



# **Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council**

Final report  
March 2016



**EUROPEAN COMMISSION**

Directorate-General for Employment, Social Affairs and Inclusion

Unit Labour law

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Directorate-General for Employment, Social Affairs and Inclusion  
Directorate for Employment and Social Legislation, Social Dialogue, Unit B2 – Labour Law

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Luxembourg: Publications Office of the European Union, **2016**

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## **ABSTRACT**

The possibility to establish European Works Councils (EWCs) was first introduced by Directive 94/45/EC. EWCs are bodies representing European employees within transnational companies. They aim at ensuring that employees are informed and consulted by management on any business issues or decision that could have an impact on employment and working conditions.

Over the years, a number of legal and implementation challenges arose and the original directive was revised in 2009 through Directive 2009/38/EC Directive (Recast).

The purpose of this evaluation was to evaluate the transposition and implementation of Directive 2009/38/EC Directive (Recast) in the EEA countries and the extent to which it has achieved goals of the Recast for instance around encouraging the creation of more EWCs, enhancing the effectiveness of employees' transnational information and consultation and enhancing legal certainty. Furthermore, the evaluation assessed the costs and benefits of the implementation of Recast provisions, as well as identifying best practices.

Amongst other things, an assessment of the coherence of the Recast Directive rules with the existing European legislation and policy developments in the field employee information and consultation was undertaken. The national laws transposing the new rules of the Directive were assessed against each new provision introducing all the key areas of change in the Recast Directive.

The evaluation was undertaken using a range of sources and methods, including the use of existing studies and the EWC database, interviews with employee and employer representatives at EWCs, as well as consultations with social partners at EU and national level.

The final report provides analysis, conclusions and recommendations on the effectiveness and efficiency of the implementation of the Recast Directive. It will support the work of the Commission in the preparation of the report to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive due by mid-2016.

## **ABSTRAIT**

La possibilité de créer des comités d'entreprise européens (CEE) a été introduite par la Directive 94/45/CE. Les CEE sont des organes représentant les travailleurs européens dans les entreprises transnationales et leur objectif est de s'assurer que les travailleurs sont informés et consultés sur toute question ou décision d'entreprise qui pourrait avoir un impact sur l'emploi et les conditions de travail.

Au fil des années, un certain nombre d'enjeux juridiques et de mise en œuvre sont apparus et ont conduit à la refonte de la Directive originale en 2009.

Cette étude a pour objectif d'évaluer la transposition et la mise en œuvre de la Directive 2009/38/CE (Directive de refonte) dans les Etats Membres de l'UE et de l'EEE. Il s'agit également de comprendre si les objectifs de la Directive de refonte ont été atteints, à savoir encourager la création de plus de CEE, l'amélioration de l'efficacité du processus d'information et de consultation transnationale des travailleurs et le renforcement de la sécurité juridique. En outre, l'évaluation a évalué les coûts et les avantages de la mise en œuvre des dispositions de la Directive de refonte ainsi que l'identification de bonnes pratiques.

Une évaluation a notamment été entreprise pour évaluer la cohérence des dispositions de la Directive de refonte avec la législation européenne en vigueur et l'évolution des politiques européennes existantes dans le domaine de l'information et consultation des travailleurs. Les législations nationales transposant les nouvelles règles de la Directive ont été évaluées pour chaque nouvelle disposition apportant une modification dans un des domaines clés de la Directive.

L'évaluation a été réalisée à l'aide de différentes sources et méthodes, comprenant entre autres, des études existantes, la base de données des CEE, des entretiens avec des représentants des travailleurs et des employeurs, ainsi que des consultations avec les partenaires sociaux au niveau européen et national.

Le rapport final présente des analyses, conclusions et recommandations sur l'efficacité et l'efficience de la mise en œuvre de la Directive de refonte. Ce rapport s'inscrit dans le cadre des travaux de préparation du rapport de la Commission au Parlement européen, au Conseil et au Comité économique et social concernant la mise en œuvre de cette Directive, qui est attendu d'ici mi-2016.

## ABSTRAKT

Die Möglichkeit, einen Europäischen Betriebsrat (EBR) einzusetzen, wurde ursprünglich durch die Richtlinie 94/45/EG eingeführt. Europäische Betriebsräte sind Organe, die europäische Arbeitnehmer in gemeinschaftsweit operierenden Unternehmen vertreten und gewährleisten sollen, dass die Arbeitnehmer von der Unternehmensleitung über geschäftliche Angelegenheiten oder Entscheidungen, die sich möglicherweise auf die Beschäftigungs- und Arbeitsbedingungen auswirken, unterrichtet und angehört werden.

Im Laufe der Jahre entstanden jedoch rechtliche und umsetzungsbedingte Probleme, und die ursprüngliche Richtlinie wurde durch die Richtlinie 2009/38/EG (Neufassung) ersetzt.

Zweck dieser Evaluierung war die Bewertung der Umsetzung der Richtlinie 2009/38/EG (Neufassung) in den EU-/EWR-Ländern sowie die Bewertung des Umfangs, in dem diese neugefasste Richtlinie ihre Ziele erreicht hat, wie beispielsweise die Einrichtung von weiteren EWR, eine effektivere länderübergreifende Unterrichtung und Anhörung der Arbeitnehmer und die Förderung der Rechtssicherheit. Zudem wurden die durch die Umsetzung der Bestimmungen der neugefassten Richtlinie entstandenen Kosten und Vorteile bewertet und erfolgreiche Verfahren ermittelt.

Des Weiteren wurden die Kohärenz der in der neugefassten Richtlinie enthaltenen Bestimmungen mit der bestehenden europäischen Gesetzgebung beurteilt sowie die politischen Entwicklungen im Bereich der Unterrichtung und Anhörung der Arbeitnehmer bewertet. Schließlich wurden die der Neufassung der Richtlinie angeglichenen nationalen Gesetze mit den einzelnen Bestimmungen, die die wichtigsten Änderungen der neugefassten Richtlinie darstellen, verglichen.

Die Evaluierung erfolgte mittels verschiedener Quellen und Methoden. Dazu gehörten beispielsweise bestehende Studien und die EBR-Datenbank, Gespräche mit Arbeitnehmer- und Arbeitgebervertretern in EBR sowie mit Sozialpartnern auf EU- und nationaler Ebene.

Der Schlussbericht enthält eine Analyse, Schlussfolgerungen und Empfehlungen zu Effektivität und Effizienz der Umsetzung der neugefassten Richtlinie und wird die Kommission bei Erstellung ihres Berichts an das Europäische Parlament, den Rat und den Europäischen Wirtschafts- und Sozialausschuss, der Mitte 2016 veröffentlicht werden soll, unterstützen.

## **EXECUTIVE SUMMARY**

### **Background**

- This summary covers the main findings of the *Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*. The purpose of the study was to **evaluate the impact of new rules and changes introduced by Directive 2009/38/EC on the establishment and operation 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)**.
- European Works Councils (EWCs) are bodies representing European employees in transnational companies. They aim to ensure that employees are informed and consulted by management on any business issues or decisions that could have an impact on employment and working conditions. The possibility to establish European Works Councils was first introduced by Directive 94/45/EC. Over the years, a number of legal and implementation challenges arose which led to the **recast of the original Directive in 2009**.
- The study methodology combined an analysis of secondary data, including an analysis of the coherence of the Directive with other EU legislation addressing workers' information and consultation rights and the articulation between different information and consultation instruments, a legal analysis of the national transposition and national case law, and a literature review. Additionally, primary data were collected from stakeholders such as EU and national level social partners and Member State ministries. Furthermore, information was gathered via interviews and surveys from employee and/or employer representatives in companies which established EWCs under the new rules (henceforth 'Recast EWCs'), as well as companies which established EWCs under Directive 94/45/EC but which have recently renegotiated or revised their agreement in line with the rules of the Recast Directive (later 'Renegotiated EWCs'). Finally, information was also gathered from companies which concluded their agreement under Art. 6 of Directive (94/45/EC) and have not (so far) revised their Agreement (henceforth 'Art.6 EWCs').
- Although the response rate to interview requests was relatively high (at 63%), employee side representatives were more likely to respond than employer representatives, leading to an imbalance in the responses received and limited the information which could be collected on the costs of setting up and running an EWC. The legal transposition analysis was rendered more challenging by the fact that transposition reports to the Commission only include information on changes to existing legislation, making it more difficult to fully assess provisions already in place prior to the Recast and whether these meet the requirements of the Recast Directive. Uncertainties in this analysis were addressed by a further round of consultations with relevant national ministries. It should be noted that the resulting assessment represents the views of the contractor and not that of the European Commission.

### **Transposition of the Recast Directive in the EU Member States and the EEA countries**

#### ***Extent to which all the provisions have been correctly transposed into national legislation***

- **In the majority of cases, the national laws correctly transposed the provisions** of the Directive.



**Differences, if any, in scope of the EU and EEA countries laws transposing the Directive were as follows:**

- 15 EU and EEA countries have introduced provisions which are more favourable than those foreseen in the Directive. These relate, among other things, to enhanced rights to means to perform EWC representative duties and enhanced definitions of information, consultation and transnational matters.
- By contrast, in 12 EU and EEA countries at least one national rule was assessed as not meeting all the requirements of the Directive. Only in 4 Member States at least one of the key substantive provisions of the Directive<sup>1</sup> was judged to have not been transposed fully. In 9 EU and EEA countries, a relatively minor non-substantive provision (or part of such provision) was not transposed. Among such more significant shortcomings in transposition were the failure to provide the right to training for the EWC representatives without loss of wages, the requirement to inform European social partners about the start of negotiations and ensuring the SNB right to meet without management.

**Impacts in terms of legal certainty**

- Most stakeholders consulted considered that the Recast Directive has increased legal certainty.

**Coherence of the Recast Directive with other existing European legislation**

- The new rules are **generally consistent with other EU legislation addressing workers information and consultation rights.**
- Key possible inconsistencies with the existing I&C instruments identified relate to the Recast EWC Directive **not including a list of (minimum) information to be provided to employees in the I&C procedures, a specific timeframe for I&C procedures and do not require an official management answer to an opinion from an EWC in a consultation process** (or indeed to reach agreement, as provided by Directive 2002/14/EC).

**Fulfilment of the Directive's objectives**

**Impact on the creation of EWCs and on the continuous functioning of existing EWCs**

- **Both Directive 94/45/EC and the Recast Directive provided an impetus for the setting up of EWCs, although in the case of the Recast, this was much less significant in terms of the number of newly created EWCs.**
- Up to 58 EWCs have been newly established in line with the rules of the Recast Directive since June 2009. Companies headquartered in France (19%), followed by Sweden (12%) and the US (9%) host the largest number and share of Recast EWCs. Since June 2009 **more EWCs have been created in the 'building & woodwork', 'transport', and different service sectors.**
- On average, companies with **Recast EWCs are smaller in terms of number of employees and the average turnover** than companies with EWCs established under Articles 13 and 6 of Directive 94/45/EC. This affects the number of employee representatives on EWCs which is smaller in Recast EWCs (16 delegates) than in EWCs operating under Articles 13 and 6 (23 delegates).
- Recast EWCs operate a slightly **more frequent programme of plenary meetings** than other types of EWCs.

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<sup>1</sup> Key substantive provisions were considered to relate to the opening and conducting negotiations, role of social partners and experts, contents of the subsidiary requirements, general principles and concepts of information and consultation and transnational matters, links between the levels of information and consultation of employees, role and capacity of employees' representatives and the adaptation cause.

- There has been a significant **improvement in ensuring the 'right' to training for EWC representatives without a loss of wages**. Reference to this 'right' in EWC agreements has increased to 93% (from less than a third of the original Article 13 agreements having such a clause). Two-thirds of interviewed Recast EWC employee representatives confirmed that employees had made use of their right to training. Among those who had requested training, the vast majority (80%) noted that there had been **no particular challenges in securing access to it**.
- The Recast Directive has provided **some impetus for the renegotiation of existing EWC agreements**. 117 Article 13 and Article 6 EWC agreements have been renegotiated since June 2009. However, **an increase was observed in the proportion of EWCs operating under the subsidiary rules** (i.e. minimum conditions for the EWCs) since the introduction of the Recast Directive (but data recording issues might affect the reliability of this finding).

#### ***Impact on the effectiveness of EWCs in guaranteeing employees' information and consultation rights***

- The **impact of EWCs on restructuring decisions remains limited**. According to most employer and employee representatives, the consultation of EWC members has not led to any significant changes in corporate decision-making. The consultation of EWC members is however seen as positive by stakeholders to develop a common corporate vision and some EWCs have been able to influence processes of restructuring (in term of the protection and packages offered to affected workers).
- **The impact of the Recast on improving information flow in EWCs has been greater than its impact on improving consultation**. Information is considered to be delivered in a relatively timely fashion (e.g. in advance of a decision) in the majority (70%) of cases.
- A majority of Recast EWCs focus 'almost exclusively' on transnational matters. There are difficulties in some cases in relation to **the interpretation of the notion of transnationality**. The extent to which EWCs can focus on transnational matters **depends on the soundness of the interpretation of the concept** and the determination of EWC leadership to keep the discussions focussed on transnational issues. Some challenges appear to remain in relation to the precise interpretation of the concept of transnational matters in practice, as employee representatives often lack sufficient information to question what management deem to be transnational or national matters.

#### ***Impact on the role of EWCs in the negotiation, implementation and monitoring of transnational agreements***

- There has been a **limited impact of the Recast EWCs on the conclusion and quality of transnational company agreements**. Only 3 out of 37 Recast EWCs<sup>2</sup> have concluded such agreements to date. This may be due to the fact that many of these EWC have only become operational relatively recently.

#### **Costs and benefits generated by the Directive**

##### ***Fulfilment of worker protection objectives in light of resources utilised***

- The quantifiable **costs of setting up EWCs have declined** when compared to the experience of Article 6 agreements under Directive 94/45/EC (from EUR 143,537 to EUR 119,207). These lower costs primarily result from the fact that fewer meetings were held with fewer representatives (and therefore associated

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<sup>2</sup> Interviews were carried out with 37 out of 58 EWCs set up under the rules of the Recast Directive.

meeting costs) – albeit over a longer period of time – in regard to EWCs established under the Recast Directive. This is linked to the size of companies negotiating new agreements rather than the provisions of the Recast Directive.

- **Costs relating to the operation of Recast EWCs are similar to those of EWCs** established under Directive 94/45/EC and the main problems of the effective implementation of consultation in particular remain. Not much has changed in terms of EWCs influencing company decisions on transnational matters, despite the enhanced definition of these concepts.
- **Employee and employer representatives in the Recast EWCs are positive about the non-quantifiable benefits** of their EWC. It is notable that the perceived benefits of having an EWC decreased among companies with Recast EWCs compared to EWCs established under Directive 94/45/EC. The greatest decline in the perceived value of EWCs is in relation to their ability to affect the impact of restructuring situations on employees and their effectiveness in the exchange of information.
- At the same time, **the perception of non-quantifiable costs also seems to have decreased, particularly in the eyes of employers.** Notable was a reduction in the employers' perceptions of EWCs raising employee expectations in an unrealistic manner. Employers also considered EWCs less costly in terms of such bodies leading to calls for transnational collective bargaining, and introducing unnecessary rigidities into employee and management relations.

#### ***Extent of the impact of the economic context***

- The operation of the Recast EWCs has not been affected by **the economic and financial crisis (although the subject matters discussed may have been shaped by declining economies, e.g. resulting in restructuring)**. In those cases where the economic context affected the work of the EWC, the management openly discussed financial concerns of the company and asked the EWC members to respect some cost-cutting measures during the difficult times.

#### **Key recommendations from the study**

1. There is scope for the European Commission to initiate dialogue with the responsible national authorities in relation to instances where, on the basis of available legal texts, the transposition of the Directive appears to be insufficient on key substantive aspects of the Directive. The assessments made in this evaluation about shortcomings in transposition should be clarified in dialogue with the national authorities and appropriate action taken.
2. Improvements to the legal concepts could be considered through further clarifications and sharing of practical examples and best practices.

In principle, the Directive remains silent on which law shall be chosen to govern the negotiations or the national jurisdiction governing the EWC agreement (its existing rules only help to determine the relevant partner for workers representatives and define central management). This is left to the discretion of both sides and more prescriptive action could be taken to prevent possible misuses. This could include further specification in the legislation on this issue (e.g. stipulating that the national law of the company's European HQ should govern the EWC agreement; this could include guidance on how the location of the company's European HQ is to be determined, such as in relation to management structures or share of employees in the EU, etc.<sup>3</sup>).

3. The general Directive on information and consultation of workers (Directive 2002/14/EC) goes further than the Recast EWC Directive as regards to defining

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<sup>3</sup> Some jurisprudence from national case law is available on this issue (see section 4.6.1 – Manpower case).

'consultation'. First, it provides for consultation 'with a view to reaching an agreement' while the Recast EWC Directive 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 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'. Second, the general directive on I&C requires employers to provide a response and its reasons to an opinion. Those two elements could also be incorporated into the Recast Directive in order to strengthen its impact.

Furthermore, a number of stakeholders on the employee side remarked that more precise guidance could be given on the timing for information provision and the separation of information and consultation processes. This is due to the fact the Directive only stipulates that consultation should take place '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', which many on the employee side argue may be insufficient to ensure effective consultation. The rationale on the employer side is often that information needs to remain confidential specifically for companies listed on the stock market. The latter should, in principle, already be addressed by requiring EWC members to respect such confidentiality.

Further guidance could be given on the basis of the experience of EWCs which have established internal rules on the precise processes of information and consultation (steps and timing involved). This could be enhanced with testimony from relevant EWC members on the beneficial impact of implementing such clear processes.

4. The issues of enforcement, sanctions and penalties are left to the national level implementation measures. As a consequence, provisions vary significantly and lead to arguments that in some cases sanctions are not sufficiently dissuasive. Further action could be taken to ensure that sanctions and enforcement procedures are sufficiently dissuasive (such as sharing of information on different national practices and their impact).
5. The creation of additional EWCs (as not all eligible companies have established EWCs) could be further supported through the following actions: More work to publicise the legal entitlements and the potential benefits of EWCs to company and employee representatives (for instance supported by European and national social partner organisations). To undertake such outreach and publicity work, the eligible companies without the EWCs would need to be reached. Currently, there is insufficient knowledge about such companies, although some initiatives to map these exist (e.g. ETUI database) and European social partners (both cross-sectoral and sectoral) have some knowledge of relevant companies. To address any knowledge gap, further action could be taken, such as updating existing databases of eligible companies without EWCs, involving the ETUI and / or European social partners. The figure of 2,400 potentially eligible companies has been estimated some time ago, but this is a 'moving target' because of significant restructuring processes.

It could also take the form of the establishment and maintenance of a European level contact point for companies/ employees which would like to establish EWC and would like assistance, further guidance and signposting to existing legislation and EWC practice. Such contact points could be made public also by the national authorities in each of the Member States. The contact point at the

European level could provide continuous support and assistance in the process of the creation of the EWCs (such service could be contracted out to external providers or agencies such as Eurofound entrusted with such task). Such assistance is currently often provided by European social partner organisations, but in some cases they also lack knowledge of all potentially eligible companies and/or the capacity to assist in each case. As an alternative to a contact point, a webpage signposting relevant European sectoral social partner organisations (or relevant national bodies) could also be envisaged, but this have to be linked to a resource for the signposted organisations to deal with any queries.

Exchange of practice (including at HR conferences) between the management of potential and existing EWCs about the work and benefits of existing EWCs should be reinforced.

More examples of EWC operating in small companies should be provided and peer learning between them encouraged by the European Commission through organisation of peer learning events and seminars.

DG EMPL budget lines are available to support projects which could lead to the establishment of EWCs in the set up phase.

6. There is scope to consider how to further improve information and consultation processes in EWC.

Sharing best practices and real life examples from existing EWCs on how EWC involvement in the corporate decisions made a positive contribution to the company operation and culture across the EU (this evaluation already identified a number of such examples). This could include information on how to organise and optimally implement information and consultation in specific restructuring situations (e.g. should whole EWC or enhanced steering group – involving affected countries – be involved). Some EWCs have drawn up process plans setting out distinct information and consultation steps which might be of interest to other EWCs (see also Recommendation 2). To achieve this, a series of seminars and peer learning events could be organised in order to share the EWC practices. In such events, the EWC representatives could be invited to share and discuss the examples of their work in improving the EWC information and consultation processes.

A clearer distinction between the information and consultation phases can help EWCs in influencing the decision making, as well as employer willingness to share relevant information. More precise guidance (in the form of very practice-oriented 'how to' guide) on the timing for information provision and the separation of information and consultation processes, based on the legal interpretations of the Recast Directive, the identified court cases and practices of the existing EWCs could be discussed via those events/documentations.

7. Despite the further clarification provided on the concept of transnational matters by the Recast Directive, in practice significant uncertainties and tensions remain regarding how this should be interpreted and whether sufficient information is available to employees to query claims by management that certain matters are not transnational. An exchange of practices and guidance on the results of relevant Court cases may be of value in this area. There is thus scope for the European Commission to provide further guidance on practical interpretation of the concept of transnationality based on existing jurisprudence and examples from existing EWCs. The guidance could include a non-binding compendium of examples of the national court decisions with respect to the interpretation of the transnational matters, examples of existing EWC interpretations of transnational matters (drawn for example from EWC agreements) and assessments of the implications of such examples for the work of EWCs.

8. Some EWCs play a role in relation to concluding transnational company agreements (although the EWCs do not have such explicit negotiations powers). This EWC role could be further clarified through an explicit reference to such a role in the EWC related legislation to provide legal clarity and certainty on this question.
9. The right to training without a loss of wages has been a success of the Recast Directive. As many Recast EWCs are in the early stages of the implementation of their operations, a further review in a few years by the European Commission may be required to assess the implementation of this right in more detail to determine how much and what kind of training has been funded. The European Commission could continue to finance projects with joint training for EWC members, especially coming from smaller (in terms of turnover) companies (see also Recommendation 2).
10. Identified practices on how to maximise benefits and minimise costs should be more widely shared between the EWCs. These include:
  - Exchange of good practice on the role, rights and duties of the EWC members as suggested in previous recommendations to maximise the potential value of EWCs.
  - The existing EWCs exploring effective ways in reducing meeting costs without undermining the benefits of face to face meetings and the ability to communicate with representatives from all different countries by learning from the experience of existing EWCs (e.g. on cost of different venues, potential to use telephone or videoconferences for certain types of meetings such as more regular steering groups; cost of language training versus cost of interpretation/translation etc.).

## RÉSUMÉ

### Informations préliminaires

- Ce résumé évoque les principales observations de *l'Étude d'évaluation de la mise en œuvre de la Directive 2009/38/CE sur l'institution d'un comité d'entreprise européen*. L'objectif de cette étude consiste à **évaluer l'impact des nouvelles règles et des modifications introduites par la Directive 2009/38/CE concernant l'institution et le fonctionnement d'un comité d'entreprise européen ou d'une procédure dans des entreprises de dimension communautaire et des groupes d'entreprises de dimension communautaire en vue d'informer et de consulter les travailleurs (Directive de refonte)**.
- Les comités d'entreprise européens (CEE) sont des organes représentant les travailleurs européens dans les entreprises transnationales. L'objectif est de s'assurer que les travailleurs sont informés et consultés sur toute question ou décision d'entreprise qui pourrait avoir un impact sur l'emploi et les conditions de travail. La possibilité de créer des comités d'entreprise européens a été introduite pour la première fois dans la Directive 94/45/CE. Au fil des ans, un certain nombre d'enjeux juridiques et de mise en œuvre sont apparus et ont conduit à la **refonte de la Directive originale en 2009**.
- La méthodologie de l'étude combine une analyse de données secondaires, y compris une **analyse de la cohérence de la Directive 2009/38/CE avec d'autres législations de l'UE concernant les droits à l'information et à la consultation des travailleurs et son articulation avec les différents instruments d'information et de consultation existants au niveau de l'UE**. L'étude se fonde également sur une **analyse juridique de la transposition de la Directive en droit national**, des études de cas nationales, et une revue de la littérature existante. De plus, des données primaires ont été recueillies auprès de différents acteurs, tels que les partenaires sociaux aux niveaux européen et national et les ministres des États membres. En outre, des informations ont été rassemblées au travers d'entretiens et d'enquêtes menés auprès des représentants des travailleurs et/ou des employeurs dans les entreprises ayant créé des CEE selon les nouvelles règles (appelés ci-dessous « CEE 'refonte'»), ainsi que dans des entreprises ayant créé des CEE sur la base de la Directive 94/45/CE, mais ayant récemment renégocié ou révisé leur accord conformément aux règles de la Directive de refonte (plus tard, « CEE renégociés »). Enfin, des informations ont également été rassemblées auprès de entreprises ayant conclu leur accord conformément à l'Art. 6 de la Directive (94/45/CE) et n'ayant pas (encore) révisé leur accord (appelés ci-dessous « CEE Art. 6 »).
- Bien que le taux de réponse aux demandes d'entretiens ait été relativement élevé (63 %), les représentants des travailleurs ont été plus enclins à répondre que les représentants des employeurs, ce qui a entraîné un déséquilibre dans les réponses reçues et a limité les informations recueillies concernant les coûts de création et d'organisation d'un CEE. L'analyse de la transposition de la Directive s'est avérée plus complexe puisque les rapports de transposition remis à la Commission par les États Membres ne fournissent que des informations sur les amendements apportés à la législation déjà en vigueur lors de la mise en œuvre de la Directive 2009/38/CE. Il a donc été plus difficile de comprendre quelles étaient les dispositions déjà en place avant la mise en œuvre de la Directive de refonte et si ces dernières répondaient bien aux exigences de cette Directive. Les incertitudes de cette analyse ont été revues grâce à une autre série de consultations avec les ministères nationaux concernés. Il convient de noter que l'évaluation qui en ressort représente les points de vue du contractant et non ceux de la Commission européenne.



## **Transposition de la Directive de refonte dans les États membres de l'UE et les pays de l'EEE**

### ***Transposition des dispositions de la Directive en droit national***

- **Dans la majorité des cas, les dispositions de la Directive ont correctement été transposées en droit national.**

### ***Les différences de transposition en droit national concernant le champ d'application de la Directive dans les États Membres de l'UE et de l'EEE***

- 15 États membres ont introduit des dispositions plus favorables que celles prévues dans la Directive. Celles-ci concernent, entre autres, un renforcement du droit d'obtenir les ressources nécessaires pour exercer les devoirs de représentant du CEE ainsi qu'une consolidation des définitions des concepts d'information, de consultation et des questions transnationales.
- En revanche, dans 11 États membres, au moins une disposition nationale ne répondait pas à toutes les exigences de la Directive. Dans seulement 4 États membres, on a estimé qu'au moins une des principales dispositions essentielles de la Directive<sup>4</sup> n'avait été que partiellement transposée. Dans 8 États membres, une disposition essentielle relativement mineure (ou une partie de cette disposition) n'a pas été transposée. Les lacunes les plus significatives en termes de transposition sont notamment l'absence de droit à la formation sans perte de salaire pour les représentants des CEE, l'exigence d'informer les partenaires sociaux européens sur l'ouverture de négociations et les dispositions sur la composition du CEE.

### ***Impacts en termes de sécurité juridique***

- La plupart des acteurs consultés ont considéré que la Directive de refonte avait renforcé la sécurité juridique.

### ***Cohérence de la Directive de refonte avec d'autres législations européennes existantes***

- **Dans l'ensemble, les nouvelles provisions sont conformes aux autres législations de l'UE concernant les droits à l'information et à la consultation des travailleurs.**
- Les principales incohérences avec les instruments d'information et consultation (I&C) existants sont liées au fait que la Directive de refonte **n'inclut ni de liste d'informations (minimum) à fournir aux travailleurs dans les procédures d'I&C, ni de calendrier spécifique pour les procédures d'I&C, et ne requiert pas de réponse officielle de la direction à une opinion provenant d'un CEE au cours d'un processus de consultation** (ou pour arriver à un accord, tel qu'énoncé par la Directive 2002/14/CE).

### ***Réalisation des objectifs de la Directive***

#### ***Impact sur la création de CEE et sur la continuité du fonctionnement des CEE existants***

- **La Directive 94/45/CE et la Directive 2009/38/CE ont donné un élan à la mise en place de CEE, bien que, dans le cas de la Directive de refonte, le nombre de CEE créés ait été moins important.**

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<sup>4</sup> Les principales dispositions essentielles ont été considérées comme liées à l'ouverture et à la conduite de négociations, au rôle des partenaires sociaux et des experts, au contenu des exigences subsidiaires, aux principes et concepts généraux de l'information, de la consultation et des questions transnationales, l'articulation entre les niveaux d'information et de consultation des travailleurs, au rôle et à la capacité des représentants des travailleurs et à la cause d'adaptation.



- Depuis juin 2009, 58 CEE ont été créés conformément aux règles de la Directive de refonte. Ce sont les entreprises basées en France (19 %), suivie par la Suède (12 %) et les États-Unis (9 %) qui possèdent le plus grand nombre et la plus grande part de CEE 'refonte'. Depuis juin 2009, **davantage de CEE ont été créés dans les secteurs de la « construction et menuiserie », du « transport » et dans différents secteurs de services.**
- En moyenne, les entreprises avec des **CEE 'refonte' sont plus petites en termes de nombre de travailleurs et de chiffre d'affaires moyen** que les entreprises avec des CEE créés selon les Articles 13 et 6 de la Directive 94/45/CE. Cela affecte le nombre de représentants des travailleurs dans les CEE 'refonte' qui est inférieur (16 délégués) à celui des CEE fonctionnant selon les Articles 13 et 6 (23 délégués).
- Les CEE de la nouvelle directive fonctionnent avec **un programme de réunions plénières légèrement plus fréquentes** que les autres types de CEE.
- Il y a eu une **amélioration significative en vue d'assurer le « droit » à la formation pour les représentants des CEE sans perte de salaire.** La référence à ce « droit » dans les accords des CEE est montée à 93 % (en partant de moins d'un tiers des accords originaux au titre de l'Article 13 comprenant une telle clause). Les deux tiers des représentants des travailleurs des CEE 'refonte' interrogés ont confirmé que les travailleurs avaient fait usage de leur droit à la formation. Parmi ceux qui avaient demandé une formation, la plus grande majorité (80 %) n'avait remarqué **aucun problème particulier dans l'accès à celle-ci.**
- La Directive de refonte a lancé une certaine dynamique **pour la renégociation d'accords existants de CEE.** 117 accords de CEE selon l'Article 13 et l'Article 6 ont été renégociés depuis juin 2009. Cependant, **la proportion de CEE fonctionnant selon les réglementations subsidiaires a augmenté** (c.-à-d. les conditions minimum pour les CEE) depuis l'introduction de la Directive de refonte (mais des problèmes d'enregistrement des données peuvent affecter la fiabilité de cette observation).

#### ***Impact sur l'efficacité des CEE à garantir les droits à l'information et à la consultation des travailleurs***

- **L'impact des CEE sur la restructuration des décisions demeure limité.** Selon la plupart des représentants des employeurs et des travailleurs, la consultation des membres des CEE n'a pas abouti à des modifications significatives dans la prise de décision des entreprises. Cependant, la consultation des membres des CEE est jugée comme positive par les différents acteurs pour développer une vision d'entreprise commune. De plus, certains CEE ont pu influencer les processus de restructuration concernant les aspects de protection des travailleurs et les conditions offertes aux travailleurs affectés.
- **La Directive 2009/38/CE a eu un impact plus important sur l'amélioration du flux d'informations dans les CEE que sur l'amélioration du processus de consultation.** On estime que l'information est livrée en temps relativement opportun (à savoir, avant une décision) dans la majorité des cas (70 %).
- Une majorité des CEE créés sous l'égide de la Directive 2009/38 traitent « presque exclusivement » de questions transnationales. Dans certains cas, il existe des difficultés relatives à **l'interprétation de la notion de transnationalité.** Deux facteurs influencent la capacité des CEE à se focaliser sur des questions transnationales : la façon dont est interprétée le concept de transnationalité et la volonté des représentants de l'employeur à garder les discussions axées sur les questions transnationales.
- Néanmoins, certaines difficultés demeurent quant à l'interprétation exacte du concept de 'questions transnationales' dans la pratique. En effet, les

représentants des travailleurs manquent souvent d'informations pour juger du caractère transnational ou national des sujets discutés.

### **Impact sur le rôle des CEE dans la négociation, la mise en œuvre et la surveillance des accords transnationaux**

- **La Directive 2009/38/CE a eu un impact limité sur la conclusion et la qualité des accords d'entreprise transnationaux.** À ce jour, seulement 3 des 37 CEE 'refonte'<sup>5</sup> ont conclu de tels accords. Ceci peut être dû au fait que bon nombre de ces CEE ne sont devenus opérationnels que relativement récemment.

### **Coûts et bénéfices générés par la Directive**

#### **Réalisation des objectifs de protection des travailleurs selon les ressources utilisées**

- **Les coûts quantifiables de mise en place des CEE ont diminué** par rapport aux coûts engendrés par la création de CEE sous l'Article 6 de la Directive 94/45/CE (passant de 143 537 EUR à 119 207 EUR). La baisse de ces coûts découle principalement de la baisse du nombre de réunions et du nombre de représentants présents (et donc des coûts de réunions qui y sont associés) quand bien même la procédure de création de CEE s'étalait sur un laps de temps plus long dans le cas des CEE 'refonte'. Ceci est dû à la taille des entreprises qui négocient de nouveaux accords plutôt qu'aux dispositions de la Directive de refonte.
- **Les coûts relatifs au fonctionnement des CEE 'refonte' sont identiques à ceux des CEE** créés au titre de la Directive 95/45/CE, et les principaux problèmes liés à l'efficacité de la mise en œuvre des dispositions concernant la consultation en particulier, restent inchangés. En outre, le degré d'influence des CEE sur les décisions d'entreprises concernant des questions transnationales a peu évolué malgré la révision de la définition de ces concepts.
- **Les représentants des travailleurs et des employeurs des CEE 'refonte' ont un avis positif sur les bénéfices non quantifiables** de leur CEE. Il faut noter que les bénéfices perçus liés à la création d'un CEE ont diminué dans les entreprises ayant un CEE 'refonte', par rapport aux CEE créés selon la Directive 95/45/CE. Le déclin le plus important dans la valeur perçue des CEE est lié à leur capacité d'impacter les situations des travailleurs lors de restructurations et leur efficacité lors d'échanges d'informations.
- Parallèlement, **la perception des coûts non quantifiables semble également avoir diminué, en particulier aux yeux des employeurs.** Il est important de relever que les employeurs semblent moins penser que les CEE augmentent les attentes des travailleurs de façon irréaliste. Les employeurs ont également jugé les CEE moins coûteux vis-à-vis des exigences des négociations collectives transnationales et par rapport aux rigidités inutiles qui pourraient survenir dans les relations avec les travailleurs et la direction.

#### **Étendue de l'impact du contexte économique**

- Le fonctionnement des CEE 'refonte' n'a pas été affecté par **la crise économique et financière (bien que les sujets débattus aient pu être influencés par ce contexte d'économies en déclin, par exemple, lors de la survenue de restructurations)**. Dans les cas où le contexte économique a pu affecter le travail du CEE, la direction a discuté ouvertement des problèmes financiers de l'entreprise et a demandé aux membres du CEE de respecter certaines mesures de réduction des coûts pendant la période de crise.

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<sup>5</sup> Des entretiens ont été menés auprès de 37 des 58 CEE mis en place selon les réglementations de la Directive de refonte.

## Recommandations clés de cette étude

1. Il est possible pour la Commission européenne de nouer le dialogue avec les autorités nationales responsables concernant les instances où, sur la base de textes juridiques disponibles, la transposition de la Directive apparaît insuffisante sur les principaux aspects essentiels de la Directive. Les résultats de cette évaluation sur les lacunes de transposition doivent être clarifiés par un dialogue avec les autorités nationales, et des mesures appropriées doivent être prises.
2. Des améliorations des concepts juridiques pourraient être envisagées grâce à de plus amples clarifications et au partage d'exemples concrets et de bonnes pratiques.
3. En principe, la Directive ne donne pas d'indications quant à la loi qui doit être choisie pour régir les négociations ainsi que la juridiction nationale compétente pour juger de l'accord du CEE (les dispositions existantes n'aident qu'à déterminer le partenaire adéquat pour les représentants des travailleurs et à définir la direction centrale). Cela est laissé à la discrétion de chacune des deux parties, et une mesure plus contraignante pourrait être prise pour éviter de possibles abus. Ceci pourrait inclure une nouvelle spécification dans la législation concernant cette question (à savoir, la disposition selon laquelle la loi nationale du siège européen de l'entreprise doit régir l'accord du CEE ; cela pourrait inclure des instructions sur la manière dont doit être déterminée la localisation du siège européen de l'entreprise, en relation avec les structures de direction ou la part des travailleurs dans l'UE, etc.<sup>6</sup>).

La Directive établissant un cadre général relatif à l'information et la consultation des travailleurs (Directive 2002/14/CE) va au-delà de la Directive de refonte en ce qui concerne la définition de « consultation ». Tout d'abord, elle prévoit une consultation « en vue d'aboutir à un accord », tandis que la Directive de refonte dispose que la consultation consiste en « l'établissement d'un dialogue et l'échange de vues entre les représentants des travailleurs et la direction centrale ou tout autre niveau de direction plus approprié, à un moment, d'une façon et avec un contenu qui permettent aux représentants des travailleurs d'exprimer, sur la base des informations fournies et dans un délai raisonnable, un avis concernant les mesures proposées qui font l'objet de la consultation, sans préjudice des responsabilités de la direction, lequel *pourra être pris en compte* au sein de l'entreprise de dimension communautaire ou du groupe d'entreprises de dimension communautaire ». En outre, la Directive établissant un cadre général relatif à l'I&C exige de la part des employeurs l'apport d'une réponse motivée. Cet élément pourrait également être incorporé à la Directive de refonte afin d'en renforcer l'impact.

De plus, un certain nombre d'acteurs du côté des travailleurs ont mentionné le fait que des instructions plus précises pourraient être fournies sur le calendrier de communication d'informations et la séparation des processus d'information et de consultation. En effet, la Directive mentionne uniquement le fait que la consultation doit avoir lieu « à un moment, d'une façon et avec un contenu qui permettent aux représentants des travailleurs d'exprimer, sur la base des informations fournies et dans un délai raisonnable un avis concernant les mesures proposées qui font l'objet de la consultation ». Un certain nombre de personnes du côté des travailleurs soutiennent que cela peut être insuffisant pour assurer une consultation efficace. La justification du côté des employeurs consiste souvent à dire que l'information doit rester confidentielle, en particulier pour les entreprises cotées en bourse. En principe, ceci est déjà couvert par la clause de

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<sup>6</sup> Il existe une jurisprudence antérieure sur cette question (voir section 4.6.1 - Cas de Manpower).

confidentialité qui exige de la part des membres du CEE de ne pas révéler à des tiers les informations qui leur ont été expressément communiquées à titre confidentiel.

De nouvelles instructions pourraient être apportées sur la base de l'expérience des CEE qui ont établi des réglementations internes sur les processus précis d'information et de consultation (étapes et calendrier). Ceci pourrait être complété en apportant le témoignage de membres compétents du CEE sur l'impact bénéfique de la mise en place de tels processus clairs et précis.

4. Les questions relatives à l'application, aux sanctions et aux pénalités relèvent des mesures de mise en œuvre au niveau national. Par conséquent, les dispositions varient de manière significative et mènent à des débats selon lesquels les sanctions ne sont parfois pas suffisamment dissuasives. De nouvelles mesures pourraient être prises pour assurer que les sanctions et les procédures d'application soient suffisamment dissuasives (telles que le partage d'informations sur les différentes pratiques nationales et leur impact).
5. La création de CEE supplémentaires (puisque toutes les entreprises éligibles/remplissant les critères de la directive n'ont pas créé de CEE) pourrait être davantage soutenue par les actions suivantes : plus d'efforts pour rendre publics les droits juridiques et les bénéfices potentiels des CEE aux représentants des entreprises et des travailleurs (par ex., soutien d'organisations de partenaires sociaux européens et nationaux). Pour entreprendre un tel travail de diffusion et de publicité, il faudrait toucher les entreprises remplissant les critères de la Directive et n'ayant pas encore de CEE. Actuellement, la connaissance de telles entreprises est insuffisante, bien que des initiatives pour en dresser une liste existent (à savoir, la base de données ETUI) et que des partenaires sociaux européens (à la fois interprofessionnels et sectoriels) en aient connaissance. Pour répondre à ces lacunes, de nouvelles mesures pourraient être prises, telles que la mise à jour de bases de données existantes sur les entreprises remplissant les critères de la Directive et n'ayant pas de CEE, impliquant l'ETUI et/ou les partenaires sociaux européens. Il y a quelque temps, le nombre d'entreprises qui remplissent les critères de la Directive de refonte a été estimé à 2 400, mais c'est une « cible mouvante » à cause des processus de restructuration significatifs.

Cela pourrait également prendre la forme d'une création et d'une maintenance d'un point de contact au niveau européen pour les entreprises/travailleurs qui aimeraient créer un CEE et souhaiteraient de l'aide, de nouvelles instructions et indications sur la législation existante et les pratiques des CEE. De tels points de contact pourraient également être rendus publics par les autorités nationales dans chacun des États membres. Le point de contact au niveau européen pourrait apporter un soutien et une aide continue dans le processus de création de CEE (un tel service pourrait être confié à des prestataires ou agences extérieurs tels que Eurofound). Une telle aide est actuellement souvent apportée par des organisations de partenaires sociaux européens, mais dans certains cas, elles manquent d'informations sur toutes les entreprises remplissant les critères de la Directive et n'ont parfois pas la capacité d'apporter leur aide pour chaque cas. Comme alternative à un point de contact, une page Web indiquant les organisations de partenaires sociaux sectoriels européens compétentes pourrait également être envisagée (ou des organismes nationaux compétents), mais celle-ci devra être liée à une ressource pour les organisations indiquées pour pouvoir gérer les demandes d'informations.

L'échange de bonnes pratiques (y compris lors de conférences RH) entre la direction des CEE potentiels et existants au sujet du travail et des bénéfices des CEE existants doit être renforcé.

Plus d'exemples de CEE fonctionnant dans des petites entreprises doivent être fournis, et l'apprentissage par les pairs et l'échange d'expériences entre ces acteurs devra être encouragé par la Commission européenne par le biais d'organisation d'événements et de séminaires d'apprentissage par les pairs.

Les lignes budgétaires de la DG EMPL sont disponibles pour soutenir des projets qui pourraient mener à la création de CEE.

6. Il est possible d'examiner attentivement comment améliorer davantage les processus d'information et de consultation dans les CEE.

Cela consisterait à partager les bonnes pratiques et les exemples concrets de CEE sur la manière dont l'implication de ces derniers dans les décisions de l'entreprise a apporté une contribution positive au fonctionnement et à la culture d'entreprise à travers l'UE (cette évaluation a déjà identifié un certain nombre d'exemples). Ceci pourrait inclure des informations sur la manière d'organiser et de mettre en place de façon optimale l'information et la consultation dans des situations de restructuration spécifiques (à savoir, si tout le CEE ou un groupe de pilotage renforcé, impliquant les pays affectés, doit être impliqué). Certains CEE ont élaboré des plans de processus pour la conception d'étapes d'information et de consultation distinctes qui pourraient représenter un intérêt pour les autres CEE (voir également la Recommandation 2). Afin d'y parvenir, une série de séminaires et d'événements d'apprentissage par les pairs pourraient être organisés afin de partager les pratiques des CEE. Lors de tels événements, les représentants des CEE pourraient être invités à partager et à discuter des exemples de leur travail d'amélioration des processus d'information et de consultation des CEE.

Une distinction plus claire entre les phases d'information et de consultation peut aider les CEE à influencer la prise de décision, ainsi que la volonté des employeurs de partager des informations pertinentes. Des indications plus précises (sous la forme d'un guide très pratique) sur les délais pour communiquer l'information et la séparation des processus d'information et de consultation, basées sur les interprétations juridiques de la Directive de refonte, la jurisprudence et les pratiques des CEE existants pourraient être examinées à travers ces événements/documents.

7. Malgré la nouvelle clarification apportée au concept des questions transnationales par la Directive de refonte, il reste, dans la pratique, des incertitudes et des tensions significatives concernant la manière dont cela doit être interprété et concernant le fait de savoir s'il y a un nombre suffisant d'informations disponibles aux travailleurs pour remettre en question les affirmations de la direction selon lesquelles certaines questions ne sont pas transnationales. Dans ce domaine, un échange de bonnes pratiques et des conseils pratiques sur les décisions de justice pertinentes peut être utile. Ainsi, il est possible pour la Commission européenne de fournir de nouvelles instructions/clarifications sur l'interprétation pratique du concept de transnationalité basé sur la jurisprudence existante et les exemples de CEE existants. Ces instructions pourraient inclure un recueil non contraignant d'exemples des décisions de justice au niveau national quant à l'interprétation des questions transnationales, d'exemples d'interprétations des CEE existants des questions transnationales (tirés par exemple des accords des CEE) et d'évaluations des implications de tels exemples pour le travail des CEE.
8. Certains CEE jouent un rôle en relation avec la conclusion d'accords d'entreprise transnationaux (bien que les CEE n'aient pas de tels pouvoirs de négociation explicites). Ce rôle des CEE pourrait être davantage clarifié par une référence explicite à un tel rôle dans le CEE en rapport avec la législation pour fournir clarté et certitude juridiques sur cette question.

9. Le droit à la formation sans perte de salaire a été un succès de la Directive de refonte. Comme bon nombre de refontes de CEE n'en sont qu'aux débuts de la mise en place de leur fonctionnement, un examen plus poussé dans quelques années par la Commission européenne pourrait être nécessaire pour évaluer plus en détail la mise en place de ce droit afin de déterminer le nombre et le type de formations financées. La Commission européenne pourrait continuer à financer des projets avec une formation conjointe pour les membres des CEE, particulièrement ceux provenant des entreprises plus petites (en termes de chiffre d'affaires ; voir également la Recommandation 2).
10. Les pratiques identifiées sur la manière de maximiser les bénéfices et de minimiser les coûts doivent être partagées plus amplement entre les CEE. Il s'agit :
  - de l'échange de bonnes pratiques sur le rôle, les droits et les devoirs des membres des CEE tel que suggéré dans des recommandations précédentes pour maximiser la valeur potentielle des CEE ;
  - de l'exploration par les CEE existants de manières efficaces de réduire les coûts de réunions sans affaiblir les bénéfices des réunions en personne et la possibilité de communiquer avec des représentants des différents pays en apprenant de l'expérience des CEE existants (à savoir, sur le coût de différents lieux, la possibilité d'utiliser le téléphone ou des visioconférences pour certains types de réunions tels que pour l'organisation de réunions du comité restreint plus fréquemment ; le coût d'une formation en langue par rapport au coût d'un service d'interprétariat/de traduction, etc.)

## ZUSAMMENFASSUNG

### Hintergrund

- Diese Zusammenfassung gibt einen Überblick über die wichtigsten Ergebnisse der *Studie zur Evaluierung der Umsetzung der Richtlinie 2009/38/EG über die Einsetzung eines Europäischen Betriebsrats*. Ziel der Studie war es **zu bewerten, welche Folgen die neuen Regeln und Änderungen hatten, die durch die Richtlinie 2009/38/EG über die Einsetzung eines Europäischen Betriebsrats oder die Schaffung eines Verfahrens zur Unterrichtung und Anhörung der Arbeitnehmer in gemeinschaftsweit operierenden Unternehmen und Unternehmensgruppen (Neufassung) eingeführt wurden.**
- Europäische Betriebsräte (EBR) sind Organe, die europäische Arbeitnehmer in gemeinschaftsweit operierenden Unternehmen vertreten und gewährleisten sollen, dass die Arbeitnehmer von der Unternehmensleitung über geschäftliche Angelegenheiten oder Entscheidungen, die sich möglicherweise auf die Beschäftigungs- und Arbeitsbedingungen auswirken, unterrichtet und angehört werden. Die Möglichkeit, einen Europäischen Betriebsrat einzusetzen, wurde ursprünglich durch die Richtlinie 94/45/EG eingeführt. Im Laufe der Jahre entstanden jedoch rechtliche und umsetzungsbedingte Probleme, so dass **im Jahr 2009 eine Neufassung der ursprünglichen Richtlinie verabschiedet wurde.**
- Die vorliegende Studie umfasst eine Analyse von Sekundärdaten, darunter eine **Analyse der Kohärenz der Richtlinie mit anderen EU-Rechtsvorschriften über die Unterrichtungs- und Anhörungsrechte der Arbeitnehmer und der Abstimmung zwischen verschiedenen Informations- und Anhörungsinstrumenten**, ferner eine **Analyse der Umsetzung in innerstaatliches Recht** und des nationalen Fallrechts sowie eine Sichtung der Literatur. Darüber hinaus wurden Primärdaten unter Interessenvertretern, wie europäischen und nationalen Sozialpartnern und Vertretern nationaler Ministerien, erhoben. Zusätzlich wurden Informationen anhand von Umfragen und Interviews gesammelt, die zum einen unter Arbeitnehmer- und/oder Arbeitgebervertretern in Unternehmen durchgeführt wurden, die einen Europäischen Betriebsrat auf Grundlage der Neufassung der Richtlinie eingeführt hatten (im Folgenden als „Neufassungs-EBR“ bezeichnet), zum anderen unter Arbeitnehmer- und/oder Arbeitgebervertretern in Unternehmen, die ihren Europäischen Betriebsrat auf Grundlage der Richtlinie 94/45/EG eingerichtet hatten, die Vereinbarung aber kürzlich gemäß den Regeln der Neufassung der Richtlinie neu verhandelt oder überarbeitet hatten („Neuverhandelter EBR“). Abschließend wurden auch Informationen über Unternehmen zusammengetragen, die ihre Vereinbarung gemäß Artikel 6 der Richtlinie 94/45/EG geschlossen und (bislang) noch nicht überarbeitet hatten (im Folgenden als „Artikel-6-EBR“ bezeichnet).
- Auf die Bitte, ein Interview durchführen zu dürfen, wurde zwar relativ positiv reagiert (63 %), doch waren Arbeitnehmervertreter mit größerer Wahrscheinlichkeit gesprächsbereit als Arbeitgebervertreter, was zu einem Ungleichgewicht bei den Antworten führte und nur eine begrenzte Erhebung von Daten über die bei der Einrichtung und Tätigkeit eines EBR entstehenden Kosten zuließ. Zudem war die Analyse der Umsetzung der Richtlinie in nationales Recht insofern problematisch, als die Umsetzungsberichte für die Kommission nur Informationen über die Änderung der bestehenden Rechtsvorschriften enthalten. Aus diesem Grund war es schwierig, die bereits vor der Neufassung getroffenen Regelungen zu bewerten und zu beurteilen, ob sie den Anforderungen der Neufassung der Richtlinie genügen. Diesbezügliche Ungewissheiten wurden im Rahmen weiterer Gespräche mit Vertretern zuständiger nationaler Ministerien beseitigt. An dieser Stelle wird darauf

verwiesen, dass die resultierende Beurteilung die Ansichten des Auftragnehmers und nicht die der Europäischen Kommission wiedergeben.

### **Umsetzung der Neufassung der Richtlinie in den EU-Mitgliedstaaten und den EWR-Ländern**

#### ***Umfang, in dem alle Bestimmungen korrekt in innerstaatliches Recht umgesetzt wurden***

- **In der Mehrzahl der Fälle wurden die Bestimmungen der Richtlinie korrekt in nationales Recht umgesetzt.**

#### ***Unterschiede im Hinblick auf den Anwendungsbereich der Gesetze in EU- und EWR-Ländern, die die Richtlinie in innerstaatliches Recht umgesetzt haben, waren wie folgt:***

- 15 Mitgliedstaaten führten Bestimmungen ein, die die in der Richtlinie niedergelegten Bestimmungen übertreffen. Dies gilt unter anderem für einen umfassenderen Anspruch auf Mittel zur Ausübung der Pflichten eines EBR-Vertreters sowie eine umfassendere Definition der Begriffe „Unterrichtung“, „Anhörung“ und „länderübergreifende Angelegenheiten“.
- Dagegen wurde in 11 Mitgliedstaaten mindestens eine nationale Regelung ermittelt, die der Bewertung zufolge nicht allen Anforderungen der Richtlinie entspricht. In nur 4 Mitgliedstaaten war den Untersuchungen zufolge mindestens eine der inhaltlich wichtigsten Bestimmungen der Richtlinie<sup>7</sup> nicht komplett in nationales Recht umgesetzt worden. In 8 Mitgliedstaaten war eine relativ nebensächliche Bestimmung (oder Teil einer solchen Bestimmung) nicht umgesetzt worden. Schwerwiegendere Mängel bei der Umsetzung bestanden unter anderem darin, dass kein Anspruch auf Schulung der EBR-Vertreter ohne Lohn- oder Gehaltseinbußen, keine Vorschrift zur Unterrichtung der europäischen Sozialpartner über den Beginn von Verhandlungen und keine Vorgaben bezüglich der Zusammensetzung des EBR vorgesehen waren.

#### ***Folgen für die Rechtssicherheit***

- Die meisten der befragten Interessenvertreter waren der Ansicht, dass die Neufassung der Richtlinie die Rechtssicherheit erhöht hat.

#### ***Übereinstimmung der Neufassung der Richtlinie mit sonstiger europäischer Gesetzgebung***

- Im Allgemeinen stimmen die neuen Regeln **mit anderen EU-Richtlinien und Instrumenten über die Unterrichtungs- und Anhörungsrechte der Arbeitnehmer überein.**
- Wichtige mögliche Unstimmigkeiten mit den bestehenden Unterrichtungs- und Anhörungsinstrumenten, die ermittelt wurden, **beziehen sich darauf, dass die Neufassung der EBR-Richtlinie weder eine Liste der (Mindest-)Informationen, die den Arbeitnehmern bei den Unterrichtungs- und Anhörungsverfahren zur Verfügung gestellt werden müssen, noch irgendwelche zeitliche Vorgaben für die Unterrichtungs- und Anhörungsverfahren enthält und dass die von einem EBR bei einem Anhörungsverfahren vorgelegte Stellungnahme keine offizielle Antwort seitens der Unternehmensleitung** (bzw. Einigung wie in der Richtlinie 2002/14/EG) **erfordert.**

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<sup>7</sup> Als inhaltlich wichtig wurden Bestimmungen betrachtet, die sich auf folgende Aspekte beziehen: den Beginn und die Durchführung von Verhandlungen, die Rolle der Sozialpartner und Sachverständigen, den Inhalt der subsidiären Vorschriften, die allgemeinen Prinzipien und Konzepte der Unterrichtung und Anhörung und der länderübergreifenden Angelegenheiten, die Abstimmung der Ebenen der Unterrichtung und Anhörung der Arbeitnehmer, die Aufgabe und Funktion der Arbeitnehmervertreter und den Anpassungsgrund.



## Erfüllung der Ziele der Richtlinie

### **Wirkung auf die Einrichtung neuer und die Tätigkeit bestehender EBR**

- **Sowohl die Richtlinie 94/45/EG als auch die Neufassung der Richtlinie gaben Anstoß zur Einrichtung eines EBR, obwohl die Zahl der anlässlich der Neufassung eingerichteten EBR wesentlich geringer war.**
- Seit Juni 2009 wurden 58 neue Europäische Betriebsräte gemäß den Bestimmungen der neugefassten Richtlinie eingerichtet. Die größte Anzahl bzw. der größte Anteil dieser „Neufassungs-EBR“ entfiel dabei auf Unternehmen mit Hauptsitz in Frankreich (19 %), gefolgt von Schweden (12 %) und den USA (9 %). Zudem wurden seit Juni 2009 **mehr EBR in den Bereichen „Bau- und Holzindustrie“, „Transport“ und in verschiedenen Dienstleistungssektoren gegründet.**
- **Unternehmen mit einem „Neufassungs-EBR“ haben im Durchschnitt weniger Mitarbeiter und einen geringeren Umsatz** als Unternehmen mit einem EBR, der gemäß Artikel 13 und 6 der Richtlinie 94/45/EG eingerichtet wurde, ein Umstand, der sich auch auf die Zahl der Arbeitnehmervertreter in dem EBR auswirkt: In „Neufassungs-EBR“ ist ihre Zahl mit 16 Vertretern geringer als in EBR, die laut den Bestimmungen von Artikel 13 und 6 eingesetzt wurden und in Durchschnitt 23 Arbeitnehmervertreter umfassen.
- „Neufassungs-EBR“ halten etwas **häufiger Vollversammlungen** als andere Arten von EBR ab.
- Die **Gewährleistung des Rechts der EBR-Vertreter auf Schulung ohne Lohn- oder Gehaltsverlust** hat sich deutlich verbessert. Der Anteil der EBR-Vereinbarungen, die dieses Recht erwähnen, ist auf 93 % gestiegen (von den ursprünglichen Artikel-13-Vereinbarungen beinhaltete weniger als ein Drittel eine solche Klausel). Zwei Drittel der befragten Arbeitnehmervertreter eines „Neufassungs-EBR“ gaben an, ihr Recht auf Schulung auch wahrgenommen zu haben. Von denen, die eine Schulung beantragt hatten, meldete die überwiegende Mehrheit (80 %), **dass der Zugang zur Schulung ohne größere Probleme erfolgt sei.**
- Die Neufassung der Richtlinie gab auch einen **gewissen Anstoß für die Neuverhandlung bestehender EBR-Vereinbarungen.** So wurden seit Juni 2009 insgesamt 117 gemäß Artikel 13 und Artikel 6 getroffene EBR-Vereinbarungen neu verhandelt. Allerdings ist seit Neufassung der Richtlinie offenbar auch **der Anteil an EBR gestiegen, die die subsidiären Vorschriften** (d. h. Mindestbedingungen für Europäische Betriebsräte) **anwenden** – eine Feststellung, die aufgrund von Datenerhebungsproblemen jedoch möglicherweise nicht ganz zuverlässig ist.

