

# Conclusions

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This study represents an attempt to contribute to a gradually expanding, but still arguably underdeveloped legal domain of research on EWCs. The ETUI has always shown a lively interest in the topic and a commitment to the cause of providing research foundations for informed worker participation practice. Starting with the ongoing service of the EWC database it has contributed with research output throughout the process of preparation for the review of the Directive, as well as during the final stages preceding adoption of the Recast Directive 2009/38/EC (with, for example, publications directly linked to the Directive, such as (Jagodzinski, Kluge and Waddington 2009; Picard 2010a; Waddington 2010; Dorssemont and Blanke 2010). The current study is but a natural continuation and development of the ETUI's contribution to the understanding of EWCs following logically on the publication of the *Trade Union Guide to the EWC Recast Directive 2009/38/EC* (Picard 2010a) that commented on the Directive and sought to provide insights into its implementation. We have always emphasised that while discussions about the contents of the modified directive are important its implementation at national level is of at least equal weight.

By emphasising the importance of the national legal frameworks within which EWCs function the present report aims at pointing out that while these legal frameworks are not the sole determinant of the quality of EWC operations or of their effectiveness (other important factors include the agreements between EWCs and managements, national industrial relations traditions, corporate governance models and social dialogue culture within companies) they represent an important backbone, which is a basis for more precise arrangements in the EWC agreements and impacts them directly. As the ETUI has demonstrated (ETUC and ETUI 2014), the quality of these frameworks (both of the EU directive and national transpositions) has

significant standard-setting influence on the content of EWC agreements: the legal provisions are often directly copied into EWC agreements and over time we have observed a ‘gravitation’ of negotiated arrangements towards standard solutions set by the law.

Meaningful implementation of employees’ information and consultation rights is thus not an expectation merely to argue in favour of full respect for the law and against diluting European directives by sub-standard national implementation (although both are valid reasons in themselves). Far more important is the practical significance of the ultimate standard of the EU *acquis*, that is, the principle of effectiveness of information and consultation. In other words, the most important reason for demanding a thorough, inquisitive and complete review of national implementation laws is the necessity to ensure that the Directive lives up to the goals laid down in it and that workers have the necessary legal instruments and practically available means to exercise their rights because it is vital for their working lives and performance in multinational enterprises. Obvious as it might seem, it has been the authors’ goal to recall these goals so that they do not get lost in the course of legal(istic) discussions and amidst formalistic excuses used in course of transposition of the Directive. The authors insist that this test of the practical effectiveness of individual national provisions and their ability to deliver in practice, not just on paper, should thus be the ‘spectacles’ and the litmus test with which the expectations towards the implementation study are evaluated. From this point of view, whatever provision or demand to modify national legislation ensures the real effectiveness of workers’ rights to transnational information and consultation should be viewed as normal, even if critics might argue that these expectations or demands are too high or far-reaching. The authors’ argument is, however, that we can no longer settle for solutions that only pretend to cover the requirements of the Directive, while in fact they do not deliver when put to the test of EWCs’ everyday operations.

At this stage the key question of the general goal-setting character of directives and their level of prescriptiveness arises. It should be clarified that any directive sets general goals far more frequently than it requires specific solutions. It is no different in the case of the EWC Recast Directive that sets common standards and minimum requirements that can and should be specified further by national legislators. The means, provisions and procedures at national level should clearly serve the obligation on the part of member states to fulfil the goals of the Directive. Consequently, if national frameworks are too lax, imprecise, vague, general or plainly ineffective in part or as a whole they cannot be found to be compliant with the Directive.

- As this study demonstrates, the quality of national transpositions differs significantly across the EU. The diversity of solutions comes as no surprise due to the inherent characteristics of any directive and EU member states’ different traditions and systems of industrial relations. What does come as a surprise, however, is the very peculiar mix consisting of, on one hand, at times very formalistic copy/paste transposition laws in some respects, combined with, on the other hand, very general, imprecise and vague with regard to aspects where the Directive needs sharp, concrete and well-defined implementation. This occurs particularly often with regard to the following high-profile aspects of implementation of the Directive (for more detailed conclusions see below):

- transnationality (transnational competence of the Directive), where copy/paste and lack of definition are frequent;
- excessive diversity combined with frequent loopholes in enforcement frameworks (sanctions in particular and access to courts in general);
- only general, copy/paste-like inclusion of wording on means to be provided to EWCs and their members;
- very limited specificity (or deliberately general wording) concerning the right to collectively represent the interests of employees.

