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Evaluation

Accompanying the document

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee

Report on the implementation by Member States of Directive 2009/38/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast)

{COM(2018) 292 final}

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I. INTRODUCTION

A. Purpose of the evaluation

This evaluation assesses the impact of new rules and changes introduced by the **Recast Directive 2009/38/EC** on the establishment and operation of a European Works Council ('EWC') or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (commonly named 'the Recast Directive'¹).

European Works Councils (EWCs) are bodies representing European employees within transnational companies². Through them, employees are informed and consulted by management on the progress of the business and any significant decision at European level that could affect their employment or working conditions.

Article 15³ of the Recast Directive requires the Commission to report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.

Since work on this evaluation started before the adoption of the 2015 Commission Better Regulation Guidelines⁴, an evaluation roadmap was drawn up in January 2016 to comply with them. In the light of the Guidelines, the evaluation draws conclusions on the effectiveness, efficiency, coherence, relevance and the EU added value of the new provisions introduced by the Directive. It also provides corresponding analysis and findings.

B. Scope of the evaluation

The evaluation focuses on the changes brought by the Recast Directive to the original Directive 94/45/EC⁵ as determined in the evaluation roadmap. It does not therefore analyse the entire Directive, only those provisions introduced in the 2009 Recast and their effects on: (i) the creation of more EWCs; (ii) the effectiveness of employees' transnational information and consultation rights; and (iii) the improvement of the legal framework.

¹ Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees (Recast) (OJ L 122, 16.5.2009, pp. 28-44).

² Defined as 'Community-scale undertakings' in Article 2(1) (a) of Directive 2009/38/EC.

³ 'No later than 5 June 2016, the Commission shall report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making appropriate proposals where necessary.'

⁴ https://ec.europa.eu/info/files/better-regulation-guidelines_en.

⁵ Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees — OJ L 254, 30.9.1994, p. 64-72.

The evaluation assesses the transposition and the implementation of the Recast Directive in the Member States and the extent to which it has achieved its goals set out in its Recital 7: *‘It is necessary to modernise Community legislation on transnational information and consultation of employees with a view to ensuring the effectiveness of employees’ transnational information and consultation rights, increasing the proportion of European Works Councils established while enabling the continuous functioning of existing agreements, resolving the problems encountered in the practical application of Directive 94/45/EC and remedying the lack of legal certainty resulting from some of its provisions or the absence of certain provisions, and ensuring that Community legislative instruments on information and consultation of employees are better linked.’*

The geographical scope of this evaluation covers the European Economic Area, i.e. the EU in its present composition of 28 Member States plus Norway, Liechtenstein and Iceland.

The time period covered is from June 2011 (the date of the transposition deadline of the Recast Directive⁶) to November 2017.

II. BACKGROUND TO THE INITIATIVE

This section provides a short description of the history of the Recast Directive, its content, objectives and ‘intervention logic’.

A. History of the Recast Directive

The possibility to establish EWCs was first introduced by Directive 94/45/EC⁷ of 22 September 1994. It was extended to the United Kingdom by Council Directive 97/74/EC of 15 December 1997 and adapted by Council Directive 2006/109/EC of 20 November 2006, to take account of Bulgaria and Romania joining the EU. In the implementation report of 4 April 2000 to Parliament and the Council⁸, the Commission stated that it would take a decision on a possible review of the Directive 94/45/EC based on the subsequent assessments required under the Directive and on developments in the other legislative proposals on the involvement of employees.

This implementation report highlighted the following problems in the application of the Directive:

- the legal framework was not ensuring an adequate transnational information and consultation within a reasonable timeframe, especially in restructuring cases;

⁶ Except for Croatia, for which the date of accession to the EU (July 2013) is the relevant date.

⁷ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31994L0045>.

⁸ Commission implementation report COM (2000) 188.

- there were practical shortcomings in its application, particularly on the effectiveness of the flow of information between the different levels of worker representation;
- the lack of appropriate training for EWC representatives to be able to represent workers' interests and ensure transnational communication.

Also, EWCs have been set up in only 36 %⁹ of undertakings falling under the Directive.

A political agreement was reached in 2008 under the French EU Presidency to recast the Directive once the social partners had been consulted and their joint input taken into account. The Commission adopted a legislative proposal in July 2008¹⁰. Improving the efficiency of EWCs was one of the objectives of the action programme for reducing administrative burdens in the EU¹¹.

The European Parliament and the Council adopted the new Directive 2009/38/EC on 6 May 2009. Some amendments introduced by the co-legislators reflected a joint position of the social partners put forward during the adoption process in a joint letter to the Commission¹².

The Recast Directive entered into force on 5 June 2009. In October 2015, it was amended¹³ to include seafarers in its scope of application.

B. Content of the Recast Directive

EWCs can be established in undertakings where the following conditions are met:

- **Community-scale undertakings** employing at least 1 000 employees within the Member States and at least 150 employees in each of at least two Member States;
- **Community-scale group of undertakings¹⁴ employing:**
 - at least 1 000 employees within the Member States;
 - at least two group undertakings in different Member States;

⁹ COM(2008) 419 explanatory memorandum.

¹⁰ Commission proposal COM(2008) 419 final and Impact Assessment SEC(2008) 2166.

¹¹ COM(2009) 544 final of 22.10.2009 and its Annex C.

¹² Joint advice by the social partners on the European Works Council 'Recast Directive' of 29 August 2008.

¹³ Directive (EU) 2015/1794 of the European Parliament and of the Council of 6 October 2015 amending Directives 2008/94/EC, 2009/38/EC and 2002/14/EC of the European Parliament and of the Council, and Council Directives 98/59/EC and 2001/23/EC, as regards seafarers.

¹⁴ Article 2(1)(b) of the Recast Directive defines 'group of undertakings' as a controlling undertaking and its controlled undertakings.

- at least one group undertaking with at least 150 employees in one Member State; and
- at least one other group undertaking with at least 150 employees in another Member State.

The process of establishing a body or procedure to inform and consult employees is triggered by a request by 100 employees from two countries or an initiative by the employer. The composition, competences and functioning of an EWC are laid down in an agreement reached by a ‘special negotiating body’ representing employees and central management. Subsidiary requirements apply in the absence of such an agreement. EWCs are to be informed and consulted on transnational issues affecting employees.

The specific objectives of the Recast Directive 2009/38/EC are¹⁵:

- **ensuring the effectiveness of employees’ transnational information and consultation rights;**
- **promoting the creation of new EWCs;**
- **resolving the problems encountered in the practical application of Directive 94/45/EC;**
- **remedying the lack of legal certainty resulting from defects in some provisions (such as definitions of information and consultation) and the absence of others (e.g. definition of transnationality);**
- **ensuring better links with other EU legislative instruments on information and consultation of employees.**

The Recast Directive aimed to achieve these objectives by introducing the following main substantive provisions:

- *Opening and process of negotiations:* Article 4 clarifies the responsibility of local management to provide information enabling the launch of negotiations to set up new EWCs. Article 5 details the role and composition of the special negotiating body (i.e. the body representing employees in the negotiation).
- *Role of trade union and employers’ organisations:* Article 5 introduces the obligation to inform the trade unions and employers’ organisations of the start of negotiations establishing an EWC.
- *General principles and concepts of information and consultation:* Article 1 of Directive 94/45/EC stipulates that the arrangements for informing and consulting employees must follow the general principle of effectiveness. Article 2 of the Recast

¹⁵ Recital 7 of Recast Directive 2009/38.

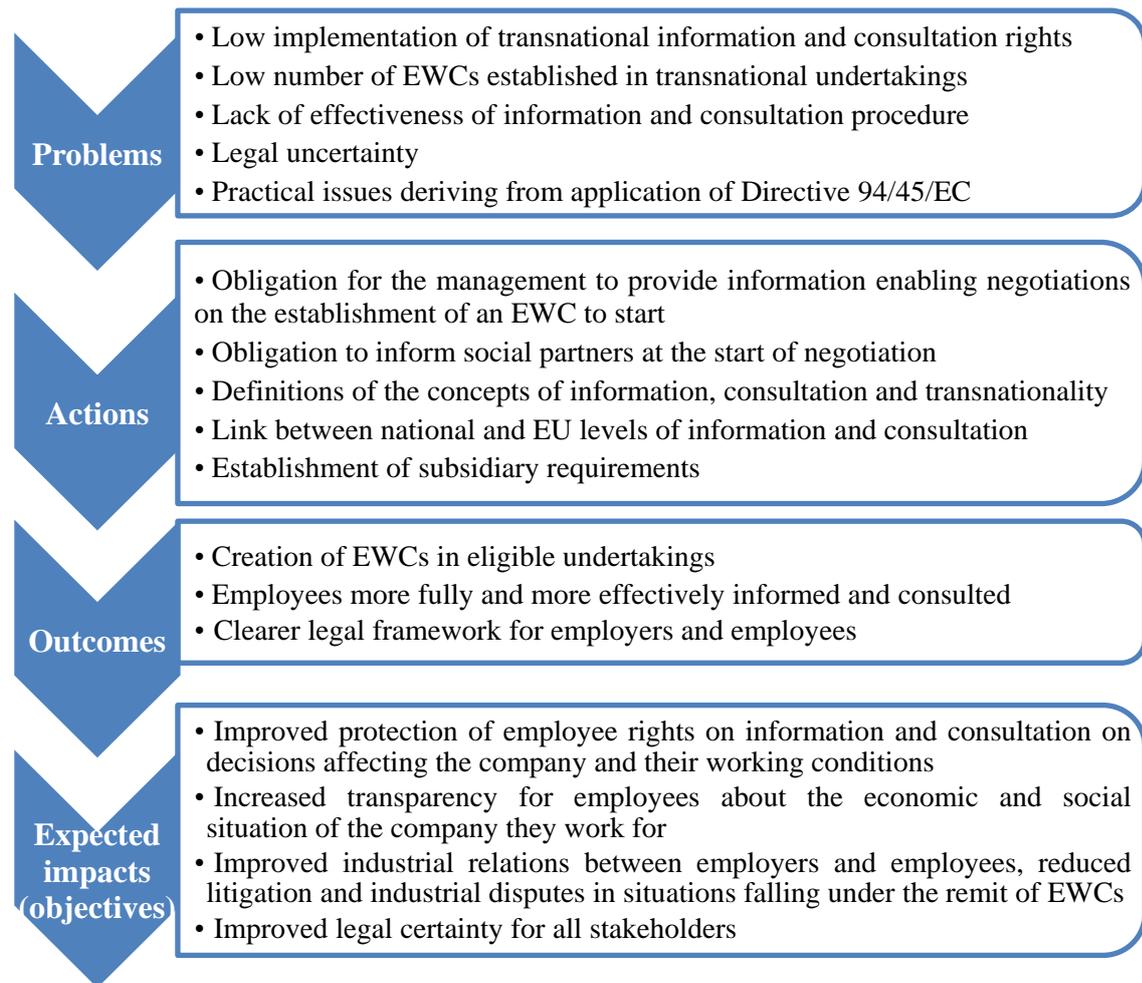
Directive adds a definition of information and brings the definition of consultation into line with other Directives¹⁶, including the concepts of timing and content appropriate to the information and consultation.

- *Transnational competence of the EWC*: The EWC's competence is limited to transnational issues, with the Recast Directive introducing criteria that are more specific to determine the transnational nature of an issue.
- *Links between the levels of information and consultation of employees*: Article 12 of the Recast Directive introduces the principle of a link between the national and transnational levels of information and consultation of employees, with due regard for the representative bodies' competences and areas of action.
- *Role and capacity of employees' representatives*: Article 10 provides that the members of an EWC must have the means required to apply the rights arising from the Directive to represent collectively the interests of the employees. It also places an obligation on the employees' representatives to report to the employees they represent and gives employees' representatives the possibility to attend training without loss of salary.
- *Adaptation clause*: Where the structure of the undertaking or group of undertakings changes significantly, Article 13 provides for the agreements in force to be adapted in accordance with the applicable agreement or in accordance with the negotiation procedure for a new agreement.
- *Continuity*: Under Article 14, the agreements in place under the 1996 Directive are not subject to the obligations arising from the Recast Directive. The same applies to agreements establishing EWCs between 5 June 2009 and 5 June 2011.
- *Content of the subsidiary requirements*: the Annex to the Directive lays down the rules applicable in the absence of agreement between the management and employees representatives concerning an EWC's establishment, composition and competences.

C. Intervention logic

The intervention logic diagram below summarises the problems, purpose, content, outcomes and intended impacts of the Recast Directive and their inter-relations.

¹⁶ Directives 2002/14 on a general framework of information and consultation of employees; 98/59 on collective redundancies; 2001/86 on involvement of employees in European companies.



III. METHODOLOGY

This report is based on an analysis of data and information collected from various sources, as explained below.

A. Sources of findings

The main sources of information and data used in the evaluation combine the following:

- **a study by an external contractor** ('the study') commissioned in 2015¹⁷. The final report was delivered in May 2016 and covers the implementation of the Recast Directive in all Member States since the transposition deadline of June 2011. The study has been validated by a steering group led by the Commission (see Annex 1). The external study involved consultation of the following key stakeholders¹⁸:
 - the cross-industry EU social partners (i.e. Business Europe, European Trade Union Confederation, CEEP);
 - the 23 European social partner organisations from the key sectors in which EWCs are represented;
 - national social partners;
 - a sample of employee and employer representatives from companies with EWCs established after the adoption of the Recast Directive;
 - a sample of employee and employer representatives from companies with EWCs established under Directive 94/45 EWCs but with revised agreements under the Recast Directive;
 - a sample of employee and employer representatives from companies with EWCs established under Directive 94/45 and not amended since;
 - representatives of Member States;
 - European labour law experts (European Labour Law Network¹⁹).
- **expert group meetings**, which took place in November 2015 and June 2016. The Commission collected opinions on the evaluation and the Directive in general from national experts designated by Member States and European social partners. During the meetings, the interim findings and the final findings of the external study were presented and acknowledged by the members of the expert group. The specific

¹⁷ *Evaluation Study on the implementation of Directive 2009/38/EC on the establishment of an EWC*, ICF, May 2016.