### **Wirkung auf die Effektivität der EBR in Bezug auf die Gewährleistung der Unterrichts- und Anhörungsrechte der Arbeitnehmer**

- Der **Einfluss der EBR auf Umstrukturierungsentscheidungen ist weiterhin begrenzt.** Der Mehrzahl der Arbeitgeber- und Arbeitnehmervertreter zufolge hatte die Anhörung von EBR-Mitgliedern keinen spürbaren Einfluss auf unternehmerische Entscheidungen. Dennoch wird die Anhörung der EBR-Mitglieder von Interessenträgern als nützlich zur Entwicklung einer gemeinsamen Unternehmensvision betrachtet, und einige EBR konnten Umstrukturierungsverfahren beeinflussen (im Hinblick auf Schutz und Hilfsmaßnahmen für betroffene Arbeitnehmer).
- **Die Neufassung der Richtlinie hatte einen größeren Einfluss auf die Verbesserung des Informationsflusses in EBR als auf die Verbesserung der Anhörung,** und in der Mehrzahl der Fälle (70 %) werden die Informationen offenbar relativ rechtzeitig zur Verfügung gestellt (z. B. vor einer Entscheidung).

- Die Mehrheit der „Neufassungs-EBR“ konzentriert sich „fast ausschließlich“ auf länderübergreifende Angelegenheiten. In einigen Fällen ist die **Interpretation des Begriffs „länderübergreifend“** jedoch mit Problemen behaftet. In welchem Maße sich die EBR länderübergreifenden Angelegenheiten widmen können, **hängt von der Plausibilität der Interpretation des Konzepts** sowie von der Entschlossenheit der EBR-Führung ab, länderübergreifende Angelegenheiten zu einem Schwerpunktthema zu machen. In der Praxis scheint die genaue Interpretation des Konzepts der länderübergreifenden Angelegenheiten weiterhin etwas problematisch zu sein, da Arbeitnehmervertreter oftmals nicht über ausreichende Informationen verfügen, um das, was die Unternehmensleitung als landesspezifische oder länderübergreifende Angelegenheit betrachtet, in Frage zu stellen.

#### **Wirkung auf die Rolle des EBR bei Verhandlung, Umsetzung und Beobachtung länderübergreifender Vereinbarungen**

- Die „Neufassungs-EBR“ hatten einen **begrenzten Einfluss auf den Abschluss und die Qualität länderübergreifender Unternehmensvereinbarungen**, und derzeit haben nur 3 von 37 „Neufassungs-EBR“<sup>8</sup> eine solche Vereinbarung geschlossen. Ein Grund hierfür könnte sein, dass viele dieser EBR erst vor relativ kurzer Zeit eingerichtet wurden.

#### **Kosten und Nutzen der Richtlinie**

##### **Erfüllung der Ziele zum Schutz der Arbeitnehmer in Anbetracht der verwendeten Mittel**

- Im Vergleich zu den Artikel-6-Vereinbarungen, die auf Grundlage der Richtlinie 94/45/EG geschlossen wurden, **sind die quantifizierbaren Kosten für die Einrichtung eines EBR gesunken** (von 143 537 EUR auf 119 207 EUR). Wichtigster Grund hierfür sind geringere Sitzungskosten, da von EBR, die auf Grundlage der neugefassten Richtlinie eingerichtet wurden, eine geringere Zahl von Sitzungen mit einer geringeren Zahl von Vertretern (wenn auch über einen längeren Zeitraum hinweg) abgehalten wurden, was jedoch weniger durch die Vorschriften der neugefassten Richtlinie, sondern vielmehr durch die Größe der Unternehmen bedingt war, die eine neue Vereinbarung geschlossen hatten.
- **Die laufenden Kosten eines „Neufassungs-EBR“ sind ähnlich hoch wie für einen EBR**, der auf Grundlage der Richtlinie 94/45/EG eingerichtet wurde. Die wichtigsten Probleme, insbesondere bezüglich einer effektiven Umsetzung des Anhörungsverfahrens, bleiben bestehen und auch der Einfluss der EBR auf Entscheidungen in länderübergreifenden Angelegenheiten ist trotz der umfassenderen Definition dieser Konzepte unverändert.
- **Arbeitnehmer- und Arbeitgebervertreter der „Neufassungs-EBR“ äußerten sich positiv zu den nicht quantifizierbaren Vorteilen** ihres EBR. Beachtenswert ist, dass die Vorteile in Unternehmen mit einem „Neufassungs-EBR“ als geringfügiger eingestuft wurden als in Unternehmen mit einem EBR, der auf Grundlage der Richtlinie 94/45/EG eingerichtet wurde. Am deutlichsten ausgeprägt war dieser Rückgang in Bezug auf die Fähigkeit des EBR, die Folgen einer Umstrukturierung für Arbeitnehmer zu beeinflussen, sowie in Bezug auf ihre Effektivität beim Austausch von Informationen.
- Parallel dazu sind offenbar – **insbesondere in den Augen der Arbeitgeber – die nicht quantifizierbaren Kosten gesunken**. Auffallend war zudem der Eindruck der Arbeitgeber, dass der EBR in weniger hohem Maße unrealistische Erwartungen der Arbeitnehmer schürte und geringere Kosten im Hinblick auf

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<sup>8</sup> Insgesamt wurden Gespräche mit 37 von 58 Vertretern von EBR geführt, die auf Grundlage der Regeln der neugefassten Richtlinie eingerichtet wurden.

die Forderung nach länderübergreifenden Tarifverhandlungen und die Einführung unnötig starrer Regeln für die Beziehungen zwischen Arbeitgebern und Unternehmensleitung verursachte.

### **Wirkung des wirtschaftlichen Umfelds**

- Die Tätigkeiten der „Neufassungs-EBR“ wurde durch die **Wirtschafts- und Finanzkrise nicht beeinträchtigt (obwohl der Konjunkturrückgang und die daraus resultierenden Umstrukturierungen möglicherweise die Diskussionsthemen bestimmten)**. In Fällen, in denen der wirtschaftliche Kontext die Tätigkeit der EBR beeinflusste, sprach die Unternehmensleitung offen über finanzielle Probleme und bat die EBR-Mitglieder, während der schwierigen Zeiten einige Sparmaßnahmen zu akzeptieren.

### **Die wichtigsten Empfehlungen, die sich aus der Studie ergeben**

1. In Fällen, in denen wichtige inhaltliche Aspekte der Richtlinie den verfügbaren Rechtstexten zufolge offenbar unzureichend umgesetzt wurden, sollte die Europäische Kommission Kontakt mit den zuständigen Behörden aufnehmen, durch diese Evaluierung aufgezeigte Umsetzungsmängel im Rahmen eines Dialogs mit den nationalen Behörden eingehender erörtern und entsprechende Maßnahmen ergreifen.
2. Die rechtlichen Konzepte ließen sich durch weitere Erläuterungen und den Austausch erfolgreicher Praxisbeispiele verbessern.
3. Im Grunde enthält die Richtlinie keinerlei Anhaltspunkte dazu, welches Gesetz als Grundlage für die Verhandlungen oder für die nationale Rechtsprechung, die für die EBR-Vereinbarung gilt, dienen soll (die bestehenden Vorschriften helfen lediglich bei der Wahl des zuständigen Partners für Arbeitnehmervertreter und bei Definition der zentralen Unternehmensleitung). Diese Entscheidung ist den beiden Seiten überlassen und ein möglicher Missbrauch ließe sich durch präskriptivere Schritte, wie weitere rechtliche Vorgaben zu diesem Punkt, vermeiden. Beispielsweise könnte vorgegeben werden, dass die EBR-Vereinbarung dem nationalen Recht des Landes unterliegt, in dem sich der europäische Hauptsitz des Unternehmens befindet, und nach welchen Kriterien der Ort des Hauptsitzes bestimmt wird (beispielsweise auf Grundlage der Managementstrukturen oder des Arbeitnehmeranteils in der EU usw.<sup>9</sup>).

Die Richtlinie zur Festlegung eines allgemeinen Rahmens für die Unterrichtung und Anhörung der Arbeitnehmer (Richtlinie 2002/14/EG) geht weiter als die Neufassung der EBR-Richtlinie, was die Definition des Begriffs „Anhörung“ betrifft. Erstens sieht sie eine Anhörung vor „mit dem Ziel, eine Vereinbarung [...] zu erreichen“, während die Neufassung der EBR-Richtlinie den Ausdruck „Anhörung“ definiert als „die Einrichtung eines Dialogs und den Meinungs austausch zwischen den Arbeitnehmervertretern und der zentralen Leitung oder einer anderen, angemesseneren Leitungsebene zu einem Zeitpunkt, in einer Weise und in einer inhaltlichen Ausgestaltung, die es den Arbeitnehmervertretern auf der Grundlage der erhaltenen Informationen ermöglichen, unbeschadet der Zuständigkeiten der Unternehmensleitung innerhalb einer angemessenen Frist zu den vorgeschlagenen Maßnahmen, die Gegenstand der Anhörung sind, eine Stellungnahme abzugeben, die innerhalb des gemeinschaftsweit operierenden Unternehmens oder der gemeinschaftsweit operierenden Unternehmensgruppe *berücksichtigt werden kann*“. Zweitens fordert die Richtlinie zur Festlegung eines allgemeinen Unterrichts- und Anhörungsrahmens (2002/14/EG) von den Arbeitgebern, eine mit Gründen versehene Antwort auf eine etwaige Stellungnahme

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<sup>9</sup> Hierzu sind einige nationale Rechtsprechungsbeispiele vorhanden (siehe Abschnitt 4.6.1 – „Manpower“).

vorzulegen. Diese beiden Elemente könnten in die Neufassung der Richtlinie aufgenommen werden, um deren Wirkung zu verstärken.

Einige Interessenvertreter auf Arbeitnehmerseite merkten überdies an, dass detailliertere Leitlinien bezüglich der fristgemäßen Bereitstellung von Informationen und der Trennung der Unterrichts- und Anhörungsverfahren bereitgestellt werden könnten. Die Richtlinie besagt nämlich nur, dass die Anhörung „zu einem Zeitpunkt, in einer Weise und in einer inhaltlichen Ausgestaltung“ zu erfolgen hat, „die es den Arbeitnehmervertretern auf der Grundlage der erhaltenen Informationen ermöglichen, [...] zu den vorgeschlagenen Maßnahmen, die Gegenstand der Anhörung sind, eine Stellungnahme abzugeben“, was zahlreichen Stimmen auf Arbeitnehmerseite zufolge für die Gewährleistung einer effektiven Anhörung möglicherweise nicht ausreicht. Auf Arbeitgeberseite wird hierzu häufig erklärt, dass die Information insbesondere im Fall von börsennotierten Unternehmen vertraulich bleiben muss. Dies sollte im Prinzip jedoch dadurch sichergestellt sein, dass EBR-Mitglieder zur Wahrung eben dieser Vertraulichkeit verpflichtet werden.

Weitere Leitlinien könnten auf Grundlage der Erfahrungen von EBR erstellt werden, die präzise interne Regeln für ihre Unterrichts- und Anhörungsverfahren (einzelne Schritte und Zeitplan) aufgestellt haben. Durch Erklärungen von EBR-Mitgliedern zu den Vorteilen, die durch Einführung detaillierter Verfahren entstehen, könnten diese Leitlinien zusätzlich ergänzt werden.

4. Durchsetzung, Sanktionen und Bußgelder werden auf nationaler Ebene festgelegt. Folglich weichen die Bestimmungen stark voneinander ab und einigen Stimmen zufolge sind die Sanktionen nicht immer abschreckend genug. Durch zusätzliche Schritte (wie beispielsweise einen Austausch über nationale Praktiken und deren Wirkung) könnte sichergestellt werden, dass Sanktionen und Durchsetzungsverfahren die gewünschte Wirkung nicht verfehlen.
5. Die Einrichtung weiterer EBR (nicht alle in Betracht kommenden Unternehmen haben bereits einen EBR gegründet) könnte durch folgende Maßnahmen unterstützt werden: Mehr Anstrengungen zur besseren Unterrichtung der Unternehmens- und Arbeitnehmervertreter über die Rechtsansprüche und potenziellen Vorteile eines EBR (z. B. unterstützt durch europäische und nationale Sozialpartnerorganisationen). Dies würde die Ansprache der in Betracht kommenden Unternehmen erfordern, die bislang noch keinen EBR eingesetzt haben. Derzeit sind nur unzureichende Informationen über solche Unternehmen vorhanden, obwohl einige Initiativen zur Erstellung entsprechender Verzeichnisse existieren (z. B. EGI-Datenbank) und die europäischen Sozialpartner – ob nur für eine oder mehrere Branchen zuständig – die Namen solcher Unternehmen kennen. Durch entsprechende Maßnahmen ließe sich diese Informationslücke schließen (beispielsweise könnten Datenbanken, die die Namen in Betracht kommender Unternehmen ohne einen EBR enthalten, mit Unterstützung des EGI und/oder der europäischen Sozialpartner auf den neuesten Stand gebracht werden). Vor einiger Zeit wurde die Zahl der potenziell in Betracht kommenden Unternehmen auf 2 400 geschätzt. Angesichts umfassender Umstrukturierungsverfahren ist diese Zahl jedoch ein „bewegliches Ziel“.

Eine weitere Möglichkeit ist die Einrichtung einer europäischen Kontaktstelle für Unternehmen/Arbeitnehmer, die einen EBR einsetzen möchten und Unterstützung, Beratung und Informationen über bestehende Gesetze und EBR-Praktiken brauchen. Eine solche Kontaktstelle könnte eine kontinuierliche Beratung und Unterstützung bei Gründung eines EBR bereitstellen (ein Service, der externen Anbietern übertragen oder Agenturen wie Eurofound anvertraut werden könnte), und ihre Existenz könnte von den nationalen Behörden der

Mitgliedstaaten publik gemacht werden. Derzeit wird diese Form der Unterstützung häufig von europäischen Sozialpartnerorganisationen geleistet, die jedoch nicht immer über ausreichende Kenntnis der in Betracht kommenden Unternehmen und die zur Unterstützung jedes einzelnen Unternehmens erforderliche Kapazität verfügen. Alternativ zu einer Kontaktstelle wäre eine Webseite mit Informationen zu sektoralen europäischen Sozialpartnerorganisationen (oder einschlägigen nationalen Behörden) denkbar, die zur Bearbeitung der Anfragen jedoch entsprechende Ressourcen benötigen würden.

Verstärkt werden sollte auch der Austausch von Praxisbeispielen über die Tätigkeit und Vorteile eines EBR zwischen der Leitung potenzieller und bestehender EBR (unter anderem auf HR-Konferenzen).

Darüber hinaus wird die Organisation von Seminaren und Veranstaltungen zur Verbreitung weiterer Beispiele für die Arbeit der EBR in kleinen Unternehmen und die Förderung des gegenseitigen Lernens durch die Europäische Kommission empfohlen.

Die GD EMPL verfügt über Haushaltslinien zur Unterstützung von Projekten, die zur Gründung von EBR führen könnten.

6. Es ist möglich, die Unterrichts- und Anhörungsverfahren in EBR weiter zu verbessern, beispielsweise durch:

Austausch erfolgreicher Verfahren sowie echter Praxisbeispiele dafür, wie die Einbeziehung eines EBR in Unternehmensentscheidungen die Kultur und Tätigkeit von Unternehmen in der EU positiv beeinflusst hat (im Rahmen dieser Evaluierung wurden bereits einige Beispiele hierfür ermittelt). Dies könnte auch Ratschläge zur Organisation und optimalen Umsetzung von Unterrichts- und Anhörungsverfahren in bestimmten Umstrukturierungssituationen umfassen (z. B. ob der gesamte EBR oder nur eine Lenkungsgruppe einbezogen werden sollte, die die betroffenen Länder vertritt). Einige EBR haben Verfahrenspläne mit den einzelnen Unterrichts- und Anhörungsschritten erstellt, die auch für andere EBR interessant sein könnten (siehe auch Empfehlung 2). Zur Verbreitung und zum Austausch dieser Praktiken könnten Seminare und Veranstaltungen für gegenseitiges Lernen organisiert werden, auf denen ausgewählte EBR-Vertreter über ihre Tätigkeit zur Verbesserung der Unterrichts- und Anhörungsverfahren berichten.

Eine eindeutigere Unterscheidung zwischen der Unterrichts- und Anhörungsphase kann es den EBR erleichtern, Einfluss auf Entscheidungen des Arbeitgebers sowie auf dessen Bereitschaft zu nehmen, einschlägige Informationen mit ihnen zu teilen. Die genannten Veranstaltungen/Dokumente könnten daher auch zur Besprechung detaillierterer Leitlinien (in Form von stark praxisorientierten Ratgebern) dienen, die auf der Rechtsauslegung der neugefassten Richtlinie, den dazu ermittelten Gerichtsverfahren und bestehenden EBR-Praktiken basieren und Informationen über den richtigen Zeitpunkt der Unterrichtung und über die Trennung der Unterrichts- und Anhörungsverfahren enthalten.

7. Obwohl die Neufassung der Richtlinie das Konzept der länderübergreifenden Angelegenheiten genauer definiert, herrschen in der Praxis weiterhin beträchtliche Anspannung und Ungewissheit darüber, wie dies zu interpretieren ist und ob die Arbeitnehmer über ausreichende Informationen verfügen, um Behauptungen der Unternehmensleitung, dass gewisse Angelegenheiten nicht länderübergreifend seien, in Frage zu stellen. Zu diesem Punkt könnte ein Austausch über relevante Gerichtsurteile nützlich sein. Die Europäische Kommission könnte also weitere Leitlinien für die praktische Interpretation des Konzepts der länderübergreifenden Struktur bereitstellen und dabei auf erfolgte

Rechtsprechung und Beispiele bestehender EBR verweisen. Diese Leitlinien könnten ein unverbindliches Kompendium von Beispielen enthalten, wie länderübergreifende Angelegenheiten von nationalen Gerichtsurteilen und von bestehenden EBR (z. B. basierend auf EBR-Abkommen) interpretiert werden, und die Folgen dieser Beispiele für die Tätigkeit der EBR aufzeigen.

8. Einige EBR sind am Abschluss länderübergreifender Unternehmensabkommen beteiligt (obwohl sie nicht über diesbezügliche explizite Verhandlungsrechte verfügen). Diese Funktion der EBR könnte durch eine explizite Bezugnahme in EBR-bezogener Gesetzgebung näher erklärt werden, um die Rechtslage zu erläutern und in dieser Frage entsprechende Gewissheit zu geben.
9. Ein Erfolg der neugefassten Richtlinie war das Recht auf Schulung ohne Lohn- oder Gehaltsverlust. Da sich zahlreiche „Neufassungs-EBR“ noch in einem frühen Stadium ihrer Tätigkeit befinden, könnte in einigen Jahren eine erneute Beurteilung seitens der Europäischen Kommission erforderlich sein, um die Umsetzung dieses Rechts genauer zu bewerten und zu ermitteln, wie viel und welche Art von Schulung finanziert wurde. Die Europäische Kommission könnte weiterhin Projekte mit gemeinsamer Schulung von EBR-Mitgliedern insbesondere aus kleineren Unternehmen (d. h. mit geringem Umsatz) finanzieren (siehe auch Empfehlung 2).
10. Es sollte ein intensiverer Austausch zwischen EBR über erprobte Verfahren zur Maximierung der Vorteile und Minimierung der Kosten erfolgen. Zum Beispiel:
  - Austausch bewährter Praxisbeispiele bezüglich der Aufgaben, Rechte und Pflichten der EBR-Mitglieder wie bereits in früheren Empfehlungen zur Maximierung des potenziellen Nutzens der EBR vorgeschlagen;
  - Untersuchung effektiver Möglichkeiten zur Reduzierung der Sitzungskosten, ohne die Vorteile eines persönlichen Zusammentreffens und die Möglichkeit der Kommunikation mit Vertretern anderer Länder zu verlieren, wobei aus den Erfahrungen bestehender EBR gelernt werden kann (beispielsweise in Bezug auf die Kosten verschiedener Sitzungsorte, die Möglichkeit von Telefon- oder Videokonferenzen für Sitzungen wie die regelmäßige Zusammenkunft von Lenkungsgruppen; Kostenvergleich zwischen Sprachunterricht und Dolmetscher-/Übersetzungsdiensten usw.).

## List of acronyms

ABR	Administrative Burden Reduction
EEA	European Economic Area
EBSCO	Provider of research databases, e-journals, magazine subscriptions, ebooks
EC	European Commission
ECJ	European Court of Justice
EIRO	European Industrial Relations Observatory
ELLN	European Labour Law Network
ETUI	European Trade Union Institute
EWC	European Works Council
HORECA	Hotel/Restaurant/Café
HR	Human resources
HQ	Headquarters
I&C	Information and consultation of workers
SE	European Company (Societas Europaea)
SP	Social partners
SWOT	Strengths, Weaknesses, Opportunities and Threats

## Glossary of key concepts

Article 13	Voluntary EWC agreements: Agreement concluded before Directive 94/45/EC came into force (22.09.1996 - or respective later implementation deadlines for the UK and newer MS) and <i>not</i> revised since to align to the requirements of the DIR 94/45/EC or the recast DIR 2009/38/EC.
Article 6	Agreement concluded or revised since 22.09.1996 and not revised since to the requirements of the recast DIR 2009/38/EC.
Article 14.1b	Agreement concluded or revised between 05.06.2009 and 05.06.2011 pursuant to Article 6 of DIR 94/45/EC (Article 14.1b).
Pre-recast	Agreements following the rules of the Directive (94/45/EC).
Recast EWCs	Agreements following the rules of the Recast Directive (2009/38/EC)
Renegotiated EWCs	Article 13 or Article 6 EWC agreements which have been recently renegotiated or revised in line with the rules of the Recast Directive.
Nominal scale	Categorically discrete data.
NVivo	Software package that supports qualitative and mixed methods research. It facilitates the collection, organisation and analysis of content from interviews, surveys, policy documents as well as quantitative information. NVIVO enables systematic storing, exploration and comparison of qualitative data.

## Disclaimer

The information contained in this publication does not necessarily reflect the position or opinion of the European Commission.

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## **1 Introduction**

ICF was appointed by DG Employment, Social Affairs and Inclusion in February 2015 to carry out an evaluation of the implementation of Directive 2009/38/EC, under specific Service Order No. VC/2015/0077 of the Framework Contract for the provision of Evaluation and Evaluation Related Services to DG EMPL (No. VC/2013/0083\_01). This is the Final Report which outlines the key findings and presents conclusions and recommendations of this study.

### **1.1 Key features of the Directive 2009/38/EC**

European Works Councils (EWCs) are bodies representing European employees within transnational companies. They ensure that employees are informed and consulted by management on any business issues or decision that could have an impact on employment and working conditions.

#### **Box 1: European Works Council (EWC)**

EWCs can be established in Community-scale undertakings employing more than 1,000 employees within the EU Member States and at least 150 employees in each of at least two Member States and in community-scale groups of undertakings employing at least 1,000 employees within the Member States and 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.<sup>10</sup>

A request by 100 employees from two countries or an initiative by the employer triggers the process of establishing a body or procedure to inform and consult workers. The composition, competences, and functioning of a EWC are defined by an agreement reached by a 'special negotiating body' (SNB) representing employees and the central management. Subsidiary requirements apply in the absence of such an agreement. EWCs are to be informed and consulted on transnational issues affecting workers.

The possibility to establish European Works Councils was first introduced by Directive 94/45/EC. Over the years, a number of legal and implementation challenges arose and the original directive was revised in 2009.

The Recast Directive 2009/38/EC, aimed to address some of these challenges by pursuing the following objectives:

- Ensuring the effectiveness of employees' transnational information and consultation rights,
- Favouring the creation of new EWCs,
- Enabling the continuous functioning of existing arrangements,
- Remedying the lack of legal certainty resulting from some provisions and the absence of others,
- Ensuring better links with other Community legislative instruments on information and consultation of employees.<sup>11</sup>

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<sup>10</sup> Article 1(1)&(2) Directive 94/45/EC.

<sup>11</sup> Recital 7, 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).

These goals were to be achieved through a Recast of the Directive, including the following key amendments:

- First, a definition of the notion of 'information' has been introduced in the Recast Directive. Directive 94/45/EC only referred to this term but without providing a clear definition. Directive 2009/38/EC aimed to bring clarity and reinforce the obligation for the management to inform employees by providing guidance on the steps to follow. It states for instance that information must 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'.
- Another change relating to definitions is the attempt to provide a clarification of what was meant by 'consultation' in the Directive. The Recast Directive contains a more detailed definition which now attempts to clarify the consultation process by adding for instance that this must enable employees' representatives to express an opinion on the basis of the information provided. This attempts to reinforce the information and consultation rights of EWCs which appear as two different procedures but which are nonetheless closely interrelated.
- One of the main changes was the insertion of a definition of the concept of 'transnational matters'. This clarified the scope of matters EWCs should deal with (as opposed to national matters that should be dealt at national level). The criterion used is that it is the potential effects of the subject that should determine whether this is an EU-level or national-level subject.
- The new rules also attempted to reinforce both the role of the social partners and employees' representatives. Indeed, social partners must now be informed of the composition of the Special Negotiating Body. Directive 2009/38/EC gives a mandate to employee representatives in the EWC to collectively represent the employees. It also introduces the obligation for the management to provide the EWC with means necessary to perform this function and the right to training without loss of wages.
- New provisions also include the granting of new facilities to the Special Negotiating Body such as the possibility to have pre- and post- meetings, or the presence of experts in the negotiation meetings.

The chart overleaf presents intervention logics both for the original Directive (94/45/EC) and the Recast Directive (2009/38/EC). This shows that in fulfilling the objective of the Community and the Member States to enhance dialogue between management and labour (Article 136 TFEU), the Recast aimed to enhance transnational information and consultation processes and legal certainty by providing (clearer) definitions of a number of key concepts such as 'information', 'consultation' and 'transnationality', while enabling the continuous functioning of existing arrangements and without significantly increasing burdens on businesses. This is intended to ensure that information and consultation takes place in a timely fashion in order to be effective.

The preamble to the Recast Directive also acknowledges the role played by globalisation and associated restructuring in driving mergers and the greater transnationality of businesses, thus also requiring stronger and clearer links between national and transnational information and consultation structures.

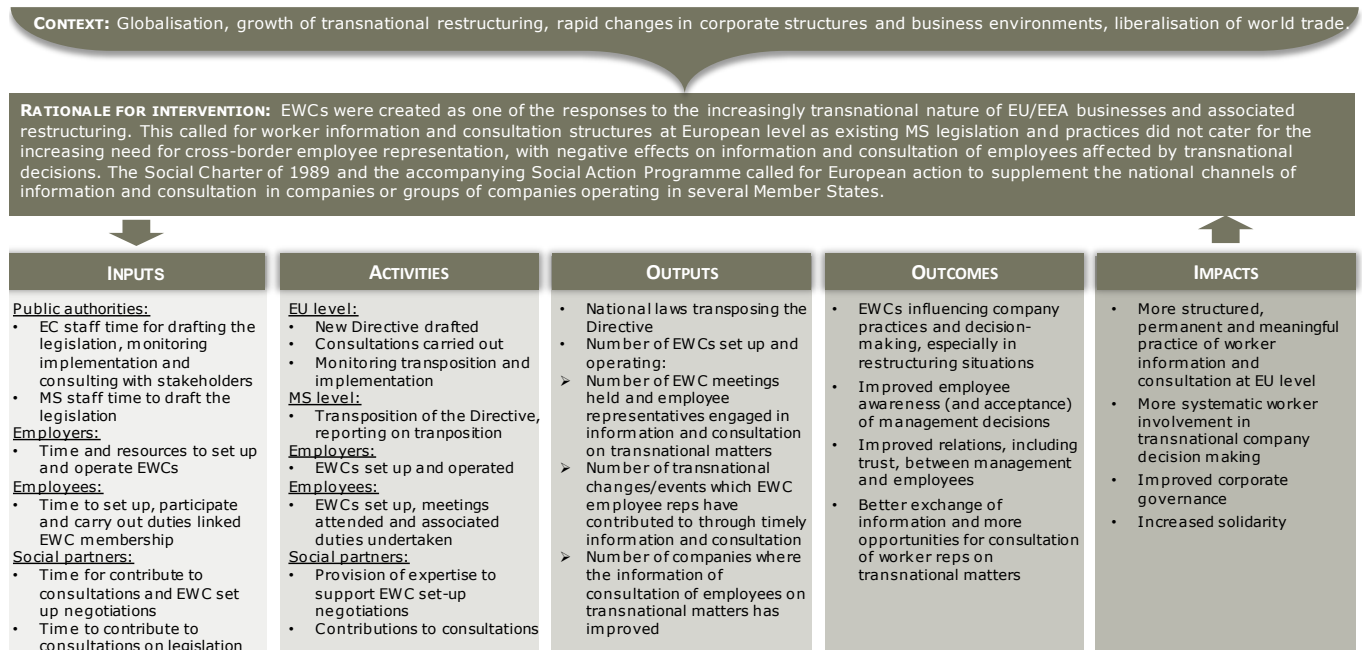
Further specification is also provided on set-up procedures (including information to be provided by the employer) and the make-up and rights and duties of employee representatives, not only in order to support the establishing of further EWCs but to ensure the balanced representation of employees. The Recast also aims to ensure the rights required to enable employee representatives to have the skills and access to expert support required to effectively engage information and consultation processes at transnational level.



# Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council

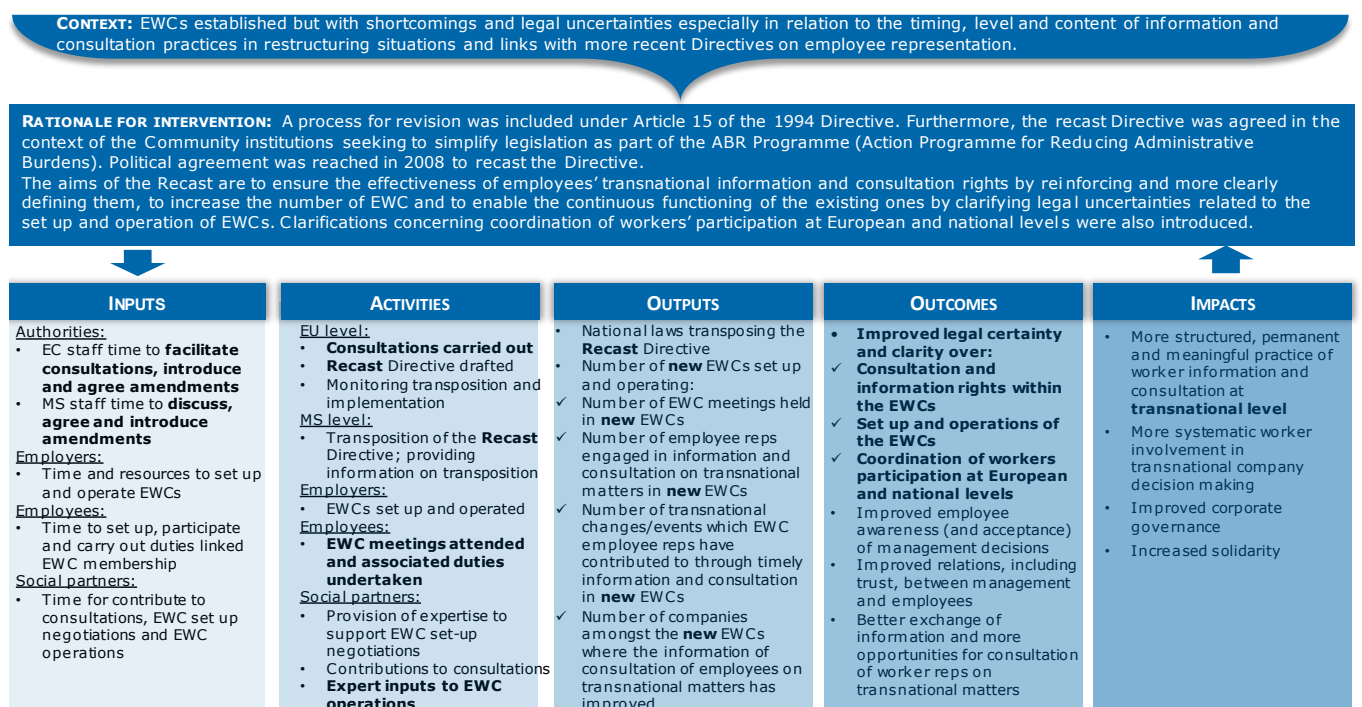
Ultimately, EWCs are intended to achieve improvements in corporate governance.

Figure 1. Intervention logic, the original EWC Directive (94/45/EC)



Source: ICF, 2015

Figure 2. Intervention logic, Recast Directive (2009/38/EC)



Source: ICF, 2015

## 1.2 Evaluation of the Recast Directive

This evaluation supports the work of the Commission in the preparation of the report due by 5 June 2016 to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive, making

appropriate proposals where necessary.<sup>12</sup> The evaluation was conducted between February 2015 and February 2016.

### **1.2.1 Evaluation objectives**

The purpose of the study was to evaluate the impact(s) of the implementation of the 2009/38/EC Directive, more specifically those deriving from the changes made to Directive 94/45/EC ('new rules').

A series of key themes were explored in this evaluation, including:

#### **Transposition of the Directive in the EEA countries**

- Extent to which all the provisions have been correctly transposed into national legislation
- Differences, if any, in worker protection levels between EEA countries
- Impacts in terms of legal certainty

#### **Achievement of the Directive's objectives**

- Impact on the creation of EWCs and on the continuous functioning of existing ones
- Impact on the EWCs' effectiveness in guaranteeing employees' information and consultation rights
- Impact on the role of EWCs in the negotiation, implementation and monitoring of transnational agreements

#### **Costs and benefits generated by the Directive**

- Achievement of worker information and consultation objectives in light of resources utilised
- Comparison of the administrative burdens for EWCs before and after June 2011
- Extent of the impact of the 2011-2014 economic context

The specific evaluation questions are outlined in Box 2. A full outline of the data analysis approach used in the study is contained in Annex 1.

### **Box 2: Evaluation Questions**

#### **The analysis of the legal aspects of the 'new rules':**

- (1) To what extent is the transposition of the new rules correct at national level? What are the main issues/aspects of the Directive that remain or have emerged as recurrent problematic or contentious issues at national and European levels or in their articulation?
- (2) Where the provisions of Article 153§3 were used by the Member States for implementing the Directive, to what extent had this implementation process an impact in terms of effectiveness and efficiency of the Directive, in comparison with the classical way of transposition?
- (3) To what extent do national laws reflect similar or provide for more protective conditions for workers than the Directive's improved information and consultation rights for employees?
- (4) What are the effects on legal certainty and clarity resulting from some of its provisions, like the adaptation clause or the definition of transnationality, or the absence of certain provisions, like on a clear articulation between national and European information and consultation procedures?

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<sup>12</sup> Article 15 of the Directive 2009/38/EC.

(5) In particular how does it impact on the enforcement of rights by the courts? What is the quantitative-qualitative dimension of litigation or complaints and debates in the Member States? What is the impact of the new competence of the members representing the employees on the EWC to represent the employees of the undertaking or group of undertakings?

**The analysis of the socio-economic aspects of the 'new rules' and their effectiveness:**

(6) Against the baseline situation (2009),

- what is the impact of the Directive on the creation or the absence of EWCs in their various contexts (companies/ sectors/ countries) as well as the reasons for this? How many EWC agreements were concluded or renegotiated during the reference period (5 June 2009 – 5 June 2011)?
- what are the current main characteristics of the EWCs: composition, number of meetings, existence of select committees and of working groups?

(7) In what respect/to what extent does the Directive - the 'new rules' - bring a new impetus to consultation and dialogue in transnational companies, in particular as regards the opening and process of the negotiations, the enhanced role of trade unions and employers' organisations, the new concepts of information and consultation? In what respect/to what extent? What is the impact of the use of new information and communication technologies?

(8) How many agreements are still not ruled by the Recast Directive because of the derogations foreseen in its Article 14? How many agreements apply the subsidiary requirements?

(9) How is the new right for employees' representatives to benefit from training without loss of salary implemented in practice?

(10) To what extent has the role of EWCs increased in the negotiation, implementation and monitoring of transnational company agreements?

(11) What is the specific effect of the recast against the prevailing economic context?

(12) To what extent is the Directive coherent with other EU legislation addressing workers' information and consultation rights?

**The costs and benefits, both quantitative and qualitative, related to the transposition of the Directive and its effectiveness:**

(13.1) How did the transposition of the new rules of the Directive, including the new right for training, affect the benefits and costs, for workers and companies?

(13.2) How did the recast simplify administrative burden?

**1.2.2 Study Method**

The methodology applied combined both primary and secondary data collection methods. An overview of the aims of each method, its application and limitations are provided in below. Annex 2 presents detailed methodology of the study.

The table below lists the tasks undertaken as part of the study and methods used. The table also provides an overview of challenges faced during the fieldwork or analysis, the way they were addressed and the assessment of the impact of these shortcomings on reliability of the final findings and conclusions drawn based on them.

Table 1. Overview of methods used

Task	Method	Challenges faced	Mitigating measures	Impact on the findings
Coherence analysis	Desk research	<ul style="list-style-type: none"> <li>• Difficult to assess coherence on a scale</li> </ul>	<ul style="list-style-type: none"> <li>• Qualitative commentary to the assessment</li> <li>• Incorporation of</li> </ul>	Low / None

*Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*

<b>Task</b>	<b>Method</b>	<b>Challenges faced</b>	<b>Mitigating measures</b>	<b>Impact on the findings</b>
			supporting literature in the analysis	
Legal analysis of the national transposition	Desk research	<ul style="list-style-type: none"> <li>Ensuring a consistent assessment of the national laws across all MS</li> </ul>	<ul style="list-style-type: none"> <li>Incorporation of answers provided by representatives of MS ministries and ELLN</li> <li>Verification of the analysis of the national transposition by representatives of ministries</li> </ul>	Low / None
	Survey among representatives of MS ministries	<ul style="list-style-type: none"> <li>Long response time</li> <li>Difficulties to identify relevant staff responsible for EWC at national level</li> </ul>	<ul style="list-style-type: none"> <li>Identification of relevant respondents in cooperation with DG EMPL and permanent representation of MS to the EU</li> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> </ul>	Low / None
	Survey among ELLN	<ul style="list-style-type: none"> <li>Long response time</li> </ul>	<ul style="list-style-type: none"> <li>Identification of relevant respondents in cooperation with DG EMPL</li> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> </ul>	Low / None
	Survey among EIRO	<ul style="list-style-type: none"> <li>Lack of interest in participation in the study without financial reward</li> </ul>	<ul style="list-style-type: none"> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> </ul>	Low
Analysis of the national case law pertinent to the new rules	Desk research	<ul style="list-style-type: none"> <li>Identifying the national case law relevant to the provisions of the Recast Directive</li> <li>Unknown number of cases which were solved through arbitration</li> </ul>	<ul style="list-style-type: none"> <li>Identification of cases through several available sources of information</li> <li>Identification of cases through survey with representatives of MS, ELLN and EWC experts involved in the study</li> </ul>	Medium
Cost-benefit analysis	Desk research Consultation with Recast EWCs	<ul style="list-style-type: none"> <li>Benefits of EWC are intangible</li> <li>Low response rate to the consultation of the representatives of employers</li> <li>Lack of information on the costs of setting up the EWC due to staff turnover</li> </ul>	<ul style="list-style-type: none"> <li>Distinction has been made between quantifiable and non-quantifiable costs</li> <li>Benefits generated were assessed qualitatively</li> <li>Multiple reminders about ongoing research</li> </ul>	Medium / High

*Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*

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<b>Task</b>	<b>Method</b>	<b>Challenges faced</b>	<b>Mitigating measures</b>	<b>Impact on the findings</b>
		<ul style="list-style-type: none"> <li>Differences between two studies in the way the information on the costs was provided and which types of cost were included in the estimations</li> </ul>	<ul style="list-style-type: none"> <li>Sufficient time to provide responses</li> <li>Out-reach to the respondents through representatives of employees in EWC</li> <li>Out-reach to the respondents through representatives of social partners</li> <li>Information from the two studies was aligned to allow comparisons</li> </ul>	
Literature review	Desk research	<ul style="list-style-type: none"> <li>Small number of sample on group of Recast EWC</li> <li>ETUI's EWC Database does not contain information on the whole population of EWCs created</li> <li>ETUI's EWC Database contains information about other types of information and consultation bodies (e.g. SE companies)</li> </ul>	<ul style="list-style-type: none"> <li>Consultations with EWCs established after transposition of the Directive to the national law</li> <li>Consultations with the EU and national level social partners supplementing the information collected in the ETUI's EWC Database</li> <li>Where possible other types of information and consultation bodies were excluded</li> </ul>	Low
EWC consultations	Telephone and face-to-face interviews with employer and employee representatives of the Recast EWCs	<ul style="list-style-type: none"> <li>Initial lack of interest in participation in the study</li> <li>Lack of information on the negotiation process of EWC due to staff turnover</li> </ul>	<ul style="list-style-type: none"> <li>Identification of relevant respondents in cooperation with EWC experts, social partners</li> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> </ul>	Low
	Telephone interviews and surveys with renegotiated EWCs	<ul style="list-style-type: none"> <li>Initial lack of interest in participation in the study</li> <li>Wrong classification of the EWC based on the information in the EWC Database</li> </ul>	<ul style="list-style-type: none"> <li>Identification of relevant respondents in cooperation with EWC experts, social partners</li> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> <li>Where possible inclusion of the interviews with wrongly classified EWC in other relevant parts of the study</li> </ul>	Low
	Online survey with Article 6 EWCs	<ul style="list-style-type: none"> <li>Initial lack of interest in participation in the study</li> </ul>	<ul style="list-style-type: none"> <li>Identification of relevant respondents in cooperation with</li> </ul>	Medium / High

Task	Method	Challenges faced	Mitigating measures	Impact on the findings
		<ul style="list-style-type: none"> <li>Lack of information on the negotiation process of EWC due to staff turnover</li> <li>Contamination of the survey sample due to snowballing</li> </ul>	<ul style="list-style-type: none"> <li>EWC experts, social partners</li> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> <li>Exclusion of responses provided by EWCs falling out of the scope of the survey</li> </ul>	
Consultations with social partners	Telephone and face-to-face interviews with EU level social partners	<ul style="list-style-type: none"> <li>Higher response rate among employers' than workers' representatives</li> <li>Long response time</li> </ul>	<ul style="list-style-type: none"> <li>Analysis of responses per type of organisation represented</li> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> </ul>	Low
	Survey with social partners at national level	<ul style="list-style-type: none"> <li>Initial lack of interest in participation in the study</li> <li>Higher response rate among employers' than workers' representatives</li> </ul>	<ul style="list-style-type: none"> <li>Identification of relevant respondents in cooperation with EU social partners</li> <li>Analysis of responses per type of organisation represented</li> <li>Multiple reminders about ongoing research</li> <li>Sufficient time to provide responses</li> </ul>	Low

### *Coherence analysis*

The relevant EU legislation in the area of worker information and consultation (I&C) was mapped and reviewed in-depth to assess the coherence of the Recast EWC Directive's rules with existing European legislation and policy developments. Such a systematic mapping of individual legal acts included an assessment of the key areas of coherence (or otherwise) of the Recast EWC Directive with other relevant legal acts and their consequences for the functioning of the EWCs. In the end eight EU level legal acts were assessed using a nominal scale:

- Highly coherent: when the relevant Recast EWC Directive provisions fully reflect the nature of the provisions of the instrument in question
- Partially coherent: when some of the relevant Recast EWC Directive's provisions reflect some of the provisions of the instrument in question – but not all (as well as identifying which ones are reflected and which are not)
- 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 coherence between the Recast Directive and other specific instruments (which often had different focus from the Recast Directive). Even though the definitions were not exactly the same, they were nonetheless coherent when bearing in mind the legislator's intention, which was to regulate information and consultation in these very specific situations. It



proved difficult to rate the different acts on a scale because they were different in focus and because no 'scale' really exists or has been approved to rate coherence at EU level, leaving any such attempt open to interpretation. Therefore the assessment using a nominal scale is accompanied with extensive qualitative commentary based on an in-depth review of mapped legislation and policy developments. The in-depth review was undertaken on the basis of a desk-based analysis of existing legal and policy texts. In addition, any relevant findings from the supporting literature were incorporated into the coherence analysis.

#### *Legal analysis of national transposition*

Under this step, the national laws (EU-28 and Norway, Iceland and Liechtenstein) transposing the new rules of the Directive were identified, collected and assessed against each new provision introducing all the 'major' areas of change in the Recast Directive.

The key challenges encountered in this Task were to ensure a consistent assessment of the national laws across all Member States. In several cases, the national transposition rules included most of the relevant provisions, but did not explicitly refer to one or other particular aspect of the Directive. In these cases, the assessment was that the national law both meets and does not meet the Directive's requirements. In several cases, some of the relevant national provisions relating to the same aspect of the Directive were new and introduced after 2009, and some were already existing in the pre-2009. In these cases, the assessment was that the provisions are both old and new.

To ensure consistent assessment across all Member States additional consultations with Member State ministries, the European Labour Law Network and EIRO correspondents were conducted to support the analysis (see below). Additionally, Member States had an opportunity to review and comment the transposition analysis at a workshop organised by the European Commission in November 2015 and after the event by submitting their comments to the research team.

#### *Consultation of Member State ministries, the European Labour Law Network and EIRO correspondents*

The legal analysis of the national transposition was supplemented by answers received in a short consultation with Member State ministries, the European Labour Law Network and European Industrial Relations Observatory (EIRO). The following responses have been received:

- 24 responses from Member States (AT, BE, BG, CY, CZ, DE, EE, ES, FI, FR, IE, IT, LI, LT, LU, LV, NL, PL, MT, RO, SE, SI, SK, UK): with 23 responses analysed in the final report, as the Netherlands provided the position of the social partners and not the government's response.
- 27 of the European Labour Law Network (ELLN) members from the following countries: AT, BE, BG, HR, DE, FI, FR, DK, EE, EL, HU, IS, IE, IT, LV, LT, LI, LU, MT, NL, NO, PL, PT, RO, ES, SE, UK.
- None of the European Industrial Relations Observatory (EIRO) correspondents responded to the short consultation.

The key challenges encountered in this Task were to clean the data from the surveys (as sometimes respondents did not provide responses in the correct category) and analyse the data provided (as sometimes qualitative answers provided were not in English or formulations used were unclear). Prior the analysis the responses provided were translated, cleaned and clarified with respondents if unclear.

#### *Analysis of the national case law pertinent to the new rules*

The national case law pertinent to the application of new rules was identified, collected and assessed on a systematic basis. In addition, potential cases relating to the lack of

consultation in the cases of joint ventures (where control is shared equally by the original groups and whose accounts are not consolidated by these groups) were examined at the Commission's request.

The key challenges encountered in this Task included identifying national case law relevant to the provisions of the Recast Directive (as opposed to the old 1994 Directive). The following sources were used to identify national case law:

- Information provided by DG EMPL on infringement proceedings (only cases of non-communication),
- European Court of Justice case law,
- National case law identified in the EWC database,<sup>13</sup>
- National case law identified by the European Labour Law Network, Member State ministries and EIRO correspondents (see above),
- National case law identified through the literature review, and
- Additional national case law identified by the members of the research team through additional desk research.

The involvement in the study of ELLN members, Member States representatives and EWC experts provided particularly valuable insights in this regard. The identified cases might not be exhaustive and cannot be taken as an indicator of whether the rules of the Recast Directive have considerably improved legal certainty compared to the "old" provisions as we do not dispose of information of how many cases arose prior to and after the Recast. Nevertheless, the identified cases show the themes of the Directive which remain problematic.

#### *Cost-benefit analysis*

One of the key objectives of the evaluation was to assess the costs and benefits (including in relation to administrative burdens) generated by the changes brought by the Recast Directive 2009/38/EC. A distinction has been made in the analysis between different types of costs:

- Set-up costs as one-off costs – this refers mainly to the 'new rules' affecting the EWC negotiation / set-up phase;
- Running costs as recurrent costs calculated on an annual basis; and
- Administrative costs (monitoring, enforcement and adjudication/litigation) aggregated since June 2011 to provide an indication of the frequency at which legal challenges to the application of the new rules occur.

A distinction has also been made between quantifiable and non-quantifiable costs. While most costs are quantifiable, most benefits are intangible. The benefits generated by the new rules are therefore being mainly assessed qualitatively.

Where appropriate, costs have been compared to the costs related to the set up and operation of EWCs prior to the implementation of the Recast Directive, especially on the basis of cost information, by type of agreement where possible (Article 13, Article 6), from the 2008 preparatory study on the impact assessment on the revision of the EWC agreement.

Despite multiple contacts, employer representatives were less likely than the employees to agree to participate in the study. Their lower response rate has an impact on the cost-benefit analysis as they were the key source of information about

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[http://www.ewcdb.eu/list\\_other\\_documents.php?webchapter\\_ID=7&type=National%20Case%20Law&sort=jurisprudence](http://www.ewcdb.eu/list_other_documents.php?webchapter_ID=7&type=National%20Case%20Law&sort=jurisprudence).



costs of running EWC. Additionally, some of the interviewed employer representatives did not work at the company when the agreement was negotiated, therefore could not provide details of the process and its costs.

In the end information on the costs of running EWC was obtained for 20 out of 37 (54%) of the companies interviewed. Due to above mentioned reasons even less interviewees were able to provide information on cost of setting up a EWC (13 out of 37). Since only handful of company representatives in the current and in the EPEC GHK study (2008) were able to provide cost information the analysis of the impact on the quantifiable costs should be treated with caution.

#### *Literature review*

Only a handful of literature sources provided quantitative evidence on costs and benefits related to EWCs. These were used as benchmarks to support the comparative elements of the study by allowing the researchers to compare the findings related to Recast EWCs with Article 13 / Article 6 EWCs. The majority of post-2011 sources reviewed sources provided commentary on the new Directive rather than evidence on impacts. Therefore the assessment of the impact of the Directive relies mainly on evidence collected as part of this study.

The information on the general characteristic of EWCs created to date was based on the available information in the ETUI's EWC Database available at [www.ewcdb.eu](http://www.ewcdb.eu). The database is the most comprehensive data source on EWCs. However, it does not contain information on the whole population of EWCs created and some types of bodies might be underrepresented in it (e.g. non-unionised companies, EWC following subsidiary requirements). To mitigate this problem, national and EU level social partners were asked additional questions about changes in the number of companies following the subsidiary requirements. Furthermore, a parallel study on the EWCs in the transport sector carried out by ICF on behalf of DG MOVE was a source of information on the companies which did not reach agreement to set up an EWC.

The ETUI records information about other types of information and consultation bodies (e.g. SE companies). Filtering on EWCs out from this is not straightforward, therefore the data presented in section 4 might include a small sample of other types of information and consultation bodies.

#### *EWC consultations*

The consultations with EWC representatives were an important part of the method to gather evidence on a number of different evaluation questions, especially on the practical impact of the 'new rules' on the set up and operation of EWCs. A short overview of the three different types of consultations has been included in Table below.

*Table 2. EWC consultations*

Consultations	Method	Rationale	Response rate
'Recast EWCs': Interviews with employer and employee representatives of the EWCs established after June 2011 and EWCs established after June 2009 following the rules of the Recast Directive	Telephone and face-to-face interviews	To gather baseline information on newly-created EWCs operating under the Recast rules	Contact established with employee and management representatives of all 68 EWCs which were included in the original sample, of which 10 proved to be out of the scope of the study. Thus, out of the 58 recast EWCs in the sample, interviews have been undertaken with 37 EWCs (overall EWC response rate of 63%). Interviews were conducted with 25 company representatives and 34 employee representatives. In 22 EWC views of both sides were obtained.
Renegotiated EWCs: EWCs	Telephone	The goal was to gather	Contact established with employee

Consultations	Method	Rationale	Response rate
which have renegotiated their Article 13 or Article 6 agreement to follow the rules of the Recast Directive	interviews and surveys	further evidence on the changes in the functioning of old EWCs, of which agreement has been changed to reflect the 'new rules'	or management representatives of 50 EWCs which were included in the original sample, of which 5 proved to be out of the scope of the study <sup>14</sup> . Out of 45 relevant EWCs approached 19 agreed to an interview which gives response rate of 42%. The total number of interviews analysed is higher (23) as in 4 EWCs interviews were conducted with both sides – representatives of management and employees.
<u>Article 6 EWCs</u> : A survey of EWCs established before June 2011 following Article 6 rules	Online survey	To allow comparison between 'recast EWCs' (2009/38/EC) and those EWCs operating under the Article 6 rules (94/45/EC)	A total of 59 representatives of EWCs responded to the survey. However due to snowballing the sample was contaminated and after cleaning of the data only 22 respondents were identified as representatives of Art 6 EWC established before June 2011. The final sample represent 5% of all EWCs operating under Art 6 provisions.

#### *Social partner consultations at EU level*

In addition to interviews with individual EWC representatives, we have conducted consultations with EU level social partners. The aim of the interviews was to obtain social partner views on the impact of the Recast Directive of 2009 on the setup and operation of new EWCs and observed problems in transposing or interpreting the new rules.

Out of the 26 EU level social partners approached, 14 agreed to take part in an interview, including:

- 3 cross-sectoral EU social partners
- 11 sectoral social partners from key sectors, including 4 representing employers and 7 representing workers

The number of refusals to participate in the study was substantially higher among employers' than workers' representatives. This is due to lack of involvement in EWCs among employers' organisations at the EU and national level.

Both employers and trade union organisations in the property service and security sectors did not participate in the interview, stating that companies or other policy officers will present their position regarding the EWCs. In four sectors (building and woodwork, public services, chemicals, metal) the views of only one type of social partners were collected – in 3 cases these were views of workers' organisations. In four other sectors (food, HORECA, agriculture, services finance, insurance, services commerce, services information technology) interviews were conducted with both employer and trade union representatives.

#### *Survey of sectoral social partners at national level*

A total of 52 national sectoral social partner organisations responded to an online survey. They represent 22 Member States. Also among this group employee organisations (56%) more often participated in the survey than employers' organisations (31%). 13% of respondents were trainers or networks of EWCs.

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<sup>14</sup> Bodies no longer effective or actually were newly established EWCs.

### *Research on case studies*

Ten case studies were chosen reflecting both individual EWC examples and thematic case studies.

## **1.3 Purpose of this report**

The purpose of this Final Report is to provide analysis, conclusions and recommendations on the implementation of this Directive in order to support the work of the Commission in the preparation of the report due by 5 June 2016 to the European Parliament, the Council and the European Economic and Social Committee on the implementation of this Directive. The Final Report consists of the following sections:

- Section 2 presents the results of legal coherence analysis,
- Section 3 includes the results of legal analysis of national transposition laws,
- Section 4 includes an analysis of results related to the qualitative and quantitative effects of the Recast Directive on new EWCs,
- Section 5 discussed the interim results on the effects of the Recast Directive on information and consultation practices in EWCs,
- Section 6 examines 'other effects',
- Section 7 provides an analysis of costs and benefits of key Recast Directive provisions,
- Section 8 identifies key effective practices from the Recast EWCs,
- Section 9 concludes with conclusions and recommendations.

The report is accompanied by the following annexes:

- Annex 1 Overview of analytical framework,
- Annex 2 Detailed research methodology,
- Annex 3 Legal coherence assessment,
- Annex 4 The overall analysis of the national transposition,
- Annex 5 The detailed analysis of national transposition laws,
- Annex 6 The results of the surveys,
- Annex 7 The supporting information on the analysis of costs and benefits,
- Annex 8 Bibliography

## **2 Analysis of the coherence of the EWC Recast Directive with the other EU legislation addressing workers' information and consultation (I&C) rights and restructuring policy instruments**

### **2.1 Introduction**

One of the objectives of the assignment was to assess the extent to which the Recast EWC Directive is coherent with other EU legislation addressing workers' information and consultation rights. A desk-based review of other EU Directives and instruments pertaining to worker information and consultation was undertaken together with an assessment of relevant literature. The summary of this review is provided in Annex 1. The focus of the coherence assessment was on the following aspects of worker information and consultation:

- The definition of the two concepts,
- Its timing,
- The list of items to be covered by information and consultation processes.

The differences in the particular situations where specific I&C instruments apply (e.g. in the case of insolvencies, cross-border mergers or transfer of undertakings which are relevant but contain less focus on the detail of information and consultation processes) were explored but not included in the assessment of the legal coherence due to the focus of this study on the I&C procedures.

