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Fundamental principles of EWC Directive 2009/38/EC

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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 breadth¹ 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.'

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 Dorsssement 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-ÁndG).

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
Liechtenstein	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 Republic³⁷ (and preliminary attempts by the United Kingdom³⁸), 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 Dorsssemont 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 NOT applicable to			Confidentiality = confidentiality			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	contacts with other EWC members	contacts with experts and/or translators	to contacts with supervisory board 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 NOT applicable to				Limitations of confidentiality = confidentiality			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	contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board members	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								
Finland	– (only minor modification)										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 NOT applicable to				Confidentiality = confidentiality			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	contacts with other EWC members	contacts with other experts and/or translators	to contacts with supervisory board 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	X	X			
Greece	-	By implication, yes ⁴⁶							X	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	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 NOT applicable to			Limitations of confidentiality = confidentiality			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	to contacts with	to contacts with				
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. ⁴⁷	
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 NOT applicable to			Limitations of confidentiality = confidentiality			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	contacts with other EWC members	contacts with experts and/or translators	to contacts with supervisory board 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 transition 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 transition act); 2) Extension of scope to 'commercial/industrial or professional secret' (Art. 11 of the transition 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. 1.1.6)	
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 Transition 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	contacts with other EWC members	to contacts with experts and/or translators				
Malta	X				X		Industrial Tribunal		
Netherlands	X		optional	optional	optional	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 NOT applicable to			Confidentiality = confidentiality			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	contacts with other EWC members	to contacts with experts and/or translators	to contacts with supervisory board 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 be 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 competence⁵⁷). 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 complementarity 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.