¹⁸ See Annex 2 for a list of stakeholders consulted.

¹⁹ <http://www.labourlawnetwork.eu/>

comments made by Member States (UK, Croatia) on the transposition analysis were taken into account in the assessment presented in this staff working document.

- **extensive data collection and analysis deriving from various studies** on EWCs, principally:
 - *European Works Councils and SE works councils in 2015, Facts and figures*, ETUI (Stan De Spiegelaere and Romuald Jagodzinski) 2015.
 - *Variations on a theme? The implementation of the EWC Recast Directive*, ETUI (Romuald Jagodzinski) 2015.
 - *Linking information and consultation procedures at local and European level*, Eurofound (Filip Dorssemont and Peter Kerckhofs) 2015.
 - *European Works Council developments before, during and after the crisis*, (Peter Kerckhofs) 2015.
 - *EWCs assessments and requirements*, Report to the ETUC — ETUC 2016.
 - *Too little and too late? — Evaluating the European Works Councils Recast Directive*, ETUI (Stan De Spiegelaere) 2016.
 - *EWCs on the move: management perspectives on the development of a transnational institution for social dialogue*, KU Leuven CESO, 2016, co-financed by Business Europe.
 - *European Journal of Industrial Relations*, volume 23, issue 3 — September 2017.
- **documentation from projects which received grant support from the Commission**

The Commission organises a yearly call for proposals²⁰ to fund operations aimed at developing employee involvement in undertakings. This covers any mechanism, including information, consultation and participation, through which employees' representatives may exercise an influence on decisions to be made within the company. The outcomes of relevant projects on EWCs were taken into account in this evaluation²¹.

A public consultation was judged unnecessary and was therefore not carried out. This was because various key stakeholders²² were already consulted via the study at company, national

²⁰ Commission call for proposals — 'Information, consultation and representation of representatives of undertakings' Directorate-General for Employment, Social Affairs and Inclusion (DG EMPL) Prerogative and Specific competencies — Commission Decision C(2016)6596/F1 for call for proposals 2017. <http://ec.europa.eu/social/main.jsp?catId=629&langId=en&callId=511&furtherCalls=yes>.

²¹ [See](#) Annex 3.

²² 83 interviews and 34 surveys conducted by the external contractor, see Annex 2.

and EU levels (see Annex 2), and given the highly specialised knowledge needed to respond meaningfully to evaluation questions on the new provisions introduced by the 2009 Recast Directive.

B. Limitations —robustness of findings

The Commission identified some limitations in the methods and data used in this evaluation.

For the study, the sample of employees, employers and social partners interviewed was made based on a balanced selection taking into account geographic location, as well as different sizes and types of labour markets. This included covering the main models of industrial relations systems extant in the EEA. However, the number of respondents among EWC practitioners was slightly lower among employers than employees²³. Interviews with stakeholders and comparisons with secondary data sources were used to cross check and assess stakeholders' statements. The Commission used a wide range of sources in this triangulation process to ensure that the assessment was as exhaustive as possible (see Section III.A 'Sources of findings'). However, some limitations in the availability of relevant data are due to the fact that this evaluation took place relatively early in the implementation of the Recast Directive. Some EWC practitioners considered themselves to be in an ongoing learning process and could not always draw conclusions on their experience of the new provisions. In addition, there was some bias in the interview data, as interviews did not cover failures to negotiate EWCs.

The compliance assessment also faced some methodological challenges, particularly in assessing the significance of divergence between the Recast Directive and national transposing provisions. The Commission and the contractor therefore established agreed definitions underlying the mapping to determine whether national legislation was compliant or not, notably by identifying the 'key substantive provisions' in the Recast Directive.

Key substantive provisions were agreed to be:

- opening and process of negotiations;
- role of trade unions and employers' organisations;
- content of the subsidiary requirements (which apply in the absence of an agreement);
- general principles and concepts of information and consultation;
- transnational competence of the EWC;
- role and capacity of employees' representatives;
- the adaptation clause.

²³ Response rate of 63 % for interviews of employers and employees representatives, with participation from the employee side 15% higher.

IV. TRANSPOSITION AND IMPLEMENTATION — STATE OF PLAY

This section sets out the state of play on the transposition of the Recast Directive provisions in the national legislation, based on the study and their effects on legal certainty. This transposition analysis was mainly conducted in four main areas:

- establishment of the EWCs;
- the concepts of information, consultation and transnationality;
- the operation of EWCs;
- the role and protection of employee representatives at company level.

The analysis also determined whether the Member States have implemented provisions, which go beyond the minimum standards imposed by the Directive.

The transposition assessment of the EU rules on enforcement is described in Section V-A-6.

A. Transposition overview

1. Establishment of EWCs

The provisions assessed here are related notably to

- the information the employer has to provide to start the EWC negotiations;
- the rules governing the special negotiating body (Article 5);
- the role of the social partners in the negotiations;
- the content of the EWC agreement (Article 6).

Most Member States properly transposed the EU legislation. In some cases, Member States included more detailed provisions that go beyond the minimum requirements in the Directive. For instance, in Lithuania and Luxembourg, the legislation specifies a time limit for sending information, the categories of information to be provided, and establishes the possibility to bring a case before the courts in case the information is not provided. Austria, Germany, Hungary and Lithuania also established an obligation to inform national social partners of the intention to launch an EWC negotiation, not only the European social partners as referred to in Recital 27.

However, in two countries (Greece and Iceland) the national provisions do not seem to contain specific provisions on the information to be given to the European social partners at the start of the EWC negotiations.

2. The concepts of information, consultation and transnationality

To improve the clarity of the legal framework, the Recast Directive redefined the concepts of information, consultation and transnationality in Articles 2(f), 2(g) and 1(4) respectively.

Those three concepts have been properly implemented in all the Member States. In addition, more extensive provisions were adopted in the Czech Republic, Germany and Estonia — for instance requiring the consultation process to end with a reasoned opinion from the management referring to the opinion expressed by employees' representatives.

3. The operation of EWCs

The operation of EWCs is covered in Section III of the Recast Directive.

Most national legislation meets the requirements on the operation of EWCs by transposing the text of the Directive verbatim.

Article 13 of the Recast Directive ('Adaptation clause') lays down a requirement to renegotiate the EWC agreement if significant changes are made to the structure of the undertaking. The renegotiation is launched at the initiative of the employer or at the request of 100 employees in at least two Member States.

Spanish and German legislation transposing Article 13 varies slightly from the EU provisions when specifying the conditions of application: German legislation does not require a minimum of 100 employees to issue the written request, while Spanish legislation specifies the minimum number of representatives that should form the special negotiating body.

In Denmark, the national rules do not seem to fully meet one of the key substantive requirements of the Directive, namely establishing a possibility for the special negotiating body to meet without the presence of central management.

4. The role and protection of employee representatives

Member States have properly transposed the provisions on the role, protection and training of EWC representatives.

In three Member States (Finland, Hungary and Italy) some provisions go beyond the requirements of Article 10 as they also cover the content of training and the rate of remuneration.

Areas where other provisions (beyond those identified as key substantive provisions) were not transposed in national legislation are:

- no restriction on the number of the select committee members (which could also be interpreted as exceeding the requirements) (Bulgaria);
- only partial reference to the subsidiary requirements (Estonia);

- no specific reference to the general principle that information and consultation must be effective and enable companies to take decisions effectively (Finland, France, Luxembourg and the Netherlands);
- no specific reference to the regularity of the select committee²⁴ consultations (Poland);
- no specific provision on the composition of the special negotiating body (Portugal).

To conclude, in most of the Member States covered by the Recast Directive, national legislation is generally compliant with the Directive by transferring the text of the Directive verbatim or by adopting a very similar wording. Only in three Member States does the national legislation not seem fully compliant with the minimum standards set out in key substantive provisions²⁵ and in 11 Member States for other provisions.

The analysis concluded that 15 Member States have provisions that are more detailed than those in the Recast Directive. These were assessed as going beyond the Directive's minimum standards, in that they are more protective for employees and/or more precise than the provisions in the Directive.

B. Legal certainty

This section assesses the Recast Directive's impact on legal certainty in the Member States for transnational information and consultation of workers.

The evidence presented here results from information collected principally from ministry representatives, national social partners, European social partners and labour law experts, and from an analysis of national case-law.

Various national and European social partners were interviewed for the study²⁶. 40 % of national social partners agreed that the Recast Directive had improved legal clarity and certainty for the type of information to be disseminated, while for one other third it did not generate any changes. The remainder stated that they could not assess the impact of the Recast Directive on legal clarity and certainty due to lack of experience with its new provisions.

Half of European social partners confirmed that the Recast Directive increased clarity and legal certainty, especially for the definition of information and consultation, the role of workers' representatives, the adaptation clause (Article 13), and the right to training. On the other hand, a further 40 % considered that it was too early to identify such impacts reliably.

²⁴ Recital 30 lays defines the role of the select committee as "allowing" coordination and greater effectiveness of the regular activities of the European Works Council, together with information and consultation at the earliest opportunity where exceptional circumstances arise."

²⁵ Denmark, Greece, Iceland.

²⁶ ICF study p. 47.

Some employee representatives drew attention to: (i) the ongoing lack of legal clarity over the scope of a transnational matter; and (ii) the resources allocated by employers to support the work of EWC members (financial and material resources, interpretation, budget for external expertise) to fulfil the obligation of Article 10 for employers to provide the means for EWC representatives to fulfil their functions. Finally, the timing of the information and consultation procedure in the event of restructuring is sometimes unclear. However, 85 % of the national social partners interviewed stated that the volume of litigation related to EWCs had in their opinion not changed since the adoption of the Recast Directive.

For the Member States, 12 out of 23 national ministry representatives²⁷ responded that legal certainty had improved across all aspects. For the others, either it was too early to draw reliable conclusions on this point or, for few Member States²⁸, the Recast did not bring further legal clarifications on specific points such as the right to request external expertise for EWCs members, the timing of information and consultation, and the capacity of the EWC.

Many Member States reported no specific experience of enforcement as the transposition is recent or there are few EWCs in the Member State concerned²⁹. Austrian, Bulgarian, French, German and Swedish representatives pointed out that enforcement had become easier due to improved legal certainty. Employers' organisations in Italy indicated that enforcement had become easier, but employees' organisations did not fully share this view, as for them some of the agreements still leave substantial room for interpretation of certain concepts that are not clearly defined, such as the scope of competence.

Among the 27 respondents in the contractor's interviews with the European Labour Law Network experts, half agreed that legal certainty had improved for all aspects covered by the Directive. Two thirds of respondents agreed that the Recast had improved legal certainty on the timing of information and consultation procedures. Half of the 27 respondents considered that the Recast had provided for better information and consultation rights for workers than was previously the case.

For experts from Croatia, Germany, Hungary, the Netherlands, Romania and the UK, some issues remain over the functioning of EWCs, in particular their scope, and the identification of the transnational nature of topics that are covered by the information and consultation requirement. The interplay between the national and European levels of consultation can also constitute a challenge in practice when the national legislation or the EWC agreement do not precisely specify the order of the consultations (i.e. should they take place in parallel, or should the national consultation be conducted before or after the European-level one).

Volume of litigation:

There is a perception among the social partners and experts that the volume of litigation before and after the entry into force of the Recast Directive did not change.

²⁷ Some countries did not reply to the questionnaire.

²⁸ Belgium, Estonia, Italy, Latvia, Luxembourg, Sweden

²⁹ From interviews carried out under the study and expert meetings that took place in 2015 and 2016.

At national level, the number of court cases challenging provisions of the Directive is low or very low³⁰.

The report³¹ on the implementation of Directive 1994/45/EC stated that the original Directive gave rise to few disputes, but there are no objective data that could allow for comparison of the volume of litigation before and after the Recast. This makes it difficult to measure the impact of the Recast on this point.

National court case analysis on legal certainty:

For the period 2010-2015, the study examined in depth 10 national court cases that addressed issues relevant to EWCs. Most occurred in France and Germany, in line with the fact that most of the EWC agreements are implemented under French or German jurisdiction.

There is no information indicating which of these cases were brought before the national courts before and after the Recast, so it is not possible to conclude whether the Recast had an impact on national litigation.

The 10 cases highlight a number of issues and legal uncertainties around the following aspects:

- *Establishment of an EWC*

A French case (Manpower) concerned the choice of the national law under which an EWC should be established. While the French trade union argued for France, the court ruled in favour of the management's decision to appoint its British subsidiary to negotiate the EWC agreement under UK law. The case highlighted some issues over the discretion that the Recast Directive leaves to the negotiating parties as to the choice of jurisdiction governing the EWC agreements.

- *Information and consultation procedures*

Two cases from Spain (Tenneco and Coca Cola) concerned the interpretation of the timing of information and consultation procedures. In both cases, it seemed that central management had already firmly decided on the measure under discussion. For that reason, trade unions maintained that the information and consultation procedures were invalid. The court ruled that these procedures should include a genuine possibility to discuss potential impacts and seek possible alternatives to ensure that the procedures are useful and efficient. This interpretation by the Spanish Courts may be considered to go beyond the Recast Directive, which states that “*consultation*” means *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*

³⁰ European Centre of Expertise data November 2017.