The analysis undertaken needs to be seen in the context of the Commission's own work to assess the coherence and complementarity of the existing I&C legislation at the EU level taking place within the overall Commission's REFIT initiative to simplify and reduce regulatory costs and to consolidate legislation to ensure so-called 'better regulation' at the EU level.<sup>15</sup>

In 2013, the Commission published the results of its fitness check of existing I&C legislation at the EU level.<sup>16</sup> It concluded that although I&C instruments are generally fit for purpose, some stakeholders expressed concerns about a possible lack of coherence in the definition and the procedures outlined for I&C across the instruments. The Commission's assessment was that the differences between the I&C instruments are due to their diverging scope and the EU legislator's objectives in formulating them (e.g. in terms of content and processes and I&C procedures suited to the specific purpose of the legislation).

Building on the results of the fitness check, in 2015 the Commission started a first phase consultation of the European social partners in line with Article 154 TFEU on a consolidation of the EU Directives on I&C of workers into potentially one legislative instrument.<sup>17</sup> In this context, questions about the coherence of legal provisions were examined again, highlighting the different definitions of the concepts 'information' and 'consultation' in existing I&C Directives:

- Directives 98/59/EC and 2001/23/EC (on collective redundancies and on the transfer of undertakings respectively) do not provide for specific definitions of the concepts of 'information' and 'consultation'. By contrast, Directive 2002/14 on information and consultation procedures at national level contains such definitions. However, these are relatively succinct in comparison to the more extensive definitions stipulated in the Recast EWC Directive 2009/38/EC. There

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<sup>15</sup> [http://ec.europa.eu/smart-regulation/refit/index\\_en.htm](http://ec.europa.eu/smart-regulation/refit/index_en.htm)

<sup>16</sup> Commission Staff Working Document, 'Fitness check', on EU law in the area of Information and Consultation of Workers, Brussels, 26.7.2013, SWD(2013) 293 final.

<sup>17</sup> <http://ec.europa.eu/social/main.jsp?langId=en&catId=329&newsId=2192&furtherNews=yes>

are calls to bring Directive 2002/14/EC as well as Directives 98/59/EC and 2001/23/EC in line with the definitions contained in the recast EWC Directive.

- Directive 2002/14/EC goes further than the Recast EWC Directive as regards to defining 'consultation', since it provides for consultation 'with a view to reaching agreement' while the recast EWC Directive states that the opinion of workers' representatives 'may be taken into account' by the employer.
- However, such comparisons of legal texts need to take account of the different focus of, on the one hand, the three I&C Directives and, on the other hand, the EWC Directive, with the former focusing on information and consultation at national and the latter at transnational level.

## **2.2 Key findings of the legal coherence assessment with I&C legal instruments**

In total, eight I&C instruments at the EU level were subject to the detailed legal analysis:

- 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/EC on cross-border mergers of limited liability companies
- Council Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer.

The **Charter of Fundamental Rights** of the European Union (hereafter referred to as EU Charter of Fundamental Rights) by its very nature provides a general legal framework for the I&C of workers in the EU (Article 27). It guarantees workers or their representatives the right to information and consultation in "good time" in situations as set out under EU and national law.

The Community Charter of Fundamental Social Rights of Workers already foresaw this right to information and consultation at "transnational" level under its heading 17. The Community Charter outlined all specific situations where information and consultation should take place and which are incorporated under European labour law Directives. Also the EU Charter of Fundamental Rights refers to Community law (thus referring to established rights) ensuring that the transnational right to information and consultation must be guaranteed. The right as set out under the EU Charter of Fundamental Rights also specifies that information and consultation at national and transnational level (when a EWC is in place) must be provided (at least of issues that fall under the EWC competence). In this regard, EU legislation concerning I&C procedures must ensure that there is a link between both levels – in rules for the national level and transnational level. The Recast Directive (under Article 12) stipulates that I&C at transnational level must be linked to national I&C procedures, taking into account the respective competencies of both levels. In the case of absence

of such provision in the EWC agreement, Member States are required to ensure that I&C processes are conducted in the EWC as well as national employee representative bodies if company decisions are likely to lead to significant changes in work organisation or contractual relations.

The Recast Directive clearly sets out under Article 10.2 that members of the EWC must inform workers' representatives in the establishments or undertakings that form part of a Community-scale group of undertakings, or – if no representative is available – the workforce as a whole, of the content of the outcome of information and consultation procedures. Links between transnational and national information and consultation processes are thus set out. However, the same is not necessarily true with regard to communication from the national to the transnational level. This can be relevant as restructuring processes can have different impacts at different levels that are not always foreseeable. Directive 2002/14/EC on national I&C provisions foresees only that rules shall be implemented without prejudice of former EWC Directive (94/45/EC), thus not creating a direct link between the national and transnational level.

Under Article 12.1 the Recast Directive sets out that I&C of the EWC shall be linked to those of the national employee representation bodies, taking into account their respective competencies. However, Article 12.2 specifies that in practice this link shall be further regulated by the EWC agreement, and as set out under Article 12.3, in case this has not been specified in the EWC Agreement the Member States shall ensure that the processes of I&C are conducted in the EWC and in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged. The linkage between national and transnational I&C procedures and bodies in practice is mainly left to negotiating parties when setting up the EWC.

In cases where no representation body or workers' representation is in place this linkage of I&C procedures may not be guaranteed, which may thus not give full effect to the fundamental right of information and consultation as set out under the EU Charter of Fundamental Rights. Directive 2002/14 does not provide for what happens if no worker representation is in place and a clear co-ordination with national and transnational I&C processes cannot always be guaranteed. It may therefore be necessary to consider this in cases of further revisions of I&C legislation to ensure effectiveness and legal certainty as these processes could be considered by management as a burden or counter-productive. It could also undermine the transnational right to information and consultation as under such a constellation a priority could be given to national I&C, leaving workers representatives to investigate what kind of issue should actually be under the competence of the EWC.

As mentioned above, the Charter sets out that I&C shall take place in "good time" in situations as set out under EU law. Timing is crucial for I&C procedures, particularly taking into account that information and consultation processes may take place as two distinct steps. Time therefore needs to be provided to have a meaningful dialogue in a specific case. The formulation used in the Charter could lead to the interpretation that "in good time" may be further specified for situations regulated under EU law. The Recast Directive does indeed specify that information should take place '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 2.1 (f)). With regard to consultation, reference is made to this taking place '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' (Article 2.1 (g)).

This concept is also linked to the content of and process that information and consultation can follow. The right as set out in the Recast Directive seems thus coherent with the Charter's right on information and consultation. In line with Article 6.2 (c) of the Recast Directive, it may be considered that the content of the EWC Agreement shall further set out the timing for I&C procedures to improve protection of workers in this regard. However, the provisions of the Recast Directive could arguably have been more specific, using the example of Directive 2001/23/EC on the transfer of undertaking which specifies a more specific timeframe ("in good time and before employees are directly affected" – see also below).

For the coherence analysis two Directives could not be compared directly with the I&C provisions of the Recast EWC Directive because they were either far more general in scope or did not contain provisions directly relevant to the information and consultation procedures:

- **Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies** which concentrates on the participation rights of employees and broadly refers to the existing body of I&C instruments at the EU level.
- **Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer** which provides for employee protection in cases of insolvencies – rather than information and consultation procedures.

Amongst the remaining five Directives and instruments being analysed, the following two types of situations are distinguished.

Two cases where a high level of consistency<sup>18</sup> with the Directive is identified:

- **Definitions of information and consultation and their timing are 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.
- Definitions of information and consultation in **Directive 2003/72/EC on European cooperative societies** are similar to the provisions in the Recast Directive with small adaptations regarding the specific situation of the creation of a European cooperative society.

Three cases where a partial coherence<sup>19</sup> with the Directive is identified with regard to the definition of core concepts:

- **In Directive 98/59/EC on collective redundancies** provisions on the timing of information and consultation are coherent with the Recast Directive as for both concepts a reference to 'in good time' is made. However, the articulation of the processes to be followed under this and the Recast EWC Directive is not always necessarily clear. This could create time inefficiencies and the timing of consultation in relation to the requirements of both directives is not necessarily clear (who should be consulted first). In addition, Directive 98/59/EC also provides a clear list of the information to be transmitted to employees which is not included in the Recast EWC Directive. A clear link between both instruments is missing, potentially leading to legal uncertainties.

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<sup>18</sup> High consistency is defined in the evaluation as situations where the wording and definitions used in the different legal texts are very close and similar to each other.

<sup>19</sup> Partial coherence was defined in the evaluation as situations where some definitions used in the different legal texts were similar or the same, however, other definitions and concepts used in the different legal texts were different or absent.



- **Directive 2001/23/EC on transfer of undertakings** does not provide a definition of the concepts of information and consultation. However, it provides a more specific timeframe (“in good time and before employees are directly affected”) for the information and consultation processes and provides a list of the minimum information which needs to be provided to employees. In addition for “consultation” it is stipulated that parties shall conduct a consultation procedure ‘with a view to reach agreement’. The Recast Directive defines that a consultation process ends with an opinion that is provided by the EWC in good time so that management may still take it into account.
- Definitions of I&C in **the Directive 2002/14/EC on information of workers** are provided but are more succinct than in the Recast Directive though Article 4 of Directive 2002/14/EC sets out practical arrangements for information and consultation. Directive 2002/14/EC also sets out the specific cases (in a non-exhaustive list) in which information and consultation shall take place. The Recast Directive only specifies under Article 1 (read in conjunction with Article 6.3) that information and consultation shall relate to “transnational issues that significantly affect workers interest”. In addition, line 2 of the subsidiary requirements of Annex I of the Recast Directive indicates that the annual meeting shall cover progress in business and prospects. Thus the Recast Directive leaves substantial room for information and consultation procedures in terms of areas that could be covered having only a geographical limit (transnational – shall involve two Member States). However, the list of the type of information that needs to be provided, as mentioned in Directive 2002/14/EC (which is broader scope than in the Recast EWC Directive) could be regarded as setting minimum number of information and consultation subjects. The timing set for information and consultation is in line with the provisions of the Recast EWC Directive. The definition of Directive 2002/14/EC already linked timing to the content, fashion and preparation of a consultation process. In addition, Directive 2002/14/ EC further details under Article 4.4 (d) with regard to the procedure of consultation that it shall occur in such a way that allows employee representatives to meet with the employer and to obtain a response, and the reasons for that response, to any opinion they might formulate. The Recast Directive only provides the possibility for employee representatives to express an opinion that central management may take into account. This definition falls short of requiring management to provide a response.

Beyond the level of coherence of the definitions of core concepts (e.g. information, consultation etc.), the question of the linkage and articulation between these different instruments in practice is also worth considering. These shall be briefly mentioned here but pertain more to issues of implementation of the rights in practice rather than coherence. The question for linkage and articulation is particularly relevant for the following: Directive 98/59/EC on collective redundancies; Directive 2001/23/EC on transfer of undertakings; and Directive 2002/14/EC on information and consultation of workers. While their scope is to set out information and consultation procedures at national level and in specific cases, these three Directives are directly complementary to the provisions of the Recast Directive. Directive 89/59/EC and Directive 2001/23/EC specify what the process of information and consultation shall cover in cases of collective redundancies and transfer of undertakings. They impact differently on coherence:

- Directive 98/59/EC – it is relevant to consider what happens if collective redundancies occur on a transnational scale – thus possibly falling within the remit for discussions in the EWC. As indicated above, there is no clear link between both instruments – an issue which may need to be clarified to ensure that the EWC first has an opportunity to be informed and consulted (e.g. on alternative measures to potentially avoid redundancies) before information and



consultation takes place at the national level to shape the precise nature of redundancy processes.

- Directive 2001/23/EC also applies at the establishment level directly involved. In a case where a Community-scale undertaking is concerned this also requires I&C procedures to be followed in the transferee undertaking and the transferor undertaking. A situation of transfer of undertakings may well be taken at central management level thus shall be discussed first with the EWC possibly at a more strategic level (again minimum type of information to be provided is not fully set out – as the Recast Directive requires information to be given so that an in-depth assessment is possible – the question that remains with this type of definition is however what question is to be assessed in-depth – the impact or the decision to transfer in the first place, or both) and then at the level of the establishment concerned. The complementary level of the EWC is not clear as the Recast Directive does not make a clear link to the procedures of the transfer of undertakings Directive. The EWC level may be undermined as management will start directly a national procedure in cases of restructuring and the EWC may remain a formality without management being obliged to take note of the EWC opinion.
- Directive 2002/14/EC sets out national level procedures for I&C and plays a key role for the development of company level dialogue at national level. It is important to note that while this sets minimum standards, significant differences remain between Member States in the rights accorded to national information and consultation bodies (and indeed the traditions and practice for such consultations). For Member States that have more protective standards for workers for I&C or more participatory models of I&C, this could imply a stronger role for those members of the EWC from these particular States and potentially leading to an unequal level of information among EWC representatives.

### **2.3 Coherence with the key EU policy developments relating to restructuring**

The assessment of the coherence of the EWC Recast Directive is also relevant in the context of the employee information and consultation rights in the situations of restructuring at the company level. A number of important developments at the EU level have occurred in the last years in this area (see Table 2). In contrast to the hard law developed in the area of I&C, these instruments are mostly soft law, based on the communications and policy directions provided by the European Commission to the partners at the national level.

As shown in Table 2, the EWC Directive is highly consistent with three soft law instruments in the area of restructuring policies (i.e. the 2005 Communication on restructuring, the 2009 Checklist for restructuring policies and the 2013 Quality Framework for Restructuring). This is because the EWC Directive aims to strengthen the process of information and consultation (also in situations of transnational restructuring) in the EWCs through clarifying and developing its key principles (such as appropriate timing, in-depth examination of impacts, cooperative dialogue between management and labour). This in principle is aimed at encouraging the EWCs to play a role in fostering a more socially responsible management of restructuring, which is a key policy message in the recent EU level policy developments. In addition, the EWC Directive aims to reinforce the role and capacity of the EWCs in managing the transnational restructuring. This is consistent with the policy directions in the EU policy developments where the EWCs are seen as a key stakeholder in the restructuring policies.

With respect to the transnational company agreements, the situation is different. The EWC Directive does not explicitly refer to the role of EWCs in negotiating and implementing the transnational company agreements. However, in practice, some EWCs play a role in the negotiation and adoption of such agreements (see section 7), even though formally they are not negotiation bodies. Hence, here the legal definitions lag behind the actual situation.

*Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*

**Table 3. Overview of key EU developments in the area of restructuring and their links to the EWC Directive**

Year	Instrument	Title	Short summary	Relevance and links to the EWC	Assessment of the coherence (in bold are the elements leading to the placement in the nominal scale)
2005	<b>Transnational Company Agreements (TCAs)</b>	<a href="http://ec.europa.eu/social/main.jsp?catId=707&amp;langId=en&amp;intPageId=14">http://ec.europa.eu/social/main.jsp?catId=707&amp;langId=en&amp;intPageId=14</a>	TCAs are concluded by one or more representatives of a company or a group of companies on the one hand, and one or more workers' organisations on the other. They cover working and employment conditions and/or relations between employers and workers or their representatives. <sup>20</sup> These initiatives help to anticipate cross-border employment developments, launch flanking measures for restructuring and manage human resources in transnational companies. Issues related to discrepancy between the transnational scope of the TCAs and the national norms and references exist. The EU supports development of TCAs through exchanges of experience, financial support, monitoring and studies. <sup>21</sup>	EWCS generally play an important role in representing workers in the context of TCAs. <sup>22</sup> Companies involved in concluding TCAs are mostly multinationals in the metal, construction, chemicals food and financial sectors with headquarters in Europe and with well-established EWCS. The initiative to start a transnational negotiation often originates from the EWCS. They have also signed a large number of the texts, particularly the European ones, even though they have no negotiating powers under Directive 2009/38/EC. Their involvement in negotiations is at odds with national systems that make a clear distinction between the consultative role of elected employee representative bodies (works councils) and the negotiating mandates entrusted to trade unions (in France for example) or which utilise a single trade-union channel for worker representation (in Italy or the Nordic countries for example).	<b>Highly consistent, mutually reinforcing</b> The Directive aims to <b>strengthen the role and capacity of EWCS</b> to help to manage the transnational restructuring and thus supports the Communication seeing the EWCS as a key player in the management of transnational restructuring. The EWC Directive aims to support the work of EWCS in managing the transnational restructuring through <b>clarifying and developing the definitions and process of information and consultation in the EWCS</b> (which often relates also to the situations of transnational restructuring). It aims to ensure that the information and consultation procedures in the EWCS are undertaken <b>on time</b> and in such way as to enable an <b>in-depth assessment of possible impacts</b> and ensure <b>meaningful consultations between the management and labour about the possible impacts</b> . The Directive also puts emphasis on the <b>spirit of cooperation</b> in the information and consultation procedures.
2009	<b>Checklist</b>	<b>Communication</b>	The document provides a set of comprehensive approaches to manage restructuring in a socially responsible way	The Communication proposes a set of actions to	<b>Highly consistent, mutually reinforcing</b>

<sup>20</sup> <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>.

<sup>21</sup> <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>.

<sup>22</sup> Commission Staff Working Document SWD(2012)264, **Transnational company agreements: realising the potential of social dialogue**.

<sup>23</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0120>.

*Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*

Year	Instrument	Title	Short summary	Relevance and links to the EWC	Assessment of the coherence (in bold are the elements leading to the placement in the nominal scale)
2013	Quality Framework on Restructuring	<b>“A shared commitment for employment” – 2009: “Checklist for Restructuring Processes”<sup>24</sup></b>	checklists of concrete actions aimed at anticipating, managing and reacting to restructuring with the aim to help the stakeholders confronted with a restructuring.	manage the restructuring in a socially responsible way which could also be used in the work of the EWCs	The EWC Directive aims to support the work of EWCs in managing the transnational restructuring through clarifying and developing the definitions and process of information and consultation in the EWCs (which often relates also to transnational restructuring). It aims to ensure that the information and consultation procedures in the EWCs are undertaken on time and in such way as to enable an in-depth assessment of possible impacts and ensure meaningful consultations between the management and labour about the possible impacts. The Directive also puts emphasis on the spirit of cooperation in the information and consultation procedures. These elements of the Directive are consistent with the processes described in the Checklist to ensure that the restructuring processes in the companies are managed in socially responsible way. <b>Highly consistent, mutually reinforcing</b> The EWC Directive aims to support the work of EWCs in managing the transnational restructuring through clarifying and developing the definitions and process of information and consultation in the EWCs (which often relates also to transnational restructuring). It aims to ensure that the information and consultation procedures in the EWCs are undertaken on time and in such way as to enable an in-depth assessment of possible impacts and ensure meaningful consultations between the management and labour about the possible impacts. The Directive also puts emphasis on the spirit of cooperation in the information and consultation procedures. The Directive thus aims to <b>strengthen the role and capacity of EWCs</b> to help to manage the transnational restructuring. These elements echo the elements of the Quality Framework of Restructuring encouraging the socially responsible way to manage restructuring, including via continuous dialogue between the management and labour. A further area of development should be to promote the Quality Framework to the EWCs to use in their information and consultation procedures.
		<b>Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, EU Quality Framework for anticipation of change restructuring.</b> Brussels, 13.12.2013 <sup>25</sup>	The framework outlines best practices for anticipating company restructuring and minimising their impact on workers and social conditions. <sup>26</sup> It offers guidance to companies, workers, trade unions, employers' organisations and public administrations in order to facilitate the process of restructuring for businesses and workers via better anticipation and investment in human capital, while minimising the social impact. <sup>27</sup>	EWCs are seen as important players in transnational restructuring. The Communication states that employees' representatives, including through EWCs, are vital partners of company management in anticipating and managing the development of jobs and skills needs and in conducting particular restructuring operations. In the management of restructuring processes, social partners and sectoral organisations are asked to explore and negotiate all possible options for avoiding redundancies including for example to foster EU-wide coordination of trade unions to help EWCs; encourage EU-level negotiations in the event of transnational restructuring; conduct negotiations on professional transition policies. <sup>28</sup>	

<sup>24</sup> European Commission, Directorate-General for Employment, Social Affairs and Equal Opportunities (2009), Checklist on Restructuring Processes.

<sup>25</sup> COM(2013) 882 final, <http://ec.europa.eu/social/main.jsp?catId=103&langId=en>.

<sup>26</sup> [http://europa.eu/rapid/press-release\\_IP-13-1246\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1246_en.htm).

<sup>27</sup> [http://europa.eu/rapid/press-release\\_IP-13-1246\\_en.htm](http://europa.eu/rapid/press-release_IP-13-1246_en.htm).

<sup>28</sup> <http://ec.europa.eu/social/main.jsp?catId=103&langId=en>.

## **2.4 Summary of key findings**

The Directive is highly coherent with the two other EU level legal instruments:

- 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 the ones in the Recast Directive.
- Definitions of information and consultation are similar in Directive 2003/72/EC on European cooperative societies to the provisions in the Recast Directive with small adaptations regarding the specific situation of the creation of a European cooperative society.

The Directive is partially coherent with the three other EU level legal instruments:

- In the Directive 98/59/EC on collective redundancies.
- Directive 2001/23/EC on transfer of undertaking.
- I&C definitions in the Directive 2002/14/EC on information and consultation of workers

Possible inconsistencies with the existing I&C instruments identified relate to the Recast EWC Directive not including:

- A list of (minimum) information to be provided to employees in I&C procedures as set out in the Directive on collective redundancies, Directive on transfer of undertakings and Directive on the information and consultation of workers providing for a better linkage to these procedures in specific cases between national and transnational level,
- A specific timeframe for the I&C procedures as specified in the Directive on transfer of undertakings' (e.g. 'in good time and before employees are directly affected'),
- The requirement for management to provide an official answer to an opinion formulated by the EWC as set out in the Directive on (national) information and consultation of workers or indeed to consult 'with a view to reaching an agreement'.

The EWC Directive is highly consistent with three soft law instruments in the area of restructuring policies (i.e. the 2005 Communication on restructuring, the 2009 Checklist for restructuring policies and the 2013 Quality Framework for Restructuring).

Possible inconsistencies and issues of partial coherence can become problematic when they contribute to a lack of legal certainty or coherence with regard to the interplay of national and transnational information and consultation instruments and I&C 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 arguably inform and consult EWCs first on such issues. However, if national transposition legislation linked to collective redundancies provides strong consultation rights for workers (e.g. consulting 'with a view to reach agreement') this could have the effect of undermining the role of the EWC, or at the very least rendering the interplay between transnational and national consultation more problematic.

Similarly, in cases of transfers of undertakings, which could in certain situations also have transnational implications, the stipulation that consultation should take place 'in good time and before employees are directly affected' could similarly lead to greater and earlier emphasis being placed on national information and consultation, at the expense of the role of the EWC.

Overall, the existence of different definitions and timescales provided can – at the very least – contribute to greater legal uncertainty at company level, which may ultimately need to be clarified by the Courts (thus potentially leading to lengthy and disruptive processes of litigation).

### **3 Legal analysis of the national transposition of the Recast Directive**

#### **3.1 Introduction**

The national transposition laws of the Recast Directive were assessed by the evaluation team using the following analytical categories:

- The national legislation meets the requirements of the directive
- The national legislation does not meet the requirements of key substantive provisions. Key substantive provisions are considered to be:
  - Opening and process of negotiations. Article 5 clarifies the responsibility of local management to provide the information allowing negotiations to be opened with a view to setting up new European Works Councils. In relation to the composition of the Special Negotiating Body, the Recast Directive is modified to one representative per 10% portion of the employees in a Member State in which at least 50 employees are employed. The right of employee representatives to meet without the employer present is clarified.
  - 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 on setting up a European Works Council and explicitly mentions the trade union organisations among the experts on whom employees' representatives may call for assistance in the negotiations.
  - Content of the subsidiary requirements (which apply in the absence of an agreement). The Annex to the Directive draws a distinction between fields where information is required and those where consultation is required, and introduces the possibility of obtaining a response, and the reasons for that response, to any opinions expressed. With a view to anticipating such eventualities, the exceptional circumstances requiring information and opening the possibility of a select committee meeting are extended to include circumstances in which decisions are envisaged that are likely to affect the employees' interests to a considerable extent. In order to enable the select committee to perform this more important function, its maximum number of members is set at five and a provision is added stipulating that the conditions enabling it to exercise its activities on a regular basis must be met.
  - General principles and concepts of information and consultation. Article 2 adds a definition of information and brings the definition of consultation into line with that of more recent directives, including the concepts of time, fashion and content appropriate to the information and consultation.
  - Transnational competence of the European Works Council. Article 1 establishes the principle of the relevant level according to the subject under discussion. To achieve this, the competence of the European Works Council is limited to transnational issues, and the determination of whether an issue is transnational is transferred from the current subsidiary requirements to Article 1, so that it can be applied to the European Works Councils established by agreement. Art.1.4 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'. However Recital 16 of the Directive seems to be broader enough. It underlines that the transnational character of a matter should be determined by taking account of both the scope of its potential effect, and the level of management and representation that it involves. For



this purpose, matters which concern the entire undertaking or group or at least two Member States are considered to be transnational. These include matters which, regardless of the number of Member States involved, are of importance for the European workforce in terms of the scope of their potential effects or which involve transfers of activities between Member States.

- Links between the levels of information and consultation of employees. Article 12 introduces the principle of a link between the national and transnational levels of information and consultation of the employees with due regard for the competences and areas of action of the representative bodies. The arrangements for this link are defined by the agreement concluded pursuant to Article 6, which now covers this matter. Where there are no such arrangements and where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged, the process would have to start in parallel at national and European level. Since certain national legislation may have to be adapted to ensure that the European Works Council can, where applicable, receive information earlier or at the same time as the national bodies, a clause has been added to stipulate that there must be no reduction in the general level of protection of employees.
- Role and capacity of employees' representatives. The obligation on the employees' representatives to report to the employees that they represent has been moved from the subsidiary requirements of the Directive to Article 10, which thus deals with the role of the employees' representatives and their protection. The competence of the members representing the employees on the European Works Council to represent the employees of the undertaking or group of undertakings is established. The possibility for employees' representatives' to benefit from training without loss of salary is also clarified.
- Adaptation clause. The agreements pursuant to Article 6 must include provisions for amendments and renegotiation. 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 provisions of the applicable agreement or, by default and where a request is made, in accordance with the negotiation procedure for a new agreement in which the members of the existing European Works Council(s) are to be associated.
- Other provisions. In Article 6, the establishment and the operation of a select committee are, where applicable, part of the content of the agreement. Article 15 provides for a review clause under which review is due five years after the time-limit for transposition. In the Annex, the composition of the European Works Council set up in the absence of an agreement is aligned with the new composition of the special negotiating body.
  - The national legislation does not meet the requirement of other provisions (not key substantive provisions outlined above).
  - The national legislation exceeds the requirements by providing additional details
  - The national legislation exceeds the requirements and provisions are more favourable for the EWCs reps/workers than the provisions of the directive.

In reading this assessment, the following key methodological remarks should be borne in mind:



- In several cases, national transposition rules included most of the relevant provisions of the EWC Directive, but did not explicitly refer to one or several particular aspect of the Directive. In these cases, the assessment used was that the national law both meets and does not meet the Directive’s requirements.
- In several cases, some of the relevant national provisions relating to the same aspect of the Directive were new and introduced after 2009, and some already existed in the pre-2009 laws. In these cases, the assessment was that the provisions are both old and new.

The following sections assess the transposition of the Recast Directive in the four key areas:

- Setting up of the EWCs (part 1),
- The key concepts of information, consultation and transnationality (part 2),
- The operation of the EWCs (part 3),
- The role and protection of the employee representatives (part 4).

Annex 2 provides a detailed assessment of the transposition by key articles of the Directive, whereas Annex 3 provides a detailed text of the relevant national laws. The analysis is provided of EU-28 Member State national laws, as well as the analysis of national laws in Norway, Iceland and Liechtenstein.

The evaluation also tested whether in some instances the provisions of Recast Directive not transposed into the national EWC legislation was included into other national legislation (see Table 4). This was found not to be the case as the broader national legislation on worker information and consultation did not contain references to some provisions of the Directive.

*Table 4. Additional checks of the national legislation*

<b>MS</b>	<b>Area of the EWC Directive where the assessment was 'not meeting' the Directive provisions</b>	<b>Other national legislation on worker information and consultation</b>
Luxembourg	Article 1.2 of the Recast Directive stipulates the key principle of information and consultation insofar as "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 company to take decisions effectively.  The national EWC transposition law has no reference to the arrangements for informing and consulting employees	The Labour Code and more especially Title III of Book IV of the Labour Code entitled "European works council or transnational information and consultation procedures of workers" <sup>29</sup> : does not contain any provisions transposing the effectiveness principle enshrined in Article 1.2 of the EWC Directive
France	Article 1.2 of the Recast Directive stipulates the key principle of information and consultation insofar as "the arrangements for informing and consulting employees shall be defined and implemented in such a way as to ensure their effectiveness and to	The Labour Code and more especially Title IV of Book III of the Second Part of the Legislative Part of the Labour Code entitled "European Works Councils or information and consultation procedure in the European-scale companies" <sup>30</sup> : does not contain any provisions transposing the effectiveness principle enshrined in Article 1.2 of

<sup>29</sup> [www.legilux.public.lu/leg/textescoordonnes/codes/code\\_travail/Code\\_du\\_Travail.pdf](http://www.legilux.public.lu/leg/textescoordonnes/codes/code_travail/Code_du_Travail.pdf).

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<http://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000025578952&idSectionTA=LEGISCTA000006177964&cidTexte=LEGITEXT000006072050&dateTexte=20150131>.

	<p>enable the company to take decisions effectively.</p> <p>The national EWC transposition law does not contain specific provision about the effectiveness of information and consultation procedures. French law does not use the same wording as the Directive but nonetheless recognises the fact that the consultation must happen without prejudice to the employer's responsibilities.</p>	the EWC Directive
UK	<p>The Recast Directive specifies the fall-back rules for cases where the negotiations on the establishment of the EWCs fail and subsidiary requirements apply. These requirements, applying in the absence of an agreement, should draw a distinction between fields where information is required and those for consultation, and provide the possibility of obtaining a response, and the reasons for that response, to any opinions expressed.</p> <p>National EWC transposition law is consistent with the Recast Directive - there is a distinction between consultation and information, but there is no clear definition regarding when consultation is appropriate and when provision of information is appropriate.</p>	Information and Consultation of Employees (ICE) Regulations <sup>31</sup> : ICE defines information and defines consultation, it then provides details on when "information and consultation" should be undertaken, but no separate set of circumstances when just information is appropriate, as distinct from consultation

### **3.2 Part 1: Setting up the EWCs**

In the national transposition laws, the majority of countries meet the relevant provisions in the Directive on the setting up of the EWCs. The key provisions examined here were:

- Providing necessary information to start the EWC negotiations. This provision is important because in situations where management might be reluctant to deliver information (such as the number of employees in different EU Member States), it is more difficult to employee representatives to determine whether thresholds for setting up an EWC are met, and the establishing of contact with relevant employee side counterparts can be more challenging. This provision is therefore among the measures aimed at encouraging the establishment of further EWCs;
- Rules about setting up and operating the Special Negotiation Body (SNB). These rules are intended to support the representativeness of employees on such bodies while ensuring the number of individuals involved remains manageable both from a financial and practical perspective. Furthermore, a right is provided to meet without management to allow employee side representatives to discuss and consolidate their negotiating positions;
- Role of social partners in the negotiations. Enhancing the role of the social partners through the requirement to inform them of the establishment of an SNB means that where appropriate they can provide additional support and

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<sup>31</sup> <http://www.legislation.gov.uk/ukxi/2004/3426/contents/made>.

advice, as well as being informed about the existence of EWCs within their sector. Entitlements to the use of experts is also clarified, which could support the employee side with additional expertise and experience in their negotiations;

- The contents of the EWC agreement. New provisions aim to ensure representation of the employee side which represents all countries where the company is present (provided certain thresholds are reached);
- The contents of subsidiary requirements. This is of relevance as it sets the framework of baseline provisions against which negotiations take place and provide a 'floor of rights' should such negotiations fail to bear fruit.

The instances of exceeding the relevant provisions relate to instances where the national laws are more favourable to the EWC representatives / workers than the EWC directive:

- In two countries (Lithuania and Luxembourg) the national rules exceed the requirements of the Directive and are more favourable for the EWC representatives/workers than the provisions of the Recast Directive by specifying the time limit for information transmission, the categories of information (in addition to the number of employees) and the possibility to go to court if the information is not provided.
- In two countries (Romania and Sweden) the national rules exceed the requirements of the Directive by establishing a reserve list for the SNB members and additional provisions for SNB membership in cases of significant restructuring.
- In four countries (Austria, Germany, Hungary and Lithuania) the national rules exceed the requirements of the Directive and are more favourable for the EWC representatives/workers than the provisions of the Recast Directive by establishing the need to inform also the national social partners, introducing a time limit for the information procedure to take place and the official publication of the information.

In one country (Italy) the national rules exceed the provisions of the Directive by specifying more detail in relation to the balance of representation. However, the extent to which this is more favourable to EWC representatives / workers is questionable.

The instances of not meeting the relevant provisions relate to a particular aspect of the Directive not being explicitly included in the national transposition law.

The key substantive requirements of the Directive are not met as follows:

- In two countries, the national rules do not meet the key substantive requirements of the Directive (Greece and Iceland) due to not containing the specific provisions about the information about the start of the EWC negotiations to be given to the European social partners.
- In one country, the national rules do not meet key substantive requirements of the Directive (Denmark) due to not containing the specific provisions about the meeting of the SNB without the presence of central management.

Other, non-substantive requirements of the Directive are not met as follows:

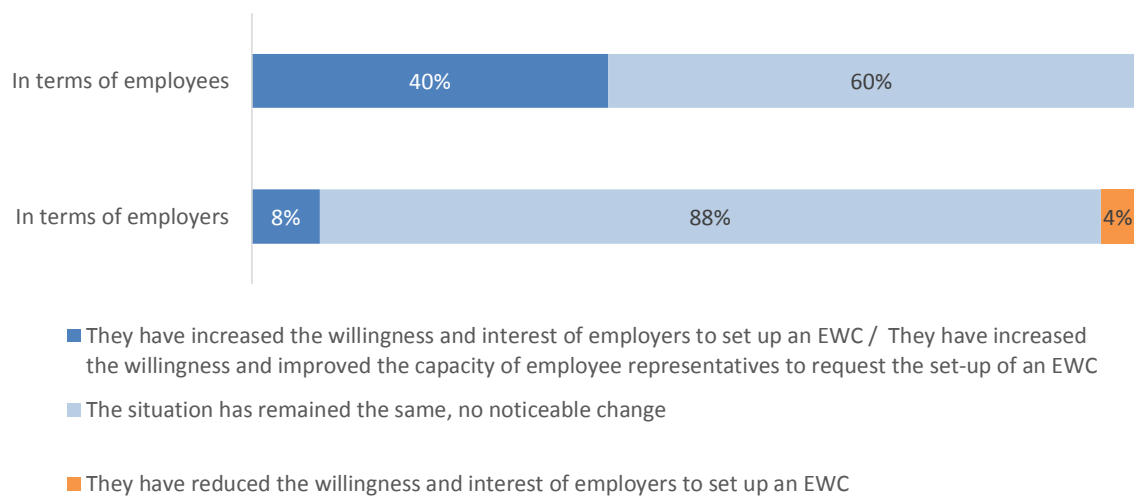
- In four countries, the national rules do not meet other requirements of the Directive (Estonia, Poland, Portugal, the UK) as they do not have specific provisions about all the aspects of the fall-back rules of the Directive.

In the survey of the national social partners<sup>32</sup>, the perceived impact on the actions of management of the 'new rules' introduced by the Recast Directive on the creation of EWCs in comparison to the 1994 Directive. Some 88% of national social partners agree that the Recast Directive has not brought about a change in the willingness and interest of employers to set up an EWC. Specifically, a social partner based in Belgium found it decreases employers' willingness and interest. The Croatian and Norwegian social partner found it had increased employers' willingness and interest to set up an EWC.

The perceived impact in terms of employee willingness/interest to set up an EWC has been somewhat greater. Less than half of respondents (40%, especially trade unions) found it had increased the willingness and capacity of employees to set up an EWC, while 60% (mostly employers' organisations) believed there was no noticeable change. None of the respondents found the Recast had decreased willingness and capacity for employees to set up an EWC.

This could therefore be an indication that from the trade union side the enhanced rights to obtaining information are seen to be somewhat useful, whereas from the employer side this may be reflective of a view that relevant information has generally been provided when requested.

Figure 3. National social partners' perceived impact of the Recast Directive on the creation of EWCs (in terms of willingness and support of management to set up EWCs / employees willingness and capacity to request the set-up of an EWC)



Source: ICF survey based on 52 national social partner responses.

Respondents were asked for their opinions of the impact of the new rules on the negotiation process and specifically on the cost of the negotiation process. The first figure shows that a little bit more than a third of social partners do not think the average costs have changed (35%) and many do not know (44%). In total, nine social partner organisations (17%) indicated that costs have increased, explaining that more rights for employees come with more costs for the employer. A German and a Belgian social partner find costs have decreased (4%). The German social partner explains

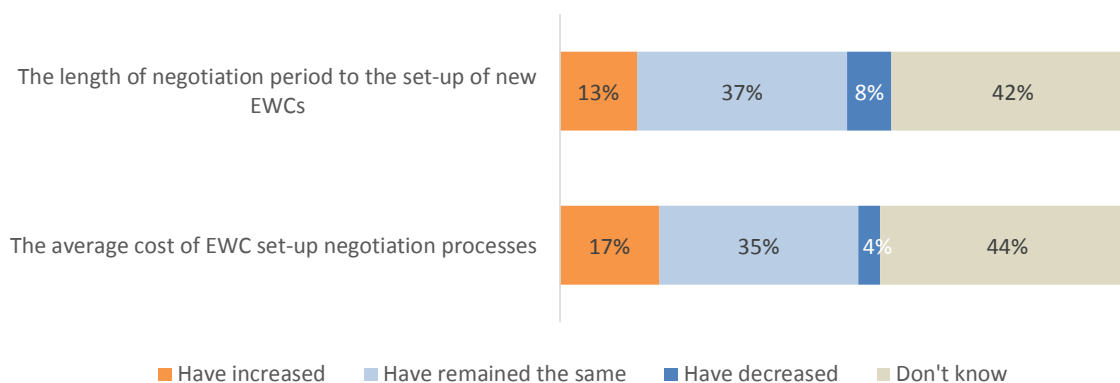
<sup>32</sup> 52 responses from national social partners. Respondents are based in Austria, Belgium (3), Bulgaria, Croatia, Denmark (4), Estonia, Finland (5), France (4), Germany (2), Hungary (2), Ireland, Italy (2), Latvia, Malta, the Netherlands (8), Norway (2), Poland, Portugal, Slovakia (2), Slovenia, Spain (4), Sweden (3) and across multiple countries (1).

that the increased clarity in the Recast Directive has led to greater efficiency in negotiations.

Secondly, national social partners were asked about the length of the negotiation processes following the new rules. As Figure 4 shows, the responses are quite similar to those regarding the costs of the negotiations: more than one-third believe this has remained the same (37%), many do not know (42%). Four stakeholders (including two German and one Swedish social partner) believe the length of negotiations has decreased (8%). Seven national social partners (including Belgian and Finnish social partners) believe the length has increased (13%).

As will be further elaborated below, in practice, the number of individuals involved in negotiating processes has declined, but this has been largely due to companies with smaller numbers of employees setting up EWCs. At the same time, the duration of negotiations has increased. This could go some way towards explaining the social partner responses obtained, although it is also clear that many organisations have no detailed knowledge on this issue.

Figure 4. National social partners' perception of the impact of the new rules on the average costs and length of EWC set-up negotiation processes



Source: ICF survey based on 52 national social partner responses.

### 3.3 Part 2: Definition of the concepts of information, consultation and transnational issues

The key concepts and definitions of information, consultation and transnational issue – of the Recast Directive have been implemented correctly in all Member States. Clearer definitions in this area were intended to improve the effectiveness and efficiency of the operation of EWCs and enhance legal certainty with regard to the subject matters and processes for transnational information and consultation.

The majority of Member States have implemented these definitions by transposing the text of the Directive verbatim. There were no instances identified where the national laws did not meet the requirements of the Directive.

In the case of the definition of information, the Czech Republic exceeds the requirements of the Recast Directive as 'information' may also lead to the expression of an opinion and it precisely sets out that information shall take place before a management decision is implemented.

In relation to the definition of consultation, three Member States (the Czech Republic, Estonia and Germany) implemented provisions exceeding the standards of the Recast Directive by defining that consultation processes end with a reasoned opinion by

management referring to the opinion expressed by workers' representatives on a specific issue under consultation.

The definition of 'Transnational issues' is given a particular geographic scope in the Recast Directive.<sup>33</sup> However, decisions that concern the undertaking as a whole may need to be defined more clearly to improve its understanding. In this regard five Member States (Belgium, Czech Republic, Finland, Hungary and Romania) chose to include in their definition a reference to issues that significantly affect workers' interests and include factors such as potential effect and level of management at which the decision is taken, as well as transfer of business between the Member States as indicators for what constitutes a 'transnational issue'. It is not clear from the analysis it has been possible to carry out as part of this study whether such greater specification of the concept has assisted in clarifying when EWC need to get involved in these countries (compared to others where national law have not included such further clarification).

Finally, it should be highlighted that the transposition of the Recast Directive has considerably renewed these concepts and in all cases (apart from the Czech Republic for information and consultation) it has led to new national regulatory provisions.

All national ministry representatives responding to the survey indicated the articulation in the Recast Directive had not led any conflicts between national and European information and consultation procedures. France specifically pointed out that there is no clear priority between national and EWC information and consultation procedures as both are autonomous procedures, but this did not lead to any issues. More specifically, 13 out of 23 respondents found that the Recast EWC Directive provided more protective conditions for workers than existing national provisions implementing Directive 2002/14/EC (Austria, Cyprus, Estonia, Spain, Finland, Ireland, Latvia, Italy, Lithuania, Malta, Poland, Romania and Sweden). Four Member State representatives found that the Recast Directive provided less protective conditions for workers than their national law (Belgium, Bulgaria, Luxembourg and Slovenia). The Czech Republic, Germany and the UK pointed out it was neither more nor less protective than its national law. France, Liechtenstein and Slovakia either did not answer or noted it did not have enough experience in this area to assess this.

In the European Labour Law Network (ELLN) survey<sup>34</sup>, two-thirds of respondents agreed that the Recast had improved legal certainty regarding the timing of information and consultation procedures. Of the one-third who did not agree (Austria, Sweden, Latvia, France, Greece, Malta, Romania and the UK) some pointed out that definitions in this regard were often still open to interpretation, while Liechtenstein believed it was too early to assess this.

In the ELLN survey, over half (55.6%) of the 27 respondents found that the Recast had provided for enhanced information and consultation rights for workers than was previously the case. Those who found the Recast provided for less protective conditions (Austria<sup>35</sup>, the Netherlands, Croatia, Sweden, France, Italy, Luxembourg, Portugal, Romania and the UK) considered that their national law provides more

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<sup>33</sup> Definition of Transnational Issues: Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues. Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States. (Art.1.3-1.4, rec.12,15,16).

<sup>34</sup> 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.

<sup>35</sup> Which is contradicting the ministry representative view from Austria expressed above.

protective conditions, or in the case of Luxembourg the provisions in national law and the Recast are similar. Liechtenstein indicated it found this difficult to assess. Similarly, the UK had also pointed out it depends on ones perspective whether the Recast provides for more or less protective conditions for workers. This follows from a more general description regarding the information and consultation procedure.

Overall, it therefore appears that ministry and academic experts consider that the new and enhanced definitions contained in the Recast Directive have contributed to greater legal certainty. The extent to which this is in fact the case on the ground will be discussed in more detail in section 6 below.

### **3.4 Part 3: Operation of the EWCs**

In the national transposition laws, the majority of countries meet the relevant provisions in the Directive on the operation of the EWCs.

The instances of exceeding the relevant provisions related to two countries, where the national rules exceed the requirements of the Directive (Germany and Spain) due to the national laws specifying more extensively the conditions for the adaptation clause to be applied.

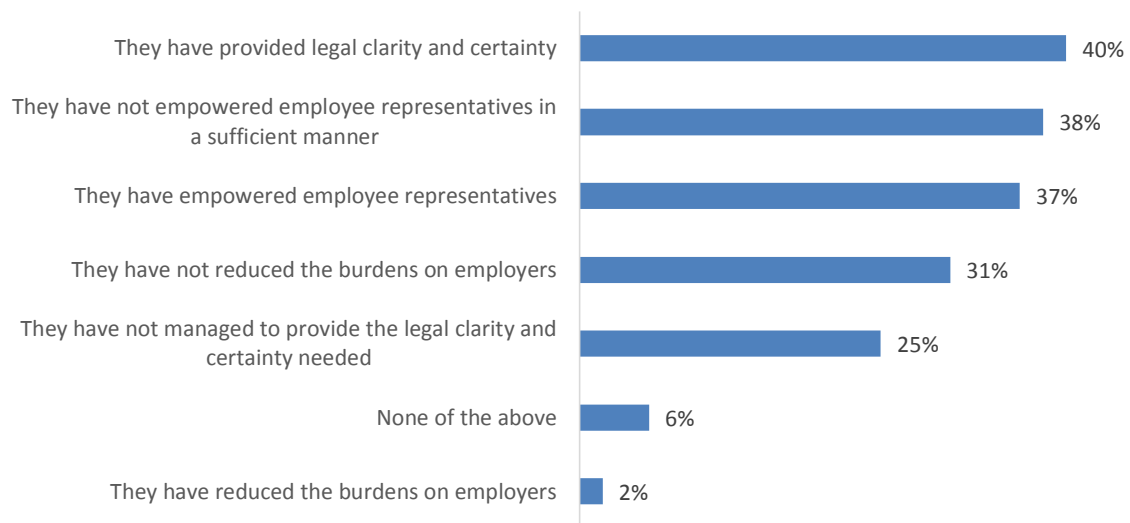
The instances of not meeting other, non-substantive provisions relate to a particular aspect of the Directive not being explicitly included in the national transposition law:

- In one country, the national rules do not meet the requirements of the Directive (Bulgaria) due to the national laws not containing provisions about the number of representatives on the Select Committee or the absence of the rules specifying the working conditions for the Committee.
- In four countries, the national rules do not meet the requirements of the Directive on the general principle of effective information and consultation (Finland, France, Luxembourg, and the Netherlands). This is because no such general principle is contained in the national law (Finland, France, Luxembourg, and Netherlands).

In the survey, national social partners were also asked to indicate how the Recast Directive affected the practical operation of the EWCs, following the introduction of the Recast's new rules as opposed to the 1994 Directive. More than one-third of the respondents identified with the statement that following transposition of the Recast, employee representatives were not empowered in a sufficient manner (38%). Slightly fewer respondents thought the rules following the Recast empowered employees sufficiently (37%). Respondents identified most with the statement that the new rules have provided legal clarity and certainty (40%, mostly trade unions). Respondents identified least with the statement that the new rules had reduced burdens on employers (1 of 52: a German social partner). On the contrary, almost one-third of the respondents (16, or 31%) indicated that the new rules had not reduced burdens on employers (mostly employers' organisations).



Figure 5. National social partners' perceived impact of the Recast Directive on the practical operation of EWCs (n=52)



Source: ICF survey based on 52 national social partner responses. A respondent could identify with multiple categories.

### 3.5 Part 4: The role and capacity of employee representatives

In the national transposition laws, the majority of countries meet the relevant provisions of the Directive on the role, protection and training of EWC members.

The instances where relevant provisions exceed the requirements of the Directive relate to eight countries (Austria, Belgium, Czech Republic, Italy, Lithuania, Poland, Portugal and Norway) the nature of the means for the EWC members to carry out their duties. This was more favourable to the EWC representatives than the Directive requirements. Also, three countries (Finland, Hungary and Italy) provided for more specific additional provisions on the contents of training and the rate of remuneration during the training. These additional provisions are not necessarily more favourable to the EWC representatives than the requirements of the Directive.

The instances of not meeting the relevant provisions relate to a particular aspect of the Directive not being explicitly included in the national transposition law.

In one country (the UK) national law refer to the right to training in general but do not include a specific reference to training without loss of wages (which is a key substantive provision of the Directive). As will be further elaborated below, the specific right to training without loss of wages has had an impact on EWC agreements and access to such rights in practice.

### 3.6 Analysis of the national case law

For the period of 2010 to 2015, the research identified ten EWC relevant national legal cases. Most cases occurred in France and Germany, in line with the fact that most of the EWC agreements are implemented under the German or French jurisdiction.

While the number of court cases currently identified remains rather low, it cannot be taken as an indicator of whether the rules of the Recast Directive have considerably improved legal certainty in comparison to the "old" provisions. We do not dispose of information of how many cases were brought in national courts before and after the



Recast. In addition, a number of court cases that were identified in the Commission impact assessment in 2008<sup>36</sup> relate to the “old” provisions.

However the recent cases highlight a number of issues and legal uncertainties relating to the following aspects:

- Installation of an EWC
- Links of national and European level consultation in particular timing
- Transnational issue definition and possible I&C subjects
- Communication between EWC and national level employees
- Enforcement rights.

The following table provides an overview of the recent national case law, followed by the analysis of key rulings by thematic areas of the EWC Directive. Additionally, the UK indicated that since the UK regulations transposing the provisions of the Recast Directive came into effect, the Central Arbitration Committee has considered eight complaints. Four of these were withdrawn, two led to a decision of the Central Arbitration Committee and two are pending in 2016.

*Table 5. Overview of the national case law (2010-2015)*

MS	Year	Name	Key provisions of the Recast Directive concerned in the case	Outcome
Spain <sup>37</sup>	2014	Tenneco	Invalid consultation	In a consultation process management shall consider alternative solutions
Spain <sup>38</sup>	2014	Coca Cola	Invalid consultation	In a consultation process management shall consider alternative solutions
France <sup>39</sup>	2011	GDF Suez	Links between national and European level	National and EU level I&C shall take place simultaneously
France <sup>40</sup>	2014/2015	Transdev Group	Definition of transnational issue	Hypothetical impact on the whole undertaking of a measure does not make it a transnational issue
France <sup>41</sup>	2013	Peugeot	Links between national and European level	National and EU level I&C shall take place simultaneously
France <sup>42</sup>	2014	Manpower	Installation of EWC	Free choice of law to govern the EWC agreement
Germany <sup>43</sup>	2012	Visteon	Information Consultation/ Enforcement	& German law does not foresee to invalidate/ or stop the managerial decision as long as the consultation was not correctly implemented
Germany <sup>44</sup>	2014	A. Group	Communication between EWC and employees	No priority/ superiority of face to face transmission of outcomes of I&C EWC procedure
Germany <sup>45</sup>	2013	Amcor	Communication between EWC and employees	EWC cannot directly communicate outcomes to the entire workforce if a worker representative body was in

<sup>36</sup> European Commission, Impact assessment of the European Works Council Directive, SEC(2008) 2166.

<sup>37</sup> <http://www.ewc-news.com/en012014.htm>, 16.08.2015.

<sup>38</sup> Spanish National Court, Social Chamber, Madrid, Resource no: 79/2014.

<sup>39</sup> French High Court, Paris, 11/00433.

<sup>40</sup> French High Court, Nanterre, 14/02861, Court of appeal of Versailles, 21 May 2015, No. 14/08628.

<sup>41</sup> [http://www.franceinfo.fr/sites/default/files/2013/01/29/875795/pdf/fichier/arr%C3%AAt\\_PSA.pdf](http://www.franceinfo.fr/sites/default/files/2013/01/29/875795/pdf/fichier/arr%C3%AAt_PSA.pdf), 02.08.2015.

<sup>42</sup> District Court of Paris, TGI de Paris, interim order, 17 July 2014.

<sup>43</sup> German District Court, Amtsgericht Köln 5 BV 208/11.

<sup>44</sup> State Labour Court Baden-Württemberg of 02.10.2014, 11 TaBV 5/14, <http://openjur.de/u/770098.html>, State Labour Court Lörrach of 08.04.2014 – 4 BV 7/13.

<sup>45</sup> <http://www.ewc-news.com/en032013.htm>, 16.08.2015.

MS	Year	Name	Key provisions of the Recast Directive concerned in the case	Outcome
UK <sup>46</sup>	2013	British Council, CAC	Consultation, Transnationality	place Pay policies shall be excluded from I&C procedures of EWCs; EWC cannot consult on issues that fall under the competence of national I&C

### **3.6.1 Installation of EWCs**

In one French case (Manpower) a French trade union aimed to enforce that an EWC shall be established under French law. However, the court ruled that management had rightly appointed its British subsidiary to negotiate the EWC agreement under the British law. The Recast Directive provides several orientations in this respect and normally it shall be the country where central management is located which provides the legal basis for the agreements. If central management is located outside the EU, the place shall be the representative management for the EU, otherwise the establishment with the highest number of employees. However, this rule only helps to determine the relevant partner for workers representatives and define central management. This could indicate that in our assessment, in principle, the Directive remains silent on which law shall be chosen to govern the negotiations or the national jurisdiction governing the EWC agreement. It seems to remain under the discretion of the negotiating parties to make this choice.

### **3.6.2 Consultation procedures**

The cases from Spain (Tenneco and Coca Cola) on invalid consultation procedures concerned the interpretation of the timing of I&C procedures. In both cases, it seemed that central management had already taken its decision firmly on the measure under discussion (a closure of plants and transfer of business between Member States). Thus, trade unions maintained that the I&C procedures could be no longer regarded as efficient and no true dialogue could have been developed in such a case. Consequently, the court ruled that I&C procedures shall take place with an actual possibility to discuss effects and seek possible alternatives to ensure the I&C procedures are useful and efficient. This interpretation by the Spanish Courts may be considered to go beyond the provisions of the Recast Directive. Its definition is implicit on timing and it does not say explicitly that I&C takes place before a measure is taken and that management shall seek alternatives. The Directive also specifies that management may take the EWC's views into account without prejudice to their obligations.

### **3.6.3 Links between national and European level consultation**

There are two court cases that deal with the issue of linking national and transnational levels of consultation.

In the two French cases concerning restructuring (GDF Suez and Peugeot) the ruling was that that the national level and transnational levels shall be consulted simultaneously. All consultation procedures must be correctly carried out at all levels before a decision may be implemented. In the case of Peugeot, the Court further stated that the establishment level works council could await the outcome of the transnational level procedure before giving an opinion. Either way, both level consultation procedures must be completed before management may further implement a measure. This outcome provides for complementarity at both levels. It

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<sup>46</sup> <http://www.ewc-news.com/en022013.htm>, 16.08.2015.

could also lead to a more strategic way of organising consultations in such a way that different level representation bodies assess the different aspects of the measure or to ensure that this could also be carried out jointly. This interpretation would certainly improve the efficiency of I&C procedures at all levels.

#### **3.6.4 Transnational issues and possible I&C matters**

There are two cases in which the Court (in case of the UK it is the Central Arbitration Council) had to rule over issues at stake on whether they were transnational.

In the French case (Transdev), it concerned the measure of a payment advance which led to the commencement of the procedure of insolvency of a subsidiary of the French part of the Community undertaking. The EWC claimed it should have been consulted on the matter. The Court assessed in its decisions (first instance and appeal) both factors to determine whether an issue is of transnational nature:

- the geographical limit – has to involve two Member States; and
- the factor that it shall affect the group as a whole.

While the first factor could be quickly excluded, the second factor lead to further discussions. In order to determine whether a measure could impact the company as a whole the judges also referred to the “significant impact of EU workforce interests” and “substantial changes in work organisation”. The EWC agreement combined the definitions of the Directive by stating that transnational defines the questions relating to at least two sites in two different Member States or questions which, regardless of the number of Member States involved, are of significance for European workers concerning the scale of their potential impact or the transfer of activities between Member States.

For this assessment, factors such as the size of the workforce of the French subsidiary were used and group company level plans of restructuring to assess scale of their potential impact. The workforce of the subsidiary only represented 2.5% of the overall workforce in the EU and the restructuring plans did not refer to France. In addition, the Court held that the advancement of a payment as such did not produce an impact on a European scale thus a link to “significant impact” and transnational matters could not be made. The Court concluded that the measure was solely of national nature and management did not need to consult the EWC.

However, the judges did state that while this measure may lead to important consequences and potential impact for the European workforce, at that stage, however this can only be regarded as a hypothesis and cannot be proven. This last note makes it clear that in some cases of restructuring the EWC cannot be properly consulted at an early stage. The notion of restructuring and potential transnational impact may be further discussed at the EU level in a guidance note to make I&C procedures more efficient in particular at an early stage. This case also highlights why national and European level I&C are closely linked because it is important that both levels are aware of measures discussed at all levels of the establishment. Sometimes the national company strategy (in particular in the headquarter country) may only impact much later on the European workforce.