All this is accompanied by a common disregard (with only rare exceptions) of references to the Preamble of the Directive and the lack of influence of the Expert Group report (European Commission 2010a) in the work in which all the member states participated through representatives of relevant national authorities responsible for drafting the implementation laws.

The above shortcomings of national implementation provisions are particularly worrying if one takes into account the importance of the Directive for workers' rights and interests in particular and the effort on the part of all stakeholders to adopt the Recast EWC Directive. The campaign to improve workers' rights to transnational information and consultation has been long and has gone through multiple stages. While for some observers the heated debate and dramatic refusal to negotiate on the part of the trade unions that finally led to the adoption of Recast Directive 2009/38/EC (Jagodzinski 2008) marked the end of the struggle, that was certainly not the case. As the ETUI together with trade union experts and associated academics have always emphasised, implementation of the Directive in national law is just as critical and important a stage as the Directive itself. The ETUI has also strongly underlined the special character of the Directive as it introduced a right to transnational information and consultation that was not present in many of the EU member states at the time and might have seemed alien. For this reason, amplified by the upgrade of the law's status to that of a fundamental right, the EU has now a *special* responsibility for ensuring the application of this right. This responsibility extends by means of *general* principles of the EU to implementation of the European law of which the European Commission is guardian. If the key amendments introduced into the Recast Directive are not properly transposed all this labour devoted to improving the framework for EWCs would be in vain or mainly unrewarded.

### **Definitions of information and consultation and transnational competence of EWCs**

Definitions have been transposed mainly word for word; hardly any member states have enhanced the precision of the Directive's provisions to specify what kind of information (digital, written and so on) is to be provided to EWCs.

With regard to the key element of the modified EWC Directive – the definitions of information, consultation and transnational competence of EWCs – the overall quality of implementation has proved to be ambiguous. First, concerning definitions of information and consultation, based on the above review we conclude that generally they have been transposed in a harmonised way. This statement is true

if one considers the common approach of copy/pasting the exact wording of the Directive as a harmonised transposition. Arguably, however, these key workers' rights should not be interpreted and transformed at national level as they represent a common foundation for the European right to transnational information and consultation. On the other hand, if one takes a more inquisitive look into some less obvious (but not less important) aspects of the definitions it will be possible to discover the abovementioned ambiguity casting a shadow of doubt on the homogeneity of definitions across Europe:

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

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

## **Confidentiality of information and consultation**

The obligation to respect obligations of secrecy concerning information transferred to workers' representatives under the confidentiality clause is an important factor modifying and limiting the exercise of the right to information and consultation under the EWC Directives. Confidentiality of information was introduced to protect legitimate company interests, but according to reports from European trade union federations and EWCs, instances of management abuse of confidentiality clauses are not uncommon. This comes as little surprise, admittedly, if one considers the imbalance in the legal framing of responsibility for violations of confidentiality by workers' representatives and for abuses of confidentiality by management. On one hand, at least 15 out of 31 member states provide in transposition laws for sanctions for employee representatives violating confidentiality. These sanctions vary from financial penalties, through civil damages for potential harm inflicted on the com-

pany to penal sanctions, including imprisonment. It should not be forgotten that due to the magnitude of possible sanctions (civil liabilities, penal sanctions) and their awareness of corporate access to the best lawyers workers' representatives are often effectively discouraged from dealing with confidential information in any way that could even remotely expose them to suspicion of violating confidentiality. This represents a serious practical obstacle in their work, which forces the European Commission to ask questions about the golden mean between the need to protect company interests and the effectiveness of information and consultation regulations.