³¹ Commission implementation report COM (2000) 188.

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’.

- *Articulation between national and European-level consultation, in particular over timing*

In two French cases concerning restructuring (GDF Suez and Peugeot) the ruling was that the national level and transnational levels must be consulted simultaneously. All consultation procedures must be correctly carried out at all levels before a decision may be implemented.

- *Definition of ‘transnational’ issues*

A French case (Transdev) concerned the payment of an advance which led to the launch of insolvency proceedings for a subsidiary of the French part of the Community undertaking. The EWC claimed it should have been consulted on the matter. The Court concluded that the measure was of a solely national nature and that management were not obliged to consult the EWC. The Court also stated that while it is conceivable that the measure might have significant consequences in future and a potential impact for the European workforce, at the stage when the matter was brought before the court this could only be regarded as an unproven hypothesis. This makes clear that the transnational nature of a matter may or may not emerge later in the process and in any case after the point at which the EWC should have been consulted. This shows the close link between national and European-level information and consultation and the importance of both the national and European works councils being aware of measures under discussion at all levels of the establishment.

In a second case, in the UK (British Council, CAC), the Arbitration Council did not rule as such on whether the measure was of a transnational nature but focused on the subject matter of the measure in question (pay policies). The Council argued that because pay policies are excluded from regulation at EU level they couldn’t by consequence also be a transnational subject matter for the EWC. As a result, it is only the national-level representation bodies that must be consulted on such a measure.

- *Communication between EWC representatives and national employees*

Two German cases dealt with the communication of the outcomes of an information and consultation procedure from the EWC to national worker representation bodies.

In the case of a multinational group, the management refused to cover the travel costs of two EWC Select Committee members who wished to present the outcomes of an information and consultation procedure in person locally at a plant site, and did not see any reason why both of the representatives had to carry out the task. It was further argued that only Select Committee members might provide such information on the outcome of an information and consultation procedure. The Court ruled that the German transposition text restricts the function of informing the workforce of the

outcome of information and consultation procedures to Select Committee members, but found that under the Directive, any member of the EWC can inform national employee representation or the workforce. There is no obligation stipulating the means of sending this information, whether in person or via video conferencing. Both are compatible with the Directive.

In the second case (Amcor), the EWC intended to communicate a report directly to the whole workforce via their intranet webpage. The central management brought a case against this direct communication. The Court ruled that an EWC has no right to directly communicate with the workforce on the company intranet if there is a works council present in the respective country or workplace. The Court referred to Article 10(2) of the Recast Directive, according to which the EWC *'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 (...)'*.

- *Enforcement rights*

In the Visteon case (Germany), the Court declared the consultation procedure invalid and the EWC claimed that the Court should stop the measure in question as long as the consultation was not correctly carried out. However, such a measure to enforce the EWC's rights does not exist under German law, which provides only for a monetary fine in cases of breaches of obligations deriving from the EWC legislation. In the case in question the Court ordered that the company pay a fine of EUR 15 000. The decision was much criticised on the grounds that imposing a fine that is relatively modest given the amounts at stake in the decisions in question is not a sufficient disincentive to prevent undertakings from avoiding information and consultation procedures.

At EU level, there have been no preliminary rulings of the Court of Justice of the EU on the Recast Directive. The Commission has received only one formal complaint on the implementation of the Recast Directive. This related to the level of sanctions in Finland.

The low number of cases at national and EU level tends to indicate that there is not much litigation over implementation of the Recast Directive and that it does not generate issues that cannot be resolved through legal interpretation using the existing systems. This could be due to several factors such as the Recast's improvement of the definitions of key concepts and social partners' capacity to find solutions through practice and social dialogue based on their growing experience of EWCs. However, it could also be linked to problems with access to enforcement and capacity to act in justice³².

Overall, it appears from the evidence provided by stakeholders and legal experts that the new and enhanced definitions contained in the Recast Directive may have contributed to greater legal certainty. However, the lack of reliable statistics on volume of litigation is not at this stage conclusive and other reasons may have led to the modest volume of cases brought

³² See enforcement analysis below in Chapter 5.

before the justice systems. The improvement of the legal framework does not systematically solve all practical issues faced by the social partners while operating EWCs, as described in Section V-A below.

V. ANALYSIS OF THE BETTER REGULATION EVALUATION CRITERIA

A. Effectiveness

This section assesses how the Recast Directive supported the closure of gaps and loopholes identified before its adoption, specifically by: (i) increasing the number of EWCs; (ii) solving practical issues by better defining the scope of EWCs' competences; (iii) ensuring the effectiveness of the information and consultation process; and (iv) ensuring the linkage between EU and local levels of information and consultation.

1. Encouraging the creation of EWCs and their characteristics

Quantitative overview of EWCs

From 1997 to 2001, the annual number of EWCs newly established each year was between 50 and 100, while between 2002 and 2008 it decreased to 30/40 per year³³. The trend has been for the creation of around 20 EWCs³⁴ gross each year since the Recast Directive's transposition deadline (June 2011). While the Recast Directive did not stop the declining trend in the creation of EWCs and has not completely achieved its objectives in this regard yet, the absolute number of European Works Councils increased following the adoption of the Recast Directive. There are currently more than 1 060 EWCs³⁵, compared with an estimated³⁶ total of 2400 companies where the thresholds for the establishment of EWCs have been met.

The graph below, derived from the ETUI database, provides an overview of changes in the total number of EWCs since the end of 1980s; the bottom line shows the net creation of EWCs (EWCs created vs EWCs dissolved). The impact of the Recast Directive can be observed after June 2011³⁷:

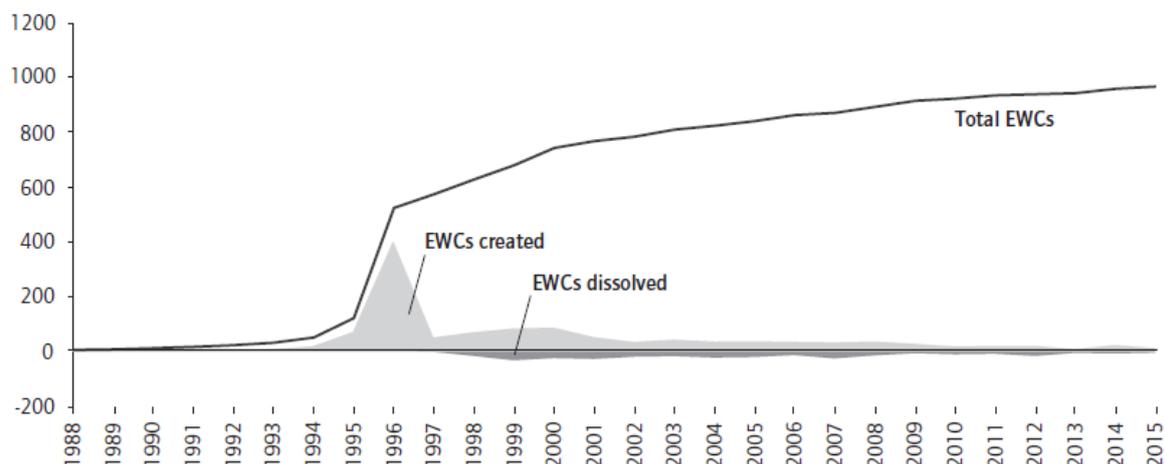
³³ Courrier hebdomadaire 2198 p 36 Kerckhofs 2013.

³⁴ ICF Study Figure collected in January 2016.

³⁵ ETUI EWCs and SE Works Councils in 2015.

³⁶ This is an estimate as no EU register exists of companies meeting the thresholds for eligibility to establish an EWC.

³⁷ *Too little too late? Evaluating the European Works Councils Recast Directive*, ETUI (Stan De Spiegelare) 2016, page 22 (Figure 1).



Source ETUI database-Report Too little too late Evaluating the EWC directive-Stan De Spiegelaere-Report 138-2016

Analysis of the ETUI EWC database shows that around 118 EWCs have been created since the adoption of the Recast Directive. However, EWCs have also been dissolved³⁸, mainly because of mergers and acquisitions. The largest number of post-recast EWCs is in France (19 %), followed by Sweden (12 %), the US (9 %) and Spain (7 %).

Out of the overall number of EWCs, 20 % are established in companies headquartered in Germany, followed by France and the United Kingdom. EWCs are also active in multinational companies headquartered in the US, Switzerland and Japan with activity in the EU meeting the thresholds for establishment of EWCs. There are few EWCs set up in new Member States (five in Hungary, one in Poland) registered in the ETUI EWC database in 2016, reflecting the low numbers of multinational companies headquartered in the new Member States.

The rationale for establishing EWCs under the Recast provisions was principally the need to comply with the Directive. However, the distribution by Member State also reflects the nature of the industrial relations culture: countries with a culture fostering development of transnational social dialogue tend to have a larger proportion of EWCs. Three types of EWCs coexist, depending on their legal basis:

- ‘Article 6 EWCs’ are EWCs fully covered by the Recast Directive³⁹ and all its obligations (see also section below on subsidiary requirements). Some 117 agreements have been renegotiated under the Recast Directive.
- ‘Article 13 EWCs’: Article 13 of the Recast Directive created the possibility for pre-existing works council agreements concluded before September 1996⁴⁰ to continue

³⁸ An estimated 10 EWCs are dissolved per year according to the ETUI EWC Database.

³⁹ Article 6.

without being obliged to implement the Recast Directive. Some 395 EWCs are functioning under pre-directive EWCs.

- ‘Article 14(1)(b) EWCs’: the Recast Directive extended the exemption to EWCs negotiated during the transition period from June 2009 to June 2011⁴¹ which were not obliged to implement the new provisions created in the Recast Directive. 3 % of EWCs function under this article.

According to the ETUI EWC database, 40 % of active EWCs are still functioning under pre-Recast rules. During the transition period, 83 agreements were signed, largely consisting of amendments or extensions to existing agreements.

The Recast Directive has provided some impetus for the renegotiation of existing agreements, despite the fact that it permits existing agreements to continue unrevised. However, it is not possible to isolate the impact of the Recast Directive on the revision of existing agreements from drivers of broader business re-organisations or shortcomings in existing practices. It is useful to recall that the objective of the Recast Directive was to increase the proportion of eligible undertakings establishing a EWC while ‘enabling the continuity of existing agreements’ (Recital 7). It does not therefore constitute a failure of the Recast that its rules do not apply to all existing EWCs.

The evaluation concludes that the Recast Directive did not lead to an increase in the rate of creation of EWCs. The reasons for this are complex and multiple:

- The lack of awareness of legal requirements among those affected (20 % of respondents from German works councils in eligible companies did not know of the existence of EWCs⁴²).
- There is no automatic obligation to establish a EWC even if the undertaking meets the thresholds; it has to be requested by 100 workers or established at the initiative of the employer. Representative European social partner organisations in the sector do not have the right to trigger the written demand.
- The location of companies headquartered in countries with a less developed tradition of employee information and consultation, such as many of the southern and central and eastern Member States
- Companies with EWCs are larger and more transnational in extent than the companies potentially covered by the Recast Directive that have not yet set up an EWC⁴³.

⁴⁰ Transposition deadline of Directive 1994/45/EC.

⁴¹ Transposition deadline of Directive 2009/38/EC.

⁴² *Too little too late? Evaluating the European Works Councils Recast Directive*, ETUI (Stan De Spiegelaeere) 2016, page.

- A significant volume of mergers and acquisitions in some sectors such as transport led to numerous dissolutions of EWCs, which lowered the net rate of creation of EWCs.
- The duration of EWC negotiations: on average it takes 2 to 3 years from the establishment of the special negotiating body to conclusion of the EWC agreement.
- The structure of some undertakings means that the thresholds for establishing a EWC may not formally be met. An example of this is the widespread use of franchising by some multinational companies in the catering sector.
- The lack of appropriate enforcement measures in some Member States when the obligations arising from the Recast Directive are not met.
- Scepticism among employers about the added value of EWCs compared with the costs and resource implications of establishing and operating them.
- The possibility to use other instruments such as *Societas Europaea* (SEs⁴⁴) which offer other means of keeping employees informed and consulting with them.
- Some of these factors, which restrict the potential growth in the number of EWCs, may indicate that the Recast Directive had a positive impact on keeping the net rate of creation of new EWCs positive. Close to half of all eligible companies have now established an EWC, but if the issues set out above are addressed in a more targeted manner, there is potential to achieve greater take-up.

Characteristics of EWCs following the Recast Directive:

New EWCs are generally created in large multinational companies in the metal, services and chemical sectors (with more than 10 000 workers). However, compared with before the 2009 Recast, there is a growing proportion of smaller companies (with more than 5 000 workers) establishing EWCs in sectors such as textile, transport and services⁴⁵. The indication that companies with recast EWCs may be smaller in terms of number of workers is confirmed by analysis of average turnover, which for those companies is five times lower than for EWCs established under previous rules.

According to the study, EWCs operating under the new rules are on average considerably smaller than EWCs operating under Article 13 and Article 6 rules, in line with the smaller

⁴³ <https://www.etui.org/Publications2/Reports/European-Works-Councils-Facts-and-Figures-2016>

⁴⁴ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE); Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

⁴⁵ *Too little too late? Evaluating the European Works Councils Recast Directive*, ETUI (Stan De Spiegelaere) 2016, page.

overall number of employees in these companies. The average number of employee representatives is 16, compared to 23 among EWCs established under Directive 94/45/EC. However, this depends obviously on the company size and structure: those EWCs, operating under new rules, involve on average four representatives of the management, although up to nine or ten can be involved in the EWC. This is largely in line with trends in other EWCs.