In the second case involving an undertaking in the UK (British Council, CAC), the Arbitration Council did not decide as such whether the measure was of transnational nature but it focussed on the subject matter of the measure in question (which related to pay policies). In addition, this case can also be linked to the issue of the linkage of national and European competence of workers representation bodies. The Council argued that because pay policies are excluded from regulation at EU level it cannot, by consequence, also be a transnational subject matter for the EWC. As a result, it is only the national level representation bodies to be consulted on such a measure. Even if the matter may be of transnational interest, the EWC cannot be competent and is

excluded from such I&C. The link between the scope of the EU treaties and the scope in this respect of EU Directives poses the following questions:

- Are there subjects that by nature can be excluded from transnational I&C procedures if the parties did not expressly include the matter in their agreement?
- In addition, while only the national level may be competent but the measure still produces a transnational and significant impact for the European workforce, shall the transnational level EWC still be left out from the I&C procedures?

The Recast Directive remains indeed silent on these points.

### **3.6.5 Communication between the EWC and the national level representatives**

The two German cases dealt with the communication of the outcomes of an I&C procedure from the EWC to national worker representation bodies.

In the case of the A. Group, two members of the EWC Select Committee wished to present the outcomes of the I&C procedure in person locally at a plant site. However, management refused to cover the costs for such travel and also did not see any reason why both of the representatives had to carry out such a task. It was further argued that only Select Committee members shall carry out such information of the outcome. The Court ruled that the German transposition text does say that only Select Committee members can do so but any member of the EWC can inform national employee representation or workforce. There is no primacy either of the fact that information shall be given in person and not via video conferencing.

In the second case (Amcor), the EWC intended to communicate with national workers representatives via the intranet webpage. The Court ruled that there is no immediate right to communicate with the workforce directly if the national workforce representation bodies were in place. In the German context, information must be provided for the relevant workers representatives and shall not immediately be communicated to the entire workforce. This ruling thus delimits the possibility of direct communication with the workforce which seems however within the intentions of Article 6.1 (c) of the Recast Directive which does refer only to workers representatives.

### **3.6.6 Enforcement**

In the German case Visteon the Court declared the consultation procedure invalid and the EWC claimed that the Court shall stop the measure in question for as long as that the consultation was not correctly carried out. However, such a measure to enforce the EWC rights does not exist under the German law. While German law foresees such a measure for breaches of national level I&C procedures it has not been applied for transnational I&C procedures. German law foresees in cases of breaches only a monetary fine. In the case in question the Court ordered a fine of 15,000 Euros. This decision has been much criticised arguing that such low fines encourage the undertakings not to carry out I&C procedures. It can be debated whether this sanction is an appropriate measure to ensure the compliance and dissuasiveness not to comply. The problem of effective, proportionality and dissuasiveness of sanctions has also been discussed in a recent EU policy paper by the ETUI<sup>47</sup>.

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<sup>47</sup> Jagodzinski, R. (2014), Implementation of enforcement provisions of the European Works Council Directive: are sanctions really effective, proportionate and dissuasive?, ETUI - policy papers.

### **3.6.7 Findings from the interviews**

All but one of the European social partners interviewed (14) were not aware of any disputes between the management and employees over the new provisions of the Directive. Hence, the general view was that the level of disagreements has remained the same following the Recast Directive. Only one social partner organisation was aware of the legal dispute over the operation of the new Directive (EWC Eiffage). However, the interviewees pointed out (a number of) disagreements between management and employees over:

- Training – who should decide the contents of the training.
- Transnationality – the definition of the issues which should be covered by EWC and after the Recast Directive, the number of disagreements in this regard increased due to point 16 of the DIR.
- Consultation – how long should it take to conduct the consultation (in-depth assessment), how much information should be provided, how many meetings, how much they have time to react.
- Expert – who should choose the advisor, how long he should advise, who pays for him.

### **3.7 Summary of key findings**

The analysis below was undertaken by the ICF team during the evaluation and does not reflect the official position of the European Commission.

#### **3.7.1 Key findings of the transposition analysis**

A total of 17 Recast Directive provisions were assessed in the legal transposition analysis at the national level (see Tables 6 and 7). In the majority of cases, the national regulations met the provisions of the Directive by transferring the text of the Directive verbatim or using very similar wording to transpose the spirit of the Directive.

15 Member States additionally introduced more detailed provisions than those foreseen in the Directive while remaining within the Directive. Such regulations were rated as exceeding the requirements of the Directive. This was most frequently observed in the Czech Republic, Hungary, Italy and Lithuania (in each country, three provisions of the Directive were exceeded).

The key areas where national rules exceeded the provisions of the Directive are as follows (see Table 6):

- During the process of negotiations to establish the EWC – an obligation to inform not only the European, but also the national social partners (Austria, Germany); the possibility to go to Court if the management does not provide the required information (Lithuania, Luxembourg); establishing a reserve list for the SNB members (Romania) and additional wider provisions for the wider composition of the Special Negotiating Body in cases of significant restructuring (Sweden). All these provisions are more favourable to the EWC representatives / workers.
- More extensive provisions of means for the EWC members to perform their duties – guaranteed access for EWC members to local establishments (Austria, Belgium); specific details on defining the means (Czech Republic, Portugal, Norway); duration of annual leave for EWC members (Italy). All these provisions are more favourable to the EWC representatives / workers.

- In relation to the training of EWC members – defining the rate for pay during training (Finland, Poland), contents of training (Italy). These provisions do not necessarily per se are more favourable to the EWC representatives / workers.
- More generous conditions to initiate the adaptation clause (Germany, Spain).
- More extensive definitions of consultation (Czech Republic) and transnational matters (Hungary, Romania). All these provisions are more favourable to the EWC representatives / workers.

In contrast, in 12 EEA countries at least one national rule was assessed as not meeting all the requirements of the Directive. However, only in 4 EEA countries at least one of the key substantive provisions of the Directive was not transposed correctly. In other countries, a relatively minor non-substantive provision (or part of the provision) was not transposed.

The key areas of national regulations not meeting the provisions in the key substantive provisions of the Directive are as follows (see Table 6):

- No specific reference ensuring the SNB right to meet without management (Denmark);
- No specific reference to the requirement to provide information to European social partners on the composition of the special negotiating body and the start of the negotiations (Greece, Iceland);
- No specific reference to ensuring EWC members receive training without loss of wages (UK).

The key areas where other but not key substantive provisions (as currently defined) were not transposed in the Member States laws are as follows:

- Lack of restriction of the number of the standing committee members which could also be interpreted as exceeding the requirements (Bulgaria);
- No specific reference to the subsidiary requirements or not all aspects of subsidiary requirements included (Estonia);
- No specific reference to the general principle of information and consultation needing to be effective and enable companies to take decisions effectively (Finland, France, Luxembourg, Netherlands);
- No specific reference to regularity of the select committee consultations (Poland);
- No specific reference to SNB composition (Portugal).

In three countries (Belgium, Italy and Norway) the transposition of the Recast was undertaken on the basis of collective agreements between the social partners. This method of transposition did not lead to instances of incorrect transposition. The stakeholders consulted in this evaluation (independent labour law experts, national social partners and the Ministry representatives) also did not identify challenges associated with this form of transposition.

*Table 6. Summary assessment of the national legal transposition*

<b>MS</b>	<b>Total number of provisions assessed</b>	<b>Total number of 'exceeds' (additional more favourable conditions)</b>	<b>Total number of exceeds (additional conditions)</b>	<b>Total number of 'Meets'</b>	<b>Total number of 'Does not meet a key substantive provision'</b>	<b>Total number of 'Does not meet' (not a key substantive provision)</b>
Austria	17	2		15		
Belgium	17	1		16		

*Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*

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<b>MS</b>	<b>Total number of provisions assessed</b>	<b>Total number of 'exceeds' (additional more favourable conditions)</b>	<b>Total number of exceeds (additional conditions)</b>	<b>Total number of 'Meets'</b>	<b>Total number of 'Does not meet a key substantive provision'</b>	<b>Total number of 'Does not meet' (not a key substantive provision)</b>
Bulgaria	17			16		1
Cyprus	17			17		
Croatia	17			17		
Czech Republic	17	3		14		
Denmark	17			16	1	
Estonia	17			16		1
Finland	17		1	15		1
France	17			16		1
Germany	17	2		15		
Greece	17			16	1	
Hungary	17	2	1	14		
Ireland	17			17		
Italy	17	1	2	14		
Latvia	17			17		
Lithuania	17	3		15		
Luxembourg	17	1		15		1
Malta	17			17		
Netherlands	17			16		1
Poland	17	1		15		1
Portugal	17	1		15		1
Romania	17	2		15		
Slovakia	17			17		
Slovenia	17			17		
Spain	17	1		16		
Sweden	17	1		16		
UK	17			15	1	1
<b>EEA countries</b>						
Iceland	17			16	1	
Liechtenstein	17			17		
Norway	17	1		16		

Source: ICF analysis of national transposition laws.



Table 7. Summary assessment of the key areas of exceeding and not meeting the Directive

MS	Key areas of 'Exceeds' (more favourable / additional)	Key areas of 'Does not meet' (substantive / non-substantive provisions)
Austria	<ul style="list-style-type: none"> <li>• (more favourable): additional obligation to inform national social partners of the negotiations (not only the European social partners)</li> <li>• (more favourable): added a provision providing that the EWC must be granted access to the establishments and undertakings after providing information to the local management of the establishment or undertaking</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Belgium	<ul style="list-style-type: none"> <li>• (more favourable): the Belgian legislation also refers to the employees' representatives of the technical production units as a whole located in Belgium who must be granted necessary time and means in addition to the members of the EWC.</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Bulgaria	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• (non-substantive): does not restrict the number of the standing committee members (this could also be interpreted as exceeding the requirements)</li> </ul>
Cyprus	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Croatia	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Czech Republic	<ul style="list-style-type: none"> <li>• (more favourable): More extensive definition of consultation</li> <li>• (more favourable): The link to national consultation procedures is also applied in case of other supranational information and consultation procedures</li> <li>• (more favourable): More extensive definition of means for the EWC members to operate</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Denmark	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• Substantive: no provision for the SNB to meet without management</li> </ul>
Estonia	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• Non-substantive: not all specific provisions about the subsidiary requirements are included</li> </ul>
Finland	<ul style="list-style-type: none"> <li>• (additional): Clarifies the rate of pay for any time spent on EWC related duties and training outside working hours.</li> </ul>	<ul style="list-style-type: none"> <li>• Non-substantive: the FI law does not make direct reference to the 'ability of the company to take decisions effectively'. The only relevant sentence was found within the definition of 'consultation' which states that the consultation should take place 'without prejudice to the responsibilities of the management'.</li> </ul>
France	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• Non-substantive: does not contain specific provision about the effectiveness of information and consultation procedures</li> </ul>
Germany	<ul style="list-style-type: none"> <li>• (more favourable): Additional obligation to inform national social partners of the negotiations (not only the European social partners).</li> <li>• (more favourable): In the adaptation clause, the written request of 100 employees to request change to the EWC agreement is not required, implying any number of employees can make the request</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>
Greece	<ul style="list-style-type: none"> <li>• None</li> </ul>	<ul style="list-style-type: none"> <li>• Substantive: no provision to inform the European social partners about the start of SNB negotiations</li> </ul>
Hungary	<ul style="list-style-type: none"> <li>• (more favourable): The provision includes the obligation for the employment ministry to publish the names and contacts of the</li> </ul>	<ul style="list-style-type: none"> <li>• None</li> </ul>



*Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*

MS	Key areas of 'Exceeds (more favourable / additional)	Key areas of 'Does not meet' (substantive / non-substantive provisions)
	<ul style="list-style-type: none"> <li>member of the Special Negotiating Body on the official journal.</li> <li>(more favourable): Considers as 'transnational issues', not only matters concerning the undertaking as a whole or two establishments in two different MSs, but also matters which may be of relevance considering the scope of their potential effects.</li> <li>(additional): More specifications given on the training to which EWC members and SNB members are entitled to (e.g. training in language and legal skill). Absence fee foreseen for the time of the training also foreseen.</li> </ul>	
Ireland	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Italy	<ul style="list-style-type: none"> <li>(more favourable): Defines a minimum level of annual leave for members of the EWC. In addition, members are entitled to better conditions in case these are defined by national agreements</li> <li>(additional) Additional provisions on the contents of training.</li> <li>(additional): The national legislation provides a more specific definition of the "balanced representation of employees" (as suggested by the "Joint Agreement")</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Latvia	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Lithuania	<ul style="list-style-type: none"> <li>(more favourable): In the opening of negotiations, the transposition law specifies the time limit (30 days) as well as various of categories of information that must be submitted by the management. The national law also provides a possibility to go to court if the management refuses to provide the information or there is a dispute over the correctness of information.</li> <li>(more favourable): The time limit is specified to inform the European social partners of the start of negotiations.</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Luxembourg	<ul style="list-style-type: none"> <li>(more favourable): The non-provision of the information to start the negotiations as required by the Directive is recognised as an offense under Luxembourgish law.</li> </ul>	<ul style="list-style-type: none"> <li>Non-substantive: no reference to 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 company to take decisions effectively</li> </ul>
Malta	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Netherlands	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>Non-substantive: there is no provision stating 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 company to take decisions effectively</li> </ul>
Poland	<ul style="list-style-type: none"> <li>(more favourable): Adding cost of remuneration for participation in training</li> </ul>	<ul style="list-style-type: none"> <li>Non-substantive: the transposition does not mention that the select committee should be able to consult regularly.</li> </ul>
Portugal	<ul style="list-style-type: none"> <li>(more favourable): Specifically mentions that EWC members should be provided with the financial and material resources needed to perform their duties. In addition to Article 28 of the Portuguese 2009 Law establishes several additional conditions for the protection of employee' representatives and their role.</li> </ul>	<ul style="list-style-type: none"> <li>Substantive: 10% provision is specified only for the SNB composition, not the EWC composition</li> </ul>

*Evaluation study on the implementation of Directive 2009/38/EC on the establishment of a European Works Council*

MS	Key areas of 'Exceeds' (more favourable / additional)	Key areas of 'Does not meet' (substantive / non-substantive provisions)
Romania	<ul style="list-style-type: none"> <li>(more favourable) : More extensive definition of transnational matters</li> <li>(more favourable) : A reserve list for SNB is established</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Slovakia	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Slovenia	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Spain	<ul style="list-style-type: none"> <li>(more favourable) : More specifications are included in the national law regarding the Adaptation clause. The national law specifies the minimum number of members that should form the negotiating committee.</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Sweden	<ul style="list-style-type: none"> <li>(more favourable): Additional provisions are given for where negotiations are initiated in the case of significant restructuring, that go beyond the provisions in the Directive, making extra demands with regard to the composition of the SNB.</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
UK	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>Non-substantive: no clear definition regarding when consultation is appropriate and when provision of information is appropriate.</li> <li>Substantive: The obligation on central management does not include an obligation to provide time off during working hours to undertaking training, or remuneration for such time off</li> </ul>
<ul style="list-style-type: none"> <li><b>EEA countries</b></li> </ul>		
Iceland	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>Substantive: there is no obligation to provide the European social partners with information on the composition of the special negotiating body and the start of the negotiations</li> </ul>
Liechtenstein	<ul style="list-style-type: none"> <li>None</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>
Norway	<ul style="list-style-type: none"> <li>Substantive: the law specifies the EWC agreement needs to include the budget for EWC activities, and the management needs to ensure sufficient meetings, travel accommodation and translation costs</li> </ul>	<ul style="list-style-type: none"> <li>None</li> </ul>

Source : ICF analysis of national transposition laws

### **3.7.2 Key views of the stakeholders**

This overall positive picture of the transposition at the national level is confirmed by the analysis of stakeholder views in the evaluation, including the national labour ministry representatives (23 respondents), national social partners (mostly trade unions) (52 respondents), the European social partners (14 stakeholders) and the labour law experts (27 respondents).

#### **3.7.2.1 Views from the Member State representatives**

The Member States were asked to identify the main challenges in transposing the new rules of the Recast EWC Directive. Out of 23 respondents<sup>48</sup> from the national labour ministries, 4 countries identified challenges in transposing the new rules. For Belgium, these arose when considering the practical application of the law (including the definitions of key concepts, questions when the renegotiation is obligatory, how to implement the right to training in practice). Sweden experienced some issues but did not give further detail other than having asked the Commission for clarification. Latvia experienced issues transposing Articles 13 and 14 of the Recast Directive, but does not give further detail as to what the issue was. Poland indicates while it did not have any significant issue, a discussion did occur around the election procedures of EWC members and members of the Special Negotiating Body.

Furthermore, Member States were asked what aspects of the Recast had improved legal certainty. 11 out of 23 national ministry representatives answered legal certainty had improved across all aspects. Two countries (Belgium and Slovakia) responded that for many aspects it was too early to tell. The Czech Republic, Spain and Luxembourg did not provide an assessment. Ireland points out that the Directive was not an issue of particular importance in Irish context, hence they have no further information on whether legal clarity has improved. Belgium, Estonia, Italy, Latvia, Luxembourg and Sweden pointed out a few aspects where the Recast had not improved legal certainty. In Italy (right to organise meetings before and after meetings with central management, role and capacity of EWC representatives and subsidiary requirements) Estonia (definition of information, consultation and right to request external expertise), Latvia (specific information rights, role and capacity of EWC representatives, subsidiary requirements) and Sweden (right to request external expertise, role and capacity of EWC representatives) this was the case because national provisions already provided this certainty. For Belgium this related to specific information rights and the adaptation clause. With regard to causes, it pointed out the challenges in transposing the Recast as a cause. Luxembourg did not provide further explanation. The role and capacity of the EWC is most mentioned as not having improved in legal clarity (4), but in 3 cases this was because there was already enough legal clarity. In one case no reason was provided.

Many Member States reported no experience with enforcement as the transposition is quite recent or as there are no EWCs in the Member State it does not apply. However, Bulgarian, French, Austrian, German and Swedish representatives pointed out enforcement has become easier due to the improved legal certainty. Italy indicates enforcement has become easier for employers' organisations, but not so much for employees as those rules are more open for interpretation (e.g. it is left for the management to decide whether the EWCs fall under the old or new rules of the Recast Directive).

As the transposition of the Recast Directive is still relative recent, not many Member States have identified outstanding legal issues. Member States identifying some issues

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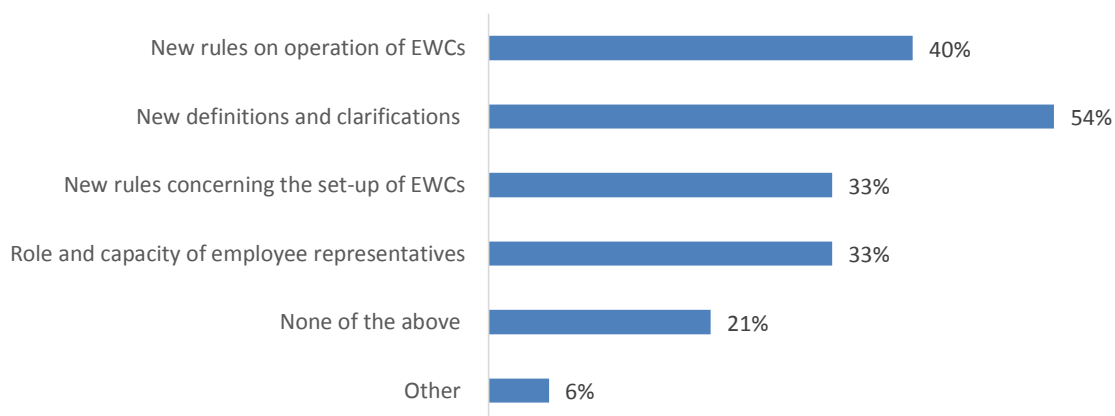
<sup>48</sup> Belgium, Bulgaria, Czech Republic, Germany, Estonia, Ireland, Spain, France, Italy, Cyprus, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Austria, Poland, Romania, Slovenia, Slovakia, Finland and Sweden and the UK.

are Italy, Germany and France. In Italy there is a call from employee organisations to define timescales for information and consultation more clearly by specifying these in national agreements. Germany points out it is not quite clear when and with what content the information needs to be provided. France has identified some outstanding issues. With regards to the set-up of EWCs this relates to the timing of the information of the European social partners, and the timing of the negotiations. As for the functioning of the EWCs, this concerns the articulation between the EWC and the national employee representation bodies in absence of an agreement. In Poland there not many EWC have been set up, however this is due to economic constraints, not legal constraints. One particular situation explored in the survey was the operation of EWCs in cases of joint ventures. Member States were asked if they knew of such examples in their countries, but none were identified.

### 3.7.2.2 Views of the national social partners

Amongst the national social partner respondents, across various aspects considered (see Figure 5) 40% of the respondents agreed that the Recast had improved legal clarity and certainty (mostly trade unions). The national social partners who did not find the Recast had improved legal clarity were based in Belgium, Finland, Hungary, Malta, the Netherlands, Slovakia, Spain and Sweden. One transnational trade union organisation also agree with this assessment.

Figure 6. National social partners' perceived impact of the Recast Directive on the legal clarity



Source: ICF International survey based on 52 national social partner responses

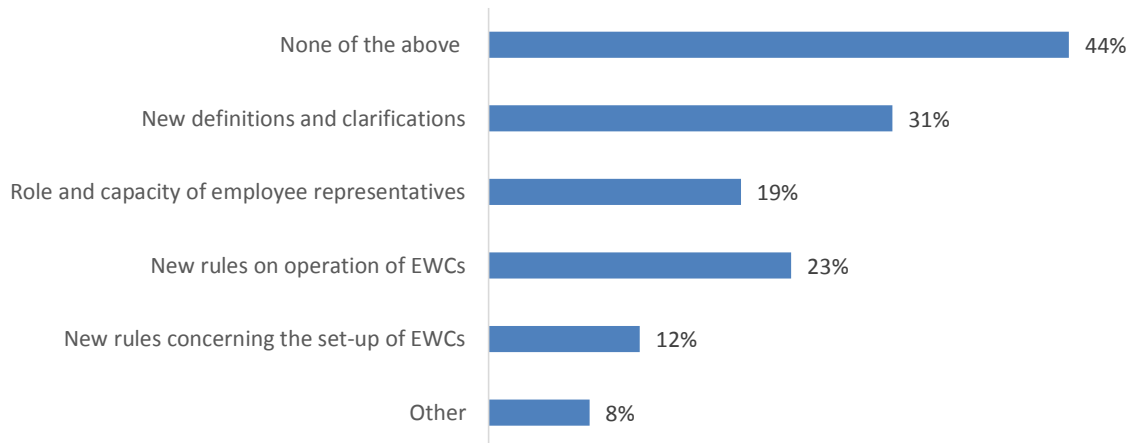
National social partners were also asked to indicate which of the rules relating to those categories had proved problematic (see Figure 7). These results show that 44% of respondents did not come across any problems with the new rules. However, 31% of all respondents did indicate they had encountered issues with the new definitions and clarifications (e.g. application of the confidentiality rule, the right to training and development of necessary EWC representative competences).

Furthermore, national social partners were asked to indicate whether they believed the rules of the Recast Directive had increased the number of legal disputes. A majority of 85% indicated that the level of EWC specific complaints and litigation had remained the same. Two social partners (from Belgium and the Netherlands) indicated that the number of disputes had increased, while two social partners (German and French) believed they had decreased. In parallel, three social partners (two from Spain, one from Denmark) indicated that the number of legal disputes had increased, while one social partner (Polish) believed they had decreased.

When asked what the main reasons for disputes are, answers seem to diverge. However, the following issues are mentioned at least a couple of times: disputes as a

result of differences in employer versus employee perspectives over what constitutes sufficient time for information and consultation and meaningful information and consultation procedures in practice; definition of 'transnational' matters; number and interpretation in the EWC meetings, and informing EWCs in time and sufficiently about the changes and restructuring of companies.

Figure 7. National social partners' perceived problems with 'new rules' following from the Recast Directive



Source: ICF International survey based on 52 national social partner responses

### 3.7.2.3 Views of the European social partners

Half of interviewees (7 out of 14 stakeholders) were of the view that the new Directive has helped to increase legal certainty, especially in relation to the definition and timing of information and consultation, the role of employee representatives in the EWC and the adaptation clause. Three interviewees thought it was too early to see the impact of the Directive and two interviewees saw a number of negative impacts of the Directive in relation to legal certainty (unclear definition of in-depth assessment in the information process, unclear definition of means necessary to set up an EWC, unclear definition of transnational matters, too long a timeframe of 3 years to set up an EWC).

When asked about the examples of countries or sectors where there have been particular problems in transposing or interpreting the new rules, most of the interviewees did not see any patterns. Where mentioned, they considered that usually Belgium, France, Germany and the Nordic countries are perceived as going beyond the requirements of the Directive. In terms of sectoral issues, the implementation of the EWCs in the HORECA sector was considered to be problematic because companies operate in franchising systems and outsource big departments. Another social partner thought that the implementation of the Directive to some degree depends on the sector and the tradition of employee representation. Also, in large transnational companies with members from many different countries it is difficult to manage the dialogue because of the multitude different national regulations / traditions of social dialogue – but this is not seen to be due to transposition difficulties.

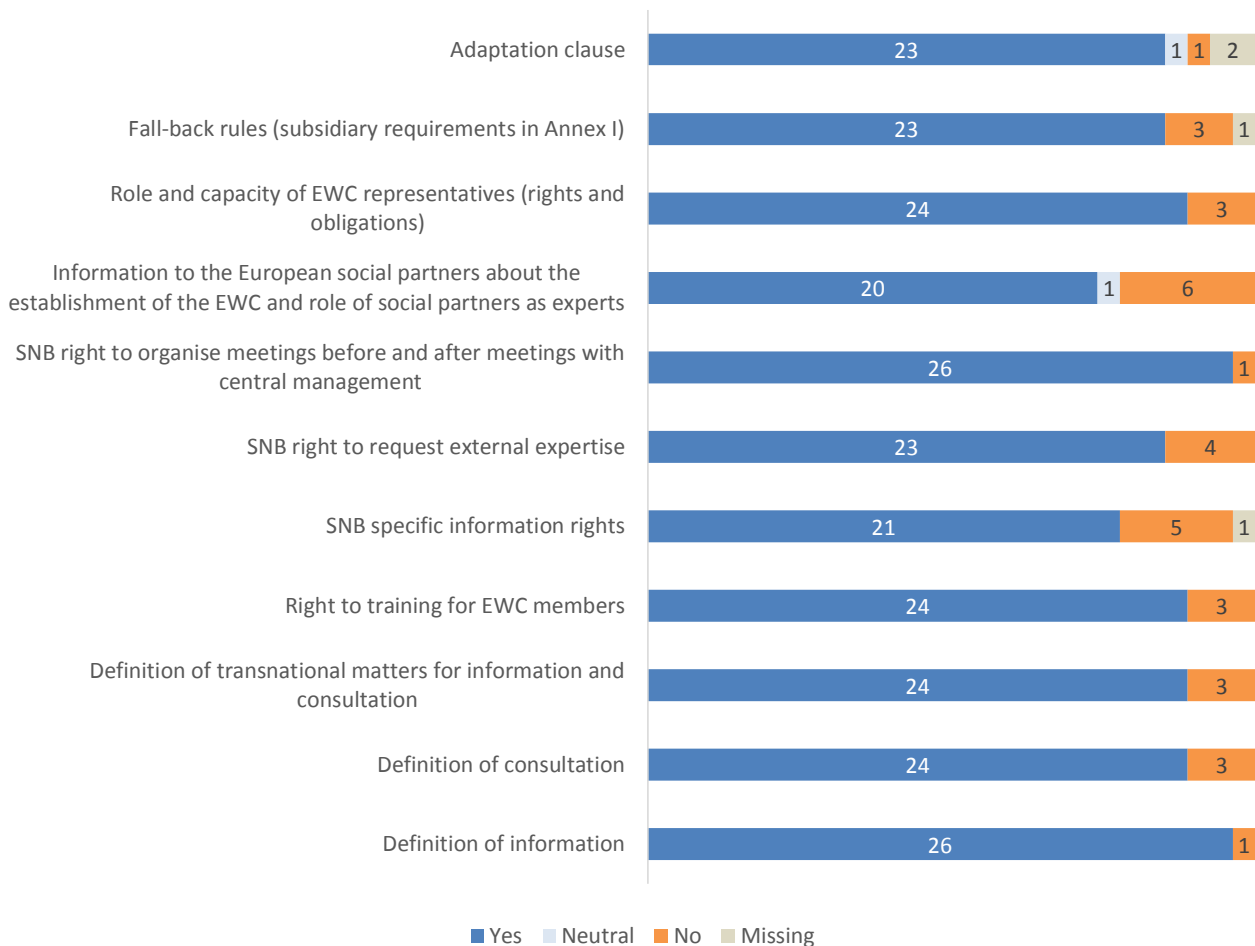
The interviewees were not aware of any particular issues when the transposition took place via collective agreements in countries like Belgium and Italy.

### 3.7.2.4 Views of the labour law experts

The members of the European Labour Law network were also asked their views on the aspects of the Recast Directive improving the legal certainty. Among the 27 respondents, almost half agreed legal certainty had increased across all mentioned aspects (12 respondents from Austria, Denmark, Estonia, Norway, Croatia, the

Netherlands, Greece, Italy, Spain, Lichtenstein, Lithuania and the UK). In contrast, the legal certainty concerning the right to inform the European social partners about the start of EWC negotiations was most often cited as not having improved, though to put this into context, a majority (78%) did think it improved.

Figure 8. Improved legal certainty following the Recast Directive (views of the ELLN members)



Source: ICF International survey of 25 ELLN members

When asked about remaining legal issues with the implementation of the Recast Directive in their countries, many ELLN respondents maintained that many countries have not had much experience with the law yet. However, three respondents indicate issues with setting up the EWC (Croatia<sup>49</sup>, Germany<sup>50</sup> and Italy<sup>51</sup>) and six respondents

<sup>49</sup> Especially to organise a workers meeting in big companies. Namely, the elections are valid solely if at least 50% of employees with a right to vote attended the elections (Article 19(1)). If there were not enough employees attended, the election are organised again regardless of the number of employees attending the election.

<sup>50</sup> Section 23 of the European Works Councils Act does not explicitly provide for an election of representatives in case that no workers' representation exists under the Works Constitution Act (Betriebsverfassungsgesetz).

Applicability of obligation to provide necessary information (Article 4(4) of Directive 2009/38/EC) is not clear if it is uncertain whether the Directive applies.

On a literal interpretation, section 18(1): implementing of Article 6(2) lit. c, e, g and Article 12(2) sentence 2 of Directive 2009/38/EC is a mere recommendatory provision.

Duty of confidentiality (section 35) does not explicitly relate to "information which has expressly been provided to them in confidence" (Article 8(1) of Directive 2009/38/EC).

with their functioning (Croatia, Germany, Hungary, the Netherlands, Romania and the UK). Issues stem from:

- broadly defined concepts which leave room for interpretation:
  - Transnational matters although decided by the central management could be formally adopted as "strategies". These decisions are adopted by the national managements and therefore are seen as national matters without the right of EWCs to be informed and consulted.
  - One of the topics left to the national law-makers by the initial Directive 94/45/EC, and later on by the Directive 2009/38/EC is the issue of sanctions. Recital 35 and the new Recital 36 specify that the national legislator must provide for effective, dissuasive and proportionate sanctions in case of violation of the Directive. However, the Romanian sanctions are of very little significance.
  - In the UK, there were concerns on both sides about the operation of EWCs. For example, employers felt that some employee representatives on occasion did not appreciate the need for prudent cost management and the speed with which organisations needed to make decisions. They could lack an awareness of their responsibilities to colleagues. They suggested that this had a negative impact on EWCs. Employers also referred to the increase in EWC costs caused by the enlargement of EU membership. On the other hand, trade unions felt that employers too often saw EWCs as a burden on business. The quality of information and consultation was poor in their view. Central management have often claimed that the manager in an individual country is responsible for consultation only for the manager to deny this or state that they have insufficient information to consult on. Unions experienced attempts to sideline them at national and European level. In certain cases unions have been shut out of meetings and refused access to SNBs to advise on draft agreements. Balloting processes could be problematic, and representatives had to ask several times for basic information relating to the structure and employee numbers in the undertaking.
- clashes between the national law and specific EWC law, e.g.:
  - In Germany, according to section 1(7) of the European Works Councils Act, the European Works Council and national representatives must be informed and consulted simultaneously at the latest. Article 12(2) sentence 1 of Directive 2009/38/EC, on the other hand, leaves it completely to the parties concerned to reach an agreement on possible priorities. In addition, it is not entirely clear whether the adaptation clause also applies to cases of organic growth of a business. Moreover, the expert considered it doubtful whether the cases mentioned in section 37 have to be interpreted restrictively.
  - The articulation between the two levels of information and consultation is problematic. The Netherlands has implemented the EWCD in an Act separate from the national Works Council Act to emphasise that there exists no hierarchy between the two institutions, that they have their separate sets of scope, rights and obligations. However, because of this and because the national works councils has more rights, the EWC is regarded as a waste of time (especially in a Community-scale undertaking with its seat in the Netherlands). The fear sometimes exists that the procedure with the EWC complicates and troubles the procedure with the national works council.

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<sup>51</sup> Where the time limit of 3 years is considered to be too long and should be reduced to 1 year.

Six respondents also indicated issues around enforcement (Germany, Finland, Hungary, Italy, Romania and the UK), half of those were concerned with the severity of sanctions (*in italic*). A foreseen potential issue in the survey were cases of joint ventures, however none of the respondents indicate there are such cases in their countries.

In the majority of cases, the national regulations met the provisions of the Directive by transferring the text of the Directive verbatim or using very similar wording to transpose the spirit of the Directive.

15 Member States introduced more favourable (to the EWC representatives / workers) provisions than those foreseen in the Directive – in the EWC negotiation process, more extensive means to perform EWC duties, rate of pay during the EWC member training, more extensive definitions of information, consultation and transnational matters.

In contrast, in 11 Member States at least one national rule was assessed as not meeting all the requirements of the Directive.

However, only in 4 Member States at least one of the key substantive provisions of the Directive was not transposed correctly. In other Member States, a relatively minor non-substantive provision (or part of such provision) was not transposed. The key substantive aspects not transposed correctly were the lack of providing the right to training without loss of wages, the requirement to inform European social partners about the start of negotiations and provisions on the composition of the EWC.

The number of national court cases challenging the provisions of the Directive was low.

Stakeholder responses confirm the positive assessment of legal transposition.



## 4 The effects of the Recast Directive on the number and characteristics of EWCs

### 4.1 Introduction

One of the main aims of the evaluation was to assess the impact of the Recast Directive on the number and characteristics of new EWCs. Specifically, this included an analysis of the impact on:

- Scale: The number of new EWCs created since the Recast Directive, and
- Scope: The qualitative characteristics of EWCs created since the revision of the Directive, comparing the characteristics of new EWCs (2009/38/EC) with those operating under Article 6 rules (94/45/EC).

This section is based on the following data sources and analyses:

- An analysis of statistics from the ETUI's EWC database<sup>52</sup>: these statistics should however be regarded as indicative only for this particular study as the statistics include not only EWCs but also other types of worker information and consultation structures, such as Societas Europaea (SE) works councils<sup>53</sup> and international work councils and committees. The ETUI's database of EWCs is the most comprehensive source of information on the EWCs, nevertheless it does not contain information on the whole population of EWCs created. Particularly, non-unionised companies, EWC following subsidiary requirements might be underrepresented in it. ETUI in their analysis and publications usually covers both EWCs and SEs, arguing that these transnational information and consultation bodies draw upon the same model of and have similar aims. Therefore the ETUI's database also records information about other types of information and consultation bodies and filtering only EWC is not straightforward. The data presented in this section might thus include a small sample of other information and consultation bodies.
- An analysis of key features of newly-established EWCs, on the basis of findings from interviews with management and employee representatives of 37 Recast EWCs, complemented when relevant, with findings from the Article 6 survey (22 respondents) as well as surveys and interviews with the national and EU social partners (52 and 14 respondents respectively).
- Comparative baseline data from other sources (including Eurofound publications, the 2008 GHK study on the EWCs).

### 4.2 Background: trends in the creation of worker information and consultation bodies, including the EWCs

The aim of this section is to **set the scene** by comparing the number of new EWCs created and renegotiated over the last 30 years (between 1985 and 2015). However, as mentioned above, these **statistics should be regarded as indicative only** as they **include not only EWCs but also other types of worker information and consultation structures**, such as SE works councils and international work councils and committees.

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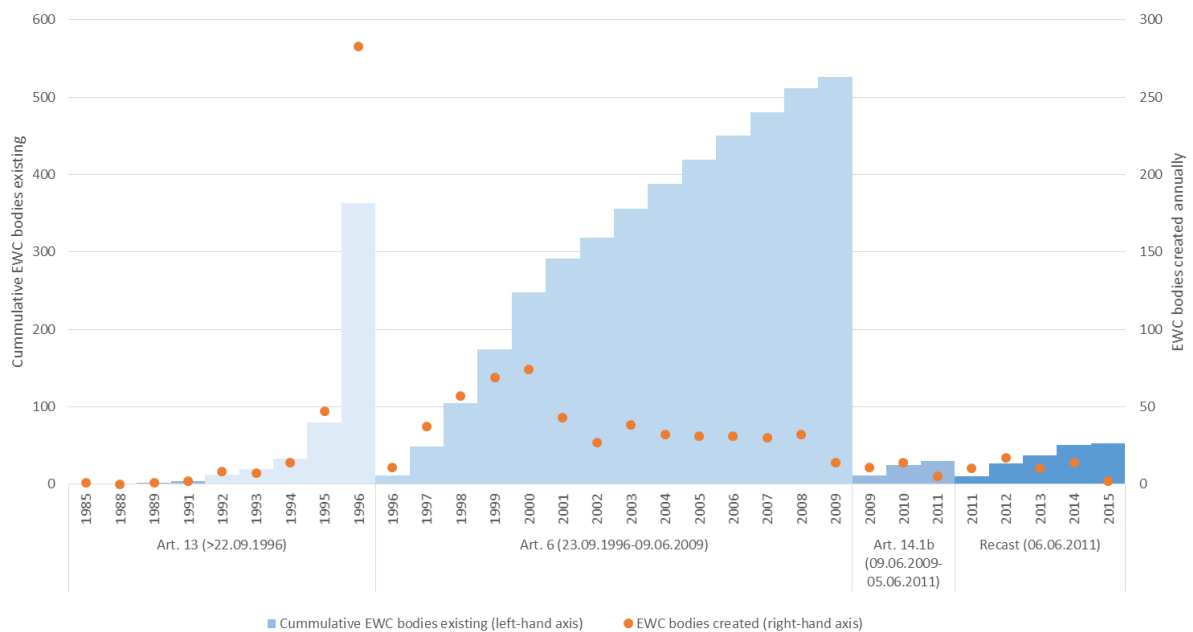
<sup>52</sup> <http://www.ewcdb.eu/index.php>.

<sup>53</sup> SE companies are a special legal form of a 'European company', with its own legislative framework, under the EU Regulation (2157/2001). The SE status allows companies incorporated in different Member States to merge or form a holding company or joint subsidiary to void the legal and practical constraints arising from the different national legal systems. The legislative EU framework also provides for the involvement of employees in such SE (through the special supplementary Directive (2001/86/EC). It sets out to ensure that the establishment of an SE will not mean the disappearance or watering down of existing employee involvement arrangements in the companies concerned, <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=212>.

1,296 worker information and consultation bodies have been created to date<sup>54</sup>. The number of active bodies has increased every year between 1985 and 2013<sup>55</sup>. In 1985, just 6 such bodies were active while in 2013, 1,048 were counted as still being active. This has recently slightly increased to 1,072<sup>56</sup>. According to the ETUI's 2015 facts and figures, EWCs make up 88% of these. Based on this information, there are currently 943 active EWCs in existence<sup>57</sup>.

The trend in newly created worker information and consultation bodies shows that after an initial high in 1996, the number of additional bodies created declined to an annual average of around 50 until 2009, and to around 20+ in the post-2009 period. As shown by Figure 9, the peak in the number of new agreements concluded happened just prior to the entry into force of the original Directive (94/45/EC). The other peaks occurred 3-5 years after this, and again in the years before the transposition of the Recast Directive. Therefore, these **trends suggest that the Directives brought about an impetus to complete agreements before the transposition deadlines of original and recast Directives** in order to benefit from 'interim rules'. However, there has been **an overall downward trend in the number of new agreements signed since 2000**.

Figure 9. Worker information and consultation bodies created and effective



Source: ICF, on the basis of data from the ETUI's EWC database filtered out only EWC.

*Terminology: Article 13 agreements are voluntary EWC agreements concluded before Directive 94/45/EC came into force (22.09.1996 - or respective later implementation deadlines for the UK and newer MS). Article 6 agreements are EWC agreements concluded or revised between 22.09.1996 and the transposition deadline for Recast Directive (June 2011). Article 14.1b refers to agreements concluded during the period of June 2009 and June 2011 when the EWCs were able to choose to follow either Article 6 rules or the rules of the Recast Directive. Recast EWC agreements are agreements following the rules of the Recast Directive (2009/38/EC)*

<sup>54</sup> <http://www.ewcdb.eu/index.php>

<sup>55</sup> ETUI (2013), Creation of EWC bodies – evolution:

[http://www.ewcdb.eu/documents/freegraps/2013\\_11\\_EN.pdf](http://www.ewcdb.eu/documents/freegraps/2013_11_EN.pdf)

<sup>56</sup> ETUI (2015), Statistics and Graphs, [http://www.ewcdb.eu/statistics\\_graphs.php](http://www.ewcdb.eu/statistics_graphs.php)

<sup>57</sup> Based on ETUI (2015), European Works Councils and SE Works Councils in 2015, p. 13.

The available literature uses the estimates of around 2,498 companies which meet the relevant criteria to establish an EWC.<sup>58</sup> **Given that there are currently around 943 EWCs<sup>59</sup> and the trend has been for the creation of around 20+ EWCs per annum since the transposition deadline for the Recast Directive, the potential to create additional EWCs has not yet been fully exploited.** Given that one of the goals of the Recast was to encourage the creation of more EWCs this has maybe not been fully achieved. The reasons for not establishing EWCs – and indeed for employee representatives not to request the setting up of an SNB – are not entirely clear. What will be shown below is that in companies headquartered in countries with a tradition of strong employee information and consultation and in large multi-nationals headquartered outside the EU (but meeting the relevant thresholds), the setting up of such bodies has proved more likely than in companies with headquarters in Member States without such a strong tradition and in larger companies. As will be discussed below, the Recast did lead to more ‘smaller’ multi-national companies to establish EWCs, but these did not include too many such companies very close to the required size threshold. Furthermore, although the Recast has also brought the establishment of more EWCs in sectors previously not so strongly represented (see below), it remains true that certain sectors (metalworking, chemicals etc.) are not only often larger, but also tend to have a stronger tradition of trade union activity and thus the push for information and consultation bodies to be established.

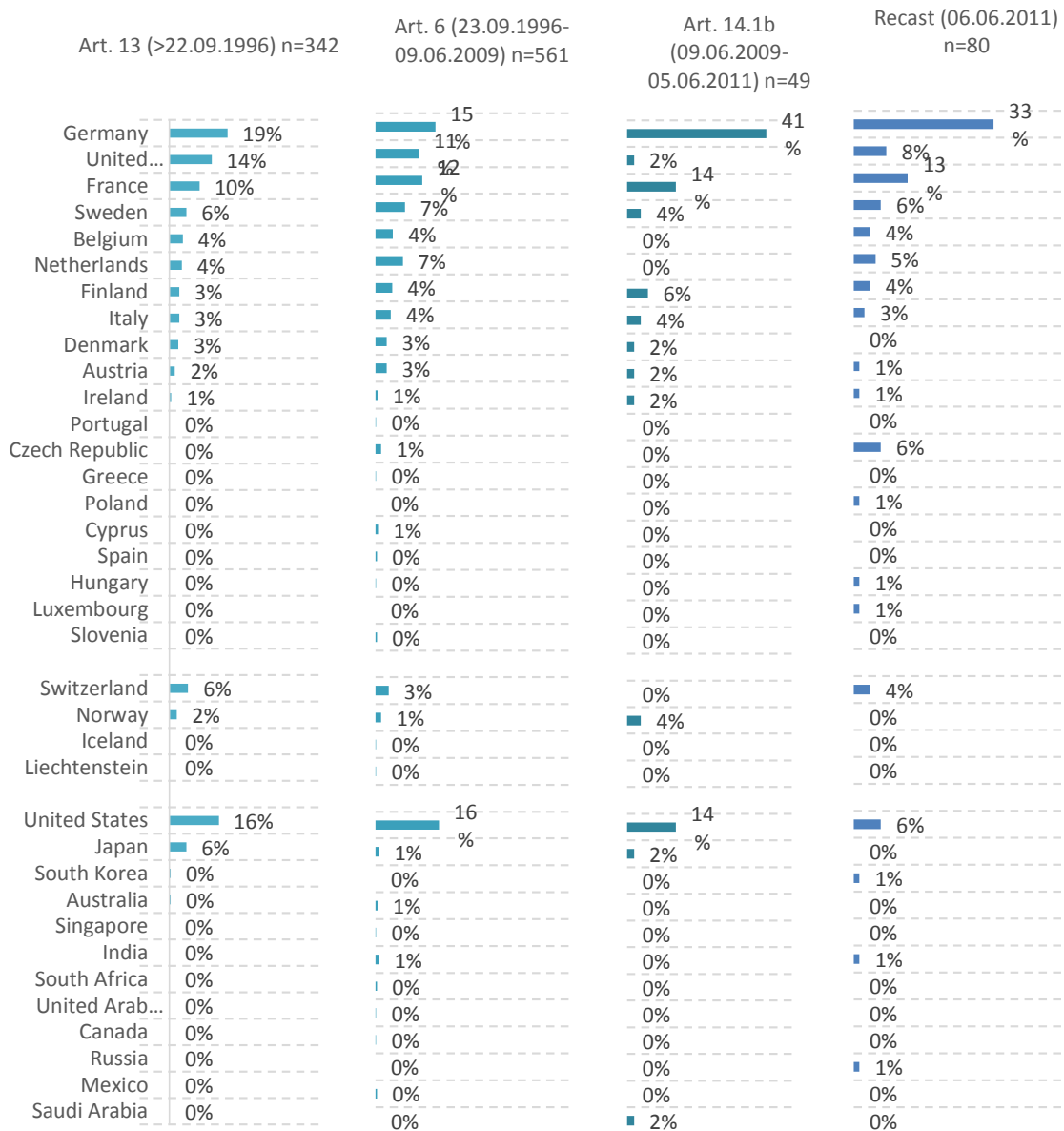
Figure 10 offers an overview of the countries where the companies with new EWC agreements are headquartered. It shows that Germany is the country of headquarter for most of these companies, followed by France, the US and the UK. It is however worth recalling that many of the worker information and consultation agreements in companies based in Germany are SE works councils which are generally governed by a different EU legislation (unless they chose to operate under the rules of the EWC Directive).

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<sup>58</sup> ETUI, updated in 2009 database of companies which are in the scope of the Directive: [http://www.ewcdb.eu/search\\_results\\_companies.php](http://www.ewcdb.eu/search_results_companies.php).

<sup>59</sup> ETUI (2015), Statistics and Graphs, [http://www.ewcdb.eu/statistics\\_graphs.php](http://www.ewcdb.eu/statistics_graphs.php).

Figure 10. HQ countries of companies where new worker information and consultation agreements concluded



Source: ICF, on the basis of data from the ETUI's EWC database. Notes: see preceding Figure for explanations.

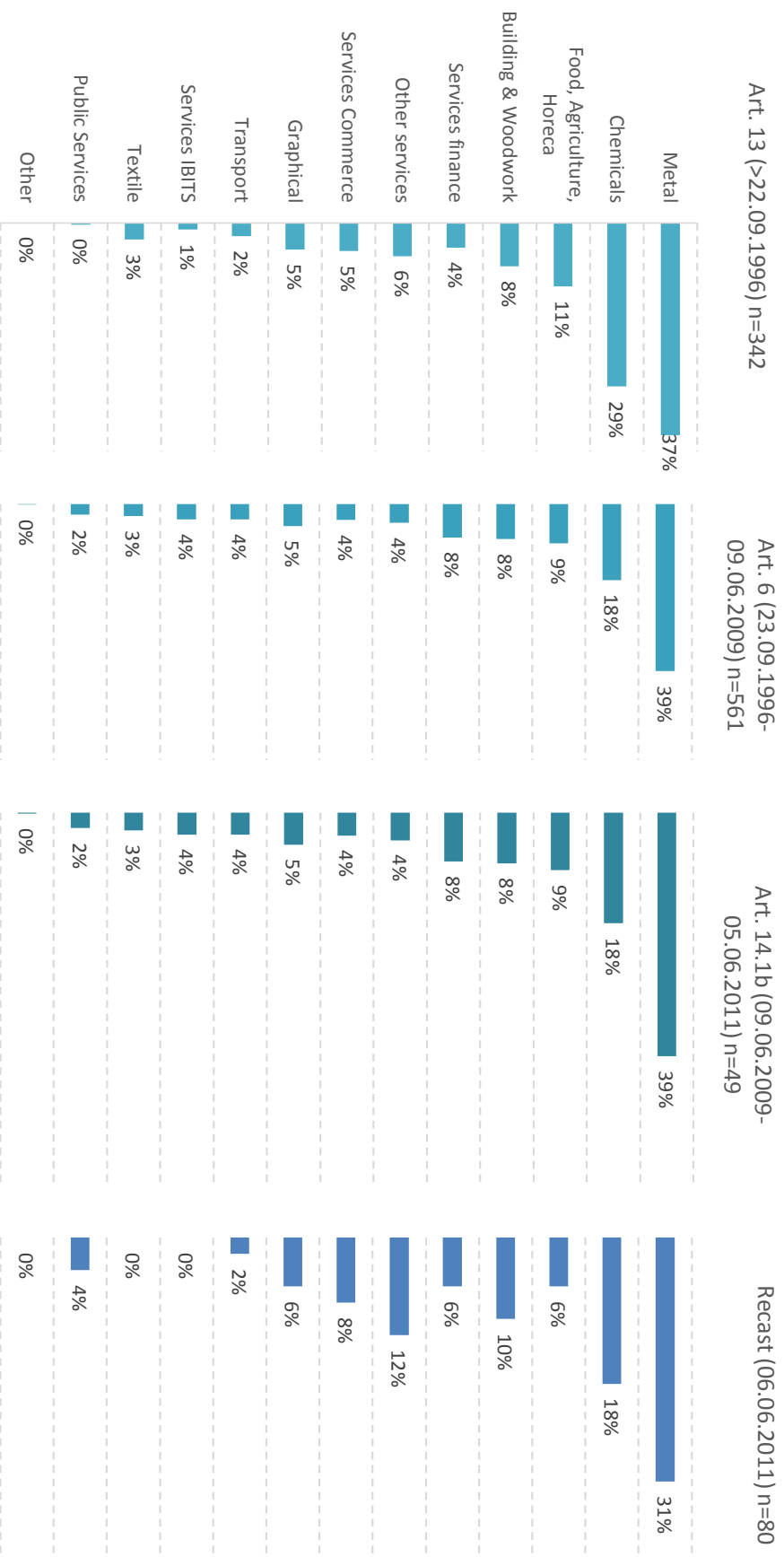
The EU accession process has been important for the further development of EWCs (in terms of numbers of EWC representatives). Indeed, the growing number of EU Member States goes hand in hand with the growing involvement of employees' representatives from these countries. In 2013, out of the 1,048 active EWCs, 270 included one or more representatives from a Member State that joined the EU in 2004. Over seventy EWCs have at least one employee representative from Bulgaria or Romania and 10 had a representative from Croatia<sup>60</sup>. In some of the newer Member States, the election of EWC representatives provided particular challenges in the

<sup>60</sup> ETUI, Active EWC bodies and involvement of employees or observers from new EU member states and applicant countries, [http://www.ewcdb.eu/documents/freegraphs/2013\\_11\\_EN.pdf](http://www.ewcdb.eu/documents/freegraphs/2013_11_EN.pdf).

absence of a strong national tradition of employee representation and information and consultation.

Worker information and consultation bodies cover a wide range of sectors. The metalworking sector is by far the sector with the greatest number of transnational worker information and consultation bodies (400+), followed by the chemical sector with in excess of 200 bodies. This is not surprising given the strong tradition of social dialogue and high levels of trade union representation in these sectors. There are no significant differences in the sectoral activity before and after the transposition deadline for the recast Directive, although it is apparent that the share of new agreements in 'other services', 'commerce services', 'public services' and 'building and woodwork' are growing in importance.

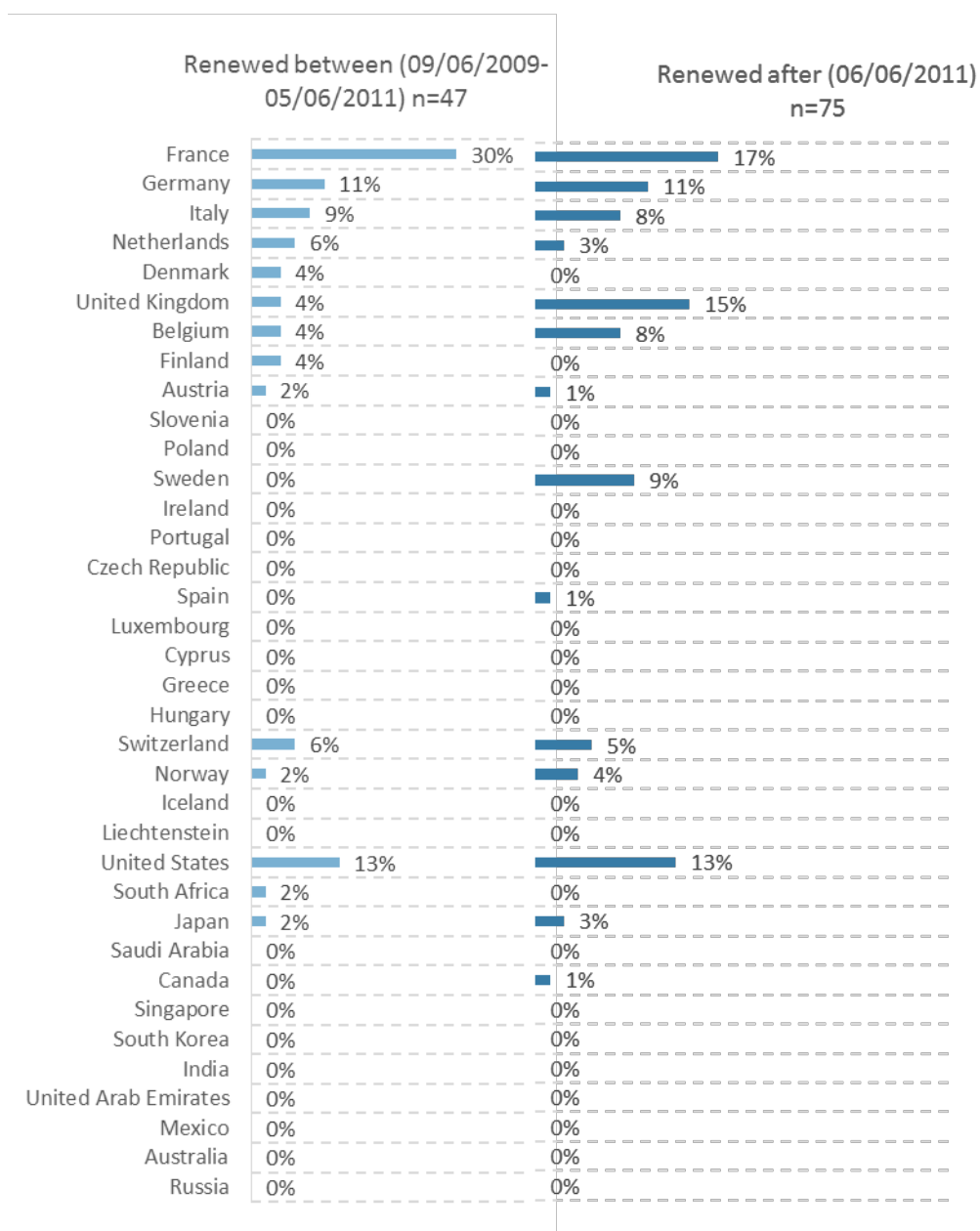
Figure 11. Sectors of companies with new worker information and consultation agreements concluded



Source: ICF, on the basis of data from the ETUI's EWC database. Notes: see preceding Figure for explanations.

A considerable amount of renegotiation of existing EWC agreements has taken place in the years since the Recast Directive. Information from **the EWC database suggests that a total of 122 worker information and consultation agreements have been revised since June 2009**. However, this figure includes all different types of agreements, not only EWCs, and the renegotiations have not automatically led to a revision of Article 13 or Article 6 EWC agreements in line with the rules of the Recast Directive. However, our evidence, which is discussed in section 5.5 below, points to the fact that a proportion of these renegotiations have led to an alignment of EWC agreements with the new definitions and rules introduced by the Directive.

Figure 12. The number of worker information and consultation agreements revised/renegotiated since the Recast Directive



Source: ICF, on the basis of data from the EWC database. Notes: see Figure above for explanations.

