers to set up an EWC '[i]t shall be prohibited to refuse to provide information on the grounds that the structure or number of employees of the European Union-scale undertaking or the European Union-scale group of undertakings constitutes confidential information (…)' (Art. 12.5 of the transposition law). In Cyprus in case of a suspected breach/abuse of con-

fidentiality court orders are applicable to situations in which the management has (unlawfully) classified information as confidential (Art. 17(2)b of Law 106(I)/2011, No 4289, 29.7.2011). In Poland the District Commercial Court may order access to confidential information (Section 5 of the Law on European Works Councils, 5 April 2002), but, at the same time, the Court may limit access to evidence should it risk harming the interests of the company. No sanction for management is mentioned. Similarly, in the United Kingdom, Statutory Instrument 3323 of 1999 (TICER) in Part VI, Section 23 para 6 stipulates the right of recourse to CAC (Central Arbitration Committee),[43] but if CAC considers that the 'disclosure of the information or document by the recipient would not, or would not be likely to, prejudice or cause serious harm to the undertaking, it shall make a declaration that it was not reasonable for the central management to require the recipient to hold the information or document in confidence.' Surprisingly, no sanctions for such actions by a company are foreseen.

To sum up, in 15 member states sanctions are foreseen for workers' representatives for breaches of duty to maintain confidentiality of information provided to them as such, yet, despite the possibility to issue court orders to lift the secrecy clause in four other countries (France, Lithuania, Poland and the United Kingdom) no mention is made of corporate responsibility for abuses of confidentiality, apart from in France. This situation shows a stark imbalance in how national authorities value company interests over against those of workers and how they differ in their approach to corporate violations of law and those of workers' representatives.

Finally, there is a question of the applicability of limitations to the degree to which confidentiality applies to workers' representatives in their processing of information and consultation. In 10 member states (Austria, Croatia, Estonia, Germany, Hungary, Ireland, Latvia, Luxembourg, the Netherlands and Slovenia; see Table 4) confidentiality does not apply to at least one of the following types of contacts of EWC members with other actors:

– contacts with other workers' representatives;
– contacts with other EWC members;
– contacts with experts and/or translators;
– contacts with supervisory board members

All these actors have obligations to maintain confidentiality that apply specifically to them; thus there is no risk of confidential information being released to third parties. At the same time, in the above listed countries application of the confidentiality clause does not obstruct or make processing information and preparation of opinions and consultation impossible. In the remaining countries any use of information deemed confidential, even in contacts with fellow workers' representatives or EWC members, may represent enough ground for companies to charge workers' representatives with violations of secrecy of information. It is a powerful weapon the use of should be supervised by the relevant national authorities. As we have

43 (6) A recipient whom the central management (which is situated in the United Kingdom) has entrusted with any information or document on terms requiring it to be held in confidence may apply to the CAC for a declaration on whether it was reasonable for the central management to impose such a requirement.

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
Austria	X		X							
Belgium	–	?							X	
Bulgaria	–	X[44]					X		Mediation and/ or voluntary arbitration with the National Institute for Conciliation and Arbitration	Art. 30: 'Persons who have received information with a request to treat it in confidence shall be liable for any damages that may be caused to the respective undertakings as a result of their failure to comply with the request for confidentiality.'
Cyprus	X						X		X	1) Members of EWC and management 'shall jointly decide on the issues covered by confidentiality and data information to be disclosed to third parties' (Art. 17.1 c) of the Law 106(I)/2011); 2) Only in case of suspected confidentiality breach/abuse are court orders applicable to situations in which the management has (unlawfully) classified information as confidential (Art. 17(2)b of Law 106(I)/2011, No 4289, 29.7.2011).

44 Art. 29 of the Law On Information and Consultation with Employees of Multinational (Community-Scale) Undertakings, Groups of Undertakings and Companies, Promulgated in the State Gazette No 57 of 14.07.2006.

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
Croatia	X		X	X	X					
Czech Republic	– (only minor modification)	X					X		X[45]	On top of EWC representatives confidentiality applies also to members of the competent trade union organisation and representatives dealing with the protection of health and safety.
Denmark	–	X					X			§36 Anyone who discloses information given in confidence in accordance with §§ 30 and 32 shall be punished by a fine, unless more severe punishment is warranted under other legislation (Act N° 371 OF 22 May 1996 on European Works Councils)
Estonia	X		X	X	X	X				
Finland	– (only minor modification)							X	X	Provisions on secrecy/confidentiality apply also to situations referred to in Section 43 of the Cooperation Within Undertakings Act stipulating: 'The provisions on business transfers in this chapter shall also apply to mergers and divisions of undertakings.'

45 Section 276 of the Labour Code: '(5) If the undertaking requires that any information provided as confidential be withheld, employees' representatives shall be entitled to seek a ruling that the information was designated confidential without reasonable justification. If the undertaking does not provide information, employees' representatives may seek a ruling that the undertaking is obliged to provide information.'

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
France	X						X		Tripartite arbitration committee led by Labour Inspectorate	1) Apart from 'information the nature of which can harm the undertaking' extension to 'manufacturing secrets' and 'commercial secrets' (Art. L-433-4); 2) An intentional abuse of confidentiality clause by management is sanctioned by a fine between 251 and 3 750 euros. (Art. L-433-8); 3) Violation of confidentiality by workers' representatives is sanctioned by a fine between 251 and 1 250 euros and/or by imprisonment (8 days to 1 month)
Germany	–	X	X	X	X	X	X	X		
Greece	–	By implication, yes[46]					X		By implication: yes	Art. 18.1 line 2 refers to provisions of the Act on Works Councils N° 1767/88
Hungary	–	X	X	X	X	X				
Iceland	N/A	By implication, yes					X			Art. 34 of the Act on European Works Councils in Undertakings, No. 61/1999: 'Those who, despite the obligation not to divulge confidential information under Art. 29, provide a third party with

46 Rules of the Works Councils Law N° 1767/88 apply.

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
Iceland (cont.)										(cont.) information that has been made known to them, shall be sentenced to pay a fine unless more severe penalties are prescribed in other statutes.'
Ireland	–	X	X	X	X		X		Independent arbitrator appointed by the Minister[47]	1) Reference is made to information that is 'commercially sensitive' (Art. 15.3) classified as such 'where it can show that the disclosure would be likely to prejudice significantly and adversely the economic or financial position of an undertaking or group of undertakings or breach statutory or regulatory rules, or (.)'
Italy	X						X		1. A Technical Conciliation commission to solve a preliminary and non-contentious disputes; 2. Territorial Labour Inspectorate as second instance.	The prohibition to disseminate information under confidentiality lasts for a period of three years following the expiration of the time allowed by the mandate of all the subjects.

47 The parties to an arbitration under this section shall each bear their own costs (Section 20.3 of the EWC implementation act).

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC) (cont.)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
Latvia	X		o	o	o		X			The right set out in paragraph 3 of this Section shall not apply to information concerning the number of employees in an undertaking.' (Section 29.4 of the transposition act)
Lithuania	X						X		X (within 30 days)	1) 'It shall be prohibited to refuse to provide information on the grounds that the structure or number of employees of the European Union-scale undertaking or the European Union-scale group of undertakings constitutes confidential information (...)' (Art. 12.5 of the transposition act); 2) Extension of scope to 'commercial/industrial or professional secret' (Art. 11 of the transposition act); 3). Access to state, official and professional secrets and liability for the disclosure or unlawful use thereof shall be regulated by special laws. (Art. 11.6)
Luxembourg (Based on the draft Bill 6373/5. 6 July 2012.)	X		X	X	X		X		X	In case of disputes a tripartite body led by the Director of the Labour Inspectorate and Mines decides (no appeal against his decision is possible), Art. L433-4 of the Transposition Bill

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC) (cont.)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
Malta	X						X		Industrial Tribunal	
Netherlands	X		optional	optional	optional	optional	X	X		The management 'shall, as far as possible, state with respect to the specific matter what reasons exist for treating it confidentially, what written or verbal information is covered by the confidentiality requirement, how long it will apply, and whether there are any persons who are not required to maintain such confidentiality' (Art. 23.6 of the Transposition Act).
Norway	X	X						X	1) according to dispute settlement defined in agreement; 2) Industrial Democracy Committee	
Poland	–	X					X		District Commercial Court	The District Commercial Court may order access to confidential information. (Section 5 of the Law on European

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC) (cont.)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
Poland (cont.)										(cont.) Works Councils dated 5 April 2002). The Court may limit access to evidence if it risks harming the interests of the company.
Portugal	X						X		X	1) Art. 20.2 of transposition: 'The provisions of the above paragraph shall extend to representatives of employees of establishments or undertakings situated in countries that are not member states and who attend the negotiations pursuant to Art. 7(3).' 2) Violations by workers' representatives to respect confidentiality are considered 'a very serious administrative offence.' (Art. 20.6 of the transposition act). --> See also Table 18 in Chapter 5.
Romania	X	X					X		Court within 30 days	
Slovakia	X							–		
Slovenia	X		X	X	X	X		X		
Spain	X							X		

Table 4 **Implementation of confidentiality provisions in national transpositions (Directive 94/45/EC and Recast Directive 2009/38/EC) (cont.)**

Country	Confidentiality provisions in transposition of Recast Directive 2009/38/EC	Provisions unchanged since implementation of Directive 94/45/EC	Limitations of confidentiality = confidentiality NOT applicable to				Possibility to withhold information deemed potentially harmful by management	Explicitly applicable to reporting back	Recourse to courts/ administrative authorities	Other specific provisions on confidentiality / remarks
			contacts with other workers' representatives	to contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members				
Sweden	X			X	X			X		The EWC shall report back to employees with any restrictions that may arise from the fact that the employee representatives are subject to a duty of confidentiality. Notwithstanding the duty of confidentiality, it is permitted to transmit such information to other employee representatives or experts in the same body.
United Kingdom		X					X		X	
Liechtenstein	X						X	X		

Source: Compilation by Romuald Jagodzinski 2015.

demonstrated, in the vast majority of countries this weapon can be used against workers' representatives to the advantage and sole discretion of company management, reinforcing the inherent balance of positions in access to information.

4. Articulation between levels

The 1994 EWC Directive (94/45/EC) remained silent about the relationship between national and European procedures for worker involvement. The competences of EWCs and those of national works councils or other national bodies of workers' representation are usually and quite naturally different. EWCs deal with transnational issues while the national level of representation deals with national (or local) issues. However, a transnational decision could have national consequences and imply the intervention of both levels. Conversely, decisions often reported as having only a local impact in today's reality of transnational (global) enterprises often influence the situation in other parts of the company operating abroad. The distinction between local, national and transnational is becoming increasingly blurred. In this context several questions arise:

- What is the distinction between transnational and local issues?
- What should be the timing of information and consultation of European Works Councils in relation to national rights to worker involvement?
- Which level should be consulted first?

4.1 Definition of the transnational competence of EWCs

- On the first question of the definition of transnational issues the Directive stipulates that these comprise situations in which: 'decisions which affect them [employees of Community-scale undertakings] are taken in a Member State other than that in which they are employed' (Recital 12).
- 'Workers and their representatives must be guaranteed information and consultation at the relevant level of management and representation, according to the subject under discussion. To achieve this, the competence and scope of action of a European Works Council must be distinct from that of national representative bodies and must be limited to transnational matters.' (Recital 15).
- 'The transnational character of a matter should be determined by taking account of both the scope of its potential effects, and the level of management and representation that it involves. For this purpose, matters which concern the entire undertaking or group or at least two member states are considered to be transnational. These include matters which, regardless of the number of member states involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between member states.' (Recital 16)
- 'The competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues' (Art. 1.3).
- 'Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a

whole, or at least two undertakings or establishments of the undertaking or group situated in two different member states' (Art. 1.4).

The Directive's recitals and articles outline sufficiently clearly the transnational competence of EWCs and what a transnational information is. Just to highlight the point, Recital 12 'introduces the presumption that every decision taken in another Member State than where it will be implemented is part of a transnational strategy affecting the global conduct of the enterprise' (Picard 2010a). It is also worth emphasising that, according to the above provisions of the Directive, whenever a matter exceeds local management's competence it shall considered transnational (Recital 16). In this context it is noted that 'It should be up to central management to reverse this presumption by demonstrating that the decision in question is a purely local issue' (ibid.). The same goes for the criterion of 'scope and potential effects' which shall be determined by the EWC as the body collectively representing interests of workers and not arbitrarily by the management based on subjective criteria. Unfortunately, national transposition laws do not reproduce the criteria laid down in the Directive in an equally precise manner. Table 5 shows that in the vast majority of countries Recitals 12, 15 and 16 – which are key for defining the transnational character of matters and information to be provided to EWCs – have not been transposed at national level.

Table 5 **Transposition of provisions concerning the transnational character of information and the transnational competence of EWCs**

	Restriction to transnational issues	Definition of transnationality identical to Directive 2009/38/EC	Definition of transnationality enriched by all recital(s)
Austria	yes	yes	yes (added to Directive's definition)[48]
Belgium	yes	yes	yes (added into Commentary)
Bulgaria	yes	yes	no
Cyprus	yes	yes	no
Croatia	no	no	no
Czech Republic	yes	yes	yes[49]
Denmark	yes	yes	no
Estonia	yes	yes	no

48 'Transnational matters shall be those which concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two establishments or undertakings of the group of undertakings situated in at least two Member States. The transnational character of a matter shall be determined by taking account of both the scope of its potential effects and the level of management and representation that it involves. In any event, and regardless of the number of Member States involved, matters which are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States shall be transnational matters'. (Art. 26 of the Federal Law 101, of 2010).

49 Section 288 para 1 of the Labour Code: '(1) For the purposes of this Act, transnational information and consultation shall mean the process of informing and consulting in relation to undertakings or groups of undertakings active in the Member States of the EU and the European Economic Area as a whole or at least two undertakings or organisational units of undertakings or groups of undertakings located in at least two Member States. Account shall be taken, when assessing whether transnational information and consultation applies, of the scale of any impact and the level of management and representation of employees.'

Table 5 **Transposition of provisions concerning the transnational character of information and the transnational competence of EWCs (cont.)**

	Restriction to transnational issues	Definition of transnationality identical to Directive 2009/38/EC	Definition of transnationality enriched by all recital(s)
Finland	yes	yes	yes[50]
France	yes	yes	no
Germany	yes	yes	no
Greece	yes	yes	no
Hungary	yes	yes	yes
Ireland	yes	yes	no
Italy	yes	yes	no
Latvia	yes	yes	no
Lithuania	yes	yes	no
Luxembourg	not available	not available	no
Malta	yes	yes	no
Netherlands	yes	yes	no
Norway	not available	yes	no
Poland	not available	yes	no
Portugal	unclear[51]	yes	no
Romania	yes	yes	yes[52]
Slovakia	unclear[53]	yes	no
Slovenia	yes	yes	no
Spain	yes	yes	yes (in the preamble)
Sweden	unclear[54]	yes	no
United Kingdom	yes	yes	no
Liechtenstein	yes	yes	no[55]

Source: Compilation by Romuald Jagodzinski, 2015.

50 Section 13a of the 620/2011 Act amending the Act on cooperation in Finnish groups of undertakings and Community-scale groups of undertakings adopted on 10 June 2011 stipulated: 'Transnational issues are also issues which, regardless of the number of Member States concerned, are of major consequence for the situation of employees or involve transfers of activities between Member States.'

51 The law makes reference to 'transnational matters' without defining the meaning.

52 When defining the transnational competence of EWCs Art. 2 of Law No. 186 of 24 October 2011 stipulates '(4) The transnational character of an issue shall be determined by taking account, regardless of the number of Member States involved, of the level of management and representation that it involves, and the scope of potential effects on the European workforce or which involve transfers of activities between Member States.'

53 The law makes reference to 'supranational information and consultation' without defining it.

54 The law makes reference to 'transnational questions' without defining the meaning.

55 In the amending provisions modifying transposition of Directive 94/45/EC no reference is made to any broader definition of transnationality; however, in the accompanying commentary (explanations) on modifications to be introduced reference is made to the necessity to transpose the transnationality definition in such a way as to accommodate the impact on workers' interests, irrespective of the number of countries involved.

Surprisingly many countries, despite the Directive's guidelines, do not provide a clear limitation of EWCs' competence to transnational matters (Croatia, Luxembourg, Norway, Poland). Relatively many countries define the boundaries – that is, restrict the scope – of EWCs' right to transnational information and consultation by stipulating that these should be 'transnational questions' (Sweden) or 'matters' (Portugal) or 'supranational information and consultation' (Slovakia), which borders on tautology. Only Austria, Belgium (in the customarily commonly accepted quasi-binding commentary to the transposition), Hungary, Romania, Spain (in the Preamble to the Transposition Act) and Liechtenstein contain references to the Recast Directive's recitals.

4.2 Timing and priority between levels

With regard to the second and third questions – the correct timing and priority between the levels of information and consultation – there are multiple aspects to be considered. According to the impact assessment study (European Commission 2007),

'The interplay between national and transnational levels of information and consultation, which is not addressed by any of the directives concerned, is a major challenge as well as a key legal uncertainty in the operation of EWCs. According to the 2008 EPEC survey, three quarters of companies have undergone a restructuring that has affected more than one European country in the last three years. In a very high proportion of cases (60% — to be further researched), company and employee representatives had differing views on which level had been consulted first for the same past restructuring event.'

Unfortunately, the Recast Directive does not give a precise answer to this question, despite the fact that some cases have demonstrated the need to establish a chronological order of intervention with regard to the various workers' representatives.[56] The final text devotes two provisions to this issue without resolving it. On one hand, it is henceforth provided (Art. 6(2)(c)) that the agreement establishing the EWC must provide arrangements for linking information and consultation of the EWC and national employee representative bodies, in accordance with the principles set out in Art. 1(3) (that is to say, with regard to the EWC's transnational competence[57]). On the other hand, Art. 12 generally provides that 'information and consultation of the EWC shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Art. 1(3)'. The directive therefore charges the SNB with

56 This is the case in France, where a number of tribunals have had to deal with this issue. For example, in its judgment in the Continental case the Tribunal of first instance of Sarreguemines found that to require employers to consult the EWC prior to national bodies would be to impose a legal obligation that does not exist. For the Tribunal, the order of consultation has not been legally determined and therefore consultations with national/Community level can take place in any order or concurrently (TGI, 21 April 2009, Liaisons Sociales Europe, 2009, n° 225, 2. See S. Laulom, 'The Flawed Revision of the EWC Directive', ILJ, 39 (2), June 2010, p. 202. R. Brihi, 'France' in Dorssemont and Blanke 2010, p. 141.

57 According to Art. 1.3, 'information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the EWC and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues'.

handling this issue, but limits its freedom to do so by stating that it should be done 'with due regard to the competences and areas of action of each' (de facto establishing that EWCs cannot be informed and consulted later than the national level of workers' representation – Recital 37 of the Recast Directive). One can therefore easily imagine situations in which prior consultation with the EWC limits the competences of national representatives. The reality is that, while the term 'linkage' is used, the national and European procedures are still viewed as independent of each other, each one having a specific competence. However, the role of EWCs must be conceived of alongside that of national representation. In embryonic fashion, this sequence of 'Europe first' or, at the very least, of national and European procedures running alongside each other is reflected in the preamble, which provides 'National legislation and/or practice may have to be adapted to ensure that the EWC can, where applicable, receive information earlier than or at the same time as the national employee representation bodies' (Recital 37).

Also, Art. 10.2 deals with the relationship between the national and European levels in providing that 'the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation carried out in accordance with this Directive'.

On this issue, the Recast EWC Directive leaves substantial discretion to the member states and, indeed, a direct obligation to specify in their transposition laws the linkage between the various levels of representation. This obligation covers both the necessity to provide for fall-back, standard rules in case of a lack of such arrangements in the EWC agreements, as well as specifying in those fall-back rules the scope of the contents of information and consultation and the time priority between the two levels in cases of conflict/overlap.

However, looking at the national transposition laws, it seems that most member states have merely reproduced – copy-pasted – the wording, and thus automatically the uncertainties, of the EWC Recast Directive.

All member states have implemented the obvious and easy – as it merely transfers the responsibility for providing arrangements to the EWC and management – component of the articulation arrangements, namely, Art. 6.2 c) of the Recast Directive according to which the agreement establishing a European Works Council shall stipulate the arrangements for linking information and consultation of the EWC and national employee representative bodies. Usually, there is also a reference to the obligation that these arrangements respect the principle according to which information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion.

Some member states do not go any further and, contrary to the requirement imposed on them by Art. 12.3 of the Recast Directive, did not provide any statutory fall-back solution if the agreement setting up a EWC does *not* include any arrangements for links between national and European levels. This is the case for Austria, Cyprus, Denmark, Lithuania, Luxembourg, Norway, Slovenia and Sweden. All

Table 6 **Articulation between national and European levels**

	To be defined in the agreement	Provision applicable in the absence of an agreement (12.3)	Transposition of Recital 37	Transposition of Art. 10.2
Austria	yes	no	no	yes
Belgium	yes	yes	in the comments (at the same time)	no
Bulgaria	yes	yes	yes (simultaneously)	yes
Croatia[58]	yes[59]	no	no	no
Cyprus	yes	no	no	yes
Czech Republic	yes	yes (no specific timing	no	no
Denmark	yes (vague)	no	no	yes
Estonia	yes	yes (no specific timing)	no	yes
Finland	yes	yes (no specific timing)	no	yes
France	yes	yes (no specific timing)	no	no
Germany	yes	yes	yes (EWC consulted at the latest at the same time as the national body)	yes
Greece	yes	?	no	?
Hungary	yes	yes	yes (simultaneous information)	yes
Ireland	yes	yes (both levels in parallel)	yes	no
Italy	yes	yes	yes (in a coordinated manner)	yes
Latvia	yes	yes (no specific timing)	no	no
Lithuania	yes	no	no	yes
Luxembourg[60]	yes	no	no	no
Malta	yes	yes (no specific timing)	yes	no
Netherlands	yes	yes	yes (at the same time)	yes
Norway	yes	no	no	no
Poland	yes	yes (no specific timing)	no	no

58 Based on Decision promulgating the Law on European Works Councils, which the Croatian Parliament adopted in session on 15 July 2014 (Class: 011-01 / 14-01 / 111; No: 71-05-03 / 1-14-2) available at the time of writing only in Croatian.

59 The Croatian transposition law imposes an interesting obligation on negotiating parties with regard to participation of employee representatives in the SNB from countries that are not members of the EU (Art. 175): if the agreement contains provisions on the inclusion of employee representatives from non-EU countries it must include provisions on the method of involvement of such members, a method for calculating their number and their legal status.

60 Based on the draft Bill 6373/5. 6 July 2012.

Table 6 **Articulation between national and European levels (cont.)**

	To be defined in the agreement	Provision applicable in the absence of an agreement (12.3)	Transposition of Recital 37	Transposition of Art. 10.2
Portugal	yes	yes (no specific timing)	no	yes
Romania	yes	yes	yes (concomitantly)	no
Slovakia	yes	yes (implicit)	no	yes
Slovenia	yes	no	no	yes
Spain	yes	yes	yes (simultaneously)	yes
Sweden	yes	no	no	yes
United Kingdom	yes	yes (no timing)	no	yes (sanction)

Source: Authors' compilation.

these countries have failed to implement Art. 12.3 of the Recast Directive. In these cases, it means that EWCs must be informed and consulted on transnational matters but their involvement is without prejudice to the competence of national level of representation. As a result, the national levels of representation must also be informed and consulted. Whatever the implied conclusions such a lack of provisions obviously does not help transparency and legal certainty.

However, many member states have also implemented Art. 12.3, according to which, where no arrangements for links between information and consultation of the EWC and national employee representative bodies have been defined by agreement, the member states shall ensure that the processes of informing and consulting are conducted in the EWC, as well as in the national employee representative bodies. Most of the time, member states have merely reproduced the relevant article of the Recast Directive without adding any more precision on the manner and timing of the linkage between the levels. For example, the Portuguese legislation states that where the agreement does not regulate the link between the levels, the EWC and other structures collectively representing employees shall be duly informed and consulted whenever decisions arise that may involve significant changes to work organisation or employment contracts. In Estonia, if there are no arrangements for links between the levels, the EWC and the employee representative bodies shall be informed and consulted in cases in which decisions are envisaged that will lead to substantial changes in work organisation or contractual relations. If we compare the legislation of member states that have not transposed Art. 12.3 and those that have transposed it without adding anything to the Directive, ultimately the situation is the same. Because of the uncertainties of the Recast Directive and the member states' unwillingness to specify the general wording of the Directive, an opportunity was lost to clarify and improve the effectiveness of employees' transnational information and consultation rights.

Very few member states have transposed Recital 37 of the Recast Directive (Belgium,[61] Bulgaria, Germany, Hungary, Italy, the Netherlands, Romania and Spain).

61 In Belgium, comments to acts are binding.

Only Germany seems to require prior information and consultation of the EWC in accordance with the legislation; the EWC is supposed to be informed and consulted at the latest at the same time as the national employee representative bodies. However, this should be done while respecting the rights of national employees' representatives. In all the other countries, the European procedure of informing and consulting the EWC and the national procedure involving national employees' representatives should be implemented simultaneously.

With the exception of Germany, it seems that all member states have preferred not to choose how to regulate the chronological succession of information and consultation at different levels, probably because – potentially – any other solution could lead to a reduction of the rights of information and consultation. Any predefined chronological commitment to the course of action could narrow the rights of the organ that will be informed and consulted. Of course, transnational and national information and consultation procedures do not have the same scope and content. The information to be given is not the same and consultation at national level is also different from consultation at European level. However, the fact of presenting the two procedures as different and not specifying their chronological order is not without consequences: the national and European procedures are still viewed as independent of each other, each having a specific competence. Their complementariness is neither well grasped at national level nor sufficiently emphasised by the Directive itself.

4.3 Reporting back about information and consultation

The last aspect of articulation between the levels of information and consultation is coordination between European and national workers' representative levels. As already mentioned, the Recast Directive tries to address this question without defining any specific time order with regard to the chronological coordination and the member states have done the same.

Therefore, the only provision suggesting coordination between the EWCs and the national employees' representatives is Art. 10.2 of the Directive.[62] However, many countries have not implemented this Article, perhaps because it is not central to the Directive (Belgium, Czech Republic, France, Ireland, Latvia, Luxembourg, Malta, Norway, Poland and Romania). When the Article has been implemented, the national legislation usually merely reproduces its wording without defining more precisely how EWCs should fulfil this obligation of informing the national representatives of European companies of the outcome of the information and consultation procedure. In general, it needs to be stated that for the abovementioned reasons specific means have not been specified for executing this right and obligation imposed on workers' representatives. Only two member states can be quoted as outliers. On one hand, a positive example is Lithuania, where legislation specifies that the process of informing workers about the outcome of information and consulta-

62 According to this Article, 'Without prejudice to Article 8, the members of the European Works Council shall inform the representatives of the employees of the establishments or of the undertakings of a Community-scale group of undertakings or, in the absence of representatives, the workforce as a whole, of the content and outcome of the information and consultation procedure carried out in accordance with this Directive.'

tion procedures at EWC level must take place at least once a year, while the EWC may also obligate an EWC member to present the information to employee representatives in a specific company. On the other hand, the United Kingdom provides for more specific provisions, notably foreseeing possible sanctions for not observing the duty to report back. An employee or employees' representative may present a complaint to a specific body (CAC) if the EWC fails to inform them of the outcome of the information and consultation procedure. It remains an open question whether sanctioning infringements of this obligation is correct according to the EU legislator's intention, especially when the means to execute this right are stated only very generally. This question is not a theoretical one, but of considerable practical bearing: if from a given country there is only one workers' representative on the EWC, who represents workers from several plants in distant locations, a failure to provide clear rules on the means available to communicate with all his constituents exposes him to potential legal proceedings and sanctions.

4.4 Conclusions on articulation between the levels of information and consultation

To conclude, it is up to the parties concerned, the SNB and the central management to define chronological coordination of the various participation levels. Many countries have merely copied and pasted the Recast Directive, with all its uncertainties and ambiguities. It is thus possible to argue that this is not a correct way to implement a Directive as it leaves many questions without clear answers. Moreover, Art. 10.2 and 12.3 have *not* been implemented at all in some countries, which amounts to an outright violation of the obligation to (correctly) transpose the Directive. Whereas non-implementation of Art. 10. 2 is problematic, non-implementation of Art. 12.3 does not, in our view, create more legal insecurity than a verbatim implementation of the Directive. The reason why is easy to explain: Art. 12.3 does not have any added value. It just reiterates the existence of procedures at national and transnational level, without providing any guidance whatsoever on the issue of articulation.

At the same time, it will be necessary to analyse the new agreements that will be concluded under the Recast Directive, to see whether the parties prefer to choose a specific chronology or to remain as vague as the Recast Directive and national legislations.

5. Conclusions

Our conclusions from the above analysis focus on three specific areas: (i) the definitions of information and consultation, (ii) articulation between various levels of information and consultation and (iii) confidentiality.

With regard to the definitions of information and consultation we conclude that they were transposed mainly word for word, although hardly any increased the precision of the Directive's provisions to specify what kind of information (digital, written and so on) is to be provided to EWCs.

With regard to the key element of the modified EWC Directive – the definitions of information, consultation and transnational competence of EWCs – the overall quality of implementation has proved to be ambiguous. First, concerning definitions of information and consultation, based on the above review we conclude that generally they were transposed in a harmonised way. This statement is true if one considers the common approach of copy-pasting the exact wording of the Directive as harmonised transposition. However, casting a more inquisitive look at some less obvious (but not less important) aspects of the definitions reveals the following ambiguities and problems:

- Only in Germany, Estonia, the Czech Republic, Slovakia and Lithuania was a broader definition of consultation implying the right to obtain a detailed response from central management to the opinions expressed by the EWC transposed in the body of the Directive (note, this right is mandatory in the case of application of Annex 1 of the Directive).
- In the Czech Republic, Slovakia and Lithuania references to negotiations with management are made when defining consultation.
- Only 15 out of 28 member states refer to the obligation to ensure respect for the principle of effectiveness of information and consultation rights.
- 16 out of 28 member states make reference to the requirement of ensuring effective decision-making, but none of them specifies the meaning of this constraint.

One other very important aspect of transposition of the definitions of information on which some member states deviated was the question of transferring information on the basis of which an assessment by an EWC would be undertaken concerning the *possible* impact of managerial decisions. Denmark, Lithuania, the Netherlands, Portugal and Slovakia did not include this reference in their transpositions, which casts doubt on whether the quality of the Recast Directive's definitions (Art. 2.1 (f) and Recitals 16 and 42) and insistence on the fact that not only factual, but also possible/potential impact on workers' interests is enough to validate EWCs' right to be informed and consulted has been reproduced in these countries. If national definitions do not reflect this important modification of the Recast Directive workers' rights to information of sufficient quality and extent may be compromised.

Second, concerning the transnational competence of EWCs – the key parameter for determining EWCs' scope of action – some serious problems were identified. Surprisingly, many countries, despite the Directive's guidelines, do not provide a clear delimitation of EWCs' competence to transnational matters only (Croatia, Luxembourg, Norway, Poland). Relatively many countries define the boundaries – that is, restrict the scope – of EWCs' right to transnational information and consultation by stipulating that these should be 'transnational questions' (Sweden) or 'transnational matters' (Portugal), 'supranational information and consultation' (Slovakia), which borders on tautology and does not make differentiation any easier. Only Austria, Belgium (in the customary commonly accepted quasi-binding commentary to the transposition), Hungary, Romania, Spain (in the Preamble to the Transposition Act) and Liechtenstein contain references to the Recast Directive's recitals (among others, Recitals 15 and 16). This shortcoming of national implementation laws is

stark and consequential as the definition of the parameter for EWCs' involvement is crucial to their functioning.

Third, with regard to national provisions concerning articulation between various levels of information and consultation our analysis has shown that some member states do not go any further and, in contrast to the requirement imposed on them by Art. 12.3 of the Recast Directive, did not provide any statutory fall-back solution if the agreement setting up a EWC does not include any arrangements for the links between the national and European levels. This is the case for Austria, Cyprus, Denmark, Lithuania, Luxembourg, Norway, Slovenia and Sweden. Because of this shortcoming we conclude that these countries have failed to implement Art. 12.3 of the Recast Directive.

The obvious non-transposition of the obligation of Art. 12.3 of the Recast Directive is, however, only the proverbial tip of the iceberg. Some member states pretend to have implemented Art. 12.3 of the Recast Directive by providing fall-back provisions on articulation, but in reality the wording of these fall-back provisions does not address the question of articulation because, most of the time, member states have just reproduced the article of the Recast Directive without adding any more precision on the procedure, priority of access (EWC, national-level works council), content and timing of information and consultation at various levels. For example, the Portuguese legislation states that where the agreement does not regulate the link between levels, the EWC and other structures collectively representing employees shall be duly informed and consulted whenever decisions arise that may involve significant changes to work organisation or employment contracts. In Estonia, if there are no arrangements for the links between the levels, the EWC and the Estonian employee representative bodies shall be informed and consulted in cases in which decisions are envisaged that will lead to substantial changes in work organisation or contractual relations. If we compare the legislations of member states that have not transposed Art. 12.3 and those that have formalistically copy-pasted the wording of this Article without adding anything to the Directive's language, the situation seems, indeed, to amount to the same result, namely no effective transposition. Because improved articulation between various levels of information and consultation was one of the main achievements of the Recast Directive (however vaguely and indecisively formulated in the Directive), an opportunity to clarify and improve the effectiveness of employees' transnational information and consultation rights and those of local worker representation bodies seems to have been lost.

Fourth, the obligation to respect the secrecy of information supplied to workers' representatives under the confidentiality clause is, beyond doubt, an important factor modifying and limiting the exercise of right to information and consultation under the EWC directives. Confidentiality of information was introduced to protect viable company interests, but the imbalance in the legal framing of responsibility for violations of confidentiality by workers' representatives and similar responsibility on the part of management for abuses of confidentiality is striking. On one hand, at least 15 out of 31 member states provide in transposition laws for sanctions for employee representatives violating confidentiality. These sanctions vary from financial penalties through civil damages for potential harm inflicted on the company to penal sanctions, including imprisonment. At the same time only in France are

abuses of the confidentiality clause by company management punishable. In three other countries there is a remedy in the form of a possibility to issue court orders to lift the secrecy clause (Lithuania, Poland and the United Kingdom), but no mention is made of corporate responsibility for abuses of confidentiality if the court or other authority (usually the labour inspectorate) finds the company at fault of imposing confidentiality with regard to information that did not require such protection. This situation shows a stark imbalance with regard to how national authorities value company interests against those of workers and how they choose to differ in their approaches to corporate violations of law and those of workers' representatives.

If confidentiality is introduced without a system of proper checks and balances it may become a powerful weapon that can easily override and indeed cripple information and consultation rights. Therefore the use of confidentiality should be better monitored and supervised by the relevant national authorities. As we have demonstrated, in the majority of countries there is a worrying lack of a system of checks and balances, which allows confidentiality to be used against workers' representatives to the advantage and at the sole discretion of company management, reinforcing the inherent imbalance with regard to access to information.

2
Procedure for the establishment and adaptation of a European Works Council or an information and consultation procedure

Sylvaine Laulom

1. Introduction

Establishing EWCs under the original Directive 94/45/EC entailed a number of problems. The main obstacle that workers' representatives encountered early in the process was collecting information from management about the company's workforce and its distribution. Without this data it was often hardly possible to get the process of setting up an EWC under way. This basic problem led to three lawsuits[1] that made it all the way to the Court of Justice of the European Union.

These legal problems and their importance for EWC practice made them core candidates for amendments in the new EWC Recast Directive. As a result, regarding the procedure for the establishment and adaptation of a European Works Council or an Information and Consultation Procedure, the Recast Directive made a few improvements. In this chapter we follow the order of these improvements. First, the preliminary right to information is now included in the Recast Directive which has integrated the solutions of the ECJ. Second, the role of trade unions in negotiations is now recognised. Finally, the Recast Directive provides a solution to the lacuna concerning the 1994 Directive, which rapidly became apparent: the absence of any provision addressing the frequent occurrence of changes in the structure of Com-

1 The case of Kühne & Nagel dragged on for many years, from the German labour court of first instance up to the Court of Justice of the European Union (C-440/00) and back to national labour tribunals in the member states (Norway, Slovakia and Austria). Similar difficulties have characterised other cases before the Court of Justice of the European Union since 1998 (Bofrost C-62/99 and ADS Anker C-349/01).

munity undertakings' (or groups of undertakings). As a remedy to this problem an adaptation clause was introduced in the Recast Directive (the new Art. 13).

All these modifications were aimed at the general objective of 'ensuring the effectiveness of employees' transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in practical application and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions', as defined in Recital 7 of the Preamble of the Recast Directive.

The new information right and the involvement of European trade unions has the potential of facilitating the establishment of new EWCs and improving the quality of agreements to ensure their effective functioning.

2. Enhanced access to the information required for commencing negotiations

As already mentioned, all three EWC-related court cases that made it to the Court of Justice of European Union (CJEU)[2] raised the issue of access to the information required to set up a Special Negotiating Body (SNB). The information required was necessary to determine whether a given undertaking (or group of undertakings) had Community-wide scale of operations and/or whether its workforce was of the size required by the 1994 EWC Directive to make a valid claim for establishing an EWC. The new Recast Directive incorporated the solutions proposed by the ECJ in its case law. Henceforth, Art. 4.4 provides that the management of every undertaking belonging to the Community-scale group of undertakings and the central management or the deemed central management of the Community-scale undertaking or group of undertakings shall be responsible for obtaining and transmitting to the parties concerned by the application of this Directive the information required to open negotiations, in particular, 'the information concerning the structure of the undertaking or the group and its workforce'. Recital 25 adds that

> 'the responsibility of undertakings or groups of undertakings in the transmission of the information required to commence negotiations must be specified in a way that enables employees to determine whether the undertaking or group of undertakings where they work is a Community-scale undertaking or group of undertakings and to make the necessary contacts to draw up a request to commence negotiations.'

The Recast Directive provided a very important addition that establishes a dual (or joint) responsibility of the central management and the management of every undertaking belonging to the group to provide the necessary information for negotiations to be opened.[3] Art. 4.4 is not as clear concerning whom this information

2 C-62/99 *Bofrost*; C-440/00 *Kühne and Nagel* and C-349/01 *Anker*.

3 It is a direct aftermath of the strategy applied in the *Kühne + Nagel* case in which a strategy of endless shifting of responsibility between the central management and its national counterparts was adopted and resulted in an evident practical paralysis with regard to implementation of the ECJ's ruling.

Table 7 **Responsibility for providing the necessary information to commence negotiations**

	Providers of the information	Content of the information	Who is informed?
Austria	As in the Recast Directive	As in the Recast Directive	Parties to which the Directive applies and management of the other undertakings
Belgium	As in the Recast Directive	As in the Recast Directive	Parties concerned and other undertakings
Bulgaria	As in the Recast Directive	As in the Recast Directive	Members of the special negotiating body
Croatia[58]	As in the Recast Directive	As in the Recast Directive	Employees' representatives
Cyprus	As in the Recast Directive	As in the Recast Directive	Parties concerned
Czech Republic	Central management	As in the Recast Directive	Employees or their representatives
Denmark	Central management	As in the Recast Directive	Employees
Estonia	As in the Recast Directive	As in the Recast Directive	Employees or their representatives and central management (of a request to start negotiations)
Finland	As in the Recast Directive	As in the Recast Directive	Parties preparing the establishment of an ICP
France	As in the Recast Directive	As in the Recast Directive	Employees or their representatives
Germany	As in the Recast Directive	As in the Recast Directive	Employee representative body
Greece	As in the Recast Directive	As in the Recast Directive	The interested parties
Hungary	As in the Recast Directive	As in the Recast Directive	Employees or their representatives
Ireland	As in the Recast Directive	As in the Recast Directive	Parties concerned
Italy	As in the Recast Directive	As in the Recast Directive	Parties concerned
Latvia	As in the Recast Directive	As in the Recast Directive	Parties concerned
Lithuania	As in the Recast Directive	Same as in the Directive and the undertaking's legal status, the procedure for representation, information on employee representatives that will represent the employees of the undertakings or the undertakings controlled by them. The information must be given within 30 days, free of charge and in writing.	Employee representatives and the information shall be given to the requesting management
Luxembourg[60]	Central management	As in the Recast Directive	Employee representatives from Luxembourg or if there are none, workers
Malta	As in the Recast Directive	As in the Recast Directive	Parties concerned
Netherlands	As in the Recast Directive	As in the Recast Directive	Employees or their representatives

4 Based on the draft Bill of 11 November 2011.

Table 7 **Responsibility for providing the necessary information to commence negotiations (cont.)**

	Providers of the information	Content of the information	Who is informed?
Norway	Management in each establishment	As in the Recast Directive	Employees' representatives
Poland	As in the Recast Directive	As in the Recast Directive	Special negotiating body
Portugal	No provision	No provision	No provision
Romania	As in the Recast Directive	As in the Recast Directive	Employees or their representatives, central management
Slovakia	As in the Recast Directive	As in the Recast Directive	Parties concerned
Slovenia	As in the Recast Directive	As in the Recast Directive	Workers concerned or their representatives
Spain	As in the Recast Directive	As in the Recast Directive	Parties concerned
Sweden	As in the Recast Directive	As in the Recast Directive	Employees
United Kingdom	As in the Recast Directive	As in the Recast Directive	Employees or their representatives

Source: Author's compilation, 2015.

should be addressed to. However, the 'parties concerned' are supposed to be those who are at least entitled to request the opening of negotiations, namely employees and their representatives. According to the trade union guide to Directive 2009/38/EC, based on Art. 5.2 c) and 5.6, the relevant European industry federation may also be regarded as a 'party concerned' by the application of the Directive, 'as they are to be now informed of the composition of the SNB and the start of negotiations' (Picard 2010a).