In 15 member states sanctions are foreseen for workers' representatives for breaches of duty to maintain confidentiality of information provided to them as such. At the same time, only in France is abuse of the confidentiality clause by company management punishable. In three other countries there is a remedy in the form of a possibility to issue court orders to lift the secrecy clause (Lithuania, Poland and the United Kingdom), but no mention is made of corporate responsibility for abuses of confidentiality if the court or other authority (usually the labour inspectorate) finds the company at fault in imposing confidentiality on information that did not require such protection. This situation shows a stark imbalance in how national authorities value company interests against those of workers and how they choose to differentiate their approaches to corporate violations of law and to those of workers' representatives.

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

## Principle of effectiveness

Despite the common reproduction of the wording of Art. 2 (Definitions) in national laws many member states have not explicitly transposed the principle of Art. 1.2 of the Directive (Austria, Bulgaria, Denmark, Spain, Finland, France, Germany, Lithuania, the Netherlands, Poland, Portugal, the United Kingdom) which requires that workers' right to information and consultation be *effective*.<sup>1</sup> The question remains open whether some other acts in national legal systems ensure the fulfilment of this requirement of the Directive (which would mean that the Directive was properly

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<sup>1</sup> Art. 1 stipulates: '1. The purpose of this Directive is to improve the right to information and to consultation of employees in Community-scale undertakings and Community-scale groups of undertakings. 2. To that end, a European Works Council or a procedure for informing and consulting employees shall be established in every Community-scale undertaking and every Community-scale group of undertakings, where requested in the manner laid down in Art. 5(1), with the purpose of informing and consulting employees. The arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to enable the undertaking or group of undertakings to take decisions effectively.'

transposed with regard to its goal). An alternative question is whether Art. 1.2 contains a specific or a more general requirement of a less explicit character, which can be assessed as taking into consideration the entirety of the implementing laws. It is also unclear what bearing the absence of an explicit statement of the requirement to make these rights effective might have for workers' rights. If, for instance, a dispute becomes a lawsuit and is tried before a court of justice will this court interpret the workers' rights to information and consultation with the principle of 'effet utile' in mind, will it not take it into account or will it be obliged to apply this principle due to the superior general requirement of effectiveness stemming from the EU made law? Whatever the answer and the reason for the lack of an explicit transposition of Art. 1.2 such a situation negatively affects the transparency of law and endangers coherent application of the EU law.

### **Articulation between various levels of information and consultation**

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

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

tation rights and those of local worker representation bodies seems to have been lost. In this sense the lack of common introduction of the right to guarantee EWC members the right and means to meet with local workforces in various locations to pass on news about EWC information and consultation and to gather evidence and requests directly from workers and their representatives is striking. This is regrettable because the EWC Recast Directive offered a genuine opportunity to bring the European, transnational level of information and consultation closer to ordinary workers' needs and make it more relevant. Underperformance in this department may contribute significantly to further alienate some EWCs from the local level of worker representation.

### **Transnational competence of EWCs**

Surprisingly, many countries, despite the Directive's guidelines, do not provide a clear limitation of EWCs' competence to transnational matters only (Croatia, Luxembourg, Norway, Poland). Relatively many countries define the boundaries – restrict the scope – of EWCs' right to transnational information and consultation by stipulating that these should be 'transnational questions' (Sweden) or 'matters' (Portugal), or indeed 'supranational information and consultation' (Slovakia), which borders on tautology and does not make the differentiation any easier. Only Austria, Belgium (in the customarily commonly accepted quasi-binding commentary to the transposition), Hungary, Romania, Spain (in the preamble to the transposition act) and Liechtenstein make reference to the Recast Directive's recitals (among others, Recitals 15 and 16). This shortcoming of national implementation laws is stark and consequential as the definition of the parameters for EWCs involvement is paramount to their functioning.

### **The setting-up of European Works Councils and the role of trade unions**

Increasing the number of EWCs is one of the goals of the EWC Recast Directive, which to this end addresses the question of simplifying access to information about companies and workforce distribution to allow the establishment process to commence (Art. 4.4). In this sense, cases such as that of the Portuguese legislation, which does not explicitly oblige the management to provide such information to workers, cannot be considered to be in compliance with the obligation to transpose the Directive. All the other member states have implemented Art. 4.4 of the Recast Directive, often by reproducing its wording without taking the opportunity of implementing the Directive to make more precise how this information should be provided, in what form (what documents, data and so on), to whom and whether, for example, employee representatives have the right to request additional data or documents. For example, Belgium, Cyprus, Italy, Malta, Slovenia and Spain have merely copied out Art. 4.4 of the Directive. As in the case of other aspects of the Directive we must insist that such national legislative strategies cannot be accepted as proper transposition and require a response and corrective measures from the European Commission.