The next sections discuss the scale (the number of new EWCs established under the Recast Directive) and scope (their key characteristics) of the new agreements, and

wherever possible, comparing these characteristics with those of other active worker information and consultation bodies.

### 4.3 Scale: the number of new EWCs since the Recast Directive

There are **up to 58 EWCs that have been newly established in line with the rules of the Recast Directive since June 2009**. However, a small number of these 58 – at least 3 - have been created as a result of a de-merger or another form of reorganisation. This means that at least some of the employees in these companies may have been covered by another EWC agreement before, although they may not have stayed with the company they were originally employed with after the reorganisation. Due to the fast, on-going nature of restructuring, the situation in the companies that fall under the rules of the EWC Directive changes fairly frequently so that any assessment at a given point in time is a snapshot of the 'current' situation.

In relation to **Recast EWCs, four-fifths are companies headquartered in the EU** (see Table 8). This is slightly more than the 72% of all worker information and consultation bodies which are headquartered in the EU. Some 14% of the new EWCs are headquartered outside the EU/EEA, mainly in the US. Seven per cent are based in one of the EEA countries. **France hosts the largest number and share of Recast EWCs with 19%, followed by Sweden with 12%, the US with 9% and Germany with 7%**. Germany hosts the largest number of all worker information and consultation bodies established since the EWC Directive was revised, but – as previously stated- many of these bodies are SE works councils and thus governed by different EU legislation<sup>61</sup>.

Table 8. HQ country breakdown of recast and all EWCs (%)

Country type	Headquarter country	All worker information and consultation bodies (N=990)*	Recast (N=58) EWCs	Difference
<b>EU</b>		<b>72%</b>	<b>79%</b>	<b>+</b>
	Germany	13%	7%	-
	France	12%	19%	+
	United Kingdom	12%	5%	-
	Sweden	8%	12%	+
	Netherlands	6%	5%	-
	Belgium	4%	5%	+
	Italy	4%	5%	+
	Finland	4%	3%	-
	Denmark	3%	0%	-
	Austria	2%	2%	=
	Spain	1%	7%	+
	Ireland	1%	2%	+
	Luxembourg	0%	2%	+
	Greece	0%	2%	+
	Cyprus	0%	0%	=
	Slovenia	0%	0%	=
	Czech Republic	0%	0%	=
	Portugal	0%	0%	=

<sup>61</sup> As established under SE works councils regulating the involvement of employees in European companies (under the Directive (2001/86/EC)).



Country type	Headquarter country	All worker information and consultation bodies (N=990)*	Recast (N=58)	EWCs	Difference
	Poland	0%	2%		+
	Slovenia	0%	2%		+
	Hungary	0%	0%		=
<b>EEA</b>		<b>7%</b>	<b>7%</b>		<b>=</b>
	Switzerland	5%	5%		=
	Norway	2%	2%		=
	Iceland	0%	0%		=
	Liechtenstein	0%	0%		=
<b>Other</b>		<b>22%</b>	<b>14%</b>		<b>-</b>
	United States	17%	9%		-
	Japan	3%	0%		-
	Canada	1%	2%		+
	Australia	0%	0%		=
	South Africa	0%	0%		=
	South Korea	0%	2%		+
	Singapore	0%	0%		=
	United Arab Emirates	0%	0%		=
	Saudi Arabia	0%	2%		+
	Mexico	0%	0%		=
	India	0%	0%		=
	Russia	0%	0%		=

\*Source: European Trade Union Institute (ETUI), EWC database 4/2015. Note: the statistics should be read with care due to big differences in the samples (990 vs 58). Legends: = the share (%) has remained the same, + the share (%) has increased, - the share (%) has decreased.

According to the sectoral classification of the EWC database, **nearly a third of new Recast EWCs are active in the 'metal' sector (29%), followed by 'chemicals' and 'building & woodwork' with a 12% share each.** This is largely in line with the sectoral breakdown of all worker information and consultation bodies, but the sectors where – in comparative terms – **more EWCs have been created than before include 'building & woodwork', 'transport', and different service sectors** ('industry, business and information technology services', 'public services such as utilities' and 'other services'). It is however worth pointing out that many of the affected companies are active in more than one sector and the sectoral classification may change over time as companies expand to offer new goods and services or scale down their business in others.

Table 9. Sectoral breakdown of Recast EWC and all worker and information bodies (%)

Sector*	All worker information and consultation bodies (N=990)**	Recast EWCs (N=58)	Difference
Metal	38%	29%	-
Chemicals	21%	12%	-
Food, Agriculture, Horeca	10%	9%	-
Building & Woodwork	8%	12%	+
Services finance	6%	2%	-
Graphical	6%	0%	-
Other services	5%	7%	+
Services, commerce	4%	3%	-
Transport	4%	10%	+

Sector*	All worker information and consultation bodies (N=990)**	Recast EWCs (N=58)	Difference
Industry, Business and Information Technology Services	3%	9%	+
Public Services	2%	7%	+
Textile	3%	0%	-
Other	0%	0%	=

\* Based on the classification of [www.ewcdb.eu](http://www.ewcdb.eu). \*\*Source: European Trade Union Institute (ETUI), EWC database 4/2015. Note: the columns do not add up to 100% as one company can be active in more than one sector. Legends: = the share (%) has remained the same, + the share (%) has increased, - the share (%) has decreased.

## 4.4 The characteristics of newly established Recast EWCs

### 4.4.1 The research sample

The analysis in this section is based on information from 37 Recast EWCs whose management and employee representatives were interviewed as part of this study. These 37 companies come from a wide variety of sectors ranging from manufacturing to a range of services (see Table 10). 86% of the sample companies have global headquarters in the EU/EEA. The most represented country of headquarter in the sample is France, reflecting their dominance among all Recast EWCs. France is followed by Switzerland, Belgium, Germany and Sweden. As previously indicated, Germany is not more significantly represented as many new transnational information and consultation agreements negotiated during this period were excluded from this study (as they are SE works council agreements rather than EWCs).

Table 10. Sectoral breakdown of Recast EWCs (n=37)

Headquarters		Main area of activity*
Global	European	
Belgium	Belgium	Electricity
US/Denmark	Denmark	Metal works
Belgium	Belgium	Food
UK	UK	Manufacturing
Belgium	Belgium	Bathroom solutions
Finland	Finland	Services (technology)
Finland	Finland	Building & Woodwork (building and industrial services)
Italy	Italy	Manufacturing (Manufacture of cement)
Switzerland	UK (EU HQ)	Road/air/sea freight and logistics
Spain	Spain	Private security
France	France	Transport and logistics
France	France	Rail
Sweden	Sweden	Chemicals
Norway	Norway	Renewable Energy Production
Sweden	Sweden	Building Services
France	France	Service voucher
France	France	Utilities
France	France	Services (benefits and expense management mainly)
Switzerland	Switzerland	Beverage machinery manufacturing
Germany	Germany	Railway engineering
Switzerland	Switzerland	Car suppliers
Germany	Germany	Optical Industry
Germany	Germany	Transport, maritime and ports
US	Ireland	Packaging
Italy	Italy	Manufacture of energy and telecom cables
Canada	UK	Services IBITS
Poland	Poland	Paper Industry
Saudi Arabia	Netherlands	Chemicals
Austria	Austria	Rail
Luxembourg	Luxembourg	Stainless Steel industry
France	France	Insurance broker
Switzerland	Switzerland	Agrofood industry
US	Switzerland	Water
US	UK	Laboratory services
Slovenia	Slovenia	Production of electricity operated household appliances

Headquarters		Main area of activity*
Global	European	
Netherlands	Netherlands	Metal
Sweden	Sweden	Building & Woodwork

Source: ICF interviews with the EWCs. \* Based on the classification / description of interviewees in the new EWCs.

#### 4.4.2 Characteristics of companies hosting Recast EWCs: a comparison with other types of EWCs

##### 4.4.2.1 Number of employees

The companies operating newly-established Recast EWCs are, in general, **medium-sized multi-national companies**. The average global number of employees in the Recast EWCs belonging to the sample is 24,599 of which around 16,612 are employed in the EU/EEA. The average number of workers in the European headquarter country is 11,539. The smallest company in the sample has just some 1,400 workers globally while the largest has some 250,000 workers. Several companies in the sample have fewer than 100 workers in the European HQ country, with the smallest one employing just 21 staff in the European HQ country.

Table 11. Number of employees in companies with Recast EWCs

Scope	Average	Lowest*	Highest*
Global	24,599	1,400	250,000
EU/EEA	16,612	1,400	236,000
European HQ country	11,539	21	214,000

Sources: based on information from annual reports and interviewees from 30 out of 37 companies in the sample \*Figures may be rounded.

In order to compare the size of companies with EWCs negotiated under the Recast Directive with EWCs set up under the rules of Directive 94/45/EC, two main points of comparison are available.

Firstly, the 2008 Preparatory study for an impact assessment of the EWC Directive researched a total of 70 EWCs operating under Article 6 and Article 13 rules<sup>62</sup>. The companies in this sample employed, on average, 49,000 workers globally and 29,000 workers in the EU/EEA. Thus, when compared to this sample, **companies which have set up Recast EWCs are quite considerable smaller (by around 12,000 employees) than companies which established EWCs previously under Article 13 (EWCs established prior to the transposition deadline for EWC Directive 94/94/EC) and Article 6 (of the original EWC Directive)**.

This is also confirmed by a comparison of employee numbers of Recast EWCs with the sizes of all other worker information and consultation bodies (including EWCs) registered in the EWC database. As shown in the Table below, Recast EWCs appear to include a smaller share of large employers and larger share of comparative small employers (in the context of the thresholds for establishing EWCs) than other worker information and consultation bodies.

Table 12. Number of employees in the companies with Recast EWCs vs. all worker information and consultation bodies<sup>63</sup>

Scope	Recast EWCs (N=37)	All worker information and consultation bodies* (N=972)
Unknown	13.5%	10%
Small (< 5,000 employees in EEA)	49%	37%

<sup>62</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

<sup>63</sup> In global terms, 44% of the companies in the sample have more than 10,000 workers, 22% have between 5,000 and 10,000 workers and 28% have fewer than 5,000 workers. Global worker figures were not available for 6% of the sample (2 companies).

Scope	Recast EWCs (N=37)	All worker information and consultation bodies* (N=972)
Medium (between 5,000 and 10,000 employees in EEA)	13.5%	16%
Large (10,000+ employees in EEA)	24%	37%

\*Sources: ICF interviews with the EWCs; European Trade Union Institute (ETUI), EWC database, 6/2015

Overall, this finding may not be so surprising given that in the past the EWC 'take-up' rates have gone hand-in-hand with the size of the workforce. Indeed, early ETUI studies showed that the EWC take-up rate more than doubled with a growth of a workforce from just 5,000 to 10,000<sup>64</sup>.

#### 4.4.2.2 Turnover

This finding indicating that companies with Recast EWCs may be smaller, on average, than companies which set up EWCs under the Article 13 and Article 6 rules, is also supported by findings on the turnover of companies in question. As shown in the Table below, **the average turnover of companies with Article 13 and Article 6 EWCs is around five times higher than the average turnover of companies with EWCs established under the Recast Directive.**

Table 13. Turnover (€)

Scope	Average	Lowest	Highest
Recast EWCs	EUR 4.2 billion	EUR 197 million	EUR 32.2 billion
EWCs operating under Article 13 and Article 6 rules*	EUR 20 billion	EUR 54 million	EUR 202 billion

\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

#### 4.4.2.3 Internationalisation

Existing studies<sup>65</sup> on EWCs have shown that there is a direct relationship between the degree of internationalisation attained by a company and the likelihood of an EWC being established. Companies with operations in fewer countries have a lower take-up rate than companies present in most EU/EEA countries. It was therefore interesting to compare the rate of internationalisation of companies with Recast EWCs with that of companies with EWCs operating under the rules of the previous Directive.

**Only a minor difference was detected in the rate of internationalisation.** The companies hosting Recast EWCs are present, on average, in 12 countries. Companies hosting Article 13 and Article 6 EWCs are present in 14 countries, on average.

Table 14. Internationalisation: worker presence in EU/EEA countries

Scope	Average	Lowest	Highest
Recast EWCs*	12	2	28
EWCs operating under Article 13 and Article 6 rules**	14	2	29

\*based on information from interviewees from 37 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

#### 4.4.3 Background of Recast EWC agreements

The average **time Recast EWCs have operated is 2.9 years.** The newest EWC agreements were drawn up earlier this year (2015). This has an important implication on the findings in this study in that many do not have considerable experience in running their EWC; in several cases only one or two plenary meetings have taken

<sup>64</sup> Kerckhofs, P. (2002), European Works Councils: Facts and Figures, ETUI.

<sup>65</sup> Kerckhofs, P. (2006), European Works Councils: Facts and figures ETUI.

place since the establishment of the body. Six out of the first 37 Recast EWCs in the sample have already revised their original agreements, mainly as a result of reorganisation that has led to mergers and take-overs.

The agreements of Recast EWCs whose global or European headquarters are in the EU are **all (100%) governed by the national legislation of the country where the company's global or European headquarters are based**. Only the five companies of which European HQs are outside the EU (Norway or Switzerland) operate (necessarily) under the legislation of another country (EU country). Three of the five had chosen to follow German or French law in relation to their EWC, while one follows Swedish law and another follows UK law. Therefore, on the basis of evidence from the first 37 Recast EWCs, **the trend found in other studies of companies preferring a governing legislation of a country, such as the UK, where the legislation related to worker information and consultation is deemed as being weaker than in other countries, does not appear to affect new EWCs**.

#### 4.4.4 Composition of the Recast EWCs

This section examines the composition of Recast EWCs by outlining their key features and identifies any potential differences or similarities with the composition of other types of EWCs.

The first findings on the composition of Recast EWCs suggests that **EWCs operating under the new rules are considerable smaller bodies than EWCs operating under Article 13 and Article 6 rules** (in line with the smaller overall number of employees in these companies). The **average number of employee representatives is 16**, with the smallest Recast EWC in the sample having just 8 employee representatives in total and the largest one having 34 members. According to the 2008 preparatory study on the revision of the EWC directive, the number of employee EWC delegates in EWCs established under Article 13 and Article 6 varies from 5 to 47, with an average of 23<sup>66</sup>. When compared against data from the EWC database, more than half of the Recast EWCs have fewer than 15 employee members, while only 8% of 'all EWCs' falling into this smallest size category.

**No evidence has been collected on the Directive itself causing this difference, but – as indicated above - it is more likely to do with the sizes of companies in question;** the companies of Recast EWCs are smaller and slightly 'less international' and have fewer employees than the companies that set up EWCs under the rules of the original Directive.

Table 15. Composition of Recast EWCs: employee delegates

Number of employee representatives	Recast EWCs*	Other EWCs**
Average	16	23
- Maximum	34	47
- Minimum	8	5
Number of employee representatives	Recast EWCs*	Other I&C bodies***
<15	54%	8%
15-29	41%	26%
30-39	5%	60%
40-75	0%	6%

\*based on information from interviewees from 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules. \*\*\*European Trade Union Institute (ETUI), Statistics and Graphs -maximum number of representatives, 7/2015.

<sup>66</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

The Recast EWCs 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.

In less than a third of Recast EWCs (32%), the employee delegates represent all the EU/EEA countries where they employ staff. However, there are many countries where companies with EWCS have employees which do not have a direct representative on the EWC.

#### 4.4.5 The organisation of the EWC meetings schedule: a comparison of practices of Recast EWCs with other EWCs

##### 4.4.5.1 Plenary meetings

The frequency of meetings can have an important impact on the quality of information exchanges between management and employees as well as the extent to which the EWC is used as a forum for consultation on important transnational matters. Starting with the programme of annual plenary meetings, the study findings suggest that **Recast EWCs operate a slightly more frequent programme of plenary meetings than other types of EWCs**. Two-fifths of Recast EWCs (40%) in the sample organise two annual plenary meetings while the rest organise one annual plenary meeting per year (two respondents did not answer). On the other hand, several EWCs in the sample have so far organised 2-3 extra-ordinary meetings a year which are becoming an almost regular part of the schedule in order to ensure on-going and timely information exchange in cases of restructuring situations. These trends suggest **an overall increase in the frequency of ordinary meetings** as only 26% of all worker information and consultation bodies registered in the EWC database appear to organise two or more annual plenary meetings (however, it needs to be borne in mind that not many newly established EWCs would also not have had more than two ordinary meetings).

Video-conferencing does not appear to be frequently used, although one of the smallest EWCs, operating in the telecoms sector, organises one of the two annual plenary meetings using video-conferencing.

Table 16. The organisation and running of annual plenary meetings

Number of annual plenary meetings	Recast (N=35)	EWCs*	EWCs operating under Article 13 and Article 6 rules (N=70)**	All worker information and consultation bodies*** (N=972)
1	60%		60%	74%
2	40%		40%	24%
3	0%			1%
4	0%			2%
5+	0%			0%

*\*based on information from interviewees from 35 out of 37 companies in the sample. \*\* based on EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. Data refer to EWCs operating under Article 13 and Article 6 rules. The study used different scale therefore detailed breakdown of the number of meetings was not possible. \*\*\*European Trade Union Institute (ETUI), Statistics and Graphs -maximum number of representatives, 7/2015.*

##### 4.4.5.2 Extra-ordinary meetings

All but two Recast EWCs in the sample (94%) have provisions in their agreements to hold extra-ordinary meetings in situations of transnational change / restructuring. In some cases, this right is extended to the members of the steering committee only. This is largely in line with the trend across EWCs operating under Article 13 and Article 6 rules (88% of such agreements include provisions to hold such extra-ordinary meetings).



Table 17. The organisation and running of annual plenary meetings

A right to hold extra-ordinary meetings specified in the agreement	Recast EWCs* (N=35)	Other EWCs** (N=70)
Yes	94%	88%
No	6%	12%

\*based on information from interviewees from 35 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

**Nearly half of the new Recast EWCs (42%) have already made use of this 'right' to organise extra-ordinary meetings**, holding between one and six extra-ordinary meetings since the EWC was launched (which, on average, was 2.9 years ago).

#### 4.4.5.3 Steering committee meetings

The Recast Directive formalised the role of steering committees in that it introduced a right to establish such as steering body and laid out some rules regarding the number of members ('maximum of five members') and the frequency of meetings ('the conditions enabling it to exercise its activities on a regular basis must be met'). **This right has not been taken up by all new Recast EWCs: four out of 35 Recast EWCs in the sample are not operating one.** This trend is largely in line with the trend in other types of EWCs.

Table 18. Operation of steering committees

Operation of a steering committee	Recast EWCs* (N=35)	Other EWCs** (N=70)
Yes	89%	88%
No	11%	12%

\*based on information from interviewees from 35 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

Almost a fifth (23%) of all Recast EWC steering committees exceed the maximum limit of employee side members specified in the Directive, in that they have 6-10 members instead of the maximum of 5. This tends to apply to larger EWCs where there is a desire for greater national representation in the steering committee to be maintained. However, with an average number of steering committee members of 4.5, overall there is a slight tendency towards smaller steering committees, but more so because of the smaller size of Recast 'companies' and 'EWCs', rather than for other reasons. On average, one management representative liaises with the steering committee, although this number ranges from zero to six.

Table 19. Composition of steering committees

Employee members	Recast EWCs* (N=30)	Other EWCs** (N=70)
Average	4.5	5
Maximum	10	15
Minimum	2	2
Share of employee members (%)	Recast EWCs* (N=30)	Other EWCs** (N=70)
- 5 or fewer members	77%	NA
- More than 5 members	23%	NA
Management 'members'	Recast EWCs* (N=30)	Other EWCs** (N=70)
Average	1	2
Maximum	6	4
Minimum	0	0

\*based on information from interviewees from 30 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

The steering committees of Recast EWCs tend to meet, on average, three times a year.

Table 20. Frequency of steering committee meetings

Frequency of meetings	Recast EWCs* (N=31)	Other EWCs** (N=70)
Average	3	3
Maximum	6	12
Minimum	0	0

\*based on information from interviewees from 31 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

#### 4.4.5.4 Employee-only preparatory meetings

Amongst the **Recast EWCs there is a slight decline in the share of EWCs that operate employee only preparatory meetings.** Reasons for this could include the use of online communication channels in the regular work of the EWCs and exchange of information on a regular basis.

Table 21. Operation of employee-only preparatory meetings

Frequency of meetings	Recast EWCs* (N=35)	Other EWCs** (N=70)
Yes	77%	96%
No	23%	4%

\*based on information from interviewees from 35 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

#### 4.4.5.5 Working groups

Many EWCs operate working groups to deal with specific subjects or allow employee delegates from different branches/sub-sectors of the business to discuss matters concerning them. **More than one-third of Recast EWCs (36%) have set one up,** which is a higher share than among Article 13 and Article 6 EWCs that were researched in 2008. The topics of working groups of Recast EWCs are in line with the topics of other EWCs and include topics such as:

- Code of conduct and sustainability
- Work-life balance
- Health and safety
- Employment and training
- Business sub-groups
- Human resources
- Business and financial matters.

The working groups of Recast EWCs tend to feature a very diverse mix of structures, compositions and meeting arrangements. Some are so new that they are yet to meet while others meet as / when needed, on average one to three times a year.

Table 22. Working committees

Types of meetings	Recast EWCs* (N=33)	Other EWCs** (N=70)
Yes	36%	29%
No	64%	71%

\*based on information from interviewees from 33 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.



## **4.5 Quantitative and qualitative effects on renegotiated EWC agreements**

In parallel to newly established EWCs since the Recast Directive, a number of EWCs have renegotiated their EWC agreements over this period. The evaluation analysed the nature of renegotiated agreements and their impact on the aims of the worker information and consultation. In total, 23 respondents took part in the survey, including 15 employee representatives, seven employer representative and one external expert (see Annex 2 for the detailed information on the profile of the respondents). Respondents represented 19 companies, as in 4 companies both sides were interviewed. The interviewed companies equate to 42% of bodies which were identified as EWCs which have renegotiated their Article 13 or Article 6 agreement to follow the rules of the Recast Directive.

A case study was also undertaken in the evaluation to explore the effects of renegotiation in one EWC in detail.

### **Case study findings: a renegotiation of the EWC agreement in a company in the Mobility and Safety sector**

The three largest achievements since the renegotiation, are the three agreements:

- Occupational health and safety (framework agreement),
- Demographic change (position paper with recommendations for action/action plans),
- Code of Conduct (from 2003; renegotiated).

The company along with the EWC hereby commits, at the European level vis-a-vis its employees, to establish a concrete framework for working conditions in all companies and undertakings throughout Europe. The development and implementation of the framework will be followed in regular workshops with the EWC and HR. A joint communication from HR and the EWC to all management levels and company executives is planned at the beginning of 2016 urging the levels concerned to implement the recommendations. In 2016 there will furthermore be a new focus put on Controlling and Monitoring. In the field of health there have already been agreements on actions for preventing addiction. The concept is very successful within the company. Unfortunately the negotiations were not simple. Particularly around disputes with the trade unions who did not wish to surrender their negotiating mandate to the EWC. The EWC nevertheless decided to bring the negotiations to a conclusion.

The Directive should grant the possibility for employee representatives, in co-operation with the trade unions, but also under leadership/coordination of the employee representatives, to conclude transnational company agreements

A further example of good practice is the involvement of the EWC as soon as the situation at a site becomes critical. This means that the information and consultation procedure does not have to take place at the last minute when everyone is under pressure, but enables the EWC to follow the entire process.

### **4.5.1 Reasons for renegotiating the latest/current EWC agreement**

This section focuses on the rationale behind the renegotiation of the EWC agreement, and how this renegotiation took place.

#### **4.5.1.1 Main reasons for renegotiating the latest EWC agreement**

Out of 23 respondents, the majority indicated that **the main reason for renegotiating was the wish to comply with the new rules in the new 2009 Directive** (13, or 57%). Most of these respondents were employees (nine). Besides, an equal number of respondents reported that the main reason for renegotiating was the need/wish to improve the effectiveness of the existing EWC (four or 17%), the

restructuring / changing operations in the company (four or 17%) or another reason (four or 17%).

Eight respondents further specified the reasons for renegotiating:

- Renegotiation clause in the agreement.
- Part of a regular process of renewal of the agreement.
- Need for more transparency on stakeholders' roles and responsibilities.
- Willingness to improve the text in the agreement (including grammar etc.).
- Creation of sub-committees per activity to deal with high levels of information, which could not be dealt with only in plenary meetings; need to better define information/consultation procedures, which used to be vague; and need to secure further training days for EWC members.
- The main change concerned the right to call an extra-ordinary meeting: previously this was only the right of employers, and the agreement was changed so that employees were also given a right to do so.

#### **4.5.1.2 Initiative to start the renegotiation process of the latest EWC agreement**

According to the survey respondents, the renegotiation process for the latest EWC agreement started mostly at the initiative of EWC employee representatives (10 respondents, or 43% - including seven employees), or following a joint initiative of EWC employer and employee representatives (eight respondents, or 35% - including seven employees). Only three respondents (including two employers) reported that the renegotiation started at the initiative of EWC employer representatives.

#### **4.5.1.3 Length of the renegotiation process**

Almost three-quarters of the various renegotiation processes took more than three months (16, or 70%): five took between three and six months (22%); three between six and nine months (13%); three between nine and 12 months (13%); and five took more than 12 months (22%).

Five respondents (22%) reported that the renegotiation process took less than three months, and two respondents said they did not know/did not remember.

#### **4.5.1.4 Number of – plenary or steering committee – meetings held for the renegotiation process**

More than half of the respondents (12 out of 23, or 52%) indicated that between one and five meetings were held for the renegotiation process: five respondents reported one meeting (22%); two respondents reported three meetings (9%); and five respondents reported five meetings (22%).

In addition, only one respondent respectively reported that six, seven, nine and ten meetings were held for the renegotiation process. Two respondents indicated that six or seven meetings were necessary. Almost a quarter of the respondents (five out of 23, or 22%) said they did not know/did not remember how many meetings were held.

#### **4.5.1.5 Specific aspects to the new agreement that were difficult to agree upon**

Ten respondents (43%) reported no specific difficulties related to the new agreement. More than half of the survey respondents mentioned specific aspects to the new agreement that were difficult to agree upon, notably:

- The definition and meaning of 'transnationality' (five respondents), e.g. the 'meaning of transnational decision', the 'definition of transnational matters', or

the 'concept of transnational question when something important happens in only one country'.

- Disagreements on the number of representatives (three respondents), which can be due to differences in national legislation on EWCs: e.g. 'the French legislation allows the number of representatives to be counted on the basis of all employees, including inactive and consultants, while the German legislation is more restrictive in this regard. This meant that France was going to get, proportionally, more employee members than other countries.'
- Disagreements around the number of meetings to be organised per year (three respondents), e.g. 'the number of annual plenary meetings was hard to agree on'.
- Definitions and process of information and consultation (two respondents).
- Other issues mentioned by single respondents included:
- Payment for support of experts: 'the company did not want to bear these costs. They agreed on 5,000 EUR to cover costs of the external experts'.
- Discussion on the right articulation between EU and national level.
- 'Minutes, confidentiality, more teleconference meetings instead of on-site'.

#### **4.5.1.6 Role and impact of the external experts in supporting the renegotiation process**

The large majority of survey respondents said they appointed an external expert to help with the renegotiation process (16 out of 23, i.e. 70% - mostly employees: 11 out of 16). The appointed experts included mostly 'unionists', 'legal experts' and 'experts from ETF', but also 'specialists' and 'external consultants'.

Respondents mentioned the following main impacts of these experts:

- Ensuring that employees' representatives are better aware of their (legal) rights and obligations.
- Supporting the negotiation and communication process.
- Aligning the agreements with the law.
- Acting as facilitators between the management and employees' representatives.
- Helping to implement all important issues from the EU Directive 2009 and providing an overview of other agreements to compare theirs with others.
- Increasing the speed of the negotiation process.

Six respondents (three employees and three employers) said they did not appoint such an external expert. One respondent indicated that one employee participated in the social dialogue committee at EU level, and could thus be considered as an expert. Another respondent reported that they preferred negotiating an agreement directly with their employee delegates rather than having external experts taking care of the negotiations. This respondent also said that 'an expert from the national employers federation read the draft agreement, gave suggestions, but [they] only took some of them into consideration'.

#### **4.5.2 Key changes in the latest agreement in relation to information and consultation**

This section focuses on the main changes in the latest EWC agreement, in relation to the information and consultation.

#### **4.5.2.1 Changes to the definition of 'information' provision within the EWC agreement**

Almost two-thirds of the respondents (15 out of 23, or 65%) indicated that the definition of 'information' provision within their EWC agreement changed following the latest revision of the agreement. This was the case for two-thirds of the employees (10), more than half of the employers (four), and the external expert. Eight respondents (five employees and three employers) reported that the definition of 'information' provision within their EWC agreement has not changed.

13 respondents provided further information on the changes to this definition, including:

- Better definition in the national law than in the EU law, and additional power provided to EWCs (although the timing of information provided could be improved).
- The new definition of the national law was taken over.
- The renewed agreement took over the definition of the Recast directive.
- Alignment of the definition with the Recast Directive, e.g. 'creation of sub-committees per activity due to the high request of information that could not be dealt with just in the plenary meeting', 'better definition of information/consultation procedures', and 'securing double training days for EWC members'.
- A better definition of the situations in which information has to be provided to the EWC.
- EWC and management commit themselves to 'start and complete the information and consultation process at the earliest time possible'.

#### **4.5.2.2 Changes to the definition of 'consultation' within the EWC agreement**

Almost two-thirds of respondents (15 out of 23, or 65%) indicated that the definition of 'consultation' within their EWC agreement changed following the latest revision of the agreement. This was the case for two-thirds of the employees (10), more than half of the employers (four), and the external expert. Eight respondents (five employees and three employers) reported that the definition of 'consultation' within their EWC agreement has not changed.

13 respondents provided further information on the changes to this definition. Most of them indicated that the Recast Directive provided clearer definitions, which they followed and aligned on. Some respondents indicated the following:

- 'A real consultation right was enshrined in the agreement, which was not the case in the previous agreement.'
- 'We added something about the organisation of the meetings'
- 'Addition of outsourcing and of the costs and benefits of transnational issues'

#### **4.5.2.3 Changes to the definition of 'transnational matters' within the EWC agreement**

A large majority of respondents (14 out of 23, or 61%) indicated that the definition of transnationality changed following the latest revision of the agreement (nine employees and five employers). On the other hand, nine respondents (six employees, two employers and the external expert) reported that the definition has not changed following the latest revision of the agreement.

10 respondents provided further information on the changes to this definition, including:

- Alignment with the Recast Directive.
- More specific definition, including the scope, potential effects and level of management involved, e.g. 'matter affecting two countries', 'matters concerning at least two different undertakings', 'affecting 5% of the staff', etc.
- The renewed agreement 'took over the definition of the Recast Directive' and added that a project can be considered as a transnational issue if it 'has an important impact for the whole group, even if it affects only one single Member State'.
- A question can be raised if it affects at least 50% of the staff (even in one Member State). The Steering committee can ask for a meeting with the management.
- Definition tailored to the company.
- Alignment of employee and management representatives' views on transnational: 'matters that affect Community-scale undertakings or Community-scale groups of undertakings as a whole or at least two establishments or two undertakings located in different member states.'

#### **4.5.2.4 Practical application of information and consultation provisions since the latest re-negotiation of the agreement**

Almost three-quarters of the respondents (17 out of 23, or 74%) reported no noticeable change to the work of the EWC as an employee information forum compared to how it worked under the previous agreement (two-thirds of the employees, six employers and the external expert). Five respondents (four employees and one employer) said that the work of the EWC as an employee information forum has improved since the latest revision of the agreement. Only one employee reported that it has deteriorated, and indicated that there were now fewer meetings as a result of the changes to the agreement (where fewer meetings are scheduled).

Almost two-thirds of respondents (15 out of 23, or 65%) reported no noticeable change to the work of the EWC as an employee consultation forum compared to how it worked under the previous agreement (nine employees, five employers and the external expert). Almost one-third of the respondents (seven out of 23, or 30%) said that the work of the EWC as an employee consultation forum has improved since the latest revision of the agreement (five employees and two employers). One employee reported that the work of the EWC as an employee consultation forum has deteriorated.

- More than two-thirds of the respondents (16 out of 23, or 70%) reported no noticeable change to the work of the EWC as a forum for exchanging information and views on transnational matters only, compared to how it worked under previous agreement (11 employees and five employers).

Six respondents (three employees, two employers and the external expert) said that the work of the EWC as a forum for exchanging information and views on transnational matters only has improved since the latest revision of the agreement. One employee indicated that this has deteriorated since the latest revision of the agreement.

Almost three-quarters of the respondents (17 out of 23, or 74%) reported no noticeable change to the link and relationship between EWC and national information and consultation forums, compared to how it worked under previous agreement (11 employees, five employers and the external expert).

The overall sense that the operation of EWC which had re-negotiated agreements in line with the enhanced definitions of the Recast Directive have stayed the same or improved somewhat could be indicative of a number of things:

- the EWCs which have found it possible to re-negotiate their agreement already functioned relatively well and therefore no significant change was required, although some small improvements have been achieved in some cases.
- the new definitions do not significantly serve to enhance the clarity of the content and process of information and consultation and what constitutes transnational matters and therefore operations have remained more or less unchanged.

As will be further discussed in section 6 below, it is likely that with regard to the issues of consultation and transnationality, the latter is the predominant reason for the assessment of the impact of revised agreements.

#### **4.5.2.5 Potential disputes with the company over the functioning of the EWC**

The majority of survey respondents (12 out of 23, or 52%) indicated that their EWC had not faced any disputes with the company over the functioning of the EWC. This was reported by the majority of employees (eight), less than half of the employers (three) and the external expert.

In addition, five respondents did not know/remember (three employees, two employers).

One quarter of respondents (four employees and two employers) reported disputes over the functioning of the EWC. The key messages are presented below:

- Difficulties to find a common position on the functioning of the information and consultation process (e.g. level of formality of the process) and on the articulation between EWC level and National I/C bodies level.
- Discussions about: agenda of meetings; future of the company (e.g. mergers and de-mergers); time spent by EWC members to fulfil their responsibilities.
- 'Although the EWC was not able to change a restructuring process, it managed to change the timing of the process through consultation. This type of consultation process was useful and improved the cooperation between both sides for both sides – management and EWC – to gather further insights on the restructuring project. Now the management rather approaches some projects by first testing results and evaluating possible effects'.

#### **4.5.3 Achievements and challenges in the renegotiated EWCs**

Survey respondents were also asked about the main achievements of and remaining challenges for their EWC.

##### **4.5.3.1 Greatest achievements of the EWC to date**

The survey respondents mentioned the following key achievements of the EWC to date:

- Increased transparency of the roles and responsibilities of all stakeholders; better relationships between the parties; mutual respect and trust between employee representatives and the management; increased collaboration; informal dialogue; early management of issues; low level of conflicts
- Effective exchange of information; faster transmission of economic and financial information between parties; improved quality of information provided to the EWC; improved online communication platforms
- Higher number of country representatives
- More productive meetings as the employees get to meet alone one day before the joint meeting, benefit from trainings and discuss on the most important issues to be debated with the management afterwards



- Organisation of the plenary meeting, which allows EWC members to go into small groups and different members of the management to answer specific questions
- Stability of EWC members, low turnover rate
- Better awareness of their rights among workers, e.g. EWC members campaigned to have the same maternity policies in Poland as in Sweden, and the central management agreed with employee representatives (therefore disagreeing with local management) and introduced improved maternity policies in Poland
- Common position adopted on different agreements, e.g. on Demography, Health and Safety, and Code of Conduct
- Creation of a working group on health and safety within the EWC, which helped to take concrete actions in different countries to increase the prevention of accidents
- Strengthened social dialogue at national level
- Revision and improvement of staff satisfaction surveys and safety management systems following feedback from EWC members
- One respondent highlighted the following elements as key successes: 'The EWC acts as the voice of employees in Europe. It considers employees' interests in company decisions [...] and helps to keep as many jobs as possible in the company in Europe under human conditions. [...] In a restructuring case, the EWC had analysed the situation correctly while this was not taken into account by the management, which recognised at a later stage that the decision taken was wrong and that they learned a lesson from the EWC. [...] The increased number of meetings and improved structure and functioning of the EWC have improved the timing of information procedures. [...] The information process has improved since the introduction of the new definition. [...] In some subjects the EWC reached good results and relationships with management improved. It has become a real forum with more visibility among workers. [...] The EWC has become more European: EWC members are representing EU matters and not their national interests any more'.

#### **4.5.3.2 Main remaining challenges for the EWC going forward**

The survey respondents mentioned the following key remaining challenges:

- Having the EWC recognised as an important institution by the management and ensuring the right to consultation is enforced in practice
- Decreasing the negotiating period
- Harmonising the number of EWC delegates per country
- Increasing the number of meetings
- Better taking the employees' views into consideration when taking decisions, and ensuring the management does not always oppose negotiations
- Improving participation rights
- Giving more prevalence to union officials as members of the EWC to allow a more constructive dialogue on key issues
- Ensuring the company's structure remains international and keeps its EU focus
- Reinforcing the EWC as a consultation body and making sure the EWC becomes a real communication platform between employees and the management

- Increasing the culture of social dialogue and enhancing the circulation of information to all employees
- Preventing EWC members from using the EWC as an information and consultation forum for local issues
- Renegotiating the internal codes of conduct
- Safeguarding jobs and the right to conclude legal agreements directly with the employer
- Dealing with different cultural backgrounds and managing language issues
- Better defining 'transnational' decisions and agreeing on the same definition

#### **4.6 The impact of the Recast Directive on the extent of exceptions and derogations from the Directive**

One of the evaluation questions for the assignment concerns the extent to which the new rules have reduced the number of exceptions and derogations from the Directive, especially in terms of:

- The number of Recast EWCs applying the subsidiary requirements,
- The number of agreements not ruled by the Directive because of the derogations foreseen in the Article 14.

In the ETUI database out of 1,072 EWCs created to date, only 17 are reported to follow subsidiary requirements as part of both Directives. This accounts for around 1.5% of the total number of EWCs.

Since the introduction of the Recast Directive, the ETUI database reveals that only 6 bodies are operating under the subsidiary requirements; which are set out in the Directive and must be followed if an employer refuses to negotiate after receiving a request to do so or, after 3 years both sides fail to reach agreement on the terms of the EWC<sup>67</sup>. These requirements impact on the number of meetings required with employees and when employees should be consulted in cases of major changes in the employment situation. So, for example, under these requirements, EWCs only need to meet once a year with their employees and some companies prefer this than to renegotiate an EWC agreement which might require more meetings.

Compared to the number of EWCs created under the Recast rules, this indicates less than one in ten (8%) of EWCs under the Recast Directive apply subsidiary requirements.<sup>68</sup> By comparison, before June 2009 eleven EWCs operated under the subsidiary requirements. This is 1% of all EWCs created (operational/still in existence and non-operational) under the previous directive (Article 13 & 6) and only 2% of EWCs created under Article 6 of Directive 94/45/EC.

**These figures therefore suggest an increase in the proportion of EWCs operating under subsidiary rules since the introduction of the Recast Directive.** However, it should be noted that the ETUI database may underrepresent the number of EWCs which follow the subsidiary requirements (under the Recast and original Directive) because, for example, some companies who failed in negotiations might not want to make it public and therefore might not have declared themselves or

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<sup>67</sup>

<http://www.lewissilkin.com/Knowledge/2013/November/~media/Knowledge%20PDFs/Employment/European%20Works%20Councils.ashx>.

<sup>68</sup> From the interviews conducted, however, this proportion is much smaller (1 out of 37 Recast EWCs) – a German company where both management and SNB decided jointly to let the three year negotiation period pass and opted for the subsidiary requirements.



another reason may be that companies might still be in the 3 year negotiation period and the outcome of which are yet to appear in the figures.

According to interviews conducted with the EU level social partners as part of the study, many respondents did not perceive any impact on the level of EWCs operating under subsidiary requirements and others responded that they simply did not know what the impact was. However, one suggested there was possibly a slight increase in the numbers following subsidiary requirements due to the fact that it can be seen to be easier to follow subsidiary requirements than to negotiate enhanced provisions with employees. A counterbalancing factor, however, would include the desire for companies to finalise negotiations quickly so as to maintain a good PR profile.

In this regard, it is important to investigate why EWC negotiations fail in order to assess the factors contributing to the use of derogations from the Directive. From interviews conducted as part of the study, only 1 out of 37 Recast EWCs interviewed opted for the subsidiary requirements, the reason being that both management and SNB decided jointly to let the 3 year negotiation period expire given the difficulties in the relationship between management and works' representatives. Based on a study to evaluate the effectiveness of the European Works Councils in the transport sector<sup>69</sup>, from interviews with worker representatives from companies with either intentions to start negotiations or ongoing EWC negotiations, a number of reasons for EWC inactivity or failure emerged:

- A lack of a common strategy of worker representations and mistrust among worker representatives, caused in some cases due to disagreements over how and which workers' representatives were appointed to the Special Negotiating Body.
- Lack of common interest between national / local workers' representatives for the setting up of the EWC.
- Lack of common interest to deal with transnational issues in the EWC. This may arise for example if management already provides more extensive information on transnational matters despite not being obliged to within national level information and consultation procedures; also, national workers' representatives felt that they would have more impact in the national industrial relations framework with regard to national specific solutions.
- Management resistance to setting up an EWC and thus delaying set up via slowing down negotiation processes e.g. delays in replies etc.
- Mistrust between workers and employers preventing effective meetings and information exchange.

Another type of derogation from the Recast Directive are the EWCs created or renegotiated in the interim period between June 2009 and June 2011 (so-called Article 14b EWCs). In the whole population of EWCs created and functioning to date, Article 14b EWCs constitute only 3% of all such bodies. Article 14b EWCs negotiated during the transposition period constitute 27% of all EWCs established since the adoption of the Recast directive. This represents a lower proportion compared to the number of Article 13 agreements when 45% of EWCs were created prior to entry into force of the rules of the previous Directive 94/45/EC.

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<sup>69</sup> ICF (2015), Study to evaluate the effectiveness of the European Works Councils in the transport sector.

## **4.7 Key findings: the impact of the Directive on the number and the characteristics of the EWCs**

### **4.7.1 Limited creation of new EWCs**

The trend has been for the creation of around 20+ EWCs per annum since the transposition deadline for the Recast Directive, hence, the potential to create the EWCs has not yet been fully exploited. Given that one of the goals of the Recast was to encourage the creation of more EWCs, this has maybe not been fully achieved. The reasons for not establishing EWCs are not entirely clear. What is clear is that companies headquartered in countries with a tradition of strong employee information and consultation and in large multi-nationals headquartered outside the EU (but meeting the relevant thresholds), the setting up of such bodies has proved more likely than in companies with headquarters in Member States without such a strong tradition and in smaller companies. Although the Recast has also brought the establishment of more EWCs in sectors previously not so strongly represented (see below), it remains true that certain sectors (metalworking, chemicals etc.) are not only often larger, but also tend to have a stronger tradition of trade union activity and thus the push for information and consultation bodies to be established.

### **4.7.2 Renegotiation of existing agreements**

In quantitative terms, the Recast Directive has provided some impetus for the renegotiation of existing agreements. 117 Article 13 and Article 6 EWCs agreements have been renegotiated since June 2009.

Out of the recently renegotiated EWCs, around two-fifths adapted their agreement and relevant definitions in line with the new Directive, nearly a third continued to follow the 'old' rules (either Article 13 or Article 6).

The revision of the EWC Directive has given an impetus for many existing EWCs to review their agreement, even when the main reason was not to revise it according to the new rules but to revise it following broader business re-organisation or to address shortcomings in existing practices.

The revisions of Article 13 and Article 6 agreements in line with the rules of the Recast Directive have not necessarily been done to take into consideration changes introduced by the Directive, but in many cases (albeit not all) the changes introduced have been done in light of the strengths and weaknesses in existing practices and priorities of each EWC.

The 'new rules' that have had the greatest impact on the renegotiation processes have tended to concern:

- Inclusion of new definitions on 'information', 'consultation' and 'transnationality'
- Adaptation clause
- A right to training
- Role and protection of employee representatives.

The overall sense that the operation of EWC which had re-negotiated agreements in line with the enhanced definitions of the Recast Directive have stayed the same or improved somewhat (with regard to consultation and transnationality issues in particular) is most likely due to the fact that the new definitions in practice do not significantly serve to enhance the clarity of the content and process of information and consultation and what constitutes transnational matters.

### **4.7.3 Reduction of derogations and exceptions from the Directive**

An increase in the proportion of EWCs operating under subsidiary rules (i.e. minimum conditions for the EWCs) since the introduction of the Recast directive is observed (but data recording issues might affect the reliability of this finding)

On a more positive side, there were fewer EWCs negotiated in the transposition period of the Recast Directive compared to the number of EWCs negotiated in the transposition period of the original Directive. This indicates less inclination of the companies to make use of the perceived more lenient rules from the previous Directive.

## **5 Other effects of the Recast Directive**

This section provides evaluation findings on other 'effects' of the Recast Directive:

- The role of 'old' and 'new' EWCs in the negotiation, implementation and monitoring of the transnational company agreements;
- Practical implementation of the new right for employee representatives to benefit from training without loss of salary;
- The influence of the prevailing economic context on the implementation of the new rules of the Recast Directive.

### **5.1 The impact on the conclusion of transnational company agreements**

Transnational company agreements (TCAs) are typically concluded between worker and management representatives on a specific issue applicable in the company across more than one Member State. They usually cover various aspects of working and employment conditions (such as health and safety, mobility) and relations between employers and workers or their representatives. The texts of agreements apply then in more than one Member State where the company is based.<sup>70</sup>

The work of the European Commission in this area includes support to the exchanges of experience between companies concluding the agreements, and monitoring (including a database of agreements maintained jointly with ILO), as well as setting up of an expert group which has produced a number of studies in this regard.<sup>71</sup>

EWCs generally play a role in representing workers in the context of TCAs. Companies involved in concluding TCAs are mostly large multinationals in the metal, construction, chemicals food and financial sectors with headquarters in Europe and with well-established EWCs. The initiative to start a transnational negotiation often originates from the EWCs. EWCs have signed a large number of such texts, even though they have no formal negotiating powers under the Recast Directive. Their involvement in negotiations is at odds with national systems that make a clear distinction between the consultative role of elected bodies (works councils) and the negotiating mandates entrusted to trade unions (in France for example) or which utilise a single trade-union channel for worker representation (in Italy or the Nordic countries for example).

However, the **evidence in the evaluation shows only a limited impact of the Recast EWCs on the conclusion and quality of the transnational company agreements. Only a minority of Recast EWCs have concluded such agreements**, and the European social partners interviewed rated the EWC impact in this area as insignificant. **Only the national social partners had a more positive view** in this respect.

Out of 37 new Recast EWCs assessed in depth in the evaluation, a transnational company agreement was negotiated in three companies on the following issues (see the box below for detailed case study findings):

- UN Global Compact – 1 company
- Health & Safety and Equal treatment - 1 company
- Safety at work – 1 company.

In a further five companies, the interviewees indicated that such agreements have not yet been negotiated, but they expect such texts to be negotiated in the near to medium term future.

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<sup>70</sup> <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>.

<sup>71</sup> Ibid.

The limited number of such texts thus far negotiated could therefore be due to the fact that many EWCs established under the Recast have only relatively recently begun their operations and further developments along these lines could be expected in future.

### **Case study findings: the role of Recast EWCs in the TCAs**

#### **EWC A:**

The EWC has concluded two European framework agreements on Health & Safety in June 2014 and on Equal treatment in March 2015. The EWC has prepared the negotiation and one of its working groups ensures the follow up. A negotiation is ongoing about Strategic Workforce Planning agreement. According EPSU, the EWCs Representatives from Finland, France, Germany, Italy, Luxembourg, The Netherlands, Belgium, Poland, Sweden, the United Kingdom and Spain met for the 5th time on 24 September 2015 on this issue. The negotiations focused on how to set up a European Observatory of Skills into the company and how to carry out:

- Regulatory monitoring of business activities with an analysis of any possible consequences on employment and skills;
- Monitoring of changes to commercial trends (changing demands of customers-tenders);
- Monitoring of changes to the technologies specific to business activities and an analysis of any possible consequences on employment and skills;
- An analysis of the requirements for qualifications, skills.

It appears to be a good practice to set up working group that will prepare a negotiation, which will be managed by unions but mainly with members participating within the working group, and that will become after the signature, a follow-up committee.

#### **EWC B:**

One of the main achievements of the EWC in the transport sector is the conclusion of a framework agreement and a Charter on Social Rights and Ethics. These texts provide for a framework and principles to be respected in all the countries where the company is based.

#### **The Social Rights and Ethics Charter**

This Charter applies to all employees in all the company and subsidiaries and the EWC is in charge of having the Charter applied everywhere. As mentioned in the Charter, it aims at "fostering a climate of enhanced mutual trust and respect in a work environment in which no form of discrimination or harassment may be tolerated". In an annex a Corporate Social Responsibility statement is also attached and "ensures that the activity of the company goes hand in hand with the promotion of social values and environmental quality".

The Charter covers the following areas:

- Health and safety and dignity at the workplace
- Employment, wages, working time and working conditions
- Equality
- Social dialogue

This Charter also puts a strong emphasis on making sure that all the principles and fundamental rights enshrined in this text are respected by all subcontractors with whom the company maintains relations anywhere in the world.

#### **Framework Agreement on Outstations & Commercial organisations**

A framework agreement has been adopted and provides details on how to conduct the social dialogue in all the Member States in which the company operates. It is not binding but national trade unions have welcomed this initiative. Indeed, as this agreement has been signed by the top management, the local management can hardly derogate to it.

These initiatives are particularly relevant in a context of search of economic profit where companies use more and more subcontractors or create subsidiaries to be competitive.

In the survey of EWCs following the Article 6 rules, out of 22 companies responding to this question, a Transnational Company Agreement had only been concluded in three companies (where it was considered that the EWC has given an important or the main contribution).

*Table 23. Company has concluded a Transnational Company Agreements to which EWC has given an important or the main contribution: a survey of Article 6 EWCs*

Yes/No	Number	Share (%)
Yes	3	14%
No	13	59%
Don't know	6	27%
Total	22	100%

Source: ICF analysis of Article 6 survey results (n=22).

In the interviews with the European social partners (14 in total), most stakeholders had no information on this particular question. Where the EWC impact was identified, it affected mainly the quality of the agreement.

Less than a third of the national social partners (29%) thought that the activities of EWCs had led to an increase in the number of TCAs, while 48% thought they have increased the quality of TCAs. More than two-thirds of the respondents (69%) said that EWCs did not play a significant role in the negotiation of new transnational company agreements. More than half of the respondents (52%) indicated that EWCs have neither improved nor reduced the quality of Transnational Company Agreements.

*Table 24. The views on the national social partners (n=52)*

Impact on the <u>number</u> of TCAs	Number of responses	Impact on the <u>quality</u> of TCAs	Number of responses
EWCs have increased the number of TCAs/European Framework Agreements	15	EWCs have increased the quality of TCAs/European Framework Agreements	25
EWCs have reduced the number of TCAs/European Framework Agreements	1	EWCs have reduced the quality of TCAs/European Framework Agreements	N/A
EWCs have not played a significant role in the creation of new of TCAs/European Framework Agreements	36	EWCs have neither improved nor reduced the quality of Transnational Company Agreements	27
<b>Total</b>	<b>52</b>	<b>Total</b>	<b>52</b>

Source: ICF survey of national social partners.

Since 2011, the European Commission funded a number of projects led by the social partners to build capacity, exchange knowledge and further support the work of EWCs.<sup>72</sup> The issue of EWC involvement in the TCAs has also been covered in these projects. The project UNI Europa EWCs: Fit for Purpose (VS/2013/510), which organised five workshops with over 100 trade union representatives, EWCs members and coordinators from 25 multinational companies, recommended to 'develop activities with a view to [...] define guidelines on a transnational company agreement'. The possible role and added value of the Transnational Company Agreements were also discussed in the workshops organised in the framework of the project VS 2012/3019 (training for employee representatives in the new Member States and candidate countries in the construction sector organised by the EFBWW). This shows that the issue of the EWC involvement in the TCAs remains topical in the work of EWCs, with the need to provide further clarity on the EWC involvement in the work accompanying the TCAs (see also section 3.2).

The available research has also highlighted the increasing involvement of EWCs in the negotiation and implementation of the TCAs. EWCs are shown to become increasingly involved in the TCAs, especially in the context of managing the restructuring processes

<sup>72</sup> <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=211>.

in the companies.<sup>73</sup> TCAs on restructuring are considered to be examples of good practice in this area.<sup>74</sup> Such EWC involvement in the TCAs has been especially detected when the EWC agreements explicitly included the competence for the EWC to conclude such agreements. Such competences are provided to EWCs in companies that include Allianz SE, Crédit Lyonnais, Danone, Danske Bank and Solvay.<sup>75</sup> This involvement in the TCAs is also becoming increasingly complex and is considered to require the development of further means and tools for the EWCs. This coincides with the overall policy attention at the European level devoted to the support of TCAs, including the considerations of the European Commission.<sup>76</sup>

## 5.2 Implementation of the new right for employee representatives to benefit from training without loss of salary

### 5.2.1 Background

The Recast Directive introduced a new right to training for employee EWC representatives without loss of wages. This was in response to a need for employee representatives to acquire a better understanding of the legal context related directly to EWCs but also to industrial relations processes (such as information and consultation), as well as business and financial management and processes, in order to carry out their employee representative duties in EWCs in a more effective manner.<sup>77</sup> There is also demand for the language training among EWC members.

A study of Eurocadres found that *"the issue of training seems to be a real challenge, as 40% of the respondents did not receive any training on the new legislation on information and consultation either at the national or European level. The actual situation on this topic varies widely from one country to another and no common pattern can be found, inasmuch as training may depend on trade union policies or EWC agreements"*.<sup>78</sup> The 2008 preparatory study on the impact assessment on EWCs<sup>79</sup> concluded that over half of the companies (58%) with Article 13 or Article 6 EWCs offered a right for their EWC members to training but in a number of cases this 'right' referred to English language training only and in others it actually referred to rights for employee representatives of national worker councils rather than those of EWCs. Others argued that any reasonable training requests were usually approved as long as they were relevant, which is not the same as a 'right' to training.

Research by the ETUI on the right to training has concluded that there has been a significant improvement in this regard following the Recast Directive, with the 'right' being now included in nine out of ten new agreements signed. As shown by Table

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<sup>73</sup> Jagodzinski R. (2015), Variations on a theme? The implementation of the EWC Recast Directive, ETUI.

<sup>74</sup> Report Group of Experts Implementation of Recast Directive 2009/38/EC on European Works Councils, December 2010.

<sup>75</sup> De Spiegelare S., Jagodzinski R. (2015), European Works Councils and SE Works Councils in 2015, Facts & figures, ETUI. The example of Solvay EWC is especially interesting. Since 1999, Solvay has signed several Transnational Company Agreements regarding health and safety, social policy and sustainable development. The last agreement installed a profit-sharing system which directly impacts the income of the Solvay employees.

<sup>76</sup> Commission Staff Working Document, Transnational company agreements: realising the potential of social dialogue, Brussels, 10.9.2012, SWD(2012) 264 final.

<sup>77</sup> The specific training needs for the EWC members have also been outlined in the academic research, Miller, D. (2001), Transnational worker representation and transnational training needs: the case of European works councils. *International Journal of Training & Development*. 5, 1, 34.

<sup>78</sup> Sample of 42 EWC – type of agreement not specified. Eurocadres (2013), Professional and Managerial Staff competencies improving EWC's effectiveness, available at: [http://www.tek.fi/cm/s/browser?id=workspace%3A//SpacesStore/5933049b-80ef-4dd3-9b3e-261a1dade47a&filename=/kansainvalinen-vaikuttaminen/ewc-eurooppalainen-yrittysneuvosto/Competencies\\_EWC\\_Effectiveness.pdf](http://www.tek.fi/cm/s/browser?id=workspace%3A//SpacesStore/5933049b-80ef-4dd3-9b3e-261a1dade47a&filename=/kansainvalinen-vaikuttaminen/ewc-eurooppalainen-yrittysneuvosto/Competencies_EWC_Effectiveness.pdf).

<sup>79</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.



below, the occurrence of this 'right' in the agreements has increased to 93% from less than a third of the original Article 13 agreements having such clause.

Table 25. Occurrence of a right to training in EWC agreements

	Before 1996	1996 – 2000	2001 – 2009	Since 2009
Yes	31%	51%	72%	93%
No	69%	49%	28%	7%

Source: ETUI (2014), *Benchmarking Working Europe*, available at: <http://www.etui.org/Publications2/Books/Benchmarking-Working-Europe-2014>, p. 99

### 5.2.2 Evaluation findings

The evaluation has explored the qualitative dimensions of this right by examining whether this right actually materialises in practice. **Two-thirds of employee representatives confirmed that employees had made use of this right to training without loss of wages**, whereas one-third confirmed that this was not the case. Overall, the main reasons for the lack of take-up of training in the new EWCs included:

- The EWC was just recently established and the members had not yet had the time to consider training requests.
- There was no demand among members (yet).