Recast EWCs operate a slightly more frequent programme of plenary meetings than other types of EWCs. 40 % of sampled EWCs organise two annual plenary meetings, while the rest organise one plenary meeting per year.

94 % of EWCs have provisions in their agreements to hold extraordinary meetings in situations of transnational change/restructuring. In some cases, this right is available to the members of the steering committee only.

Among the Recast EWCs, there has been a slight decline in the share of EWCs that operate employee-only preparatory meetings (77 % compared to 96 %). This may be due to the impact of new technology (online communication channels) on the regular exchange of information.

More than one third of Recast EWCs (36 %) have set up a working group to follow up meetings or prepare extraordinary meetings, compared to 29 % of Article 6 and 13 EWCs.

The following sections examine to what extent the new provisions of the Recast Directive impacted the functioning of the EWCs.

2. The scope of EWC action: transnational matters

The Directive limits the competence of the EWC to transnational matters. The criteria used to determine whether a matter is transnational or national are related to the number of undertakings concerned and the extent of its potential effects.

Article 1(4) of the Directive specifies that *'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'*.

Recital 16 provides additional details: *'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 that 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.'*

The Directive establishes quantitative (Article 1(4)) and some qualitative (Recital 16) factors for establishing whether an issue is transnational. The transposition analysis concludes that Member States did not go beyond the EU minimum standards by defining the concept in more detail.

According to the findings of the study, most Recast EWCs focus ‘almost exclusively’ on transnational matters. Of the employees’ representatives interviewed, some 30 % stated that the EWC was *solely* focused on transnational issues, while the remainder indicated that theirs was *almost solely* focused on transnational matters. This is a surprising result given the formal restriction of the scope of EWCs to transnational matters. It can be explained by the fact that EWC members generally also have a role as national representatives, so national concerns often remain more pressing and are introduced into the work of the EWC. The ability of an EWC to remain solely focused on transnational matters depends on the clarity with which distinctions between national and transnational issues are delineated by both sides. The extent to which representatives of one country dominate the balance of representatives on an EWC can also have an impact in weighting its work towards a single Member State.

Similarly to the employee representatives, most employer representatives interviewed indicated that their EWC almost exclusively focused on transnational matters. A number of respondents on the management side explained that keeping EWCs as a transnational forum can be quite challenging, as employees’ representatives tend to bring up local issues at the EWC meetings.

Feedback from European social partners reveals: (i) difficulties in some cases over how to interpret the notion of transnationality; and (ii) some confusion over the notion of transnationality due to the strategic nature of certain decisions, stock exchange rules and the difficulty of determining if certain matters qualify as transnational.

The study commissioned by Business Europe also shows a mixed picture as to the perceptions of effectiveness of the concept of transnationality. It found that while the criterion in the Directive according to which a matter is transnational if two or more Member States are concerned is the principal element used, some agreements go beyond this and set quantitative criteria⁴⁶. 39 % of interviewed managers found that the Recast Directive led neither to change in the EWC agreement in this respect nor to a reform of EWC practice. 20 % indicated that changes have been implemented because of the Recast.

Good practices have been developed by the social partners, such as the inclusion of a transnationality clause in the agreement defining the scope of competence of the EWC, with for instance a set of criteria going beyond Article 1(4)⁴⁷. The ETUI study concludes that this is where the Recast Directive has had a tangible effect: it found that the probability of including transnationality definitions in EWC agreements increased from 65 % to around 85 % due to the Recast Directive⁴⁸.

Overall, feedback suggests that a majority of newly established Recast EWCs focus ‘almost exclusively’ on transnational matters. Difficulties remain, however, in some cases over how to

⁴⁶ *European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue*, KU Leuven (Valeria Pulignano and Jeff Turk) 2016, pages 83-85.

⁴⁷ Study ASTREE IR Share 2016.

⁴⁸ *Too little too late? Evaluating the European Works Councils Recast Directive*, ETUI (Stan De Spiegelaeere) 2016, page 62.

interpret the notion of transnationality, which creates some confusion concerning the type of information to disseminate to EWC members.

3. Ensuring the effectiveness of employees' transnational information and consultation rights

This section examines whether the new provisions ensured effective transnational dialogue in companies, in particular whether they ensured that relevant information was passed on in sufficient time to enable the EWC to express its opinion and for the management to take it into account before implementing their initiatives.

EWCs must be informed and consulted on management decisions affecting their employment and working conditions. In practice, the EWC can address a wide range of topics such as the introduction of new technologies, development of a new branch of activity, or mergers, acquisitions and restructuring.

The absence of a full and detailed definition of information and consultation in the 1994 Directive led to diverging interpretations of these concepts in transposing legislation and — perhaps more significantly — in their practical application⁴⁹.

Therefore, the Recast Directive aimed to improve effectiveness by introducing a precise definition of information and consultation in Article 2(f) and (g), whereas the original Directive gave only an indication of what information and consultation could mean.

Article 2(f) defines 'information' as:

'(..) 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.'

Article 2(g) defines consultation as follows:

'(..) 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'.

⁴⁹ European Commission (2008), Consultation of the European social partners on the revision of Council Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, available at: <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=211>.

There is evidence that the Recast Directive has led to definitions of information and consultation being included in more EWC agreements. According to the ETUI study: *‘the need for clear definitions was clearly accepted as a best practice that was proliferating, but the fact that the Recast included clear definitions gave a serious boost to the likelihood of EWC agreements including such definitions’*⁵⁰. Since 2009, a large majority of newly established EWCs have adopted the definition of information and consultation set out in the Recast Directive.

On the basis of the 37 interviews conducted among EWC members operating a Recast EWC⁵¹, it was found that more than 75 % of agreements transpose closely the definition of information and consultation but also provide more details on practice, such as how the information should be provided, and when and how confidential information should be treated. Some of these agreements contain additional provisions beyond the requirements of the Recast Directive such as a list of information to be provided or an extensive list of subjects for consultation. Some provisions go further by laying down the timing for consultation or by obliging the employer to consult the local works council before consultation at EU level.

In the European Labour Law Network survey⁵², two thirds of respondents agreed that the Directive had improved legal certainty on the timing of information and consultation procedures. Of the one third who did not agree (Austria, France, Greece, Latvia, Malta, Romania, Sweden and the UK), some pointed out that the definitions in this regard were often still open to interpretation.

For most social partners, the Recast Directive improved the legal framework for the information and consultation process. Raising awareness of social partners’ rights and duties has been a major effect of this EU legislation.

Information:

From the management perspective, companies operating under the new rules (60 % of interviewees) do not report any technical difficulties in providing information to EWC members.

However, the management representatives indicated that the definition of which information to communicate was not always clear, due to difficulties in determining which decisions have or do not have a transnational dimension.

The study⁵³ concluded that the information is delivered in a timely manner for the majority of employee representatives consulted (76 % of the cases). Concretely, this means that the

⁵⁰ *Too little too late? Evaluating the European Works Councils Recast Directive*, ETUI (Stan De Spiegelaere) 2016, page 61.

⁵¹ ICF Study p 91.

⁵² In the evaluation, the independent labour law experts in the European Labour Law Network were surveyed to obtain their views about the Recast Directive. A total of 27 experts replied to the survey.

⁵³ ICF study p 93.

employer provides the required information sufficiently in advance of a decision to allow for reflection within the EWC and for it to provide an opinion during the consultation phase. The timely transmission of information could also lead to improvement in the relationship between employees' representatives and employers.

Nevertheless, the concept of timeliness leaves room for interpretation and dispute, particularly if it is not specified in more detail in the EWC agreement.

From the inputs of employee representatives,⁵⁴ it can be concluded that the Recast provisions had a positive effect on the information process in practice, but some shortcomings were identified:

- an extensive use of confidentiality clauses based on Article 8 of the Recast Directive (e.g. stock market rules cited as preventing employers from sharing specific information for companies on the stock market exchanges);
- insufficient sanctions for the late provision of information;
- a lack of resources and competences to support information and consultation processes (no possibility to use external expertise, limited timelines for consultation phases);
- lack of clarity about the transnational competences of the EWC, leading to disputes.

Consultation:

The Recast Directive defines the consultation process as enabling employee representatives to express an opinion based on the information provided.

The Recast brought more clarity on this point and a vast majority of Recast EWC agreements reflect the new definition of consultation. Recast EWCs are more likely than other types of EWC to be consulted earlier in the decision-making process. However, there is evidence that in some cases the consultation remains only a formal step rather than an opportunity to seek and consider a substantive opinion from the EWC⁵⁵. The effectiveness of the consultation depends largely of the quality, quantity and timeliness of the information provided.

For workers' representatives⁵⁶, the consultation process shows deficiencies in practice despite the improvement of the legal framework and the insertion of definitions in the EWC agreements. The main reasons they cited were: (i) a lack of joint understanding regarding consultation or the absence of consultation; (ii) limited timelines for consultation phases; (iii) no possibility to make use of external expertise; (iv) extensive use of confidentiality clauses

⁵⁴ ETUC-EWC assessment and requirements.

⁵⁵ ICF study p 94.

⁵⁶ ETUI survey conducted among EWC coordinators 2016 — project co-financed by the European Commission.

that could limit the recourse to external support such as from national or European trade union federations and prevent the share of information with the company workforce.

Most employer representatives of newly established EWCs interviewed indicated that consultations of EWC members have not led to changes in the decision-making process, or indeed to a different decision⁵⁷. The Directive seems therefore to leave managerial prerogatives largely unchanged. Respondents on the management side argued that the consultation of EWC members brings benefits to all parties in many ways, such as: (i) improving the common understanding of issues among members; (ii) explaining decisions; (iii) initiating positive discussions leading to valuable proposals for action depending on the topics discussed (introduction of new technology, purchase of company, mergers, trend of employment, investments, collective redundancies).

Overall, the Recast Directive has improved the quality and scope of the information workers receive. However, the study shows that the consultation right could be more effective, as EWC members seem to have little influence on the decision-making process in their companies. This is particularly the case of restructuring, as described below.

Impact of EWC in cases of restructuring:

The study shows that EWCs' experiences of EWCs of restructuring are diverse. Only 26 % of interviewed employee representatives reported that their EWC was consulted before a decision was made by the management. For almost 40 % of the employee representatives interviewed who have had some involvement in the EWC consultation process, this has not led to any changes to the restructuring plans or decisions of their respective employer. However, in some cases it had a positive impact on the effects and consequences for employees impacted by the restructuring⁵⁸.

Similarly, in a study by the Catholic University of Leuven (KU Leuven) 72 % of interviewed managers (62 % companies with Article 13 EWCs and 81 % from companies with Article 6 EWCs) indicated that the EWC was informed some time in advance of the managerial decision being implemented, but after the strategic decision was finalised⁵⁹. At the same time, the perception of the impact of the EWC on restructuring varied: nearly 40 % of managers in companies with Article 6 EWCs considered there was such an impact, compared to less than 20 % in those with Article 13 EWCs.

These figures are unlikely to be definitive. Many of the companies examined are still 'experimenting' with their EWCs and considered themselves to be in a learning process.

⁵⁷ ICF study p 95.

⁵⁸ ICF study page 103.

⁵⁹ *European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue*, KU Leuven (Valeria Pulignano and Jeff Turk) 2016, pages 44-47.

Nevertheless, the EU Quality Framework for Restructuring⁶⁰ does provide a tool for social partners to address the challenges of preparing for and implementing restructuring. The tool, which takes the form of a soft-law instrument setting out good practices for anticipating and monitoring restructuring for the stakeholders involved, could have a positive impact on the functioning of EWCs.

4. Articulation of the various levels of the information and consultation process

Article 12 of the Directive establishes the principle of linkage between the national and European levels of consultation. These should be defined by the social partners in the EWC agreement. If not, Member States should ensure that information and consultation takes place at both levels. Recital 37 provides guidance about the order of the processes by putting forward two main alternatives: the information and consultation of the EWC takes place either before or at the same time as the workplace-level information and consultation.

A Eurofound study has examined the interplay between information and consultations at EU and workplace levels⁶¹. The study identified a variety of situations in the Member States where most EWCs are headquartered:

- information and consultation linked at both levels, without any indication about how or when (France);
- information and consultation linked at both levels, within a reasonable time (UK) or in a coordinated way (Italy), but the indication about how and when the processes should be linked is imprecise;
- the process should be simultaneous (Belgium) or ‘as far as possible’ simultaneous (the Netherlands);
- if not before, then simultaneously (suggesting that, ideally, one should happen before the other) (Germany).

The scope of information and consultation at local level differs from that at the European level. The nature of local-level information and consultation also varies between countries. Furthermore, the existence of co-determination rights, injunction rights or more or less dissuasive sanctions to enforce local-level information and consultation rights may also influence the way Member States and social partners at each level perceive the issue of linking. The issue of linking cannot be solved entirely by social partners’ arrangements because they do not have the power to deviate from the national provisions that apply in each of the Member States considered here. French court rulings suggest that the priority rule can only be invoked by some actors, and only for the sake of the effectiveness of employees’

⁶⁰ Commission Communication on an EU Quality Framework for Anticipation of Change and Restructuring, COM(2013) 882.