In order to facilitate the process of setting up EWCs the Recast Directive also introduced the provision of Art. 5.2c<sup>2</sup> designed to allow workers to benefit from the support of trade unions. Despite the latter's efforts to monitor and follow all negotiations sometimes it is not (always) possible. For this reason, among others, the Directive introduced the obligation to inform the competent European workers' and employers' organisations.

There are numerous problems with this new obligation, though. The relevant Article does not specify which European workers' and employers' organisations shall be deemed competent and are to be informed. Only Recital 27 indicates that these organisations are those social partner organisations that are consulted by the Commission under Art. 154 of the Treaty. As a result, in line with the common strategy of disregarding the Preamble to the Directive, most countries merely reproduce the vague wording of Art. 5.2.c. without giving any more precise indication of the identity of these organisations. Admittedly, all the member states provide that the European social partners shall be informed of the composition of the SNB and of the start of negotiations, but only a few countries – for example, Ireland<sup>3</sup> – provide more detail with regard to the content of such information and give some precision about the timing of the information (for example, in Estonia and Hungary, the names and contact details of the members of the SNB should also be included in the communication; in Estonia and Slovenia, the information should also include the names of the SNB members' companies and their position). In Belgium, the information shall be given at the latest when the first meeting with the SNB is convened, in Estonia, 'without delay' and in Ireland 'in writing and as soon as possible'.

In other countries, however, the implementing provisions remain general and vague. As a result, in practical terms, the entity obliged to transmit the information (commonly unidentified in national legislation), even if willing to transmit this information, could find it difficult to determine the proper addressee.<sup>4</sup> This omission of a concrete indication of the addressees of such information blatantly violates the principle of *effet utile*. Some countries – such as the Czech Republic, the Netherlands, Poland, Romania and Slovakia – have transposed Recital 27 into law; only Hungary mentions in the law that the minister responsible for employment policy shall publish the e-mail addresses to which information must be sent on the government's official informational website. In all the other member states, however, this level of detail is completely absent from the legislation and, consequently, the obligation to inform the 'competent European workers' and employers' organisations' remains a dead obligation whose practical execution is totally obscure to the relevant parties (despite the fact that national legislation follows the vague formulation of Art. 5.2 (c) and does not specify whose obligation it is).

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2 Art. 5.2. c: 'The central management and local management and the competent European workers' and employers' organisations shall be informed of the composition of the special negotiating body and of the start of the negotiations.'

3 See: <http://www.djei.ie/employment/industrialrelations/work.htm>

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



Finally, quite understandably, there is no legislation sanctioning violation of the obligation to inform about the launch of negotiations, which explains why, according to the ETUC (the competent European workers' organisation referred to in Art. 5.2 (c) and the Expert Report, (European Commission 2010a) had by January 2015 received only two such communications, despite the fact there were (at least) 114 newly established EWCs (since 06/06/2011) and 184 signed agreements registered in the ETUI database of EWCs in January 2015 ([www.ewcdb.eu](http://www.ewcdb.eu)).

## **Significant structural change and renegotiation of EWC agreements**

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

An important general observation concerning transposition of the provision on significant structural change is that national legislation provides a few, only slightly differing examples, but never a broader (going beyond mergers, acquisitions and takeovers), encompassing or more precise definitions that would include significant changes, such as outsourcing of certain parts or services within a company or selling of company parts, products or sectors. This is regrettable because the catalogue of forms of significant structural change in contemporary companies is much broader than the three examples mentioned in Recital 40 of the Directive. At the same time, one should not forget that Recital 40 is not a closed catalogue (the wording 'for example' is used; see also (Picard 2010a)) and therefore it is reasonable to assume an expectation that more precision will be provided in the course of transposition of the Directive in the member states and would be welcome.