Among those who had requested training, the vast majority (80%) of EWC members noted that there had been no particular challenges in securing it. The remaining ones (20%) consistently identified one challenge of the reluctance of the management to allow such training to take place or leave to be taken. In one particular case the issue was caused by decentralisation of the responsibility to finance EWC related training from central to local management. The practical implication of this was that the members coming from countries with the weakest tradition of worker information and consultation suffered most as local managers in these countries were not as supportive of training as managers in countries where worker representatives play a bigger role and have more rights.

Those members of Recast EWCs that have taken up this right have received, on average, 1-3 days of training per year.

Table 26. Number of days of training per year

	0	Up to 5 days	5-10 days	10+ days
Share of respondents (%)	23	65	12	0

Source: Based on a survey of employee representatives of Recast EWCs: 26 valid responses out 37 EWCs in the sample.

The most common topics of training included legal (mentioned by 25% of respondents) and economic (15%) affairs, as well as languages and communication skills (37%). In other cases, employees were given training on specific transversal skills, such as negotiation, or the training took the form of team building. In other cases training was specific to the work in the different aspects of EWCs.

### 5.2.3 Benefits and costs of training

The benefits of training identified by the employee members have been manifold and relating to several aspects, including improved soft skills and better awareness of the EWC mandate and possibilities as well the legal EWC framework and different experiences of other EWCs (see Figure 13).



Figure 13. The benefits of training in Recast EWCs

Enhanced mutual understanding, trust and understanding	Improved soft skills: communication, language and negotiation skills
Improved understanding of financial management of multi-national corporations	Increased buy-in and ability to contribute to the EWC; at the same time more realistic expectations of potential achievements of EWCs

Source: Interviews with the employee members of Recast EWCs.

Since 2011, the European Commission funded a number of projects led by the social partners to build capacity, exchange knowledge and further support the work of the EWCs.<sup>80</sup> The key activity financed in such projects was the training and information exchange provided to the different EWC members. The results of these projects showed that the participants in the seminars were better equipped with knowledge, confident and able to fulfil their EWC mandate following the training.<sup>81</sup> Individual EWC representatives were more aware of their rights, and more determined to ensure employers meet their legal obligations to inform and consult at European level. The implementation of joint EWC member training sessions enables trainers belonging to partner trade unions to respond to the needs of information and training of their members, based on a practical knowledge of the latest legal texts; knowledge of existing good practices in terms of transnational social dialogue, information and consultation process, and link between national and European information and consultation levels.

In terms of quantifiable costs of training to the companies, 22 EWCs operating under Article 6 rules had an annual average EWC training expenditure of around EUR 43,800.<sup>82</sup>

15 Recast EWCs (where the cost data was provided to the evaluation) report significantly lower training costs, with the annual average training cost of around EUR 12,000 (these cost estimates do not tend take into account travel costs or time costs, but mostly costs related to the fees for trainers and possible venue costs, when applicable). No geographical or sectoral patterns were identified.

The potential reduction in the training costs compared with the Article 6 EWCs is unlikely to be directly related to the Recast Directive per se, but more likely to be associated with a smaller companies operating the Recast EWCs and the fact that many Recast EWCs are very new with only a year to two operation behind them. This means that in some Recast EWCs the new EWC employee representatives have not yet requested or organised the training.

This has also been highlighted by a recent Eurofound study which found that *"the EWCs studied here did not show significant changes in their functioning directly resulting from the recast Directive. This might be because they are examples of EWCs that had already developed beyond the previous legal minimum requirements by, for example, having implemented provisions on the training of EWC members, holding more than one annual plenary meeting or having further fine-tuned their information and consultation mechanisms"*.<sup>83</sup>

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<sup>80</sup> <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=211>.

<sup>81</sup> Based on ICF analysis of the final project activity reports.

<sup>82</sup> Source: ICF survey of 22 EWCs.

<sup>83</sup> Eurofound (2015), European Works Council developments before, during and after the crisis, p.1.

Table 27. Estimated annual budget spent on training of EWC members (Recast EWCs) (EUR)

	None	<5,000	5,000-10,000	10,000-20,000	20,000-30,000	30,000+
Share of respondents	21%	37%	10.5%	5%	10.5%	16%

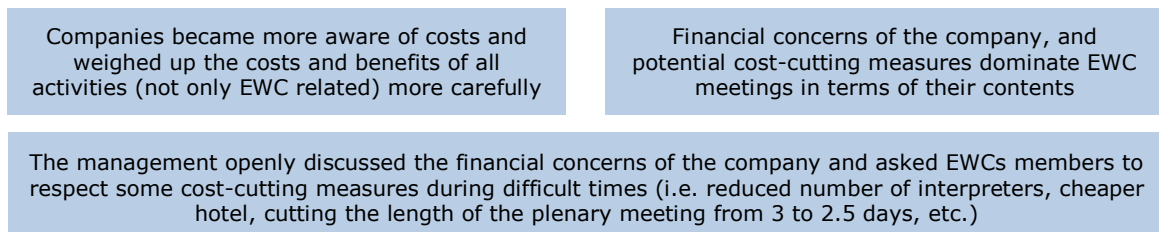
Source: Based on a survey of employee representatives of Recast EWCs: 19 valid responses out of 37 EWCs in the sample.

The EU social partners were also asked to comment on the practical implications of the introduction of this new 'right' to training without loss of wages. Two of the thirteen respondents identified this as the biggest practical success of the new Directive. Several raised concerns about potential bias in the content of training courses providing as they tend to be either management or trade union led, rather than 'independent'. One respondent called for more simultaneous training of management and worker representatives. Several stakeholders also raised concerns around this right potentially causing disagreements as a result of costs and relevance of training courses now that the availability and access to training has improved.

### 5.3 The effect of the prevailing economic context on the implementation of the new Recast Directive rules

The majority of respondents from the management and employee representatives of Recast EWCs as well as those that have recently renegotiated their agreement in line with the new rules stated that **the financial crisis had not really affected the work of their EWCs**. This is because many new EWC negotiation processes started after the worst period of the crisis in the HQ country and the prevailing economic climate was therefore no longer that negative or had already become 'the new normal'. However, in those cases where the economic context affected the work of the EWCs, it had the following implications (see Figure 14).

Figure 14. Implications of the financial crisis on the Recast EWCs



Source: Interviews with management and employee representatives of Recast and Renegotiated EWCs.

The EU social partners interviewed in the evaluation were also asked to consider the impact of the financial crisis. About half of the representatives consulted did not think the financial crisis had had any particular or significant effect on the set up or operation of EWCs. Sometimes, however, the overwhelming turmoil in the industry had side-lined social dialogue as a priority topic.

Those that highlighted a more visible impact stressed an increased number of matters to be considered for EWCs (including a greater number of restructuring processes) and the loss of EWC members. One of the interviewees highlighted that in some companies the crisis and the management of its effects caused frictions while in others it increased cooperation between the two sides as both wanted to work towards the future (and sustainability) of the company.

The available research also indicates a mixed evidence on the impact of the crisis on the work of the EWCs. The impact of the crisis on the work of the EWCs is considered

to have been indirect via the changes to company set in motion by the economic crisis.<sup>84</sup> The restructuring cases occurring in the aftermath of the crisis (especially in the financial and automobile sectors) did challenge the existing EWCs to provide an adequate response.<sup>85</sup> However, the research found that such crisis-related restructuring also offered some EWCs an opportunity to clarify information and consultation procedures.

#### **5.4 Summary of key findings: other impacts of the Directive**

The evidence shows a limited impact of the EWCs on the conclusion and quality of the transnational company agreements. Only a minority of EWCs have concluded such agreements, and the European social partners interviewed rated the EWC impact in this area as insignificant. This is at least partly due to the fact that many Recast EWCs have not been operational for a long period of time and this finding could therefore change in the years to come.

There has been a significant improvement in the 'right' to training without loss of salary. The occurrence of this 'right' in the agreements has increased to 93% from less than a third of the original Article 13 agreements having such clause. Two-thirds of interviewed Recast EWCs employee representatives confirmed that employees had made use of their right to training without loss of wages. Among those who had requested training, the vast majority (80%) of EWC members noted that there had been no particular challenges in securing it.

The economic and financial crisis had not really affected directly the work of the EWC. In those cases where the economic context affected the work of the EWC, the management openly discussed the financial concerns of the company and asked EWCs members to respect some cost-cutting measures during difficult times.

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<sup>84</sup> Eurofound (2015), European Works Council developments before, during and after the crisis, p.1.

<sup>85</sup> Fetzer, T. (2012), From nationalism to European patriotism? Trade unions and the European works council at General Motors, Journal of European Public Policy, April 2012, Vol. 19 Issue 3, p342-357.

## 6 Effects of the Recast Directive on information and consultation in EWCs

This section provides an examination of the effects of the Recast Directive on the primary functions of EWCs:

- Receiving **information** from the management on transnational matters;
- Serving as a **consultation** forum on corporate decisions or strategies (e.g. restructuring).

First, this section provides an overview of the issues that arose under the original Directive of 1994 in relation to the concepts of information and consultation, as well as transnationality. This is followed by a brief description of the rationale and the new provisions of the Recast Directive, in particular its definitions of 'information', 'consultation' and 'transnational matters'. Then, the analysis is provided of the survey with the EU and national partners and from interviews with employer and employee representatives of Recast EWCs.

The aim of this section is to highlight the main effects of the rules of the Recast Directive on the information and consultation functions of EWCs, and in particular on the extent to which the views of the EWC are taken into account in the transnational corporate decisions pertaining to business restructuring.

### 6.1 Issues arising in relation to the implementation of information and consultation in the Directive 94/45/EC

The main rationale behind the drafting of the original EWC Directive of 1994 was to provide an effective means for workers to be informed and consulted on such developments which can and do affect decisions on employment and working conditions (c.f. Article 1.1 of the Directive). It thus sought to bridge a "representation gap" between increasingly transnational corporate decision making and employees' nationally defined information and consultation rights<sup>86</sup>.

Directive 94/45/EC itself does not contain a full definition of the "information" concept, beyond mentioning that it "*shall relate in particular to transnational questions which particularly affect workers' interests*"<sup>87</sup>. Consultation is defined in the Directive as the "*exchange of views and establishment of dialogue between employees' representatives and central management or any more appropriate level of management*"<sup>88</sup>.

The absence of a full and detailed definition of information and consultation in the 1994 Directive led to different interpretations of these concepts in transposing legislation and – maybe more significantly – in their practical application<sup>89</sup>.

A 2006 report by Eurofound on European Works Councils and Transnational Restructuring and the Preparatory study for an impact assessment of the EWC Directive carried out by GHK in 2008 both found that "*although most EWCs are, on paper, well equipped to deal with issues surrounding restructuring (e.g. in respect to the nature of the information they should regularly receive and through the possibility of holding extraordinary meetings), it is rare for agreements to state – and in reality*

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<sup>86</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

<sup>87</sup> Article 6(3) of Directive 94/45/EC.

<sup>88</sup> Article 2(1)(f) of Directive 94/45/EC.

<sup>89</sup> 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>.

for meetings to occur in time to allow for meaningful consultation or for the EWC's position to be taken into account prior to restructuring decisions being taken<sup>90</sup>.

Eurofound's 2006 study which included a review of agreements concluded under the 1994 Directive (Article 6 agreements) showed that only 28% of them make explicit reference to the provision of information and consultation in good time<sup>91</sup>. This finding is echoed by a study conducted by ETUC in 2014 which reveals that less than one in twenty (4.1%) EWC established before 2009 contained robust definitions of information and consultation<sup>92</sup>.

The absence of an exhaustive definition of information and consultation in most of the agreements under the 1994 Directive resulted in issues regarding the extent to which these bodies were able to meet their original purpose as set out in the Directive. Surveys conducted in 2005<sup>93</sup> and 2008<sup>94</sup> provided baseline information regarding timing of provided information and consultation in restructuring processes.

*Table 28. Timing of information and consultation: was the EWC consulted on restructuring*

<b>When</b>	<b>The 2005 study (N=473)</b>	<b>The 2008 study (N=45)</b>
Before the decision was finalised	20%	
Before the decision was made public	30%	
After the decision was made public	20%	20%
Not at all	30%	4%
Same time as the board		38%
Before press release		18%
When announced to the press		20%

*Source: Waddington J. (2005), University of Manchester, and EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.*

The results show that EWCs under the 1994 Directive had limited opportunities to influence transnational corporate restructuring decisions through the exercise of their information and consultation function.

Work conducted by Eurofound<sup>95</sup> confirmed that in the majority of cases information was only be provided to the EWC employee representatives after the decisions had been taken by the board. In particular, the study suggested that this was the result of a very narrow application of the notion of "consultation" on the basis of the wording of the Directive.

The limited role of EWCs in restructuring was also influenced by the lack of a clear definition of transnationality in the 1994 Directive, which was considered by the Eurofound study to work against the purpose of EWCs.

The survey conducted for the Eurofound study showed that employers and a majority of employee representatives argued that detailed discussions on the implementation of restructuring processes should be left to the local level. Their understanding of the legislation was that while EWC members can be informed of transnational decisions with the possibility of discussing them or asking questions, detailed consultations or

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<sup>90</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission., p. 73.

<sup>91</sup> Eurofound (2006), European Works Council and transnational restructuring, p. 14.

<sup>92</sup> ETUI (2014), Benchmarking Working Europe, p. 99.

<sup>93</sup> Waddington J. after: European Commission (2008), Staff Working Document accompanying the Proposal for a Directive of the European Parliament and the Council 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 (recasting), COM(2008) 419 final, p. 18.

<sup>94</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

<sup>95</sup> Eurofound (2008), European Works Councils in practice: Key research findings Background paper, p. 5.

negotiations subsequently take place at the national or local level – i.e. the level generally directly impacted by restructuring decisions.

The 2008 study of GHK showed that 80% of the survey respondents (both employers and workers) considered that the EWC information and consultation processes had made no difference to the implementation of restructuring plans.

The studies on the functioning of EWCs under the 1994 Directive raised issues regarding provisions on the timeliness of information and consultation and the precise nature of the consultation process, as well as highlighting the need for greater clarity regarding the concept of transnationality. They revealed a contrast between the aspirational role that EWCs could potentially play in the context of transnational restructuring and the often minimalist interpretation of the existing rules of the Directive in practice. The lack of clear definitions in the original Directives was considered to be a weakness in this regard.

## **6.2 Improvements under the Recast Directive with respect to information and consultation and the definition of transnationality**

To remedy issues around the appropriate information and consultation of EWCs and the concept of transnationality, the Recast Directive aimed to increase legal certainty<sup>96</sup> by introducing definitions which are in line with other Community legislative instruments<sup>97</sup> (in particular the 2002 *Societas Europaea* (SE) Directive<sup>98</sup>).

Directive 2009/38/EC aimed to bring clarity and reinforce the obligation for the management to inform employees by providing guidance on the steps to follow. It states that information must 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'*<sup>99</sup> meaning that information, in terms of both form and content, should be delivered in such a way that it enables the EWC to carry out a detailed examination of the potential effects of planned decisions in preparation for possible consultations with competent management representatives<sup>100</sup>.

Another change relating to definitions is the attempt to provide a clarification of what was meant by 'consultation' in the Directive. The new Directive 2009/38/EC brought more details to this definition which now attempts to clarify the consultation process by adding for instance that this must *'enable employees' representatives to express an opinion on the basis of the information provided'*<sup>101</sup>. This attempts to reinforce the information and consultation rights of EWCs which appear as two different procedures but which are nonetheless strongly interrelated.

One of the main changes was also the insertion of a definition of 'transnational matters'. The criterion used for determining transnational matters is *'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'*<sup>102</sup>. This sought to clarify the scope of matters

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<sup>96</sup> Recital 7, 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).

<sup>97</sup> Article 2 of Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees ('the SE Directive').

<sup>98</sup> Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees.

<sup>99</sup> Article 2(1)(f) of Recast Directive 2009/38/EC.

<sup>100</sup> <http://www.worker-participation.eu/European-Works-Councils/Recast-Directive/Frequent-Questions-on-the-recast-EWC-directive-2009-38-EC>.

<sup>101</sup> Article 2(1)(g) of Recast Directive 2009/38/EC.

<sup>102</sup> Article 1(4) of Recast Directive 2009/38/EC.

EWCs should deal with compared to national or matters that should be dealt with at the national or local level respectively.

The effects of these changes in practice have been recently assessed. The 2014 ETUI's review of EWC agreements shows that there has been improvement in the quality of definitions used in the agreements. Since 2009, a majority of newly-established EWCs have adopted the Recast Directive's definitions of information and consultation (57% of all EWC agreements)<sup>103</sup>.

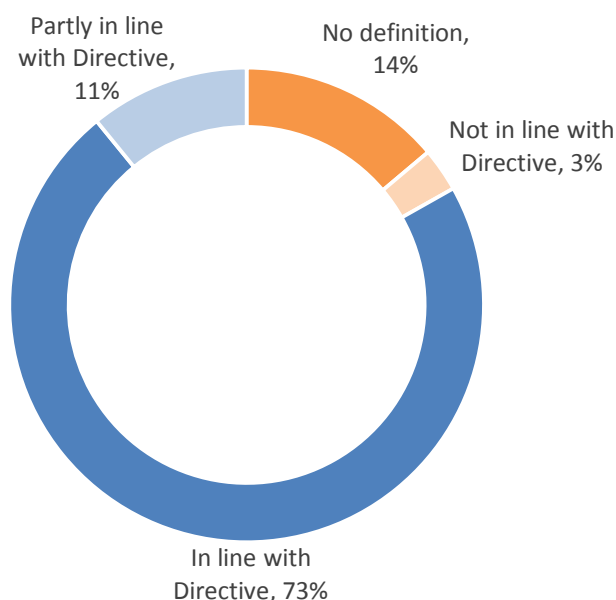
### 6.3 Impacts of the Recast EWC Directive on definitions of information and consultation in EWC agreements

#### 6.3.1 Definitions of information

Out of the 37 companies operating a new 'Recast EWC' and analysed in detail in the evaluation, 25 (or **73%**) **have an agreement which transposes closely the definition of information in the Directive 2009/38/EC**. This also includes eight EWC agreements which refer to specific circumstances (e.g. to make decisions quickly in a competitive environment), include time limits for the provision of information (e.g. 30 days before a meeting) or even specific rules about the information to be provided and how this should be treated (e.g. with reference to the stock market rules). This indicates an additional more extensive definition of information in a substantial number of EWCs.

Four companies have an agreement which only partially covers the definition of information provided in the Recast Directive and falls short of the definition provided in the Recast Directive. This applies to the agreements where only part of the information definition of the Recast Directive has been included or only the areas for which information has to be provided are defined. Of the 37 companies, 5 companies have an EWC agreement which does not include a definition of information.

Figure 15. Implementation of the Recast Directive's definition of Information in 37 newly-established EWC agreements (views of the EWC)



Source: ICF interviews with the EWC members.

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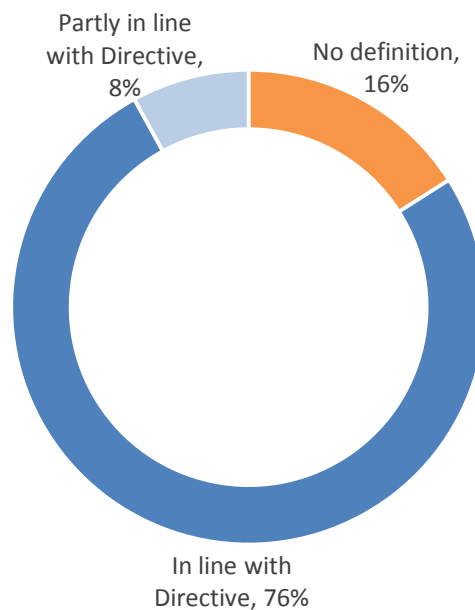
<sup>103</sup> ETUI (2014), Benchmarking Working Europe, p. 99.



### 6.3.2 Definitions of consultation

Of the 37 new, 'Recast EWCs' interviewed (and with valid information for this section), **28 (or 76%) have an agreement which transposes closely the definition of consultation in the Directive 2009/38/EC.** Three companies have an agreement which only partially covers the definition of consultation provided in the Recast Directive. Here, "*partially in line*" is applied to agreements which do not provide an actual definition of consultation or which do not make a clear distinction between the definitions "information" and "consultation". Six companies have an agreement which does not include a definition of consultation.

Figure 16. Implementation of the Recast Directive's definition of Consultation in 37 newly-established EWC agreements



Source: ICF interviews with the EWC members.

In summary, the majority of new agreements include definitions of information and consultation in line with the Recast Directive. A small number of new agreements in the sample (approx. 15%) do not contain either of these definitions. For around a third of the new agreements, the definitions of information and consultation have been re-interpreted to various degrees. Certain agreements interpret information and consultation in a way that falls short of the definitions provided in the Directive, while other agreements provide further specific rules or criteria in relation to these two concepts.

In the case study (see Box below), out of 15 EWC agreements reviewed in depth, a third contained extensive lists of subjects of the information to be provided to the EWC and over a half contained more extensive rules for consultation process in the EWC.

#### Case study findings: comparison of the definition of information and consultation in 15 EWC agreements concluded since 2011

The evaluation team examined in depth the specific definitions of information and consultation in 15 EWC agreements (randomly selected).<sup>104</sup> The absolute majority of 15 EWC agreements used verbatim or more extensive definitions of information and consultation.

In relation to defining 'information':

<sup>104</sup> [http://www.ewcdb.eu/search\\_agreements.php](http://www.ewcdb.eu/search_agreements.php).



- Six agreements used the verbatim definition of information in the Recast Directive;
- Five agreements used a more extensive definition by providing an extensive list of subjects for information;
- Three agreements did not contain a definition of information;
- One agreement was using a definition of information which was less extensive than the Recast Directive.

In relation to defining 'consultation':

- Eight agreements used a more extensive definition by providing an extensive list of subjects for consultation; timing for consultation (4 weeks); required the provision of information to local working councils and Unions before consultation at the European level
- Four agreements used the verbatim definition of consultation in the Recast Directive;
- Three agreements did not contain a definition of consultation.

Views among the EU and national social partners provided to this evaluation were mixed regarding the impact of the Recast Directive as regards the definitions of information and consultation. While around two-thirds of respondents (65%) hold the view that the situation has remained the same as under the previous Directive, less than one-third (29%) indicated that, in practice, there have been improvements in the timing, level and scope of the information and consultation of EWCs on transnational matters.

Indeed, for most social partners, the Recast Directive constitutes a clearer legal basis with regard to the information and consultation process. Others argued that EWC members have a better knowledge of their rights and duties thanks to the Recast Directive, and that this will further improve with experience in applying the new rules on information and consultation.

All of the national social partners who provided a reason as to why they thought the situation had improved commented on the greater awareness by representatives and employers about the Directive. Out of these respondents, three specifically mentioned that representatives are more aware of what is expected from the employer and ask for their rights to be met.

*Table 29. Change in the timing, level and scope of the information and consultation of EWCs on transnational matters – views of national social partners*

	<b>Decline</b>	<b>No change</b>	<b>Improvement</b>
Number	3	34	15
Share (%)	6	65	29

*Source: ICF survey of national social partners, based on 52 responses to the question.*

Among the national social partners (primarily trade unions) who indicated "no change", some of the issues raised were that the Recast Directive was considered to be not ambitious enough with the new definitions, there is no obligation among companies to implement the wording of the definitions (e.g. allowing Article 13 agreements to continue to stay in force); insufficient sanctions for late information and consultation, and that issues around confidentiality and 'stock market rules' continue to hamper effective information and consultation in practice.

Motivation, understanding and buy-in from senior management is key for the implementation of the Directive to be successful. Some respondents have pointed out that corporate culture and management's openness to change play an important part in this respect.

## 6.4 Practical impacts of the Recast EWC Directive on information and the consultation process in the EWCs operating under the new rules

The analysis of the impacts of the Recast Directive focusses on stakeholders' views regarding the timing and quality of information provided, the process of consultation (including its timeliness) and the extent to which employee views are taken on board. Furthermore, this section highlights the issues around the articulation of different levels of information and consultation and delivers an assessment of the factors which contribute to the good/poor functioning of information and consultation processes.

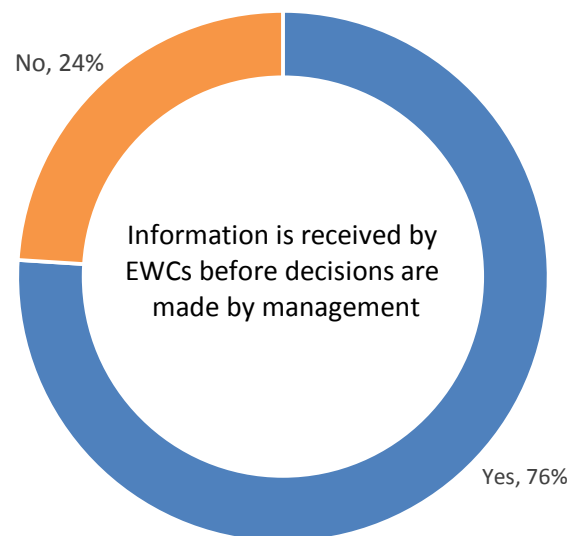
### 6.4.1 Timeliness and quality of information and consultation processes

In the Recast Directive, timeliness refers to providing information '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'. Consultation processes must 'enable employees' representatives to express an opinion on the basis of the information provided.'

#### 6.4.1.1 Views of employee representatives

According to the feedback from 34 employee representatives, information is considered to be **delivered in a timely fashion (e.g. in advance of a decision) in practice in the majority (76%) of cases.**

Figure 17. Employee representatives' perception of the extent to which information is received by EWCs before decisions are made by management



Source: ICF interviews conducted with 33 EWC employee representatives.

Many among them have also argued that when information is disseminated in a timely manner it results in improvements in the relationship between members of the management and staff representatives. Some other respondents argued that there is some room for improvement, and that inconsistencies can also arise in the timely dissemination of information. This seems to be related to the nature of the information itself and its degree of complexity (e.g. complex company level financial information).

Some respondents have criticised how management members consider what constitutes timeliness in the dissemination of information. As has been the case for EWCs established under Directive 94/45/EC, stock market rules are often quoted by management as reasons for not revealing information earlier.

Employee representative in an IT company: *"The management says that the company is transparent. The EWC receives information 2-3 days before everybody else. Last year the reorganisation was made and the EWC was not informed – the management claimed that they took the decision on the same day. The company is on the stock exchange; this limits timing to provide information."*

A considerable number of the companies have not had an EWC for very long, therefore some of the respondents were unable to assess the situation of transmitting the information. Some of them have reported that the transmission process can be slowed down due to the fact that EWC operations are still in their infancy and that it can take time before such processes can be carried out more fluidly.

It appears that there is considerable variation in terms of the effects of the Directive on information transmission, according to the responses provided by the employee representatives. Timeliness remains a concept which is open to interpretation as no specific timescales are provided in the Recast Directive or most transposing legislation at the national level. The timeliness of information provision also seems to vary depending on the contents of the information disseminated. As a result, a number of respondents take the view that the consultation rights of employee representatives can be negatively affected in such circumstances.

#### **6.4.1.2 Views of management**

From the feedback obtained from employer representatives, most companies operating under the new rules (60%) have not experienced any technical difficulties in providing information to the EWC members. On the other hand, some employer representatives have indicated that issues with the transmission of information arise from difficulties in determining which decisions have a transnational impact and what this impact may be.

Employer representative in a steelmaking company: *"No difficulties [in providing information] but the main challenge is to identify the transnational impact of projects and then to anticipate the information/consultation if needed."*

Employer representative in an industrial company: *"[We] find it difficult as this is very vaguely formulated in the Directive and nationally: not sure when the impact is national only or transnational. This is a hotly debated issue between employees and the company."*

Other feedback indicates that employers can take it upon themselves to decide which transnational issues require rapid communication and which are only delivered to regular plenary meetings (which can lead to some time delay).

Employer representative in a corporate services company: *"No difficulties have been experienced. However, the management do not provide transnational information continuously. It has to select 'important' information, which needs to be passed to the EWC (or Select Committee) immediately, and 'less important' information that lead to an information at the next plenary meeting."*

A number of arguments made also highlight that fact that priority in providing information continues to be given to the national level of worker information and consultation (even when this pertains to transnational matters). Stock market rules and concerns over breaches of confidentiality also continue to be quoted as concerns by employer representatives and are provided as reasons for consultations with EWCs not being a priority.

Employer representative in an electricity company: *"Information gets out in the press before the meetings. Management don't see informing the EWC as a priority. National*

*workers councils will discuss topics first. Topics discussed at the EWC level generally have already been discussed in the National Works Council."*

Most of the employer representatives of newly-established EWCs interviewed indicated that the consultations of EWC members have not led to changes in the decision-making process, or indeed to a different decision. Only a few employer representatives mentioned that the opinions of EWC employee representatives are usually taken into account in the company decisions. Others have indicated that it is too soon to tell as their respective EWCs have not been operating long enough (and/or have not yet dealt with restructuring situations).

Many respondents on the management side have argued that the consultation of EWC members brings benefits to all parties in many ways: for example, the consultation process improves the common understanding of issues among members and also leads to fruitful discussions and useful suggestions.

In summary, the delivery of information is defined in the Directive as information that is 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'*. Clear differences can be shown in relation to how this is further defined in national legislation, individual agreements and in practice. In some cases, it is not clear how implementation in practice meets the requirement of allowing *employees' representatives to undertake an in-depth assessment of the possible impact'*, thus limiting the consultation process in practice.

The majority of employee representatives are generally satisfied with their experiences in the timeliness of information transmission and argue that where this is provided, it has improved their relationships with management. Overall, employer representatives of newly-established EWCs do not consider that they experience particular difficulties in disseminating information to EWC members in a timely manner; but highlight issues in determining which decisions have a transnational impact. Employer feedback indicates that internal decisions are being taken as to what information needs to be provided to EWCs and when it should be provided. In addition, other rules (i.e. stock market rules) are often invoked as reasons which are considered to prevent them from disseminating information to EWC members in good time.

According to most employer representatives, the consultation of EWC members has not led to any changes in corporate decision-making. The consultation of EWC members is however seen as positive by most employer representatives as a means of developing a common corporate vision.

#### **6.4.2 Practical impacts of the Recast Directive on the ability of newly-established EWCs to focus on transnational matters**

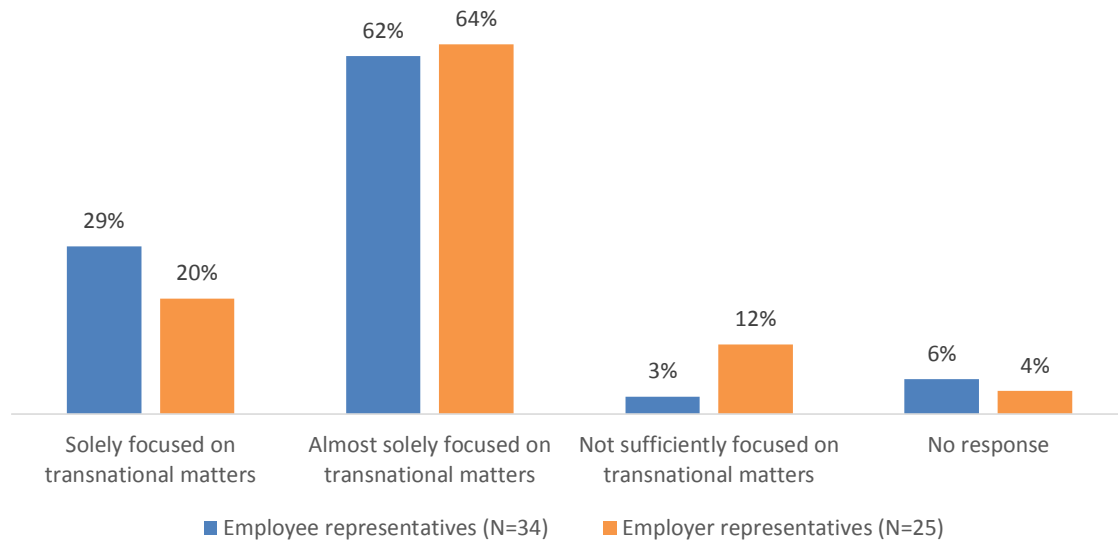
The Recast Directive introduced the following criterion for determining transnational matters: *'where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States*. This section provides an initial analysis of stakeholder views on the extent to which their EWC focusses solely and sufficiently on transnational matters.

##### **6.4.2.1 Views of employee representatives**

Of the employee representatives interviewed in 34 different companies (see Figure 18), 10 indicated that their EWC was *solely* focused on transnational issues while the majority – i.e. 21 respondents – indicated that theirs was *almost solely* focused on transnational matters. Only one respondent indicated that the company EWC was not sufficiently focused on transnational matters and commented on the fact that some employee representatives seek to bring national issues to the EWC table. Five

respondents were unable to express a view due to the fact that the EWC of their respective company had only recently become operational.

Figure 18. Focus on transnational matters in Recast EWCs



Source: Based on 34 interviews conducted with EWC employee representatives and 25 employer representatives.

An issue raised was that some employee representatives lack sufficient knowledge or training on which issues should be considered to be transnational. Furthermore, because of their role as national representatives, national concerns often remain more pressing. In the worst cases, discussions and questions can sometimes relate to national or local issues at the expense of the core transnational matters. 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 articulated by both sides. The extent to which representatives of one country dominate the balance of representatives on an EWC can also have an impact here.

Employee representative of a rail transport company: "[There are] a lot of Franco-French issues as [the company] has a wide majority of activities in France. Plus, French employees have a specific status."

Employee representative in a telecommunications company: "For the employees the company as whole is important. Which makes it easier to focus on the transnational matters."

A number of employee representatives mentioned that information on national and local matters is sometimes given by management where appropriate in an effort to ensure transparency, but that no questions are taken during EWC meetings. In certain EWCs, it appears that the transmission of information on national or local matters is not incompatible with discussions on transnational matters, depending on the specific circumstances. From the feedback obtained, it also appears that the ability to keep an EWC as a transnational forum can depend on the style of management within companies.

#### 6.4.2.2 Views of management

Again, a majority of the company representatives interviewed – i.e. 16 out of 25 respondents – indicated that their EWC was almost solely focused on transnational matters against only five respondents who indicated that their EWC was solely focused on transnational matters (see Figure 18). Only one company representative indicated

that the company EWC was not sufficiently focused on transnational matters; a further two gave no response.

A number of respondents on the management side explained that keeping EWCs as a transnational forum can be quite challenging as certain employee representatives tend to bring up local issues at the EWC meetings. Again, feedback gathered suggests that a lot depends on the firmness of management representatives or the EWC employee chair as to whether EWC discussions remain focused on transnational matters.

Other employer representatives have pointed out that identifying what constitutes as 'transnational matters' is made difficult given the imprecision of the definition in the Directive, and there are also difficulties around the distinction between transnational and strategic matters.

#### 6.4.2.3 Views of social partners

Feedback from other EU social partners reveals that there is some confusion around the notion of transnationality due to the strategic nature of certain decisions, stock exchange rules, and the difficulty determining if certain matters qualify as transnational.

EU sectoral social partner: *"There is a problem in defining how many people impacted make the matter which should be consulted at the EU level (% of staff, number or employees, how many?). When the local level has to be consulted it is difficult to manage this process because the social dialogue traditions and legislation differs between countries."*

EU sectoral social partner: *"The [Recast] Directive made the distinction on the types of information provided. But still there is uncertainty over the level of details provided to employees. It is not clear if the information provided is sufficiently detailed at the EWC level."*

EU sectoral social partner: *"The rule is still unclear and leaves a lot of room for interpretation. Redundancies in one country are still argued to be the national matter and not the matter for EWC, even though it turns out that waves of redundancies are occurring in several countries."*

Views were also mixed among the national social partners surveyed as to whether the Recast Directive provides more certainty on the type of information to be disseminated transnationally via EWC as opposed to local and national information and consultation forums. But, it appears overall that their view is that the Directive has improved clarity regarding the type of information to be disseminated (37%) but that changes are very slow and that there is still a gap between theory and practice.

Table 30. *More certainty than before to the type of information to be disseminated transnationally via EWC as opposed to local and national information and consultation forums, survey of national social partners*

	Don't know	No	Yes
Number	19	14	19
Share (%)	37%	27%	37%

Source: Survey of national social partners, based on a sample of 52 responses to the question.

#### 6.4.2.4 Summary

According to the interview feedback, there were very few differences of opinion between employer and employee representatives from the same company regarding the extent to which their respective EWC focuses on transnational matters. Where opinions diverged within the same company, employee representatives were more likely to argue that their EWC focussed solely or mainly on transnational matters, whereas employer representatives were more likely to interpret items being raised by



employee representatives as purely national. This highlights that differences in opinion can remain on which decisions should be considered to have transnational impact under the definition offered by the Directive.

Most of the EU social partners interviewed so far are of the opinion that the Recast Directive has not sufficiently improved legal certainty regarding the definition of transnational matters. They have expressed the view that there are inherent difficulties in distinguishing between purely transnational and national matters, especially in increasingly globalised businesses, and that, as a result, this leaves EWCs room for interpretation. Similarly EU social partners in the construction and telecommunications sector have raised concerns around the actual criteria (e.g. number of workers affected in two or more countries) for considering matters as being transnational in nature, which creates some confusion as to which level of representation should be consulted first.

In summary, the following conclusions can be drawn:

- Feedback suggests that a majority of newly-established 'Recast' EWCs focus 'almost exclusively' on transnational matters
- Difficulties remain however in some cases around the interpretation of the notion of transnationality, which creates further confusion concerning the type of information to disseminate to EWC members
- There are also difficulties in ensuring EWCs are a transnational forum as some employee representatives use them as a platform for voicing what management consider to be national or local-level concerns
- Experiences show that the extent to which EWCs can focus on transnational matters depends on the soundness of the interpretation of the concept and how well meeting chairs perform in keeping discussions focused on transnational issues.

In this regard it is worth noting that some EWC agreements contain more detailed definitions of the concept of transnationality (see box below with the findings from the case study).

#### **Case study findings: definitions of transnationality in 15 EWC agreements negotiated since 2011**

The evaluation team assessed the definition of transnational matters in 15 EWC agreements (randomly selected).<sup>105</sup>The majority of 15 EWC agreements used a verbatim or more extensive definition of the transnational matters:

- Seven agreements used the verbatim definition of transnational matters from the Recast Directive.
- In four agreements, the definition was more extensive: by specifying precisely which matters are considered transnational; specifying that transnational issue needs to affect at least 100 employees in the affected country; defining that what is considered transnational is up to the President and Secretary to decide and giving the EWC precedence over other information and consultation bodies.
- In one agreement, the definition of transnational matters is less extensive than the Recast Directive (no reference to the Community-scale undertaking or Community-scale group of undertakings as a whole).
- Three agreements do not contain a definition of transnational matters.

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<sup>105</sup> [http://www.ewcdb.eu/search\\_agreements.php](http://www.ewcdb.eu/search_agreements.php).

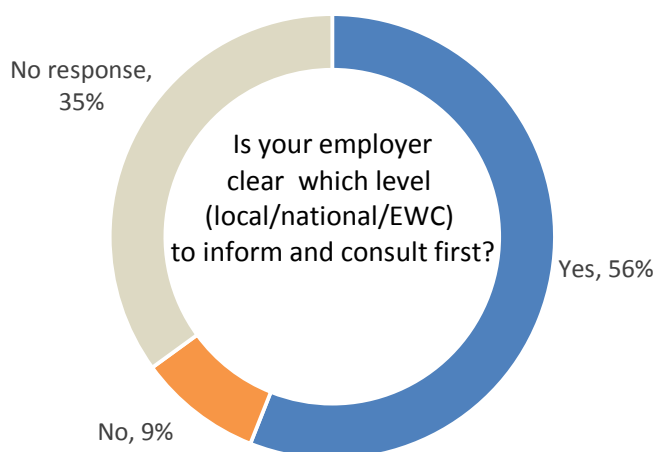
It is clear that in the absence of full information, it is often difficult for employee side representatives to judge from the outset whether a matter is of transnational concern or not. Good interactions between employee side representatives from different countries can help in the matter but remains dependent on the quality of information provision by management.

#### 6.4.3 Practical impacts of the Recast Directive on the articulation of information and consultation processes at different levels

The Recast Directive also sought to achieve greater clarity with regard to the articulation of information and consultation processes at different transnational and national levels.<sup>106</sup> As only transnational matters are to be discussed by the EWC, the discussion of the articulation of different levels of information and consultation is closely linked to the transposition and interpretation of the concept of transnationality.

Over half of the employee representatives in the Recast EWCs considered that their employer was clear which level (EWC/national/local) should be consulted first. Conversely, only in 3 companies this was considered to be the case.

Figure 19. Employee representatives' views on employers' judgement on who should be consulted first



Source: Based on 34 interviews conducted with EWC employee representatives.

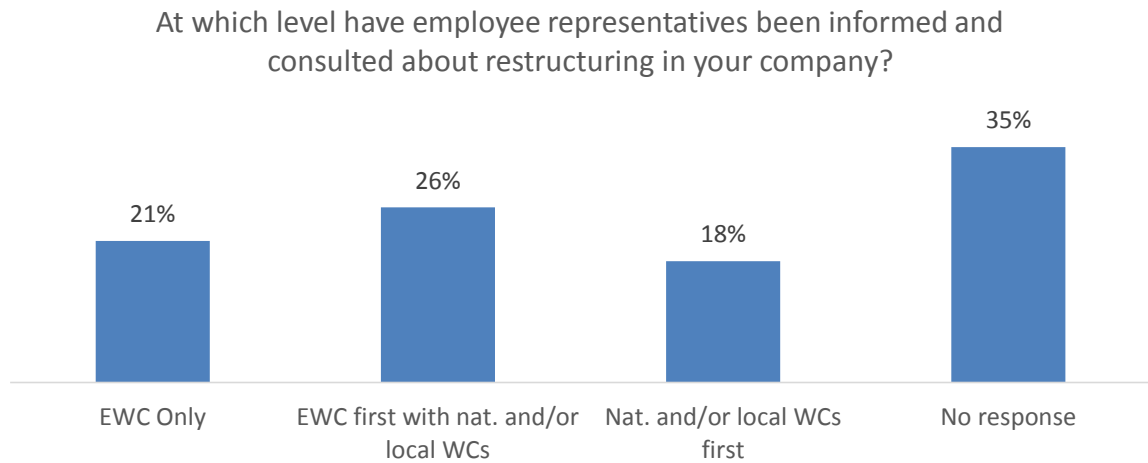
There appears thus to be a good understanding among employers that EWCs should receive information on transnational matters first, but it does not necessarily mean that this always happens in practice. This is reflected in the answers given by the employee representatives interviewed, which show that around a quarter of EWCs are not informed (and consulted) first in restructuring situations.

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<sup>106</sup> Article 12 specifically states among other things that 'Information and consultation of the European Works Council shall be linked to those of the national employee representation bodies, with due regard to the competences and areas of action of each and to the principles set out in Article 1(3). The arrangements for the links between the information and consultation of the European Works Council and national employee representation bodies shall be established by the agreement referred to in Article 6. Where no such arrangements have been defined by agreement, the Member States shall ensure that the processes of informing and consulting are conducted in the European Works Council as well as in the national employee representation bodies in cases where decisions likely to lead to substantial changes in work organisation or contractual relations are envisaged.'



Figure 20. Employee representatives views on the level at which employee representatives were informed and consulted first



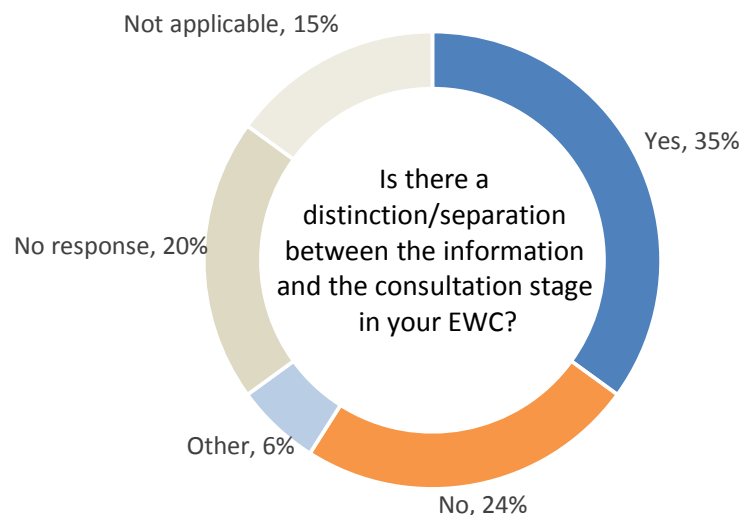
Source: Based on 34 interviews with EWC employee representatives.

The figure above shows that, in many cases, the information (and consultation) of EWCs and national or local works councils takes place simultaneously.

Qualitative feedback from the interviews suggests that for companies' headquartered in countries with traditionally strong national works councils, national/local information and consultation bodies often continue to be informed first.

However, the feedback obtained from employee representatives suggests that the difference between information and consultation is not always taken into account by the EWCs. This depends on factors such as the possibility to organise extraordinary meetings, the intensity of relations between management and staff, and to a lesser extent, on the national legislation under which the agreement is enforced.

Figure 21. Employee representatives views on the extent to which management distinguishes between information and consultation



Source: Based on interviews with 34 EWC employee representatives.

A majority of the EU social partners interviewed consider that the recast Directive did not provide significantly greater clarity on the articulation of the different levels of information and consultation.

In summary, there appears to be a good level of agreement between employer and employee representatives on who should be consulted first on different decisions, although uncertainties about the interpretation of transnationality remain.

### 6.5 Practical impacts of the Directive on the information and consultation of EWCs in the restructuring situations

Of the 37 companies operating Recast EWCs assessed in-depth in the evaluation, 20 have undergone restructuring since their EWC was set up.

Interview feedback shows that the experiences of Recast EWCs in restructuring situations are diverse. They reveal that there are considerable differences among the companies examined in their practices and procedures for informing and consulting EWC members on restructuring plans or decisions. In some EWCs, the influence on restructuring decisions has been considerable (see Box below).

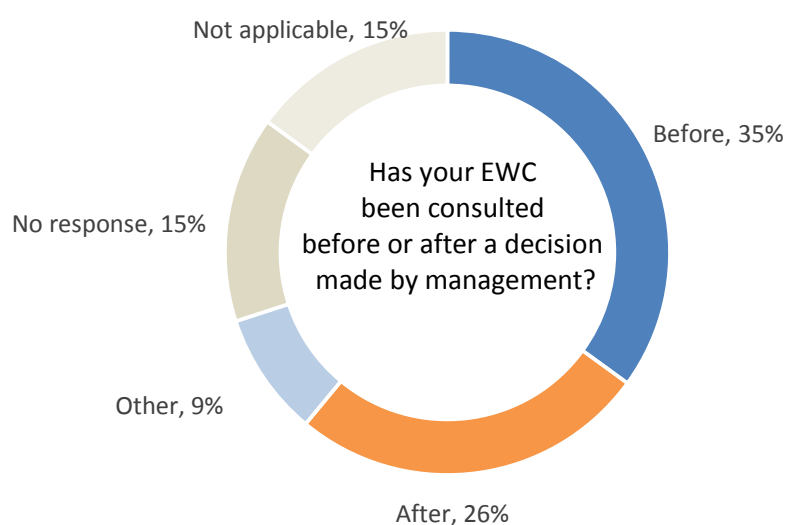
#### Case study findings: the impact of restructuring from the EWC in Beckers and ColArt

There has been some restructuring of the company in recent years. Following investment in new facilities in Liverpool the company sought to consolidate manufacturing facilities in Liverpool, with job losses in the midlands and south east. Further there has been some movement of manufacturing jobs from Germany to the UK. As part of the restructuring process the company designed and provided retraining for workers whose job was at risk and also undertook to provide assistance to workers to relocate to the new manufacturing facility.

Through consultation with the EWC there were fewer job losses than originally projected by the employer. The company spent more on retraining staff in Germany than they had planned. The retrained staff in Germany were then able to work on expanding areas of the business in their own country. In addition a trans-Europe relocation package was provided (though, in practice there was no take up for this).

In many cases, Recast EWCs are informed of restructuring plans either before or at the same time as national/local works councils. However, this does not mean that EWCs are routinely informed before a decision has been made. In fact, quarter of the employee representatives interviewed have revealed that their EWC was consulted *after* the restructuring decision had already been made.

Figure 22. Extent to which Recast EWCs are consulted prior to the decision making



Source: Based on interviews with 34 EWC employee representatives.

A slightly smaller proportion of EWCs under the Recast Directive (35%) receive information on restructuring decisions prior to a decision being made than was previously the case (see the case study in the Box below). The GHK (2008) study

showed that 38% of EWC received information at the same time as the board (whereas in all other cases this was only received just before or at the same time as announcements were made to the press).

#### **Case study findings: the impact of the Air France EWC on restructuring**

Restructuring at Air France/KLM has been an on-going subject for the last five years. The search for more cost-efficient procedures have led Air France to move its activities to Central Eastern countries also considering non-EU Eastern countries. It also increasingly uses sub-contractors and is intensifying activities of its subsidiaries such as Transavia which provides for working conditions which are not as good as the ones in Air France/KLM.

One of its key EWC features is the quality of social dialogue which led to making decisions 'more social' where restructuring occurred in the company.

This quality of social dialogue in the EWC is explained by good communication between EWC members and the management. The management provides the necessary information for plenary meetings in advance and there is on-going communication between EWC members thanks to an online platform only accessible to them where they can share information. Dissemination of the outcomes of meetings is also done as far as possible and a website presenting the EWC members, their work and their achievement has been created.<sup>107</sup> Finally, there is also good stability in EWC members which enables people to cooperate well together and benefit from training sessions tailored-made to their needs which enable to go further than the basic introductory sessions.

In addition, the ETF is part of the EWC and guides members when they have questions about technical aspects. The Agreement also provides a "Movement rights" which was very welcome by EWC members. It enables them to have access to undertakings belonging to the Air France/KLM Group in order to meet, on their own premises, elected employees' representatives, regular employees or trade union representatives. They may visit the sites of these undertakings after informing the local appropriate management concerned<sup>108</sup>.

The good communication is also present in the existence of permanent working groups where EWC are active but where non-members are also welcome to share their experience. Several working groups exist on the main categories of jobs existing in the company i.e. commercial, maintenance and cargo. Another working group is in charge of social indicators where it coordinates and updates the information on number of employees and sites of Air France/KLM in Europe and across the world. Finally, another working group is in charge of organising the hearing of the Chair of the EWC who once per year presents the strategy of the Group. All the organisation of the EWC is actively coordinated by the steering committee who is also a point of contact for the management. It coordinates the preparing of meetings, liaise for the logistics and is in charge of the online platform/library where members of the steering committee gathers the country reports done by EWC members of different Member States. This reports gives an overview of the economic situation of the country and is a key document to better understand the context of each country.

The EWC is considered to have had positive impact on decisions in the framework of restructuring procedures. Indeed, the EWC which was informed before the local and national level of restructuring cases with a transnational feature, was consulted at a moment where the management could still take some aspects into account. The EWC was able to formulate recommendations and making the management more aware of the social component and the social impact of their decision. This led to the modifications of some decisions. For instance, a new call center in London was given the status of an Air France/KLM entity and not just subcontractor.

In cases where the EWC was informed and consulted before a restructuring decision had been taken, this appears to be linked to the readiness of management to pass on such information (see case study in the Box below), procedural aspects such as the

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<sup>107</sup> <http://www.cge-air-france-klm.com/>.

<sup>108</sup> Article 21 of the latest Air France/KLM EWC Agreement.

clear distinction between the information and consultation phase and the possibility for whole EWCs or steering committees to hold extraordinary meetings.

#### **Case study findings: a positive impact of EWC in Kuehne & Nagel**

Both employer and employee representatives consider that consultation with the EWC has had a positive impact on restructuring discussions in cases of the outsourcing of specific business activities.

In 2013/2014, the company piloted the outsourcing of facilities management in three countries with the aim of outsourcing a number of tasks. The goal of the project on the part of the company was to generate synergies and lower costs to the business by 5%. The outsourcing was to affect catering, cleaning, building maintenance, mail and security services and was to affect 149, 51 and 56 workers in France, Germany and the UK respectively.

The EWC was informed early and EWC representatives (via the expanded Steering Group) were able to meet with all outsourcing contractors to discuss the proposed conditions for workers transferring to the new contractor. Through these detailed discussions, it was ensured that all benefits (even extra-contractual ones) would be transferred across. It was also ensured that in this process nobody was made redundant and existing terms and conditions were protected for 3 years. It was also ensured that employees received any required training upon transfer within a three month period. An agreement was also reached that in the roll out of the project to other EU Member States, affected employees would obtain the same benefits as those agreed for the pilot countries. The EWC was given access to the names of all affected workers and it was possible for the EWC chair and relevant steering group members to consult individually if requested by the employee with each worker and to provide advice which was much appreciated by staff and also made the transfer process run more smoothly for the employer.

The agreement reached with the EWC has been used since, not only in the realisation of the facilities management project, but also other outsourcing initiatives in the field of IT and financial services. In each case, the EWC was able to advise employees and to redeploy where possible, and have a common goal for no enforced redundancies.

In each case, the EWC's expertise was seen to help in gathering information in different member states on the term, conditions and non-contractual benefits to be protected and in communicating directly with staff.

Particularly notable is the proactive co-operation of EWC Steering Committee members with management in restructuring situations and its role in informing and consulting employees affected by outsourcing situations. The ability to reach an agreement at EWC level for a uniform approach to be taken in similar situations also shows the added value of the work of this body.

The distinction between the information and consultation phases, i.e. guaranteeing a time lag between the two aspects, appears to be important in securing the consultation rights of EWC members. It is worth mentioning that this distinction is required in practice under the legislation of certain Member States (e.g. France).

In companies where there is no distinction between the information and consultation phases, this may not necessarily mean that EWC members were only informed after a restructuring decision had been made. However, based on the feedback gathered here, the lack of a distinction between these two phases appears to affect negatively the consultation rights of EWC members.

The findings also reveal that the provision to hold extraordinary meetings can also have a positive effect in terms of securing the consultation rights of EWC members, and is also a means of empowering EWC steering committees and enhancing trust between management and staff representatives. The example provided below illustrates this point.

Employee representative of a logistics company: *"The EWC has been able to have a positive effect in restructuring situations. [For instance, with the] facilities management project piloted in three countries with the aim of outsourcing a number of tasks. The EWC steering committee was informed about this project well in advance. In the three pilot countries, the outsourcing project was to affect 300*

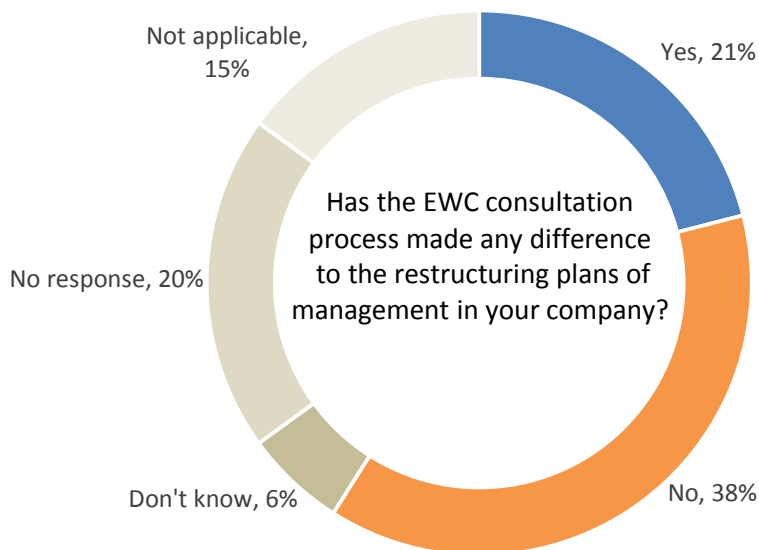
company workers. EWC members were able to meet with all outsourcing contractors to discuss employees' working conditions [with their] new employer. It was ensured that all benefits (even extra-contractual ones) [would be] transferred across. This was achieved. EWC [representatives were] able to [discuss directly with] each affected worker. Nobody was made redundant and the [contractual] terms and conditions were protected for 3 years. An agreement was also reached that in the roll out of the project to other Member States, affected employees would obtain the same benefits as those agreed for the pilot countries."

Feedback also shows that in cases where EWC members have been consulted on restructuring matters, the resulting impacts have remained fairly limited. In a limited number of cases, this is due to the fact that restructuring plans do not necessarily entail job losses. EWC members may not always feel entirely concerned with certain restructuring plans as a consequence, as the example below shows.

Employee representative of an energy company: "For the acquisition of a new company, the EWC was consulted at an early stage before a decision had been made. For the rebranding, the EWC members were informed before an announcement was made to the media. The EWC members had ultimately no strong views about the acquisition or the rebranding. However, a working group was charged with following up on the developments."

It is important to draw a distinction between information and consultation taking place and such processes having an impact on final outcomes. Generally speaking, feedback from employee representatives suggests that the impact of EWCs on restructuring decisions is quite limited.