⁶¹ *Linking information and consultation procedures at local and European levels*, Eurofound (Filip Dorssemont, Peter Kerckhofs), 2015, page 1.

information and consultation rights at a lower level. Such an approach encourages local and European employees' representatives⁶² to seek a consensus.

5. Others measures impacting the effectiveness of the Recast Directive

Role of social partner and employee representatives:

The Directive also aims to strengthen both the role of the social partners and employees' representatives. Social partners must now be informed of the composition of the special negotiating body (SNB) before an EWC is set up. The Recast Directive also provides that employee representatives in the EWC must have the means to collectively represent the employees.

The analysis of national legislation shows that all Member States provide that the European social partners must be informed of the composition of the SNB and the start of the negotiation. However, few Member States provide practical details on how the process should be carried out; in Estonia and Hungary for instance, the name and contacts details of the SNB Members should also be shared. In Belgium, the information must be given at the latest when the first SNB meeting took place.

According to over half of the interviewed representatives of recast EWCs, there has been an upward trend in the extent to which European social partners are being informed and involved in negotiations to establish an EWC: more than 50 % under the Recast Directive compared to less than 40 % in 2008. However, European social partners are still not systematically informed of ongoing negotiations and therefore cannot fully support the stakeholders in this exercise.

Right to training without loss of wages:

Article 10 of the Recast Directive introduces the obligation for the management to provide the members of the EWC with the necessary means to perform their functions under the Directive and the right to training without loss of wages. This section assesses how the new right for employees' representatives to receive training without loss of salary is implemented in practice.

The 2008 impact assessment highlighted that despite the right to training being explicitly mentioned in half of the agreements; in reality, it took the form only of training for national works council issues or of English-language learning.

- The right to training is now included in 58 % of the agreements signed⁶³. Two thirds of employee representatives confirmed that they made use of the right to training without loss of wages.

⁶² Ibid, pages 1-2.

⁶³ *Too little too late? Evaluating the European Works Councils Recast Directive*, ETUI (Stan De Spiegelare) 2016, page 54.

- Among those who requested training, a large majority (80 %) of EWC members noted that there had been no particular challenges in securing it, but some 20 % stated that local management posed obstacles to employee representatives securing training.

Those members who took up this right have received, on average, 1-3 days of training per year.

The most common topics of training included legal issues (mentioned by 25 % of respondents) and economic affairs (15 %), language and communication skills (37 %), and more general, cross-cutting skills such as negotiation capacity building. In other cases, training was specific to the work in the different aspects of EWCs.

European social partners were also asked to comment on the practical implications of the introduction under the Recast of the new ‘right’ to training without loss of wages. Two of the 13 respondents identified this as the biggest practical success of the new Directive. However, several raised concerns about potential bias in the content of training courses, since they tend to be management- or trade union-led, rather than ‘independent’.

82 % of the interviewees (on a basis of 56 interviews) of the KU Leuven/Business Europe study indicated that the training requirements of the Recast Directive resulted in no change to the operation of the EWC, as the training already existed in practice. At the same time 10 % stated that changes have been implemented in conjunction with the new legislation (e.g. including a right to training by an expert for all EWC representatives). The analysis concluded that the access to training was not affected by the sector, country of origin or company size⁶⁴.

The inclusion of training provisions in the Recast Directive was intended to develop the capacity of EWCs by ensuring that representatives have the appropriate skills to actively participate in the work of the EWC. Both Business Europe and the European Trade Union Confederation (ETUC) argued that training was not a controversial issue and that the content of training should be decided through agreement between senior management and EWC representatives within each company⁶⁵.

- **Subsidiary requirements**

The Recast Directive sets out in its Annex entitled ‘Subsidiary Requirements’ the default rules of procedure that apply to the functioning of an EWC in the absence of a specific agreement between the management and employees representatives concerning the establishment, the composition and competence of the EWC.

Article 7 lays down the various cases when the subsidiary requirements are applicable:

- when the central management and the SNB decide;

⁶⁴ *European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue*, KU Leuven (Valeria Pulignano and Jeff Turk) 2016, page 85.

⁶⁵ ICF Study 2016.

- when the central management refuses to open negotiations 6 months after a request was made;
- in the absence of agreement after 3 years from the start of negotiations.

The Annex draws a distinction between fields where information is required and those where consultation is required. It also introduces the possibility to obtain a response to any opinions expressed, and the reasons for that response. Lastly, it provides details on the composition of the select committee.

According to the ETUI EWC database, 12 EWCs are functioning based on the subsidiary requirements.

- **Transnational company agreements**

Transnational company agreements (TCAs) are a form of social dialogue in multinational companies. They codify reciprocal commitments whose scope extends to the territories of several states and which have been concluded between one or more representatives of a company or group of companies and one or more workers' organisations. TCAs use cross-border social dialogue as a way to improve international working standards. They address a wide range of subjects, such as anticipating and managing change and restructuring, skills development, training, mobility, health and safety at work, and equality and anti-discrimination.

By end of 2015, more than 200 agreements had been registered, covering over 10 million workers in multinational companies, most of them with headquarters in the EU. Information on existing agreements is available in a database on the European Commission's website⁶⁶. While there is no EU-level legal framework governing TCAs, the Commission issued a staff working document in 2008⁶⁷.

EWCs play a role in representing workers in the negotiation of TCAs. Companies signing TCAs are predominantly multinationals in the metal, construction, food and finance sectors, and they usually already have an established EWC. Despite not having any formal bargaining power, EWCs have signed a large number of TCA agreements⁶⁸.

The 2016 external study concluded that EWCs regulated by the Recast Directive have a limited impact on the conclusion and the quality of TCAs. Of the 37 Recast EWCs, only three have signed TCAs. These relate to health and safety at work and the establishment of a charter on social rights and ethics. Among the social partners interviewed, more than 60 % indicated

⁶⁶ <http://ec.europa.eu/social/main.jsp?catId=978&langId=en>.

⁶⁷ *The role of transnational company agreements in the context of increasing international integration*, SEC(2008)2155.

⁶⁸ <http://ec.europa.eu/social/main.jsp?catId=978&langId=en>.

that EWCs did not play a significant role in the negotiation of TCAs, and for half of them the EWCs did not have an impact on the quality of TCAs.

However, in cases of restructuring, EWCs appeared to become increasingly involved in the negotiation and implementation of TCAs⁶⁹: some EWC agreements explicitly include the competence for EWCs to conclude such agreements⁷⁰.

A case study of the role of EWCs in TCAs in the metalwork sector indicated that in practice EWCs go beyond their formal information and consultation role relatively frequently. More companies, than was formerly believed to be the case, are promoting the regulation of industrial relations and working conditions at European company level. Taken together, the number of informal arrangements and formal agreements point to the growing importance of transnational, supra-state industrial relations and regulations at company level, and a growing negotiating role for EWCs⁷¹.

6. Enforcement

Directive 94/45/EC included only a general requirement for the Member States to provide for ‘*appropriate measures in the event of failure to comply with this Directive*’, and more specifically, to ensure that ‘*adequate administrative or judicial procedures are available to enable the obligations deriving from this Directive to be enforced*’.

The Recast Directive introduced criteria for sanctions and obliged the Member States to amend their national enforcement systems so that they conform to the new standards.

The amendment on enforcement and sanctions introduced by the Recast Directive had two elements:

Firstly, the addition of Article 10(1): ‘*Without prejudice to the competence of other bodies or organisations in this respect, the members of the European Works Council shall have the means required to apply the rights arising from this Directive, to represent collectively the interests of the employees of the Community-scale undertaking or Community-scale group of undertakings.*’

Secondly, two new recitals:

⁶⁹ *Variations on a theme? The implementation of the EWC Recast Directive*, ETUI (Romuald Jagodzinski editor) 2015, page 28.

⁷⁰ ICF study p 81.

⁷¹ *Transnational company agreements and the role of European Works Councils in negotiations: A quantitative analysis in the metalworking sector*, ETUI (Torsten Müller, Hans-Wolfgang Platzer and Stefan Rüb) 2013, page 85.

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

First, the capacity of EWCs to seek legal redress varies from one EU Member State to another. In four Member States (Austria, France, Romania and Sweden) EWCs have full legal personality, allowing EWCs' representatives to initiate judicial proceedings on behalf of the EWC and to represent the EWC in relations with third parties. In a further 11 countries (the Czech Republic, Finland, Germany, Ireland, Latvia, Lithuania, the Netherlands, Poland, Slovakia, Spain and Hungary,) EWCs can be a party in legal proceedings. In a further five (Belgium, Ireland, Estonia, Luxembourg, Slovenia, Slovakia, Italy and the UK), only EWC members or trade unions have the capacity to act in justice an action on EWC matters⁷².

Second, another element that influences the capacity to bring an action before the courts in cases of litigation is the cost of proceedings. In the vast majority of countries, rules on financial means and the legal costs of proceedings are limited to the general provisions of Article 10(1) of the Recast Directive, under which the members of the EWC *‘shall have the means required to apply the rights arising from [the] Directive’*. The data collected via the European Centre of Expertise in Labour Law⁷³ show that no legislation lays down a dedicated budget or financial means for court fees in cases of potential litigation between EWCs and business. However, most experts⁷⁴ consider that the costs could generally be part of the operating expenses of the EWC. In some Member States (Bulgaria, Romania and Austria), industrial relations litigation is exempted from court fees.

Disputes over the establishment or functioning of EWCs can also be resolved in 15 Member States via alternative dispute mechanisms such as conciliation, mediation or arbitration⁷⁵. Those alternative mechanisms are not specially designed for EWCs (they are available for any private dispute), except in the case of Italy, where a dedicated Conciliation Committee was established to provide proposals to solve EWC-related disputes within 20 days. Therefore, the capacity to seek legal redress on behalf of members of EWCs varies across Europe and often depends on trade unions' capacity to act.

Finally, the type and level of sanctions have a direct impact on the effectiveness of the enforcement of the Directive. Recital 36 of the Directive sets three criteria that must be

⁷² ECE Data November 2017 — see annex 5.

⁷³ ECE Data November 2017 — Annex 5.

⁷⁴ See Annex 5.

⁷⁵ ECE data November 2017 Annex 5.

fulfilled by the sanctions regime (effectiveness, dissuasiveness and proportionality). Article 11(2) of the Directive, which places responsibility on the Member States to ensure ‘adequate administrative or judicial procedures’, complements these criteria.

According to the analysis of national legislation, we can distinguish the following models for handling violations of EWC rights:

- countries where a violation of EWC rights is considered an administrative or labour law offence (Austria, Cyprus, Ireland, Italy, the Czech Republic, the UK, Spain, Slovakia, Lithuania, Malta, Finland and Portugal);
- countries where a violation of EWC rights is considered a criminal offence (France, Poland, Germany, Cyprus, Greece, Luxembourg and Belgium);

The sanctions provided for in most Member States consist of financial penalties.

There are significant differences in the levels of minimum and maximum financial penalties for a breach of EWC rights.

In some Member States, depending on the type of violation, the minimum fines can be as low as EUR 23 (Malta) or EUR 30 (Lithuania) per worker. The maximum fine can be around EUR 15 000 in Germany and EUR 7 500 in France, while in other countries it can theoretically be as high as EUR 100 000 (Slovenia), EUR 115 000 (UK) or EUR 187 515 (Spain)⁷⁶. The sanctions also vary according to the degree of violation of the law. However, violations related to establishing the EWC carry more dissuasive sanctions than violations related to its operation. In Luxembourg and Croatia, the respective laws punishing national labour law breaches are stronger than those applying to breaches of EWC provisions are.

Finally, labour law experts from 10 Member States⁷⁷ indicated enforcement issues and specifically the lack of dissuasive sanctions as an obstacle to the effectiveness of the Recast Directive. In addition, they highlighted the lack of experience in enforcement of the Recast Directive, as in Bulgaria, Romania, Hungary, Cyprus and Malta no or very few EWCs exist under national law.

Employee representatives stressed that differences in the levels and scope of sanctions set at national level were an obstacle to effective redress and an insufficient incentive for the respect of EWC rights. They argue for a revision of the Recast Directive to introduce an obligation to nullify company decisions where information and consultation procedures have been breached, on the condition that the national trade unions directly affected by the decision support suspension and/or nullification⁷⁸.

⁷⁶ See Annex 6 ECE Data November 2017.

⁷⁷ Germany, Finland, Lithuania, Italy, Romania, the UK, Luxembourg, Austria, France, Hungary.

⁷⁸ ETUC Position paper *For a modern European Works Council (EWC) Directive in the Digital Era*, March 2017 <https://www.etuc.org/documents/etuc-position-paperfor-modern-ewc-directive-digital-era#.Wh1v-f6ouAg>.

While this solution is not proposed by employer organisations, they also recognise the need to improve measures enforcement measures of the Recast Directive⁷⁹.

The evidence of the operation of the redress and sanction system indicates that it does not fully meet the objectives of the availability of ‘appropriate measures’ to be pursued where the obligations relating to an EWC are not met. There is no consistent practice across Member States as to whether EWCs have the legal status to bring an action before the courts. In addition, the lack of dedicated financial means could constitute an obstacle to pursuing a judicial remedy, and the nature and level of sanctions are in many cases not effective, dissuasive and proportionate.

B. Efficiency

This section assesses, in line with the Better Regulation Guidelines, the costs and benefits generated by the Recast Directive and analyses the extent to which it creates administrative burdens or has the potential to reduce them.