## Agreements in force

It has been obvious from the beginning that delimiting the coverage and binding scope of the Recast Directive between voluntary pre-Directive agreements (Art. 13 agreements) and later agreements under the full regime of EWC Directives would prove a complex matter. Undoubtedly, the system defined by the Recast Directive is complex and the transposing national legislations are consequently similarly complicated. Many countries have more or less reproduced Art. 14 of the Directive, but only Austria has correctly embraced the logic and ensured the genuine effectiveness of Art. 14 by explicitly providing that the definitions of information, consultation and transnationality shall apply to all agreements concluded, irrespective of their date of conclusion. On the other hand, some countries seem not to have transposed Art. 14 (Bulgaria, Greece, Romania and Slovenia) at all and other member states do not seem to impose the application of the adaptation clause to the agreements exempted from the application of the Recast Directive (Malta, Norway), which is contrary to the objective of the Directive.

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

## Enforcement provisions including sanctions

Despite the clear aims of the Recast Directive to increase the effectiveness of EWCs and avoid legal uncertainty, our review of national transposing measures on enforcement shows that a number of serious difficulties in this area remain untreated.

First, despite the insertion of Art. 10.1 giving EWCs and employee representatives the means required to apply the rights arising from the Directive to represent collectively the interests of the employees, it appears that the majority of member states have either copied the relevant text verbatim, without any adaptation (or explanation) to the national legal context, or have assumed that national law already provides for such means. In these countries it is difficult to establish how national laws have amended, formally and practically, their rules to ensure that EWC members can exercise their rights granted by the Recast Directive. The general principle expressly giving means (material and legal) to EWC members was welcome, but the spirit of this new obligation does not seem to have materialised in national laws. National and European case law will therefore need to be monitored to see whether the lack of practical measures or means will be argued before the courts. However, with regard to the latter, EWCs' access to courts may be seriously hindered by the lack of clear rules on their legal status (legal personality, court capacity) defining what EWCs can or cannot do, as well as on the means available to them in such legal proceedings. It needs to be emphasised that as long as there are doubts as to whether an EWC has legal status or whether individual EWC members can seek redress, only a limited number of cases will be brought before the courts.

The same applies to the lack of clarity over financing by management of necessary costs incurred by EWCs in preparation for court proceedings.

Such a state of affairs will of course enable some stakeholders and commentators to argue that the lack of disputes is sign of a well-oiled machinery and smooth transposition/integration of the modified directive into national contexts. Those inclined to argue – against our findings – that such smooth transposition has been taken place are likely to do so on political grounds.

It needs to be emphasised that European law (the EWC Recast Directive) could have been more precise and directly ordered member states to apply a system in which the collective body is given legal personality or the means to have access to courts or dispute resolution systems. Furthermore, it could also be more pragmatic to require that national implementation frameworks include the obligation to provide EWCs with their own financial means or guaranteed access to financial means in order to obtain independent legal advice and recourse to lawyers, if judicial proceedings are necessary. Because, unfortunately for legal clarity and workers' interests, more explicit references to the meaning of 'means' was not chosen in the Recast Directive, EWC members remain in doubt concerning what they can do to enforce their rights in a significant number of countries. The forthcoming (2016) review of national implementation by the European Commission and the European Parliament seems the last opportunity to remedy this shortcoming.

Second, our analysis revealed several countries in which sanctions seem altogether absent or are so obscure that it was impossible to find direct reference to them. Surprisingly, some of them escaped the attention of the Implementation Report in 2000 (European Commission 2000). The review of 2015/2016 thus represents a chance to bring these national frameworks up to the required standard.

Third, the variety of sanctions available in member states does not give workers equal redress and endangers coherent application of the Directive in the transnational settings of EWCs.