Figure 23. Views of employee representatives who have taken part in EWC consultations regarding their impact



Source: Based on interviews with 34 EWC employee representatives

**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.**

Given that many of the EWCs looked at in this study have only been established relatively recently, feedback from employer representatives suggests that the consultation rights of EWC members may improve with time. In other words, many of

the companies examined are still at a stage of “experimentation” with their respective EWC.

Very few examples of the impact of EWCs on restructuring decisions were provided by the EU and national social partners interviewed. The examples were mostly limited to a better understanding among EWC members of the rationale of company decisions, as well as consultation practices within EWC changing for the better albeit slowly.

An EU sectoral social partner: *“The biggest benefit of having an EWC is for employees to better understand decisions, rather than to change them (...) The [Recast] Directive has enhanced [transparency] giving management a unique opportunity to meet employees from different levels, cultures and explain them the vision of the company.”*

On the whole, the feedback from EU and national level social partners therefore suggests that **Recast EWCs do not play a critical role in restructuring situations in practice.**

These findings from the evaluation reflect the findings from previous research on the EWC impact in restructuring situations.

The overall finding in the existing literature (which also covers EWCs established prior to the Recast Directive) is that whilst there is a great variation in the effectiveness of the EWCs in the restructuring situations to exercise their information and consultation functions, few examples are detected where EWC have influenced transnational company restructuring.<sup>109</sup> A number of EWCs have in fact been able to help ensure that employment and social aspects are taken into account to a varying extent in the implementation of restructuring.<sup>110</sup> The key two types of problems identified relate to:

- Timing and clear differentiation between the information and consultation phases;
- Linking and differentiation between the consultation of EWCs and consultations of local / national worker representation structures.<sup>111</sup>

Given the range of problems encountered in the EWCs dealing with restructuring decisions, some analysts have argued for a more realistic expectation of the EWC role – focused on the ameliorating the impact of restructuring rather than the expectation on the reduction of scale or costs of restructuring.<sup>112</sup>

A range of supporting factors has been identified in the literature. One key facilitating factor identified was the presence of joint EWC texts on the arrangements in the restructuring situations,<sup>113</sup> as well as the provisions of the agreement establishing the EWC’s right to hold extraordinary meetings<sup>114</sup>, supportive management attitudes (including international outlook of company leadership and HR departments),<sup>115</sup> ongoing and established communication between the EWC and the management and overcoming the constraints imposed by confidentiality requirements and stock-market rules. In addition, the existence of strong local / national structures of worker

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<sup>109</sup> Eurofound (2006), European Works Councils and transnational restructuring.

<sup>110</sup> Eurofound (2008), European Works Councils in practice: Key research findings, Background paper.

<sup>111</sup> Expert Group (2010) Report Group of Experts Implementation of Recast Directive 2009/38/EC on European Works Councils.

<sup>112</sup> BIS (2010), Impact Assessment, Implementation of the Recast European Works Council Directive.

<sup>113</sup> Eurofound (2006), European Works Councils and transnational restructuring.

<sup>114</sup> As a single annual meeting is not considered to be sufficient to empower the EWC to deal with the situations of continuous restructuring, De Spiegelaere S., Jagodzinski R. (2015), European Works Councils and SE Works Councils in 2015, Facts & figures, ETUI.

<sup>115</sup> Marginson P., Lavelle J., Quintanilla J., Adam D., and Sánchez-Mangas R. (2013), Variation in approaches to European Works Councils in multinational companies. ILRReview, 66(3).

information and consultation can help to ensure the involvement of EWCs in the transnational restructuring situations.<sup>116</sup>

## **6.6 Summary of findings on the impact of the Recast Directive on the information and consultation in the EWCs**

The majority of Recast EWC agreements reviewed contain definitions of information and consultation in line with the Recast Directive. Around one in five include definitions which are partially in line with those of the Directive but can indeed add greater specificity – but a small number do not contain any definitions at all.

These findings are reflected in the feedback obtained from the EU-level, with just over half indicating that the Recast Directive has led to improvements in the timing, level and scope of the information and consultation of EWCs, but with other highlighting remaining issues. Less than one-third of the national social partners (29%) indicate that the Recast Directive has led to improvements in the timing, level and scope of the information and consultation of EWCs, while almost two-thirds of the respondents (65%) said the situation has remained the same or that there was no noticeable change.

The majority of Recast EWCs focus 'almost exclusively' on transnational matters. There are difficulties in some cases in relation to the practical interpretation of the notion of transnationality. Experiences show that the extent to which EWCs can focus on transnational matters depends on the soundness of the interpretation of the concept and the determination of meeting chairpersons in keeping focusing discussions onto transnational issues only.

Recast EWCs are more likely to be consulted earlier in the process of decision making. However, the impact of EWC members' opinions on restructuring decisions remains limited. According to most employer representatives, the consultation of EWC members has not led to any changes in corporate decision-making. The consultation of EWC members is however seen as positive by stakeholders to develop a common corporate vision.

A clearer distinction between the information and consultation phases can help EWCs in influencing decision making, as well as employer willingness to share relevant information. Extraordinary meetings can empower EWC members, especially steering committees, in consultations.

Remaining weaknesses in the consultation could be linked to the fact that, albeit enhancing the definition of consultation, there is no specific requirement (as in the case in other I&C Directives), for consultation to take place before a decision is taken or for management to provide a reasoned response on an input received from the EWC (or indeed to consult with a view to reaching agreement). It can also remain difficult to employee side representatives to assess which issues might be of a transnational nature if they do not have access to sufficient information to judge such matters.

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<sup>116</sup> Fetzer, T. (2008), European Works Councils as risk communities. *European Journal of Industrial Relations* 14(3): 289-308.



## **7 Analysis of costs and benefits associated with the implementation of the Recast Directive**

One of the objectives of the evaluation was to assess the costs and benefits (including costs and benefits and increased or reduced administrative burdens) generated by the changes brought about by the Recast Directive 2009/38/EC. The analysis relies on findings from the various parts of primary and secondary research.

The analysis of the costs and benefits associated with the 'new rules' brought about by the recast Directive in this report includes the following:

- An analysis of **cost and benefits associated with the changes in the rules concerning the establishment of new EWCs** (Part A of the cost and benefit analysis framework).
- An analysis of **cost and benefits associated with the changes in the rules related to definitions and concepts on 'information', 'consultation' and 'transnationality'** (Part B of the cost and benefit analysis framework).
- An analysis of **cost and benefits associated with the changes in the rules concerning the operation of EWCs** (Part C of the cost and benefit analysis framework).
- An analysis of **cost and benefits associated with the changes in the rules concerning the role and capacity of employee representatives** (Part D of the cost and benefit analysis framework).
- A summary of different **stakeholder views of non-quantifiable costs and benefits associated with the recast Directive** (this refers to the views of management and employee representatives of Recast EWCs – in comparison with the views of management and employee representatives of Article 13 and Article 6 EWCs, national social partners and EU social partners).
- Identification of **administrative burdens** or indeed reductions in them.

### **7.1 The analysis of cost and benefits associated with the changes in the rules in the EWC set-up phase**

The study provided a qualitative and quantitative assessment of the additional costs and benefits associated with changes introduced by the Recast EWC Directive 2009/38/EC to the process of setting up an EWC. This section firstly analyses the overall costs of establishing a Recast EWC. This is then followed by the assessment of key costs and benefits associated with following changes made to the process of establishing the EWC:

- The responsibility of the employer to provide the necessary information to start negotiations (Art 4.4),
- The composition (Art. 5.2.b) and number of meetings (Art. 5.4) of the Special Negotiating Body (SNB),
- Informing social partners at the EU level (Art. 5(2).c) and involving trade unions and external experts (Art 5.4),
- Balanced representation of employees (Art.6.2.b),
- Subsidiary requirements which apply in the absence of an agreement (Annex 1.a. Rec 44).

This section analyses the consequences of each change, followed by an assessment of the overall impact of changes made on the cost and indeed benefits due to a potentially improved realisation of negotiating processes.

### 7.1.1 Impact on the quantifiable costs of setting up the EWC

Changes introduced by the Recast Directive could have an impact on the cost of setting up the EWC. Due to the more specified requirement to furnish information, the potentially higher number of SNB members, meetings and the inclusion of experts one could expect an increase in costs. In order to verify this hypothesis, the evidence from social partners (EU and national level) and companies (set up under Recast Directive and previously under Art. 6<sup>117</sup>) was collected. Since only handful of companies – both in the current and in the 2008 study – were able to provide any cost estimations, the values presented have to be treated with caution (for more details on costs see Annex 7). According to the data available, the average cost of a negotiating process to reach an EWC agreement under the Recast rules was EUR 111,871. On average this amounts to 0.01% of company turnover.

Compared to the EWCs established under Art. 6 of Directive 94/45/EC, fewer employee and management representatives were involved in negotiation processes under the Recast. The SNB also met (in person) less frequently. Nevertheless, the whole process took slightly longer (see Table 31).

Table 31. Differences in the negotiation process between the Recast and pre-Recast EWCs

	Recast EWC in 2015 (N=37)	Art. 6 EWC in 2008 (N=22)
Average number of meetings	3	4
Average number of employer representatives	3	7
Average number of employee representatives	9	12
Average length of the negotiations	14 months	13 months

Source: Interviews with employer and employee representatives of Recast EWCs. EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

To estimate if the cost of negotiations increased compared to Art. 6 EWC, the way the costs were calculated was aligned in the two studies.<sup>118</sup> The table below indicates that **the cost of setting up an EWC decreased** (by EUR 24,000 – see Table 32 for details) – mainly due to the smaller SNB size and lower number of meetings. Both of these **changes are associated with the type of companies which currently establish EWC (smaller in size) than the legislative changes made in the Directive.**

<sup>117</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

<sup>118</sup> The EPEC GHK study conducted in 2008 made the following assumptions to calculate the cost of the negotiation process:

- The time spent on preparation, training costs, expert fees and administrative costs due to a shortage of reliable information from companies were excluded.
- The following assumption have been made:
  - all the meetings last one day (thus the subsistence and translation costs have been calculated for one day only),
  - all the employee delegates require travel and one night of accommodation,
  - all the meetings have been provided with translation apart from other forum meetings,
  - at that time four face-to-face meetings have been held during the negotiation period.

Similar assumptions were made in the current study.

Table 32. Comparison of costs of setting up an EWC under Recast Directive and under Art. 6 of Directive 94/45/EC (in 2014 prices)

	Recast EWC in 2015 (N=37)	Art. 6 EWC in 2008 (N=22)
One F2F SNB meeting: Fixed costs	€ 23,196	€ 20,810
One F2F SNB meeting: Time costs	€ 16,539	€ 15,074
Total: Fixed costs	€ 69,589	€ 83,241
Total: Time costs	€ 49,618	€ 60,296
Total cost of EWC set-up	€ 119,207 <sup>119</sup>	€ 143,537

Source: Interviews with employer representatives of Recast EWCs. EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. Note: Findings must be read with caution given the very small number of companies which were able to provide information about costs. All the information based on estimates referring to 2014 as opposed to prices when the negotiations were held.

The above comparison does not include additional cost which might be borne by companies which established EWC under the Recast Directive – such as the cost of experts. Over two thirds of management and employee representatives reported that external experts were invited to support the negotiating phase.

### 7.1.2 The costs and benefits of providing necessary information for commencing the EWC negotiations

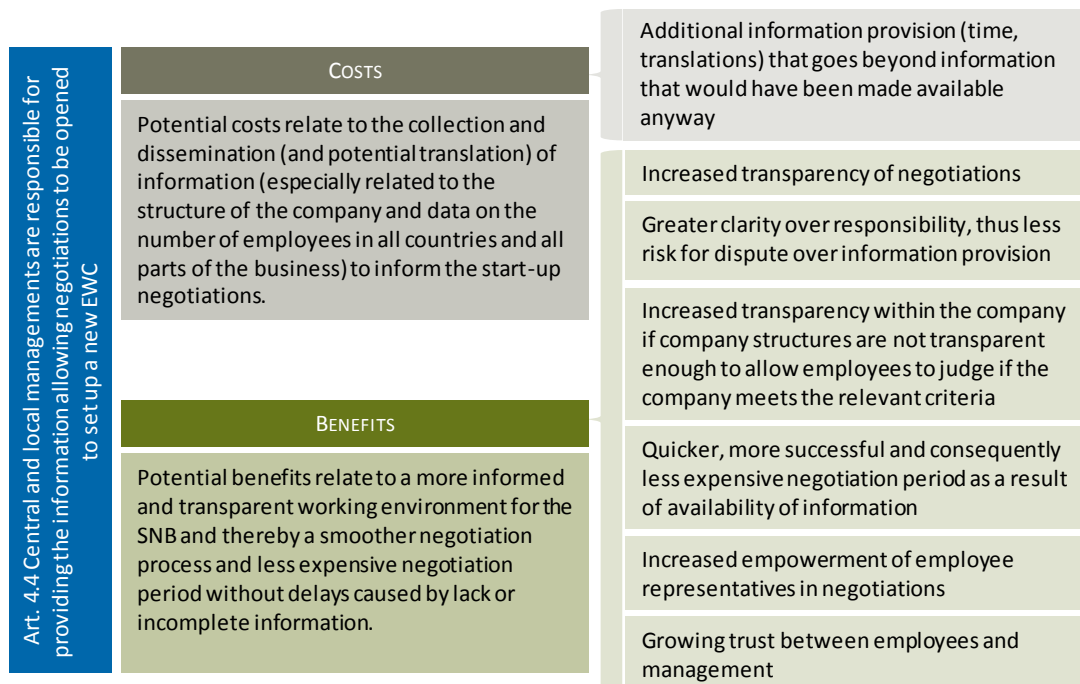
Article 4.4 is a response to some company practices which appear to obstruct the establishment of an EWC.<sup>120</sup> The new article obliges companies to obtain and transmit the information required to commence negotiations. This includes information about the structure of the company and its workforce, including confirmation on whether the company meets the thresholds of the Directive. Additionally, according to the European Court of Justice, the identity and addresses of employee representative bodies is also essential information for the purpose of commencing EWC negotiations.<sup>121</sup> Potential benefits and costs of the obligations on central management to facilitate the start of negotiations are presented in Figure 24 followed by evidence from various sources regarding the consequences of the new requirement.

<sup>119</sup> This cost is slightly above the average costs of negotiations reported in Table 2 due to the different methods of calculations. In Table 2, the data was used from the available 15 EWCs which have provided such information. In Table 5, the cost data from the 15 EWCs was extrapolated to the whole sample of 37 EWCs.

<sup>120</sup> Bofrost C-62/99 of 29 March 2001 and Kühne & Nagel C-440/00 of 13 January 2004. After: Picard, S. (2010), European Works Councils: a trade union guide to Directive 2009/38/EC, ETUI, <https://www.etui.org/Publications2/Reports/European-Works-Councils-a-trade-union-guide-to-directive-2009-38-EC>, p. 70.

<sup>121</sup> Picard, S. (2010), European Works Councils: a trade union guide to Directive 2009/38/EC, ETUI, <https://www.etui.org/Publications2/Reports/European-Works-Councils-a-trade-union-guide-to-directive-2009-38-EC>, p. 71.

Figure 24. Potential costs and benefits associated with introduction of Art. 4.4



Source: ICF

On balance, the obligation imposed by the Recast Directive on management did provide some greater legal certainty but was not seen to have had a significant impact on the negotiating process. Where costs were identified they were linked to prolonged time needed for negotiations while benefits related to improved information transmission and therefore more informed negotiations.

### 7.1.3 Setting up a special negotiation body (SNB)

#### 7.1.3.1 Composition of the Special Negotiating Body

The Recast Directive changed the rules on the composition of the SNB. It was argued that the minimum (3) and maximum<sup>122</sup> number of SNB members in Directive 94/45/EC needed to be replaced with a more flexible system because:

- The composition of the SNB and its representativeness plays a pivotal role in the legitimacy of the agreements.<sup>123</sup>
- It is difficult to apply the rule on a maximum number of SNB members in practice. Member States with a small number of employees should be represented through a group arrangement or indirectly.<sup>124</sup>
- The system set up in Directive 94/45/EC may lead to imbalances in representation on the SNB.<sup>125</sup>

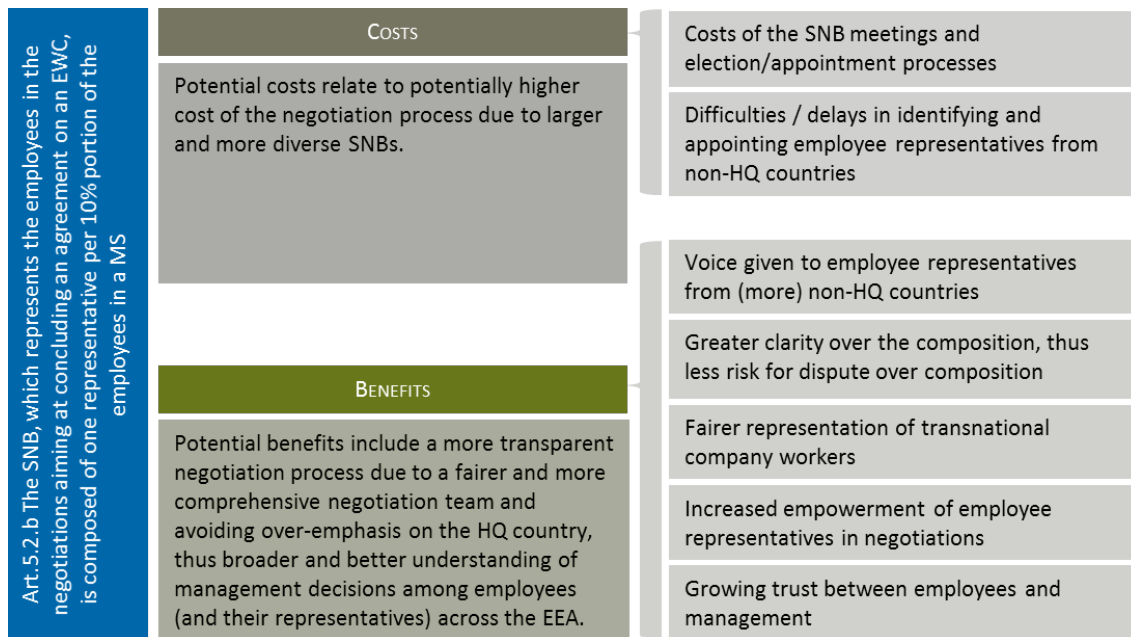
<sup>122</sup> Directive 94/45/EC, Art. 5.2.b. maximum number of members equal to the number of Member States which was 17 at the time when the Directive was originally adopted.

<sup>123</sup> Béthoux, É. (2004), Les comités d'entreprise européens en quête de légitimité, Travail et emploi, [http://travail-emploi.gouv.fr/publications/Revue\\_Travail-et-Emploi/pdf/98\\_2637.pdf](http://travail-emploi.gouv.fr/publications/Revue_Travail-et-Emploi/pdf/98_2637.pdf).

<sup>124</sup> 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>.

Due to above the issues, the Recast Directive defined a new system of allocating SNB seats proportionally to the share of employees in the Member State – 1 seat per 10% of the whole company workforce. This change could potentially increase the cost of setting up the EWC due to a higher number of employees participating in the negotiating process. On the other hand, it could improve the process of identifying the SNB members as there is no need to cover all Member States. Potential benefits and cost of the new composition of the SNB are presented in Figure 24 followed by evidence from various sources regarding the actual impacts of the new rules.

Figure 25. Potential costs and benefits associated with introduction of Art. 5.2.b



Source: ICF

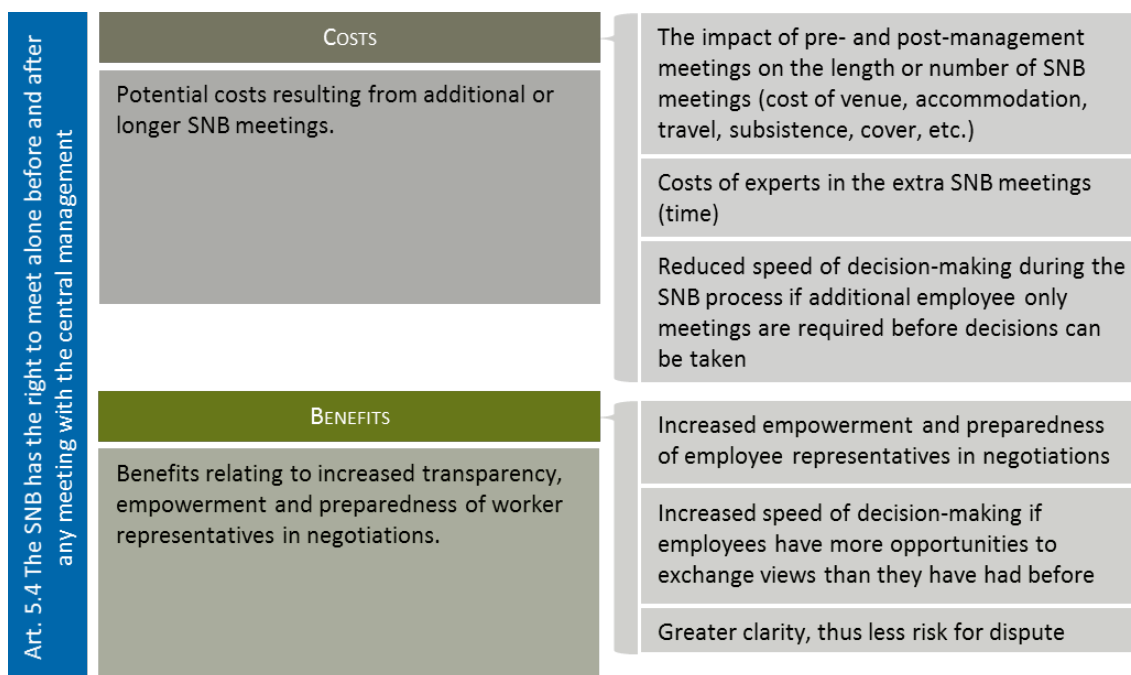
The dominant view of this impact of this change expressed by employee representatives in Recast EWCs and other stakeholders was the Recast Directive itself had little impact on the costs associated with setting up a SNB. At the same time no specific benefits were identified either, for instance in terms of increasing transparency or fairer representation of workers.

### 7.1.3.2 Employee only meetings of the SNB

Article 5.4 of the Recast Directive stipulates that the SNB has the right to meet alone before and after any meeting with the central management. This was done to facilitate employee-only meetings to prepare the negotiations and discuss any arising issues and challenges in confidence without the presence of management. Potential benefits and costs of additional SNB meetings are presented in Figure 26 followed by evidence from various sources regarding the actual impacts of the new rules.

<sup>125</sup> 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>.

Figure 26. Potential costs and benefits associated with introduction of employee only SNB meetings



Source: ICF.

According to employee representatives, in almost two thirds of companies the SNB met on their own prior to meetings with management. Although the meetings were held face-to-face, they were additionally supported with email exchanges and teleconferences.

Table 33. Did your SNB have preparatory or post-meetings as an employee only body during the negotiation period?

Employees (N=34)	
Yes	62%
No	26%
Don't know / not available	12%

Source: ICF interviews with Recast EWC employer representatives

The preparatory meetings were used to agree on the list of questions and on a draft agreement text to be submitted to management for discussion. The meetings held after negotiating sessions with management were used to discuss results and next steps. The number and length of the meetings varied from only 1 to 2 hours before and after each negotiation meeting. The main benefits of such meetings were considered to be the ability to get to know each other, exchange information, obtain more detailed knowledge of items to be discussed and agree on common positions. Negative issues identified were linked to a lack of experience, time or only partial country representation. Despite the introduction of the right to hold such employee only preparatory meetings, it is interesting to note that the number of EWCs actually holding such meetings was lower in the Recast EWC consulted for this study than among those surveyed for the 2008 study (62% compared to 98%). This may be due to the greater use of other remote communication technology, but this assumption cannot be verified.



## 7.1.4 The role of social partners and experts in the EWC negotiations

### 7.1.4.1 Involvement of the European social partners

The Recast Directive introduced an additional requirement for central or local management to inform European workers' and employers' organisations about the start of the negotiations. National transposition could additionally enhance transparency by obliging companies to register EWC agreements in national registers.<sup>126</sup> The aim of this change was to enable an exchange of good practices and traceability of EWC agreements.<sup>127</sup>

Potential benefits and costs of providing information to the EU level social partners are presented in Figure 27 followed by evidence from various sources regarding the actual impacts of the new rules.

Figure 27. Potential costs and benefits associated with introduction of the involvement of European social partners



Source: ICF

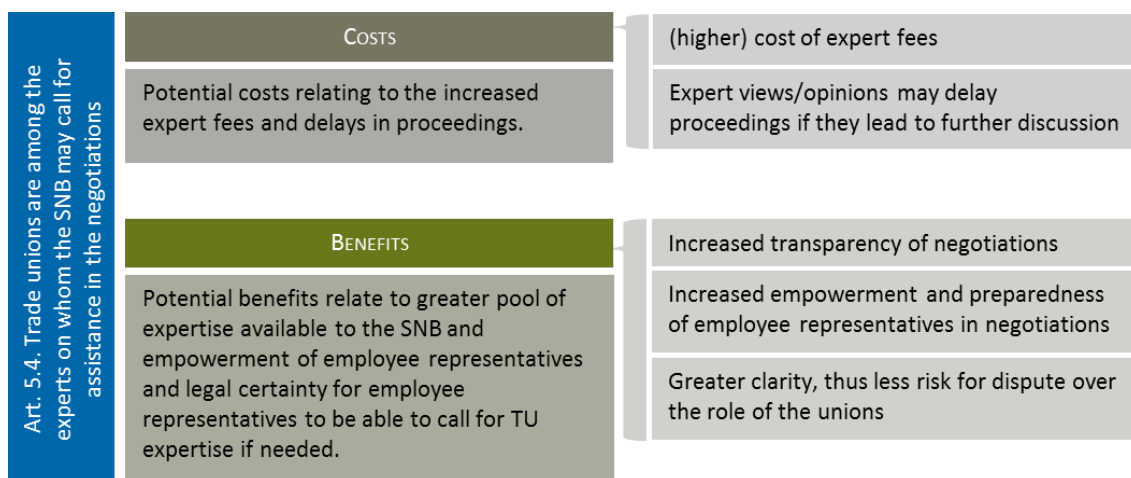
The Recast Directive also strengthened and clarified the role of trade unions and experts at the negotiation stage. As already indicated above, the SNB can be assisted by experts (including experts from the European social partners), which may improve the process of negotiations by providing specific expertise but this can also increase the cost of setting-up the EWC (see Figure 28).

<sup>126</sup> Picard, S. (2010), European Works Councils: a trade union guide to Directive 2009/38/EC, ETUI, <https://www.etui.org/Publications2/Reports/European-Works-Councils-a-trade-union-guide-to-directive-2009-38-EC>, p. 74.

<sup>127</sup> Picard, S. (2010), European Works Councils: a trade union guide to Directive 2009/38/EC, ETUI, <https://www.etui.org/Publications2/Reports/European-Works-Councils-a-trade-union-guide-to-directive-2009-38-EC>, p. 71.



Figure 28. Potential costs and benefits associated with introduction of involvement of trade unions and external experts



Source: ICF analysis

Over half (56% according to employee and 64% according to employer representatives) of companies with the EWC established under the Recast Directive informed and involved social partners in the negotiating process. This is higher compared to 41% of EWCs established before 2011 which informed relevant EU level social partners about the start of negotiation process and were supported by them (see Table 34).

Table 34. SNB supported by the competent EU social partners (e.g. trade unions, sectoral employer federations) during the negotiation process

	Recast employees (N=31)	Recast employers (n=24)	Pre-recast EWCs (N=22)
Yes	56%	64%	41%
No	32%	12%	9%
Don't know	12%	24%	50%

Source: ICF survey of Recast EWCs and Article 6 EWCs (n=22).

Similarly over half (68% of Recast EWC employee representatives) indicated that they had requested assistance from external experts. These were legal experts, trade union delegates, EWC consultants, or technical experts (e.g. on HR, collective bargaining). Compared with EWCs established before 2011, a slightly higher number of companies used external experts during negotiations.

Table 35. Did you request support from any external expert or a trade union over the type of information requested?

	Recast EWC employees (N=32)	Pre-recast EWC (N=22)
Yes	68%	60%
No	24%	40%
Don't know / not available	8%	-

Source: ICF survey of Recast EWCs and Article 6 EWCs (n=22).

Representatives of Recast EWCs reported that where the EU level social partners did not provide any support this was due to the staff turnover in the EU level organisations, perceived lack of interest in medium to small multinationals negotiating the Recast EWCs and time lag to appoint the social partner representatives to accompany the negotiation process.

Where available, European social partners supported the SNBs in the form of training (dedicated or open to EWCs across Europe), flyers, advice or guidance on the legal EWC framework, social dialogue and/or collective bargaining and drafting of the agreement. As a result, employee representatives felt better informed about the Directive, scope of the agreement, information needed from the management in order to draft the agreement. The EU level social partners also informed them about other EWC successful negotiations and how to reach a consensus between employees' coming from different social dialogue cultures. The expert support provided was considered to be beneficial in providing legal clarifications on the EWC legal framework and the negotiation process, building awareness of EWC rights and competences, and offering expertise from other EWC experiences.

The support led to the employee representatives being more aware of their rights. The external expertise also gave the employees and employers confidence that the established EWC is in line with new Directive. This aspect was especially important in the early years after introduction of the Directive – when the negotiations were mainly lead by lawyers and external experts.

Employer representatives in the Recast EWCs also identified a number of positive benefits of involving the European social partners and experts, including supporting the negotiations and compromise searching, help with drafting the agreement and informing about the EWC practices from other EWCs in the sector. However, some more negative experiences were also shared, including the clash of cultures of industrial relations between more combative style coming from the European level unions and more negotiation oriented style of national trade unions (which was what the company was used to).

The costs associated with informing the European social partners were considered to be low as for the majority of companies this took very little time (see Table 36).

*Table 36. Time taken to inform and involve the European social partners in the negotiations*

<b>Time taken</b>	<b>Number of respondents (n=16)</b>
Less than half a day	13
About 1 day	1
About 2 days	1
More than 2 days	1

*Source: ICF interviews with Recast EWC employers (n=16 responses to this question).*

By contrast, both types of EU level social partner organisations<sup>128</sup> maintained that the provision of informing the European social partners is rarely enforced. Informing them about the start of the negotiating process depends on the company's tradition of social dialogue, the specific sector and the country of headquarter (and the national tradition of information and consultation). The information provided is not really due to the impact of the new Directive but previous knowledge and cooperation of the company with the EU level social partners. One interviewee argued that there is a gap in the transposition because the Article requires companies and employees to know about the relevant organisations at European level. If the national legislation does not provide information on the names of organisations to be informed and/or trade unions/managers with specific knowledge are not involved in the setting up of the EWC, there is a significant knowledge gap. One representative of an employers' organisation questioned the rationale of this requirement since the employer organisations were less interested in this information in general and employees

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<sup>128</sup> This question was not included in the national social partner survey.

organisations probably helped the process of setting up the EWC therefore they possibly already know that agreement is being negotiated.

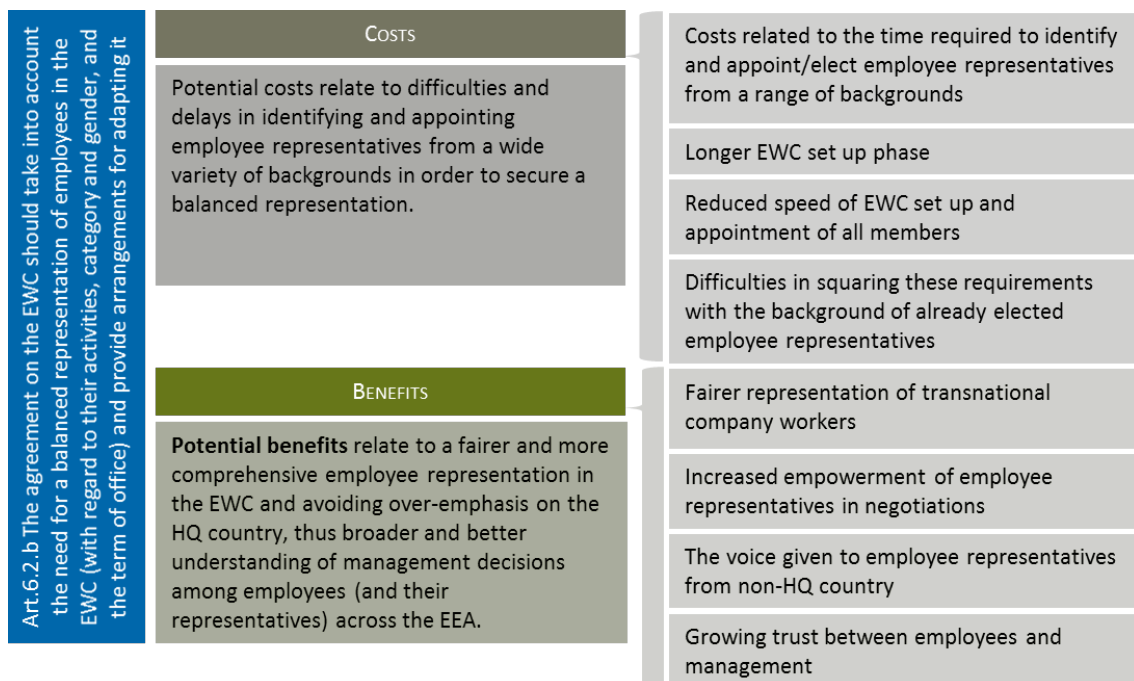
### 7.1.5 Balanced representation of employees on the EWC

Article 6.2.b specifies that the EWC agreement should take into account the need for a balanced representation of employees on the EWC (with regard to their activities, category and gender, and the term of office) and provide arrangements for adapting it. The rationale for this change was that the composition of the EWCs needs to be improved to reflect in a more balanced way the workforce represented in the EWC.

The Recast Directive also specified that one representative of the EWC is elected per 10% portion of the employees in a Member State in which at least 50 employees are employed. This change was intended to strengthen the balanced geographical representation of the EWC.

Potential benefits and cost of the balanced composition of the EWC are presented in Figure 29 followed by evidence from various sources regarding the actual impacts of the new rules.

Figure 29. Potential costs and benefits associated with introduction of the requirement for a balanced EWC composition



Source: ICF

In the Recast EWC interviews with employee representatives, 60% of respondents thought their EWCs achieved balanced representation (at least in relation to a single aspect of geography / gender / activities) whereas 40% of respondents through this was not achieved. Where the balanced representation was achieved, this was due to the elections and negotiations procedures paying attention to the balance of representation, the willingness of national partners to appoint balanced representatives or the introduction of quotas (for gender). The factor hindering a more balanced representation related to the lack of central EWC control over the election of EWC representatives in each country. In addition, some specific factors were also identified:

- Geographical balance: was difficult to achieve where EWC was covering countries with less strong tradition of employee representation;

- Gender: was difficult to achieve in the companies with the workforce traditionally dominated by one gender;
- Activities: was difficult to achieve where certain types of workers were less used to worker information and consultation culture and hence less prone to participate in the EWCs.

Respondents to the survey of pre-Recast directive EWCs indicated that they have between zero and ten employer representatives in their EWC, and between two and 54 employee representatives. The majority of respondents have between one and nine employer representatives (50%) and between 10 and 32 employee representatives (50%). On average, there are respectively four and 25 employer and employee representatives per EWC.

More than three-quarters of the respondents (17 out of 22, or 77%) reported that not all the EU/EEA countries where their company has employees are represented by their own EWC member. It was the case for only five respondents. The main reasons for not having employee representatives in the EWC from all EU/EEA countries are:

- The low number of employees in some countries (14 respondents);
- The lack of interest to engage in the EWC (six respondents);
- The lack of tradition/expertise to engage in employee representation duties (three respondents); and
- The lack of management support to identify individuals for such roles (three respondents).

The results of the interviews with management and employee representatives of Recast EWCs show only minor differences in the rate of internationalisation between companies operating under different types of EWCs. Indeed, companies hosting Recast EWCs are present, on average, in 12 countries, while companies hosting Article 13 and Article 6 EWCs are present, on average, in 14 countries – as illustrated in Table 37 below.

*Table 37. Internationalisation: worker presence in EU/EEA countries*

Scope	Average	Lowest	Highest
Recast EWCs*	12	2	28
EWCs operating under Article 13 and Article 6 rules**	14	2	29

*\*based on information from interviewees from 37 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.*

As for the composition of Recast EWCs, the survey conducted for this study suggests that the EWCs operating under the new rules are much smaller bodies than EWCs operating under Article 13 and Article 6 rules. The average number of employee representatives is 16, with the smallest Recast EWC in the sample having just eight employee representatives in total and the largest one 34 members. According to the 2008 preparatory study on revision of the EWC directive, the number of employee EWC delegates varies from five to 47, with an average of 23<sup>129</sup>. When compared against data from the EWC database, more than half of the Recast EWCs have fewer than 15 employee members, while only 8% of 'all EWCs' fall into this group.

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<sup>129</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

No evidence has been collected on the Directive itself causing this difference, but it is more likely to do with the sizes of companies: the companies of Recast EWCs are smaller and slightly 'less international' than the companies that set up EWCs under the rules of the old Directive.

Table 38. Composition of Recast EWCs: employee delegates

Number of employee representatives	Recast EWCs*	Other EWCs**
Average	16	23
- Maximum	34	47
- Minimum	8	5
Number of employee representatives	Recast EWCs*	Other I&C bodies***
<15	54%	8%
15-29	41%	26%
30-39	5%	60%
40-75	0%	6%

\*based on information from interviewees from 37 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

\*\*\*European Trade Union Institute (ETUI), Statistics and Graphs -maximum number of representatives, 7/2015.

The Recast EWCs engage 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 too.

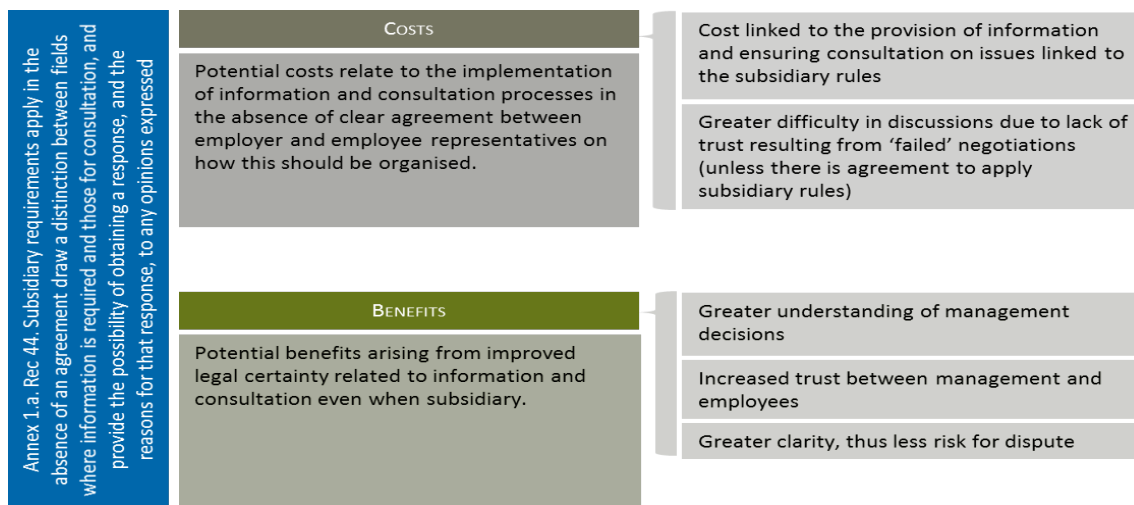
Overall, there have been positive changes to improve the balanced representation of the EWCs, especially in relation to the gender composition, but progress has not been made uniformly in all EWCs and in relation to all aspects of representation. There are usually few or no problems with the balance representation of different countries but the equal representation in terms of gender, type of employees is difficult to achieve (or not achieved at all) because the national laws and practices determine the process of elections of EWC representative. In practice, therefore this provision is considered to be difficult to implement centrally when the election of the members takes place locally.

### 7.1.6 Fall-back rules

Fall-back rules were introduced in the Recast Directive to ensure that a 'minimum level' of provisions apply in situations where management and worker representatives fail to negotiate an EWC agreement within the specified timeframe.<sup>130</sup> The potential benefits and costs of following subsidiary requirements are presented in Figure 29 followed by the evidence from social partners at EU and national level regarding the impact of the new rules on the number of companies following them.

<sup>130</sup> Subsidiary requirements applying in the absence of an agreement draw a distinction between fields where information is required and those for consultation, and provide the possibility of obtaining a response, and the reasons for that response, to any opinions expressed. Annex 1.a, rec.44: The content of the subsidiary requirements which apply in the absence of an agreement and serve as a reference in the negotiations must be clarified and adapted to developments in the needs and practices relating to transnational information and consultation. A distinction should be made between fields where information must be provided and fields where the European Works Council must also be consulted, which involves the possibility of obtaining a reasoned response to any opinions expressed. To enable the select committee to play the necessary coordinating role and to deal effectively with exceptional circumstances, that committee must be able to have up to five members and be able to consult regularly.

Figure 30. Potential costs and benefits associated with introduction of Annex 1.a Rec 44



Source: ICF

Only 1 out of 37 (or 2.7%) Recast EWCs interviewed in the evaluation followed the fall-back rules and the subsidiary requirements since the introduction of the new rules. This is lower than 8% of all Recast EWCs following the subsidiary rules, but higher than 1.5% of all EWCs created so far subsidiary requirements (see section 5.6).

Half of the social partners at EU level (n=7) commented on the number of companies following subsidiary requirements. Four of them do not associate this number with the changes in the Directive. Similarly, national social partners do not associate any increasing trend in number of companies following subsidiary requirements with the changes in the Directive but rather to the lack of will of individual companies to establish the EWC. Overall, the national social partners could not comment on the impact of the Directive (56%) or did not notice any changes in this regard (31%).

Overall, the use of subsidiary requirements amongst the Recast EWCs is very low, albeit being higher than among all EWCs created so far. However, the social partners attribute this not to the changes in the Directive but more to the willingness of the company to negotiate successfully an EWC agreement.

## 7.2 Analysis of cost and benefits associated with the changes in the definitions of concepts of information, consultation and transnational matters

With the introduction of the Recast Directive, a number of important concepts were defined or clarified:

- Clarification of the concept of 'information' and introduction of a definition in the Directive (Art. 2(f));<sup>131</sup>
- Clarification of the definition 'consultation' which now gives criteria to respect the consultation process (Art. 2(g)).<sup>132</sup>

<sup>131</sup> According to Article 2(f) in the Recast Directive, the term 'information', means transmission of data by the employer to the employees' representatives in order to enable them to acquaint themselves with the subject matter and to examine it; information shall be given at such time, in such fashion and with such content as are appropriate to enable employees' representatives to undertake an in-depth assessment of the possible impact and, where appropriate, prepare for consultations with the competent organ of the Community-scale undertaking or Community-scale group of undertakings.

<sup>132</sup> In the Recast Directive, Article 2 (g), the term consultation, means ' the establishment of dialogue and exchange of views between employees' representatives and central management or any more appropriate



- Clarification of the notion of 'transnational matters' that should be dealt at the transnational level by EWCs as opposed to the national bodies (Art. 1(3), 1(4), rec. 12, 15, 16).<sup>133</sup>
- Link with information and consultation at national level: Information and consultation of the EWC shall be linked to those of the national employee representation bodies (Art. 12).
- General principle of effective information and consultation: 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 company to take decisions effectively (Art. 1.2, rec.14).

The legal changes sought to bring greater clarity and certainty to the work of the EWCs and align these definitions to the concepts defined in the other existing information and consultation legislation (see section 3). This section analyses the costs and benefits of these changes in the Recast Directive. Potential benefits and costs of the introduction of a definition of information, consultation and transnationality are presented in Figure 31, followed by evidence from various sources regarding the consequences of the new requirements.

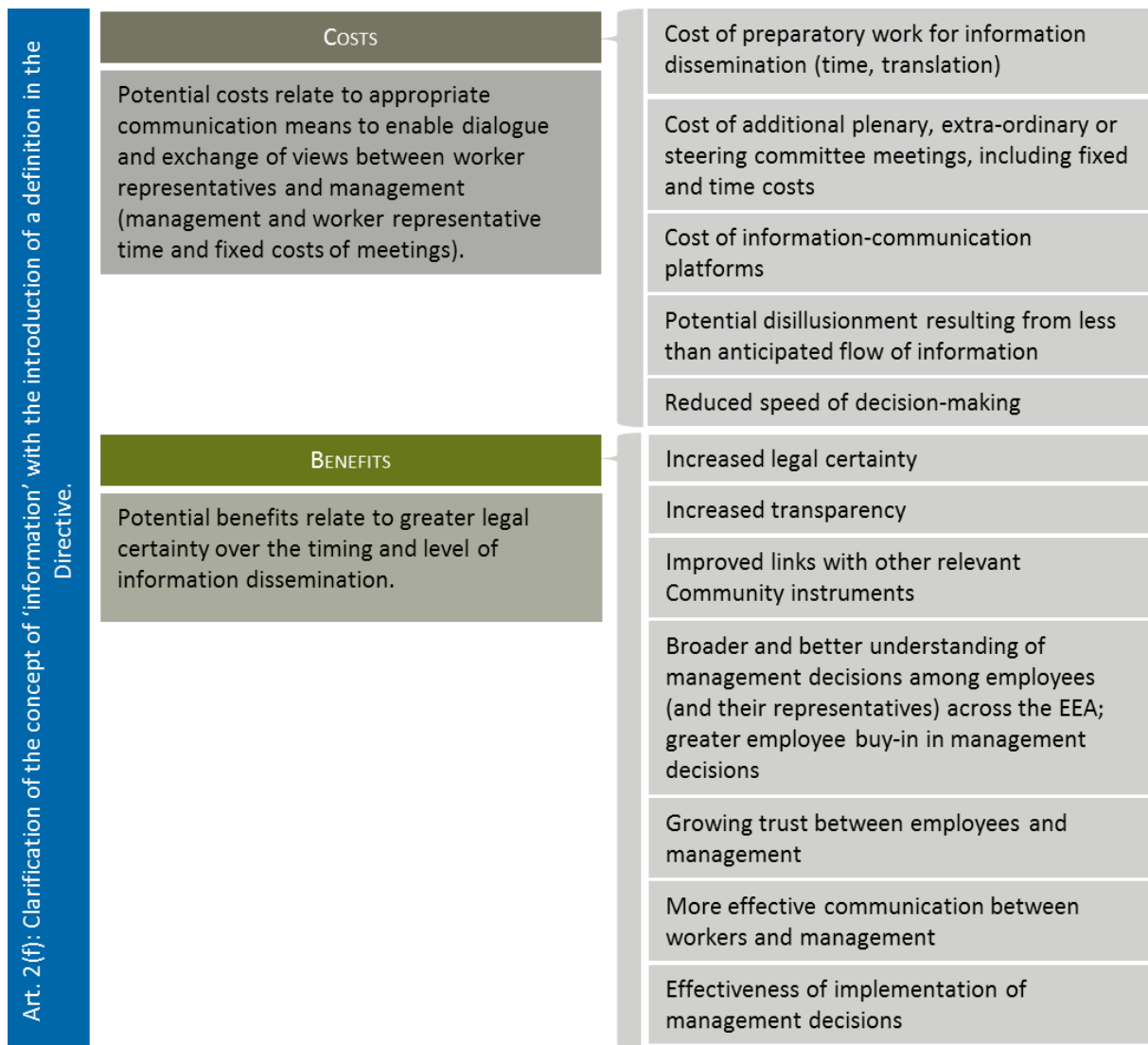
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level of management, at such time, in such fashion and with such content as enables employees' representatives to express an opinion on the basis of the information provided about the proposed measures to which the consultation is related, without 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'

<sup>133</sup> Definition of Transnational Issues: Information and consultation of employees must occur at the relevant level of management and representation, according to the subject under discussion. To achieve that, the competence of the European Works Council and the scope of the information and consultation procedure for employees governed by this Directive shall be limited to transnational issues. Matters shall be considered to be transnational where they concern the Community-scale undertaking or Community-scale group of undertakings as a whole, or at least two undertakings or establishments of the undertaking or group situated in two different Member States. (Art.1.3-1.4, rec.12, 15, 16).



Figure 31. Potential costs and benefits associated with the definition of information, consultation and transnational matters and their practical functioning in the Recast Directive



Source: ICF.

### 7.2.1.1 Views of the employer and employee representatives of Recast EWC

To a certain degree, it is challenging to identify additional costs arising from the enhanced definition of information, consultation and transnationality in the Recast Directive, as requirements to inform and consult on measures having an impact on employment and working conditions at transnational level already existed under Directive 94/45/EC. The question is therefore whether these definitions have brought about a need for additional meetings, legal advice or have indeed served to delay or change management decisions (with a resulting costs rather than a benefit – which could also be the case in the long term).

Nine companies indicated that they had to seek legal or expert advice on whether the EWC should deal with an issue as opposed to local or national worker information and consultation forums. This cost across the nine companies ranged from EUR 5 000 to EUR 25 000 with the average cost of legal advice being around EUR 15 000. None of the companies in the sample faced any legal disputes with workers representatives over the functioning of the EWC information and consultation processes which would

have entailed legal costs (this was confirmed by both employer and employee representatives interviewed, although one employee representative pointed out a legal dispute in the EWC set-up phase). This is lower compared to the EWCs surveyed in 2008 where about a half of the 58 companies surveyed faced legal disputes either in the EWC set-up phase or during the operation of the EWC.<sup>134</sup>

According to employee representatives, less than a half of (10 out of 25) companies have established EWC specific information communication platforms (such as discussion forums, intranet sites, shared sites for uploading documents). For most such companies, the costs of running such platforms were either difficult to estimate separately or low due to the use of existing standard company-wide operations. Only one company indicated that the maintenance of such platform is quite labour intensive (and there is a part-time secretary working for the EWC).

The majority of employee representatives (24 out of 34 interviewees) considered that the information flow in their EWC works in practice. Relevant information tends to be provided, and some consultation does take place on the face of it, although it is rare that this changes the approach initially proposed by management. Where dissatisfaction with the information and consultation process is being expressed, interviewees pointed out very late timing of providing information and the fact that this did not allow for any real consultation. In many cases, decisions were already taken before consultation took place and there was little scope for the EWC's meaningful involvement (see also section 7.5).

Overall, respondents seem to be more positive about information provision than about consultation processes (see Table 38). Indeed, while 23% of the respondents indicated that their EWC 'always' received information on transnational matters before the decisions have been made, only 5% indicated that their EWC was 'always' consulted. Besides, respectively 27% and 32% of the respondents reported that their EWC was 'never' informed nor consulted.

*Table 39. Functioning of EWC in relation to information and consultation – in practice*

	<b>Always</b>	<b>Often</b>	<b>Sometimes</b>	<b>Rarely</b>	<b>Never</b>
EWC receiving information on transnational matters affecting employee in more than one country before the decisions have been made	23%	9%	27%	14%	27%
EWC is consulted on transnational matters affecting employee in more than one country before the decisions have been made	5%	14%	36%	14%	31%

*Source: Survey of pre-Recast EWCs employee representatives, based on 22 responses to the question.*

The level of satisfaction of respondents about the practice of information within their EWC is relatively low, since only 5% reported being very satisfied and 27% fairly satisfied with the use of their EWC as an information forum. Half of the respondents indicated being somewhat satisfied, and 18% reported not being satisfied at all. The situation is worse regarding the practice of consultation within respondents' EWC. Indeed, 41% of the respondents indicated being not at all satisfied with the use of

<sup>134</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

their EWC as a consultation forum, 27% reported being somewhat satisfied and only 32% reported being fairly satisfied. No respondent was very satisfied with the situation. The detailed responses are presented in Table 39 below.

*Table 40. Satisfaction with the practice of information and consultation within EWC*

	Very satisfied	Fairly satisfied	Somewhat satisfied	Not satisfied at all
EWC as an information forum	5%	27%	50%	18%
EWC as a consultation forum	0%	32%	27%	41%

*Source: Survey of pre-Recast EWC employee representatives, based on 22 responses to the question.*

The following main challenges were identified in relation to their EWC as an information and consultation forum:

- Lack of respect for the right to consultation;
- Issue with receiving timely information for consultation, e.g. timing of meetings in line with the changes within the organisation;
- Lack of information coming from the management, e.g. lack of willingness from management to provide information in good time;
- Difficulty in getting continuous and stable employee representatives from all countries and companies; lack of pro-activeness and low interest of some employee representatives; conflict between representatives belonging to different unions, without actually being constructive.
- Language barriers, which prevent fruitful dialogue;
- Coordination and harmonisation of documents between sectors and business lines;
- Socially responsible workforce reduction, transfer of work to other countries; and
- Merging of divisions within the Group structure and the resulting impact on the headcount.

In the interviews with Recast EWCs, with regard to the articulation of information and consultation processes at different levels, the majority of employers were considered by the employee representatives to be clear which level of worker representation needs to be consulted first (see Figure 19).

This shows a good understanding amongst the companies that EWCs should receive information on transnational matters first, but this does not necessarily mean that this always happens in practice. This is reflected in the answers given by the employee representatives interviewed, which show that around a quarter of EWCs are not informed (and consulted) first on corporate strategy and in restructuring situations (see Figure 20).

The figure above shows that, in many cases, the information (and consultation) of EWCs and national or local works councils takes place simultaneously. Qualitative feedback from the interviews suggests that, for companies headquartered in countries with traditionally strong national works councils, national/local information and consultation bodies often continue to enjoy the privilege of being informed first.

### **7.2.1.2 Views of the pre-Recast Directive EWCS**

The survey with the 22 EWCs established before the Recast Directive showed that in only 32% of such EWCs the information is received always or often, whereas in around

a third the information is never received by the EWC (see Table 41). The situation was even worse in relation to the consultation where only 19% of the EWCs were always or often consulted on transnational matters.

Table 41. Views of the pre-Recast EWCs on the information and consultation

	EWC is receiving information on transnational matters affecting employee in more than one country before the decisions have been made		EWC is consulted on transnational matters affecting employee in more than one country before the decisions have been made	
	N	%	N	%
Always	5	23%	1	5%
Never	6	27%	7	32%
Often	2	9%	3	14%
Rarely	3	14%	3	14%
Sometimes	6	27%	8	35%
Total	22	100%	22	100%

Source: ICF Survey with Art. 6 EWC (N=22).

### 7.2.1.3 Views of the social partners

As part of this evaluation, 14 European social partners provided their views on the impact of the 'new rules'. The European social partner respondents, both employer and employee organisations' representatives, reported a **greater clarity on certain provisions** of information, consultation and transnational matters. But **problems do still remain with the interpretation of these concepts in practice**, with employee representatives in particular often considering that definitions and requirements remain too vague. Particular concerns were expressed that the level of **'consultation and real dialogue is very limited** and a key problem'; the timing of information provision was seen to impact on the potential for real consultation and other rules (such as stock market rules) were often cited as a hindrance to the timely delivery of information.

European level social partners were also asked whether the new provisions on the link with information and consultation at national level have resulted in more frequent dissemination of information towards workers, and/or in more time given to employee representatives to carry out their information dissemination duties (see Table 42).

Table 42. The awareness of Recast's impact on the frequency of and availability of workers for information dissemination (views of the EU social partners)

	Employers organisations	Workers organisations	Total
Positive impact	1	2	3
No impact (problems remain)	3	6	9
Don't know	1	1	2
Total	5	9	14

Source: ICF interviews with European level social partners (n=14)

A large majority of respondents (nine out of 14, or 64%) reported that the Recast Directive had no impact on this issue. Employers' representatives mentioned that problems remain regarding: lack of clarity about 'what constitutes confidential information'; lack of meetings (only one is foreseen) to allow for 'an efficient operation of the EWC'; limited representation of employees, who do not have sufficient means to

disseminate information; and limited 'linkages with local bodies (e.g. local trade unions), which makes it difficult to disseminate the information'.

Around two thirds of the national social partners surveyed as part of this evaluation felt that the **new rules introduced had none or very little impact** in relation to timing, the level and scope of information and consultation of EWCs on the transnational matters (see Table 43). Just under one third felt that there was an improvement.

*Table 43. National social partner views on the impact of the new rules introduced by the Recast Directive on the extent to which EWCs are used as information and consultation forums*

	<b>Employers organisation (N=16)</b>	<b>Trade union (N=29)</b>	<b>Other (N=7)</b>	<b>Total (N=52)</b>
The situation has remained the same, no noticeable change	69%	59%	86%	65%
There has been a decline in the timing, level and scope of the information and consultation of EWCs on transnational matters	6%	7%	0%	6%
There has been an improvement in the timing, level and scope of the information and consultation of EWCs on transnational matters	25%	34%	14%	29%

*Source: ICF survey with national social partners.*

The reasons put forward by those who felt the situation had largely unchanged since the introduction of new rules included:

- The Directive was not ambitious enough, only introducing modest legal changes to information and consultation concepts;
- Lack of enforcement and sanctions in cases of poor information and consultation with the EWCs;
- Where it had been implemented, 'the majority is characterised by poor implementation of rules',
- Financial and economic crisis and the focus on costs reduced the company willingness to engage in the information and consultation with the EWCs.