The explanatory memorandum of the Directive⁸⁰ identified the following potential areas for simplifying and reducing administrative burden: *‘The proposal contributes towards linking Directive 94/45/EC with other directives concerning the information and consultation of employees, in particular by aligning the definitions, determining the scope of the European Works Councils and incorporating the arrangements for the links between the levels of information and consultation.’*

The following section presents the findings on costs generated by the provisions introduced by the Recast Directive and their benefits for the establishment and functioning of EWCs.

1. Quantifiable and non-quantifiable costs

The study provided a qualitative and quantitative analysis of the costs associated with changes introduced by the Recast Directive.

In this context, the following provisions have been identified as potentially affecting the costs of EWCs in the take-up phase as well as in their functioning:

- the responsibility of the employer to provide the necessary information to start negotiations (Article 4(4));

⁷⁹ Business Europe position paper on the EWC Recast Directive February 2017 https://www.buinessurope.eu/sites/buseur/files/media/position_papers/social/2017-02-09_european_works_councils_recast_directive.pdf.

⁸⁰ COM(2008) 419 final, paragraphs 28 and 29.

- the composition (Article 5(2)(b)) and number of meetings (Article 5(4)) of the special negotiating body;
- informing social partners at EU level (Article 5(2)(c)) and involving trade unions and external experts (Article 5(4));
- the right to training for employees' representatives without loss of wages (Article 10(4)).

The study concluded that quantifiable costs of setting up EWCs were lower than for the Article 6 agreements under Directive 94/45/EC (falling from EUR 143 537 to EUR 119 207). Costs were lower primarily because for EWCs established under the Recast Directive fewer meetings were held with fewer representatives in the special negotiating body, resulting in lower associated meeting costs. This is mainly explained by the smaller size of the companies launching negotiations to set up EWCs after the Recast.

According to the study conducted by KU Leuven⁸¹, 95 % of EWC agreements include a clause stipulating that the company will cover the basic expenses of EWC activity, such as travel and accommodation costs, administrative assistance and communication facilities.

Looking at comparable cost estimates (fixed costs only) for the operation of EWCs established under Article 6 of Directive 94/45/EC and those under the Recast Directive, there are few differences in average annual running costs (EUR 153 667 and EUR 160 900 respectively). When taking into account not only fixed costs but also expenditure related to the time spent by employees on EWC-related activities, the average total cost of a Recast EWC per year is EUR 240 000, or 0.009 % of the company turnover.

According to the study conducted by KU Leuven, the cost of operating an EWC varies significantly over the full range of companies that have one: the median annual cost was EUR 60 250, although the actual range was between EUR 10 000 and 1 000 000⁸².

Two thirds of the Recast EWC members availed themselves of the right to training. The training costs reported by Recast EWCs are significantly lower than those for EWCs established under Article 6. This could partly be explained because some of the new EWCs have only been operating for a limited period and have not yet had the opportunity to assess training needs and provide training.

In terms of the quantifiable costs of training to the companies, 22 EWCs operating under Article 6 rules had an annual average EWC training expenditure of around EUR 43 800⁸³ (part of the above-mentioned operational costs). The overall annual costs of operating an EWC may depend on the structure of the EWC and the number of meetings held. Although the number of EWC members is lower in the EWCs established since 2011, the country coverage is slightly higher, which can impact translation and interpretation needs. The KU Leuven study also concluded that the variation in costs and lack of a direct relationship

⁸² *European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue*, KU Leuven (Valeria Pulignano and Jeff Turk) 2016, page 55.

⁸³ Source: ICF survey of 22 EWCs.

between the costs and the number of representatives and meetings may also indicate that companies use EWC meetings for different purposes (e.g. costs could increase when an extensive restructuring is under way).

The KU Leuven research shows an overall positive perception of the cost-benefit balance of the EWCs. In their survey, 54 % of interviewed managers considered that the benefits do justify the costs, 19 % responded that the costs were not matched by the benefits, and a further 26 % answered that the key issue was compliance with the legislation rather than whether the benefits justified the costs.

2. Quantifiable and non-quantifiable benefits

Benefits from EWCs operating under the Recast Directive are essentially non-quantifiable. They relate to topics such as: (i) the development of social dialogue in the company; (ii) the reinforcement of mutual trust on both sides of the industrial relationship; (iii) better informed strategic decision-making; and (iv) better targeted measures accompanying structural changes.

The entitlement to employee-only pre-and post-negotiation meetings was considered a benefit as it allowed the employee side to prepare, become more familiar with the legislation and consolidate views following discussions with management.

The use of experts in negotiations also increased (to nearly 70 %) and was considered helpful in providing advice on the detail of new legislation also in sharing expertise from other existing EWCs.

The right to training established by the Recast Directive is considered to be beneficial. The benefits of training identified by the employee members have been manifold and relate to improved soft skills and better awareness of the EWC mandate and possibilities, as well the legal EWC framework and different experiences of other EWCs. Some employee representatives highlighted the ‘professionalisation’ of EWC representatives. However, the impact of the right on actual training received is difficult to assess, as it would require a longer-term analysis.

The study showed that employee and employer representatives are generally positive about the benefits of their EWC, with employee representatives positive to a greater extent.

In the KU Leuven study, as many as 77 % considered that EWCs effectively assisted management in issues such as conflict resolution, encouraging support for management initiatives, explaining managerial practice, creating an appropriate atmosphere, facilitating employment transfers across EU Member States and promoting corporate identity⁸⁴.

However, the external study found that the perceived benefits of having an EWC have reduced among companies with Recast EWCs compared to EWCs established under Directive 94/45/EC. There have been some small improvements in the perception of employers, notably their perception that having an EWC leads to more effective decision-making, enhanced productivity, improved ability to communicate with employee/employer representatives and

⁸⁴ *European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue*, KU Leuven (Valeria Pulignano and Jeff Turk) 2016, pages 63-75.

increased trust. By contrast, employees seem to have a more negative view following the Recast. Most notably, there has been a decrease in perceived value of EWCs in their ability to influence company decisions. Apart from the question of methodological comparability (two separate surveys, involving different size samples of employee and employer representatives), this change may reflect the fact that there is now greater accumulated experience of operating EWCs, including the finding that the impact on company decision-making in restructuring situations is limited. At the time of the original Directive, there may have been greater optimism about the potential impact of EWCs among employee representatives. Another reason for this change could be that after 2008 many companies went through restructuring due to the economic crisis. Even if they did not make redundancies, 2008 was the start of a period of greater uncertainty for employees and this may be reflected in the more sceptical attitude of employee representatives.

3. Comparison of the administrative burdens for EWCs before and after June 2011

Administrative burdens are typically defined as obligations for businesses to provide information about aspects of their operations to the public authorities⁸⁵.

The Recast Directive did not have a specific objective to reduce administrative burdens; in fact it introduced an additional obligation for companies to inform European social partners about the start of the EWC negotiations. However, the costs associated with informing European social partners were considered by the companies to be very low.

Although this was not specified in the Recast Directive, national EWC-related legislation could introduce a legal requirement for companies to register the EWC agreement with the national authorities. Of 23 employer representatives responding, only a third (8 respondents) indicated that such obligation existed and that they had followed it. In other words, in practice this is rarely implemented and unlikely to lead to significant administrative burden.

Furthermore, according to the study conducted by KU Leuven, 84 % who responded to the question on constraints argued that the Recast Directive had added no additional constraints to EWC practice⁸⁶.

C. Relevance

The objectives of the Recast Directive are still relevant. The role of EWCs was considered as relevant, or highly relevant, by all stakeholders involved (e.g. employers, public authorities, trade unions), not only employees.

Social partners explicitly recognise the need to develop transnational social dialogue at EU level. 70 % of the employers consulted⁸⁷ recognised the added value of EWCs, rising to 83 %

⁸⁵ European Commission, Better Regulation Guidelines Toolbox, http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf.

⁸⁶ *European Works Councils on the move: management perspectives on the development of a transnational institution for social dialogue*, KU Leuven (Valeria Pulignano and Jeff Turk) 2016, page 88.

⁸⁷ *Ibid*, page 73.

in large companies. According to them, EWCs provide a mechanism to cascade information throughout the undertaking, to promote employee engagement in the strategic development of a multinational company. The EWC also creates leverage between the EU and local levels, smoothing the way for the introduction of strategic initiatives, and leading to qualitative improvements in the company's strategic solutions. More broadly, EWCs constitute a valuable instrument for capacity building for transnational social dialogue at company level, which complements that taking place at other levels.

In terms of the objective of improved employee protection, the Recast Directive was found to make an important contribution to ensuring transnational social dialogue at company level.

From the employers' side⁸⁸, EWCs are also perceived as bringing about a 'learning curve', through which both employer and employee representatives develop a common understanding of the environment, challenges and constraints of the operation of the company. This generates mutual benefits and helps the two sides to find compromise solutions.

EWCs play an important role in reconciling economic and social objectives within the single market, especially in a changing world of work. They provide a privileged platform for exchanges between employees' representatives and employers on business issues or decisions that could have an impact on employment or working conditions in undertakings active across several Member States.

EWCs contribute to the implementation of the European Pillar of Social Rights adopted on 17 November 2017⁸⁹, particularly principle 8: *'Workers or their representatives have the right to be informed and consulted in good time on matters relevant to them, in particular on the transfer, restructuring and merger of undertakings and on collective redundancies. Support for increased capacity of social partners to promote social dialogue shall be encouraged.'*

D. Coherence

This section summarises the main findings on the consistency of the Recast Directive with the relevant EU legislation on worker information and consultation.

In 2013, the Commission carried out a 'Fitness Check'⁹⁰ of EU law on information and consultation of workers, covering the Directives⁹¹ on: (i) collective redundancies; (ii) information and consultation of employees; and (iii) transfer of undertakings. The Fitness Check concluded that the three Directives are generally relevant, effective, coherent and mutually reinforcing and, thus, broadly fit for purpose, but it also pointed to some gaps and shortcomings in the scope and operation of the Directives. The Recast EWC Directive was

⁸⁸ Ibid page 78.

⁸⁹ <http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=9003&furtherNews=yes>.

⁹⁰ SWD(2013) 293 final of 26.7.2013.

⁹¹ Directives 98/59/EC, 2002/14/EC, 2001/23/EC

excluded from the Fitness Check exercise, particularly because it concerns worker information and consultation in a transnational context, but also because the end of the transposition period was too recent (expired in June 2011) and because the Directive itself included provision for a specific evaluation of its implementation.

The provisions of the Recast Directive have been mapped and reviewed in depth to assess their consistency with existing European legislation and policy developments listed below:

- Charter of Fundamental Rights of the European Union (2000);
- Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies;
- Council Directive 2001/23/EC on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses;
- Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees;
- Council Directive 2002/14/EC establishing a general framework for informing and consulting employees in the European Community;
- Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees;
- Council Directive 2005/56/EC⁹² on cross-border mergers of limited liability companies.

Due to the lack of established methodology to rate coherence at EU level, the legal acts were assessed using the following scale:

- highly coherent: when the relevant Recast Directive provisions fully reflect the nature of the provisions of the instrument in question;
- partially coherent: when some of the relevant Recast Directive's provisions reflect only a part of the provisions of the instrument in question or show some inconsistencies;
- not coherent (if other legal acts are not in tune with the provisions included in the Recast Directive);

The key challenges encountered in the analysis were to assess precisely the consistency between the Recast Directive and other specific instruments (which often had a different focus from the Recast Directive), taking into account the variety of definitions and objectives of the respective rules.

⁹² Replaced by Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, OJ L 169, 30.6.2017, p. 46-127.

The Directive is highly coherent with the following instruments:

- The definitions of information and consultation and their timing provided in Directive 2001/86/EC (supplementing the Statute for a European company with regard to the involvement of employees) are very similar to those in the Recast Directive.
- The definitions of information and consultation in Directive 2003/72/EC on European cooperative societies are similar to those in the Recast Directive, with small adaptations for the specific situation of creating a European cooperative society.
- The three soft-law instruments on restructuring policies: the 2005 Communication on restructuring, the 2009 Checklist for restructuring policies and the 2013 Quality Framework for Restructuring.

Some possible inconsistencies have been identified between the Directive and the following three EU legal instruments:

- Directive 98/59/EC on collective redundancies:

The Directives on collective redundancies, on transfer of undertakings and on the information and consultation of works provide a list of (minimum) information to be provided to employees in information and consultation procedures, which provides a better linkage to these procedures in specific cases between national and transnational level.

- Directive 2001/23/EC on transfer of undertaking:

The Directive on transfer of undertakings lays down a specific timeframe for the information and consultation procedures (e.g. *‘in good time and before employees are directly affected’*).

- Directive 2002/14/EC on information and consultation of workers:

The Directive on (national) information and consultation of workers lays down a requirement for management to provide an official answer to an opinion of the EWC or to consult *‘with a view to reaching an agreement’*.

For a detailed coherence analysis of each directive, see Annex 4.

Possible inconsistencies might contribute to a lack of legal certainty or coherence over the interplay of national and transnational information and consultation instruments and information and consultation rights pertaining to particular situations (e.g. collective redundancies, transfers of undertakings, etc.). For instance, employers in companies undergoing transnational restructuring processes potentially involving collective redundancies in several countries should generally inform and consult EWCs first on such issues. National transposition legislation linked to collective redundancies provides that consultation rights for workers are *‘with a view to reaching agreement’* with management, which differs from the equivalent provision of the Recast EWC Directive. However, the EWC has a clearly distinct role compared to the national works council: the former is a vehicle for exchange of views

about the transnational matter subject to consultation while the latter concerns views from the local perspective on national or local issues. Similarly, in cases of transfers of undertakings, which could in certain situations also have transnational implications, consultation should take place ‘*in good time and before employees are directly affected*’ while the EWC should be consulted at such time, in such fashion and with such content to express its opinion in a reasonable timeframe⁹³.