Fourth, there are serious doubts with regard to the available sanctions' compliance with the requirements of effectiveness, proportionality and dissuasive potential in the vast majority of the member states. While the majority of sanctions available currently involve financial penalties, even at the higher end they are unlikely to deter companies from breaching their own agreements or the subsidiary requirements. Without a strong lead from the European draftsmen imposing a universal sanction, the effectiveness of information and consultation rights risks being seriously diluted. During the forthcoming review of national implementation measures the European Commission will be confronted in some member states with sanctions of almost negligible dissuasiveness and effectiveness, and, however difficult this task might be, it will be expected and required to take a position on the matter, keeping in mind the requirements set out in Recital 36 of the Recast Directive.

Tough as it might be, given the above evidence from the mapping of sanctions there simply seems to be no alternative but to seriously and consistently enforce member states' compliance with the Directive in this regard.

Of particular interest is the choice of tools and methods that the European Commission will apply to translate the general criteria of effectiveness, proportionality and dissuasiveness into practice and evaluate national sanctions accordingly. Even if a review of the European Directive proves favourable to a common European level of financial penalty, the most deterrent measure would be to deprive management decisions of their legal effects unless information and consultation obligations have been observed by Community-scale companies. The resistance to such a proposal has historically been too strong and national measures rarely go so far. However, without such an incentive, it is unlikely that information and consultation processes will ever play the role designated for them in the EWC Directive(s) and EWCs will remain toothless.

Last but not least, it seems clear that if infringement of the rights to timely information and genuine consultation is to be prevented and tackled effectively, every EU member state should guarantee efficient measures that make it possible to halt a decision-making process conducted in contradiction of employees' rights to be informed and consulted. It seems obvious there is little use in applying other sanctions of relatively low severity (often small administrative fines; see below) after the event, once the management has taken the decision and the situation cannot be remedied by employee representatives. Analysis of national implementation acts of the EWC Directive reveals, however, that only few national legal orders provide for the effective measure of the court injunction to safeguard EWC rights. Consequently, applications to courts by EWCs aiming to stop managerial decisions sometimes deliberately taken in violation of EWC rights, are handled by courts in the normal course of their activities, which usually takes several months after an unlawful decision has been taken and implemented.<sup>5</sup> The Commission should thus consider making recommendations on making such a measure available in all the member states.

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There is no doubt that making direct and concrete orders to member states to bring their enforcement frameworks into line with the requirements of the Directive will be a very difficult political decision to reach and a mighty task to execute. If one classifies 'transposition of the Directive' as the mere presence or reproduction of the original Directive's provisions in national legal texts, then it could be said that, indeed, most member states have implemented the provisions of the Recast Directive on the establishment and adaptation of EWCs. However, in the present study we believe we have documented obvious and flagrant shortcomings in national laws transposing the Recast Directive. With this evidence in hand any evaluation by the European Commission that is similar in terms of perfunctoriness and laxness to that of the previous Implementation Report of 2000 (European Commission 2000) seems unthinkable. In view of the evidence we have presented, the European Commission's responsibilities as the 'Guardian of the Treaties' leave no room for a soft approach, especially because a common interpretation of the Directive has been established among the member states thanks to the very informative and competent

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5 Apart from Hungary, where the court is obliged to issue a ruling within 15 days of an application by an EWC.

European Commission's support to national authorities (European Commission 2010a).

The authors hope that the work, effort and resources put into producing the guidelines and recommendations of the Expert Report (*ibid.*) will be applied effectively as a point of, admittedly not binding, but certainly standard-setting reference for the evaluation of individual solutions on specific aspects, as well as for the overall quality of national transposition acts. The Expert Report regrouped the results of previous impact studies, a deepened analysis and conclusions to ensure coherent application of the Directive's rules. The resources and collective expertise invested in the workings of the Expert Group are simply too precious to be considered a series of interesting meetings with minutes as a minor by-product (as was the case with similar proceedings concerning the original Directive 94/45/EC in 1995). Quite the opposite is to be postulated: that national authorities who affirmed the recommendations of the Working Party are to be held accountable for deviations between the agreement recorded in the Expert Report and the contents of national laws. If the implementation report finds discrepancies between the two enquiries, corrective actions should follow. Such decisiveness on the part of the European Commission would help to show that the goals laid down in the Better Regulation agenda are not just a lip-service response to popular expectations of a more social Europe, but really serve to improve the quality of legal frameworks, not merely to simplify and reduce them at the expense of workers' rights.