How is this obligation to provide information about workforce distribution and company structure, which is necessary for commencing negotiations, transposed? Analysing national legislations, it is particularly important to examine who is defined as the party responsible for providing the necessary information for negotiations to be opened, what the extent of the information to be provided is, who is entitled to ask for and receive information and the timing.

Portugal is the only country without direct transposition of the provisions of Art. 4.4 of the Directive. There is only one very general statement in the legislation according to which 'the central management shall promote negotiations for the establishment of a European Works Council or an information and consultation procedure'. Portuguese law No. 696/2009 of 3 September 2009 also adds that 'the employees or their representatives may express the wish to initiate negotiations to the central management or to the managements of the establishments or undertakings in which the employees are employed, who will in this case forward this to the central management'. Of course in light of the ECJ cases, national law should be interpreted in a way that authorised employees or their representatives to ask their management for the necessary information for commencing negotiations. However, on this point the Portuguese legislation is not in conformity with the Recast Directive as it does not explicitly oblige the management to provide such information to workers.

All the other member states have implemented Art. 4.4 of the Recast Directive, often by means of reproducing its wording, without taking the opportunity to refine how this information should be given, in what form (what documents, data and so on), to whom and whether, for example, employee representatives have the right to request additional data or documents. For example, Belgium, Cyprus, Italy, Malta, Slovenia and Spain merely copied Art. 4.4.

With regard to identifying the party obliged to provide the information, in most countries the central management and the management of each undertaking belonging to a group of undertakings are identified as the entities in charge of obtaining and transmitting the information to workers and/or their representatives. Some countries, however, such as Denmark, designate central management as the only body responsible for obtaining and conveying the information. Such a limitation (omission of provisions imposing a similar duty on local managements) of the obligation to provide information is unjustified and has consequences for the practical effectiveness of the exercise of workers' rights. Therefore it cannot be considered a proper transposition.

The situation is even more complex regarding the definition of who is entitled to ask for and receive the information. As in other instances, many countries merely reproduce the wording of Art. 4.4 and indicate the '*parties concerned*' without further definition as those eligible to request this information from management. On one hand, it leaves this category open and thus, potentially, inclusive; however, at the same time such undefined terms decrease legal clarity and certainty. In this sense, the lack of definition of 'parties concerned' does not contribute to the clarity of the text for the national employees and workers' representatives who will claim its application and might even prevent them from pursuing their rights in court altogether. On the other hand, it is not sure that the interpretation of this category will be the same in every country, which exposes the Directive to incoherent application, which is a particularly acute problem in the case of *transnational* rights to information and consultation.

Those countries that have specified the 'parties concerned' have not transposed this provision in exactly the same manner. For most of them, the information can be requested by the employees of the group of undertakings and their representatives. Regrettably (and contrary to the spirit of Art. 5.2 (c) of the Recast Directive), no member state has explicitly granted trade union organisations – either national or European trade union federations – the right to request information from management. In some countries, such as Sweden and Denmark, only employees seem to be entitled to request the information. In others, only employees' representatives are mentioned, which seems far too restrictive and unjustified or unfounded by the Directive itself. Only in Luxembourg may employees receive the information directly if there are no employees' representatives. National legislation in Bulgaria and Poland seems not to have understood the meaning of Art. 4.4 at all. In these two countries, the special negotiating body is designated to receive the information concerning the structure of the undertaking or the group and its workforce, which contradicts the basic idea that information on workforce distribution and company operations is necessary *prior* to setting up of an SNB at the very early stage of considering preparation of a request for negotiations. The purpose of Art. 4.4 of the

Recast Directive is to find a solution to a practical problem raised in the course of applying the 1994 Directive. Experience has shown that it may be difficult to know whether an undertaking is covered by the Directive or not. Therefore Art. 4.4. allows '*the parties concerned*' to ask for information in order to analyse whether a group of undertakings within the meaning of the Directive exists. In that respect, requests for information and requests to initiate negotiations must be distinguished and differentiated by national law. At the point of making an enquiry about workforce distribution and company structure, the SNB has not yet been constituted. To restrict the right of information to the SNB is thus against the sequence of actions in practice as well as against logic and not in line with the Directive.

Regarding the extent of the information to be provided, despite the varying wording of the various legislations, all member states require the management of the undertakings of the Community-scale group to provide information on the structure of the undertaking or the group and its workforce. Only Lithuania specifies in more detail the obligation to provide information and extends the management's duty to deliver it in the form of a detailed list. Lithuania also specifies the procedure to be followed by the management. According to the Lithuanian law,

> 'at the request of employee representatives, the central management or any other level of management must, within 30 days, submit information on the structure of the European Union-scale undertaking or European Union-scale group of undertakings, the undertaking's legal status, the procedure for representation, information on employee representatives that will represent the employees of the undertakings or the undertakings controlled by them.'

The information shall be made available to employees' representatives free of charge and in writing. A delay of 60 days is also given where the central management is located in Lithuania and must answer a request from an undertaking outside Lithuania.

3. Role of the social partners

The Recast Directive for the first time in the history of EWCs recognises the role played, in practice, by EU-level trade union organisations,[5] which have often been indispensable actors in setting up EWCs. According to Recital 27 'Recognition must be given to the role that recognised trade union organisations can play in negotiating and renegotiating the constituent agreements of European Works Councils, providing support to employees' representatives who express a need for such support. In order to enable them to support workers in the establishment of new European Works Councils and promote best practice in course of negotiations, competent trade union and employers' organisations recognised as European social partners shall be informed of the commencement of negotiations.

5 Mainly sectoral, the so-called European trade union federations that have been providing extensive organisational, expert and practical support in the process of setting up EWCs, as well as throughout their operation.

With regard to eligible actors acknowledged by the Recast Directive it stipulates that 'Recognised competent European trade union and employers' organisations are those social partner organisations that are consulted by the Commission under Art. 154 of the Treaty. The list of those organisations is updated and published by the Commission' (Recital 27). Two provisions of the Recast Directive concretise the role of trade unions in setting up an EWC. First, Art. 5.2.c. provides that '[t]he central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations'. The information of both employers' and workers' organisations at the starting of new negotiations to establish EWCs has been introduced to improve the monitoring of the constitution of EWCs via the social partners, instead of an administrative registration mechanism. This information should also allow the social partners to promote the dissemination of the best practices they have identified to the parties starting negotiations to establish new EWCs (European Commission 2008). In order to achieve this objective and respect the spirit of the Directive it is obvious – but worth mentioning – that information about the commencement of negotiations should be provided prior to launch; otherwise, it will have a purely informative or symbolic value, but will be meaningless from the point of view of practice. Second, Art. 5.4. of the Recast Directive explicitly recognises that the experts, who can be freely chosen by the SNB to assist it during the negotiations, can be trade unions representatives from a competent recognised Community-level trade union organisation.[6] Central management cannot oppose the presence of experts as long as they have been invited by the SNB. Here again, the idea is that trade union experts can provide advice and guidance in the negotiations and contribute to the establishment of an EWC.

If we look at the national legislations transposing the Recast Directive at first it seems that transposition of Art. 5.4. did not raise any problems for the member states. Most member states have explicitly recognised the right of the SNB to call in experts, who can be representatives of a competent recognised European trade union organisation. Only Sweden and Norway do not make any reference to trade unions among the experts the SNB can choose. In Germany, trade union representatives are designated as possible experts, but the German law does not indicate that they could be European trade union representatives, although it does not seem to exclude the latter. The fact that national laws in any case offer the possibility for the SNB to choose the expert they want leaves it open for the SNB to opt for trade union experts. However, the aim of Art. 5.4 of the Recast Directive is also to give an incentive for the SNB to include European trade unions representatives in the negotiations, implicitly, for the sake of improving the right to information and consultation (Art. 1 of the Directive). This element is missing in these three countries.

In all the other member states, Art. 5.4 seems to have been correctly transposed; in other words, it has respected the minimum requirements of the Directive. Only

6 Art. 5(4) states that 'For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body'.

Table 8 **Right to information about company structure and the launch of negotiations**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
Austria	Central management	Competent European workers' and employers' organisations and the competent Austrian statutory body representing the interests of employees	Composition of the SNB and start of the negotiations (without delay)	As in the Directive
Belgium	Central management	Local managements and the competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations at the latest when the first meeting with the SNB is convened	As in the Directive
Bulgaria	SNB	Central management, management of the undertakings belonging to the group and competent European-level employees and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Cyprus	Not specified	Central and local managements, competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Czech Republic	Central management	Competent European workers and undertakings' organisations with which the European Commission discusses matters pursuant to Art. 154 of the TFEU	Composition of the SNB and start of the negotiations	As in the Directive
Denmark	Not specified	Central management, local management and the competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Estonia	SNB	Central management, the competent European workers' and employers' organisations (list is published by the EC), the undertaking whose employees are represented by the member	no	yes
Finland	SNB	Central and local managements, competent employee and employer organisations at European level	Composition of the SNB	Experts of its choice, for example representatives of competent employee organisations at European level

Table 8 **Right to information about company structure and the launch of negotiations (cont.)**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
France	Central management	Local management, employee and employer organisations consulted by the Commission	Composition of the SNB and start of the negotiations	Experts of its choice, among others the representatives of European employees' organisations consulted by the Commission
Germany	Central management	Competent European trade unions and employers' organisations	Composition of the SNB and start of the negotiations	Experts and trade union representatives
Greece	Not specified	Central and local managements, competent European workers' and employers' organisations	Composition of the SNB and start of the negotiations	As in the Directive
Hungary	Central management	Leaders of all undertakings of the group, representative organisations of employees and competent European organisations of employees and employers (e-mail addresses published on the website of the government)	Names, addresses of the members of the SNB, commencement of negotiations	As in the Directive
Ireland	SNB	Central and local management	Composition of the SNB and start of the negotiations, in writing as soon as possible	As in the Directive
Italy	Trade unions	Competent European workers and undertakings' organisations with which the European Commission discusses matters pursuant to Art. 154 of the TFEU	Composition of the SNB and start of the negotiations	As in the Directive
Latvia	SNB Central management (or SNB if agreement)	Central management Local management and relevant European employers' and workers' organisation	Composition (immediately)	As in the Directive
Lithuania	Employees' representatives Central management	Employees representatives	Name, surname of the member of the SNB, name of its undertaking, position and contact address Composition of SNB	As in the Directive
Luxembourg[7]	Not specified	Central and local management and relevant European employers' and workers' organisations	Composition of the SNB and start of negotiations	As in the Directive

7 Based on the draft Bill of 11 November 2011.

Table 8 **Right to information about company structure and the launch of negotiations (cont.)**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
Malta	– Ballot supervisor – Not specified	Central and local management and the competent European workers' and employers' organisations Central and local management and the competent European workers' and employers' organisations	Formal results of the process of nomination and ballots held to appoint the SNB, as soon as possible within the month after the composition of the SNB Start of the negotiations	As in the Directive
Netherlands	Central management	Authorised and recognised employee organisations at Community level, as provided for in Art. 154 of the Treaty	Composition of the SNB and start of negotiations	Experts of its choice including representatives of competent recognised Community-level trade union organisations (as provided for in Art. 154)
Norway	SNB	Central management	Composition of the board	No reference to trade unions
Poland	SNB Central management	Central management European workers' and employers' organisations which the European Commission consults under Art. 154	Elected members of SNB	Experts of its choice, including representatives of Community-level trade union organisations
Portugal	SNB	Competent European workers' and employers' organisations and central management which shall inform the local management	Composition	Experts of its choice, particularly representatives of corresponding workers' organisations recognised at Community level
Romania	Not specified Central management	Central management Local managements and competent European organisations of employees and employers which are consulted by the European Commission pursuant to Art. 154	Composition of SNB and start of the negotiations	Experts of its choice including representatives of competent recognised

Table 8 **Right to information about company structure and the launch of negotiations (cont.)**

	Who is to communicate the start of negotiations?	To whom?	Information	Experts
Romania (cont.)				(cont.) Community-level trade union organisations (as provided for in Art. 154)
Slovakia	SNB Central management	Central management and employers concerned Relevant European organisations of employees and employers which are consulted by the European Commission pursuant to Art. 154	Composition of the SNB Composition of the SNB and start of the negotiations	Experts including representatives of recognised European organisations of employees
Slovenia	SNB Central management	Central management	Name, addresses of the members of the SNB, their establishment, start of the negotiations	Expert of its choice including representatives of trade unions at member state level
Spain	SNB Central management and SNB	Central management Local managements and the competent European employees' and employers' organisation	Composition of SNB Composition of SNB and start of negotiations	As in the Directive
Sweden	Undertaking	Local undertakings and competent European employees' and employers' organisation	Composition of the SNB and when the negotiations are to be initiated	Experts of its choice
United Kingdom	SNB	Central and local management and the European social partner organisation	Composition of the SNB and the date they propose to start the negotiations	Experts of its choice which may include representatives of European trade union organisations

Source: Author's compilation, 2014.

one difference can be noticed among the countries. Most of them have just copied Art. 5.4, which makes reference to the 'representatives of competent recognised Community-level trade union organisations' without providing any more precision or detail on their characteristics. Only Romania and the Netherlands specify that those competent organisations are the ones consulted by the Commission under Art. 154 of the Treaty on the Functioning of the European Union.

The transposition of Art. 5.2.c has left more room to member states, particularly with regard to designation of the entity obliged to communicate to the competent European workers' and employers' organisations the composition of the SNB and the start of the negotiations. The origin of this interpretational freedom is the imprecise wording of Art. 5.2.c ('shall be informed of the composition of the special negotiating body and of the start of the negotiations'), which, by using a passive form, does not indicate precisely who should be responsible for providing this information to the specified addressees (nor when the information should be provided – before or after the launch of negotiations). One group of countries has merely reproduced – copy-pasted – the formulation of the Recast Directive (Cyprus, Denmark, Greece, Luxembourg, Malta, Romania). It could be questioned whether this can be qualified as proper transposition of the Directive and whether such transposition really meets the criterion of effectiveness with regard to the involvement of European organisations. Who is going to give this information when the national law does not clearly identify who shall be responsible for transmission? Against whom will the violation of this right be enforceable if no entities have been indicated by law? Of course, one might consider that if the information must be given to the central and local management and to the European organisation, only the SNB could give the information, but such an interpretation entails many practical problems, such as whether the means necessary to comply with this obligation are available to the SNB. In any case, clear identification of the entity responsible for the information in the Recast Directive would have contributed to better effectiveness of this provision. Under the current circumstances the responsibility is on national authorities to be specific and clarify the meaning of this provision so that it is usable in practice and not just an unclear legal provision.

In a second group of countries, it is the SNB that is made legally responsible for the transmission of the information to the management and to the competent European workers' and employers' organisations (Bulgaria, Estonia, Finland, Ireland, Norway, Portugal and the United Kingdom).

For a third group of countries, the information shall be provided by the central management (Austria, Belgium, the Czech Republic, France, Germany, Hungary and the Netherlands).

Finally, in the fourth group of countries a distinction is made depending on the information and/or the entity that will receive the information. For example, in Italy trade unions must inform the central management of the composition of the SNB and of the start of the negotiations and it is up to the central management to transfer this information further to European employees' and employers' organisations. In Latvia, the SNB must inform the central management of its composition immediately before its constitution. Then, the central management shall inform the local managements of the establishment and composition of the SNB and of the start of the negotiations. The central management shall also provide this information to the relevant European employers' and workers' organisations unless the central management and the SNB have agreed that the latter will provide it. Some similar, yet slightly differentiated configurations exist in Lithuania, Malta and Poland.

The transposition of Art. 5.2.c of the Recast Directive highlights some shortcomings and lacunas of the Recast Directive itself reflected in the above varying interpretations of this provision by national transposition laws. First, because the central management is responsible for the constitution of the SNB and it shall negotiate with it why should it then be the recipient of the information on the composition of the SNB and of the start of the negotiations? Second, the Article does not specify which competent European workers' and employers' organisations are to be informed. Only Recital 27 indicates that these organisations are those social partner organisations that are consulted by the Commission under Art. 154 of the Treaty. However, most countries merely reproduce Art. 5.2.c without giving any more indication of which organisations are at issue. In practical terms, the entity obliged to transmit the information could find it difficult to identify those to whom they should address the information[8] and, consequently, in respecting the *effet utile* and standard of the Directive. Some countries, such as the Czech Republic, the Netherlands, Poland, Romania and Slovakia, have transposed Recital 27. Finally, only Hungary mentions in the law that the minister responsible for employment policy shall publish the e-mail addresses to which the information must be provided on the official government website.

Finally, despite the fact that all the member states provide that the European social partners shall be informed of the composition of the SNB and of the start of the negotiations, only a few national laws provide for extended scope of information to be transferred and specify the timing of the information. For example in Estonia and Hungary, the names and contact details of the members of the SNB also have to be given. In Estonia and Slovenia, the information must include the name of workers' undertaking and their position. In Belgium, the information must be given at the latest when the first meeting with the SNB is convened, in Estonia, without delay and in Ireland, in writing and as soon as possible. In other member states it is unclear when and what content (detail) of information should be transmitted to the competent European social partners. Such an omission on the part of the member states goes against the requirement of effectiveness of European law and thus cannot be considered proper transposition of the Directive, both in principle and for practical reasons.

4. Agreements in force and the adaptation clause

Articles 13 and 14 of the Recast Directive deal with the so-called 'adaptation clause' which makes it possible to renegotiate existing agreements in case of significant structural changes in a company. As Recital 40 of the Preamble explains, this 'adaptation clause' was put in place in order to guarantee that in cases of merger, acquisition or division of a European-scale undertaking the existing European Works Council(s) could be adapted and continuity of operations ensured. Because restructuring is a permanent reality of multinational companies EWCs are constantly

8 Admittedly, more precision was provided in the Expert Report on transposition (European Commission 2010a: 10), which gave email addresses and websites. However, this document has no binding value and was drafted not for SNBs or management, but for national authorities responsible for transposing the directive. Therefore it cannot be considered a valid solution to the problem.

confronted with this phenomenon (ETUC and ETUI 2010). Therefore these provisions represent a very important improvement of the Recast Directive and, to achieve their full effectiveness, must be read together.

In the 1994 Directive one lacuna became rapidly apparent: the absence of any provisions to deal with the very frequent occurrence of a change in the structure of a Community undertaking or group of undertakings. Possible adaptations of the EWC caused by, for example, a change in the scope of operations of the undertaking was not foreseen. The new Recast Directive, on the other hand, obliges parties to EWC agreements to introduce a clause on that issue (Art. 6(2)(g)) in order to provide for a procedure for such a possibility. At the same time, in the absence of an agreement, a standard fall-back solution is envisaged: the central management shall initiate negotiations to reach a new agreement (Art. 13). Three cumulative conditions are to be met for Art. 13 to apply :

– a significant change in structure;
– absence or conflicting provisions in applicable agreements to carry out the required adaptation;
– an initiative of central management or a written request by 100 employees or their representatives from two members states establishing the need for it.

In this case, the central management shall initiate the negotiations and at least three members of the existing European Works Council or of each of the existing European Works Councils shall be members of the special negotiating body (SNB), in addition to the other members. Art. 13 of the Recast Directive adds that 'during the negotiations, the existing European Works Councils shall continue to operate in accordance with any arrangements adapted by agreement between the members of the EWC(s) and the central management'.

Concerning transposition of these amendments of the Recast Directive our analysis showed that all the member states concerned have reproduced Art. 13 of the Directive almost without modification. Only the Portuguese legislation does not seem to provide that during the negotiations, the existing European Works Councils shall continue to operate, which again cannot be qualified as proper transposition. Otherwise, the only difference among the legislations is that some countries define or give some examples of what 'significant changes' could mean. For example, in Austria, 'acquisition, closure, limitation or relocation of undertakings, or establishments and the merger with other groups of undertakings, undertakings or establishments shall be regarded as significant changes, provided that they have a significant influence on the overall structure of the undertaking or group of undertakings'. Some examples of significant changes could also be found in Bulgaria (takeover, merger, division of the activity, change of ownership), Germany (merging of undertakings or groups of undertakings, division of undertakings or groups of undertakings, the relocation of an undertaking or group of undertakings to another member state or to a third country, or the closure of establishments where such action may have an impact on the composition of the EWC), Hungary (merger, acquisition of dominant influence or division), Latvia (merger, division, transformation) and Slovakia (merger, division).

An important general observation concerning the transposition of the provision on significant structural change is that national legislation provides a few only slightly differing examples, but never a broader – that is, going beyond mergers, acquisitions and take-overs – encompassing or more precise definition. This is regrettable because the catalogue of forms of significant structural change in contemporary companies is much broader than the three examples mentioned in Recital 40 of the Directive. At the same time, one should not forget that Recital 40 is not a closed catalogue (the wording 'for example' is used; see also (Picard 2010a)) and therefore an expectation to provide more precision in course of transposition of the Directive in the member states is by all means reasonable and legitimate.

While the national transposition laws of Art. 13 reproduce the Directive mainly by copy-pasting its exact wording, analysis of implementation laws shows a more specific problem: reconciliation between Art. 13 and Art. 14 of the Directive.

Art. 14 of the Directive concerns application of the Recast Directive to agreements concluded before 5 June 2011, the date of the Directive's entry into force. According to Art. 14, the Recast Directive shall not apply to Community-scale undertakings or group of undertakings in which an agreement has been concluded under Art. 13 of 1994 Directive ('old Art. 13 agreements'), and to agreements concluded or revised between 5 June 2009 and 5 June 2011 ('interim agreements'). For the agreements concluded under Directive 1994 (between 22/09/1996 and 5/6/2009) and which have not been revised during the transposition period (from 5/06/2009 to 5/6/2011), the Recast Directive will govern the functioning of EWCs.

However, all agreements, whatever the date of their conclusion, must respect the adaptation clause.[9] Indeed, if Art. 14 stipulates that the obligations arising from the Recast Directive do not apply to interim agreements and old Art. 13 agreements, this is 'without prejudice to Art. 13'. According to this adaptation clause, the parties may be compelled to renegotiate their agreements. 'The adaptation clause is therefore likely to play a unifying role in the future. As the business environment is constantly changing, one can logically expect that old "Art. 13 agreements" will over time have to be renegotiated under the terms of the new EWC Directive, thereby unifying the applicable regimes to EWCs throughout Europe' (Picard 2010b). Moreover, one can also consider that the new definitions of information and consultation and transnationality also apply to every agreement establishing EWCs or an ICP.

It is obvious that the system defined by the Recast Directive is a complex one and the transposing national legislations are also complex. Many countries have more or less reproduced Art. 14 of the Directive, but only Austria has correctly embraced the logic and ensured the genuine effectiveness of Art. 14 by explicitly providing that the definitions of information, consultation and transnationality shall apply to all agreements concluded, irrespective of their date of conclusion. On the other hand, some countries seem not to have transposed Art. 14 (Bulgaria, Greece, Romania and Slovenia) at all and other member states do not seem to impose the application of the adaptation clause on agreements exempted from the application of the Recast

9 Art. 14 starts with the words 'Without prejudice to Article 13'.

Directive (Malta, Norway), which is contrary to the objective of the Directive. Generally speaking, the national laws on transitional provisions are complex and not easy to understand and they are likely to cause difficulties in practical application and interpretation. Therefore the European Commission needs to evaluate whether such patchwork and potentially problematic implementation of the Directive can be accepted as proper transposition.

5. Conclusions

If one classifies transposition of the Directive as the mere presence or reproduction of the original provisions in national law then it could be concluded that most of the member states have indeed implemented the provisions of the Recast Directive on the establishment and adaptation of a EWC. Of course, some small differences can be found between the European text and the national texts and sometimes the national legislation seems not to conform to the Directive. This is the case, for example, with regard to the Portuguese legislation, which does not explicitly implement Art. 4.4. In most instances, any differences could be resolved by an interpretation of the national text in light of the Directive.

Nevertheless, even if applying only the criterion of the presence or absence of provisions the implementation of the Recast Directive into national systems also highlights some of its defects or lacunae. For example, although the Directive provides that the competent European workers' and employers' organisations shall be informed of the composition of the SNB and of the start of negotiations, it does not specify who should be responsible for providing the information. Many member states have merely reproduced the Directive without clarifying this point. Very often, member states have preferred to copy the text of the Recast Directive, complete with its uncertainties. While it can be justified that the Recast Directive remained general on some points in order not to be too prescriptive and intrude into national legal systems and traditions the same explanation cannot be applied to the implementation laws at national level. The copy-paste approach quite common among the member states in this area has the potential to weaken or impair altogether the effectiveness of the Recast Directive, especially when workers and their representatives are not aware of the European legislation.

3

Transposition of provisions of the Recast Directive on the functioning of the European Works Council

Jan Cremers and Pascale Lorber

1. Introduction

The need to improve the functioning of European information and consultation procedures has increased as a consequence of the strengthening of the Internal Market with its economic freedoms, globalisation and the impact of increased cross-border and transnational economic activities. The protection of workers' rights requires a more effective transnational voice through information and consultation to counterbalance economic and managerial power and to match global(ised) corporate strategies and decision-making structures. In the preparations for the revision of the Directive, the possibilities for ameliorating the functioning of EWCs have been collected and listed on the basis of experiences of the past 15 years (Jagodzinski 2008; Jagodzinski 2009a). The conditions for improving the functioning of EWCs have been analysed in the recent past at company, national and European level in numerous publications.[1] The European Commission, the European Parliament,[2] the European trade union federations and the European Trade Union Confederation (ETUC), as well as – last but not least – EWC members themselves have formulated numerous suggestions, proposals and demands[3] based on research results and practical experience that address the issue of improving EWC functioning.[4] The

1 A good overview with policy-relevant conclusions is the 'ETUI Memorandum on EWCs', a research-based contribution for policy-makers on the eve of the Recast Directive (Jagodzinski, Kluge and Waddington 2009).
2 European Parliament report of 16 July 2001, rapporteur: Mr Menrad (A5-0282/2001 final).
3 Some EWCs even wrote letters to the European Commission to inform law-makers about practical problems and needs for the reform of the directive (for example, the EWCs at Heineken, E.ON, Veolia, Delphi, Novartis and others) source: ETUI database of EWCs http://www.ewcdb.eu/search_results_any_documents.php).
4 See, for example, the European Parliament resolution on the Commission report on the application of the Directive on the establishment of a European works council or a procedure in Community-scale (*cont. next page*)

aforementioned research[5] has demonstrated that proper functioning of EWCs requires that the relevant procedures be based on:

– the principle of information and consultation at a time and with a content that allow EWC members to make an in-depth assessment so that they can formulate an opinion on the envisaged measures;
– the general broadening of assistance and resources, including more regular and frequent meetings and the right to extraordinary meetings and follow-up, as well as improvements with regard to the operations of select committees within EWCs, access to experts (and expert analyses), training and access to modern means of communication (including translation and interpreting services)

The aim of this chapter is to list selected broader legal provisions and key conditions that can contribute to an improved environment for EWC work and thus stimulate improved functioning of this European body (*sine qua non* conditions), although an analysis of several of these broader concepts is not the core aim of this contribution. First, there is evidence that company leadership culture and attitudes condition 'condition the organisation of works councils activity and its effectiveness (van den Bergh, A., Grift and van Witteloostuijn 2008; Jirjahn and Smith 2006). A management that is favourable and committed to dialogue and co-decision, relates the future prospects of the company to workers' well-being and approves of the involvement of works council members is likely to have an effective and thriving EWC (Whittall, Knudsen and Huijgen 2007; Struck 2011; Vitols S. 2003; Wills J. 1999; Nakano S. 1999). By contrast, a management that does not welcome or accept employee participation is more likely simply to follow the letter of the law and not engage fully with the spirit of the legislation. Based on the abovementioned assessment and casework a list of positive incentives or conditions for improved dialogue between management and works council can be formulated. A clear, open-minded and positive vision of the role and position of co-decision and information/consultation procedures inside the company is a crucial condition for success for management and workers. With such pre-conditions met both partners can profit from transparently and mutually expressed expectations. An EWC and thus workers benefit from clear-cut agreements on facilities and provisions to assist with information and consultation, provided they are combined with a real commitment to and investment by management in the process. Consultation flourishes also by mutual respect and trust and, last but not least, partners must respect the arrangements and values expressed in the EWC agreement.

In private contractual arrangements it is primarily the parties involved that shape the relationships. However, the legislator has a crucial role in creating a favourable environment and providing for minimum standards.[6] Transparent legislation can help with legal certainty, diminishing the potential for conflict and, consequently,

4 (*cont. from previous page*) undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Council Directive 94/45/EC of 22 September 1994), point 2.

5 For instance, in the period 2003–2006 a series of case studies in nine countries were carried out by Eurofound. The reports focused on the relationship of the employee representatives and management involved in an EWC and the influence of external relationships on EWC functioning and identified factors likely to favour or obstruct EWC development: http://www.eurofound.europa.eu/areas/participationatwork/ewccasestudies.htm; see also the EWC Memorandum COM(2008) 419.

6 Those minimum legal standards ensure what is referred to as 'bargaining in the shadow of (*cont. next page*)

the need for resorting to the courts. It is important to emphasise that resolving disputes about consultation in court will not help to construct effective social dialogue at company level. For the revision of the EWC Directive 94/45/EC the aim of improving conditions for EWC work required the formulation of principles:

– to remedy the lack of legal certainty, to clarify the rules and to eliminate loopholes and inconsistencies;
– to build a more consistent frame for information and consultation procedures;
– to ensure increased compliance and more effectiveness;
– to improve facilities and assistance.[7]

Analysis of the legal conditions for better functioning can be undertaken in both a narrow and a broad sense. Assessing EWC functioning in the narrow sense means looking at (possible) changes related to facilities available to EWCs, such as frequency of meetings or training. A broad assessment of the functioning of the EWC, on the other hand, considers, for instance, the efficacy of the new definitions of information and consultation in conjunction with the (improved) execution of rights and more adequate working methods. These aspects rely directly on other parts of the Directive beyond the technical regulations on available facilities. In this chapter, both approaches are used, first by looking in a very general way at whether the national transpositions provide for an improved 'climate' for EWC work; and second, by assessing facilities that have been created or provided to EWCs as a result of national implementation of the Recast Directive. The following parts of the Recast Directive are directly relevant to the functioning of EWCs:

– extended competences;
– facilities that ease the functioning of EWCs;
– enforcement and sanctions.

Although several of these aspects are also referred to in other chapters,[8] we must also discuss them in the context of this chapter. In Section 2 'Extended consequences' the 'functional' parts of the Directive related to improved competences are analysed. Section 3 concerns resources and facilities that directly or indirectly serve the functioning of the EWC. Because of its complexity and importance the question of effective enforcement of 'functional' rights is discussed separately in Chapter 4 (see below). In the final section, an attempt is made to draw preliminary conclusions.

2. Extended competences

The aim of the Directive with regard to improving competences is iterated in a number of parts, such as Art. 1 (objectives), Art. 2 (definition of information and

6 (*cont. from previous page)* the law' (Bercusson 1996b: 538–552) which, as further research has shown, perform as trend-setters for the negotiated agreements (ETUC and ETUI 2014: 98).
7 As broadly stated in the European Commission Communication opening the second stage of consultations: 'Consultation of the European social partners on the revision of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees'.
8 In particular, Chapter 4 (Enforcement Issues).

consultation) and Art. 10 (role of employee representatives). In general, the aim of improving functioning can be derived from Recital 7 of the Recast Directive:

> 'It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees' transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked.'

Table 9 suggests that laws transposing the Recast Directive barely mention the aim of the revision concerning EWCs' competence and functioning; only six countries

Table 9 **Implementation of Recital 7 of the Recast Directive 2009/38/EC across the member states**

Country	Recital 7 of the Recast Directive implemented
Austria	No
Belgium	Yes. Transposition based on collective agreement that opens with a complete and literal adoption of Recital 7.
Bulgaria	No
Cyprus	No
Czech Republic	No
Denmark	No
Estonia	No
Finland	No
France	No
Germany	No
Greece	The Greek Law of March 2012 is not available in English at the time of writing.
Hungary	Reference is made to Recital 7 where the transposed law says that EWCs shall be established 'in order to strengthen the right to information and consultation of employees of Community-scale undertakings and Community-scale groups of undertakings' (Art. 1(1) of Act XXI of 2003 modified by Act CV of 2011).
Iceland (EEA)	No transposing measure available.
Ireland	The purpose of the law is to transpose the Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, which is intended to improve the right to information and consultation of employees in Community-scale undertakings.[9]

9 As stated in the Explanatory Note added to S.I. No. 380 of 2011 European Communities (Transnational information and consultation of employees act 1996) (Amendment) Regulations 2011.

Table 9 **Implementation of Recital 7 of the Recast Directive 2009/38/EC across the member states (cont.)**

Country	Recital 7 of the Recast Directive implemented
Italy	Parties (the social partners[10]) acknowledge that the sharing of information and consultation which take place within the EWC are a good way of promptly addressing adaptation to new conditions imposed by the globalisation of the economy, because they foster a climate of reciprocal trust and respect between company and employees. Ultimately, the EWC can help in making valuable comparisons between different industrial practices in EU countries, reinforcing the development of a shared approach to the challenges faced by undertakings and employees in the ever faster and more intense process of internationalisation.
Latvia	No, but Section 2 of the transposing measure[11] indicates that the purpose of the Law is to ensure the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings.
Liechtenstein (EEA)	Reference in the preamble to 'the aim to guarantee the effectiveness of transnational information and consultation of workers'.
Lithuania	The purpose of the Law is to ensure the right to be heard, as well as the right to information and consultation of employees in a European Union-scale undertaking or a European Union-scale group of undertakings.[12]
Luxembourg	No[13]
Malta	The purpose of these regulations is to improve the right to information and consultation of employees in Community-scale undertakings (...) where requested in the manner laid down in regulation 5 and to implement the provisions of EU Directive 2009/38/EC.[14]
Netherlands	No. The explanatory memorandum of the national transposition underlines the important communication function of the EWC for the company management. Workers' involvement is necessary in decision-making processes as it can increase commitment. Consultation contributes to 'social cohesion'.
Norway (EEA)	The objective is to improve the right to information and to consultation of employees in undertakings and groups operating within the EEA and by so doing to continue in these undertakings the good cooperation which has been developed in a range of agreements and in practice in Norwegian working life.
Poland	No
Portugal	No
Romania	No

10 In Italy the Recast Directive was transposed by means of/on the basis of a Joint Declaration [of the social partners] in favour of implementation of Directive 2009/38/EC of 6 May 2009.
11 Law on informing and consulting employees of Community-scale undertakings and Community-scale groups of undertakings of 19.05.2011 ("LV", 82 (4480), 27.05.2011.) [entered into force on 06.06.2011].
12 Law amending the law of the republic of Lithuania on European works councils, 22 June 2011, No XI-1507.
13 Based on draft legislation Projet de loi portant modification du Titre III du Livre IV du Code du Travail of 29/11/2011.
14 Art. 1.2 of the Employment and Industrial Relations Act (CAP. 452), L.N. 217 of 2011.

Table 9 **Implementation of Recital 7 of the Recast Directive 2009/38/EC across the member states (cont.)**

Country	Recital 7 of the Recast Directive implemented
Slovak Republic	No
Slovenia	The purpose of the Act is to improve the right of employees to information and consultation in undertakings and groups of undertakings established in the member states. Art. 1.[15]
Spain	The central thread of this review is the enhancement and consolidation of the objectives of employee information and consultation in Community-scale undertakings and groups of undertakings so as to make those processes real and effective, with a view to creating scenarios in which fruitful and mutually rewarding channels for dialogue are established between undertakings and employees.
Sweden	The procedure for informing and consulting employees shall be fit for purpose (Section 1[16]). The Community-scale undertaking or the controlling undertaking in a Community-scale group of undertakings shall actively take steps for the establishment of a EWC or the introduction of another employee information and consultation procedure (Section 17).
United Kingdom	No

Source: Authors' compilation, 2014.

(Belgium, Hungary, Lithuania, Slovenia, Sweden and Spain) make explicit reference to Recital 7 of the Recast Directive. In some other countries (Norway, Liechtenstein) there is a general reference to improved functioning. The aspiration or spirit of the Recast Directive may thus not be fully ensured or realised across the EU.

For the European legislator it seems clear that better functioning is directly related to *allocated competences and applicable scope*. Recital 11 of the Recast Directive stipulates that 'Procedures for informing and consulting employees as embodied in legislation or practice in the member states are often not geared to the transnational structure of the entity which takes the decisions affecting those employees.' Recital 12 further clarifies this by stating that 'Appropriate provisions must be adopted to ensure that the employees of Community-scale undertakings or Community-scale groups of undertakings are properly informed and consulted.' Recital 14 adds to this notion that '[t]he arrangements for informing and consulting employees need to be defined and implemented in such a way as to ensure their effectiveness (…)', while Recital 15 makes clear that information and consultation should take place at the relevant level of management and representation. Finally, Recital 16 further defines the notion of transnationality in terms of potential effects and scope of action.

In the Recast Directive the overall goal is formulated in Art. 1, which says that the arrangements for informing and consulting employees shall be defined and imple-

15 European Works Councils Act (ZESD-1).
16 Act (2011:427) on European Works Councils.

mented in such a way as to ensure their effectiveness (1.2) and that information and consultation of employees must occur at the relevant level of management and representation (1.3). The national transpositions of Articles 1(2) and the application of the definition of transnationality are discussed in Chapters 1 and 2.

Directly related to the clarification of competences is of course *improving the existing definitions of information and consultation*. This is formulated in Recital 14 where the need for informing and consulting in a timely fashion is introduced, and made operational in Art. 2 of the Directive. Art. 2.f articulates that information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking. In some countries, this has led to the adoption of provisions offering practical guidance with regard to the annual report and the documentation to be provided by management to EWC and its members (see Table 10). Art. 2.g adds that consultation should lead to a dialogue at such time, in such fashion and with such content as to enable employees' representatives to express an opinion on the basis of the information provided about the proposed measures.

Table 10 **Improved definitions of information and consultation in selected countries (sample)**[17]

Country	Improved definitions
Belgium	Arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness. Only dialogue at the level where decisions are prepared and effective involvement of employees' representatives make it possible to anticipate and manage change.
Netherlands	Effective functioning requires more than written information; consultation has to take place through dialogue.
Portugal	For its annual meeting with the EWC, the central management must present a detailed and documented annual report on the progress of the business. The annual meeting shall be held one month after this report has been received.
Slovenia	A written agreement that regulates the information and consultation procedure for employees shall stipulate the conditions under which employees' representatives have the right to be consulted on information received and the procedure for considering their proposals or problems together with the central management or any more appropriate level of management.
Spain	The central thread of the review is the enhancement and consolidation of the objectives of employee information and consultation in order to make those processes real and effective, with a view to creating scenarios in which fruitful and mutually rewarding channels for dialogue are established between undertakings and employees.

Source: Authors' compilation, 2014.