These discrepancies are explained by the different goals and contexts of application of the respective EU instruments listed above, which were designed especially for the purposes of collective redundancies or transfer of undertakings. While the scope of the information and consultation of EWC is wider and applies to all transnational topics affecting the employment conditions of the workers, EWCs are not a negotiating body.

Overall, the Recast is considered to be generally highly consistent with other EU legislation addressing workers information and consultation rights. Discrepancies in the detailed provisions concerning information and consultation reflect differences in the purpose of the different legal acts.

E. EU added value

1. Subsidiarity

EWCs have an exclusive focus on transnational issues and exist only in multinational undertakings. Recital 45 of the Directive states that: ‘*the improvement of the right to information and to consultation in community-scale undertakings (...) cannot be sufficiently achieved by the Member States and can therefore be better achieved at community level*’. In other words, the information and consultation process at transnational level can be regulated only by an EU legal act issued only by the EU and afterwards transposed into national law. EU minimum requirements in this area guarantee a level playing field for companies and the same minimum level of protection of workers.

The Recast Directive leaves it to the Member States to adapt the provisions to their national industrial relations systems and legal systems, particularly with regard to determining the arrangements for designating or electing employees’ representatives, their protection and determining appropriate sanctions.

Also, the social partners play a key role in implementing the legislation via the negotiation of EWC agreements. If they do not come to an agreement, subsidiary requirements are provided in the Annex to the Recast Directive⁹⁴. This decentralised implementation enables information and consultation mechanisms and structures to be adapted to the specific characteristics of the given companies. It avoids rigidity in obligations or slowing down of efficient company

⁹³ Article 2(g) of Directive 2009/38

⁹⁴ Article 7.

decision-making, while also ensuring appropriate and adapted consultation and decision-making procedures.

In addition, the principle of subsidiarity is translated into: (i) the right⁹⁵ for the special negotiating body to stop the procedure of establishing an EWC with a two-thirds majority; and (ii) the choice left by Article 1(2) for a procedure for information and consultation, without the establishment of an institutionalised EWC. The evidence shows that the number of cases where this option was taken is extremely small.

In the hypothesis that the Directive were to be repealed, transnational dialogue could only exist in multinational companies on a voluntary basis or under the European Company (*Societas Europaea* (SE)) Statute⁹⁶. The information and consultation process in the SE depends primarily on the agreement reached with the employees when the SE is created. The information and consultation procedure would occur only at national level⁹⁷ on the basis of Directive 2002/14/EC and would not provide for comprehensive information and understanding of companies' decisions affecting employment conditions at EU level.

2. Proportionality

The Directive is flexible on how to adapt the EWC's operation to specific circumstances and it permits the choice of concrete implementation arrangements and related rights and obligations. The Recast Directive has clarified the legal framework in which it operates and has translated the principle of proportionality in the following ways:

- in Article 1(2) the arrangements for the information and consultation procedure must 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;
- in Article 8(2) Member States are required to provide conditions and limits on the transmission of information where it could seriously harm the functioning of the company,;
- in Article 5(2) the Member States are required to determine the applicable method for the composition of the special negotiating body.

As shown in the previous sections, the Recast Directive does not impose administrative, financial and legal obligations in a way that would constitute an unreasonable burden for companies.

⁹⁵ Article 5.

⁹⁶ Directive 2001/86 supplementing the statute for a European Company with regard to the involvement of employees and Annex Section 2.

⁹⁷ Directive 2002/14.

VI. CONCLUSIONS

The core findings of the evaluation are as follows:

- **Compliance**

Most Member States have properly transposed the EU legislation. While most provisions are implemented verbatim in national legislation, some countries have adopted more detailed provisions that go beyond the minimum requirements of the Recast Directive. For instance, in Germany, the Czech Republic and Estonia, the consultation process ends with a reasoned opinion by the management referring to the opinion expressed by employees' representatives.

Most stakeholders and practitioners consulted considered that the Recast Directive has improved the clarity of the legal framework, but challenges remain in practice, particularly while negotiating or applying the EWC agreement at company level. The previous trend for a low volume of litigation at national level has continued since the Recast. No cases have been brought at EU level.

- **Effectiveness**

The Recast Directive provided some, albeit limited, impetus for setting up EWCs and renegotiating existing EWC agreements, with the creation of around 20 EWCs per year since its implementation in 2011, mainly in companies headquartered in France, Sweden and the US. Recast EWCs tend also to be established in smaller companies. It is estimated that half of the eligible companies have not yet established a EWC. The reasons for this are complex and multiple, ranging from the lack of awareness of legal requirements to the changing structure of companies themselves. While this indicates that it is not realistic to aim for 100 % coverage of all eligible companies, there is substantial scope for increased take-up of EWCs.

While the concept of transnationality is better defined in the Recast Directive, it has often proved difficult to interpret definitively in practice.

The Recast Directive improved information of workers in terms of quality and scope but there are challenges over the effectiveness of the consultation right: despite having the right to express an opinion, EWC members seem to have limited direct influence on the decision-making process in their companies, particularly during restructuring.

Nevertheless, EWCs are perceived by employers as useful instruments bringing benefits to all parties in many ways, such as improving the common understanding of issues among members, explaining decisions, initiating positive discussions and leading to valuable proposals for action or measures depending on the topics discussed.

On enforcement, the assessment highlights a variety of situations in Member States regarding their capacity to seek legal redress. In half of the Member States alternative dispute settlement mechanisms are in place. The evaluation observed the weakness of dedicated means for the EWCs to enforce their rights and the lack of dissuasive and proportionate sanctions in a majority of Member States.

- **Efficiency**

The Recast Directive did not create additional costs for employers compared to the previous Directive. Quantifiable costs for setting up EWCs seem to even have decreased compared to the 1994 Directive, but this may simply reflect the smaller size of the companies setting up EWCs following the Recast. For most employers, the benefits outweigh the related costs. The right to training without loss of wages is largely in place and constitutes a major gain for EWC representatives, enabling them to better exercise their roles within multinational companies.

The evaluation concludes that the Recast Directive does not impose administrative, financial and legal obligations in a way, which would constitute an unreasonable burden for companies.

- **Relevance**

All stakeholders consider the Recast Directive as relevant. The need to develop transnational dialogue further is acknowledged by the social partners. As for the objective of improved employee protection, the Directive was found to make an important contribution to ensuring transnational social dialogue at company level. EWCs provide a mechanism to cascade information throughout the undertaking, create leverage between the EU and local levels and thus make it easier to introduce strategic initiatives, leading to qualitative improvements in the strategic solutions identified by the company.

- **Coherence**

The new rules are generally consistent internally as well as with other EU legislation addressing workers' information and consultation rights, including the Charter of Fundamental Rights. The differences are justified given the respective instruments' different purposes and objectives. While the scope of the information and consultation of EWC applies to all transnational topics affecting the employment conditions of a company's workers, EWCs are not a negotiating body so therefore have a different objective than information and consultation at local level, which involves trying to reach an agreement between workers' representatives and employers⁹⁸.

- **EU added value**

The EWCs have a genuine EU transnational dimension. Only an EU legal act, transposed into national legislation, can regulate this issue.

The Recast Directive allows Member States to adapt the provisions to national industrial relations and legal systems, particularly when determining the arrangements for designating or electing employees' representatives, protecting them and determining appropriate penalties.

If the Directive were to be repealed, the absence of any regulation on EU transnational dialogue would have two consequences: (i) EU transnational dialogue would be reduced to a

⁹⁸ Article 4 of Directive 2002/14/EC.

dialogue relying only on the willingness of the employers' and workers' representatives at company level; or (ii) it would be regulated only in European companies.

Annex 1: Procedural information concerning the process to prepare the evaluation

Within the Commission, the lead Directorate-General (DG) for the evaluation of the Recast Directive 2009/38/EC on the establishment of a European Works Council is DG Employment, Social Affairs and Inclusion (DG EMPL). Representatives of other relevant DGs or services were invited to participate in an inter-service steering group to accompany the evaluation.

The following DGs or departments participated in preparing the evaluation: the Secretariat-General, the Legal Service, DG GROW, DG JUST and DG MOVE.

The Steering Group met on various occasions:

Kick-off meeting	23/02/2015
Meeting on the inception report	20/04/2015
Meeting on the interim report	08/09/2015
Meeting on the draft final report	11/12/2015+02/2016
Meeting on the draft staff working document	09/12/2016 + 08/11/2017

Roadmap / work programme references

The roadmap for this evaluation is published under http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_empl_011_evaluation_european_works_council_en.pdf

For the Commission work programme, see the Communication on Regulatory Fitness and Performance (REFIT): Results and Next Steps', COM (2013) 685. See also the 2015, 2016 and 2017 Commission work programmes.

Regulatory Scrutiny Board

This evaluation was not selected for presentation to the Commission's Regulatory Scrutiny Board.

Annex 2: Stakeholder consultation

The contractor set up specific tools customised for each type of stakeholder and each type of EWC agreement (i.e. either created before the Directive, between 2009 and June 2011, which is the transposition deadline in national law of the Directive). These tools were:

- a specific online survey created for the national social partners;
- a topic guide of EU social partners;
- an online survey for the EWCs set up prior to June 2011;
- a specific questionnaire drawn up for Member States' representatives.

Figure 1: Topic guide of EU social partners

Sector	Employer organisations	Employee organisations
Metal	Council of European Employers of the Metal, Engineering and Technology-Based Industries (CEEMET)	European Metal employees' Federation (EMF)
Chemicals	European chemical employers' group	industriAll
Public services	European Public Administration Network (EUPAN)	EPSU
Services Finance, insurance	CEA, AMICE and BIPAR	UNI Europa-Finance
Building and woodwork	European Construction Industry Federation European Confederation of woodworking industries	European Federation of Building and Wood employees
Services, information technology	The European Telecommunications Network Operators' Association	UNI Europa
Property, services, security	CoESS	UNI Europa-Property Services
Services, commerce	EuroCommerce	UNI Europa-Commerce
Food, catering, agriculture	FOODDRINKEUROPE HOTREC GEOPA-COPA	EFFAT

Figure 2: Consultation with EWCs

	Date when created	Number of EWC which will be contacted for interviews and surveys	Method
Consultations with the representatives of EWCs newly created to follow the rules of the Recast Directive	Since 6 June 2011 (when the use of the Recast rules became compulsory)	53*	Face-to-face, video and telephone interviews
	Between June 2009 and June 2011, and which decided to follow the rules of the Recast Directive even if they could have opted out and followed those of the original EWC Directive (94/45/EC)	Up to 15 (see notes)*	Face-to-face, video and telephone interviews
Consultations of EWCs which have renegotiated their original EWC agreement in line with the rules of the Recast Directive	Since 2009	15*	Face-to-face, video and telephone interviews
		34*	Survey
TOTAL		83	Face-to-face, video and telephone interviews
		34	Survey

*The figures exclude SE companies as they operate under a different Directive (2001/86/EC). See the revised minutes and the revised inception report for further information.

Annex 3: Sources of findings

ICF Evaluation of the Recast Directive, commissioned by DG EMPL, final study May 2016.

European Journal of Industrial Relations, volume 23, issue 3 — September 2017

European Centre of Expertise in Labour Law — May 2016-November 2017

https://www.businesseurope.eu/sites/buseur/files/media/position_papers/social/2017-02-09_european_works_councils_recast_directive.pdf

<https://www.etuc.org/documents/etuc-position-paperfor-modern-ewc-directive-digital-era#.Wh1v-f6ouAg>

European Labour Law Network — 2015-2016.

Too little and too late? Evaluating the European Works Councils Recast Directive — Stan De Spiegelaere, Researcher at the European Trade Union Institute — June 2016.

EWCs on the move: management perspectives on the development of a transnational institution for social dialogue, KU Leuven CESO, 2016, co-financed by Business Europe.

EWCs assessments and requirements — Report to the ETUC — ETUC 2016.

European Trade Union Institute (ETUI), European works councils and SE works councils in 2015, Facts and figures Stan de Spiegelaere-Romuald Jagodzinski — 2015.

Variations on a theme? The implementation of the EWC Recast Directive — ETUI — Romuald Jagodzinski — 2015.

Linking information and consultation procedures at local and European level — Peter Kerckhofs, Eurofound 2015.

Astrees — IR Share ‘Gérer la représentation transnationale des travailleurs’ — Comment relever efficacement le défi des comités d’entreprise européen — 2016.

DG Move Evaluation — European works council in transport sector.

https://ec.europa.eu/transport/sites/transport/files/themes/social/doc/final_report_ewcs_in_transport.pdf

Report of the Group of Experts (December 2010) on the implementation of Recast Directive 2009/38/EC on European Works Councils — [Report of the Group of Experts \(December 2010\)](#).

Commission Report (2000) — on the application of the Directive on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-

scale groups of undertakings for the purposes of informing and consulting employees COM(2000) 188.

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52000DC0188>

Preparatory study for an impact assessment of the European Works Council Directive, EPEC GHK (2008).

<http://ec.europa.eu/social/BlobServlet?docId=2421&langId=en>

Impact assessment on the revision of the European Works Council Directive SEC(2008) 2166

<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008SC2166>.