17 A table showing how Art. 2 has been transposed in all member states is found in Chapter 2.

Table 10 provides examples of good practice where the legislator has gone beyond the bare minimum requirements of the Directive to influence management, either by considering the spirit of the Directive (in Belgium for example, the process of information and consultation is particularly effective), or by calling for practical steps towards increasing dialogue and meaningful consultation (by requiring the provision of annual reports in Portugal).

Improved functioning of EWCs is ultimately, of course, related to the *content of the received information and to (possible) limits on its utilisation*. As hinted in the previous paragraph, consultation is enhanced significantly if workers' representatives are provided with full and relevant information, ideally presented in a format that is understandable to the recipients. In the EWC Directives this (was and) is settled in two ways. First, a relatively open Art. 9 (of both the original 94/45/EC and the 2009 Recast Directives) prescribes that central management and the European Works Council shall work in a spirit of cooperation. Second, Art. 8 of both directives allows the management to withdraw information completely or to demand that EWC members not disclose it if it is deemed confidential. The exemption from providing information applies when its nature is such that, according to objective criteria, it would seriously harm the functioning of the undertaking. Table 11 provides selected

Table 11 **Examples of national provisions on confidential information**

Country	Examples
Czech Republic	Besides EWC representatives, members of the competent trade union organisation and representatives dealing with the protection of health and safety in the workplace shall also be obliged to withhold information expressly provided to them in confidence.
Cyprus	Members of EWCs and managements 'shall jointly decide on the issues covered by confidentiality and data information to be disclosed to third parties'.
France	The transposition exempts the management of a Community-scale undertaking or of the controlling undertaking in a business group that launches a takeover of another undertaking from the duty to refer the matter to the EWC or employee representatives as part of an information and consultation procedure prior to the launch of such a bid.
Slovenia	Confidentiality shall not apply to contacts with other EWC members and to contacts with employees' representatives in establishments or undertakings in the EU member states if these persons have to be informed of the content of information and the results of consultations under the agreement.[18]
Sweden	The EWC shall inform representatives of the employees in the Community-scale undertaking or group of undertakings of the content and outcome of the information and consultation procedure, with any restrictions that may arise from the fact that the employee representatives are subject to a duty of confidentiality. Notwithstanding the duty of confidentiality, it is permitted to transmit such information to other employee representatives or experts in the same body.

Source: Authors' compilation, 2014.

18 Similar regulations are available in Croatia, Germany, Ireland, Sweden and Slovenia.

examples of national legislation that have transposed the confidentiality article, thus restricting the information that can be provided to EWC members.

More practical guidance on the content of information and the subject matter of consultation is given in the Subsidiary Requirements (1.a) of the Recast Directive:

> 'The information of the European Works Council shall relate in particular to the structure, economic and financial situation, probable development and production and sales of the Community-scale undertaking or group of undertakings. The information and consultation of the European Works Council shall relate in particular to the situation and probable trend of employment, investments, and substantial changes concerning organisation, introduction of new working methods or production processes, transfers of production, mergers, cut-backs or closures of undertakings, establishments or important parts thereof, and collective redundancies.
>
> The consultation shall be conducted in such a way that the employees' representatives can meet with the central management and obtain a response, and the reasons for that response, to any opinion they might express.'

In several countries (such as Austria, Belgium, Bulgaria[19] and the Netherlands) aspects of Part 1.a related to obtaining a reasoned response from the management to opinions expressed by the EWC on the Subsidiary Requirements are introduced in the core body of the law, that is, they are applicable to all EWCs (and not only to those set up on the basis of Subsidiary Requirements), while in the remaining majority of countries the right to obtain such a reply from management is not provided for by law.

3. Resources and facilities necessary for the functioning of the EWC

The most concrete provisions concerning facilities necessary for the functioning of EWCs are contained in Articles 6 and 10 of Recast Directive 2009/38/EC. Art. 6 regulates the terms for the functioning of the European Works Council: negotiations '*in a spirit of cooperation*' should lead to *an agreement on detailed arrangements* for implementing information and consultation rights. The agreement determines the coverage of the undertaking(s), the composition of the EWC, functions and procedures, meeting facilities and frequency, the circumstances in which the employees' representatives meet to discuss the information conveyed to them, the possibility to set up a select committee and financial and material resources. Most specific with regard to facilities and resources is Annex 1. However, a substantial part of these practicalities that can be derived from the Subsidiary Requirements are not mandatory in the case of negotiated agreements. Therefore it is necessary to differentiate between mandatory rules for negotiated agreements (as formulated in Art. 6) and the minimum requirements for compulsory agreements (where Annex

19 Employee representatives are entitled to request meetings with the employer whenever they have to advise the employer of issues or matters raised by employees (Labour Code Art. 7c).

1 applies). We found that this demarcation is not always clear (for example, in the Czech Republic, see Table 12). Concerning the content of agreements most transposed legal acts follow the listing in Art. 6 of the Recast Directive. However, some countries have added provisions, such as arrangements on the chairing of meetings, term of office, involvement of health and safety representatives and follow-up meetings (for example, Latvia, the Netherlands and Poland, to name a few).

Other novelties contained in the Recast Directive with regard to facilities listed in Art. 6 include: the need for balanced representation in the composition of the EWC (Art. 6(2)(b)); the inclusion of a provision on how national and transnational information will be linked (Art. 6(2)(c))[20]; the composition of select committees (Art. 6(2)(e) and Recital 30)[21]; and the inclusion of an adaptation clause for when the structure of the group changes (Art. 6(2)(g) and Recital 28).[22]

3.1 Balanced representation of different categories of employees, select committee and the right to a reasoned response

The need to ensure a balanced representation of different categories of employee (Recital 20) is not just a formal requirement to satisfy 'political correctness' (especially with regard to representation of women), but encompasses an obligation to attempt to compose EWCs in such a way as to reflect the complex composition of the workforce (if possible), thus giving employees' groups an equal voice (whether men or woman, blue-collar or white-collar).[23] With regard to provisions on *select committees*, this possibility was introduced in Recital 30 of the Recast Directive in order to promote improved coordination and greater effectiveness of regular EWC activities, especially in exceptional circumstances. According to Recital 44, the select committee (if elected) must have up to five members and be able to consult regularly. However, this is not a requirement as the Directive refers only to the setting up of a select committee *if necessary*. It is therefore optional for the negotiating parties. In the case of compulsorily established EWCs, the subsidiary requirements prescribe the obligatory establishment of a select committee (Annex para 1.d) in order to coordinate EWC activities.

In the subsidiary requirements, a reasoned response can be required from central management (para 1(a)) and the circumstances in which the select committee can be involved have been extended to decisions and not only exceptional circumstances (para 1(d) and para 3).

Table 12 focusses on transposition of the need for balanced representation and the creation of a select committee when negotiating the EWC via Art. 6. Table 12 also presents the changes introduced to national subsidiary requirements providing for the right to give a reasoned response by the management following the implementation of the Recast Directive.

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20 This aspect is dealt with in Chapter 1 by Sylvaine Laulom and Filip Dorssemont.
21 Considered below.
22 This aspect is dealt with in Chapter 2 by Sylvaine Laulom.
23 S. Picard, European Works Councils: a trade union guide to Directive 2009/38/EC (report 114, ETUI 2010) p. 86.

Table 12 **Transposition (from Art. 6) of the requirement to provide balanced representation in the EWC and to create a select committee, if necessary**

Country	Balanced representation in the EWC	Creation of a select committee
Austria	Yes	Yes (optional)
Belgium	Yes	Yes (optional)
Bulgaria	Yes	Yes (called a 'standing committee' and optional)
Cyprus	Yes	Yes (compulsory)
Czech Republic	No	No (a smaller committee is envisaged but it is unclear whether it is under Art. 6 or subsidiary requirements)
Denmark	Yes	Yes (called an 'executive committee' and optional)
Estonia	Yes	Yes (optional)
Finland	Yes	Yes (called an 'executive committee' and compulsory)
France	Yes	Yes (called the 'board' of the EWC and optional)
Germany	Yes	Yes (compulsory and detailed procedure: a committee of its members to conduct ongoing business. The Committee shall comprise the chairperson and at least two, but no more than four, other members to be elected. The other members of the Committee shall be employed in different member states)
Greece	Not available[24]	Not available
Hungary	Yes	Yes (managing committee and optional)
Iceland	Transposition not available	Transposition not available
Ireland	Yes	Yes (optional)
Italy	Yes	Yes (optional)
Latvia	Yes	Yes (optional)
Liechtenstein	Yes	Yes (committee of the EWC which is compulsory)
Lithuania	Yes	Yes (committee of the EWC which is compulsory)
Luxembourg	Not available	Not available
Malta	Not available in English	Not available in English
Netherlands	Yes	Yes (optional)
Norway	No	Yes (special committee and optional)
Poland	Yes	Yes (presidium and optional)
Portugal	Yes	Yes (optional)
Romania	Yes	Yes (optional)
Slovakia	Yes	Yes (optional)
Slovenia	Yes	Yes (optional)
Spain	Yes	Yes (optional)
Sweden	Yes	Yes (optional)
United Kingdom	Yes	Yes (optional)

Source: Authors' compilation, 2014.

24 At the time of writing the Greek transposition law was available only in Greek.

Most countries have literally copied the exact wording of the new requirements from the Recast Directive into their national legislation. A request for the establishment of a select committee, as in the Directive, is mainly optional across all member states, but it is often given a different title or wording. Only in Cyprus, Finland, Germany, Liechtenstein and Lithuania did the national legislator request that the SNB and management include provisions installing a select committee in their agreements. The German model is the most elaborate, reflecting the extensive, well-regulated national legal tradition in the matter of workers' rights. The common copying of the select committee requirement is to some extent welcome, as the positive role of select committees has been established when it comes to coordinating activities between EWC meetings.[25] However, such legal practice by the national legislator again highlights the problem with verbatim reproduction of the wording of the Directive and raises questions concerning the clarity and effectiveness of such generally phrased provisions.

Table 13 **Transposition (from subsidiary requirements) of the requirements to give a reasoned response and to extended information and consultation with regard to decisions that affect the employees to a considerable extent**

Country	Reasoned response	Decisions that affect employees' interests to a considerable extent
Austria	Yes, but general definition of consultation, not only subsidiary requirement	No
Belgium	Yes	Yes
Bulgaria	Yes[26]	No
Cyprus	Yes	Yes
Czech Republic	No	Yes
Denmark	Yes	Yes
Estonia	Yes, but general definition of consultation, not only subsidiary requirement	Yes
Finland	Yes	Yes
France	Yes	Yes
Germany	Yes, but general definition of consultation, not only subsidiary requirement	Yes
Greece	Not available	Not available
Hungary	Yes	No
Iceland	Not available	Not available
Ireland	Yes	Yes
Italy	Yes	Yes
Latvia	Yes	Yes
Lithuania	Yes but applicable to all consultations	No

25 S. Picard, European Works Councils: a trade union guide to Directive 2009/38/EC (report 114, ETUI 2010) p. 90.

26 Employee representatives are entitled to request meetings with the employer whenever they have to advise the employer of issues or matters raised by employees (Labour Code Art. 7c); this right includes the possibility to visit company premises/sites.

Table 13 **Transposition (from subsidiary requirements) of the requirements to give a reasoned response and to extended information and consultation with regard to decisions that affect the employees to a considerable extent (cont.)**

Country	Reasoned response	Decisions that affect employees' interests to a considerable extent
Luxembourg	Yes[27]	At least in case of questions affecting the interests of workers to a considerable extent.
Malta	Yes	No
Netherlands	Yes	Yes
Norway	No	No
Poland	Yes	No
Portugal	No	No
Romania	Yes	Yes
Slovakia	Yes	Yes
Slovenia	Yes	Yes
Spain	Yes	Yes
Sweden	Yes ('reasoned answer')	No
United Kingdom	Yes	No

Source: Authors' compilation, 2014.

The above discussed changes were introduced to increase the effectiveness of EWCs and of the process of consultation. The role of the select committee in dealing with exceptional circumstances and decisions was also regarded as a significant element in that respect.[28] In terms of general observations concerning the transposition of the relevant provisions, on the positive side we note that most national acts have transposed the requirement to provide EWCs with a reasoned answer to opinions expressed by the EWC, with the added advantage that some countries have generally applied this obligation to all consultation processes (including those taking place based on negotiated agreements) and not only to those based on the subsidiary requirements. Regrettably, with regard to provisions concerning exceptional circumstances a number of national jurisdictions seem to have omitted the word 'decisions' from the transposition despite the fact that it was considered that such an addition would ensure better workers' rights by anticipating changes. It is therefore disappointing that the new word was not added.

4. Role and protection of employees' representatives and the right to training

Art. 10 of the 2009/38/EC directive on the 'Role and protection of employees' representatives' is innovative because it emphasises the role that should be attributed to employee representatives to render the EWC more effective. While the original

27 Based on draft legislation Projet de loi portant modification du Titre III du Livre IV du Code du Travail of 29/11/2011.

28 Group of Experts Report Implementation of Recast Directive 2009/38/EC on European Works Councils, December 2010, p. 36.

Directive 95/45 already provided employee representatives with protection when exercising their functions, there was a lack of positive engagement to give EWC members the means to fulfil their roles. This has been remedied by a general provision in Art. 10(1) which states that 'the members of the EWC shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees (…)'. Further, in order to fulfil their functions fully, the SNB or EWC members are entitled to training without loss of pay under Art. 10(4).

The final requirement of training was included to increase the effectiveness of EWCs and the information and consultation rights. The rationale is quite obvious: better trained representatives are able to contribute more constructively to transnational dialogue and are not impaired by communication or knowledge issues. It has been made clear that management should bear the cost of training (European Commission 2010a). The ETUC representing the demands of European trade union federations also argued that training should not only cover language courses, but should extend also to any relevant programme that can help representatives to perform their functions effectively (Picard 2010a).

The inserting of 'means' and 'collective representation' in the Recast Directive has its origin in the difficulties experienced by EWCs in taking legal action, especially when members of the EWC included management. The different national positions and the lack of provisions in the original Directive had led to legal uncertainty. Art. 10(1) is therefore an effort to clarify the situation, giving the EWC legal standing to take action in case of infringement of the rules.[29] The question was subsequently whether means could include financial means and could refer to the possibility for the EWC to take legal action (on behalf of the employees). It should also include the availability of financial resources for the EWC in order to take such legal action. This aspect is developed in Chapter 4.

The subsidiary requirements (Art. 7) of the original EWC Directive 94/45/EC already included rules on means, in particular those of a financial nature, which have been replicated in Art. 6 of the Recast Directive stipulating that the operating expenses of the European Works Council (and of the SNB, Art. 5.6) shall be borne by the central management (according to Art. 7). Moreover, reference is made to resources necessary for the EWC members to perform their duties.

Table 14 looks at the transposition in national law of the requirement to provide EWCs with the necessary resources, including the means to represent workers collectively and training without loss of pay. Another issue is whether there are provisions on costs being borne by management.

The study of national transposition laws in this area shows, first, that all countries have introduced provisions requiring management to pay for the operation of the SNB or the EWC. Furthermore, all countries now allow employee representatives to have training without loss of pay. Nevertheless, problems with the right to training persist in some member states. A case in point may be Hungary, where the right to

29 Group of Experts Report Implementation of Recast Directive 2009/38/EC on European Works Councils, December 2010, p. 37.

Table 14 **Means provided to EWC and their members**

Country	Means to represent collectively the interests of the employees	Right to training without loss of wages	Costs of operation (EWC and SNB) born by management
Austria	No	Yes	Yes
Belgium	Yes (means are granted to EWC members and employee representatives)	Yes	Yes
Bulgaria	No	Yes[30]	Yes[31]
Cyprus	Yes	–	Yes
Czech Republic	Yes	Yes	Data not available
Denmark	No	Yes	Yes
Estonia	Yes	Yes	Yes
Finland	Yes	Yes	Yes
France	No	Yes	Yes
Germany	No	Yes	Yes
Greece	No	No	No
Hungary	Yes	Yes	Yes
Iceland	Not available	Not available	Not available
Ireland	Yes	Yes	Yes
Italy	Yes	Yes	Yes
Latvia	No	Yes	Yes
Lithuania	No	Yes (?)[32]	Yes
Luxembourg	No	Yes	Yes[33]
Malta	Yes	Yes	Yes
Netherlands	They shall be provided with such facilities as they reasonably require for the performance of their duties	Yes	Yes
Norway	No	Yes	Yes
Poland	No	Yes	Yes

30 Art. 11, para 9 of Decree 55 (Act amending the Act on informing and consulting employees in multinational undertakings, groups of undertakings and European companies) states 'Where necessary for the exercise of their representative duties in an international environment, the members of the European works council or standing committee shall be provided with training. The cost of the training may not be deducted from their wages'.

31 Art. 8 (2) 5 of the Law on Information and Consultation with Employees of Multinational (Community-Scale) Undertakings, Groups of Undertakings and Companies of 2006 concerning the operation of EWCs ensures full coverage of the operation costs, yet it is unclear whether the same applies to SNBs because Art. 7 Section 4 seems to limit facilities for the latter to training and communication.

32 The Lithuanian transposition law speaks of 'training opportunities' rather than 'training': Lithuania: 'Article 13. Protection of the rights and guarantees of employees' representatives. 1. Members of the European Works Council or of the committee of the European Works Council, as well as members of the special negotiating committee (...) shall be provided with training opportunities where required by their representation duties, while retaining their job and average wage.'

33 Based on the Projet de loi portant modification du Titre III du Livre IV du Code du Travail of 29/11/2011.

Table 14 **Means provided to EWC and their members (cont.)**

Country	Means to represent collectively the interests of the employees	Right to training without loss of wages	Costs of operation (EWC and SNB) born by management
Portugal	Yes (the special negotiating body, the European Works Council, the select committee and the employees' representatives in the context of the information and consultation procedure shall have a right to the material and technical resources needed to perform their duties)	Yes	Yes
Romania	Yes	Yes	Yes
Slovakia	Yes (resources made available for the performance of their role in the collective representation of the interests of employees)	Yes	Yes
Slovenia	Yes	Yes	Yes
Spain	Yes	Yes	Yes
Sweden	No	Yes	Yes
United Kingdom	Yes	Yes	Yes

Source: Authors' compilation, 2014.

training was (admittedly, possibly in the legislator's attempt to provide more clarity) limited to a closed list of topics, by defining that 'training that aims at providing knowledge required for the fulfilment of needs relating to practical requirements of the EWC activity, including communication and foreign language skills, and for the understanding of the legal and labour background, international structure and strategy of the Community-scale undertaking (...)' (Art. 68(2) of the transposition act). It seems to exclude training on, for example, financial aspects of company operations, restructuring, outsourcing and so on, that might be relevant for EWC operations. Another issue occurring in national transposition laws regarding training can be summarised as follows:

– providing 'training opportunities' or 'access to training', which are not the same as being 'provided with training', or, at least, cause unnecessary interpretation problems;
– stipulating that the 'content of training subject to parties' agreement' (Poland), which raises questions concerning EWC's autonomy in determining training contents according to its own needs as opposed to training contents being imposed (or, at least, blocked) by company management. Legal doubts also arise with regard to potential clashes between the EWC and management over the content of training, as the law does not provide for a solution to solve them;
– arguably improper transposition of the entitlement to training in countries in which no paid time-off for training is guaranteed (Bulgaria, Greece).

On the other hand, Art. 10(1) has been transposed in nearly half of the countries. In some cases, the Recast Directive's provisions have simply been copied and pasted (for example, in Cyprus, Estonia and Finland), while in other cases there has been a slight rewording, with Portugal being the more explicit and forceful, inserting a right to material and technical resources to perform duties. It thus appears that countries are formally committed to provide employee representatives with the necessary means to perform their duties, but, as with other rights, remain very general and vague with regard to arrangements, making it potentially difficult for workers' representatives to effectively demand these means and facilities from management. The lack of transposition of Art. 10(1) in some national settings does not indicate an immediate breach of the Directive because (or provided that) national law may already give information and consultation committees (at national and supranational level) the capacity to take actions (see Chapter 4 for more details).

4.1 Duty to report back about information and consultation

The collective right to represent workers and the new facilities available to representatives are interlinked with a collective obligation, namely a duty to report back to national employee representatives or the whole workforce in relation to the content and outcome of the information and consultation procedure (under Art. 10(2) and Recital 33 of the Recast Directive). This duty was moved from the subsidiary requirements to the main text of the Recast Directive because the circulation of information was rightly considered to improve the effectiveness of the EWC and information and consultation rights (European Commission 2010a). This was partly a request from management that dissemination of meeting information should also rest with EWC members. The requirement was also hoped to improve articulation and facilitate a factual exchange of information between national and transnational fora. However, the ETUC argues that fulfilling the new communication duty involves management facilitating the information of the relevant representatives by enabling EWC members to have access to all sites (Picard 2010a). Table 15 indicates whether national laws have transposed this new requirement.

The requirement to inform workers domestically about the outcome of information and consultation has been transposed in all member states for which the national law is available in English, with the exception of the Czech Republic. Most jurisdictions have, as has been notoriously common with regard to other provisions, copied and pasted verbatim the wording of the Recast Directive (Austria, Cyprus, Finland, Hungary, Ireland, Italy, Latvia). Belgium, Germany and Lithuania have given more detail concerning the reporting duty, with Belgium being more in line with the ETUC recommendations as the duty comes along with the obligation to provide the EWC members with the necessary means and time to fulfil this new task. Based on interpretation of the Recast Directive, as has been consistently argued by the trade unions, the requirement to provide the necessary means for reporting back implies the imperative provision of the right to meet with the represented workforce on company premises. Such visits to company premises must be facilitated and any linked costs must be reimbursed by the management (Picard 2010a).

Table 15 **Transposition of the EWC members' duty to report back to local representatives**

Country	Transposition of Art. 10(2)
Austria	Yes
Belgium	Yes (The necessary time and means shall be granted to the members of the European Works Council and the employees' representatives (...) to enable them to inform)
Bulgaria	Yes
Cyprus	Yes
Czech Republic	No
Denmark	Yes
Estonia	Yes (members of select committees can also discharge this duty)
Finland	Yes
France	Yes
Germany	Yes (specify to local representative committee and possible written report)
Greece	Not available
Hungary	Yes
Iceland	Not available
Ireland	Yes
Italy	Yes
Latvia	Yes
Lithuania	Yes (EWC and select committee to provide information at least once a year)
Luxembourg	Yes
Malta	Yes
Netherlands	Yes
Norway	Yes
Poland	Yes
Portugal	Yes
Romania	Yes
Slovakia	Yes
Slovenia	Yes
Spain	Yes
Sweden	Yes
United Kingdom	Yes (possible sanctions for non-compliance)

Source: Authors' compilation, 2014.

Last, but not least, our analysis of provisions concerning the workers' representatives' duty to report back revealed that in some member states the introduction of these provisions was accompanied by relevant enforcement rules. In the United Kingdom workers' representatives are not only legally obliged to report back to their constituencies about the work of EWCs, but may also face penal responsibility in case of their failure to do so. In the United Kingdom, workers are entitled to start legal proceedings against their representatives in such cases. The United Kingdom has thus gone beyond the legal minimum set by the Directive, but not in a direction that seems to be encouraged by the European legislator, as there is no trace of such

a zealous interpretation of the Directive in the Expert Group Report (European Commission 2010a) or any similar document. While such a choice of rules transposing the Directive can hardly be argued against and seem perfectly legal, it will, at the same time put workers' representatives under additional pressure. It also has the potential for creating litigious situations in cases where, for instance, workers' representatives will claim they have not been provided the necessary means to report back by the management, while the latter will claim the opposite (compare, for example, the Luxembourg Act of 2011, Art. L-433-8, which explicitly penalises management for such actions). Obviously, even ideal provisions cannot eliminate conflicts entirely in advance, but any legal framework should at least be transparent and clear enough to minimise the risk of lawsuits.

4.2 Advisors and experts

From the national level we know that information and consultation processes can be improved by the use of *advisors and experts*. The original EWC Directive already allowed the presence of experts in negotiations for the establishment of EWCs (in the special negotiating body, Art. 5). Further, EWCs (or select committees), based on the subsidiary requirements, could be assisted by experts, in so far as this is necessary to carry out their tasks (Annex to the Directive, para 5). Member states may formulate limits in this regard (to one expert, Annex paragraph 6). The recast Directive extended these rights, stating that:

> 'For the purpose of the negotiations, the special negotiating body may request assistance from experts of its choice which can include representatives of competent recognised Community-level trade union organisations. Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body.' (Recital 4 of the Preamble)

This expansion and reference to trade unions is now found in Art. 5(4), but has not been mirrored in the subsidiary requirements (Annex to the Directive), which is surprising and inconsistent. The possibility to have recourse to European trade unions (ETUFs) in negotiations is further explained or justified in Recital 27, which acknowledges the role that trade unions can play in negotiating agreements as they provide employees with support. It is important to note that introduction of the reference to European trade unions was a direct response to one of the demands of the ETUC at the time of the debates preceding the revision of the Directive[34] and was not controversial for the other social partners.[35]

This provision could be interpreted as meeting two of the Recast Directive's goals: (i) to boost legal certainty and clarity, as there had been questions in practice about whether European trade unions could be experts and attend negotiations;

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34 ETUC demands available at <http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Table-ETUC-demands-and-Commission-proposal>

35 Group of Experts Report, Implementation of Recast Directive 2009/38/EC on European Works Councils December 2010, p. 29.

(ii) to improve the effectiveness of EWCs as European trade unions can disseminate best practice and offer expert support and long-standing experience in EWC practice.

Table 16 shows examples of how experts are used in some countries and whether member states have inserted the new requirement on European trade unions in their SNB processes.

Table 16 **Use of experts and transposition of new Art. 5(4)**

Country	Examples of use of experts	Access to European trade unions as experts for SNB negotiations
Austria	For the purpose of negotiations with the central management the SNB can be assisted by experts of its choice. EWCs' recourse to experts can be limited to one.	Yes
Belgium	The European Works Council and the select committee may be assisted by experts of their choice, in so far as this is necessary for them to carry out their tasks. A protocol on cooperation lays down the practical arrangements for the presence of experts at the EWC and select committee meetings.	Yes
Bulgaria	The EWC or the select committee may be assisted by experts of their choice, insofar as this is necessary for the performance of their tasks.	Yes
Cyprus		Yes
Czech Republic		Yes
Denmark		Yes
Estonia	The EWC may be assisted by experts of its choice.	Yes
Finland	Yes	Yes
France	Yes	Yes
Germany	The EWC may obtain support from experts of its choice if necessary to enable it to discharge its duties properly. Experts may be authorised trade union representatives. If experts are consulted, the obligation to bear costs shall be restricted to one expert unless otherwise agreed.	Mentions trade union representatives but not European.
Greece		Legislation not available in English.
Hungary		Yes
Iceland		Legislation not available
Ireland		Yes
Italy		Yes
Latvia	The select committee or the EWC shall utilise the assistance of experts selected at its own discretion, where this is necessary in order to perform its duties.	Yes
Lithuania		Yes
Luxembourg		Not available

Table 16 **Use of experts and transposition of new Art. 5(4) (cont.)**

Country	Examples of use of experts	Access to European trade unions as experts for SNB negotiations
Malta	The European Works Council or the select committee may be assisted by experts of its choice, in so far as this is necessary for it to carry out its tasks.	Yes[36]
Netherlands		Yes
Norway	The EWC or working committee may seek the assistance of experts of its own choice if this is considered necessary to carry out its tasks. The management can stipulate that only one such expert may have their fees covered by the undertaking/group.	No
Poland	The EWC or the Presidium may be assisted by experts of its choice, in so far as this is necessary for them to carry out their tasks.	Yes
Portugal	The EWC and the select committee may be assisted by experts of their choice, insofar as this is necessary to carry out their tasks. The costs of at least one expert are borne by the central management.	Yes
Romania		Yes
Slovakia		Yes
Slovenia	The rules of procedure may provide for experts to assist the EWC and its committees.	Yes
Spain	Presence of and advice from experts, who could be from a trade union, is foreseen at elections of representatives.	Yes
Sweden	The EWC and the select committee may be assisted by experts of their choice	No
United Kingdom		Yes

Source: Authors' compilation, 2014.

With the exception of Norway, Sweden and Germany, all countries refer to European or Community-level trade unions or employee representatives in their implementation acts transposing the Recast Directive. There is therefore a very high rate of compliance, although the lack of transposition of this important achievement of the Recast Directive in three member states is worrying and deprives workers' representatives and EWCs of a key resource in terms of knowledge, support and experience, thus potentially putting at risk the achievement of another goal of the Directive, which is to boost the effectiveness of EWCs overall.

5. Conclusions

The Recast Directive is intended to improve the effectiveness of EWCs and to clarify how they should operate. As already discussed, this took the form of refined and

36 'Such experts and such trade union representatives may be present at negotiation meetings in an advisory capacity at the request of the special negotiating body' (Art. 5, para 13).

extended definitions of transnational information and consultation, but also translated into new essential requirements, such as giving EWC members the means to collectively represent workers' interests and to benefit from access to training without loss of pay. Other important additions included the possibility to call in experts representing European trade unions in the course of EWC negotiations and increased recourse to select committees when decisions likely to affect the workforce were envisaged. Some novelties were introduced only as options, such as balanced representation of the workforce or setting up a select committee in negotiated agreements. However, the positive message is that most countries have embraced the changes and integrated them into national law, even if this transposition was in many respects only formal and limited to a copy-paste from the text of the Recast Directive itself. A limited number of member states have either integrated the spirit of the changes by inserting recitals and objectives or have given the new provisions more substance than required by the Directive (for example, Belgium in relation to Recital 7 which states the objectives of the Recast Directive and the more generous facilities given to EWC members when they have to report to local representatives). The large majority of countries, however, seem to have copied and pasted the Directive. Therefore how some of those changes will be inserted in agreements remains a matter of local interpretation and practice. This approach is regrettable and counter-productive as it pushes responsibility for clarification onto the parties negotiating EWC agreements, while one of the supreme overarching objectives of the Recast Directive was to increase legal certainty (Recital 7 of the Preamble).

Flexibility in designing national legal frameworks is, however, obviously needed. The main reasons are the different national traditions, needs and profiles of multinational companies. For example, some countries or larger multinationals may be more accustomed to having a select committee that runs the day-to-day activities of the EWC. The legislative changes and national implementation, by offering options to the parties, thus seem to be going in the right direction with regard to relatively straightforward 'mechanical' changes. Nevertheless, when it comes to measuring impact against aims, numerous countries did not transpose recitals or even the content of Art. 10(1), which expressly states the need for EWCs to have sufficient means to represent workers collectively and apply information and consultation rights. One general conclusion is thus that optional and non-controversial provisions, which are more 'mechanical' and less burdensome (for example, setting up select committees or the right to training), have been transposed into national laws more commonly and extensively. On the other hand, the less specific and perhaps more complex and significant changes which required interpretation and choice – such as Art. 10(1) – have not received the same attention on the part of national authorities, which tended to neglect them, either reproducing the vagueness of the Directive or simply leaving them out altogether.

4

Enforcement frameworks and employees' rights of access to enforcement procedures

Romuald Jagodzinski and Pascale Lorber

1. Introduction

In this chapter we complement the analysis of implementation of the new rights provided by EWC Directive 2009/38/EC with an examination of procedural rules of enforcement. To this end we discuss selected aspects of enforcement frameworks:

- collective (EWC) and individual (worker representative) legal status and capacity (*locus standi*) in courts;
- cost of legal proceedings applicable in EWC court cases;
- sanctions for breach of EWC rights and provisions.

We argue that implementation of the Directive's procedural enforcement provisions is not merely a subsidiary technical complement to the substantive rights provided to EWCs, but an important element of the overall fundamental principle of '*effet utile*'.

The situation of workers' representatives in terms of protection and vindication of their rights has changed significantly in recent years. First, the new EWC Recast Directive contains important new provisions in this area (see below). Second, the general context and understanding of enforcement provisions has evolved, too. With the adoption of the EU Charter of Fundamental Rights some scholars argue that 'the more fundamental the Community right which is infringed, the more intrusive should be the remedial structure' (Fitzpatrick 2003) and pose the question 'Should it be a factor in Community law enforcement that the level of scrutiny of national remedies, and wider judicial process, should be stricter where fundamental social rights are at issue?' (Fitzpatrick 2003). This question is once again particularly rele-

vant in the context of the forthcoming review of national implementation measures with regard to the EWC Directive and in view of the recognition of workers' rights to information and consultation as fundamental rights (Art. 27 of the EU Charter).

The new EWC Recast Directive has brought substantial improvements in terms of enforcement provisions and the means that have to be put at EWCs' disposal to enable their effective functioning. The 'calibre' of the Directive's provisions in these respects varies, though: the issue of means is dealt with by Art. 10 (and Art. 4.1 with regard to setting up an EWC), while the matter of sanctions is considered in the Preamble (Recital 36).

Art. 10.1 states that:

> 'Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.'

Sanctions remain (predominantly[1]) a matter for national law,[2] but as a result of the recast, the preamble of the Directive expressly refers to the general principle of EU law that sanctions must be 'effective, dissuasive and proportionate in relation the seriousness of the offence [...] in cases of infringement of the obligations arising from the Directive'.[3]

The authors' understanding of 'enforcement' with regard to EWCs rests on two pillars. First, EWCs must have the means they need to apply the rights stemming from the Recast Directive. Second, in line with the Recast Directive's amendments national implementation must respect the requirement that the sanctions available to EWCs must be effective, proportionate and such that employers will be deterred from ignoring the law and/or from preventing employees from exercising their rights to information and consultation (in accordance with the notion of legal deterrence). In turn, the first pillar of means can be subdivided into two categories: statutory and material means. The former revolves around the idea that the legal status of EWCs should be such that it allows them to stand up effectively for their rights and, if necessary, pursue litigation. This is a direct requirement stemming from the right to collectively represent the interests of the workforce (Art. 10.1 of the Recast Directive). The latter ensures that EWCs are provided with financial means that allow them to apply the formal statutory rights provided to them (see Chapter 3 for details). Both pillars have been considered by the Recast Directive as a result of numerous uncertainties in and lack of effectiveness of the 1994 Directive. The vagueness and incompleteness of the original 94/45/EC Directive was reproduced at national level, giving rise to a de facto paralysis of EWCs in their pursuit of justice. Contrary to the understanding presented above, national case-law showed

1 For a discussion of this topic see Jagodzinski 2015 (forthcoming).
2 The European Commission has consistently refused to regulate sanctions in the Recast Directive 2009/38/EC, arguing more specifically that such a legislative approach would be incompatible with the nature of directives.
3 Recital 36.

that some courts were not familiar with the EWC Directive's spirit and objectives and the practicalities of EWC operations, involving employee representatives and management.[4]

It should be emphasised that the statutory and the material-means pillars are complementary, not alternatives or substitutes; in consequence, only when both aspects are ensured and sufficiently safeguarded by national law can one consider a member state's obligation to comply with the Directive with regard to enforcement issues fully satisfied.

This chapter focuses on the two pillars of 'means' and 'sanctions', with particular emphasis on the former and considering the changes brought to national law in light of the formulation adopted in Art. 10.1. The aim is to identify whether transposing measures have helped to meet the objective of 'modernising Community legislation on transnational information and consultation', by 'resolving problems encountered in the practical application' of the original Directive, reducing legal uncertainty and increasing the effectiveness of information and consultation'.[5]

2. Means of enforcement

2.1 EWCs' legal status and capacity

2.1.1 State of debates and views

Art. 47 of the EU Charter of Fundamental Rights provides that everyone whose rights are guaranteed by EU law and subsequently infringed has the right to an effective remedy. This principle is 'particularly germane to the debate over the sanctions available for breach of the EU directive on information and consultation of workers' representatives' (Bercusson 1992; Bercusson 2009). This right alone is, arguably, a sufficient requirement in relation to member states to provide effective means of access to courts for workers' representatives in general (ibid.) and, more specifically, for EWCs collectively and/or for their members individually.

Going to court requires two things: (i) legal capacity (whether in the form of full legal personality or its functional equivalents); and (ii) recognised judicial interest. Art. 10 of the Recast Directive clearly covers both elements and requires the member states to provide these legal means to EWCs.

EWCs' recognised judicial interest in matters of transnational information and consultation is beyond question. Therefore, in discussions about possibilities of standing up for one's rights in court the principal question seems to be the claimant's formal capacity to submit an application, start proceedings, perform actions with legal effects and to be subject and object of rights and duties. In other words, before studying the question of a party's rights in court one needs to ascertain that the party can actually go to court.

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4 See the P&O case, for example, discussed in P. Lorber 2010: 214.
5 Recital 7.

Questions of the transposition of EU directives into national law, with a specific focus on principles of enforcement of European labour law, have obviously been dealt with in research ((Bercusson 1996b; Bercusson 2004; Bercusson 2009; Malmberg 2003; Hartlapp 2005; Supiot 1991). In this body of research Alain Supiot and Brian Bercusson both proposed a general distinction between national jurisdiction systems depending on whether they apply administrative, judicial (through courts) or industrial relations (through social partners) mechanisms of enforcement of EU labour law. Indeed, all the above cited authors considered questions such as the efficiency of enforcement frameworks, the applicability of the '*effet utile*' in this domain, enforcement of rights of workers in the context of fundamental labour law and human rights and interventions (jurisprudence) by the Court of Justice of the European Union (CJEU) in national judicial enforcement.

At the same time, debate on the legal capacity and right of EWCs to go to court has been taking place mainly at the margin of analyses of other aspects of EWC operation, such as financial means for EWC operation, the validity of Art. 6 and Art. 13 agreements[6] or the legal effectiveness of transnational agreements signed by EWCs.[7] Academics and experts are split on these issues. The majority of discussants[8] have argued in favour of legal personality on principle for EWCs as a precondition for the validity and binding effect of agreements signed by these bodies and the managements of multinational companies.[9] According to these views either a form of a restricted legal personality[10] or 'capacity to execute its rights and duties, including in courts'[11] are considered necessary for special negotiating bodies (SNBs) and/or EWCs to ensure workers' representatives' access to courts.[12] Following Blanpain's approach (Blanpain 1999) legal personality is sometimes considered in relation only to the SNB rather than in regard to the subsequent EWC[13] and is limited only to the necessary competence to conclude or terminate an agreement establishing an EWC or an information and consultation procedure (ICP).[14] Most specifically, the question of EWCs' legal personality was debated in a project initiated by Romuald Jagodzinski (ETUI) and coupled with the current analysis dealing with EWC-related case law.[15] The legal standing of EWCs (including legal personality) was explored and discussed with regard to specific countries in which EWC-related case law occurred. It presented a varied picture across the EU, with some countries ensuring much broader prerogatives to EWCs than others.

Other scholars have investigated the legal personality of EWCs in connection with the question of the effectiveness of national sanctions for breaches of information and consultation rights.[16] On the other hand, some lawyers have argued that in

6 Bercusson 1996b: 298.
7 Blanke and Köstler 2006: 438–439.
8 Blanke and Köstler 2006; Bercusson 1996b.
9 Blanke 2004: 426.
10 Blanpain 1999: 11: 'The SNB has in a sense a restricted legal personality, with the necessary competence to conclude or to terminate an agreement, establishing an EWC or a procedure. By the same token, the SNB should have the legal competence to introduce actions before the courts in case of dispute relating to matters covered by the Directive.'
11 Ibid: 13.
12 See also ETUC 2008a: 8.
13 Compare Engels and Salas 1998: 25.
14 Blanpain 1999: 11.
15 Dorssemont and Blanke 2010.
16 Blanke and Köstler 2006: 435–441.

particular countries legal personality is a potentially risky empowerment of EWCs.[17] In general, however, the available literature on this formal characteristic of EWCs' legal anchorage is scarce and definitely not conclusive. One reason for this research deficiency might be the fact that the knowledge of EWC jurisprudence is limited and without a summary overview such as presented in Dorssemont and Blanke (Dorssemont and Blanke 2010) the link with judicial procedures as relevant for EWCs' operations was not posed either as a pragmatic or as a research question.

2.1.2 Provisions of Directive 94/45 concerning legal status and capacity of EWCs and SNBs

The ambiguity of conclusions arising from the legal debate on the status of EWCs stems from the imprecision, or, indeed, the lack of any clear provision of Directive 94/45 in this regard.[18] Under these circumstances attempts have been made to close that loophole by means of interpretation of the Directive and inference of certain powers or competences (functions) of EWCs from its general provisions.

Seeking hints concerning the legal personality of EWCs one finds the provision of Art. 8.2 on confidential information. This article stipulates that a dispensation not to disclose information, granted optionally by the member states to enterprises on the basis of a confidentiality clause, can be (optionally) subject to prior administrative or judicial authorisation. Even though the Directive does not explicitly mention EWCs as parties entitled to take advantage of this entitlement, it seems obvious that it is the EWC as a collective body that is the beneficiary of information and consultation and thus subject to confidentiality restrictions. As a consequence, in case of infringements, it is the EWC as a collective body that has a direct interest in contesting any limitation on sharing information based on the management's confidentiality prerogative. One can therefore infer that it is the EWC, as a collective body, that is entitled to effectively participate in court (or administrative) proceedings as a party. In order to be able to assume this right, EWCs have to be granted, at least, some specific aspect of legal personality. At the same time, Art. 11.4 of the Directive specifies that 'Where member states apply Article 8, they shall make provisions for administrative or judicial appeal procedures which the employees' representatives may initiate (…)'. The provision of Art. 11.4 should, however, in our view, not be considered a limitation of the right to effectively act in courts stipulated in Art. 8, but rather as an indication that EWCs are entitled to pursue such lawsuits by either a mandated representative agent or proxy. In both cases such representation should be selected and mandated in line with internal rules of procedure adopted by the EWC or other regulations in place.

Furthermore, assuming that an agreement between the SNB and the management includes '*financial and material resources*' to be allocated to the EWC for its operations,[19] it can be inferred that those resources are made available in the form of a budget. This presupposes that the EWC has the capacity to manage those funds autonomously and on its own behalf. Consequently, it can be inferred that the EWC was therefore tacitly acknowledged by the EU lawmaker as capable of entering into civil contracts with third parties delivering services (for example, transla-

17 Biagi's intervention in: Blanpain and Biaggi 1998:25–26.
18 Blanpain 1999: 13.
19 Art. 6.2.e.

tors, interpreters, experts) or goods. This would result in an eligible conclusion that EWCs as collective bodies are also capable of collectively assuming rights and obligations, as well as of taking part in legal transactions. The above argumentation is clearly of a very formal nature and consequently vulnerable to criticism in cases in which EWCs have not been granted a separate budget by the company,[20] but where instead the company binds itself to cover all the expenses linked to the operations of an EWC. Such an arrangement would suggest that the particular EWC would not be intended to be an autonomous body with collective rights to pursue legal actions or assume obligations. This conclusion, however, should in our view not be adopted hastily as it would suggest that legal personality (or other forms thereof) are bound to parties' will or lack of it, which clearly cannot be a criterion in systemic statutory arrangements. If the latter were the case, EWCs without autonomous budgets would automatically be deprived of the possibility to defend their rights in courts, which in view of the quoted provisions and the Directive's general goals and the principle of effectiveness does not hold true.

2.1.3 Modifications of the Recast Directive 2009/38/EC and the legal status of EWCs and SNBs

The ambiguity or indeed silence of Directive 94/45/EC with regard to the legal standing of EWCs has caused numerous difficulties and inconsistencies across the EU.[21] Probably the most blatant example of the consequences of this lacuna was displayed in the P&O case, in which a mixed-type EWC (employers with employees) based on British law sought in vain to initiate a lawsuit against the management. The EWC was refused this right and a legal standing in pre-court proceedings due to its mixed composition and, reportedly, the impossibility for the EWC to initiate legal actions against management, which was part of the EWC.[22]

As explained earlier, 'resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions' [23] was one of the reasons for adopting the Recast Directive. This is a clear reference to identified case law and legal obstacles experienced by EWCs.[24] Art. 10.1 was intended as the solution and remedy to the practical difficulties and legal uncertainty experienced.

The authors consider that the Recast Directive should be interpreted as providing two separate categories of means to EWCs by two different actors. The first category (pillar) contains the most obvious financial and material means to be provided to EWCs by management in order to allow EWCs to operate and to exercise rights arising from the EWC Directive. This general obligation has a specific dimension in cases of legal conflicts in which the EWC should be provided by the management

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20 The ongoing analysis of EWC agreements conducted by the ETUI, as it stands at the moment (January 2015) lists 131 EWCs currently existing to which an autonomous budget was granted and further 30 EWCs that no longer exist used to benefit from this right in the past.

21 See COM 2000 (188) final Report from the Commission to the European Parliament and the Council on the application of the Directive on the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, p. 4.

22 For details see Lorber 2010: 214.

23 Preamble, Recital 7.

24 See, for example, Jagodzinski, Kluge and Waddington 2009; Dorssemont and Blanke 2010: 225 ff.

with the resources and means it needs to exercise the right to seek justice (such as money to finance a lawyer to represent it and provide legal advice). The addressee of this obligation is the central management.

The second category of obligations imposed by the Directive comprises, arguably, means of an institutional nature (provisions of national law) that are required to apply the rights stemming from this Directive and to collectively represent the interests of employees. Implicitly, the institutional measures represent a part of the general term 'means' as defined in Art. 10.1, for without appropriate legal (or administrative) procedures members of EWCs have no possibility of fully exercising their rights (the principle of effectiveness of the *acquis communautaire*). The requirement to provide for effective legal (court or administrative) means directly formulated by Art. 11.2, [25] not only mentions 'appropriate measures' in general, but specifies 'adequate administrative or judicial procedures'. The latter provision of Recast Directive 2009/38/EC represents an important, but often overlooked and underplayed improvement, or a clarification compared with Directive 94/45/EC and leaves no doubt about EWCs' capacity to go to court and participate in legal proceedings. At the same time, as indicated above, monitoring of national transpositions (see below) of the Recast Directive to date suggests that the member states have considered their existing provisions in this regard to be sufficient. Therefore it remains to be seen how scrupulously and with what degree of thoroughness the European Commission in a future report on implementation of the Recast Directive [26] will evaluate implementation of this provision. In many cases, improvement of the factual legal standing of EWCs and their right to apply the rights stemming from the Directive in national law depends solely on proper transposition of Art. 11.2.

2.1.4 Overview of solutions applied in the member states concerning legal status of EWCs and SNBs

Across the EU member states an array of solutions is applied as regards granting EWCs (and SNBs) legal status or, alternatively, equivalent specific powers in courts or legal procedures. The large majority of solutions remain unchanged since the implementation of Directive 94/45/EC (see section (a) below) demonstrating that the member states consider these originally adopted solutions sufficient to guarantee the standards of Art. 10.1 of the Recast Directive. In the second part of the section particular attention will be devoted to countries that decided to modify provisions governing the legal status of EWCs in the wake of transposition of Recast Directive 2009/38/EC.

In the following section, three solutions with regard to the legal status of EWCs and SNBs are differentiated, from the fullest to the most limited: (i) legal personality as the fullest status granted to EWCs and SNBs; (ii) capacity to act in court defined as a set of rights and powers granted by the given national law to EWCs and SNBs (either specifically or by default to all employee representative bodies) empowering them to proceed in courts as a collective body, and mutatis mutandis acquire,

25 'Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced'.

26 In November 2014 the European Commission announced an internal call for tender to prepare the implementation report which, reportedly, should be completed by the end of 2015.

as a collective body, rights and obligations, yet without the formal status of a legal person; and (iii) capacity to address a court with applications and to start legal proceedings (occurring mainly in cases of confidentiality disputes).

(a) National provisions transposing Directive 94/45/EC

First, only in four EU member states (Austria,[27] France,[28] Romania and Sweden[29]) since the adoption of the transposition laws of Directive 94/45/EC have EWCs enjoyed the fullest form of the initially implicit, and with the Recast Directive, explicit right (Art. 10.1) to represent workers' interests; in other words, legal personality that allows them to claim obligations and duties on behalf of EWCs.[30] Consequently, EWCs in these countries have the necessary capacity to lawfully act and represent employees' interests towards third parties. This legal status allows EWCs to approach courts as well as to deal with, for instance, banks (where they can open accounts or even take out loans) or conclude contracts (with experts, lawyers and so on) collectively, that is, as a body and not as individual natural persons (EWC members). However, because the possible legal personality is granted by national laws, in principle it remains binding only within the specific country's authority. Consequently, a question arises concerning the legal capacity of such EWCs with nationally granted legal personality to conclude contracts with third parties abroad, which is a relevant question for EWCs as bodies for transnational information and consultation. To date, no such litigation has been reported, but it is a potential consequence of differing national provisions that EWCs' legal capacity will be denied by a court in a country that does not recognise EWCs' legal personality.

Second, it should be noted that in other member states the fundamental entitlement to take actions with legal effects and the power of lawful effective representation towards third parties, in any of its forms, is not always guaranteed to EWCs. As the analysis of the current project reveals, only in a further seven (Germany,[31] Spain, Lithuania, the Netherlands, Norway, Poland, Slovakia and the United Kingdom) out of the 31 EEA countries (EU27 and Norway)[32] in which the EWC Directive is applicable were those employee representative bodies officially recognised

27 Although this is not explicit but can be inferred and presumed from the *Arbeits- and Sozialgerichtsgesetz* (the Labour and Social Security Courts Act); see D. Rief, 'Austria' in F. Dorssemont and T. Blanke (eds), *The Recast of the European Works Council Directive*, Intersentia, 2010, p. 116.

28 Art. L-439-7 of the Labour Code.

29 Section 36 of Act. No. 359 of 9 May 1996 on European Works Councils. The law expressly grants legal capacity to the SNB and the EWC 'to acquire rights and assume obligations.

30 Full legal personality for EWCs was reportedly considered also in the Luxembourg transposition of the Recast Directive. A bill concerning the Recast Directive (2009/38/EC) was submitted and the Luxembourg Chamber of Commerce published its opinion in conformity with the national legislative procedure. In the meantime, two other bodies (*chambres professionnelles*) finalised their opinions and recommended that the law should clearly emphasise that the members of the Works Council have the right to sue in court. (see: A report by the European Labour Law Network of 07-04-2012 at: http://www.labourlawnetwork.eu/national_labour_law/national_legislation/legislative_developments/prm/109/v__detail/id__1961/category__22/index.html)

31 Already the German transposition of Directive 94/45/EC (*EBR-Gesetz*) recognised the EWC's capacity to collectively represent employees' interests. Similarly, regulations concerning coverage of costs (§ 39 Abs. 1 EBRG) in the course of establishment and operation refer to EWCs as collective bodies. However, similar to national works councils, the EWC has no assets and the employee representatives' functions therein are not remunerated (honorary function). Thus according to German law EWCs have no automatic right to an autonomous budget (though management must assume all costs). Moreover, concerning the German case views are divided with regard to qualification.

32 The two remaining countries belonging to the European Economic Area, where the EWC directive is applicable – Liechtenstein and Iceland – were not included in the analysis.

in proceedings as collective organs. A good example is Germany where, similar to national works councils, an EWC has no general legal personality or capacity, although it can be a collective object of rights and duties within the scope of regulations on EWCs. Therefore it can be represented as a collective body in law by its president and has – within the scope of its rights provided by the national law – a (procedural) capacity to participate in proceedings. These rights are, however, not directly provided to EWCs in the transposition laws of the EWC Directive(s), but are stipulated in external (procedural) laws (labour courts procedure), as well as in national jurisprudence in the area of worker representation.

In some cases (for example, Spain[33] and Latvia since the transposition of Recast Directive 2009/38/EC) EWCs' and their members' capacity to act in courts is guaranteed or reinforced by the possibility of trade unions representing their interests under the rules of protection of collective agreements (for example, Art. 38(2) of the Spanish Act of 1997). It must be emphasised, however, that in some of these countries the conclusion about EWCs' capacity to go to court is inferred on the basis of the capacity to submit requests to courts challenging management decisions to label information 'confidential'. Such an interpretation or legal inference of rights is prone to conflicts and dissenting views. Similar potential problems arise with regard to countries such as Finland where only signatories of EWC agreements individually can approach courts in case of a dispute; consequently, in practice various types of EWCs might have differing capacities: EWCs established by means of subsidiary requirements as collective bodies in view of the lack of an agreement and its signatories individually when EWCs are established by agreement.

It should be noted, however, that in specific circumstances or systems the lack of a collective capacity to act in court does not automatically result in insufficient means for EWCs to approach courts. For instance in Estonia, where workers' representatives (employee trustees) individually have the capacity to initiate proceedings in case of dispute by notifying the labour inspectorate and no fees for launching such procedures apply it seems that such individual competence on the part of employee representatives might be sufficient to meet the requirements of the EWC Directive in the area of access to courts.

Despite the coincidence of specific circumstances, such as those in Estonia, in view of the findings presented above the conclusion seems to be that only in a limited number of the above mentioned member states and, in fact, arguably only in a limited number of cases (mainly referring to confidentiality of information) have EWCs been granted sufficient means to seek justice. In the remaining countries in which neither legal personality nor equivalents thereof – that is, forms of a functional legal personality or similar collective rights – were granted to EWCs legitimate doubts concerning complete and proper transposition of Directive 94/45/EC in this area could be raised already prior to adoption of the Recast Directive.

33 Art. 37 of the Law of 10 April 1997 on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation.

(b) Changes to national rules in consequence of transposition of Recast Directive 2009/38/EC

The legal framework in the area of access to courts laid down by the original Directive 94/45/EC was significantly modified by Recast Directive 2009/38/EC, first and foremost, with Art. 10.1 granting EWCs the right to collectively represent workers' interests. Following the adoption of the modified Directive member states were responsible for transposing the extended rights into their national laws.

Table 17 **Transposition of Directive 2009/38/EC with regard to the provision 'means necessary to apply rights stemming from the Directive' (in selected countries)**

Country	No mention in transposition of Recast Directive 2009/38/EC	Copy-paste from Directive 2009/38/EC	No copy-paste from the Directive BUT equivalently general provision	Other transposition of Recast Directive 2009/38/EC	Remarks
Austria				X	Required to be specified by parties in EWC agreement.
Belgium		X			
Bulgaria			X		
Cyprus		X			
Croatia		X			Required to be specified by parties in EWC agreement.
Czech Republic	X				Yes
Denmark	X				
Estonia			X		Art. 40(3) 'The members of the European Works Council must have the means required to perform the functions arising from this Act, including to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.'
Finland				X	Required to be specified by parties in EWC agreement.
France	X				
Germany				X	Art. 39(1) 'Any expenses arising from the training and functioning of the European Works Council and the Committee shall be borne by the central management. The central management shall, in particular, make available adequate rooms, material and human resources for the meetings and day-to-day business as well as interpreters for the meetings. (...)'
Greece		X			

Table 17 **Transposition of Directive 2009/38/EC with regard to the provision 'means necessary to apply rights stemming from the Directive' (in selected countries) (cont.)**

Country	No mention in transposition of Recast Directive 2009/38/EC	Copy-paste from Directive 2009/38/EC	No copy-paste from the Directive BUT equivalently general provision	Other transposition of Recast Directive 2009/38/EC	Remarks
Hungary				X	Includes the right to commence legal disputes.
Ireland			X		Amendment 13 Amendment of section 17 of Act of 1996 (...) central management shall provide the members of the European Employees' Forum or European Works Council, as the case may be, with the means required to apply the rights arising from the Directive, to represent the collective interests of employees (...).
Italy		X			
Lithuania				X	Art. 24(5) 'the financial and material resources allocated, and the services provided for the operation of the European Works Council' must be stipulated in the EWC agreement.
Luxembourg			X		Art. 432-1: The responsibility for establishment and operation of EWC/SNB lies with the central management which 'shall establish conditions and provide means necessary to this end'. + Art. 432-44 'the necessary material means'.
Latvia				X	Required to be specified by parties in EWC agreement.
Malta			X		Art. 11(1) 'The members of the European Works Council shall have the means required to apply the rights arising from these regulations, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings'.
Netherlands				X	Amendment to Art. 18: '2. The third sentence in the third paragraph reads as follows: 'If a select committee is elected, the powers of that committee shall be set out in the rules of procedure, which shall also establish the resources necessary to enable it to pursue its activities.'

Table 17 **Transposition of Directive 2009/38/EC with regard to the provision 'means necessary to apply rights stemming from the Directive' (in selected countries) (cont.)**

Country	No mention in transposition of Recast Directive 2009/38/EC	Copy-paste from Directive 2009/38/EC	No copy-paste from the Directive BUT equivalently general provision	Other transposition of Recast Directive 2009/38/EC	Remarks
Norway				X	The management is responsible for arranging and paying for the negotiations, including ensuring the necessary translation of documents and interpreting services, and for implementing and financing the permanent cooperation mechanism the parties establish, cf. §3 and § 6 (6). + experts and means of communication mentioned.
Poland	X				

Source: Compilation by Romuald Jagodzinski, 2014.

As already mentioned, during the transitory period devoted to transposition of the Recast Directive some member states raised questions about the nature of Art. 10.1 of the Directive and its extent. Clear explanations and consensus were given to the extent that the provision of Art. 10.1 of the Recast Directive should not only be understood in the narrow sense as a provision referring only to financial means for the operation of EWCs (European Commission 2010a). For example, the European Commission indicated that Art. 10.1 was designed to ensure means which 'include the ones required to enable EWC members to launch court proceedings in the event of violations of transnational information and consultation rights' (European Commission 2010a): 39). Despite common arrangements in the course of preparations for the transposition conducted under the auspices of the European Commission, implementation of this provision in national systems varies, sometimes considerably. National provisions implementing Art. 10.1 of the Recast Directive can be grouped into the following categories:[34]

(i) Countries applying the narrow (limited to financial means) interpretation (Denmark, Estonia, Finland, Greece, Iceland, Italy, the Netherlands, Sweden, the United Kingdom and, by implication, Belgium):

A good example here may be Belgium, where Collective Agreement No. 101 of 21/12/2010 (Art. 44) stipulates:

34 This is inferred in parallel with the competence bestowed by Belgian law on members of (national/local) works councils (see, for example, Dorssemont 2013).

> 'The operating expenses of the European Works Council shall be borne by the central management located in Belgium. This management shall provide the members of the European Works Council with such financial and material resources as enable them to perform their duties in an appropriate manner.'

This wording refers only to '*financial and material resources*' and gives no consideration whatsoever to non-financial aspects of the obligation to provide the necessary means to EWCs[35] and, against the advice of the Expert Report (European Commission 2010a), does not address the question of providing legal means, such as legal status, enabling EWCs to fully apply rights stemming from the Directive. In the given example of Belgium (though not exclusively), it is a serious shortcoming in transposition and an obstacle to the practical operations[36] of EWCs[37] as, according to our research, they do not have a collective right to act in courts (only individual members of EWCs have that right, see Table 18a and 18b).

(ii) The second group of countries (Cyprus, Estonia, Finland,[38] Ireland, Italy, Malta, Slovenia, Spain and Greece) adopted the strategy of copy-pasting the exact (more or less) wording of Art. 10.1 of Directive 2009/38/EC without specifying concretely what are the 'means necessary to collectively represent the interests of employees'. There are two possible explanations:

(a) an improbable (in view of the existence of the Expert Group Report 2010[39]) state of unawareness that '*the means necessary*' should also comprise legal status guarantees for EWCs, providing them with improved access to courts;
(b) deliberate failure to specify the definition and content of this rule in order to avoid stating clearly what the legal status of EWCs is.

Some examples of cosmetic – in the sense that they do not bring more clarity to the wording of the Directive – changes to the original wording of the Recast Directive can be mentioned. The Slovenian transposition act changes the wording of Art. 10.1 of Recast Directive 2009/38/EC slightly by stipulating

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35 Admittedly, the Belgian transposition in order to be complete still requires a statutory act (law) to regulate the question of sanctions for breaches of a collective agreement. This is because deciding on sanctions for law infringements is beyond the competence of the social partners. It is, however, uncertain whether the law on sanctions will be modified at all in Belgium, and if so, whether Art. 10.1 will be considered to be part of it.

36 National court cases have highlighted legal uncertainties with regard to the right of employee representatives to pursue complaints, in particular where the EWC includes management representatives (Preliminary hearing on the issue of court costs, *P&O* (Employment Appeal Tribunal, 28.6.2002); *Panasonic* (Appeal against Bobigny TGI, 4.5.1998).

37 This view was shared by the European Commission itself in the Impact Assessment SEC(2008)2166, in which – with reference to the Court of First Instance of the European Communities' acceptance of the Legrand European Works Council's intervention in the dispute over competition law arising from the merger with Schneider – the Commission recognised the capacity of the EWC to represent workers and act in legal proceedings: 'The European Courts do recognise the competence of European Works Councils to represent employees, which is not restricted to the internal matters of the company in question' (CFI, T-77/02, Schneider Electric, Judgment of 6.6.2002).

38 The Finnish transposition act 620/2011 (Act amending the Act on cooperation in Finnish groups of undertakings and Community-scale groups of undertakings, adopted: Helsinki, 10 June 2011) replaced the term 'means' with 'possibilities'. This modification, however, does not seem to change the meaning of this provision that appears limited to material and not legal means to perform EWC functions.

39 European Commission 2010a.

that members of the EWC 'shall have the means required to exercise the rights arising from this Act and shall collectively represent the interests of employees', but the wording does not specify what the collective representation of interests does entail and what means it might require. Similar uncertainties with regard to the 'means required' were raised by the Greek expert,[40] who explained that neither Art. 64 of Law 4052 nor any relevant external acts contain clear cut rules on the legal status of EWCs. According to the Greek laws, neither EWC members nor the EWC as a collective body have legal personality (EWC members seem to have this right, see explanation on Greece in Table 18a and 18b), but according to the expert, EWCs could attempt the solution of approaching courts as an 'association' that, according to Art. 69 of the Greek Code of Civil Procedure (*Kodika Politikis Dikonomias*), has such competence.

(iii) A third group of countries has not introduced any new provisions of the Recast Directive modifying the existing framework for EWCs (Czech Republic, France, Lithuania, Portugal, Poland, Malta, Netherlands, Norway, Romania, Sweden and Germany). This decision demonstrates a conviction that EWCs in these countries are already equipped with sufficient rights ensuring fulfilment of the standards laid down by the Expert Group Report (European Commission 2010a) with reference to the 'means required to represent collectively the interests of employees'. While in countries in which EWCs already have legal status, which allows them to approach courts as collective bodies (France, Germany, Netherlands, Romania, Sweden and Lithuania; see Table 18a and 18b) it can be accepted that no modifications were necessary, that approach is questionable with regard to other countries in this group that had no regulations in place within the framework of Directive 94/45/EC or had introduced regulations on EWC status of insufficient quality under the transposition of Directive 94/45/EC.

(iv) A fourth group of countries (Estonia and Finland) applies a solution granting employee representatives the right to seek legal redress as individual members of the EWC (rather than granting such rights to the EWC collectively). Such individual rights might be further differentiated between a general competence to seek legal redress and a right applicable only in specific cases (for example, refusal of information/consultation based on the confidentiality clause).

(v) The fifth legislative approach to transposing the 'right to collectively represent the interests of employees' can be classified as an implicit granting of collective capacities to the EWC. This strategy was adopted only in the British transposition instrument.41 Regulation 19D stipulates that the EWC may become subject to sanctions if it fails to inform the employees of the content or outcome of the information and consultation procedure. It is clearly stipulated that the failure to inform and the sanction refer to the EWC as a collective body, not only to its members. One can argue that this particular capacity of an EWC to be an object of legal sanctions is an expression of the general new capacity given to EWCs to 'represent collectively the interests of the employees'.[42] Con-

40 Panos Katsampanis, Federation of Industrial Workers Unions (OBES).

41 The Transnational Information and Consultation of Employees (TICE) Regulations 1999 amended by the Transnational Information and Consultation of Employees (Amendment) Regulations 2010 (SI 2010/1088).

42 Art. 10.1 Recast Directive 2009/38/EC.

sequently, in the case of the UK transposition one can argue that if the statutory instrument recognises the collective legal responsibility of EWCs (their passive collective capacity), it must also recognise their collective rights and capacity to collectively assume rights and obligations and to act as a subject of law (the positive collective capacity). This understanding is in line with the Expert Group Report[43] that made explicit reference to the British context.[44]

This interpretation will have to be confirmed in litigation, but it seems there is no escape from recognising EWCs' collective rights to seek legal redress under the new regime, even if it is based on the principle of implied powers. Further support for this argument is found in cases accepted by the Central Arbitration Committee (the body responsible for hearing disputes about the application of the regulations)[45] even before the Recast Directive was drafted. The conclusion could be drawn that even though it is not explicitly recognised, the British transposition of the Recast Directive sufficiently ensures the rights of EWCs to seek redress in judicial proceedings.

(vi) Finally, there are countries that modified the previous legislation on EWCs by explicitly granting them legal status or legal competencies that ensure access to courts in cases of conflict (Hungary, Latvia, Slovakia).

A good example of this approach is the Hungarian transposition act, which stipulates in Art. 67 (2) that:

> 'Without prejudice to the competence of other employee representation and participation organisations in this respect, *the members of the European Works Council shall represent collectively the interests of the employees* of the Community-scale undertaking or Community-scale group of undertakings and *shall have the means required* to exercise the rights provided to the European Works Council, *including the commencement of legal disputes relating to the violation of the rights to information and consultation of employees*' (authors' emphasis).

While the above clear statement regarding EWCs' capacity to act in court is praiseworthy, according to Hungarian expert information,[46] under the 2012 reforms of the Labour Code the protection against dismissal of EWC members (and other national-level workers' representatives) has been significantly reduced or removed altogether. Such deprivation of protection for workers' representatives is starkly at odds with the Recast Directive's requirement in Art. 10 to provide EWC members with means to exercise rights stemming from the Directive.

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43 European Commission 2010a: 37.

44 Court case concerning P&O alleging that the EWC suffered hindrance in accessing justice due to the lack of clear provisions in the British transposition act, the TICE Regulations of 1999; For more details see Dorssemont and Blanke 2010.

45 The list can be found at http://webarchive.nationalarchives.gov.uk/20140701192834/http://www.cac.gov.uk/index.aspx?articleid=2304 (consulted on 15/08/2015), and especially the case of Haynes and the British Council tried by the Central Arbitration Committee in 2012 (http://webarchive.nationalarchives.gov.uk/20140701192834/http://www.cac.gov.uk/index.aspx?articleid=4312 consulted on 15/08/2015).

46 Presentation given by Tamás Gyulavári of the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University, Budapest, at an EWC Seminar on 20–21 January 2015. See also: http://www.worker-participation.eu/National-Industrial-Relations/Countries/Hungary/Workplace-Representation.

In this group, Latvia should also be mentioned. This country, under the Act of 29/03/2001 transposing Directive 94/45/EC, had no specific provisions on-sanctions or access to justice for EWCs. Under the new act transposing Directive 2009/38/EC this area was regulated by reference to the Labour Dispute Act that provides for mediation, conciliation or arbitration (depending on whether the dispute has an individual or a collective character and whether it concerns interests or rights) by a Labour Dispute Commission (consisting of employers' and employees' representatives or a Conciliation Commission or Mediator). No specific mention of EWCs is made in this act, but they are explicitly covered by its provisions on the basis of Section 32 of the Act of 19/05/2011 transposing the Recast Directive. The Labour Dispute Act grants the parties the capacity to submit applications for adjudication and, in case of dispute over the outcome of proceedings by the Labour Dispute Commission (or the Conciliation Commission or Mediator, depending on the nature of the dispute) empowers the parties to seek further redress with the courts or the Arbitration Court(s). Importantly, in case of individual disputes regarding rights, Section 8 of the Labour Dispute Act empowers unions to represent their members and individual EWC members to act in courts. Consequently, both the collective and individual capacity of EWCs and their members to have resort to justice seem well guaranteed.

Similarly to the Latvian transposition, the Slovak implementation of the Recast Directive[47] explicitly introduces legal capacity for EWC and SNB members (and employee representatives) to participate in judicial proceedings ('capability to be party to court proceedings') as a competence stemming from Art. 10.1 of the Recast Directive.[48] In this way the Slovak implementation (and other transposition acts in this category) leaves no doubts about EWCs' and their members' capacity to seek legal redress, as would have been the case if the only provision of these transpositions referring to EWCs' access to courts had been Section 249 (1) of the Slovak Act of 8 February 2011 granting the right to 'parties concerned to turn to courts to determine the lawfulness of application (by company management) of the confidentiality of information clause'. Such questions concerning the derivation of the general right to start legal proceedings and/or act in court from the competence to address courts to ascertain or challenge the designation of information as confidential can be raised with regard to national transpositions of the EWC Recast Directive in Poland, Estonia[49] and Romania where EWCs' capacity is mentioned only with regard to specific confidentiality disputes. It seems thus that in the latter group of countries the Recast Directive's Art. 10.1 was not transposed properly as it grants no general right to represent workers' interests collectively at courts.

47 Act of 8 February 2011, amending Act No. 311/2001, the Labour Code, as amended and amending certain other laws.

48 Section 250(3) of the Act of 8 February 2011, amending Act No 311/2001, the Labour Code, as amended and amending certain other laws: 'Members of a special negotiating body, members of a European Works Council and employees' representatives implementing another procedure for informing and consulting employees shall have resources made available for the performance of their role in the collective representation of the interests of employees of an employer operating on the territory of the member states or group of employers operating on the territory of the member states in relation to the exercise of the right to supranational information and consultation and for this purpose they shall be authorised to take part in judicial proceedings.'

49 In Estonia the Act of June 2011 transposing (among other things) the EWC Recast Directive (along with SE and SCE regulations) in Art. 82 provides for recourse to courts only for SCE and SE members or employees' representatives in these types of companies, but not for EWC members.

Table 18a **Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs**

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)			Remarks [concerning implementation of Recast Directive 2009/38/EC in italics]
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary	Court costs	
Austria	x	x[1]			x		x	Each party pays its own costs[2]	
Belgium			x	x[3]	x		x	Usually the losing party pays. Each party pays its own costs	
Bulgaria					x			Free of charge	*Court order to disclose information classified as confidential by management added*
Cyprus								Not known	*Court order to disclose information classified as confidential by management added*
Czech Republic		x[4]						Normally paid by plaintiff (the Court Fees Act)	
Denmark			x[5]				x[6]	EWC members individually[7] / trade union	*Fines added for infringement of some rights*

1 Under Article 53 in combination with Article 40 paragraph 4b, Labour and Social Courts Act, EWCs established on the basis of Article 6 agreements and statutory EWCs are capable of taking part in and conducting legal action as bodies (Büggel 2002).
2 Each party meets its own costs; an EWC has no claim to the reimbursement of costs by the company, irrespective of whether the EWC wins or loses. As a rule, the EWC's costs are paid by a trade union or workers' chamber under the existing regulations on the provision of legal protection. However, any agreement to pay costs depends on a prior assessment of the prospects for success. In situations where the evidence is unfavourable, for example, it is to be assumed that not all costs will be met (Büggel 2002).
3 In line with Art. 4 of the Law of 23 April 1998 setting out various measures for the establishment of an EWC or an information consultation procedure provides that the representative workers' organisation within the meaning of the Works Councils Constitution Act may bring an action before the Labour Courts. For more on the issue see Dorssemont 2010: 128 ff.
4 'Capacity to participate in civil proceedings', Section 276.8 of the Labour Code.
5 No explicit regulations on this issue. On the basis of general law, therefore, it can only be supposed that the EWC is capable of taking part in and conducting legal action as a body, while in confidentiality disputes probably only individual members are eligible. If Article 13 agreements are viewed as agreements under civil law, only individual members may take part in and conduct legal actions (Büggel 2002).
6 EWC legislation does not provide for arbitration as a compulsory procedure (but otherwise in collective disputes concerning rights and interests conciliation is compulsory, see Valdés Dal-Ré 2002: 22). Parties must agree on all details of the form taken by such a procedure, its duration and the (*see next page*)

Table 18a **Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)**

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)			Remarks (concerning implementation of Recast Directive 2009/38/EC in italics)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary	Court costs	
Estonia			x		x		x[8]	Not specified directly / not applicable due to procedure before Labour Inspectorate	EWCs' right to address court with regard to confidentiality disputes (Art. 39) directly in the EWC implementation act (before in Employee Trustee Act 2006). Otherwise state supervision by Labour Inspectorate.
Finland		x[9]	x[10]				x[11]	The losing party[12]	
France	x	x		x	x		x[13]	If EWC wins employers claim costs	
Germany		x			x		x	Company	
Greece		o[14]	x[15]			x[16]		Each party pays its own; court fees upon application	

6 (*Denmark, from previous page*) appointment of the arbitrator. The outcome of conciliation is binding, but it can be appealed against and challenged in court (Büggel 2002).
7 (*Denmark, from previous page*) The trade union makes an expert available to the EWC.
8 Under the transposition of Directive 94/45/EC.
9 Based on the possibility provided for by Art. 26.2 of the Employee Trustee Act of 2006 referring to extrajudicial proceedings concerning misdemeanours.
10 Büggel (2002) argues that it is not possible to ascertain whether (and if so what kind of) a distinction and difference in legal status exists between the judicial assertion of claims under Article 13 and Article 6 agreements. Büggel draws the conclusion that 'The supplementary provisions of the implementing legislation indicate that in the case of an Article 13 agreement only individual EWC members can take legal action'.
11 Only signatories to the agreement are entitled to take legal action. It is unclear what happens in the case of statutory EWCs (Büggel 2002).
12 Arbitration Act (Act 1992/967) provides for voluntary conflict resolution in the form of arbitration. Its application is optional and subsidiary in the case of a conflict between an EWC and a company. The nature of the arbitration procedure and the appointment of the arbitrator can be chosen by the parties. Arbitration awards can be challenged only in case of serious formal or procedural errors, or in the event of contempt.
13 The costs of an arbitration procedure are very high and the party that loses the arbitration procedure as well as in court pays the costs. In practice, however, because trade union representatives have always co-signed the EWC agreement trade unions meet these costs (Büggel 2002).
14 (*Greece, next page*) A hypothetical possibility, since neither Article 64 of Law 4052 nor relevant external acts contain clear-cut rules on EWCs' legal status. According to the Greek expert, under (*see next page*)

Table 18a **Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)**

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)			Remarks (concerning implementation of Recast Directive 2009/38/EC in italics)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary	Court costs	
Hungary					▲[17]			Court fees payable in advance by plaintiff/applicant	Introduction of extrajudicial proceedings by court concerning violations of EWC establishment and functioning[18]
Iceland		x[19]	x[20]			x[21]			*Rules of Act on Trade Unions and Industrial Disputes, No. 80/1938 apply*
Ireland		x			x			Each party bears its own costs; court fees payable upon application	
Italy			+[22]	+ [23]				Applicant upon starting procedures	

14 (*Greece, from previous page*) Greek law neither EWC members nor an EWC as a collective body have legal personality, but they could attempt the solution of approaching the court as an 'association' that, according to Art. 69 of the Greek Code of Civil Procedure (KODIKA POLITIKIS DIKONOMIAS), has such competence.

15 (*Greece*) The author's own conclusion based on an analysis of Article 21 (and other articles which address individuals, that is, members of an EWC or workers' representatives) of the Presidential Decree transposing Directive 94/45/EC, in relation to which the commentary stipulates that 'Anyone issued with a capacity to act as referred to above shall have the right to seek to have it quashed by the Magistrates' Court (Irinodikio) in the place where the authority is located'. It should be noted that in contrast Büggel (2002) arrived at a conclusion that the capacity to act in courts is a collective capacity.

16 (*Greece*) The legislation provides for an arbitration procedure only where the special negotiating body and the management of the company cannot agree on the text of the agreement (Büggel 2002).

17 Art. 67 of the Amendment of Act XXI of 2003.

18 Article 69 of the Amendment of Act XXI of 2003 stipulates: Article 23(1) of the Euüt. shall be replaced by the following provision: '(1) The court shall decide within fifteen days in an extrajudicial procedure with regard to any disputes in connection with the agreement on the establishment of the European Works Council or the procedure of informing and consulting employees, and, furthermore, in connection with the legal regulations on the European Works Council and on the rights and obligations regulated by this Act of the special negotiating body, the European Works Council and members thereof incurred between those referred to in Article 1(3) and the European Works Council, the members thereof, employees, the works council or the trade union.'

19 According to Art. 45 of the Act on Trade Unions and Industrial Disputes, No. 80/1938 if a party is represented by trade unions the right to approach the Labour Code is collective.

20 According to Art. 45 of the Act on Trade Unions and Industrial Disputes, No. 80/1938 parties unaffiliated to trade unions may submit their cases on their own.

21 State Conciliation and Mediation Officer based on Section III, Art. 20 of the Act on Trade Unions and Industrial Disputes, No. 80/1938.

Table 18a **Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)**

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)			Remarks (concerning implementation of Recast Directive 2009/38/EC in italics)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary	Court costs	
Latvia		x			x			Stipulated by court procedural law. Free in the Labour Dispute Committee/ Mediator/Conciliation	Changes concerning competent courts and dispute settlement (by reference to Labour Dispute Act)
Lithuania		x			x			Not known	
Luxembourg								Upon order of court at the end of proceedings	Implementation of the Recast Directive 2009/38/EC brought with it a slight change of financial penalties.
Malta								Not known	
Netherlands		x[24]	x[25]		x			EWCs, SNBs and members thereof exempted from costs of proceedings[26]	
Norway		x			x			Not known	
Poland		x[27]			x			Not stipulated / but EWC has its own budget (by law)	

22 (*Italy, from previous page*) In the event of a breach of employee representatives' rights, those representatives can use a general procedure regulated by the Code of Civil Procedure. An individual worker can use a general procedure (for example, urgency procedure regulated by Art. 700 of the Code of Civil Procedure) to defend his or her right to be informed and to have fair representation. Local entities of a national trade union can activate the procedure under Art. 28 (Tribunal of Bari, 13 April 2004).

23 (*Italy, from previous page*) Only local entities of national trade unions can sue on the basis of Art. 28 of the 1970 Statuto dei Lavoratori: the judges have not recognised the right to sue to employees' representatives in the workplace.

24 Based on Section 5 of the Act of 23 January 1997.

25 Section 5 of the European Works Councils Act of 23 January 1997 with later amendments: any interested party to apply to the Enterprises Division of the Court of Appeal in Amsterdam in case of any infringement on the rights of the law or the EWC agreement, except the provisions of Art. 4 (the so-called national rights such as workers' protection and secrecy and confidentiality). It is added that the SNB and the EWC cannot be ordered to pay the costs of the process.

26 Section 5 of the European Works Councils Act of 23 January 1997 with later amendments.

27 Limited to cases concerning confidentiality of information and consultation (Section 5.4 of the Law on European Works Councils dated 5 April 2002).

Table 18a **Characteristics of legal status of EWCs in national law: legal standing, extrajudicial proceedings and court costs (cont.)**

	Legal status					Extrajudicial proceedings (mediation, conciliation, arbitration)			Remarks (concerning implementation of Recast Directive 2009/38/EC in italics)
	Legal personality	Capacity to act in courts collectively	Capacity to act in courts individual EWC members	Trade unions eligible to represent/participate	EWC entitlement to start proceedings	Compulsory	Optional / voluntary	Court costs	
Portugal								Not stipulated / Court fees payable in instalments (first instalment payable upon application)	*Infringements classified as administrative offences.*
Romania	x	+			x[28]			Not stipulated but EWC has own budget (by law) and is exempt from court fees	
Slovakia		▲			▲			Applicant /plaintiff upon starting procedures	According to Büggel (2002) EWCs had the capacity to act in courts and to start legal proceedings already under transposition of Directive 94/45/EC
Slovenia								Upon application/ the losing party	Change in fines for infringement.
Spain		x[29]		x[30]	x	x[31]	x[32]	No court fees apply	
Sweden	x[33]	x[34]	x		x		x	Applicant upon starting procedures	
UK		x[35]	x		x[36]	o[37]	x	Not stipulated / usually the losing party	

28 Limited to abuses of confidentiality.
29 Title III Chapter II of the Law of 10 April 1997 on the right of employees in Community-scale undertakings and groups of undertakings to information and consultation implementing Directive 94/45/EC.
30 Conclusion on Art. 37 of the implementation law (Law of 10 April 1997).
31 Obligatory conciliation: Art. 154 of the Law on Labour Procedure: 'In order to process the lawsuit, a prior requirement shall be that conciliation will have been attempted before the corresponding administrative department or before the conciliation bodies that may be assigned according to inter-professional agreements or the CBAs referred to in Art. 83 of the Revised Text of the Workers' Statute (RCL 1995, 997).'
32 Optional (voluntary) arbitration according to the Arbitration Act of 2003 (State Official Gazette No. 309 -Ley 60/2003 de 23 de diciembre, de Arbitraje).
33 The author's conclusion about the equivalence of the capacities of EWCs to those of parties to a collective agreement based on Articles 40 and 41 (including footnote 7) of Act 359 of 9 May 1996.
34 Art. 40 of the implementation law of Act 359 of 9 May 1996.
35 Legal standing in courts arguably limited to employee-only EWCs, not granted to mixed EWCs (only under implementation of Directive 97/74/EC).
36 Court obliged to issue judgments within 15 days.
37 Voluntary unless the Employment Appeal Tribunal (EAT) refers the disputed case to the Advisory, Conciliation and Arbitration Service (ACAS) or Central Arbitration Committee (CAC).