[EC Projects funded via the call for proposals on information, consultation and representatives of undertakings:](#)

Reference of the project	Name of the beneficiary	Title of the action
2014		
VP/2014/003/0048	European Federation of Building and Woodworkers	GPICC — Practical EWC guide on Information and Consultation
VP/2014/003/0103	Katholieke Universiteit Leuven, represented by KU Leuven Research & Development	The perspective of management on European Works Councils
VP/2014/003/0008	Instituto Sindical De Trabajo, Ambiente Y Salud	SCORE: The Scope of COrporate social REsponsibility and the contribution of work councils
VP/2014/003/0022	Federazione Autonoma Bancari Italiani	To.Be.E. EWC — Towards a better employee involvement in undertakings: roles and tasks of the main actors in establishing and improving European Works Councils
VP/2014/003/0123	Association Travail Emploi Europe Société	Promoting active and efficient European Works Councils: EWC guidelines for HR managers
VP/2014/003/0218	European Trade Union Confederation	ETUC action for Worker Participation

2015		
VP/2015/003/0049	European Trade Union Confederation	ETUC conference for EWCs 2016

Annex 4: Coherence analysis overview with other EU instruments

Directive	Relevance and links to the EWC	Scope	Assessment of the consistency
Charter of Fundamental Rights of the European Union	Article 27 pertains to employees' rights to information and consultation within the undertaking.	This applies to all employees in the EU.	Coherent with the Recast Directive as it provides a general framework for all employees to be informed and consulted no matter what the situation is.
Collective redundancies Council Directive 98/59/EC	Sets out rules on the information and consultation of employees' representatives before collective redundancies are made. Also sets out provisions on practical support for employees who are laid off.	Information and consultation provisions only apply in cases of collective redundancies in establishments employing more than 10 employees. In addition, this Directive does not apply to public administrative bodies or establishments governed by public law.	Partially coherent — mutually reinforcing (brings specifications for the situation of collective redundancies). Coherent with the Recast Directive in scope but does not contain any definitions of information and consultation. However, the timing of information and consultation is highly coherent with the Recast Directive as for both concepts there is a reference to 'due time' in the case of information and 'good time' for the concept of consultation. It also provides a clear list of the information needed to be sent to employees, which complements the Recast Directive.
Transfers of Undertakings Directive 2001/23/EC	Relevant to Information and Consultation Directives at national level. All Member States except Lithuania have provisions for information and consultation, either with works councils or trade union representatives. Most also have arrangements for information and consultation when no such formal organisation exists.	The Directive applies to any transfer of an undertaking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger. This Directive applies to any public and private undertakings engaged in economic activities whether or not they are operating for gain as long as one of the entities is situated within the territorial scope of the Treaty. Public administrative authorities are not covered by this Directive.	Partially coherent — mutually reinforcing Directive 2001/23/EC is complementary to the Recast Directive as it provides specific detail on the situation of transfers of undertakings. While no specific definition is provided, the Directive stipulates that consultation must take place with a view to reaching an agreement. However, it provides a more specific timeframe for the information and consultation procedures and provides a minimum list of the information needed to be given to employees.
European Company Statute Council Directive 2001/86/EC	The Directive ensures that the establishment of an SE does not entail the disappearance or reduction of practices of employee involvement existing within the companies participating in the establishment of an SE. Companies participating in the formation of a European company must negotiate with the employees via a special negotiating	This Directive only applies in the case of a creation of a European company, regardless of whether this is done via merger or a classic creation of such a company.	Highly coherent — mutually reinforcing. Definitions of information and consultation are provided in the Directive 2001/86/EC and are very similar to those in the Recast Directive. The timing of information is more precise as it concerns the specific case of the creation of a European company. The timing of the consultation is also in line with the Recast Directive, using a very similar wording. There is also a mention of specific information that needs to be passed on.

Directive	Relevance and links to the EWC	Scope	Assessment of the consistency
	body made up of employee representatives.		
Information and Consultation of employees Directive 2002/11/EC	The Directive marked the introduction of employees' general rights to information and consultation through permanent bodies across the European Union for the first time. The Directive establishes a general framework for informing and consulting employees and plays a key role in promoting social dialogue (on a national level).	As this Directive regulates information and consultation at national level, there is no mention of a criterion of transnationality. As a result, the obligation to inform and consult applies to: <ul style="list-style-type: none"> undertakings employing at least 50 employees in any one Member State, or establishments employing at least 20 employees in any one Member State. 	Coherent with the Recast Directive. It complements the Recast Directive well by providing a legal framework for information and consultation at national level. <p>Definitions in the Directive 2002/14/EC are provided but are more succinct than in the Recast Directive. The timing of information and consultation is in line with the Recast Directive.</p> <p>The Recast Directive only provides for the possibility for employee representatives to express an opinion that central management may take into account. This definition does not go as far as under the national framework, which entitles employees to obtain a response.</p>
European Cooperative Society Directive 2003/73/EC	Information, consultation and in some cases, participation procedures at transnational level are to be used whenever a European cooperative is created.	This Directive only applies in the case of a creation of a European cooperative society and concerns a specific situation. It is complementary to the Recast Directive.	Highly coherent — mutually reinforcing <p>Definitions of information and consultation are similar in to the ones in the Recast Directives with small adaptations for the specific situation of creating a European cooperative society. The timing of information and consultation is in line with the Recast Directive. Clear elements have been identified for transmission to employees. The Directive only applies to the creation of a European cooperative society, regardless of whether this creation comes out of a merger or from a typical company creation.</p>
Cross-Border Mergers Directive 2005/56/EC	Employee participation systems should apply to cross-border mergers where at least one of the merging companies already operates under such a system. Employee participation in the newly created company will be subject to negotiations based on the model of the European Company Statute.	This Directive only applies to cross-border mergers of limited liability companies as defined in the Directive.	Coherent <p>Relates to participation rights but directly refers to the existing information and consultation provisions under EU law.</p> <p>Directive 2005/56/EC concentrates on participation rights of employees. However, a reference is made to information and consultation according to other Information and Consultation Directives reviewed in this exercise.</p>

Annex 5: Enforcement overview

(Source: European Center of Expertise Network November 2017)

Member states	Capacity to bring actions before the courts for the EWC	Alternative dispute settlement mechanisms	Autonomous means to enable the EWC to act
Austria	Yes and legal status	No, but pre-trial mediation ⁹⁹ during court proceedings	No dedicated budget but costs related to the activities of EWC and select committees are borne by central management ¹⁰⁰ . Labour law issues are exempted from court fees below EUR 2 500
Belgium	Only individual EWC members ¹⁰¹ and trade unions can act for EWCs, no legal status	No	Cost of judicial proceeding are considered as operating expenses so should be borne by central management
Bulgaria	Yes	Yes	Statutory release for EWCs from labour court fees
Croatia	Yes ¹⁰²	Agreement between parties allowed	Cost of judicial proceeding are considered as operating expenses so should be borne by central management
Cyprus	No	Yes, mediation procedure under tripartite mechanism	No
Czech Republic	No legal status but the EWC has the right to be a party to civil judicial proceedings in disputes on:	Yes ¹⁰³	No

⁹⁹ *Zivilrechtsmediationsgesetz*, ZivMediatG transposing mediation directive 2008/52.

¹⁰⁰ Art 197 of the labour constitution Act.

¹⁰¹ Advice No 1756 of National labour council on implementation of Directive 2009/38.

¹⁰² Art 155 of the Labour Act.

¹⁰³ Mediation Act No 202/2012.

	- the provision of information which the employer refused to provide to the EWC; and - the confidentiality of the provided information		
Denmark	No legal status of EWC to act in ordinary court. Special negotiating body and social partners can act in labour courts	Cooperation committee at company level	No
Estonia	No	Yes ¹⁰⁴	No
Finland	No	No	No
France	Yes, legal personality but a legitimate interest is required ¹⁰⁵	Special negotiating body can initiate a mediation procedure	No but EWC must have the financial resources to fulfil its mission
Germany	Yes	No	Cost of judicial proceedings are considered as operating expenses so should be borne by central management. However, those costs are not charged for EWCs in labour court proceedings
Greece	Yes	No	no
Hungary	Yes	Yes ¹⁰⁶	Costs of judicial proceedings are considered as necessary and justified costs of the special negotiating body so should be borne by central management
Ireland	No ¹⁰⁷ , only individual workers representatives	Yes, arbitration	No
Italy	No, only local	Yes ¹⁰⁸ , conciliation	No

¹⁰⁴ Conciliation act RTI/2009//59/385.

¹⁰⁵ Art 31 code procédure civile.

¹⁰⁶ Section 291 292 293 of Hungarian Labour Code.

¹⁰⁷ 1996 Act transposing Directive 2009/38.

	trade unions can act	procedure	
Latvia	No	Yes, conciliation and arbitration	No but public conciliation is free of charge
Lithuania	An EWC can bring action before the courts in limited cases ¹⁰⁹	Yes, conciliation	No
Luxembourg	No, only an individual worker representative can act	Yes	
Malta	No	No	No
Netherlands	Yes	No	Considered as ‘reasonable expenses’ that should be borne by central management ¹¹⁰
Poland	No legal personality, but can act when dispute concerns access to confidential information	No	No
Portugal	Yes	No	Cost of judicial proceedings are considered as operating expenses so should be borne by central management
Romania	Yes, specific provision on disclosure of confidential information	Yes ¹¹¹	No, but cases before labour courts are exempt from fees
Slovakia	The special negotiating body and the members of the EWC can act	No	No, only establishment and operating budgets provided for

¹⁰⁸ Legislative Decree No 113 of 2012.

¹⁰⁹ In the event of refusal to provide the necessary information (by the employer on the grounds that the information is confidential); in the event of violation by the company’s management of the obligation to provide the information about the structure of the group, numbers of employees, (Article 11(5) of the LEWC).

¹¹⁰ EWC Act paragraph 20.

¹¹¹ Law 192/2006 on mediation.

Slovenia	Yes ¹¹²	No, but general arbitration mechanism possible between workers and employee representatives	Cost of judicial proceeding are considered as operating expenses so should be borne by central management
Spain	Yes, legal personality	Yes, conciliation, mediation and arbitration service dedicated to collective labour mechanisms	No
Sweden	Yes ¹¹³	Yes, arbitration	No

¹¹² Para 3 of Article 45 of the ZDSS.

¹¹³ Act on European Works Council 2011:427.

Annex 6: Sanctions overview

(Source: European Center of Expertise Network 2017)

Country	Type of sanction	Level of financial penalties ¹¹⁴
Austria	Administrative offence ¹	Maximum EUR 20 000 ¹ per breach and EUR 40 000 if recurrent. Minimum fine EUR 7 ¹
Belgium	Criminal sanction and administrative offence	Sanction related to establishment of EWC: between EUR 400 and EUR 8 000, multiplied by the number of employees concerned. Sanction related to operation of EWC: between EUR 200 and EUR 4 000, multiplied by the number of employees concerned
Bulgaria	Administrative offence	Minimum EUR 750 and maximum EUR 15 000
Croatia	Administrative offence	Maximum between EUR 900 and EUR 2000; sanctions for a work council legislation offence are higher (between EUR 4 000 and EUR 8 000)
Cyprus	Criminal sanctions	Imprisonment up to 2 years and fine up to EUR 34 000
Czech Republic	Administrative offence, fines	Max EUR 7 700
Denmark	Administrative offence, fines	Up to the appreciation of the judge

¹¹⁴ For countries outside of the euro area, the figures in national currencies have been converted into euros for ease of comparison.

Estonia	Administrative offence, fines applied by the Labour Inspectorate	Ranges between EUR 800 and EUR 3 200
Finland	Administrative offence, fines	Maximum EUR 30 000
France	Criminal sanction and administrative offence	Sanction related to establishment of EWC: Imprisonment up to 1 year and fine up to EUR 7 500 Sanction related to operation of EWC: fine up to EUR 7 500.
Germany	Criminal sanction and administrative offence	Sanction related to establishment of EWC: Imprisonment up to 2 years and fine Sanction related to operation of EWC: fine up to EUR 15 000
Greece	Criminal and administrative sanction	Imprisonment up to 2 years and fine between EUR 300 and EUR 50 000
Hungary	Administrative offence	No sanctions laid down in law (Act repealed in 2012)
Ireland	Administrative offence, fines	Up to EUR 222 219
Italy	Administrative offence, sanctions applied by the Labour Inspectorate	Ranges between EUR 1 033 and EUR 30 988
Latvia	Administrative offence, sanctions applied by the Labour Inspectorate	n/c
Lithuania	Administrative offence, sanctions applied by the Labour Inspectorate	Ranges between EUR 30 and EUR 3 000
Luxembourg	Criminal and civil sanctions	Minimum EUR 251 and maximum EUR 3 750
Malta	Criminal sanctions	Minimum of EUR 23 and maximum EUR 11 646.87 per worker
Netherlands	Civil sanctions	n/c

Poland	Criminal sanction	Restriction of liberty and maximum fine of EUR 1 250
Portugal	Administrative offence, fines	n/c
Romania	Administrative offence, fines	Ranges between EUR 445 and EUR 890
Slovakia	Administrative offence, fines	Up to EUR 100 000
Slovenia	Administrative offence, fines	Sanction related to establishment of EWC: fine between EUR 20 000 and EUR 100 000 Sanction related to operation of EWC: fine between EUR 2 000 and EUR 5 000
Spain	Administrative offence, fines	Sanction related to establishment of EWC: fine up to EUR 187 515 Sanction related to operation of EWC: fine up to EUR 6 250
Sweden	Reparation of damages	n/c
UK	Penalty imposed by the employment appeal tribunal	Up to EUR 110 000