Notes:
x – a facility / solution exists
o – no facility / solution is in place, but see footnote
▲ – change introduced by national bill/law transposing Recast Directive 2009/38/EC
+ – inferred based on external legislation other than EWC transposition laws or based on case law
Italics – remarks referring to changes introduced in the wake of adoption of the EWC Recast Directive 2009/38/EC
Countries in grey background – countries where legislation in the area of legal status and/or sanctions was in any way modified following the EWC Recast Directive.

Source: Jagodzinski 2015.

Table 18b **Characteristics of legal status of EWCs in national law: character of breach and sanctions**

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law[1]
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Austria		x				▲[2] /x				x	
Belgium		x	x[3]		x[4]	x[5]	x				Imprisonment[6]
Bulgaria	x				▲[7]				x	x[8]	Civil liability for damages; court order to disclose info
Cyprus		x			▲[9]	x	x[10]				
Czech Rep.		o[11]		x						x	

1 For more detailed information on confidentiality and sanctions for its breach see Table 4 in this volume.
2 Fines raised to 20,000 euros for a single breach of EWC rights, raised to 40,000 euros for repeat breaches.
3 A criminal sanction (*sanction pénale*) can be imposed if the employer fails to comply with the deadlines in accordance with Art. 21 of the Act of 14 February 1961 (European Commission 1998). Criminal sanctions are also imposed based on the Code Pénal Social stipulating that a violation of a collective agreement (*La violation de la partie normative d'une convention collective*) is sanctioned by Art. 189: 'An employer will be punished by a level 1 sanction if, in breach of the law of 5 December 1968 on collective labour agreements and joint committees, it has committed an infringement of a collective labour agreement that has been made compulsory and that is not already sanctioned by another article of the present Code. With regard to the infringement referred to in the first paragraph, the fine will be multiplied by the number of workers concerned.' (For more information see: Dorssemont 2012).
4 A distinction is made between: 1) fast-track proceedings concerning confidential information: the president of the labour court decides alone; as a rule, the verdict takes 2 days, but where it is possible to prove special urgency the decision is handed down immediately; 2) other fast-track cases: chamber ruling on the matter comprises the president of the court, one workforce representative and one employer representative. In both cases, actions may be prohibited or ordered (injunctions). Decisions issued under summary proceedings can be challenged (Büggel 2002).
5 Under Article 1(14) of the *Loi relative aux amendes administratives applicables en cas d'infraction à certaines lois sociales* of 30 June 1971 [Act governing administrative fines imposable in the event of infringement of certain social legislation], each case of failure to comply with a rule in a collective agreement is subject to an administrative fine (*amende administrative*) ranging from BFR 2 000 to 50 000.
6 Criminal prosecution is also possible (Art. 4). Under Art. 11, this administrative fine is imposed separately for each employed worker, up to a total of BFR 800 000 (European Commission 1998).
Criminal penalties can be applied according to the law setting out support measures for the establishment of a European Works Council or a procedure in Community-Scale undertakings and groups of Community-Scale undertakings for the purposes of informing and consulting employees. [C – 2011/00140] Moniteur Belge — 23.03.2011 – Ed. 3 — Belgisch Staatsblad 18321, Chapter VI.
7 Court order to disclose information classified as confidential by management.
8 Art. 404 of the Labour Code.
9 Possible only with regard to an injunction for management to disclose information classified earlier as confidential (art. 17(2) b of the Law 106(I)/2011, No 4289, 29.7.2011).
10 Imprisonment of up to 2 years (+ a fine) (Art. 22 of of the Law 106(I)/2011, No 4289, 29.7.2011).
11 Breaches of EWC regulations may be considered 'Breaches of the legislation and administrative offences' under the Labour Inspection Act of 3 May 2005.

Table 18b **Characteristics of legal status of EWCs in national law: character of breach and sanctions**

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Denmark		x			x	x	+[12]				As stipulated by separate acts
Estonia				x	x[13]					x	Penal sanctions (penal and misdemeanour code)[14]
Finland				x	x[15] / ▲[16]	x					Fine
France			x[17]		x[18]	x	x	+			Civil and penal sanctions
Germany		x			+[19]	x[20]	x				Penal sanctions (offence)

12 Based on Sections 4 and 5 of the Criminal Code of Finland (39/1889, amendments up to 927/2012 included; available at: http://www.finlex.fi/en/laki/kaannokset/1889/en18890039.pdf).

13 Termed 'precept' by the Employees' Trustee Act of 2006 making reference to procedures under the Occupational Health and Safety Act of 16.06.1999 (with subsequent amendments) RT I 1999, 60, 616.

14 The Estonian Employee Trustee Act 2006 Art. § 264, 'Failure to perform obligations of elected members of trade unions in relations with employers', stipulates that 'An elected shop-steward who fails to ensure avoidance of disruption of work during a period prescribed by law or a collective agreement shall be punished by a fine of up to 100 fine units'. Different sanctions (§§ 267) are laid down for violation of the obligation to maintain the confidentiality of information, which 'shall be punished under the conditions and pursuant to the procedure prescribed in §§ 25 and 26 of the Employee Trustee Act.'

15 Responsibility to use summary proceedings lies with the local district court. It is not possible to say whether a measure already introduced by the company can be suspended until the verdict is handed down. No experience has been gathered to date. Duration of these proceedings: between 6 months and 1 year in the first instance; up to 3 years for appeal proceedings. Decisions delivered in fast-track proceedings may be challenged in higher instance courts (Büggel 2002).

16 The employee representatives may demand that a tribunal rule on cases in which the employer is obliged to give this information; the employer shall then be subject to a conditional fine (Eurofound 2009).

17 Violations of EWC law fall under a general category of '*délit d'entrave*' which describes violations of worker representatives', trade union and works councils' rights. More information at: http://infosdroits.fr/le-delit-dentrave-au-droit-syndical-chsct-et-comite-dentreprise-definition-sanctions-penales-procedure/

18 EWCs can apply for the company's decision to be suspended until the EWC has been properly consulted. These proceedings last between 2 and 3 weeks. Where special urgency can be demonstrated, the verdict can be issued immediately (within hours). These proceedings may be conducted orally, but it is standard for written preparatory submissions. Representation by a lawyer is not compulsory, but is usual, on account of the complexity of the issues.
If the judge rules that fast-track proceedings are inadmissible due to a lack of urgency, they may order the institution of ordinary proceedings (Büggel 2002).

19 Article 85 II Labour Courts Act. The issue has reportedly been broadly debated: the Landesarbeitsgericht (Regional Labour Court) in Cologne in Case 13 TA267/11 (point 30 of the judgment) stated that concerning the Works Constitution Act (Betriebsverfassungsgesetz) the Federal Labour Court confirmed the principle of applicability of the general injunction to suspend actions causing infringement in cases of employers' violations of the codetermination rights (Mitbestimmungsrechte) provided for in § 87 Abs. 1 BetrVG. A commentary on this case (Hayen 2012) explains the limitations of applicability of the injunction (*next page*)

Table 18b **Characteristics of legal status of EWCs in national law: character of breach and sanctions**

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Greece				x		x	x[21]				
Hungary				x	+	x				x[22]	
Iceland						x	NO[23]				
Ireland		x			x	x	x				Penal sanctions (offence)
Italy		x			+[24]	x	+[25]	+[26]	+[27]		Disciplinary sanctions and fine[28]

19 (*Germany, from previous page*) to the infringement of information and consultation rights of EWCs. The applicability of injunctions in the German law depends on their applicability in relation to infringements of national works councils, which differs according to topic: on some issues where the latter have true codetermination rights the courts have recognised an Unterlassungsanspruch (claim to injunctive relief) until the prescribed procedures are adhered to; in other instances where national works councils have weaker rights (right to give an opinion, right of information and consultation) there is no generally recognised 'Unterlassungsanspruch' (however, this issue has been under legal debate since the 1990s; see Bauckhage 2006: 164 ff.). § 87 BetrVG contains a catalogue of issues where national works councils must agree to company policy—in the event of disagreement, there can be recourse to arbitration.

20 (*Germany*) In Germany courts are free to determine the sanction (see Bauckhage 2006: 155).

21 Imprisonment of up to two years.

22 No specific sanctions (apart from a 'fine') defined in the transposition of the EWC directives acts or in the Labour Code (Simon 2007).

23 Explicitly excluded in Art. 70 of the Act on Trade Unions and Industrial Disputes, No. 80/1938.

24 Inferred based on the literature (e.g, European Commission 1998: 5; Borelli 2011: 5) arguing that a breach of information and consultation obligations violates Art. 28 of the 1970 Statuto dei Lavoratori (Act No. 300 of 20 May 1970 on Workers' Protection, also known as the Workers' Statute, as last amended by Decree Law 196 of 2003) allowing Italian trade unions to sue the employer on the grounds of any anti-union behaviour.

25 In the event of a breach of a judge's order to management (injunction) to fulfil its duty on information and consultation, the sanction is a custodial sentence of up to 3 months or a fine of up to 206 euros (Art. 650 of the Criminal Code). The decision of a criminal court can also be published in journals chosen by the judge (Art. 36 Criminal Code).

26 Inferred based on a ruling by the Corte di cassazione on collective redundancy procedures under Art. 4 of Statute No 223/1991, which lays down the employer's obligations to inform and consult the regional employment office and the in-company union representatives, states that dismissals based on Art. 4 are null and void if the statutory procedure has not been followed (Judgment No 6759 of 26 July 1996). (European Commission 1998: 5).

27 On the basis of Art. 28, the judge should decide within 2 days, considering summary information, and if the violation is verified, he shall order the employer to stop the illegal behaviour and to remove its effects. The court decree is immediately executable and it can be withdrawn only by a decision that concludes the trial activated by the employer's appeal.

28 Based on violations of national information and consultation act implementing Directive 2002/14/EC it may be inferred that a breach of the confidentiality clause incurs an administrative fine ranging from 1033 to 6198 euros, but only for the experts assisting the workers' representatives. For the latter, the decree does not foresee any type of administrative sanction, but refers to the disciplinary measures established by collective agreements (Eurofound 2009).

Table 18b **Characteristics of legal status of EWCs in national law: character of breach and sanctions**

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Latvia				x						x	
Lithuania		x		▲		x				▲	Fine between 1033 € and 6198 € [29]
Luxembourg				x		x / ▲[30]	x				Fines and imprisonment up to 3 months
Malta		x				x					
Netherlands				x	+[31]					x	
Norway				x		x					
Poland		x				x	x				Criminal sanctions
Portugal		▲/x				x					Civil penalties
Romania		x				x					Sanctions for offences as in other breaches of EWC law
Slovakia		x								x	
Slovenia				x		x					
Spain		x			Yes[32] /x[33]	x[34]		+[35]	x		

29 Art. 17, para. 1, Law 74/2002 (National Multi-industry Agreement).
30 Art. L 433-8 of the Bill amending Title III of Book IV of the Labour Code.
31 Inferred based on the Works Councils Act: 'If, however, the works council has expressed an opinion which the employer has disregarded, Article 26(1) of the Act authorises it to challenge the employer's decision before the Ondernemingskamer (Commercial Chamber). The Chamber may, for example, enjoin the employer to refrain from implementing his proposed decision (Article 26(5)(b)). The employer may not violate such an injunction (Article 26(6)). (European Commission 1998: 26).
32 Art. 39 of the implementation law (Law of 10 April 1997).
33 In labour or ordinary courts, special summary proceedings are designed to safeguard union freedom of association and collective bargaining rights. Art. 157 of the Law on Labour Procedure: 'This lawsuit [concerning collective dismissals] shall be processed as urgent. It shall enjoy absolute preference over any other matters that are processed, except for those related to the protection of trade union freedom and other basic human rights.' The parties will be summoned within 5 days (Art. 158) and judgement delivered within the next 3 days (Art. 158, para. 2). Due to restrictive preconditions for applying summary proceedings in practice they may be hardly accessible for EWCs.
34 Art. 4 of the Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/200, 4 August, Law on Infractions and Sanctions in the Social Order).
35 According to collective research under the coordination of Susan Fanning (2012) the competent court can issue a declaration that the company's actions are null and void for failing to consult.

Table 18b **Characteristics of legal status of EWCs in national law: character of breach and sanctions**

	Category of breach				Possible sanctions						Sanctions for breach of confidentiality in EWC law
	No crime	Offence/infringement	Criminal	Not specified	Injunctions/summary procedures	Fine/financial compensation	Imprisonment	Null and void	Immediate suspension of infringement	NA/defined in court	
Sweden				x	o[36]	x					
UK		x			x[37]	x					x[38]

Notes:
x – a facility / solution exists
o – no facility / solution is in place
▲ – change introduced by national bill/law transposing Recast Directive 2009/38/EC
+ – inferred based on external legislation other than EWC transposition laws or based on case law
Italics – remarks referring to changes introduced in the wake of adoption of the EWC Recast Directive 2009/38/EC
Countries in grey background – countries where legislation in the area of legal status and/or sanctions was in any way modified following the EWC Recast Directive.

Source: Jagodzinski 2015.

36 In disputes on the confidentiality of information, 'cases shall be dealt with promptly' (Art. 40 of the implementation law of Act 359 of 9 May 1996). Moreover, by implication from the Co-determination Act of 1976 (Act on Employee Consultation and Participation in Working Life) it could be possible to derive the applicability of 'interim remedies' to instances of transnational information and consultation by EWC.
37 No mention of urgent/fast-track injunctions comparable to those available in the French system.
38 Sanctions for breach of confidentiality and breach of obligation to report back to employees about the EWC information and consultation outcomes.

2.1.5 Conclusions on EWCs' legal status

The issue of EWCs' legal status is much more fundamental than just a formal question of proper or incomplete transposition.

Acting in court requires two things: (i) legal capacity (whether in the form of full legal personality or its functional equivalents); and (ii) recognised judicial interest. Art. 10 of the Recast Directive clearly covers both elements and requires the member states to provide these legal means to EWCs.

While a recognised judicial interest of EWCs in litigation on transnational information and consultation is indisputable, legal status represents a complex and, as we have shown, often problematic issue. Various forms of legal status are necessary to allow EWCs to effectively function and exercise their rights and duties. Moreover, if needed, they allow EWCs to participate in the conduct of legal transactions and thus make them a genuine partner of management, independent of the latter's good will or obstructionism and able to stand up for their rights in case of violations. In consequence, these credentials enable meaningful information and consultation and allow employee representatives at transnational level to present views that the management must take into account. Conversely, if deprived of those legal attributes EWCs are often helpless and vulnerable objects in corporate governance, only seeming to participate on an equal footing with the managements of multinationals. Consequently, the question of legal personality or its equivalents seems decisive for the *effet utile* of the EWC directives.

The study of national acts transposing Directive 94/45/EC as amended (where relevant) by Recast Directive 2009/38/EC, as well as analysis of external acts referred to by the transpositions (labour codes, codes of penal procedure, codes of infringements) undertaken above reveals that in as many as nine member states (Bulgaria, Cyprus, Czech Republic, Hungary, Italy, Luxemburg, Malta, Portugal and Slovenia, as well as possibly Belgium[50]) EWCs have neither legal personality nor any of its functional basic rights that allow recourse to justice. Due to the complexity of national systems of law and limited resources to study them in their entirety, it is not possible to categorically conclude that EWCs in these countries are entirely deprived of access to courts or equivalent administrative procedures; at the same time it is safe to conclude that access to justice for EWCs in these countries is not regulated in a transparent, straightforward and legally clear way. It can also be safely concluded that if rights referring to access to justice do not appear transparent in the framework of this study where the authors have had access to national laws and experts, they are likely to be at least equally (if not more) unclear to members of EWCs or trade union officers where there is a dispute with company management. Consequently, if workers' representatives in an EWC cannot be certain whether they have the formal competence to launch and conduct legal disputes with management, they are likely to be generally discouraged from seeking justice. It can be also concluded that in the case of these countries Directive 2009/38/EC's requirement towards the member states to ensure 'proportionate, dissuasive and effective' sanctions is hardly met, because sanctions are outcomes of court procedures

50 It is unclear because in Belgium the right to recourse to justice is extrapolated/inferred from the competence of acting in courts granted to members of national/local works councils.

to which access needs to be secured in the first place. In this sense sanctions are to be understood as a crowning of efficient procedures that lead to their conclusion, and clear procedural rules for seeking justice are to be considered prerequisites and necessary ingredients of sanctions.

Hence, whether EWCs in these countries have legal status may ultimately depend on some distant – indirectly linked – acts or, alternatively, on a court's evaluation in individual cases,[51] leading in extreme situations to incoherence in jurisprudence. Given the proven gravity of this matter for EWCs' ability to defend their rights to information and consultation, a legitimate suspicion arises that the eight aforementioned countries have not fully and properly transposed the EWC Recast Directive. Because in all these member states the original provisions transposing Directive 94/45/EC on the legal status of EWCs have not changed in the wake of transposition of Recast Directive 2009/38/EC the above finding also corroborates the critical assessment regarding the cursory character of the Commission's Implementation Report of 2000 (European Commission 2000) and its lack of a far reaching reflection on the operation of EWCs. The European Commission neither considered this to be a fault at the time, nor noticed it as a possible shortcoming, nor discerned the gravity of its consequences for the enforcement of provisions of the EWC directive. In fact, the Commission did not deal with the issue at all, looking only at implementation of 'penalties' and 'remedies' (competent courts) available to EWCs (see further sections of this study). Consequently, no measures were taken against the member states for improper transposition of Directive 94/45/EC.

A related conclusion is thus that either the Commission's report was insufficiently thorough in these respects, and/or it did not consider such detailed and specific elements of transposition measures to be capable of causing distortions in the attainment of the goals of Directive 94/45/EC. It may be partly explained by the then limited experience with EWCs, as well as the time pressure to deliver the implementation report within the Directive's deadline. Moreover, admittedly, a deep analysis of national implementation systems, especially in the area of enforcement, requires an analysis that goes beyond national EWC acts and stretches into other domains of law. Nevertheless, criticisms of the Implementation Report's ((European Commission 2000) insufficient thoroughness seem valid. It is to be hoped that the forthcoming Implementation Report on Recast Directive 2009/38/EC foreseen for 2016 will handle the legal status of EWCs with greater perspicacity and attention.

3. Costs of legal proceedings as part of the enforcement framework

3.1 Provisions of Recast Directive 2009/38/EC

As outlined in the introduction to this chapter Art. 10.1 can be understood not only as safeguarding financial and material resources for the operation of EWCs, but also as a kind of general obligation imposed on the member states to provide EWCs

51 See Blanke and Dorssemont 2010.

and their members with whatever 'means' are necessary to apply the rights and obligations stemming from the Directive. Undeniably, the right of EWCs to defend their right to information and consultation is one of the rights stated explicitly in the EWC Recast Directive. The evidence can be found in Art. 11.2, which refers to an entitlement to adequate administrative or judicial procedures to be made available by the member states to enable the obligations deriving from this Directive to be enforced. It can be thus deduced that costs linked to legal actions and disputes between the EWC and management must be covered (Picard 2010a).

An important aspect of any legal dispute is expert advice from a lawyer. Such advice is almost always necessary even before formal proceedings commence, as it is necessary to evaluate the infringement, its circumstances and the viability of and strategy for the prospective case. Understanding Art. 10.1 as covering legal expertise is further confirmed by paragraph 5 of the Subsidiary Requirements, which grants the EWC or a select committee recourse to experts of their choice as far as it is necessary to carry out their tasks. Representing the interests of employees collectively is one of the statutory rights of any EWC and thus Art. 5 of the Subsidiary Requirements serves to reinforce the claim to provide EWCs with financing for legal counsel/expertise in preparation of legal proceedings.

3.2 Recommendations of the Report of the group of experts on the implementation of Recast Directive 2009/38/EC on European Works Councils

Reading the Recommendations of the Expert Group (European Commission 2010a) concerning Art. 10.1 and its interpretation, it appears that there are two possible views on the matter, a broad one and a narrow one. Advocates of a narrow, literal interpretation argue that Art. 10.1 refers only to financial means necessary for the operations of EWCs (for example, financial resources to be guaranteed by management to convene meetings, means of communication for EWC members and so on). By contrast, supporters of broad (extensive) interpretation insist that the 'means required' are to be understood as measures not only of a financial or material nature, but also, for example, rights enabling EWCs to make full use of their rights (Picard 2010a; Blanpain 2009). The Expert Report explains the scope of 'means' by stipulating that they 'include the ones required to enable EWC members to launch court proceedings in the event of violations of transnational information and consultation rights' (European Commission 2010a). The Report reiterates further that 'the EWC should have the financial means to represent employees', and there is no denying that defending one's rights in court is to be classified as interest representation.

The contentious part of the debate concerns the question of who should provide those means. The Report of the Expert Group contains statements by representatives of the ETUC and BusinessEurope who were invited to one of the sessions devoted to this topic. For the ETUC the question of the source was a straightforward one; it argued that because EWCs are to be created in undertakings and act in favour of those undertakings' interests and rights to information and consultation, it should be primarily the company's central management that provides the means for their operation. The ETUC representative added that 'other sources [of financing]

are possible'. With regard to the scope of 'means' the BusinessEurope representative noted that the means include travel, accommodation, facilities and so on, but expressed doubts whether costs linked to financing of court proceedings, while not excluded, are to be considered 'means required' (European Commission 2010a). He also suggested that this question should be clarified in the course of national transpositions. The Report confirmed that it 'depends on national law and practice whether the need for EWC members to have the means to enable them to launch court proceedings to defend the rights of employees to transnational information and consultation implies that central management is to bear the costs of legal action taken by employee representatives' (European Commission 2010a) . The Report further lists various solutions at national level concerning covering of the costs linked to legal actions:

(i) each side (trade union and company) bears its costs;
(ii) means to be borne by management include legal costs;
(iii) the works council cannot be condemned to any cost in legal procedures;
(iv) the party losing the case normally pays both parties' expenses' (European Commission 2010a)

While interesting, the enumeration of national regimes is both incomplete and superficial, in that it is not followed by explanations, commentary or analysis of the implications of individual solutions for EWCs. The first solution does not seem to reflect the fact that EWCs are not trade union bodies, but assemblies of nominally unaffiliated workers' representatives, a differentiation that is retained in the EWC Directives and national laws.[52] Consequently, the fact that in some instances of litigation expenditures on legal action were covered by trade unions is a testimony to the lack of clear-cut, transparent provisions concerning the means for EWCs, which has forced the latter to seek provisional solutions to defend their statutory rights. It seems that in this case the Expert Report confuses the outcome of incomplete law, for which practice has found emergency solutions, with what is considered legal tradition or a characteristic of a given national regime. Second, the record of regimes based on the principle of the losing party covering the expenses of all parties to the dispute can, again, be qualified as nothing more than a cursory record of solutions applied at national level, as the Report does not contain any further remarks or explanations about the implications of such solutions for non-commercial actors, such as EWCs. The ramifications of such legal frameworks can be such that EWCs may be effectively discouraged from defending their rights in courts if they face the potential outcome of being declared liable for the legal expenses of the company, on top of their own. It is surprising that no explanation from the European Commission was recorded on this point; after all, rather than simply listing solutions, the Commission should assume the statutory role of guardian of the treaties and analyse solutions in light of the objectives of the Directive and the overarching principle of effectiveness. The Commission is obliged to conduct monitoring of implementation of the EU *acquis* and, where necessary, to undertake steps to ensure proper implementation by the member states. In this case, if no remarks from the Commission

52 In terms of this logic, for instance in Poland and the Czech Republic the original transposition laws of Directive 94/45/EC granting representative trade unions the right to nominate (as opposed to elect) SNB and EWC members were declared unconstitutional by the respective Constitutional Tribunals.

were recorded, the impression might be that it approves of regimes in which EWCs, without their own budgets or a statutory default obligation to be provided with such a budget, might be held liable for either their own costs or even the litigation costs of the company management. It should be recalled that while enterprises in which EWCs are operating, naturally, pursue economic objectives and profit, EWCs are instances of non-profit representation of workers, have no sources of income and were introduced to defend and represent workers' fundamental rights.

Finally, the conclusions of the Expert Report, among other things, highlight that 'flexibility is needed to determine who is to bear the costs related to legal actions or how they should be shared: national practice is to be taken into account and the EWC agreement may provide for practical arrangements in that area' (ibid.). It is again doubtful whether relying on national practice is a good solution in the case of EWC-related litigation that so far has been relatively scarce[53] and limited to some member states only. Keeping in mind the guardian-of-the-treaties role of the European Commission, one would rather expect it to analyse the national transposition laws and verify whether the right of access to courts is truly safeguarded, also from the financial point of view. It should also be emphasised that in many countries EWCs were a 'foreign' body, previously unknown in national industrial relations and thus, contrary to the European Commission's assumption, in many countries the practice has not produced any 'national traditions' yet. Consequently, it would be more than natural to expect that with the introduction of EWCs as transnational, Europe-wide bodies of employee interest representation, standard rules for financing court disputes should be introduced.

Last but not least, the Report recorded a statement by the BusinessEurope representative admitting that the requirement to bear the costs related to judicial action by EWCs against companies is 'a clear concern for employers' as it would (allegedly) 'constitute an incentive to litigation' (ibid.). The latter argument, however, seems to be based on a fallacious assumption that legal proceedings are driven not by the desire to defend one's rights, but by some other interests of EWCs. The fallacy in this reasoning seems to stem from the underestimation of financial and practical challenges a court case poses for an EWC and, supposedly, from a lack of awareness of the amount of resources, time and work-investment preceding a decision to launch court proceedings. It cannot be emphasised enough in this context that EWCs are bodies grouping non-remunerated workers' representatives who usually lack prior experience in matters of law and thus likely to be at a loss when faced with a court confrontation requiring legal knowledge and experience. One should also not forget that it is both a general European rule and a specific Recast Directive obligation to provide for recourse to justice in case of breaches of law. In this context, the misinformation and fallacious assumption on the basis of which the BusinessEurope representative made their statement become evident.

53 Dorssemont and Blanke 2010.

3.3 Provisions regarding financial and material resources for the operation of EWCs[54]

The original Directive 94/45/EC clearly provided much leeway for national legislators with regard to defining the financing of EWCs' operations. Despite this often excessive lack of precision in many countries the implementation of the Recast Directive changed little: the original provisions implementing Directive 94/45/EC rather than being replaced have been retained, either completely unchanged, only slightly modified or complemented with amendments. Table 17 presents an overview of the currently binding provisions applicable to EWCs (either transpositions of the original Directive 94/45/EC where they remain unchanged, or, where applicable, of the modifications introduced in the area following Directive 2009/38/EC).

Below, we present an overview of the national frameworks determining financial conditions for EWCs' access to courts. This overview combines analysis of provisions directly transposing Art. 10.1 of the Recast Directive (the means to be provided to EWCs) as well as, where relevant, references to general (that is, acts not directly or solely related to EWCs[55]) national regimes regulating industrial or labour dispute resolution (procedural laws, such as labour law procedure, civil law procedure and so on) and other acts covering industrial relations.

Concerning transposition of Art. 10.1 of the Recast Directive the following legislative approaches have been adopted:

(i) Countries in which Art. 10.1 of the Recast Directive was transposed by means of provisions using the (general) wording of the Recast Directive (Belgium, Cyprus, Spain, Greece, Italy, Slovenia). In this category one should also mention countries that applied almost exactly the same wording as that of Art. 10.1 (Romania, Estonia), as well as countries in which there is a differentiation between the 'means to apply the rights stemming from the Directive' and means 'to collectively represent the rights of employees' (Malta, Ireland). With regard to the latter group, despite the semantic differentiation, it is difficult to explain whether the national legislator had a particular reason for taking this approach and whether any concrete legal outcome attached to the differentiation was intended. Similarly, without deep analysis of further provisions of national law it is difficult to tell whether there is any substantial content-related difference between the two. It seems that it will be necessary to wait for experience to show any implications of such differentiation.
(ii) Countries in which no changes concerning operational means for EWCs were introduced in the transposition of Recast Directive 2009/38/EC (Czech Republic, Denmark, France, Poland).
(iii) Member states requiring specification of the financial means for EWCs in the agreement (Austria, Finland, Lithuania, Latvia, Sweden, Portugal).[56]

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54 See also considerations on the nature and transposition of Art. 10.1 of Recast Directive 2009/38/EC in the previous section of this report with regard to EWCs' legal status.
55 These regimes must, however, be fit to comply with the standards of Art. 11.2 of the Recast Directive requiring the national lawmaker to provide for access to efficient juridical procedures.
56 This category could also include Poland where the law has continuously required that EWCs be provided with a budget.

(iv) Countries in which some modifications going beyond (Slovakia, Germany) or falling short of (United Kingdom) the standard of Directive 2009/38/EC were adopted.

Art. 10.1 of the Recast Directive does not specify *how* those means are to be provided for EWCs and further examination of national regimes to analyse whether EWCs are granted more specific means (such as the right to a budget) was necessary. This revealed the following practices:

Countries with statutory release from court/legal fees for European Works Councils

The most transparent solution with regard to financing EWCs' access to courts seems to be a statutory release of EWCs from any court fees that might be applicable when pursuing justice, combined with clear regulations concerning the financing of EWCs' operations. This solution has been applied in only nine countries: Latvia, Lithuania, Spain, Bulgaria, France, Germany,[57] Romania,[58] Sweden and the Netherlands.[59]

In Estonia, the costs of possible EWC-related proceedings in legal institutions were not specified, but it is unclear whether it amounts to no fees being required.
In the Netherlands, the transposition (Act of 23 January 1997 on the implementation of Council Directive 94/45/EC of 22 September 1994) of the original EWC Directive 94/45/EC stipulated in Section 5 that

> '[a]ny interested person may request the Companies Division of Amsterdam Court of Appeal to order implementation of the provisions of this Act, with the exception of section 4, subsections 1 to 8, or of an agreement as referred to in section 11 or 24. A special negotiating body or the members thereof and a European Works Council established under this Act may not be ordered to pay the costs of such proceedings. Articles 429a to 429t of the Code of Civil Procedure shall apply.'

Countries with a general regulation concerning the operating costs of EWCs

In the vast majority of countries regulations on the means available to EWCs are limited to general provisions. It is difficult to make a general (not applying to a concrete case) statement whether this is a sufficient safeguard, as the ultimate test of the viability and extent of the general obligation to provide means for EWC operation is practice. The practical test of the robustness and aptness of statutory frameworks usually manifests itself all too clearly, although not exclusively, in cases of conflict in which the EWC agreement does not provide for arrangements specifically guaranteeing an autonomous budget or financing in case of litigation.[60] In many cases of such conflict EWCs reported to the European trade union federations that they were cornered as neither the agreement nor the law gave them the right to independent financing in cases of conflict. It is thus misleading to consider that only the cases actually brought before a court are fully representative and prove that

57 Art. 2 Abs. 2 GKG.
58 Reported by the Romanian expert, but no confirmation could be found in legal acts available in English.
59 Information according to (Büggel 2000) and own research (Jagodzinski 2015 (forthcoming).
60 The ETUI's EWC database currently (January 2015) records 25 agreements (out of a total of 1,883) containing provisions guaranteeing EWC financing by management in case of litigation.

EWCs do have sufficient legal guarantees; it is actually unknown in how many cases employee representatives were discouraged from pursuing justice due to a lack of resources to make an application to a court. Nevertheless, despite the impossibility of quantifying these occurrences the problem of too general statutory regulation on financing of EWC operation remains valid.

In some countries it has been explicitly asserted that EWCs cannot use trade union budgets. That was the case in Sweden where, when the draft bill was presented, the Swedish government stated that an EWC could not ask either the workers or a trade union for financial support.[61] In other countries (Poland and the Czech Republic) when analysing provisions on the preference for trade unions in nominating EWC members instead of popular elections the national constitutional tribunal declared that EWCs are not trade union bodies, but independent forms of worker representation. This view, despite the fact it was expressed by tribunals with competence limited to an individual member state, highlights the distinction made in the EWC Directive itself between workers' representatives and trade unions and should be accepted with all its consequences: namely that trade unions cannot be relied on and de facto forced to finance EWC litigation because this seems the only practical solution to assert workers' rights. In other words, the fact that there is a practical work-around in place should not be accepted as a substitute for proper statutory guarantees of means for EWCs as required by the EWC Directive.

Countries with a de iure budget for EWCs

A contrasting approach facilitating EWC financing with regard to access to courts has been adopted in countries that introduced a legal obligation to provide EWCs with a budget for operation. By implication one can thus infer that such a budget could be also used to cover any court fees.

A statutory budget is a solution applied by the Polish transposition act that includes a de iure obligation to provide EWCs with an autonomous budget. Such a budget is to be made available by the management of a Community-scale undertaking. Such provisions requiring an EWC to be provided with its own financial means seem to ensure access to courts, including seeking independent legal advice. Nonetheless, it is obviously the application of this requirement in individual agreements – for example, the competence to manage the budget independently of management's consent – that will be key to EWCs' real autonomy in this regard.[62]

In Romania, a similar approach was adopted, at least in the case of EWCs based on the Subsidiary Requirements: management is obliged to agree on a budget with the EWC[63] and to provide it, covering resources necessary for EWCs to carry out their statutory responsibilities.[64]

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61 Büggel 2002.

62 There is currently only one EWC established based on the Polish transposition.

63 Art. 41– (1) of Law 217/2005: 'The expenses for the functioning of the European Working Council shall be borne by the central management in Romania, which shall establish its annual budget in cooperation with the Council.'

64 Art. 42-1(2): 'The central management shall provide to the European Works Council financial and material resources in order to carry out their responsibilities according to this law' in conjunction with Art. 41 introduced by the amendment law of 2011 implementing Recast Directive 2009/38/EC.

In the case of countries in which the law – either the old transposition of Directive 94/45/EC or amendments implementing Recast Directive 2009/38/EC – does not clarify the question of financing for EWCs, unless the European Commission intervenes it will be up to the courts to decide and close loopholes (provided that a case on this matter is submitted by an EWC, which, in light of the above analysis, sounds viable only in the case of external financing, either by trade unions or national works councils). It will thus depend on the judiciary to interpret the new provisions on 'means necessary'. In case of too general provisions and unclear national practice or industrial relations tradition, the obstacle remains and threatens to distort legal certainty, the principle of effectiveness and, specifically, EWCs' access to courts, as such 'means' are necessary even to launch legal proceedings (legal capacity to act collectively in courts, financial resources to obtain legal advice and representation by a lawyer). It cannot be expected that in cases of uncertainty, employers will be willing to assume any litigation costs, be it legal advice for EWCs or their representation in lawsuits against the company.

Countries without a statutory right to budget for EWCs, but with powers implied from external legislation/sources and/or practice

In some countries, although statutory frameworks on EWCs do not provide these bodies with a right to an autonomous budget, practical solutions based on national industrial relations traditions and/or powers implied from other pieces of legislation have been applied. Despite the limited evidence based on EWC court cases – circumstances under which those implied budgetary rights have been confirmed – some observations can be made based on practices and traditions in national industrial relations. In some countries – such as Spain, Belgium and France – the problem of a lack of autonomous budgets for EWCs is often resolved in practice by cooperation with trade national union organisations that have the statutory right to represent EWCs in court proceedings (see Table 18) and provide EWCs with legal representation at their cost. Alternatively, European trade union federations occasionally support EWCs in cases of legal disputes with management: the European Public Services Union has had such a fund since 2008.[65]

In France an alternative practical solution has been found by using statutory entitlements enjoyed by national works councils, which have a de iure guarantee of a budget depending on the company's financial results. By means of agreement with the EWC and company management, the local works council can cover the expenses incurred by EWC litigation. It is also relatively more common in French multinational companies than elsewhere to find arrangements on a budget for EWCs (see below).

In Germany under Art. 30 of the Act on European Works Councils transposing Directive 94/45/EC (EBR-Gesetz of 1996) extended by the 2011 Act transposing the Recast Directive, only general provisions are in place.[66] In practice, however, by analogy with the general regulations for works councils in Germany, there has been

65 See website article 'EPSU Executive approves rules for use of EPSU EWC legal fund' at http://epsu.org/a/3764%3Fvar_recherche%3DEWC.

66 Art. 39 of the EBR Gesetz vom 14/06/2011 I 1050; 'the costs arising from the establishment and operation of the European Works Council and the Committee (§ 26 (1)) shall be borne by the central management'.

common recognition of a company's obligation to reimburse a statutory EWC the costs of any necessary judicial proceedings. This also includes the costs of EWC legal representation and counsel, provided that the judicial steps taken are deemed necessary. In practice, before the case is brought to court, its viability and the subject of the dispute are assessed by a lawyer, who then decides whether to pursue the litigation or not. Normally, EWCs are supported by their trade unions both with counsel as well as with financial guarantees in case of a court decision to cover the cost of litigation.[67]

In Italy, on the other hand, agreements are almost always co-signed by national trade unions, which subsequently cover the costs of legal proceedings if a case involving EWC rights arises. Moreover, already in the implementation the act transposing Directive 94/45/EC (Decree-Law No. 74/2002) a similar provision to Art. 10.1 of the Recast was included. Art. 16 of Act No. 74/2002 stipulates that

> 'the operating expenses of the European Works Council shall be borne by the central management. The central management concerned shall provide the members of the European Works Council with such financial and material resources as are necessary to enable them to perform their duties in an appropriate manner.'

In the transposition of the Recast Directive (Decreto Legislativo No. 113 of 22/06/2012, Art. 16.12) virtually identical wording is used.

As the costs of conciliation procedure are significant in Italy (see further in this chapter), such clear provisions ensuring that the EWC's costs are always met by the company, irrespective of whether it wins or loses, are a necessary facility safeguarding the right of access to courts (however, this has not yet been tested in practice, as no legal disputes concerning EWCs have been recorded in Italy so far).

In Denmark the practical solution has been for trade unions to support individual EWC members in legal disputes. Therefore if the legal dispute concerns individual EWC members who are also members of a trade union, the latter will assume the costs of the litigation in court. If they are not union members, they have to meet the costs themselves.[68] It is supposed[69] by analogy that the fact that the employer has to cover all the EWC's expenses probably means that they also have to meet the costs of judicial proceedings conducted by the EWC as a body. In the absence of legal disputes in court in Denmark under the transposition of Directive 94/45/EC this could not be verified; however, currently under the extended provisions of Art. 10.1 of Recast Directive 2009/38/EC there should be no further doubts about assuming litigation costs incurred by the EWC collectively. Nevertheless, the lack of clear provisions and precision in transposition of the EWC Recast Directive cannot be justified by the above practice.

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67 The levels of both court and lawyers' fees are determined by the 'value' of the dispute, as determined by the court.

68 Büggel 2002.

69 Conclusion reached by the national expert in Büggel's 2002 report. It was not possible to clarify whether the employer has a statutory duty to pay these costs.

Contractual arrangements on financial resources in EWC agreements

In cases in which neither the national provisions nor the industrial relations tradition are clear enough final recourse might be offered by EWC agreements. For the sake of precision, it should be re-emphasised that both EWC Directives (94/45/EC and 2009/38/EC), in line with the principle of subsidiarity, impose on central management only a general obligation to finance the functioning of EWCs, but leave the arrangement of specific questions up to the parties. This includes laying down budgetary rules regarding the financial and material resources to be allocated to the EWC or ICP.[70] These provisions highlight the meaning of solutions negotiated and codified in individual EWC agreements. It seems that ideally the contractual arrangements should deal with the issue of the costs of possible litigation in the most efficient way, giving the parties the liberty to adapt solutions to their specific needs. This must be, however, done in the context of Brian Bercusson's '*shadow of the law*' guaranteeing appropriate fall-back solutions or automatically applicable (de iure) minimum standards in case of lack of agreement on financing by the management of, among other things, litigation costs. The 'shadow of the law' is necessary here, as parties do not have equal standing in negotiations: employee representatives are bargaining for resources that are in the possession of management, which, on top of that, in the case of a legal dispute, may be regarded by the latter as likely to be used to the detriment of the company. Understanding and acceptance of this inherent imbalance of power seems a sine qua non of recognising the need to introduce statutory fall-back provisions in this respect.

There are at least two possibilities for arranging the means of operation for EWCs in case of litigation. First, agreements can contain an obligation on the management to cover costs of litigation by the EWC against the company. This arrangement is, however, not a widely applied standard. According to the ETUI database of EWCs (www.ewcdb.eu; January 2015) arrangements on budgets for EWCs (both those indicating a specific annual budget, which is a minority of cases, and those containing only a general clause) occur only in 209 agreements (out of 1,883). Clearly, the sample is too limited to draw any express inferences, although the predominance of agreements based on Dutch and French law may suggest a link between the national tradition of industrial relations based on strong works councils and extensive facilities available to institutions of worker representation. On the other hand, at least six agreements explicitly preclude the possibility of providing EWCs with a budget (Zumtobel European Forum, De la Rue European Employee Forum, Agrolinz Melanin EWC, Quelle EWC, Dyckerhoff EWC and BMW EWC). The option of excluding a separate budget may, however, also be a form (albeit unfavourable) of agreement, as referred to and allowed by Art. 6.2 e) of Directive 94/45/EC or Art. 6.2 f) of Directive 2009/38/EC.

The second possibility is to include in an agreement, independently of arrangements on the budget, a specific clause guaranteeing coverage of costs by management in case of legal disputes. According to the ETUI database of EWCs,[71] there are

70 Art. 6.2e of Directive 94/45/EC; Art. 6.2f in conjunction with Art. 10.1 of the Recast Directive and Recital 19 of the Preamble.

71 As of January 2015.

only 25 agreements guaranteeing financing for litigation for 24 EWCs and SE works councils.[72]

In view of the above figures on contractual arrangements in EWC agreements with regard to budgets, it is clear that they are very infrequent. However helpful it seems when worst comes to worst and a conflict escalates to a lawsuit parties to EWC agreements do not commonly resort to establishing contractual arrangements guaranteeing either an explicit autonomous budget for EWCs or guarantees of coverage of legal costs in case of litigation. A far more frequent practice in EWC agreements (and in statutory acts implementing the EWC Directives) is a general clause stipulating that the management will provide the necessary resources for the operation of EWCs. Such a general clause is, however, in the majority of litigious situations or disputes no more helpful or precise than the general provisions of the Directives and/or of national implementation acts. The reason for the infrequent application of contractual arrangements on budgets might be that the bargaining relationships between management and EWCs are characterised by the intrinsic imbalance of power between the parties,[73] in which one of them (the management) has all the resources (financial, legal advice and so on) sought by the other party. Workers' representatives negotiating an EWC agreement do not have strong leverage in this area: managements often argue that a general clause on the provision of means is sufficient as this is the standard laid down in the Directive. As a result and as statistics show, workers' representatives usually agree to a general clause.

3.4 Costs of litigation and court fees

It is important to emphasise the importance of comprehensive provisions to safeguard sufficient financing for EWCs as one of the preconditions for their access to courts. In this section we look at the costs of legal disputes and present examples of national regimes governing court fees.

First, problems with financing EWC litigation were discerned in the course of implementing EWC Directive 94/45/EC into British law, in respect of which the Department for Trade and Industry (DTI) recommended that '[a]s the EWC will have no financial resources of its own, it is proposed that costs should be borne by the undertaking (excluding frivolous applications)'.[74] Although an important proposal it was only a non-legally binding recommendation. Consequently, the issue of financing has commonly been shifted onto the negotiating partners. This shift inevitably resulted in an unbalanced bargaining position, in which workers' representatives had to ask the management to provide the necessary material means and to commit itself to financing court litigation against itself. The costs of appearing before the Central Arbitration Committee (CAC) in EWC-related litigation was estimated at

72 Examples include: Laiki Group, agreement of 14/02/2007, Art. 9; Akzo Nobel European Employee Forum, agreement of 01/04/2009; Euronext of 6/11/2002; Elektrolux of 16/06/2001; Deutsche Post World Net of 23/07/2003; Credit Suisse 18/01/2002; BNP Paribas 03/05/2010; BCD Travel 06/03/2008; Elanders of 14/09/2007.

73 Wills 2000: 274.

74 DTI, *Implementation in the UK of the European Works Council Directive. A Consultative Document*. July 1999 (URN 99/926), available at: http://www.berr.gov.uk/files/file20651.pdf, pp. 37–38.

£11,900 (approximately 14,500 euros in 2012).[75] At an Employment Tribunal the estimated costs as of 2012 were £2,540 (approximately 3,000 euros).[76] Such sums suggest that enterprises are unlikely to agree to cover costs. Possibly as a result of this, no known British EWC agreement includes a provision specifically guaranteeing coverage of costs linked to litigation (and only few such agreements have been signed in any case: see previous section).[77] Thus it was not long before this financial problem surfaced, namely in the proceedings initiated by the Dubai Ports EWC (P&O).[78] Regardless of its admissibility – commonly highlighted in reports on the case – the EWC's complaint was withdrawn also because the employee side at P&O had no financial resources of its own to pursue the litigation. Moreover, it proved impossible for the EWC to raise the necessary funding.[79] Although the problems that have emerged in cases of litigation have been predominantly in the United Kingdom, in this section we argue that this problem is not a specifically British one.

When considering the costs of court litigation, in the authors' view, one should differentiate between three kinds of possible expenditure:

(i) court fees – charges, in the form of an administrative fee, payable for registration and processing of a case in court;
(ii) costs of legal representation and advice – payable by each party to the court proceedings;
(iii) subsidiary costs of gathering evidence, communicating with other members of the EWC, trade unions and other stakeholders potentially affected by the litigation.

While these costs may differ they all need to be covered in various proportions by the parties to a case. It should also be emphasised that they are also required when the parties opt for an alternative dispute resolution system (ADR), although in some cases charges for such proceedings are lower than in standard court proceedings. A case in point is Ireland, where since implementation of EWC Directive 94/45/EC Section 20.2 of the transposing law stipulates that in case of disputes over confidentiality and/or withholding of sensitive information by company management referred to an arbitrator designated by the Minister of Labour '[t]he parties to an arbitration under this section shall each bear their own costs'. Fees in Ireland, however, are not limited only to confidentiality disputes, but extend also to all other issues 'concerning interpretation or operation of agreements' (Section 21 of the Irish transposition act). In such cases, in line with Section 21 para 3, fees also apply:

> 'An arbitrator to whom under subsection (2) a dispute is referred shall be paid such fees as the Minister, with the consent of the Minister for Finance,

75 This includes the cost to the CAC of £10,234 (about 12,000 euros) and the cost to the employer of around £1,700 (about 2,000 euros) caused by two days of management time and one day of employee representative time.

76 This consists of £2,000 (2,400 euros) for the employer and £540 (660 euros) for the Employment Tribunal Service. Source: DELNI 2003: 74).

77 One supposes that in EWCs that have an autonomous annual budget (for example, for experts), autonomous legal advice would be possible (as, for example, expenses for external expertise). With this assumption the number of EWCs with a facility to cover legal costs would rise to ten (source: Jagodzinski's own analysis of EWC database of ETUI, 2008–2014). See also below in this section.

78 See Lorber 2010.

79 Altmeyer and Hahn 2008: 12.

> may determine, which fees shall be paid by the parties or a party to the arbitration as directed by the arbitrator … [and] the parties to an arbitration under this section shall bear their own costs.'

The Irish transposition, at the same time, does not, however, provide any general obligation for companies to cover the operational costs of EWCs. It only requires that such arrangements be included in the EWC agreement. Only in the Subsidiary Requirements section does it repeat the general wording obliging the management to provide the EWC with such financial and other resources as are necessary for them to perform their duties in appropriate manner. As a result, an EWC for which an agreement has been negotiated, but without arrangements on financial resources for its operation, is not covered by the Subsidiary Requirements and thus is effectively deprived of any possibility to appeal to a court or state arbitrator, as costs may be applicable. Even more shockingly, the provisions regulating the management's obligation to cover 'reasonable expenses relating to the negotiations … to enable the Special Negotiating Body to carry out its functions in an appropriate manner' (Section 11.7) explicitly do not cover expenses related to any potential dispute before an arbitrator.[80] In consequence, plainly and simply, SNBs are practically deprived of the right to seek justice. Admittedly, the law (Section 7) foresees that

> 'The Minister may make such regulations as are necessary for the purpose of giving effect to this Act and in particular in relation to : (a) expenses to be borne by the central managements in relation to undertakings and groups of undertakings [and] subject to the Second Schedule in relation to a European Works Council, the funding by central managements of the expenses of the operation of Special Negotiating Bodies, European Works Councils, European Employees' Fora or information and consultation procedures,'

but as far as it was possible to establish within the framework of this project, no such regulation has ever been issued.[81] The example of Ireland clearly shows how crucial the combination of national court/administrative fees and lack of financing for EWCs may be for EWCs' recourse to justice. It is a blatant, indeed symptomatic example of the inconsequentiality and internal inconsistency of EWC transposition frameworks. Last but not least, it is a clear example of gross negligence and refusal to take counter-measures by the European Commission, as this situation has persisted since the very beginning of EWC legislation in 1996.

Finally, the above costs are required also in the case of summary (fast-track) court proceedings. This is the case, for example, in Luxembourg where in 2002 they amounted to approximately 497–619 euros.[82]

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80 Section 11.8 stipulates 'For the purposes of subsection (7), reasonable expenses shall include the cost of meetings of the Special Negotiating Body, whether with the central management or otherwise, including the cost of materials, the venue, translations, travel and accommodation, and the equivalent cost of one expert per meeting.'

81 Based on information provided by the Industrial Relations Section of the Irish Department of Jobs, Enterprise and Innovation, at http://www.djei.ie/employment/industrialrelations/work.htm (accessed on 13/02/2015).

82 LUF 20,000–25,000, depending on the lawyer appointed; Büggel 2000).

All in all, in the member states in which court fees are required for any proceedings undertaken by EWCs it must be verified whether the national provisions provide for proper guarantees that ensure financing for EWC operations, explicitly including coverage of such legal costs as may arise when EWCs seek to pursue their right to go to court.

Countries in which no court fees are required

In the case of countries in which EWCs have no default right to be provided with an autonomous budget and those in which where no practical solution to this problem has evolved, expenses linked to seeking justice are a serious, if not insurmountable, obstacle. Court fees (as well as, usually, file preparation and representation costs), normally payable in advance upon submitting an application to the court, can amount to an insuperable hurdle on the way to justice. As EWCs do not have legal personality, they cannot open a bank account for the purpose of seeking external financing for litigation costs (for example, from trade unions). Therefore the requirement of covering court fees in advance seems to represent a serious challenge, or even a significant practical limitation of the right to judicial or administrative establishment of rights.

The latter applies in particular in countries in which such court fees apply. There is, however, a group of member states in which no court fees are required. According to Jagodzinski's investigation (based, among other things, on input from NETLEX and European Judicial Network in Civil and Commercial Matters, as well as (Büggel 2000), only eight countries do not require payment of court charges to start proceedings (Spain, Bulgaria, France, Germany, Romania, Lithuania, the Netherlands, Sweden[83]). In these countries, the obligation to provide means for EWC operation including litigation is no less important than in the others, but such costs may be somewhat lower than in the other member states and thus the deterrent effect on EWCs considering launching a case might be less significant.

Spain abolished court fees for judicial proceedings in 1986 and, additionally, remuneration for barristers is normally payable at the end of proceedings. The court has the competence to order managements to cover an EWC's costs of legal representation or the employee representatives are able to make the claim based on Art. 11.4 (c) of the Spanish transposition Act of 10 April 1997.

In France, as a rule no charges are payable to the state for acts of procedure, except in the Commercial Courts where there is a scale of registry charges.[84] Nonetheless, costs of court proceedings can be awarded by the court to one of the parties, corresponding to the sun incurred in conducting the proceedings. It is customary that EWCs may be supported by local works councils and trade unions which often assist them financially in litigation.

In Romania, EWCs are recognised as bodies that collectively represent the interests of employees on a par with trade unions and they therefore enjoy the same legal

83 Information according to Büggel 2000.
84 In fast-track (summary) proceedings involving EWCs court fees amount to approximately FRF 500 = approximately 75 euros (Büggel 2000).

guarantees as trade unions in courts, in other words, they are exempt from paying fees.[85]

In Latvia, no fees are required to refer a case to the first instance level, which is mediation, conciliation or arbitration. In Sweden, court fees are not imposed on EWCs, although the court might order that the legal costs of the defendant (the company's legal costs) are to be covered by the plaintiff.

For Cyprus, Lithuania, Malta and Norway it was not possible to verify what costs are applicable and when they are payable; in Estonia, the costs of EWC-related proceedings before law enforcement institutions were not specified, but by reference to the Employment Contracts Act of the Republic of Estonia, which designates the Labour Inspectorate as the institution responsible for the enforcement of EWC rights, it can be inferred that court costs are applicable to these administrative proceedings. In Estonia, the Employee Trustee Act of 2006[87] (Art. 26) with regard to the Labour Inspectorate specifies that it exercises state supervision over compliance with the requirements provided for in this Act under the conditions and pursuant to the procedure provided for in the Occupational Health and Safety Act. Additionally, the Labour Inspectorate conducts extra-judicial proceedings concerning misdemeanours.

Fees may apply, however, in the above listed countries if the case is referred to ADR systems (usually courts of arbitration), which is regulated by procedural court law (usually Civil Procedure Law). It must be kept in mind that in this case procedural fees or court charges might, in principle, be applicable to EWCs. For this reason the Dutch transposition act from the very beginning includes an exemption of EWCs, SNBs and their members from any costs of court proceedings.[88]

Free access to courts – that is, not requiring a registration charge and/or any other fees for proceedings or legal representation – is without doubt crucial for anyone seeking to pursue their rights in court.[89] In Spain and Bulgaria, the statutory exemption from court fees has far-reaching consequences for EWCs: even though they do not have legal personality and consequently cannot open a bank account,[90] the lack of court charges means that their access to the judicial system is ensured (however, in Bulgaria EWCs do not seem to be entitled to launch legal proceedings). In Germany and France the release from court charges is an important facility, even though it would in any case probably have been possible for EWCs to mitigate this problem, as they do possess legal personality and can thus acquire and dispose of the financial means necessary to start litigation.

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85 This was reported by the Romanian expert, although no confirmation could be found in legal acts available in English.

86 Büggel 2000.

87 Passed 13.12.2006 RT I 2007, 2, 6 Entry into force 01.02.2007.

88 Art. 5 of the Dutch European Works Councils Act authorises any interested party to apply to the Enterprises Division of the Court of Appeal in Amsterdam in case of any infringement of the rights provided for by law or an EWC agreement, except the provisions of Art. 4 (so-called 'national rights' such as workers' protection and secrecy and confidentiality). It is added that the SNB and the EWC cannot be ordered to pay the costs of the proceedings.

89 It should not be forgotten, however, that the lack of common court fees in a given country resolves only the question of financial resources for pursuing a judicial action by an EWC; as already mentioned, legal advice and representation costs still apply and need to be borne by EWCs.

90 Blanpain 1998: 26.

4. Sanctions

4.1 Sanctions and Recast Directive 2009/38/EC

The role of sanctions as a motivation to comply with the law has been known in legal philosophy and modern political science at least since the time of John Locke.[91] The theory of legal positivism teaches that (statutory) sanctions, though not the sole reason, are often the most effective motive to obey the law.[92] Of more direct relevance there has been important research on the proper implementation of sanctions and enforcement frameworks in general by, among others, Malmberg (Malmberg 2003), Bercusson (Bercusson 2009) and Hartlapp (Hartlapp 2005).

It is obvious that it is not sufficient to lay down rules that allow the relevant actors resources to implement their rights and access justice; it is also necessary to ensure that party which is found to be in breach of the law should be held responsible, be asked to remedy the breach and/or to compensate the injured party, and/or be 'punished' for not respecting the rules. The punishment should also be such that any party would not feel immune from applying the law because the potential effects are inconsequential (dissuasiveness). The present chapter offers the hypothesis that the profile and effectiveness of the transnational right to information and consultation could be substantially improved if clear, effective and dissuasive sanctions were ensured.

Traditionally, EU law has left the implementation of penalties and remedies to member states, providing at the same time as a general principle that sanctions must be proportionate, dissuasive and effective. Therefore, 'the success of enforcement of EU labour law has perhaps been greatest where EU legal technique meshes with the national tradition' (Bercusson 2009).

Directive 94/45/EC was fully in line with this principle and did not contain a reference to sanctions. The only reference to enforcement in Directive 94/45/EC can be found in the obligation to ensure remedies for EWCs (Art. 11.3[93]).

This legislative approach has, however, caused a lot of problems in the past, especially in the area of labour law: 'national enforcement of labour law has been criticised in a number of areas: from the adequacy of tribunal procedures to the sanctions available for breaches, including the compensation awarded for damages suffered' (Bercusson 2009). Some national measures, such as reduction of 'protective awards' for failure to consult workers' representatives as required by EU law by means of set-offs have been presented to and condemned by the CJEU[94] (ibid.).

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91 In his *Essays on the Law of Nature* (1664), Locke wrote: 'Those who refuse to be led by reason and to own that in the matter of morals and right conduct they are subject to a superior authority may recognise that they are constrained by force and punishment to be submissive to that authority and feel the strength of him whose will they refuse to follow (Locke 1663–64, 117).

92 Dating back to John Austin 'The Province of Jurisprudence Determined' (1832).

93 Art. 11. 3: 'Member States shall provide for appropriate measures in the event of failure to comply with this Directive; in particular, they shall ensure that adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced.'

94 *Commission of the EC vs. UK*, Cases 382/92 and 393/92, [1994], ECR I-2435.

In its review of the Directive in 2000 (European Commission 2010a), the Commission did not highlight any difficulties with sanctions, simply explaining that penalties are imposed in all countries, even though they differ in nature (fines or penal sanctions). It was further stated, however, that national legislative systems do not spell out systematically how penalties are to be applied for a breach of EWC laws. Based on these general conclusions it can be inferred that the rules at the time were not systematically transparent, thus hindering legal certainty and effectiveness.

In the period preceding Recast Directive 2009/38/EC, it was highlighted that in order to achieve effectiveness of employees' information and consultation rights, sanctions must be clarified in cases of non-compliance (European Commission 2008). The ETUC called for stronger sanctions to be inserted in the revised Directive. The European trade unions insisted that management decisions must be abandoned (declared 'null and void') if they violate information and consultation rights.[95]

Understandably, the demand to introduce such uniform sanctions across all the member states has been strongly and consistently opposed by European employers.[96] It was also the source of debates between Council, Parliament and Commission when negotiating the text of the Recast Directive.[97] The outcome was the insertion of the EU legal principle of proportionate, dissuasive and effective sanctions in the recitals but not in the body of the text. The Commission explained the latter by the incompatibility of uniform sanctions with the legal nature and objectives of directives. The abovementioned Recital 36 represents progress in comparison with Directive 94/45 and provides an explanation for Art. 11.2, which requires member states to 'provide for appropriate measures in the event of failure to comply with this Directive'.

The requirements of dissuasiveness, proportionality and efficiency of sanctions have two flaws: they are referred to only in the Preamble to the Directive and they concern only sanctions, instead of the entire body of enforcement. Nevertheless, their introduction into the EWC Directive is crucial as, implicitly, it finally introduces the principle of effective enforcement of EU law into the EWC domain. As Malmberg (Fitzpatrick 2003) and Bercusson (Bercusson 2009) point out, the accumulation of these three principles (equivalence, effectiveness and proportionality) is the cornerstone of the emergence of the 'principle of effective enforcement'.

As we shall see in our analysis of transposing measures,[98] only a small number of countries seem to have reviewed their laws in relation to sanctions as a consequence of adopting Recast Directive 2009/38/EC.

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95 ETUC demands for Recast Directive available at: http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Table-ETUC-demands-and-Commission-proposal

96 BusinessEurope, CEEP (Jagodzinski 2008).

97 Informal Trialogue, December 2008, reported in European Commission 2010a: 65.

98 See Table 17 in this chapter.

4.2 Overview of solutions applied by member states concerning breaches of EWC laws and possible sanctions

Due to the generality of the Implementation Report on Directive 94/45/EC (European Commission 2000; Jagodzinski 2015 (forthcoming) and the extension of the scope of Directive 94/45/EC, it seems worth looking anew at this aspect of transposition. Such a review seems valuable also because the lack of or limited sanctions in member states have been heavily criticised.[99] Finally, sanctions have been one of the most intensively debated aspects of the revision/recast of Directive 94/45.[100]

Following the Impact Assessment Study's (European Commission 2008) recommendations, the only modification concerning sanctions introduced by Recast Directive 2009/38/EC was the addition of two Recitals:

> (35) The Member States must take appropriate measures in the event of failure to comply with the obligations laid down in this Directive.
> (36) In accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from this Directive.

The obvious shortcoming of such a solution is that in the majority of member states the preambles of EU directives are not transposed into national law and are considered to be non-binding parts of legislation. This may be one explanation of why there has been no modification of provisions on sanctions in the majority of the member states[101] (see also sections below).

Group of Experts' Report on Implementation of Recast Directive 2009/38/EC on European Works Councils (December 2010)

In its overview of the provisions of Recast Directive 2009/38/EC, the Expert Report reiterates Recitals 35 and 36 of the Recast Directive by restating that appropriate

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99 ETUC demands for Recast Directive available at: http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Table-ETUC-demands-and-Commission-proposal

100 BusinessEurope, CEEP (Jagodzinski 2008).

101 For instance the Greek trade union OBES involved in the transposition of the directive as a social partner proposed inclusion of the following passage in the implementation act: 'In case the central management does not provide the members of the EWC or the members of the select committee the necessary information to fulfil the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or rejects the obligation to conduct consultation, the EWC legally represented or the members of the select committee have the right to appeal before the First Instance Court of the central administration office and request, through an application for interim measures, to be provided with the information required on specific transnational issues and ask that the implementation of any decisions of the central management, concerning these transnational matters be suspended until the central management properly fulfils its obligation to consultation. The above application for interim measures shall be discussed on a priority basis within fifteen (15) days. The central management has the burden of proving that it has properly fulfilled its obligation to information and consultation. In case the central management infringes the requirement for appropriate consultation and proceeds to implement decisions relating to transnational matters, such decisions are to be declared void and cannot be enforced against employees for the modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective bargaining agreements'. The Greek government refused to include this in the law, reportedly arguing that there was insufficient justification for such a modification either in the directive (non-binding character of the preamble) or in national Law 4052/12.

measures must be ensured in the event of failure to comply with the obligations laid down in the Directive. It also explains that 'in accordance with the general principles of Community law, administrative or judicial procedures, as well as sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence, should be applicable in cases of infringement of the obligations arising from the Directive' (European Commission 2010a: 9). In this way the requirement of ensuring effectiveness, proportionality and deterrence (dissuasive character) of the entirety of provisions guaranteeing access to justice is clearly reiterated, communicated and accepted by all member states sitting on the Group of Experts.

Further on, the Expert Report deals with specific questions concerning implementation of provisions on sanctions: first, the question of the executability of sanctions for non-compliance with the requirement to inform the European social partners about the composition of the SNB and of the start of the negotiations. The executability of sanctions is considered in relation to three possible options (ibid. 30). It is remarked by the Expert Group that in any case applicability of sanctions to employee representatives for not informing the European social partners is questionable because:

– they do not have a global picture of the SNB's composition before the first meeting;
– they are not responsible for organising the first meeting;
– it would be difficult to provide for sanctions on individual employees' representatives in the case of non-compliance.

The Expert Group concluded on this issue that 'an information obligation on employees' representatives towards European social partners or European trade unions could only be effective after the first meeting of the SNB. Giving the responsibility to inform to the SNB would, however, lead to delayed information and raises the question of the sanctions to be provided.'

Second, in the part of the Report that discusses the details of transposition, the Expert Group highlights the need for special attention when implementing (among other things) Recitals 35 and 36 dealing with judicial procedures and sanctions and recommends that they 'should particularly be considered, given the clarifications they provide to the aim of the articles or their importance in the adoption process' (ibid. 60).

Finally, the Expert Group report devotes a section (Section 19) to the question of compliance with the Recast Directive. When discussing the origin and objective of provisions on compliance it recalls the European Commission's earlier statements on the application of provisions concerning sanctions in the transposition of Directive 94/45/EC. In this sense it takes note of, among other things, the following points from the Impact Assessment Study (European Commission 2008):

– Clarification with regard to sanctions as a requirement as an operational objective to ensure the effectiveness of workers' rights to information and consultation;

– disseminating awareness of 'the existence of the sanctions' among the actors in order to improve compliance.[102]

Considering the significant variety in the severity of sanctions applied in the member states and the fact that in case law the maximum penalties are rarely imposed, the latter recommendation of improving awareness of their existence seems a rather liberal or even lax approach to ensuring more 'clarification on sanctions' and the effectiveness of workers' rights. This approach on the part of the European Commission leading the work of the Expert Group was, nevertheless, applied consistently and was manifest in the response to the central question on whether the existing sanctions have to be changed. The reply of the Expert Group made up of national specialists was ambiguous: 'Not necessarily, but they may have to be updated with new obligations (such as principles, information of social partners of new negotiations, training) and checked by member states in order to ensure they are "effective, dissuasive and proportionate in relation to the seriousness of the offence"' (ibid. 65). In other words, the responsibility for evaluating whether the sanctions in place fulfil the criteria of effectiveness, dissuasiveness and proportionality was delegated to the member states. Such an approach is consistent with the European Commission's policy in all areas and other directives and therefore criticism-proof. However, the Commission continues to bear the responsibility for ascertaining that the transposition laws at the national level meet the requirements of the Directive and that the achievement of its goal is genuinely ensured (Commission's role as the 'Guardian of the Treaties'[103]).

Changes to national regulations on sanctions following Recast Directive 2009/38/EC

The demand for introducing such sanctions across the member states (together with other claims by trade unions) has been strongly opposed by European employers' representatives (BusinessEurope, CEEP; Jagodzinski 2009).

The employers' resistance to the introduction of any (binding) supplementary precision, requirements or standards concerning the institution of penalties comes on top of the Commission's consistent institutional reservations concerning the limits on the degree of invasiveness of directives into national legal orders (ibid.). A compromise solution, taking into account the insistence of the trade unions and other institutional actors (European Parliament, European Economic and Social Committee; for details see Jagodzinski 2009) on the introduction of more binding punitive regulations, resulted in a compromise, namely the inclusion of the requirements of proportionality, dissuasive character and effectiveness of sanctions in the preamble to Directive 2009/38/EC (Recital 36) rather than in the universally binding body of that Directive.

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102 'As regards the clarification on sanctions, it is likely to make clearer to company actors the existence of sanctions in the event of violations of information and consultation rights, and therefore increase compliance. However, this would not necessarily require adding anything to the present Directive, as the need for Member States to provide for appropriate, dissuasive and proportionate sanctions is already a general principle in Community law'; and: 'Clarifications regarding the protection of rights: in order to improve compliance by making clear to company actors the existence of sanctions in the event of violations of information and consultation rights and to address legal uncertainties regarding the capacity of the European Works Council to represent workers' interests' (ibid.).

103 Art. 258 TFEU.

Nonetheless, Recital 36 represents progress in comparison with Directive 94/45 and provides a supplementary explanation and specification of Art. 11(2) of the Recast Directive that obliges the member states to 'provide for appropriate measures in the event of failure to comply with this directive'. It remains to be seen to what extent the obligations stemming from the preamble of Directive 2009/38/EC will be taken into account in the Commission's evaluation of the transposition. Two groups of potential infringements could be conceived.

First, there is the relatively straightforward case of countries in which sanctions are not indicated in the transposition acts, either directly or by reference to other external acts, which represents a violation of Art. 11(2) of Recast Directive 2009/38/EC. In this category, an in-depth examination should be conducted with regard to the Czech Republic, Estonia, Hungary, Latvia, the Netherlands and Slovakia (and possibly also Lithuania), where, based on the EWC transposition act implementing Directive 2009/38/EC, no conclusions could be reached as to the potential consequences of violations of EWC rights, nor could references be traced to external acts regulating punitive measures for such violations. It may of course be possible to ascertain those sanctions by reference to other acts (for example, the Labour Code), even though they are not mentioned in the given EWC transposition; nonetheless, such solutions may fall short of meeting the criterion of transparency of law and legal security in its application.

Second, another group of cases of potential infringement of transposition obligations comprises national transpositions that do include regulations on sanctions, but whose quality does not correspond to the requirements of Directive 2009/38/EC (Recital 36 in conjunction with Art. 11(2)). For the purpose of identifying such possible instances of transposition of insufficient quality, the previous and the following sections in this chapter attempt to provide tools for this evaluation.

Classification of violations of EWC laws

As the Recast Directive introduced no major changes to Directive 94/45/EC with regard to sanctions, in many member states the provisions on sanctions remain unaltered (only in Austria, Bulgaria, Denmark, Estonia, Hungary, Lithuania, Latvia, Portugal, Slovakia, Slovenia and the United Kingdom were changes introduced to provisions regulating access to justice, including sanctions; see also the overview table in Annex 1). The majority of national transposition acts do not include provisions on sanctions, but make reference to other acts of national law. One result of those references to other existing acts of law is significant variation of solutions across the EU. One implication of the diverse legislative approaches is the practical difficulty for stakeholders in obtaining an overview and evaluating the possible outcome of litigation, especially in the context of the transnational composition and character of EWCs' work.

In the first place it must be pointed out that none of the EWC Directives specifies the type of or gives an indication with regard to the branch of law in which sanctions are to be defined.[104] The analysis of the nature of references in the national acts im-

104 This is not always the case with the EU directives. Examples supporting the case in point include some of the environmental protection directives (for example, 2008/99) indicating criminal (*cont. on next page*)

plementing the EWC Directive(s) to external acts that has been undertaken within the framework of the current study reveals an array of solutions. First and foremost, sanctions threatening perpetrators for violating EWC rights and duties depend primarily on the category of 'breach' specified in the EWC transposition act. Therefore, to provide a fuller insight into the landscape of punitive measures applied in the EU, it would be worth examining how the violations of EWC laws are classified. A review of references from the EWC implementation acts to external laws resulted in the following classification:[105]

(i) countries in which the category of infringement of the respective EWC acts is considered an administrative/labour law offence (Austria, Cyprus, Ireland, Italy,[106] Germany,*[107] United Kingdom, Lithuania,[108] Malta, Spain,*[109] Slovakia, Bulgaria,*[110] Czech Republic*[111]);
(ii) countries in which the category of infringement of the respective EWC acts is considered a criminal offence (France, Poland, Germany,* Estonia,*[112] Belgium[113]);
(iii) countries in which the category of infringement of the respective EWC acts is classified under other forms of breach, infringement or violation of rights (Portugal – infringement of rights;[114] Finland – 'violation of the obligation to cooperate of a group of undertakings'; Greece – infringement of obligations; Italy – infringement; Latvia – violation of law; Romania – contravention; Bulgaria – non-observance of labour legislation[115] and violation of labour legislation[116]);

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104 (*cont. from previous page*) penalties as the preferred measure since they 'demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or a compensation mechanism under civil law' (Recital 3).
105 Countries appearing in more than one category are marked with an asterisk.
106 Offence in cases of breach of confidentiality.
107 A distinction is made between criminal and administrative offences. Violations of information and consultation stipulated by Art. 13 agreements are not considered to be offences.
108 Under the act of 29/03/2001 transposing Directive 94/45/EC, administrative offences are governed by the Code of Administrative Offences of the Republic of Lithuania.
109 Under the 1997 Act transposing Directive 94/45/EC, a distinction is made between serious and very serious administrative offences (Art. 32 and 33). This distinction is confirmed in Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/200, 4 August, Law on Infractions and Sanctions on the Social Order) Section I, Subsection II Art. 9.
110 Art. 416, para. 6: 'The ascertainment of violations, the issuance, appeal and execution of penalty decrees shall follow the procedure established by the Administrative Violations and Sanctions Act, save insofar as another procedure is established by this Code.'
111 Breaches of EWC regulations may be considered 'Breaches of the legislation and administrative offences' under the Labour Inspection Act of 3 May 2005.
112 Not stipulated directly in the EWC transposition act, but by reference to the Employment Contracts Act and the Employee Trustee Act of 2006. Offences against EWC law are monitored and prosecuted by the Labour Inspectorate which, however, in this case applies the Penal Code and/or the Code of Misdemeanours Procedure (Art. 26, Employee Trustee Act).
113 Since in Belgium the EWC Directive is applied by means of a social partner (collective) agreement, the sanctions laid down for employers who violate collective bargaining agreements that are rendered generally binding are stipulated in the Parliament Act of 5 December 1968 with respect to Collective Bargaining Agreements and Joint Committees, Official Gazette, 15 January 1969, as amended.
114 Under transposition of Directive 94/45/EC. In Act No 171 of 3 September 2009 the classification was changed to that of 'serious administrative offence' (Art. 5.4; 8.3; 7.10; 9.5; 14.5; 15.8; 22.8) or 'very serious administrative offence (Art. 9.5; 10.4; 15.8; 16.3; 17.5; 18.5; 20.6; 22.8; 24.4) or 'minor administrative offence (Art. 11(4)).
115 The right to alert the General Labour Inspectorate Executive Agency for failure to observe labour legislation. (Art. 130b, Paragraph 6: Upon failure on the part of the employer to fulfil the obligation thereof under Paragraph (1), or where the employer fails to hold the consultations under Paragraph (4), the trade union organisations' representatives and the factory and office workers' representatives under Art. 7 (2) or the factory and office workers shall have the right to alert the General Labour Inspectorate Executive Agency of a non-observance of labour legislation.)
116 Art. 414 of the Labour Code.

(iv) countries in which the category of infringement of the respective EWC acts is classified as a violation of collective agreements (Sweden,[117] Denmark);
(v) countries in which the category of infringement of the respective EWC acts is not specified in the EWC transposition act (Netherlands, Norway, Slovenia, Czech Republic,*[118] Hungary, Latvia,[119] Estonia[120]).

Table 19 **Category of EWC rights violations**

	Administrative or labour law offence	Criminal offence	Other term used without further definition	Violation of collective agreements	Not specified
Austria	x				
Belgium		x[121]		x	
Bulgaria	x		x		
Croatia	x[122]		x Alternatively, see footnote[123]		
Cyprus	x				
Czech Republic					x
Denmark				x	
Estonia					x
Finland			Violation of the obligation to cooperate of a group of undertakings		
France		x			
Germany	x	x			
Greece			Infringement of obligations		
Hungary				x	
Ireland	x				
Italy	x		Infringement (transposition of directive 94/45/EC) / violation (transposition of directive 2009/38/EC)		x
Lithuania	x		Violation of law	x	
Luxembourg	x				

117 In Sweden, any party that wishes to claim remedy according to the EWC law is obliged to demand negotiations within four months of becoming aware of the circumstances to which the claim relates and not later than two years after the occurrence of such circumstances (Footnote 06 to Art. 41 of the Swedish Act No 359 of 9 May 1996).
118 Breaches of EWC regulations may be considered 'Breaches of the legislation and administrative offences' under the Labour Inspection Act of 3 May 2005.
119 Under the Act of 22/06/2011 transposing Directive 2009/38/EC no classification of infringements of EWC rights is indicated.
120 Not stipulated directly in the EWC transposition act, but by reference to Employment Contracts Act and Employee Trustee Act of 2006.
121 Based on Art. 5 of the Parliament Act of 5 December 1968 (with respect to Collective Bargaining Agreements and Joint Committees, Official Gazette, 15 January 1969, subsequently amended) which foresees criminal sanctions for employers violating provisions of collective bargaining agreements (transposition of the EWC directives in Belgium are executed via collective bargaining agreements).
122 Based on Art. 35.2 of the EWC Act of 18/08/2014 it is inferred that in Croatia the violation is defined as a labour law offence (*prekršaj* – which is a term with multiple meanings, such as 'violation', 'infringement' and 'breach').
123 See note 257 above.

Table 19 **Category of EWC rights violations (cont.)**

	Adminis-trative or labour law offence	Criminal offence	Other term used without further definition	Violation of collective agreements	Not specified
Latvia					
Malta	x				
Netherlands					x
Norway					x
Poland		x			
Portugal			Infringement of rights		
Romania			Contravention		
Slovakia	x				
Slovenia					x
Spain	x	x			
Sweden				x	
UK	x				

Source: Compiled by Romuald Jagodzinski, 2014.

As there is a direct link between the category of violation of law and sanctions, it is clear that this element constitutes an important component of the concept of EWCs' access to justice. Furthermore, the organisational solutions applied across the member states in the above classification gives rise to a number of considerations:

First, it should be pointed out that classification of national implementation acts based only on the legal term used to describe the type of violation of EWC law may sometimes be misleading and may not reveal the type of sanctions applicable to the given infringements.[124] It is not uncommon for a violation classified as an administrative offence against labour law (which comes under civil law) to be sanctioned according to the criminal code and code of criminal procedure (for example, Poland: administrative offence and petty offences code). The above classification should therefore be used for indicative purposes only and should not be considered a final listing of corresponding sanctions. Despite this, the classification of types of EWC law violations is useful because it shows that even in the preliminary stage of determining the infringement there are significant differences between the member states.[125] The fact that the same violations are often classified very differently by national legislation (for example, a crime versus an administrative misdemean-

124 In the current project, classification was based on the statutory terms used in individual implementation acts. A further analysis of the nature of sanctions may be an interesting research project, but due to its complexity this remains outside the scope of the present examination.

125 In the study not only sanctions mentioned explicitly in the national transposition act were analysed, but also sanctions in other acts (codes, laws) to which reference was made in the implementation acts. The latter are often key to a proper classification because they contain definitions of violations and specify the sanctions.

our) produces (or multiplies) discrepancies in the implementation of the obligation placed by the Directive on the national legislator to provide for effective sanctions (for example, criminal versus administrative sanctions). As a result, a legitimate question may arise as to the equality of rights of employee representatives sitting on the very same EWC, as well as consistency in the application of EU law. In fact, this question could be the subject of a broader debate on EWCs as vehicles of the Europeanisation of industrial relations in Europe (Waddington 2010), dealing with the question of balance between national variety originating in country-specific industrial relations and the need for common standards for common EU institutions. The thread of this discussion on the effectiveness of the directives is central. On the one hand, it must be recognised that specific labour relations and traditions deserve recognition and protection. On the other, excessive variety of legal solutions might confuse all the actors involved. When EWCs and their members are confronted with the challenge of transnationality, they often struggle with the question of whether it is worth starting a court case in a representative's home country where the maximum sanction is a relatively low fine for the company, or whether it might be more effective to try to launch it in another member state in which sanctions can be more severe, making the entire logistical effort or launching litigation more worthwhile. Such EWCs, faced by a significant legal diversity of solutions and limited resources, have to grapple with the ways of finding a common denominator for workers' representation and face problems with finding an internal common standard for their operations.

Second, with all its constraints, the above classification reveals several countries in which the category of infringement is not specified in the EWC implementation act. Where this approach is adopted in national transposition measures, it may generate legal confusion and lack of transparency. Furthermore, in light of the EWC Directive's obligations to provide for (effective) procedures and sanctions, as well as in the context of the recommendations of the Working Party of 1995 and the Expert Group of 2010, in cases where no sanctions are specified directly in the implementing act (or no references to other acts are made), serious doubts can justifiably be expressed as to whether the member states have fulfilled their obligation to introduce effective and efficient legal remedies.

Third, the fact that none of the EWC Directives offers guidance on the preferred type of sanctions for EWC law violations seems to be one of the reasons for the considerable latitude of national legislators and the wide variety of solutions applied. It is an open question whether such guidance should be offered by the EWC Directive in the future, but it should be pointed out that this is not uncommon in EU legislative practice (for example, in Directive 2008/99/EC; see also next section in this chapter).

Observations concerning general trends in sanctions applicable for violations of EWC rights (including the current post-recast Directive regulations)

At the end of an often arduous and demanding trial comes the court's decision, which usually, in a more straightforward sense, means sanctions for one of the parties. Sanctions can be considered the crowning of litigation and are thus the last aspect in the legal analysis of institutional safeguards for access to justice. Even though in the vast majority of discussions the question of sanctions has attracted

most attention, the punishment of violations of EWC laws is not something that stands alone. As attempted in the current chapter, the type of sanction applicable depends on the classification of the violation and is a corollary of the choice of the branch of national law governing EWC violations (labour law, criminal law, civil law). Sanctions do not exist in a vacuum, but are closely dependent on other variables. The choice of sanctions is left to the member states, which are in no way limited by the EWC Directive or guided by the Expert Group instructions in their choice. The only ultimate requirement is that sanctions be 'effective, proportionate and dissuasive' and that national procedures ensure an effective exercise of rights stemming from the Directive (*effet utile*). An inevitable consequence of this open-ended approach to regulating sanctions and the enforcement of EWC rights (and, generally, of the choice of directive) is a significant variety in the solutions applied by the member states. On one hand, such an approach allows for the necessary respect and scope with regard to national industrial relations and traditions. On the other, it might lead to an array of widely varying solutions that, in the end, are not comparable or compatible with each other and render the application of European-wide directives incoherent. One obvious implication of such a situation is an ambiguous legal situation in which the same transnational right is applied differently, entailing legal inequality and injustice with regard to a different 'valuing' of workers' rights across the member states, depending solely on workers' national origin. If this were the case, it could be a flagrant contradiction of the main reason for adopting EWC legislation at the EU level, namely the creation of common European rights and standards across countries and multinational companies.

The analysis undertaken in the current chapter maps selected aspects of national solutions in the area of enforcement frameworks as they appear in the member states. Study of the above listed solutions allows us to draw some general conclusions.

(i) Injunctions and summary proceedings as an important safeguard of EWC rights to information and consultation

First, courts' right to issue injunctions or conduct summary proceedings pertaining to infringements of EWC rights is an important factor differentiating national implementation acts. The institution of summary court proceedings provides for a shortened and accelerated procedure that makes it possible to obtain a court decision within a relatively short time, ranging from hours – in exceptional circumstances where urgency can be proved, as in France – to approximately 14–15 days (for example, Italy or Hungary). In some countries – for example, Bulgaria[126] – summary proceedings are accompanied by a possibility to issue immediate court orders obliging the perpetrator – in the case of EWCs the management that is not respecting rights to information and consultation – to cease the actions that constitute the infringement or to undertake certain actions to rectify the violation. As some prominent cases – for example, the Gaz de France–Suez merger case or Renault Vilvoorde; for more information on case law see (Dorssemont and Blanke 2010) – have shown, the legal institution of summary proceedings touches upon the very core of *meaningful* employee rights to information and consultation, which aim at

126 Art. 404 of the Labour Code.

involving employees in decision-making before decisions are taken and measures implemented. Summary proceedings also greatly enhance access to courts[127] and the effectiveness of rights, especially when time is of the essence.[128]

In this context, the question of the availability of summary procedures and the possibility to issue injunctions in national legislation seems to be one of the decisive issues determining compliance with Art. 11.3 and 11.4 of Directive 94/45/EC and Art. 11 of Recast Directive 2009/38/EC.

Recourse to the right to issue injunctions or conduct summary proceedings by courts is an important factor differentiating national implementation acts and a variable that strongly determines the efficiency of national enforcement frameworks. These two institutions of law are not sanctions, but rather they are provisional remedies to preserve a given state of affairs in its existing condition or to safeguard the plaintiff's rights. Injunctions are essentially swift court orders issued in emergency situations by which an addressee is required to perform, or is restrained from performing, a particular act; they are measures to prevent further damage that would otherwise happen if a violation persisted. Summary proceedings are a procedure or a simplified mode of trial allowing a case to be held before a judge without the usual full hearing, so that they are accelerated by comparison with a regular trial. Summary proceedings greatly enhance access to justice (Jacobs 2004) 40) and effectiveness, especially when time is of the essence (for example, (Bocken and Bondt 2001).

In providing for a shortened procedure, summary proceedings in EWC matters can be used to obtain a court decision within a period ranging from a few hours (in exceptional circumstances when urgency can be proved, as is the case in France) to approximately 14–15 days (as in Italy and Hungary). In some countries (for example, in Bulgaria), summary proceedings also make it possible for the court or monitoring institutions to issue orders obliging the offender (that is, in the case of EWCs, the management failing to respect rights to information and consultation) to stop the actions constituting the infringement, or to carry out certain actions to rectify the violation. As shown by certain prominent EWC litigation cases, such as the cases of Gaz de France – Suez merger or Renault-Vilvoorde, the legal institution of summary proceedings and/or court orders (injunctions) goes to the very core of *meaningful* guarantees for employee rights to information and consultation and safeguards the fundamental right of workers to be involved (that is, consulted) in the decision-making process before final decisions are taken and measures implemented. In some Member States (for example, Germany) the courts' competence to issue injunctive orders (*genereller Unterlassungsanspruch* based on Art. 111 ff. of the German Works Constitution Act, BetrVG) has been the subject of an ongoing and unresolved legal debate (Bauckhage 2006).

It should be pointed out that even if injunctions are available in a legal system they do not automatically guarantee swift summary proceedings or lead to immediate actions. A case in point here is the Lithuanian transposition law,[129] which provides

127 Jacobs 2004: 40.
128 For example, Bocken and de Bondt 2001: 110.
129 Law Amending Law of the Republic of Lithuania on European Works Councils, 22 June 2011, No. XI-1507.

a legal remedy against a management's refusal to provide information or in a dispute over the correctness of the information provided, in the form of the right of employee representatives to apply to a court within 30 days (Art. 12). The court subsequently hears the case, but no mention is made of the time-limit for the issue of the ruling. In the case of a ruling that the 'refusal to provide information is unjustified or incorrect information has been provided, the central management or any other level of management in question shall be obligated to provide correct information within a reasonable period of time' (Art. 11 and 12). In other words, even if an injunction is issued to provide information, the period in which the management must remedy its failure remains unspecified ('reasonable time'). This might diminish the impact of an injunction as a remedy, where the aim is to halt a violation or prevent damage.

It is logical and in line with the requirements of EWC Directive 2009/38/EC that if the right to timely information and genuine consultation is to be effectively safeguarded, courts – or other institutions, such as Labour Inspectorates – in each EU member state should have the competence to stop a violation from causing further harm to the sufferer (workers) or their interests. It should be pointed out that the effectiveness of sanctions and their capacity to deter potential perpetrators is considerably limited if the only consequences faced by multinationals, which often have vast financial resources, are relatively small administrative fines[130] (see below) or financial penalties.

Summary proceedings and court orders (suspensive injunctions) are not sanctions as such, but are a legal means that represent an important safeguard of parties' interests. In this sense they prevent further damage from happening as a result of continuation of one party's actions and address a serious shortcoming of sanctions of any type, namely delay. The European Commission endorses the introduction of this instrument as an obligatory minimum standard in the harmonisation of sanctions for violations of national transpositions of EU financial market regulations (European Commission 2010b) 12). The European Commission stresses that injunctions can be an effective countermeasure and deterrent, especially against offences committed repeatedly.[131] Sanctions, be they financial or criminal in nature, take time to be decided on and executed and, despite their retributive character, they cannot perform the function of instantly safeguarding a party's valid rights or interests. It is obvious that this inherent deficiency of sanctions often applies to infringements of workers' rights to information and consultation, as they can hardly remedy implications of a managerial decision taken in violation of EWC rights.[132] By contrast, the possibility of stopping a company from implementing projects or decisions taken without consulting the workers gives them a chance to be heard before the decision is executed, irreversible effects produced and damage done. On a more general level, court injunctions represent a means of safeguarding respect for the

130 For more detailed analysis of the dissuasive character of financial penalties in EWC enforcement frameworks see Jagodzinski 2015 (forthcoming).

131 'For example, cease and desist orders and court or administrative injunctions may be useful if there is a risk of certain types of violation being continued or repeated.' (European Commission 2010b: 12).

132 Employee representatives' involvement in meaningful information and consultation usually cannot be restored post-factum. However such examples are known, as in the Gaz de France–Suez merger case that ended with the merger being annulled; see Dorssemont and Blanke 2010.

law in general, as their availability excludes the possibility of cynical violations of law with the aim of 'buying' oneself out – at relatively low cost – of the legal consequences of petty financial penalties as compared with possible gains to be obtained by taking 'shortcuts', that is, actions that show a flagrant disregard for weakly sanctioned laws when the cost of violation is less than that of obeying the law. Finally, one should bear in mind that, in many EU member states, injunctions in industrial relations are used by employers in industrial disputes (for example, to compel a trade union to desist from organising industrial or strike action; see, for example, (Gall 2006)). When such injunctions are available to only one of the social partners – namely, the employers or, alternatively, against just one of the social partners – as is the case in the United Kingdom (see Regulation 19D of the Statutory Instrument 1088), and are explicitly denied to the workers' representatives (for example, EWCs) in cases of infringement[133] of their key right to information and consultation, industrial relations are clearly out of balance. In the United Kingdom, this imbalance was noted in the House of Commons. When MPs were discussing the operations of private equity firms, they concluded that injunctions issued in summary proceedings are an effective means of enforcement of the obligation of a company management/the owners to inform and consult workers' representatives before any decision involving, for example, a highly debt leveraged takeover and thus should be available to workers and trade unions (House of Commons 2007: 243).

Our analysis of national acts implementing the EWC Directive reveals that the effective measure of court injunctions is available and – potentially – applicable to infringements of EWC laws in only a few national legal orders (Belgium, Bulgaria, Estonia, Finland, France, Spain, Lithuania, Ireland, the United Kingdom[134] and, debatably, in Germany[135]) and so far has been applied in court practice only in France (Brihi 2010). Sometimes injunctions are available only with regard to specific circumstances, as is the case in Cyprus, where such court orders are applicable to situations in which the management has (unlawfully) classified information as confidential (Art. 17(2)b of Law 106(I)/2011, No 4289, 29.7.2011). Alternatively, in some countries there exist sufficient theoretical premises for inferring the courts' authority to issue injunctions in EWC cases, based on the courts' analogous capacity with regard to other instances of information and consultation. One example is the Netherlands, where the Commercial Chamber of the appeal court (*Ondernemingskamer*) is competent to issue injunctions in the event of a breach of national-level information and consultation procedures stipulated in the Works Councils Act (European Commission 1998: 26).[136]

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133 Where the order is for the EWC to disclose the outcome of information and consultation to employees or employee representatives.

134 According to information provided by the CAC in a document instructing the public on possible applications and complaints that can be submitted to the CAC concerning EWC-related disputes (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/348757/EWC_Applications___Complaints__Version_3__January_2012_.pdf consulted on 15/08/2015) it is possible to obtain an order imposing statutory minimum requirements to an EWC.

135 Bauckhage 2006: 164 ff.

136 The Commission's report on the implementation of Directives 75/129 and 92/65 on collective redundancies argues: 'Non-fulfilment of the consultation requirement laid down in Art. 25(1)(a) of the Works Councils Act is not specifically penalised by the Act itself. If, however, the works council has expressed an opinion that the employer has disregarded, Art. 26(1) of the Act authorises it to challenge the employer's decision before the Ondernemingskamer (Commercial Chamber). The Chamber may, for example, enjoin the employer to refrain from implementing his proposed decision (Art. 26(5)(b)). The employer may not violate such an injunction (Art. 26(6)).'

In the remaining countries of the EEA covered by the EWC legislation such a legal institution is not available in the case of breaches of EWC regulations.

Unfortunately, an attempt to introduce such a possibility into the Greek implementation law following Recast Directive 2009/38/EC ended without success.[137] Consequently, applications by EWCs aimed at halting managerial decisions, sometimes taken in deliberate infringement of EWC rights, are handled by courts in their normal course of business, which usually means that the court decision on the subject comes several months after an unlawful decision has been taken and implemented and has negatively impacted the workers, who remained uninformed and unconsulted, and the damage cannot be undone.[138] Such situations lead to a further complication of the workers' legal position – for example, in the case of *significant company change* – and make *post factum* claims for compensation by employee representatives (for example, after major restructuring entailing redundancies has been completed) almost purposeless and irrelevant. The absence of court injunctions in EWC matters also raises questions concerning the imbalance in the importance, value and protection of interests safeguarded by the judicial system: if, for instance, in the case of corporate environmental crimes[139] injunctions can be issued, why should not this also be an option with regard to fundamental workers' rights to information and consultation?

In the context of the above considerations, the question of the availability of summary procedures and the possibility of issuing injunctions in national legislation seems to be one of the decisive issues determining compliance with Art. 11(3) and 11(4) of Directive 94/45cEC and Art. 11(2) and 11(3) of Directive 2009/38/EC. These Articles do not limit the member states' obligation to providing sanctions; the European legislator has imposed the requirement of ensuring 'that *adequate* administrative or *judicial procedures* are available to enable the obligations deriving from this Directive to be enforced'. Without doubt, injunctions fall into the category of administrative or judicial procedures and contribute to effective enforcement of

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137 Within the framework of consultative dialogue between the Greek Ministry of Labour and the trade unions, the OBES union had proposed that the following two paragraphs be included in the respective article of the transposition law, although they have in fact been omitted in the final text of Law 4052/12: 'In the event that the central management does not provide the members of the EWC or the members of the select committee the necessary information to fulfil the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or refuses the obligation to conduct consultation, the EWC legally represented or the members of the select committee have the right to appeal before the First Instance Court of the central administration office and request, through an application discussed at the time of interim measures, to be provided with the information required on specific transnational issues and to ask that the implementation of any decisions of the central management concerning these transnational matters be suspended until the central management properly fulfils its obligation to consultation. The above application for interim measures shall be discussed on a priority basis within fifteen (15) days. The onus is on the central management to prove that it has properly fulfilled its obligation to information and consultation. If the central management infringes the requirement for an appropriate consultation and proceeds to the implementation of decisions relating to transnational matters, such decisions are liable to be declared void and cannot be enforced against employees for the modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective agreements.'

138 Apart from Hungary, where the court is obliged to issue a ruling within 15 days of the EWC's application.

139 The term is used in the sense of Schrager and Short 1977) on organisational crimes and developed by (Box 1983: 20-22), who described them as 'illegal acts of omission or commission of an individual or group of individuals in a legitimate formal organisation, in accordance with the goals of that organisation, which have a serious physical or economic impact on employees, consumers … the general public and other organisations' (Tombs 1995: 132).

obligations and protection of workers' interests under the EWC Directive(s). More importantly still, they are often the only measure capable of ensuring that the right to information and consultation before decisions are taken is effectively observed. Therefore it seems reasonable for the Commission to consider verifying national acts implementing Directive 2009/38/EC against the existence of such or equivalent measures and ensuring that remedies with effect similar to injunctions are provided for in every member state.

The scope of the present analysis did not allow for undertaking an in-depth EU-wide study of the use of suspensive injunctions in labour law, but this represents a relevant and interesting area for further research. It is not unfounded to seek parallels with the execution of, for example, environmental law in the EU, where the irreversibility of damage and impossibility of restitution to the original is of particular importance: in many EU countries, in order to prevent damage to the environment resulting from illegal corporate actions, suspensive injunctions are issued or the very fact of launching administrative or court proceedings triggers a suspension of any corporate actions in question (for an overview see (Epstein 2011: 86 ff).

Therefore it seems clear that if infringement of the rights to timely information and genuine consultation are to be effectively prevented and tackled, all EU member states should guarantee efficient measures that make it possible to halt a decision-making process conducted in contradiction of employees' right to be informed and consulted. It seems obvious that there is little use in applying other sanctions of relatively low severity (often small administrative fines; see below) a posteriori once the management has taken the decision and the situation cannot be remedied by employee representatives. Analysis of national acts implementing the EWC Directive reveals, however, that the effective measure of court injunctions is provided to safeguard EWC rights by only few national legal orders. Consequently, applications to courts by EWCs aiming to stop managerial decisions sometimes taken in deliberate infringement of EWC rights, are handled by courts in their normal course, which usually comes to a conclusion only several months after an unlawful decision has been taken and implemented.[140]

(ii) Sanctions imposed by the Labour Inspectorate

In some countries sanctions can (also) be imposed by national Labour Inspectorates. Typically, powers of inspection, sanctions and administrative procedures are regulated by general labour laws, supplemented in some cases by separate provisions in occupational safety and health legislation. This is the case, for example, in Italy,[141] where the regulation on the scope of competence of inspectors contains the main provisions on inspection sanctions. This is also the case with other European countries, such as the Czech Republic and Hungary (Vega and Robert 2013). In

140 See note 272 above.

141 The labour inspectors' scope of competence is regulated by Legislative Decree No. 124 of 23 April 2004. Labour inspection in Italy is also supported by the Tripartite Committee for the Support of Labour Inspection, which was established at the beginning of the 1980s with a view to assisting the labour inspectorates. At the national level, the most representative social parties (for example, CGIL, CISL, UIL, Confindustria, Confcommercio) are informed and consulted regularly on labour inspection policies and programmes. For more information see ILO online resource at: http://www.ilo.org/labadmin/info/WCMS_126019/lang--en/index.htm

Estonia, on the other hand, the Labour Inspectorate conducts general state supervision of the observation of laws, but applies sanctions according to the Penal Code.[142]

(iii) No sanctions

Italy is a special case because, by agreement between the social partners, there were no sanctions for infringing EWC laws (stipulated in the collective agreement) and the only remotely relevant provision stipulated that 'where an infringement has been ascertained, the possibility of fulfilling the obligations should be provided for' (Point B.1 of the Joint Opinion attached to the 1996 social agreement[143]). Only failing that should a fine be imposed (supposedly by the conciliation committee itself within the Ministry of Labour and Social Security). The amount of the fine was, however, not specified. Such a situation did not seem unusual in Italy and was already reported in the past with regard to the implementation of Directives 75/129 and 92/65 on collective redundancies. A European Commission report on the implementation of these Directives suggested that legal sanctions 'can only be derived from the relevant court rulings and general labour law regulations' (European Commission 1998: 5).[144]

The recent joint social partners' agreement that served as basis for the Italian Legislative Decree transposing Recast Directive 2009/38/EC did not make any amendments to the enforcement rules. Luckily, eventually in the Act 113 of 2012 (Decreto Legislativo di 22 giugno 2012 , n. 113) financial penalties were introduced.

Similarly in Lithuania, the law amending the previous EWC implementation act[145] does not stipulate any sanctions for violation of the laws.

In Denmark, too, the transposition of the Recast Directive does not define sanctions. It merely stipulates that violation of certain provisions 'shall be punishable by a fine'.[146] It has not been possible, however, to establish the amounts of fines applicable in the case of breaches of the law. Neither was any indication provided by the previous act transposing Directive 94/45/EC into Danish law (Act No. 371 of 22 May 1996).

In Hungary, the acts implementing the EWC Directives (of 2003 and the 2011 amendment) stipulate fines for breaches of EWC regulations, but set no concrete amounts. Reportedly, no amounts are set by the Hungarian Labour Code, either.[147] Last, but not least, sanctions are lacking also in the Finnish law on EWCs.

142 Estonia Employee Trustee Act 2006: '§ 26. Procedure (1) The provisions of the General Part of the Penal Code and the Code of Misdemeanour Procedure apply to the misdemeanours provided for in §§ 261, 262, 264 and 265 of this Act. (2) Extra-judicial proceedings concerning the misdemeanours provided for in §§ 261, 262, 264 and 265 of this Act shall be conducted by the Labour Inspectorate.'

143 National Multi-Industry Agreement of 6 November 1996 on the Transposition of Directive 94/45/EC.

144 The report (European Commission 1998) specifies further that, based on legal literature and case law, violation of the employer's obligation to inform and consult the company union delegations (*rappresentanze sindacali aziendali*) is seen by some as anti-union conduct (*comportamento antisindacale*) within the meaning of Art. 28 of the *Statuto dei lavoratori* [Statute of Workers' Rights] of 1970 and hence as subject to the penalty laid down therein (see also Borelli 2011: 5).

145 Law Amending the Law of the Republic of Lithuania on European Works Councils, 22 June 2011, No XI-1507.

146 'Any infringements of § 9, § 10 sub-para. (1), § 11 sub-para. (1), § 16, § 17a, § 20, § 23, § 24 sub-paras (1), (2) and (4) and § 28 shall be punishable by a fine. Art. 31 of Act No 281 of 6 April 2011 amending the European Works Councils Act.

147 Simon 2007: 'Trade unions also have workplace information and consultation rights. (…) As noted above, in practice, unions have had to rely on the courts to enforce these rights, but the Labour Code does not cite any possibility of a sanction.'

(iv) In some countries financial penalties (fines) are accompanied by the possibility of applying criminal sanctions, including imprisonment

This is the case, for example, in Belgium, France and Poland.

(v) The severity of sanctions as a factor in the effectiveness, proportionality and dissuasive character of sanctions

The severity of sanctions (resulting from the combined result of effectiveness, proportionality and dissuasive potential) for violations of EWC law is one of the key criteria in assessing the compatibility of national legislation with the Directive (Recital 36 of Directive 2009/38/EC). In this way, the individual features of sanctions determine the overall severity of sanctions. On the other hand, the individual features of the sanctions – that is, their effectiveness, proportionality and dissuasive potential – are themselves dependent variables. For instance, as discussed above, the type of sanctions applicable to infringements of EWC regulations is derived from the classification of violations according to a specific branch of law. By this token, the fact of whether infringements of EWC laws are regarded as violations of civil, administrative or criminal law strongly determines the severity of sanctions. The sanctions may also be influenced by the legislative technique adopted in implementation of the EWC Directive. In various countries sanctions are mentioned either directly in the act transposing the EWC Directive (see, for example, Table 18, and also Spain[148] and Slovakia) or by reference to external national acts governing infringements, sanctions and procedural matters linked to worker representation issues. As indicated, the majority of EU member states classify violations of EWC regulations as administrative or labour law offences punishable by a fine (Table 18) or, alternatively, by a financial penalty combined with incarceration (Cyprus, Germany, France, Greece, Ireland, Luxembourg and Poland). The latter sanctions-mix, which includes criminal penalties on top of corporate financial liability, also includes an element of personal criminal liability, which automatically seems more severe and thus may be argued to be more *dissuasive*. The issue, however, is contentious as the relations between severity, effectiveness, dissuasive potential and efficiency of sanctions represent a complex web of interdependencies.[149] In much of the research it is argued that financial penalties are the preferred option for corporate violations of law because, based on economic calculations, they are simply cheaper than incarceration, which incurs costs (Faure 2010; Polinsky and Shavell 1991; Polinsky and Shavell 1979). At the same time, it is difficult to set the levels of financial penalties in such a way as to make them effective. As a result, in the vast majority of cases financial penalties, even in their maximum levels, are too low and incommensurate with the degree of violation and damage caused by the perpetrator. Last but not least, financial sanctions are a means of retributive justice and lack the power to restore previous states of affairs or prevent damage from happening again, which is a serious limitation with regard to workers' rights.

As the final outcome of any litigation, sanctions clearly represent one of the most important aspects of the 'access to justice' framework. Considering the international character of EWCs' operations, as well as interactions between legislation governing

148 Provisions of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.

149 For a more comprehensive discussion of these aspects with regard to EWCs see Jagodzinski 2015 (forthcoming) and Jagodzinski 2014.

the operation of EWCs (indicated in EWC agreements or by law) and the rights and duties of individual EWC members, any significant variations between legal frameworks in individual member states may have considerable impact on the workers' representatives' capacity to fulfil their obligations and/or to defend their rights.

Financial sanctions applicable to violations of EWC rights

The last aspect of institutional legal differences in national law concerns a specific form of sanction: the financial penalties applicable for breaches of EWC rights. This form of sanctions in particular shows the flagrant discrepancies in levels of punishment applied to multinational companies. Equally importantly, it does so in a way that allows direct comparisons because a common currency is in use. Furthermore, because lawsuits are usually started against the corporation rather than individual persons it is the sanction most commonly applicable. Therefore its degree is of paramount importance and practical relevance.

Because it is supposedly the most common sanction a debate on its effectiveness is particularly relevant. Because general discussions of the requisite characteristics of sanctions go beyond the scope of this study (for more detailed considerations see (Jagodzinski 2015 forthcoming) we would like to focus on only one composite feature combining effectiveness and dissuasiveness, namely 'severity'. We argue that the 'severity' of sanctions for violations of EWC law should be considered a key criterion in assessing the compatibility of national legislation with the EWC Directive. As already discussed, the category of sanctions applicable to infringements of law is a derivative of the classification of violations. In various countries sanctions are mentioned directly in the act transposing the EWC Directive (see footnotes to Table 18 and specifically Spain[150] and Slovakia) or by reference to external national acts governing infringements, sanctions and procedural matters linked to workers' representation issues. As indicated, the majority of EU member states classify violations of EWC regulations as administrative or labour law offences punishable by a fine (Austria, Belgium, Cyprus, Germany, Denmark, Spain, Finland, France, Greece, Hungary, Ireland, Italy, Lithuania, Luxemburg, Malta, Norway, Poland, Portugal, Romania, Sweden, Slovenia and the United Kingdom) or alternatively by a combination of fine and incarceration (Belgium, Cyprus, Germany, Denmark, France, Greece, Ireland, Italy, Luxemburg, Poland[151]). It may be argued that complementing financial penalties with the sanction of imprisonment is more in keeping with the spirit of guaranteeing *dissuasive* sanctions. Arguably, financial sanctions alone can hardly be severe enough (especially at their current level, see Table 18), particularly when compared with the revenues multinational companies generate.[152] We argue that when financial penalties for breaches of EWC laws are as low as they are in some member states any discussion about their dissuasive potential, proportionality, effectiveness or severity is futile: fines (or their minimal statutory threshold) as low as approximately 4 euros in Poland (lower limit for an offence) or 290 euros in Lithuania cannot be argued to meet the criterion of *dissuasive* (Recital 36, 2009/38/EC).

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150 Provisions of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.
151 In these countries incarceration may be applicable only in specific cases. See notes to Table 15.
152 Further considerations on the proportionality of sanctions in the context of the relationship between corporate turnover and the level of penalties in: Jagodzinski 2015 (forthcoming).

As regards maximum fine levels, even in countries that are considered to have set them relatively high (for example, the United Kingdom, Germany and Austria) these penalties are not sufficiently dissuasive and proportionate. In the recent case of EWC Visteon, the EWC chair involved in the proceedings called the maximum fine of 15,000 euros 'ridiculous'.[153] Even such maximum fines (it is a separate debate whether and how often courts adjudicate maximum statutory punishment in standard cases), do not seem to be 'proportionate in relation to the seriousness of the offence' (Recital 36, 2009/38/EC), while in other countries in which the maximum severity of such fine is, for example, 1,100 euros, as in Poland, the lack of dissuasiveness of sanctions is blatant, given the financial resources of their addressees.

Table 20 **Minimum and maximum thresholds of fines for breach of EWC laws (under regime of Directives 94/45/EC and 2009/38/EC), selected countries**

	Transposition of Directive 94/45/EC		Transposition of Directive 2009/38/EC	
Country	Minimum fine	Maximum fine	Minimum fine	Maximum fine
Austria	None	Up to 2,180 euros[154]	None	20,000 euros or 40,000 in case of repeated infringements
Estonia[155]		50,000 kroons (approximately 3,195 euros)	None	Equivalent of 800 euros (200 fine units[156]) if committed by private person; equivalent of 3,200 euros if committed by legal person In confidentiality cases up to 383 euros[157]
France	FRF 25,000 (approximately 3,811 euros)[158]		3,750 euros or in case of repeated infringements 7,500 euros[159]	

153 http://www.planetlabor.com/Articles/plonearticle.2012-05-30.4949489081

154 In case of the employer's violation of the duty to inform the EWC about transnational matters that have a 'considerable effect' on the interests of the workforce, Art. 207 (1) of the Labour Constitution Act.

155 The Community-scale Involvement of Employees Act (CSIEA), which transposes into Estonian law Directives 94/45/EEC, 2001/86/EC, and 2003/72/EC, as well as the cross-border mergers Directive (2005/56/EC), among other things provides for liability for violations of the prohibition on international informing and consulting and involvement of employees(§ 85), and for violation of the obligation of annual information and consultation and of information and consultation under exceptional circumstances (§87). In the event of such violations the extent of liability is the same as with regard to violation of the rules of the general framework of information and consultation (see note 46). Source: Muda 2008.

156 According to §47(1) of the Penal Code, a fine unit is the base amount of a fine and is equal to 4 euros.

157 Act amending the TKS § 851 provides for liability for a violation of the confidentiality obligation. Violation of the obligation not to reveal any confidential information by members of the SNB, of the RB, the involved experts and translators and the employees' representatives participating in an information and consultation procedure, if, during negotiations, the parties decided to establish one or more information and consultation procedures instead of an RB, is punishable by a fine of up to 100 fine units, which is 6,000 kroons/383 euros. The fine is equal to the fine provided for violation of confidentiality information by employees' representatives by national law. See Art. 25 of the Töötajate usaldusisiku seadus (Employees' Trustee Act) of 13 December 2006 – RT (RT = Riigi Teataja = Sate Gazette) I 2007, 2, 6 with later amendments (consolidated version available in English at: https://www.riigiteataja.ee/en/eli/510012014001/consolide). Identical provisions apply to members of trade unions breaching, among other things, confidentiality (see Art. 264 of the Trade Unions Act of 14 June 2000 (RT1 I 2000, 57, 372).

158 Art. 4 of the French implementing legislation (Directive 94/45/EC). When an offence is repeated, both the custodial sentence and also the fine can be doubled.

159 Art. L-483-1 of the French Labour Code.

Table 20 **Minimum and maximum thresholds of fines for breach of EWC laws (under regime of Directives 94/45/EC and 2009/38/EC), selected countries (cont.)**

	Transposition of Directive 94/45/EC		Transposition of Directive 2009/38/EC	
Country	Minimum fine	Maximum fine	Minimum fine	Maximum fine
Germany		30,000 DM (approximately 15,000 euros)[160]	No change	No change
Greece		10,000,000 DR (equivalent to approximately 29,300 euros)		50,000 euros[161]
Iceland	Fines, no level specified	Fines, no level specified		
Ireland	200 euros/day[162]	1,500 euros (summary proceedings) or 10,000 euros on conviction + 1,000 euros/day[163]	No change	No change
Italy	1,033 euros (for breach of confidentiality); 5,165 euros for other infringements[164]	6,198 euros (breach of confidentiality); 30,988 euros for other infringements[165]	No change	No change
Lithuania	Approximately 290 euros	Approximately 1,450 EUR[166]	No change	No change
Luxembourg	2,501 francs (approximately 62 euros); may be doubled[167]	150,000 francs (approximately 3,718 euros); may be doubled[168]	No change	No change
Malta	(i) Depending on type of breach: not less than 10 liri (approximately 23 euros) and not more than 50 liri (approximately 116 Euros) for each and every employee of the Community-scale undertaking or Community-scale group of undertakings (ii) Not less than 500 Liri (approximately 1,164 euros)	(i) not more than 5,000 liri (approximately 11,640 euros)	No change	No change
Poland	16 PLN (approximately 4 euros)	4,400 PLN (approximately 1,100 euros)	No change	No change

160 For infringement of information duties (withholding information, misinformation, incorrect information).
161 Fine of up 50,000 euros according to Art. 23 and 24 of Law 3996/2011. Law 3996/2011 has extensive regulations on fines and other penalties in various cases.
162 Per each day of continued infringement (S 19 of the Irish Transposition Act of 10/07/1996).
163 Per each day of continued infringement (Section 19 of the Irish Transposition Act of 10/07/1996).
164 If the orders made by the Ministry of Labour and Social Affairs under the Conciliation Procedure are not complied with within 30 days (Büggel 2002).
165 If the orders made by the Ministry of Labour and Social Affairs under the Conciliation Procedure are not complied with within 30 days (ibid.).
166 Inferred from other acts regulating workers' representation other than implementation of EWC Directives.
167 In case of repeated infringement within a period of four years (Art. 62 of the transposition act).
168 In case of repeated infringement within a period of four years (Art. 62 of the transposition act).

Table 20 **Minimum and maximum thresholds of fines for breach of EWC laws (under regime of Directives 94/45/EC and 2009/38/EC), selected countries (cont.)**

	Transposition of Directive 94/45/EC		Transposition of Directive 2009/38/EC	
Country	Minimum fine	Maximum fine	Minimum fine	Maximum fine
Portugal			Depends on the volume of business:[169] (i) for smaller companies in case of serious infringements: from 630 euros in case of negligence; from 1,260 euros in case of fraud. (ii) for bigger companies: from 1,575 euros in case of negligence; from 5,250 euros in case of fraud (iii) in case of very serious infringements:[170] (a) 2,100-4,200 euros for smaller companies in case of negligence (4,025–9450 euros in case of fraud); (b) 9,450–31,500 euros for bigger companies in case of negligence and 31,500 in case of fraud	Depends on the volume of business: (i) for smaller companies in case of serious infringements: up to 1,260 euros in case of negligence; up to 2,520 euros in case of fraud. (ii) for bigger companies: up to 4,200 euros in case of negligence; up to 9,450 euros in case of fraud (iii) in case of very serious infringements: (a) up to 4,200 euros for smaller companies in case of negligence (up to 9,450 euros in case of fraud); (b) up to 31,500 euros for bigger companies in case of negligence and up to 63,000 euros in case of fraud
Romania	2,000 RON (approximately 446 euros)	4,000 RON (approximately 893 euros)	Unchanged	Unchanged
Slovenia	None	1,000,000 tollars (approximately 4,173 euros) for legal persons, or 80,000 tollars (334 euros) for individuals	20,000 euros for legal persons; 2,000 euros for individuals	100,000 euros for legal persons; 5,000 euros for individuals
Spain	626 euros to 1,250 euros[171]	100,006 euros to 187,515 euros[172]	As previously	As previously
UK		75,000 GBP[173]		100,000 GBP

Note: Note was taken only of financial penalties and not of imprisonment, which in some cases can be imposed in parallel.
Source: Compiled by Romuald Jagodzinski, 2015.

169 Art. 554 of the Código do Trabalho (Labour Code) of the 12/02/2009 (Lei n.º 7/2009 de 12 de Fevereiro); UC (unidade de conta) = 105 euros (based on http://www.ansr.pt/Default.aspx?tabid=82&language=pt-PT).

170 Violations of confidentiality by worker representatives are considered 'a very serious administrative offence' (Art. 20.6 of the transposition act).

171 Art. 32 and 33 of the Law of 10 April 1997 as specified further by Real Decreto Legislativo 5/2000, 4 agosto, Ley sobre Infracciones y Sanciones en el Orden Social (Legal Decree 5/200, 4 August, Law on Infractions and Sanctions on the Social Order) Section I, Subsection II Art. 9 (as amended by the Ley 40/2006 of 14/12/2006), available at: http://noticias.juridicas.com/base_datos/Laboral/rdleg5-2000.html#a4 ; category of fine: serious infringements, minimum to maximum. Before the amendment by Act 40/2006 Büggel (2002) indicated that fines should range from 3,005 euros and 90,151 euros (ESP 500,001 and ESP 15,000,000). At the moment of adoption of the transposition of Directive 94/45/EC, the relevant provisions regulating sanctions were those of Law 8/1988 of 7 April on infringements and penalties in the field of industrial relations.

172 Category of breach: most serious infractions in their máximum extent (ibid.).

173 Part V, Regulation 22 of the implementing legislation (TICER 1999).

Admittedly, it is difficult to evaluate how much a sanction should amount to in order to be proportionate, dissuasive and effective, but in specific cases even the highest maximum fine available in all the countries (100,000 GBP in the United Kingdom, at the time of writing [July 2015] approximately 139,000 euros) might not fulfil this criterion when companies' revenues are considered. The question of proportionality of fines poses an additional problem of determining the point of reference: should fines be proportionate to company revenues or turnover (or any similar criterion linked to corporate wealth), as is often argued by trade unions and workers' representatives (Jagodzinski 2015 (forthcoming)); or, alternatively, should they be proportionate to other penalties stipulated in national legal systems and commensurate with what is considered reasonable in relation to the given country's cost of living or general level of corporate sanctions. Both approaches are not unreasonable. The first, postulating proportionality with companies' revenues, is based on the argument that a sanction of a couple of thousand euros is no burden for large multinational enterprises (according to the EU nomenclature, companies qualifying for an EWC do not meet the criteria for SMEs) whose turnover, in some cases, is among the highest in the world.

The disproportionality between financial penalties and corporate revenues means that sanctions do not usually meet the criterion of dissuasiveness. The problem with this argument is, however, that it would arguably require that the legislation set a very wide range of possible fines for violations of EWC law and/or necessitate broad discretionary powers for judges. Alternatively, a system allowing the setting of financial penalties for corporate wrongdoings in proportion to corporate declared revenue or turnover for the past year would be conceivable; it would also not be unprecedented as such a principle is broadly applied in the Single Market for violations of laws on company concentration, distortions of free market competition and abuses of dominant market position and financial market regulation endorsed by the European Commission itself (for more details see (Jagodzinski 2015 forthcoming).

One thing seems certain: continuing with the current system without regard to companies' growing financial power will persistently weaken the effectiveness and dissuasive potential of fines. Consequently, with such low fines the effectiveness of the entire system of enforcement is flawed, which might result in enterprises being able to afford to violate information and consultation rights and in situations of ever more frequent and harsh company restructuring they may consider workers' fundamental rights negligible in relation to economic goals and grow disrespectful of workers' interests.

With the above reflections in mind, another form of sanction to boost the effectiveness of the current enforcement framework could be considered. A more dissuasive system could consist of fines calculable per each day of lack of information and consultation with workers' representatives. Additionally, as some scholars have been arguing,[174] companies benefiting from state or EU subvention schemes should be deprived thereof and forced to refund payments if they are found to be in breach of European legislation on information and consultation.

174 Rigaux and Dorssemont 1999: 378.

Policy considerations on effectiveness concerning court injunctions (orders) and declaration of nullity and invalidity of managerial decisions as the most effective deterrent

The limitations of traditional sanctions alluded to above (for a more extensive analysis see (Jagodzinski 2015 (forthcoming)) are not just the object of academic considerations, but have also been discerned by some governments. An example is the solution applied in the United Kingdom: the 'EWC Consultation Document'[175] stated that in order to meet the requirement that the enforcement arrangements be 'effective, proportionate and dissuasive'[176] the Employment Appeal Tribunal 'may make an order requiring the management to remedy a failure to fulfil its obligations under the terms of an EWC agreement'.[177] At the same time, the DTI recognised that 'such an order may not have the effect of suspending, overturning company transactions which management has already entered into.'[178] The current legislation generally allows the Central Arbitration Committee (CAC) to make orders requiring companies to suspend decisions in clear breach of law; however, with regard to EWCs an exception is made in Regulation 21A(9) of the Statutory Instrument 2010/1088 stipulating explicitly that

> 'No order of the CAC under this regulation shall have the effect of suspending or altering the effect of any act done or of any agreement made by the central management or the local management'.

In other words, the EWC law explicitly excludes application of sanction of nullity on company decisions taken without consultation with the EWC. At the same time, by recommending a civil financial penalty of maximum £75,000 (now increased to £100 000 by implementation of the Recast Directive[179]) exceeding the average estimated cost of an EWC meeting (£60,000) the government recommendations proposed a fine of £1,000 per each day of non-compliance with the Employment Appeal Tribunal's order,[180] making, at least, the important link between the 'summary' court order (injunction), its timely execution and efficacy of a financial sanction. Such elements of enforcement or execution of sanctions, if implemented in the United Kingdom (the recommendation to fine corporations for each day of infringement never went beyond national recommendations and did not become part of binding legislation) seem to increase their effectiveness and to somewhat improve their proportionate, dissuasive and effective powers compared with other countries.

Due to the general limitations of financial sanctions for corporate violations of workers' rights, as well as particular problems related to the insufficient (incommensurate) degree of penalties for violations of EWC rights to information and consultation, it appears that a more effective and dissuasive sanction would be a possibility to nullify measures implemented by management without respecting the procedures of information and consultation.[181] Such a punishment was applied in

175 Department of Trade and Industry 1999 (Consultative Document).
176 Ibid.: 36.
177 Ibid.: 37–38. This is now the function of the Central Arbitration Committee (reg 21(4) Transnational Information and Consultations of Employees Regulations 1999, SI 1999/3323).
178 Ibid.
179 Transnational Information and Consultation of Employees (Amendment) Regulations 2010 (http://www.opsi.gov.uk/si/si2010/uksi_20101088_en_1).
180 Ibid.: 37.
181 Dorssemont and Rigaux 1999: 378.

the Gaz de France–SUEZ case,[182] where a merger of the two companies taken by the management without respecting the employees' right to be consulted was put on hold by the French court via an injunction based on the principle that violation of those employees' rights may result in decisions being declared null and void. The decision was upheld by higher instances of the French judiciary and eventually by the Supreme Court, which ordered that the merger proceedings be restarted.

In the course of our analysis of national enforcement frameworks with regard to EWC Directives we were unable to find any other country apart from France in which the courts have the possibility to declare managerial decisions null and void. This can be partly explained by the fact that Directives 94/45/EC and 2009/38/EC do not explicitly mention this measure when referring to sanctions and, generally, are not clear on the legal effectiveness of decisions taken in breach of information and consultation rights.[183] In the absence of provisions directly embedded in the relevant directives, one could search for universal EU principles in the acquis communautaire in this regard. Such a common rule can be found in the case *Comité Central d'Entreprise de la Société Générale des Grandes Sources vs. Commission*,[184] decided by the European Court of First Instance. In this case the Court clearly and expressly stipulated that non-compliance with an information and consultation procedure vis-à-vis workers' representatives by the Commission according to the concentration regulation[185] is to be considered null and void.[186] Thus, by inference, it seems reasonable to take the position that the same principle shall, by analogy, apply to managerial decisions taken in violation of information and consultation procedures provided for by EWC law.[187]

A similar view has been expressed by national-level ministerial authorities. A case in point is Hanna Schelz of Germany's Ministry of Labour who highlighted the importance of early involvement of the EWC and expressed the view that a possibility of penalties imposed after a violation has been committed is not as useful for the EWC as the use of legal means to protect damage from occurring in the first place. Ms Schelz expressed the belief that whether German labour courts would ever go as far as in France, where a court injunction was issued in the case of Gaz de France, remained to be seen.[188]

Resistance of national-level authorities to the introduction of such legal means is, however, considerable. For instance, the Greek law (4052/12) did not follow proposals from the OBES trade union to include the following two paragraphs in the respective article of the transposition law implementing Directive 2009/38/EC:

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182 Dorssemont and Blanke 2010, Jagodzinski 2015 (forthcoming).

183 Directive 2009/38/EC only in the Preamble, Recital 36 insists that the member states provide for dissuasive, proportionate and effective sanctions. At the same time, the European Commission has explained on numerous occasions that it is common practice not to stipulate specific sanctions in directives and that they are part of national transpositions.

184 European Court of First Instance 27/04/1995 T-96/92 (Comite central d'entreprise de la Societe generale des Grandes Sources vs. Commission, Jur., 1995, II-1213, no. 465.

185 Regulation No. 2367/90.

186 Dorssemont and Rigaux 1999: 378.

187 Ibid.

188 From: EBR Newsletter issue no. 2 / 2011 of EWC News, 8 August 2011 (available at: http://www.ewc-news.com/en022011.htm).

> 'If the central management does not provide the members of the EWC or the members of the select committee the necessary information to fulfil the obligation for information and the preparation of potential consultation, or it provides wrong or incomplete information or refuses the obligation to conduct consultation, the EWC legally represented or the members of the select committee have the right to appeal before the First Instance Court of the central administration office and request through an application discussed at the time of interim measures to be provided with the information required on specific transnational issues and ask that the implementation of any decisions of the central management concerning these transnational matters be suspended until the central management properly fulfils its obligation to engage in consultation. The above application for interim measures shall be discussed on a priority basis within fifteen (15) days. The central management has the burden of proving that it has properly fulfilled its obligation to information and consultation. If the central management infringes the requirement for an appropriate consultation and proceeds to implement decisions related to transnational matters, such decisions are liable to be declared void and cannot be enforced against employees for modification or termination of individual contracts of employment. Similarly, those decisions do not constitute a legitimate reason for terminating collective bargaining agreements.'

Based on our current research, due to the complexity of national legal frameworks (material and procedural) it is scarcely possible to ascertain with certainty whether injunctions issued in summary proceedings and having immediate power to put a decision on hold are available elsewhere than in France. Nevertheless, based on the analysis of EWC-related case law (see (Dorssemont and Blanke 2010) it is justified to conclude that only a specific sanctions-mix consisting of a combination of financial penalties (of an adequate amount) against corporate perpetrators, the possibility of incarceration as a form of individual sanction and, most importantly, the sanction of declaring decisions violating the relevant law null and void fully satisfies the requirement of providing effective, proportionate and dissuasive sanctions. The latter type of sanction (declaring null and void) seems to us the most efficient and dissuasive sanction of all and, indeed, the most effective means of protecting workers' interests. It is also the legal means that makes it possible, at least partly, to undo law-violating decisions. If such a guarantee is not in place, employee rights to information and consultation can be ignored relatively easily and/or cheaply (given the levels of sanctions foreseen by EWC national transposition acts currently in force). Moreover, introduction of such a sanction would increase the role of the EWC Directive as a means of genuinely (rather than merely paying lip-service to) protecting workers' interests, especially in situations of crisis or restructuring.

Understandably, the demand to introduce such sanctions across all the member states (together with other trade union demands) has been strongly opposed by European employers' representatives.[189] This resistance to the idea of effective penalties is reflected in the fact that proportionate, dissuasive and effective sanctions

189 BusinessEurope, CEEP; Jagodzinski 2009b.

were mentioned only in the recitals (no. 36) of the draft Recast EWC Directive[190] and not in the body of the text. This is unfounded because the preambles express the general spirit of directives and Recital 36 represents definite progress in comparison with Directive 94/45/EC as it provides an explanation for Art. 11.2 of the Recast Directive that obliges the member states to 'provide for appropriate measures in the event of failure to comply with this directive'. One can only hope that in the absolutely crucial phase of evaluating the transposition acts of the new Recast Directive on EWCs the issue of the proportionality, efficacy and dissuasive character of sanctions will be closely and critically examined by the European Commission. It seems to us indispensable to include in considerations about the effectiveness and dissuasive character of sanctions the above considerations on injunctions and the possibility for courts to declare decisions null and void. Accepting the above evidence requires that, where applicable, infringement procedures be launched by the European Commission against those countries whose implementation acts do not meet these criteria.

5. Conclusions

Despite the clear aims of the Recast Directive to increase the effectiveness of EWCs and avoid legal uncertainty, our review of the national transposing measures suggests that several difficulties associated with the enforcement of information and consultation rights have remained.

First, despite the insertion of Art. 10.1 giving EWCs and employee representatives the means required to apply the rights arising from the Directive to represent collectively the interests of employees it appears that the majority of member states have either copied verbatim the relevant text without any adaptation (or explanation) to the national legal context, or have assumed that national law already provides for such means. In these countries it is difficult to establish how national laws have amended, formally and practically, their rules to ensure that EWC members can exercise the rights granted by the Recast Directive. The general principle expressly providing means – material and legal – to EWC members was welcome, but the spirit of this new obligation does not seem to have materialised in national laws. National and European case law will therefore need to be monitored to see whether the lack of practical measures or means will be argued before the courts. However, with regard to the latter, EWCs' access to courts may be seriously hindered by the lack of clear rules on their legal status (legal personality, authority to go to court), defining what an EWC can or cannot do, and on the means available to them in such legal proceedings. It needs to be emphasised that, as long as there are doubts concerning whether an EWC has legal status or whether individual EWC member can seek redress, only a very limited number of cases will be brought before the courts. The same applies to the lack of clarity over financing by managements of necessary costs incurred by EWCs in preparation for court proceedings. This state of affairs will of course enable some stakeholders and commentators to argue that the lack of disputes is a sign of a well-oiled machinery and smooth transposition/integration of the modified Directive into national contexts. Those who feel inclined

190 Directive adopted by the Council on 17 December 2008, reference: P6_TA-PROV(2008)0602.

to argue against our findings that such a smooth transposition has indeed occurred are likely to do so from a particular political standpoint. It must be emphasised that European law (the EWC Recast Directive) could have been made more precise and directly ordered member states to apply a system in which the collective body – the EWC – is given legal personality or the means to have access to courts or dispute resolution systems. Furthermore, it could also be more pragmatic in requiring that national implementation frameworks include the obligation to provide EWCs with their own financial means or guaranteed access to financial means to obtain independent legal advice and recourse to lawyers if judicial proceedings are necessary. As – unfortunately for legal clarity and workers' interests – more explicit references to the meaning of 'means' were not made in the Recast Directive EWC members remain in doubt concerning what they can do to enforce their rights in a significant number of countries. The forthcoming (2016) review of national implementation by the European Commission and the European Parliament seems the last chance to remedy this shortcoming.

Second, our analysis revealed several countries in which sanctions seem altogether absent or are so obscure that it was impossible to find direct reference to them. Surprisingly, some of them escaped the attention of the Implementation Report in 2000 (European Commission 2000). The 2015/2016 review thus represents an opportunity to bring those national frameworks up to the required standard.

Third, the variety of sanctions available in member states does not give workers equal redress. While the majority of sanctions involve financial penalties, even at the higher end of the spectrum they are unlikely to deter companies from breaching agreements or the subsidiary requirements. Without a strong lead from European draftsmen imposing a universal sanction, the effectiveness of information and consultation rights risks being seriously diluted. The European Commission within the framework of the forthcoming review of national implementation measures will be confronted in some member states with sanctions of almost negligible dissuasiveness and effectiveness, and, however difficult, it will be expected and required to openly state that these sanctions do not meet the criteria laid down in Recital 36 of the Recast Directive. Let us recall, following Brian Bercusson (Bercusson 2009) that the European Court of Justice has already laid down some basic principles regarding judicial protection of EU law rights, also specifically in the area of labour law when deciding on a case[191] in the context of the EU Directive on sex discrimination, it stated that

> '[a]lthough (…) full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover it must also have a real deterrent effect on the employer. It follows that where a member state chooses to penalise the breach of the prohibition of discrimination by the award of compensation, that compensation must in any event be adequate in relation to the damage sustained.' (Paragraph 23)

191 *Von Colson and Kamann v. Land Nordrhein-Westfalen*, Case 14/83, [1984], ECR 1891.

Of particular interest is the choice of tools and methods that the European Commission will apply to translate the general criteria of effectiveness, proportionality and dissuasiveness into practice and evaluate national sanctions accordingly. Tough as it might be, given the above evidence from the mapping of sanctions, there simply seems to be no alternative to declaring that enforcement frameworks generally – and sanctions specifically – do not meet EU legal standards. One alternative could be a set of prescribed common sanctions. Hypothetically, if the forthcoming a review of the EWC Directive turns out to be favourable to a common European level of financial penalty, it would probably still not be sufficient. The most deterrent measure seems to be to deprive a management decision of its legal effect unless information and consultation obligations have been complied with by Community-scale companies. The resistance to such a proposal has historically been too strong and national measures rarely go so far. However, given the existing variety in the efficacy of national systems of enforcement, without such an incentive it is unlikely that information and consultation processes will ever play the role designated for them in the EWC Directive(s) and EWCs will remain toothless.

There is no doubt that ordering member states directly and specifically to bring their enforcement frameworks into line with the requirements of the Directive will be a very difficult political decisions to reach and execute. Nevertheless, in view of the evidence presented in this volume, there are reasonable doubts whether the member states, in line with Art. 10[192] of the EC Treaty, have taken all appropriate measures to ensure the fulfilment of the enforcement objectives and requirements set by the EWC Recast Directive.

As renowned labour lawyer the late Brian Bercusson put it:

> 'The consequence of the failure to develop a harmonised system of enforcement of EU labour law is, however, that there may be considerable diversity among member states with regard to the efficacy of enforcement of generally applicable EU labour law norms. Those member states with less efficacious remedies, more procedural restrictions, and weaker sanctions may better be able to avoid compliance with EU labour law by effectively reducing the likelihood of judicial redress for those benefiting from it, or the likelihood of liability of those subject to it.' (Bercusson 2009)

With the above evidence concerning the sometimes all too blatant and all too common shortcomings of national enforcement frameworks for EWC rights and the risk of jeopardising application of the EU fundamental right to information and consultation it seems that the European Commission's responsibilities as 'Guardian of Treaties' (Art. 258 TFEU) leave no room for laxness.

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192 'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community'.

Conclusions

Romuald Jagodzinski

This study represents an attempt to contribute to a gradually expanding, but still arguably underdeveloped legal domain of research on EWCs. The ETUI has always shown a lively interest in the topic and a commitment to the cause of providing research foundations for informed worker participation practice. Starting with the ongoing service of the EWC database it has contributed with research output throughout the process of preparation for the review of the Directive, as well as during the final stages preceding adoption of the Recast Directive 2009/38/EC (with, for example, publications directly linked to the Directive, such as (Jagodzinski, Kluge and Waddington 2009; Picard 2010a; Waddington 2010; Dorssemont and Blanke 2010). The current study is but a natural continuation and development of the ETUI's contribution to the understanding of EWCs following logically on the publication of the *Trade Union Guide to the EWC Recast Directive 2009/38/EC* (Picard 2010a) that commented on the Directive and sought to provide insights into its implementation. We have always emphasised that while discussions about the contents of the modified directive are important its implementation at national level is of at least equal weight.

By emphasising the importance of the national legal frameworks within which EWCs function the present report aims at pointing out that while these legal frameworks are not the sole determinant of the quality of EWC operations or of their effectiveness (other important factors include the agreements between EWCs and managements, national industrial relations traditions, corporate governance models and social dialogue culture within companies) they represent an important backbone, which is a basis for more precise arrangements in the EWC agreements and impacts them directly. As the ETUI has demonstrated (ETUC and ETUI 2014), the quality of these frameworks (both of the EU directive and national transpositions) has

significant standard-setting influence on the content of EWC agreements: the legal provisions are often directly copied into EWC agreements and over time we have observed a 'gravitation' of negotiated arrangements towards standard solutions set by the law.

Meaningful implementation of employees' information and consultation rights is thus not an expectation merely to argue in favour of full respect for the law and against diluting European directives by sub-standard national implementation (although both are valid reasons in themselves). Far more important is the practical significance of the ultimate standard of the EU *acquis*, that is, the principle of effectiveness of information and consultation. In other words, the most important reason for demanding a thorough, inquisitive and complete review of national implementation laws is the necessity to ensure that the Directive lives up to the goals laid down in it and that workers have the necessary legal instruments and practically available means to exercise their rights because it is vital for their working lives and performance in multinational enterprises. Obvious as it might seem, it has been the authors' goal to recall these goals so that they do not get lost in the course of legal(istic) discussions and amidst formalistic excuses used in course of transposition of the Directive. The authors insist that this test of the practical effectiveness of individual national provisions and their ability to deliver in practice, not just on paper, should thus be the 'spectacles' and the litmus test with which the expectations towards the implementation study are evaluated. From this point of view, whatever provision or demand to modify national legislation ensures the real effectiveness of workers' rights to transnational information and consultation should be viewed as normal, even if critics might argue that these expectations or demands are too high or far-reaching. The authors' argument is, however, that we can no longer settle for solutions that only pretend to cover the requirements of the Directive, while in fact they do not deliver when put to the test of EWCs' everyday operations.

At this stage the key question of the general goal-setting character of directives and their level of prescriptiveness arises. It should be clarified that any directive sets general goals far more frequently than it requires specific solutions. It is no different in the case of the EWC Recast Directive that sets common standards and minimum requirements that can and should be specified further by national legislators. The means, provisions and procedures at national level should clearly serve the obligation on the part of member states to fulfil the goals of the Directive. Consequently, if national frameworks are too lax, imprecise, vague, general or plainly ineffective in part or as a whole they cannot be found to be compliant with the Directive.

– As this study demonstrates, the quality of national transpositions differs significantly across the EU. The diversity of solutions comes as no surprise due to the inherent characteristics of any directive and EU member states' different traditions and systems of industrial relations. What does come as a surprise, however, is the very peculiar mix consisting of, on one hand, at times very formalistic copy/paste transposition laws in some respects, combined with, on the other hand, very general, imprecise and vague with regard to aspects where the Directive needs sharp, concrete and well-defined implementation. This occurs particularly often with regard to the following high-profile aspects of implementation of the Directive (for more detailed conclusions see below):

- transnationality (transnational competence of the Directive), where copy/paste and lack of definition are frequent;
- excessive diversity combined with frequent loopholes in enforcement frameworks (sanctions in particular and access to courts in general);
- only general, copy/paste-like inclusion of wording on means to be provided to EWCs and their members;
- very limited specificity (or deliberately general wording) concerning the right to collectively represent the interests of employees.

All this is accompanied by a common disregard (with only rare exceptions) of references to the Preamble of the Directive and the lack of influence of the Expert Group report (European Commission 2010a) in the work in which all the member states participated through representatives of relevant national authorities responsible for drafting the implementation laws.

The above shortcomings of national implementation provisions are particularly worrying if one takes into account the importance of the Directive for workers' rights and interests in particular and the effort on the part of all stakeholders to adopt the Recast EWC Directive. The campaign to improve workers' rights to transnational information and consultation has been long and has gone through multiple stages. While for some observers the heated debate and dramatic refusal to negotiate on the part of the trade unions that finally led to the adoption of Recast Directive 2009/38/EC (Jagodzinski 2008) marked the end of the struggle, that was certainly not the case. As the ETUI together with trade union experts and associated academics have always emphasised, implementation of the Directive in national law is just as critical and important a stage as the Directive itself. The ETUI has also strongly underlined the special character of the Directive as it introduced a right to transnational information and consultation that was not present in many of the EU member states at the time and might have seemed alien. For this reason, amplified by the upgrade of the law's status to that of a fundamental right, the EU has now a *special* responsibility for ensuring the application of this right. This responsibility extends by means of *general* principles of the EU to implementation of the European law of which the European Commission is guardian. If the key amendments introduced into the Recast Directive are not properly transposed all this labour devoted to improving the framework for EWCs would be in vain or mainly unrewarded.

Definitions of information and consultation and transnational competence of EWCs

Definitions have been transposed mainly word for word; hardly any member states have enhanced the precision of the Directive's provisions to specify what kind of information (digital, written and so on) is to be provided to EWCs.

With regard to the key element of the modified EWC Directive – the definitions of information, consultation and transnational competence of EWCs – the overall quality of implementation has proved to be ambiguous. First, concerning definitions of information and consultation, based on the above review we conclude that generally they have been transposed in a harmonised way. This statement is true

if one considers the common approach of copy/pasting the exact wording of the Directive as a harmonised transposition. Arguably, however, these key workers' rights should not be interpreted and transformed at national level as they represent a common foundation for the European right to transnational information and consultation. On the other hand, if one takes a more inquisitive look into some less obvious (but not less important) aspects of the definitions it will be possible to discover the abovementioned ambiguity casting a shadow of doubt on the homogeneity of definitions across Europe:

- only in Germany, Estonia, the Czech Republic, Slovakia and Lithuania was a broader definition of consultation, entailing the right to obtain a motivated response from the central management to opinions expressed by the EWC, transposed in the body of the Directive (note: this right is mandatory in the case of application of Annex 1 of the Directive);
- in the Czech Republic, Slovakia and Lithuania references to negotiations with management are made when defining consultation;
- only 15 out of 28 member states make reference to the obligation to ensure respect for the principle of effectiveness of information and consultation rights;
- 16 out of 28 member states make reference to the requirement of ensuring effective decision-making, but none of them specifies the meaning of this constraint.

One other very important aspect of transposition of the information definitions on which some member states deviated was the question of the provision of information on the basis of which an assessment by an EWC would be undertaken concerning the *possible* impact of managerial decisions. Denmark, Lithuania, the Netherlands, Portugal and Slovakia did not include this reference in their transpositions, which casts doubt on whether the quality of the Recast Directive's definitions (Art. 2.1 (f) and Recitals 16 and 42) and its insistence on the fact that not only factual, but also a possible impact on workers' interests are enough to validate an EWC's right to be informed and consulted have been reproduced in these countries. If national definitions do not reflect this important modification of the Recast Directive, workers' rights to information of sufficient quality and extent may be compromised.

Confidentiality of information and consultation

The obligation to respect obligations of secrecy concerning information transferred to workers' representatives under the confidentiality clause is an important factor modifying and limiting the exercise of the right to information and consultation under the EWC Directives. Confidentiality of information was introduced to protect legitimate company interests, but according to reports from European trade union federations and EWCs, instances of management abuse of confidentiality clauses are not uncommon. This comes as little surprise, admittedly, if one considers the imbalance in the legal framing of responsibility for violations of confidentiality by workers' representatives and for abuses of confidentiality by management. On one hand, at least 15 out of 31 member states provide in transposition laws for sanctions for employee representatives violating confidentiality. These sanctions vary from financial penalties, through civil damages for potential harm inflicted on the com-

pany to penal sanctions, including imprisonment. It should not be forgotten that due to the magnitude of possible sanctions (civil liabilities, penal sanctions) and their awareness of corporate access to the best lawyers workers' representatives are often effectively discouraged from dealing with confidential information in any way that could even remotely expose them to suspicion of violating confidentiality. This represents a serious practical obstacle in their work, which forces the European Commission to ask questions about the golden mean between the need to protect company interests and the effectiveness of information and consultation regulations.

In 15 member states sanctions are foreseen for workers' representatives for breaches of duty to maintain confidentiality of information provided to them as such. At the same time, only in France is abuse of the confidentiality clause by company management punishable. In three other countries there is a remedy in the form of a possibility to issue court orders to lift the secrecy clause (Lithuania, Poland and the United Kingdom), but no mention is made of corporate responsibility for abuses of confidentiality if the court or other authority (usually the labour inspectorate) finds the company at fault in imposing confidentiality on information that did not require such protection. This situation shows a stark imbalance in how national authorities value company interests against those of workers and how they choose to differentiate their approaches to corporate violations of law and to those of workers' representatives.

If confidentiality is introduced without a proper system of checks and balances it may become a powerful weapon that is easily able to override and even disable information and consultation rights. Therefore the use of confidentiality should be better monitored and supervised by the relevant national authorities. As we have demonstrated, in the vast majority of countries there is a worrying lack of a system of checks and balances, allowing to use confidentiality against workers' representatives to the advantage and at the sole discretion of company management, reinforcing the inherent imbalance with regard to access to information.

Principle of effectiveness

Despite the common reproduction of the wording of Art. 2 (Definitions) in national laws many member states have not explicitly transposed the principle of Art. 1.2 of the Directive (Austria, Bulgaria, Denmark, Spain, Finland, France, Germany, Lithuania, the Netherlands, Poland, Portugal, the United Kingdom) which requires that workers' right to information and consultation be *effective*.[1] The question remains open whether some other acts in national legal systems ensure the fulfilment of this requirement of the Directive (which would mean that the Directive was properly

1 Art. 1 stipulates: '1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings. 2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Art. 5(1), with the purpose of informing and consulting employees. The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively.'

transposed with regard to its goal). An alternative question is whether Art. 1.2 contains a specific or a more general requirement of a less explicit character, which can be assessed as taking into consideration the entirety of the implementing laws. It is also unclear what bearing the absence of an explicit statement of the requirement to make these rights effective might have for workers' rights. If, for instance, a dispute becomes a lawsuit and is tried before a court of justice will this court interpret the workers' rights to information and consultation with the principle of 'effet utile' in mind, will it not take it into account or will it be obliged to apply this principle due to the superior general requirement of effectiveness stemming from the EU made law? Whatever the answer and the reason for the lack of an explicit transposition of Art. 1.2 such a situation negatively affects the transparency of law and endangers coherent application of the EU law.

Articulation between various levels of information and consultation

Our analysis of the national transposition of provisions regarding articulation has shown that some member states do not go any further and, contrary to the requirement imposed on them by Art. 12.3 of the Recast Directive, do not provide any statutory fall-back solution if the agreement setting up an EWC does not include any arrangements for links between national and European levels. This is the case for Austria, Cyprus, Denmark, Lithuania, Luxembourg, Norway, Slovenia and Sweden. Because of this shortcoming we conclude that these countries have failed to implement Art. 12.3 of the Recast Directive.

The obvious non-transposition of the obligation of Art. 12.3 of the Recast Directive is, however, only a proverbial tip of an iceberg. Some member states pretend to have implemented Art. 12.3 of the Recast Directive by providing fall-back provisions on articulation, but in reality the wording of these fall-back provisions does not address the question of articulation because, most of the time, member states have merely reproduced the Article of the Recast Directive without adding any more precision on the procedure, priority of access (EWC, national level works council), content and timing of information and consultation at various levels. For example, the Portuguese legislation states that where the agreement does not regulate the link between the levels, the EWC and other structures collectively representing employees shall be duly informed and consulted whenever decisions arise that may involve significant changes to the organisation of work or to employment contracts. In Estonia, if there are no arrangements for links between the levels, the EWC and the Estonian employee representation bodies shall be informed and consulted in cases where decisions are envisaged that will lead to substantial changes in work organisation or contractual relations. If we compare the legislations of member states that have not transposed Art. 12.3 and those that have formalistically copy/pasted the wording of this Article without adding anything to the Directive's language, the situation seems, indeed, to amount to the same result of no effective transposition, in view of the lack of precision. Because improved articulation between various levels of information and consultation was one of the main achievements of the Recast Directive (however vaguely and indecisively formulated), an opportunity to clarify and improve the effectiveness of employees' transnational information and consul-

tation rights and those of local worker representation bodies seems to have been lost. In this sense the lack of common introduction of the right to guarantee EWC members the right and means to meet with local workforces in various locations to pass on news about EWC information and consultation and to gather evidence and requests directly from workers and their representatives is striking. This is regrettable because the EWC Recast Directive offered a genuine opportunity to bring the European, transnational level of information and consultation closer to ordinary workers' needs and make it more relevant. Underperformance in this department may contribute significantly to further alienate some EWCs from the local level of worker representation.

Transnational competence of EWCs

Surprisingly, many countries, despite the Directive's guidelines, do not provide a clear limitation of EWCs' competence to transnational matters only (Croatia, Luxembourg, Norway, Poland). Relatively many countries define the boundaries – restrict the scope – of EWCs' right to transnational information and consultation by stipulating that these should be 'transnational questions' (Sweden) or 'matters' (Portugal), or indeed 'supranational information and consultation' (Slovakia), which borders on tautology and does not make the differentiation any easier. Only Austria, Belgium (in the customarily commonly accepted quasi-binding commentary to the transposition), Hungary, Romania, Spain (in the preamble to the transposition act) and Liechtenstein make reference to the Recast Directive's recitals (among others, Recitals 15 and 16). This shortcoming of national implementation laws is stark and consequential as the definition of the parameters for EWCs involvement is paramount to their functioning.

The setting-up of European Works Councils and the role of trade unions

Increasing the number of EWCs is one of the goals of the EWC Recast Directive, which to this end addresses the question of simplifying access to information about companies and workforce distribution to allow the establishment process to commence (Art. 4.4). In this sense, cases such as that of the Portuguese legislation, which does not explicitly oblige the management to provide such information to workers, cannot be considered to be in compliance with the obligation to transpose the Directive. All the other member states have implemented Art. 4.4 of the Recast Directive, often by reproducing its wording without taking the opportunity of implementing the Directive to make more precise how this information should be provided, in what form (what documents, data and so on), to whom and whether, for example, employee representatives have the right to request additional data or documents. For example, Belgium, Cyprus, Italy, Malta, Slovenia and Spain have merely copied out Art. 4.4 of the Directive. As in the case of other aspects of the Directive we must insist that such national legislative strategies cannot be accepted as proper transposition and require a response and corrective measures from the European Commission.

In order to facilitate the process of setting up EWCs the Recast Directive also introduced the provision of Art. 5.2c[2] designed to allow workers to benefit from the support of trade unions. Despite the latter's efforts to monitor and follow all negotiations sometimes it is not (always) possible. For this reason, among others, the Directive introduced the obligation to inform the competent European workers' and employers' organisations.

There are numerous problems with this new obligation, though. The relevant Article does not specify which European workers' and employers' organisations shall be deemed competent and are to be informed. Only Recital 27 indicates that these organisations are those social partner organisations that are consulted by the Commission under Art. 154 of the Treaty. As a result, in line with the common strategy of disregarding the Preamble to the Directive, most countries merely reproduce the vague wording of Art. 5.2.c. without giving any more precise indication of the identity of these organisations. Admittedly, all the member states provide that the European social partners shall be informed of the composition of the SNB and of the start of negotiations, but only a few countries – for example, Ireland[3] – provide more detail with regard to the content of such information and give some precision about the timing of the information (for example, in Estonia and Hungary, the names and contact details of the members of the SNB should also be included in the communication; in Estonia and Slovenia, the information should also include the names of the SNB members' companies and their position). In Belgium, the information shall be given at the latest when the first meeting with the SNB is convened, in Estonia, 'without delay' and in Ireland 'in writing and as soon as possible'.

In other countries, however, the implementing provisions remain general and vague. As a result, in practical terms, the entity obliged to transmit the information (commonly unidentified in national legislation), even if willing to transmit this information, could find it difficult to determine the proper addressee.[4] This omission of a concrete indication of the addressees of such information blatantly violates the principle of *effet utile*. Some countries – such as the Czech Republic, the Netherlands, Poland, Romania and Slovakia – have transposed Recital 27 into law; only Hungary mentions in the law that the minister responsible for employment policy shall publish the e-mail addresses to which information must be sent on the government's official informational website. In all the other member states, however, this level of detail is completely absent from the legislation and, consequently, the obligation to inform the 'competent European workers' and employers' organisations' remains a dead obligation whose practical execution is totally obscure to the relevant parties (despite the fact that national legislation follows the vague formulation of Art. 5.2 (c) and does not specify whose obligation it is).

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2 Art. 5.2. c: 'The central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations.'

3 See: http://www.djei.ie/employment/industrialrelations/work.htm

4 Admittedly, more precision was provided in the Expert Report on the transposition (European Commission 2010a: 10) that indicated email addresses and websites. However, this document has no binding force and was drafted not for SNBs or management, but for national authorities responsible for transposing the Directive. Therefore it cannot be considered a valid solution to the problem.

Finally, quite understandably, there is no legislation sanctioning violation of the obligation to inform about the launch of negotiations, which explains why, according to the ETUC (the competent European workers' organisation referred to in Art. 5.2 (c) and the Expert Report, (European Commission 2010a) had by January 2015 received only two such communications, despite the fact there were (at least) 114 newly established EWCs (since 06/06/2011) and 184 signed agreements registered in the ETUI database of EWCs in January 2015 (www.ewcdb.eu).

Significant structural change and renegotiation of EWC agreements

Concerning transposition of these amendments of the Recast Directive our analysis shows that all the member states concerned have reproduced Art. 13 of the Directive almost without modification. Only the Portuguese legislation does not seem to provide that during the negotiations, the existing European Works Councils shall continue to operate, which is clearly at odds with the obligations of the Directive. Otherwise, the only difference among national legislations is that some countries define or give some examples of what 'significant changes' could mean. For example, in Austria, 'acquisition, closure, limitation or relocation of undertakings, or establishments and merger with other groups of undertakings, undertakings or establishments shall be regarded as significant changes, provided that they have a significant influence on the overall structure of the undertaking or group of undertakings'. Some enumeration of examples of significant changes could also be found in Bulgaria, (takeover, merger, division of activities, change of ownership), Germany (merger of undertakings or groups of undertakings, division of undertaking or group of undertaking, the relocation of an undertaking or group of undertakings to another member state or to a third country, or the closure of establishments where such action may have an impact on the composition of the EWC), Hungary (merger, acquisition of dominant influence or division), Latvia (merger, division, transformation) and Slovakia (merger, division).

An important general observation concerning transposition of the provision on significant structural change is that national legislation provides a few, only slightly differing examples, but never a broader (going beyond mergers, acquisitions and takeovers), encompassing or more precise definitions that would include significant changes, such as outsourcing of certain parts or services within a company or selling of company parts, products or sectors. This is regrettable because the catalogue of forms of significant structural change in contemporary companies is much broader than the three examples mentioned in Recital 40 of the Directive. At the same time, one should not forget that Recital 40 is not a closed catalogue (the wording 'for example' is used; see also (Picard 2010a)) and therefore it is reasonable to assume an expectation that more precision will be provided in the course of transposition of the Directive in the member states and would be welcome.

Agreements in force

It has been obvious from the beginning that delimiting the coverage and binding scope of the Recast Directive between voluntary pre-Directive agreements (Art. 13 agreements) and later agreements under the full regime of EWC Directives would prove a complex matter. Undoubtedly, the system defined by the Recast Directive is complex and the transposing national legislations are consequently similarly complicated. Many countries have more or less reproduced Art. 14 of the Directive, but only Austria has correctly embraced the logic and ensured the genuine effectiveness of Art. 14 by explicitly providing that the definitions of information, consultation and transnationality shall apply to all agreements concluded, irrespective of their date of conclusion. On the other hand, some countries seem not to have transposed Art. 14 (Bulgaria, Greece, Romania and Slovenia) at all and other member states do not seem to impose the application of the adaptation clause to the agreements exempted from the application of the Recast Directive (Malta, Norway), which is contrary to the objective of the Directive.

Generally speaking, the national laws on transitional provisions are complex, not easy to understand and likely to cause difficulties in practical application and interpretation. Therefore the European Commission needs to evaluate whether such patchwork and potentially problematic implementation of the Directive can be accepted as proper transposition.

Enforcement provisions including sanctions

Despite the clear aims of the Recast Directive to increase the effectiveness of EWCs and avoid legal uncertainty, our review of national transposing measures on enforcement shows that a number of serious difficulties in this area remain untreated.

First, despite the insertion of Art. 10.1 giving EWCs and employee representatives the means required to apply the rights arising from the Directive to represent collectively the interests of the employees, it appears that the majority of member states have either copied the relevant text verbatim, without any adaptation (or explanation) to the national legal context, or have assumed that national law already provides for such means. In these countries it is difficult to establish how national laws have amended, formally and practically, their rules to ensure that EWC members can exercise their rights granted by the Recast Directive. The general principle expressly giving means (material and legal) to EWC members was welcome, but the spirit of this new obligation does not seem to have materialised in national laws. National and European case law will therefore need to be monitored to see whether the lack of practical measures or means will be argued before the courts. However, with regard to the latter, EWCs' access to courts may be seriously hindered by the lack of clear rules on their legal status (legal personality, court capacity) defining what EWCs can or cannot do, as well as on the means available to them in such legal proceedings. It needs to be emphasised that as long as there are doubts as to whether an EWC has legal status or whether individual EWC members can seek redress, only a limited number of cases will be brought before the courts.

The same applies to the lack of clarity over financing by management of necessary costs incurred by EWCs in preparation for court proceedings.

Such a state of affairs will of course enable some stakeholders and commentators to argue that the lack of disputes is sign of a well-oiled machinery and smooth transposition/integration of the modified directive into national contexts. Those inclined to argue – against our findings – that such smooth transposition has been taken place are likely to do so on political grounds.

It needs to be emphasised that European law (the EWC Recast Directive) could have been more precise and directly ordered member states to apply a system in which the collective body is given legal personality or the means to have access to courts or dispute resolution systems. Furthermore, it could also be more pragmatic to require that national implementation frameworks include the obligation to provide EWCs with their own financial means or guaranteed access to financial means in order to obtain independent legal advice and recourse to lawyers, if judicial proceedings are necessary. Because, unfortunately for legal clarity and workers' interests, more explicit references to the meaning of 'means' was not chosen in the Recast Directive, EWC members remain in doubt concerning what they can do to enforce their rights in a significant number of countries. The forthcoming (2016) review of national implementation by the European Commission and the European Parliament seems the last opportunity to remedy this shortcoming.

Second, our analysis revealed several countries in which sanctions seem altogether absent or are so obscure that it was impossible to find direct reference to them. Surprisingly, some of them escaped the attention of the Implementation Report in 2000 (European Commission 2000). The review of 2015/2016 thus represents a chance to bring these national frameworks up to the required standard.

Third, the variety of sanctions available in member states does not give workers equal redress and endangers coherent application of the Directive in the transnational settings of EWCs.

Fourth, there are serious doubts with regard to the available sanctions' compliance with the requirements of effectiveness, proportionality and dissuasive potential in the vast majority of the member states. While the majority of sanctions available currently involve financial penalties, even at the higher end they are unlikely to deter companies from breaching their own agreements or the subsidiary requirements. Without a strong lead from the European draftsmen imposing a universal sanction, the effectiveness of information and consultation rights risks being seriously diluted. During the forthcoming review of national implementation measures the European Commission will be confronted in some member states with sanctions of almost negligible dissuasiveness and effectiveness, and, however difficult this task might be, it will be expected and required to take a position on the matter, keeping in mind the requirements set out in Recital 36 of the Recast Directive.

Tough as it might be, given the above evidence from the mapping of sanctions there simply seems to be no alternative but to seriously and consistently enforce member states' compliance with the Directive in this regard.

Of particular interest is the choice of tools and methods that the European Commission will apply to translate the general criteria of effectiveness, proportionality and dissuasiveness into practice and evaluate national sanctions accordingly. Even if a review of the European Directive proves favourable to a common European level of financial penalty, the most deterrent measure would be to deprive management decisions of their legal effects unless information and consultation obligations have been observed by Community-scale companies. The resistance to such a proposal has historically been too strong and national measures rarely go so far. However, without such an incentive, it is unlikely that information and consultation processes will ever play the role designated for them in the EWC Directive(s) and EWCs will remain toothless.

Last but not least, it seems clear that if infringement of the rights to timely information and genuine consultation is to be prevented and tackled effectively, every EU member state should guarantee efficient measures that make it possible to halt a decision-making process conducted in contradiction of employees' rights to be informed and consulted. It seems obvious there is little use in applying other sanctions of relatively low severity (often small administrative fines; see below) after the event, once the management has taken the decision and the situation cannot be remedied by employee representatives. Analysis of national implementation acts of the EWC Directive reveals, however, that only few national legal orders provide for the effective measure of the court injunction to safeguard EWC rights. Consequently, applications to courts by EWCs aiming to stop managerial decisions sometimes deliberately taken in violation of EWC rights, are handled by courts in the normal course of their activities, which usually takes several months after an unlawful decision has been taken and implemented.[5] The Commission should thus consider making recommendations on making such a measure available in all the member states.

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There is no doubt that making direct and concrete orders to member states to bring their enforcement frameworks into line with the requirements of the Directive will be a very difficult political decision to reach and a mighty task to execute. If one classifies 'transposition of the Directive' as the mere presence or reproduction of the original Directive's provisions in national legal texts, then it could be said that, indeed, most member states have implemented the provisions of the Recast Directive on the establishment and adaptation of EWCs. However, in the present study we believe we have documented obvious and flagrant shortcomings in national laws transposing the Recast Directive. With this evidence in hand any evaluation by the European Commission that is similar in terms of perfunctoriness and laxness to that of the previous Implementation Report of 2000 (European Commission 2000) seems unthinkable. In view of the evidence we have presented, the European Commission's responsibilities as the 'Guardian of the Treaties' leave no room for a soft approach, especially because a common interpretation of the Directive has been established among the member states thanks to the very informative and competent

5 Apart from Hungary, where the court is obliged to issue a ruling within 15 days of an application by an EWC.

European Commission's support to national authorities (European Commission 2010a).

The authors hope that the work, effort and resources put into producing the guidelines and recommendations of the Expert Report (ibid.) will be applied effectively as a point of, admittedly not binding, but certainly standard-setting reference for the evaluation of individual solutions on specific aspects, as well as for the overall quality of national transposition acts. The Expert Report regrouped the results of previous impact studies, a deepened analysis and conclusions to ensure coherent application of the Directive's rules. The resources and collective expertise invested in the workings of the Expert Group are simply too precious to be considered a series of interesting meetings with minutes as a minor by-product (as was the case with similar proceedings concerning the original Directive 94/45/EC in 1995). Quite the opposite is to be postulated: that national authorities who affirmed the recommendations of the Working Party are to be held accountable for deviations between the agreement recorded in the Expert Report and the contents of national laws. If the implementation report finds discrepancies between the two enquiries, corrective actions should follow. Such decisiveness on the part of the European Commission would help to show that the goals laid down in the Better Regulation agenda are not just a lip-service response to popular expectations of a more social Europe, but really serve to improve the quality of legal frameworks, not merely to simplify and reduce them at the expense of workers' rights.

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