National social partners who did in fact feel there was an improvement as a result of the new rules cited the clearer legal basis for timing and I&C of EWCs on transnational matters contained in the Directive, contributing to the empowerment of employees to seek involvement in such matters and at the same time increasing pressure on employers to implement the Directive.

The reasons why 6% of national social partners contacted felt that there was a worsening of the situation include the legal definitions being too vague, management not being able to fulfil their obligations due to secrecy preventing them from communicating information, and stock exchange rules overriding the EWC directive and legislation.

#### **7.2.1.4 Summary**

The table below summarises views of different stakeholders regarding the impact of the changes in the definition of information, consultation and the transnational matters in the Recast Directive. The majority view in the Recast EWCs was that the information and consultation processes in the EWCs are working with the benefits articulated in relation to a better informed decision making and better intercompany relations. The costs or difficulties in applying the concepts of the information and

consultation processes are not considered to be taxing. This positive finding contrasts with the experiences of pre-Recast EWCs (where the majority of cases do not apply information and consultation properly) and the views of the social partners at the European and national level. They acknowledged the improvements in the clarity of the definitions, but pointed out a number of problems to be addressed. In summary, on the face of it, there appears to be a good level of agreement between employer and employee representatives on who should be consulted first on different decisions, although uncertainties and practical issues of implementing this in practice remain.

*Table 44. Perception of impact of the definitions of information, consultation and transnationality by different stakeholders*

Source of information	Perception of impact
Employer representatives in recast EWCs (N=25)	Half companies held extraordinary EWC meetings to provide information and consultation (average of 3 meetings) A minority reported difficulties in providing information and consultation Half companies established specific EWC information platforms, which costs are considered to be low
Employee representatives in recast EWCs (N=34)	The majority considered that the information process in their EWC works in practice, although need for improvements is also noted. Very little consultation with the possibility to effect change in practice
EU level social partners (N=14)	Greater clarity on certain aspects but problems remain with the application of information, consultation on transnational matters in practice
National level social partners (N=52)	The definitions introduced had none or very little impact due to lack of obligation to implement, enforcement and sanctions
Comparison with pre-recast EWCs (N=22)	Only a third of such EWCs are regularly informed and consulted about transnational matters

Source: ICF analysis.

### **7.3 The analysis of cost and benefits associated with the changes in the rules concerning the EWC operation**

This section discusses the overall costs of the EWC operation under the Recast Directive, as well as the key costs and benefits of the following changes in the Recast Directive affecting the operation of the EWC:

- Select committee: In order to enable the select committee to perform a more important function, its maximum number of members is set at five and the conditions enabling it to exercise its activities on a regular basis must be met (Annex 1.d, rec.44).
- Adaptation clause: Where the structure of the company changes significantly, and either in the absence of provisions established by the agreements in force or in the event of conflicts, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees (Art. 13).

This section analyses in detail consequences of the each change, followed by overall impact of changes made on the cost of operation of EWC.

#### **7.3.1 Key costs of operating the EWC**

This section describes and estimates the key types of quantifiable costs of EWC operation and discusses changes in those between post-2011 and pre-2011 EWCs.

The interviewees were asked to provide information about various types of costs, including: venue, accommodation, travel costs for participants, subsistence costs,



translation costs, interpretation costs, administrative support, cost of experts, dissemination costs, paid time off for EWC employee members to attend meetings, management time, cost of training. Only a handful of company representatives were able to break down the EWC cost into detailed headings, therefore the interviewees were also asked to provide an estimation of the overall costs of organising one plenary meeting and running EWC throughout a year. The cost estimates were later compared with the costs reported in the 2008 study.<sup>135</sup>

The representatives of management were asked to provide an estimate cost of one plenary meeting and the annual cost of the running of the EWC (see Table 44). Companies' own calculations and estimates on their annual EWC expenditure range from under 50,000 to 500,000. The Recast EWC show lower annual budget diversity than Art. 6 EWCs interviewed in 2008. At the time representatives of companies reported EWC expenditure in the range of EUR 7,500 to EUR 2.3 million.<sup>136</sup>

According to employers' estimations one in two companies spend less than EUR 50,000 on one plenary meeting. With 40% of companies having two plenary meetings per year this translates to two thirds of companies spending less than EUR 100,000 annually on the EWC.

*Table 45. Approx. cost of EWC operation*

Approx. cost of one EWC plenary meeting (N=20)		Approx. annual cost of the running of the EWC (N=20)	
Less than €25,000	35%	Less than €50,000	25%
€25,000 - €50,000	15%	€50,000 - €100,000	40%
€50,000 - €75,000	30%	€100,000 - €150,000	5%
€75,000 - €100,000	10%	€150,000 - €250,000	0%
€100,000 - €150,000	5%	€250,000 - €300,000	5%
€150,000 - €200,000	5%	€300,000 - €350,000	15%
€200,000 - €250,000	0%	€350,000 - €450,000	0%
More than €250,000	0%	More than €450,000	10%

*Note: Findings must be read with caution given the small sample sizes.*

*Source: Interviews with employer representatives of Recast EWCs.*

Based on the values reported in ranges, the annual operational costs can be estimated at EUR 165,000. The estimates of total EWC running costs made by representatives of Recast EWC translate into 0.008% of the company turnover. It should be noted that these are only fixed costs of running EWC and does not include staff time.

*Table 46. Approx. cost of running EWC (N=20) per year*

	Total cost	Share of the running cost in company turnover in 2014	Cost per EWC member
Min	45,000	0.001%	€ 1,125
Average	165,000	0.008%	€ 5,708
Max	500,000	0.046%	€ 19,118

*Source: Interviews with employer representatives of Recast EWCs. Note: Findings must be read with caution given the small sample sizes.*

<sup>135</sup> Prices as of 2014. EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

<sup>136</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission, p. 38.



In the two studies (conducted in 2008 and in 2015) the interviewees were given flexibility whether or not to include staff costs in the overall EWC budget. These differences in reporting were taken into account by comparing the companies which included similar types of costs in their estimates. Additional limitation in comparing the costs of EWC operation lay in the way the interviewees were able to provide the information. In the 2015 study the interviewees provided their estimations in ranges, which were later recalculated into averages to allow the comparison with values reported in the 2008 study.

Overall the comparison of average costs (with or without employees' time) suggests that the operation of EWC under Recast Directive is less expensive:

- Only four representatives of EWC established after 2011 included in their estimates of annual EWC costs time of employees and management. In this group, the average EWC budget is EUR 237,500. That is over EUR 60,000 lower than of those EWCs surveyed 2008 (EUR 300,000 in 2014 prices, including staff time).<sup>137</sup>
- A comparison of information from companies which included only fixed costs in their estimates shows little difference between Recast EWCs and those established under Directive 94/45/EC (EUR 153,667 and EUR 160,900 in 2014 prices respectively).<sup>138</sup>

The annual costs of the operation of an EWC relate to the structure of EWC and the number of different meetings held. As seen in Table 47, although the number of EWC members is lower in the EWCs established since 2011, the country coverage is higher which may influence the translation costs. On average, the companies established under the Recast Directive have a lower number of plenary meetings, though the share of companies with two meetings is higher.

*Table 47. Differences in the EWC structure affecting costs of EWC operation*

	<b>Recast EWC: 2015 (N=37)</b>	<b>Art. 6 EWC (N=22)</b>
<b>EWC structure:</b>		
• Number of EWC members (employee and employer representatives) [Average]	19	23
• Number of countries represented by EWC members [Average]	11	9
<b>Annual plenary meetings:</b>		
• % of companies with 2 annual plenary meetings	40%	33%
• Number of annual plenary meetings [Average]	1.4	2.0
<b>Steering committee:</b>		
• % of companies with steering committee	89%	88%
• Number of steering committee members – employees [Average]	5	5

<sup>137</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission, p. 38.

<sup>138</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission, p. 38.

• Number of steering committee members – management [Average]	1	2
• Average number annual steering committee meetings [Average]	3	3
<b>Other meetings</b>		
• % of companies with preparatory meeting	77%	96%
• % of companies with working groups	36%	29%
• % of companies with provisions to hold extra-ordinary meetings	97%	88%

Source: Interviews with employer and employee representatives of Recast EWCs. European Commission (2008), Staff Working Document accompanying the Proposal for a Directive of the European Parliament and the Council 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 (recasting), COM(2008) 419 final.

The above comparison does not include additional costs which might be borne by companies which established an EWC under the Recast directive – such as the cost of training or experts. In the 2008 study the average annual training budget was more than EUR 50,500 (expressed in 2014 prices) in all countries including companies headquartered in France which stood out from the rest. This number is substantially lower in the group of Recast EWC which on average have annual training budget of EUR 12,900, which translates to EUR 744 per EWC member.

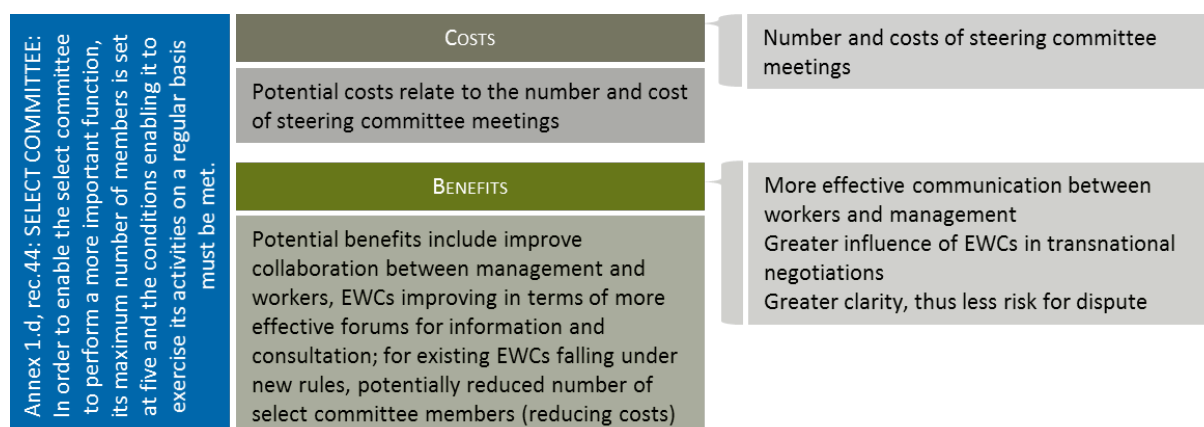
### 7.3.2 Select committee

The Recast Directive further formalised the role of steering committees in that it introduced a right for their operation and laid out some rules regarding the number of members ('maximum of five members) and the frequency of meetings ('the conditions enabling it to exercise its activities on a regular basis must be met'). This was to enhance the effectiveness of the negotiation process between workers and the management while minimising its costs and administrative burden.<sup>139</sup>

Potential benefits and costs of the requirements related to select committees are presented in Figure 32, followed by evidence from various sources regarding the consequences of the new requirement.

<sup>139</sup> European Commission (2010), Report of Group of Experts on implementation of Recast Directive 2009/38/EC on European Works Councils.

Figure 32. Potential costs and benefits associated with introduction of requirements related to select committees



Source: ICF

The new rights concerning steering committee meetings in the Recast Directive have not been taken up by all new Recast EWCs, since four out of 35 Recast EWCs whose management and employee representatives were interviewed in the evaluation are not operating one. This trend is largely in line with the trend in other types of EWCs.

Table 48. Operation of steering committees

Operation of a steering committee	Recast EWCs* (N=35)	Other EWCs** (N=70)
Yes	89%	88%
No	11%	12%

\*based on information from interviewees from 35 out of 37 companies in the sample. \*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

Almost a fifth (23%) of all Recast EWC steering committees exceed the maximum limit of EWC employee members specified in the Directive, since they have between six and ten members instead of the maximum of five. This tends to apply to larger EWCs, where national representation in the steering committee wants to be maintained. However, with an average number of steering committee members of four-and-a-half, overall there is a slight tendency towards smaller steering committees, but more so because of the smaller size of Recast 'companies' and 'EWCs', rather than for other reasons. On average, one management representative liaises with the steering committee, although this number ranges from zero to six.

Table 49. Composition of steering committees

Employee members	Recast EWCs* (N=30)	Other EWCs** (N=70)
Average	4.5	5
Maximum	10	15
Minimum	2	2
Share of employee members (%)	Recast EWCs* (N=30)	Other EWCs** (N=70)
- 5 or fewer members	77%	NA
- More than 5 members	23%	NA
Management 'members'	Recast EWCs* (N=30)	Other EWCs** (N=70)
Average	1	2
Maximum	6	4
Minimum	0	0

\*based on information from interviewees from 30 out of 37 companies in the sample

\*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

The steering committees of Recast EWCs tend to meet, on average, three times a year.

Table 50. Frequency of steering committee meetings

Frequency of meetings	Recast EWCs* (N=31)	Other EWCs** (N=70)
Average	3	3
Maximum	6	12
Minimum	0	0

\*based on information from interviewees from 31 out of 37 companies in the sample

\*\* EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission. 'Other EWCs' refers to EWCs operating under Article 13 and Article 6 rules.

The large majority of respondents to the survey of pre-Recast directive EWCs reported that their EWC operated a Steering committee (17 out of 22, or 77%). In the pre-Recast EWCs surveyed in the evaluation, the majority of respondents have, on average, between one and four employer representatives (50%) and between two and nine employee representatives (59%) in their steering committee. The number of employer representatives ranges between zero and 14, with an average of three per steering committee. The number of employee representatives ranges between zero and 16, with an average of six per steering committee.

On average, there are two plenary meetings, between four and five steering committee meetings and between three and four working group meetings organised each year, according to the survey respondents. Three respondents indicated having three plenary meetings per year; six respondents reported having between six and eight steering committee meetings per year; and three respondents reported having between seven and eight working group meetings per year.

Among renegotiation EWC agreements, the number of steering committee meetings being held stayed largely the same (61% of cases) and increased in 26% of cases. Only one EWC reported having removed the Select Committee in order to ensure that a Select Committee dominated by members from the HQ country dominated the EWC.

The table below summarises views of different stakeholders regarding the impact of the changes in relation to the Select Committee. Overall, the obligation imposed by the recast Directive did have an impact as the Select Committees are more widespread amongst the Recast EWCs.

Table 51. Perception of impact of the Select Committee by different stakeholders

Source information	of Perception of impact
Recast EWCs (n=37)	Almost 90% Recast EWCs operate Select Committees Almost a fifth (23%) of all Recast EWC steering committees exceed the maximum limit of EWC employee members specified in the Directive
Comparison with pre-recast EWCs (N=22)	Slightly fewer Article 6 EWCs have a Select Committee (78%), average of 3 members
Benchmarking with other EWCs	86% of EWC agreements contain provisions for the establishment of a select committee

Source: ICF analysis

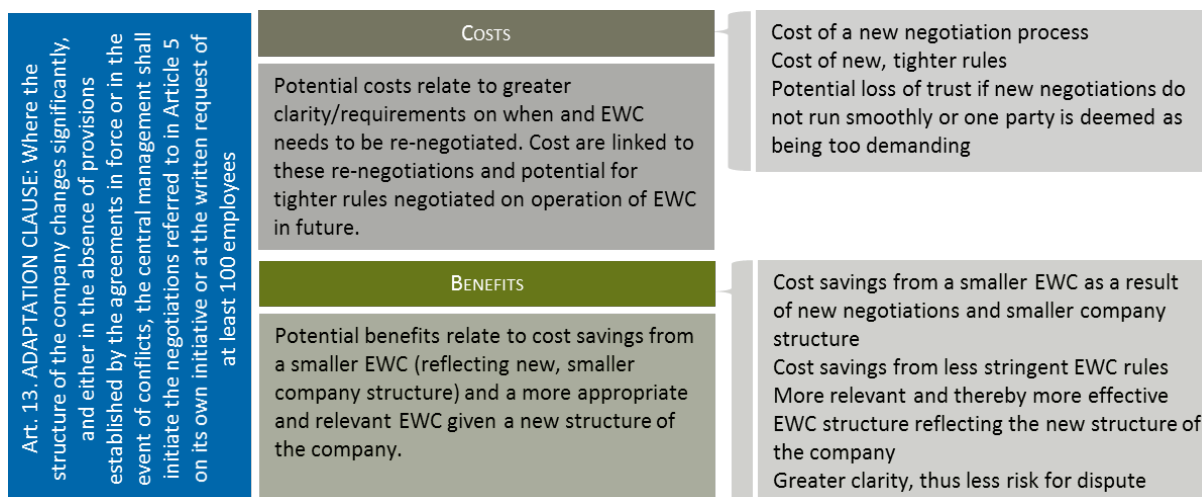
### 7.3.3 Adaptation clause

The Recast Directive established provisions for the amendments and renegotiation of the EWC agreements when the circumstances change.<sup>140</sup> This aimed to ensure greater

<sup>140</sup> Adaptation Clause: Where the structure of the Community-scale undertaking or Community-scale group of undertakings changes significantly, and either in the absence of provisions established by the agreements

legal certainty in the work of EWCs as well as providing an impetus for the renegotiations of the agreements when the circumstances change.<sup>141</sup> Potential benefits and costs of the obligations relating to the introduction of an adaptation clause are presented in Figure 33, followed by evidence from various sources regarding the consequences of the new requirement.

Figure 33. Potential costs and benefits associated with introduction of the adaptation clause



Source: ICF.

Around 40% (12 out of 31) Recast EWC employer representatives reported that they had revised the EWC agreement, to respond to the changes in the company structure, and the identified need for improvements in the EWC structure. According to employer representatives, in eight Recast EWC agreements there is an explicit clause to review the EWC agreement- either on a regular basis (i.e. going above the requirements of the Directive) or when a certain proportion of employees request it (in conformity with the adaptation clause).

The majority of respondents (12 out of 23, or 52%) to the survey of companies which renegotiated their agreement after the introduction of the Recast Directive reported that they had such an adaptation clause already before the renegotiated agreement, and that this clause is also in the latest version of their agreement (six employers and six employees). Four employees indicated that such a clause was added as a new element to the latest agreement. Almost a third of the respondents (seven out of 23, or 30%) indicated that their agreement did not include such a clause (five employees, one employer and the external expert).

Renegotiating an EWC agreement can be a good way to update it according to the changed context or to improve the existing rights. An ETUI report<sup>142</sup> highlights that 'as many as one in every two active EWCs are based on agreements valid for an indeterminate period, [...] which means they can be changed only by an explicit demand for renegotiation or the termination of the agreement by one of the two parties'. The other EWCs analysed by ETUI have agreements valid for a specific period (generally four years). Among the agreements that are valid for a specific period,

in force or in the event of conflicts between the relevant provisions of two or more applicable agreements, the central management shall initiate the negotiations referred to in Article 5 on its own initiative or at the written request of at least 100 employees or their representatives in at least two undertakings or establishments in at least two different Member States.

<sup>141</sup> European Commission (2010), Report of Group of Experts on implementation of Recast Directive 2009/38/EC on European Works Councils.

<sup>142</sup> ETUI (2015), Facts and figures.

'29% have an article that foresees a tacit renewal of the agreement, and for the other 71% explicit renewal or renegotiation will be necessary at the end of the term'.

The ETUI further highlighted that, 'of all the active EWC bodies, at least 35% have already renegotiated their agreement. [...] Nevertheless, approximately half of the pre-directive EWCs have not been renegotiated meaning, that these EWCs have not had the opportunity to incorporate some regulatory or company changes. The SE WCs have been rarely renegotiated as most of them have been established much more recently. Moreover, SE WCs are generally established in companies which already had a working EWC but changed their legal structure'.

Dissolution cases concerned 240 of the total number of EWC bodies set up. The main causes for dissolution are 'structural changes within the companies', e.g. a merger with or acquisition by another company. The ETUI states that, in such cases, 'either a new EWC is negotiated, or the existing EWCs merge to form a single new body. Of the total EWC dissolutions 6% can be attributed to changes in the legal status of a company and another 6% to bankruptcies or companies being sold. Only 2% of the known dissolutions have occurred due to the company no longer falling within the scope of the directive (decrease in number of employees) and only 1% have been directly linked to a lack of interest in the EWC'. According to the ETUI report, it appears that, once established, EWCs generally perform well.

Overall, the obligation imposed by the Recast Directive did have an impact as a significant proportion of Recast EWCs have already renegotiated their agreement and the presence of adaptation clause is noted in a quarter of Recast EWC agreements. However, it must be noted that around 52% of EWC which had renegotiated their agreement already had such a clause prior to the renegotiation.

#### **7.4 The analysis of costs and benefits associated with the changes in the rules concerning the role and capacity of employee representatives**

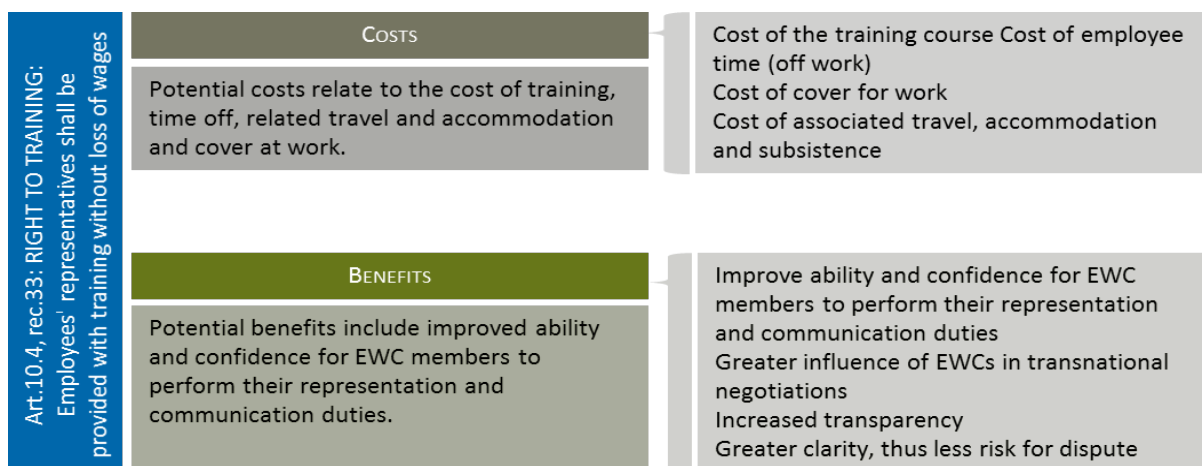
The study aimed to provide qualitative and quantitative assessment of the additional costs and benefits associated with changes introduced by Recast Directive 2009/38/EC to the rules concerning the role and capacity of employee representatives. Comparing to the Directive 94/45/EC the key changes have been made which affect their role and rights:

- Role and protection of employee reps: The members of the EWC shall have the means required to apply the rights arising from the directive to represent collectively the interests of the employees. They shall inform employees of the content and outcome of the information and consultation procedure carried out within the EWC (Art.10.1-2).
- Right to training: Employees' representatives shall be provided with training without loss of wages (Art.10.4, rec.33).

These changes were introduced to provide greater legal certainty and protection of EWC members and build their competences through a right to training. This section analyses the consequences of the each change, followed by overall impact of changes made on the capacity of employee representatives. Potential benefits and costs of the obligations of the right to training are presented in Figure 34, followed by evidence from various sources regarding the consequences of the new requirement.



Figure 34. Potential costs and benefits associated with introduction of the right to training



Source: ICF

As shown in section 6.2.3, two-thirds of Recast EWC employee representatives confirmed that employees had made use of the right to training, whereas one-third confirmed that this was not the case. This is an increase compared to over half of the companies surveyed in 2008 (58%) offer a right for their EWC members to training.<sup>143</sup>

Overall, the main reasons for the lack of take-up of training in the new EWCs included:

- The EWC was just recently established and the members had not yet had the time to consider training requests.
- There was no demand among members (yet).

Among those who had requested training, the vast majority (80%) of EWC members noted that there had been no particular challenges in securing it. The remaining ones (20%) consistently identified one challenge of the reluctance of the management to allow such training to take place or leave to be taken. Those members of Recast EWCs that have taken up this right have received, on average, 1-3 days of training per year.

Table 52. Number of days of training per year

	0	Up to 5 days	5-10 days	10+ days
Share of respondents (%)	23	65	12	0

Source: Based on a survey of employee representatives of Recast EWCs: 26 valid responses out 37 EWCs in the sample.

The most common topics of training included legal (mentioned by 25% of respondents) and economic (15%) affairs, as well as languages and communication skills (37%). In other cases, employees were given training on specific transversal skills, such as negotiation, or the training took the form of team building. In other cases training was specific to the work in the different aspects of EWCs.

In terms of quantifiable costs of training to the companies, amongst the 22 EWCs operating under Article 6 rules surveyed as part of this evaluation half had the training budget below €10,000 (of 14 EWCs reporting such costs).

<sup>143</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.



Table 53. Reported costs in pre-Recast EWCs surveyed as part of this evaluation

Training budget	N	%
Less than €5,000	6	27%
€5,000 < €10,000	1	5%
€10,000 < €20,000	2	9%
€20,000 < €30,000	1	5%
More than €30,000	2	9%
Don't know	8	36%
Nothing	2	9%
Total	22	100%

Source: ICF survey of Article 6 EWCs (n=22).

The companies surveyed in 2008 had an average annual training expenditure of EUR 43,800.<sup>144</sup> But a closer look at the cost estimates reveals that the French companies spend on average EUR 76,700 per year on the EWC training while companies from other countries have an average EWC training cost of EUR 24,800.

As shown in section 6.2.3, Recast EWCs (where the cost data was provided to the evaluation) report significantly lower training costs, with the annual average training cost of around EUR 12,000 (these cost estimates do not tend take into account travel costs or time costs, but mostly costs related to the fees for trainers and possible venue costs, when applicable) (see Table 54). No geographical or sectoral patterns were identified.

The potential reduction in the training costs compared with the Article 6 EWCs and EWCs surveyed in 2008 is unlikely to be directly related to the Recast Directive per se. This is more likely to be associated with a smaller companies operating the Recast EWCs and the fact that many Recast EWCs are very new with only a year to two of operation behind them. This means that in some Recast EWCs the new EWC employee representatives have not yet requested or organised any training.

Table 54. Estimated annual budget spent on training of EWC members (Recast EWCs) (EUR)

	None	<5,000	5,000-10,000	10,000-20,000	20,000-30,000	30,000+
Share of respondents	21%	37%	10.5%	5%	10.5%	16%

Source: Based on a survey of employee representatives of Recast EWCs: 19 valid responses out of 37 EWCs in the sample.

Half of the European social partners interviewed considered the new right to training had a positive impact on the employee representative access to training (see Table 55).

Table 55. The awareness of Recast's impact on the employee access to training amongst the European social partners

Employee representatives being given more time to carry out their EWC information dissemination duties			Impact on the employee representatives' access to training		
Employers	Workers	Total	Employers	Workers	Total

<sup>144</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

	organisations	organisations	organisations	organisations	organisations
Positive impact	1	2	3	7	7
No impact		4	4	3	4
Negative impact	3	2	5	1	1
Don't know	1	1	2	1	2
Total	5	9	14	5	14

Source: ICF interviews with European level social partners

Overall, the obligation imposed by the recast Directive did have a significant impact on the EWC member access to training with the right to training being now more widespread in the EWCs. The costs of training in the Recast EWCs is lower in comparison to the EWCs surveyed in 2008, which could be due to the recent establishment of Recast EWCs where time is needed for the employee representatives to understand and address their training needs.

## 7.5 Stakeholder views of non-quantifiable costs and benefits of EWCs

This section discusses findings on the non-quantifiable costs and benefits associated with the operation of EWCs under the Recast Directive, as perceived by employers and employees as well as their representative organisations at national and EU levels. It also looks at how these perceptions relate to those of EWCs established under the Directive EC/94/45, as measured in 2008<sup>145</sup>.

Specifically, this section focuses on the following three aspects:

- Benefits related to the operation of EWCs in companies;
- Costs/inconveniences associated with the EWCs;
- Whether the benefits outweigh the costs of having an EWC.

### 7.5.1 The views of management and employee representatives of Recast EWCs

Findings are available from interviews with 25 employers and 34 employee representatives. Some respondents pointed out their EWCs were still in such an early stage that it is too early to assess their impact, benefits in particular: when EWCs are very new or still being established, costs are incurred but the benefits may not be evident yet.

#### **Benefits of EWCs**

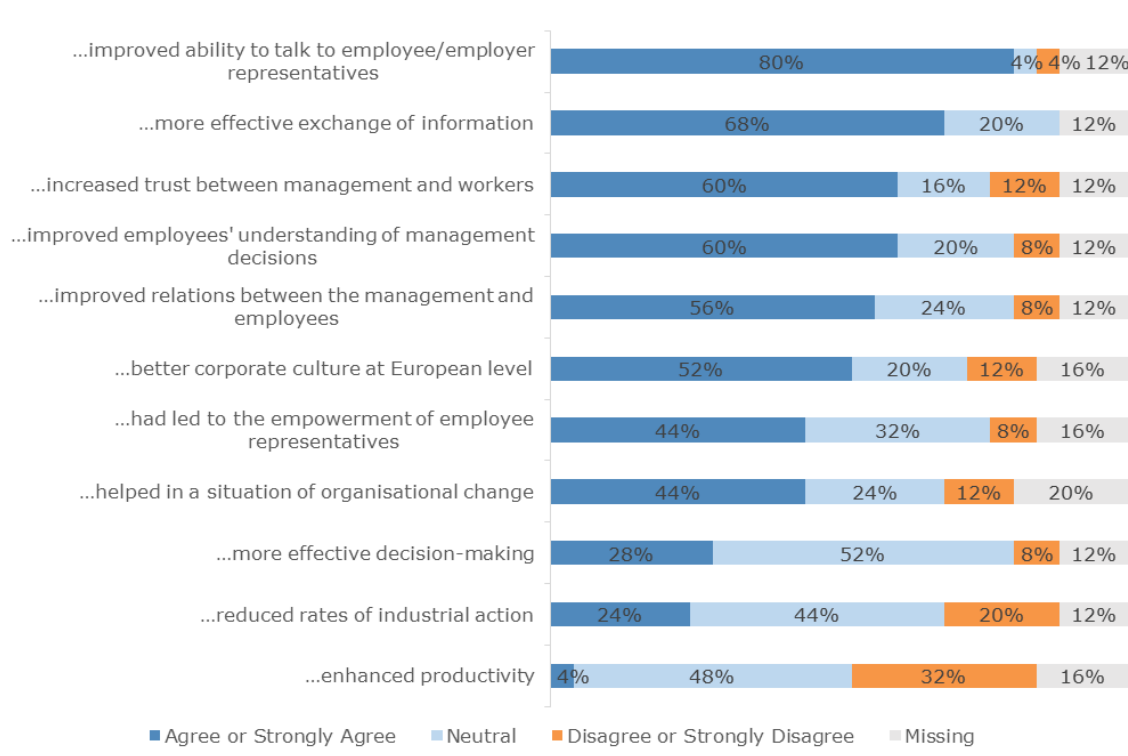
Generally, there was agreement between employers and employees that the Recast EWCs provided a platform that facilitated the communication of information. However, assessment of whether this led to constructive dialogue varied across companies. Respondents who mentioned dialogue and cooperation generally responded positively regarding the benefits of operating their EWC. Respondents who were less positive on the benefits of EWCs mentioned the interference of national issues in the EWC meetings and one-sided communication (i.e. initiative was only taken by either management or employee representatives, with the other party being unresponsive or dismissive). Both employer and employee representatives take a more neutral position regarding the benefits of operating their EWC, which may reflect that many EWCs have only recently been set up.

<sup>145</sup> EPEC GHK (2008), Preparatory study for an Impact Assessment of the European Works Council Directive, European Commission.

The perception of employer representatives regarding the benefits of the operation of an EWC in their company, following the Recast Directive shows an overall positive view. A majority of 80% of employers found their EWC had led to an improved ability to talk to employee representatives. Most employer representatives were also positive about their EWC enabling more effective exchange of information (68%) as well as increasing trust between management and workers and improving employees' understanding of management decisions (both 60%). An important function of EWCs for employers seems to be the ability to inform employees on the company's strategy and build support for this strategy, improve relations and receive feedback on key strategic issues.

Overall, employer representatives did not perceive negatively the (potential) benefits of EWC's, however, they were largely neutral regarding EWC's ability to reduce rates of industrial action, enhance productivity and improve effective decision-making.

Figure 35. Views of employers on benefits associated with operation of EWC (%)



Source: ICF survey based on responses from 25 employer representatives of Recast EWCs

The figure below summarises employee representatives' perceptions on benefits of their EWC. As is the case with employers, most employees were positive especially regarding the improved ability to talk to employer representatives (74%). Most also agreed (or strongly agreed) that the EWC had led to a more effective exchange of information (71%) and had improved relations between the management and employees (59%). For more than half of employee representatives an important function of the EWC was honesty and transparency from central management. The EWC is also recognised as a useful platform for employees to talk about transnational issues amongst themselves. It can facilitate the exchange of good practices, and help set up or serve the function of national employee representation in countries that do not traditionally have a strong trade union presence.

Employee representatives did not have an explicitly negative attitude towards any of the benefits the survey mentioned, but some of the benefits were largely regarded from a neutral position. More than 40% of employees were neutral on whether the

EWC had 'reduced rates of industrial action', 'enhanced productivity' and 'helped in a situation of organisational change'.

Figure 36. Views of employees on benefits associated with operation of EWC (%)



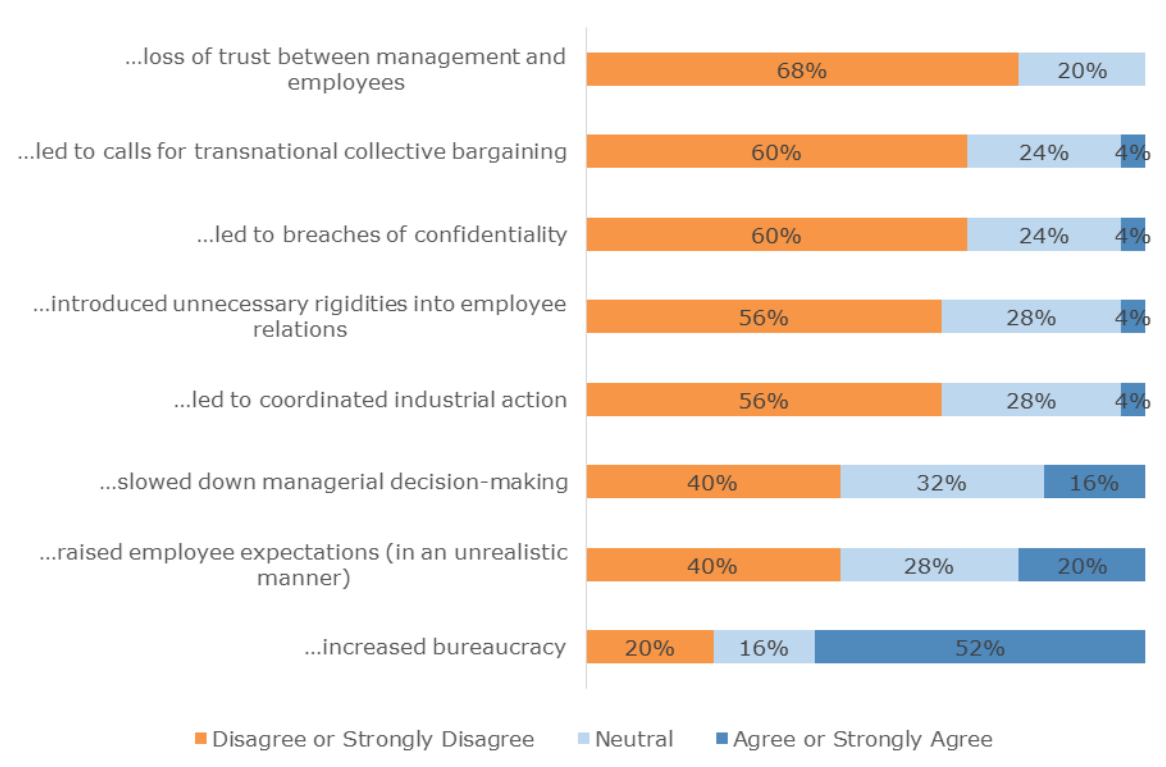
Source: ICF International survey based on responses from 34 employee representatives of Recast EWCs

### 7.5.1.1 Non-quantifiable costs of EWCs

Some of the survey results differ between employer and employee respondents, which may illustrate different priorities. Generally, however, neither employee nor employer representatives find that their EWC has led to many significant non-quantifiable costs. Many employers do find that it increased bureaucracy (52%). For employees this was not so much an issue (12%). To a lesser extent than benefits, respondents pointed out that in some cases the costs were too early to be assessed.

Most employer representatives agreed (or agreed strongly) that their EWC had increased bureaucracy. Other potential costs resulting from running the EWC as listed in the survey were not seen as an issue by the majority of respondents, but several employers pointed out the financial costs associated with running the EWC as well as the extra time required of staff.

Figure 37. Views of employers on costs associated with operation of EWC (%)



Source: ICF International survey based on responses from 25 employer representatives of Recast EWCs

Other difficulties and barriers that employers identified in relation to running an EWC were often very specific to the company itself. A couple of examples that were mentioned with some recurrence are:

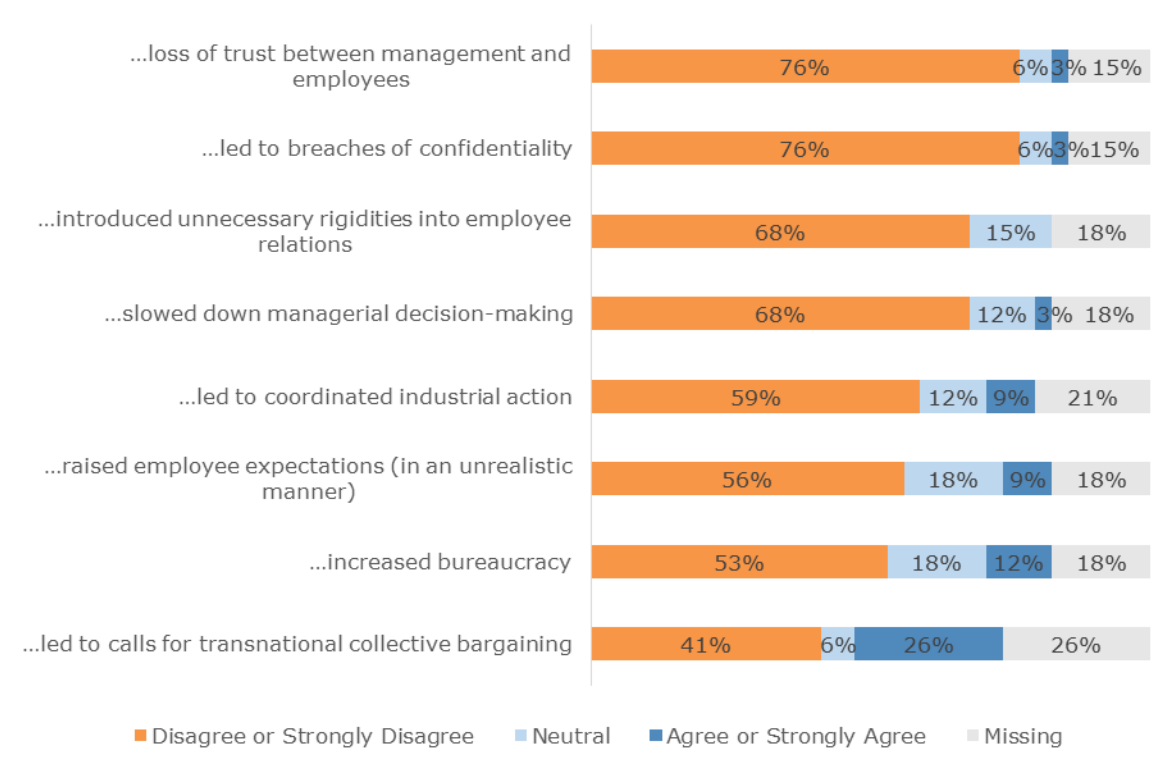
- Issues resulting from the internal organisation of the company. Where companies have very different lines of business, of which management do not work together much, have to communicate across these different lines of business in a single EWC.
- Where companies may have employees in countries with very different cultures, this means that besides the language barrier that is mentioned by both employer and employee representatives, there may be some cultural differences to overcome that can affect the atmosphere of the negotiations.
- Both employer and employee representatives acknowledge that sometimes national challenges and interests need to be overcome first, before transnational issues can be effectively addressed at the EWC level.
- Cases of restructuring (both redundancies as well as acquisitions) may present as a barrier or challenge as this will need to be reflected in the representation in the EWC.

Employee representatives do not perceive many non-quantifiable costs as a result of running their EWC (see Figure 38). However, they do identify a number of challenges and barriers. A few are identified here, but the low number of observations means this must be seen as isolated cases, not necessarily as a general cost observed across EWCs.

Employees also identify challenges with employee representation. For example: raising the visibility of the EWC among employees and managing expectations of what the EWC can do among employees. Some mentioned their EWC lacked decision-making powers as part of their challenge. This mainly related to expectations established in

relation to national representation bodies with decision-making powers. Where such bodies have co-determination powers, EWCs were often perceived to be weak information and consultation bodies.

Figure 38. Views of employees on costs associated with operation of EWC (%)



Source: ICF survey based on responses from 34 employee representatives of Recast EWCs.

Views of national and European social partners on the non-quantifiable costs and benefits of Recast EWCs were generally more neutral, beyond arguing that the clarification of the rules has been beneficial. This may be due in some cases to the lack of involvement with or knowledge of EWC (particularly in the case of employers' organisations). More details on the result of consultations with social partner organisations can be found in Annex 7.

### 7.5.2 Weighting up benefits against costs

Recast EWC employers and employer representatives and to a greater extent employee representatives are positive about the benefits their EWC provides. And while it is clear there are costs, especially for the employer, these relate to direct financial cost and costs in personnel time, as opposed to negatively influencing relationships and trust in the organisation.

National social partners (mainly trade unions) are largely neutral regarding costs and benefits of EWCs that adhere to the new rules following the Recast Directive. Especially on benefits many replied they were neutral. Similarly, most respondents were either neutral or did not think the EWCs following the new rules resulted in that particular cost.

The survey and interview results indicate a positive balance in favour of benefits, but it should be acknowledged that this does not come without costs and challenges. Running an EWC does cost time and money, and the fact that each organisation is different means there are barriers to overcome that are unique for each company. However, even taking into account these challenges, on the whole most are positive about the value added.

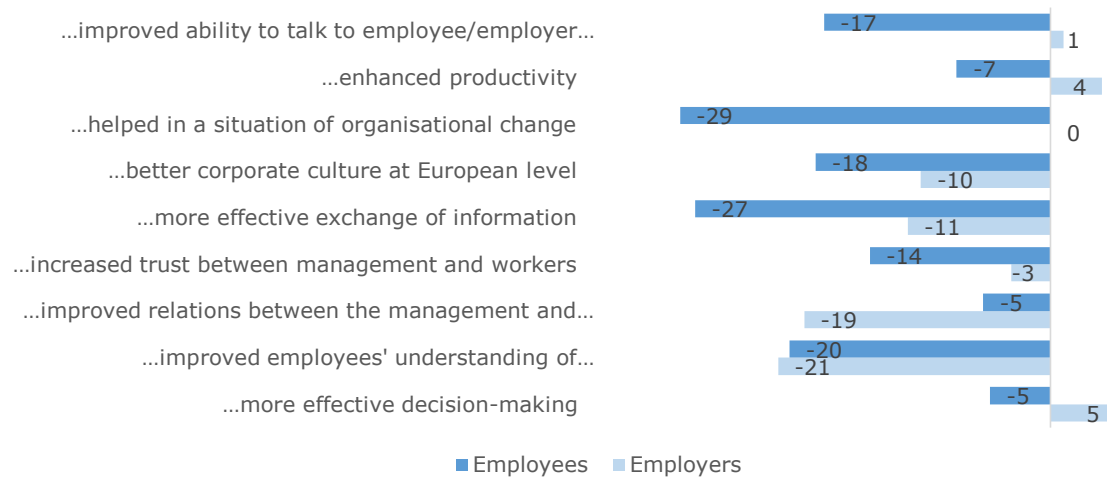
### 7.5.3 Comparisons with the Directive 94/45/EC

As the Recast aimed to improve the functionality of Directive 94/45/EC it is appropriate to compare the results we have set out here with the results of the early impact assessment for EWCs before the Recast (as set out in 'A Preparatory Study for an Impact Assessment of the European Works Councils Directive', 2008).

#### 7.5.3.1 Comparison of benefits

The figure below represents the change and direction of change of the proportions of respondents who had a positive perception (agreed or strongly agreed) on EWC benefits from the 2008 (original Directive) to the 2015 (Recast) survey. The survey results from the analysis of the EWCs based on the original Recast contain 49 responses from employer representatives, and 41 from employee representatives.

Figure 39. Changes in proportion of employers and employees who agree/strongly agree on EWC benefits from 2008 to 2015 survey



Source: ICF survey (2015: 25 employers and 34 employees) and GHK survey (2008: 49 employers and 41 employees) The arrows on the left-hand side of the 0 line represent a decrease in the perceived benefit from the original Directive to the recast, the right-hand side represents an increase. The colour of the bar determines whether this concerns employers' or employees' perception.

The figure shows that perceived benefits have reduced with the Recast, however there are a few small improvements in the perception of employers, notably their perception of the EWC leading to more effective decision-making, enhanced productivity and the improved ability to talk to employee/employer representatives and increased trust. Employees seem to have a more negative view following the Recast and have changed their opinion from the 2008 survey more significantly. Most notably, we see a decrease in perceived value of EWCs in their ability to help in a situation of organisational change and their effectiveness in exchange of information (change of almost 30 percentage points). This may be due to 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 around the potential impact of EWCs in the area among employee representatives.

Another reason for this change could be that many companies after 2008 went through some restructuring due to the economic crisis. Even if they did not make redundancies, it was a period of greater uncertainty for employees and that could be reflected in this finding. When asked whether the credit crunch has had an impact on the set up of the EWC, by far most respondent say this is not the case, but a few point out that it has had a great impact on the rest of the operations of the company. It



must also be taken into account that some responses on the benefits of EWCs based on the Recast were neutral as it was too early to make this assessment, which will impact the comparison with the original Directive.

### 7.5.3.2 Comparison of costs

The figure below represents the change and direction of change of the proportions of respondents who had a negative perception (disagreed or strongly disagreed) on EWC costs from the 2008 (original Directive) to the 2015 (Recast) survey.

Figure 40. Changes in proportion of employers and employees who agree/strongly agree on EWC costs from 2008 to 2015 survey



Source: ICF survey (2015: 25 employers and 34 employees) and GHK survey (2008: 49 employers and 41 employees). The bars on the left-hand side of the 0 line represent a decrease in the perceived cost from the original Directive to the Recast, the right-hand side represents an increase. The colour of the bar determines whether this concerns employers' or employees' perception.

Perceptions on cost, on balance, seem to have decreased, especially in the eyes of employers. Notably we see a reduction in employers' perception on EWCs raising employee expectations in an unrealistic manner (31 percentage points: in 2008 51% agreed this was a cost, in 2015 only 20% agreed). Employers also considered EWCs less costly in terms of them leading to calls for transnational collective bargaining, and introducing unnecessary rigidities into employee relations. Employees on the other hand thought EWCs led more so to calls for transnational collective bargaining, but only marginally so.

## 7.6 The effects of the Recast Directive on the administrative burden

Administrative burdens are typically defined as obligations for businesses to provide information about the aspect of their operations to the public authorities.<sup>146</sup>

The Recast Directive introduced an additional obligation in this respect for the companies to inform the European social partners about the start of the EWC negotiations, although this does not strictly qualify as an additional administrative burden. As shown in section 8.1.4, this requirement is not uniformly implemented by the companies. Over half (56% according to employee and 64% according to employer representatives) companies with the EWC established under recast Directive

<sup>146</sup> European Commission, Better Regulation Guidelines Toolbox, [http://ec.europa.eu/smart-regulation/guidelines/docs/br\\_toolbox\\_en.pdf](http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf).

informed and involved social partners in the negotiating process. Furthermore, the costs associated with informing the 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 the 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 they followed it. Hence, in practice, this is rarely implemented and unlikely to lead to significant administrative burden.

## **7.7 Summary of key findings on costs and benefits**

Based on the information presented above, the following findings on the quantifiable and non-quantifiable costs of the provisions introduced by the Recast Directive which relate to the set-up, operation and adaptation of EWCs can be highlighted.

### **7.7.1 Set-up of EWCs: quantifiable and non-quantifiable costs and benefits**

The main new provisions of the Recast Directive which impact the set-up of EWC relate to requirements regarding the provision of information, the composition of the SNB, the entitlement to employee only pre-and post-meetings; the involvement of experts and the need to inform European level social partners about the start of negotiations. These new requirements could arguably have increased costs linked to the provision of the information provision (e.g. staff time, translation costs etc.); have increased the costs of meetings due to rules regarding the composition of SNBs and the involvement of experts and raised administrative costs linked to informing European social partners, among other things. Benefits were considered to potentially revolve around greater clarity, smoother negotiating processes and more appropriate worker representation, etc.

The findings of this study show that the quantifiable costs of the set-up of EWCs have declined when compared to the experience of Article 6 agreements under Directive 94/45/EC (from EUR 143,537 to EUR 119,207). These lower costs primarily result from the fact that fewer meetings were held with fewer representatives (and therefore associated meeting costs) – albeit over a longer period of time – in regard to EWCs established under the Recast Directive. This is linked to the size of companies negotiating new agreements rather than the new provisions enacted as a result of the Recast.

In term of non-quantifiable costs and benefits, reference was made to the benefits of greater legal clarity with regard to information requirements, but overall the impact of this was seen to be limited in practice. Similarly, the rules around the composition of the SNB were considered to have had a limited impact and developments here were again mainly determined by the size and geographical representation of the companies negotiating agreements post-2011. On the other hand, the entitlement to employee-only pre-and post-negotiation meetings was considered to be a benefit as it allowed the employee side to prepare, become more familiar with the legislation and to consolidated views following the discussions with management. As such meetings took place on the same day as full negotiating sessions, no particular additional costs arose.

According to over half of representatives of Recast EWCs, there has been an upward trend in the extent to which European social partners were informed and involved in EWC set-up negotiations. This view was not necessary reflected by European social partners who did not consider that they were routinely informed of the start of such negotiations, but that this rather depended on the country of headquarter of the company (and relevant industrial relations traditions) or previous connections between the company and their organisation. The use of experts in negotiations also increased (to nearly 70%) and was considered to be helpful in providing advice on the detail of

new legislation and expertise from other existing EWCs. Quantifiable costs of these provisions are seen to be low and benefits cannot be quantified.

With regard to the requirement for balanced representation of EWC (and SNB) members in terms of gender, experience etc., many EWC argued that this was achieved as well as possible but the possibility to do so was limited by the nature of the businesses (women over-or under-represented etc.) and employee representative election/appointment processes which cannot be controlled by the EWC itself.

The use of the new subsidiary requirements was found to be relatively low among the sample Recast EWCs consulted for this study (only 1 company followed these rules based on a common agreement between employers and employees). This was attributed more to the willingness of employers to negotiate and less to the requirements of the Recast Directive.

### **7.7.2 Operation of EWCs: quantifiable and non-quantifiable costs and benefits**

The main provisions of the Recast Directive impacting the operation of EWCs relate to enhanced definitions of information, consultation and transnationality; rules regarding the establishment of a Select Committee, requirements regarding the articulation of information and consultation at different levels and more specific rules and rights of employee representatives on EWCs.

The quantifiable costs of these changes were assessed by looking at the annual costs of operating an EWC (compared to the costs established for Article 6 agreements), as the new rules could arguably impact on the number of meetings being held and the level of training provided, amongst other things.

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 difference in annual running costs (EUR 153,667 and EUR 160,900 respectively). For EWCs which could provide fixed- as well as time costs of running a Recast EWC, the costs were around EUR 240,000. The annual costs of the operation of an EWC relate to the structure of EWC and the number of different meetings held. Although the number of EWC members is lower in the EWC established since 2011, the country coverage is slightly higher which may influence the translation costs. Interestingly, the training costs reported by Recast EWCs are significantly lower than those measured among EWCs established under Article 6, but this could partly be due to the fact that 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.

Despite the more detailed definition of 'transnational matters' provided in the Recast Directive, a relatively high number of companies (9 out of 37 reported that they had to seek legal advice in relation to issues of transnationality, with an average cost of such advice at EUR 15,000). However, this is lower than half of the companies which faced legal disputes surveyed in 2008.

Few non-quantifiable costs of the new provisions were highlighted which were additional to what was already required or provided previously.

The rules regarding the right to the establishment and the number of employee side representatives on the Select Committee can be seen to have had a limited impact in practice. The share of EWCs establishing Select Committees has remained more or less the same and the number of employee side representatives and meetings held is also more or less unchanged.

Two thirds of employee side representatives in Recast EWC have accessed training. The right established by the Recast is considered to be beneficial but its impact on actual training received is difficult to assess as many EWCs are early in their period of establishment.

Provisions in the Recast which were aimed to provide greater clarity on the articulation of information and consultation mechanisms at different levels must also be seen to have had only a limited impact as although both employer and employee representatives declare that they are clear about the 'hierarchy' of consultation mechanisms, some uncertainties remain in practice.

On the wider and critical question of whether the enhanced definitions of information, consultation and transnationality have led to greater legal certainty and an improved operation of EWCs with regard to their core functions, the general estimation is that information flow has improved (only 32% of employee representatives in article 6 EWCs declared that information was provided regularly whereas this figure was 70% for Recast EWCs). In many cases, information was considered to have been supplied in a timely fashion, but in some EWCs concerns remain that the timing of information does not allow for a realistic process of consultation (in some cases the two phases are not separated which is considered to be an issue). Although consultation is seen to take place on the face of it, in most cases this is seen to have little or no impact on final company decisions. Concerns also remain about the understanding of the concept of 'transnationality' as it is generally up to company to interpret what is a transnational matter and without the relevant information, employee representatives are unable to assess whether a matter is or is not indeed transnational. The question of confidentiality around stock market rules also remains a stumbling block in practice as information is often provided late with reference to such rules.

Overall, it can therefore be said that the quantifiable cost (and benefit) impact of the Recast Directive is limited as most changes in this area are linked to size and nature of companies negotiating new agreements. Non-quantifiable costs are also generally considered to be negligible. Although there are seen to be some benefits linked to greater legal certainty and information provision is related more positively by employee representatives in Recast EWCs, the role of these transnational information and consultation bodies with regarding to actual consultation remain very limited and uncertainties remain in practice over the concept of transnationality and restrictions are reported over the timing of information with reference to confidentiality rules.

### **7.7.3 Comparison of the administrative burdens for EWCs before and after June 2011**

The additional administrative burden on the Recast EWCs resulted from the obligation to inform the European social partners about the start of the EWC negotiations. It was in practice implemented by around a half of the EWCs and was considered to incur low costs.

## 8 What are the significant best practices in the implementation of the new rules and case studies on the absence of the application of certain provisions of the new rules?

### 8.1 Introduction

This section summarises the evaluation findings on the effective practices in the implementation of the new rules of the Recast Directive, based on:

- Views from the interviews with the Recast EWCs,
- Case studies on the specific aspects of the EWC functioning.

### 8.2 An overview of the main practical achievements of Recast EWCs to date

Employee and management representatives of Recast EWCs identified a number of the practical achievements of the newly established EWCs (see Table 56). The views of management and employee representatives largely coincided with regard to the assessment of these practices. The achievements were mostly soft, including better information and consultation within the company, better intercompany relations and better dialogue between different national representatives and sites of the company. For a number of EWCs, it was too early to identify their practical achievements due to the recent nature of the establishment of their EWC.

Table 56. EWC's practical achievements identified by employer and employee representatives in the Recast EWCs

	Number of respondents			
	Better intercompany relations	Better transnational relations between national employee representatives	Better information and communication	Other
Employers (n=24)	14	4	12	6 (no achievements yet)
Employees (n=33)	21	19	23	5 (no achievements yet)

Source: ICF interviews with 37 Recast EWCs. Respondents provided multiple answers.

Some examples given by management representatives are highlighted below.

"Improved understanding among employees of the issues that need to be taken into consideration when making restructuring plans, improved understanding of how difficult the company finds it to make business decisions which might lead to job losses" – A management representative from a transnational company in the chemical sector

"Our EWC is a good thing for both sides: it helps to understand how the other side is thinking. In the end the EWC can lead to better business decisions as employees understand that we are all part of the same group. It helps to build trust" – A management representative of a Swedish EWC in the construction sector

"The EWC improves the quality of social dialogue within the group" – A French management representative in the utilities sector

"There are no practical, tangible achievements yet – it is too early. However, EWC members have started to prepare for a future transnational negotiation about the role and means of union representatives within the group (recognition of acquired skills during the mandate, specific career management...). (...) The EWC has also asked to set up works councils in countries or entities where they don't currently exist." – A management representative of a French company in the service sector

"It is too soon. But (...) it has been useful to transmit a clear message about the company in Europe." – A management representative of a Spanish EWC in the private security sector

Some examples given by the employee representatives are included below.

*"Transmission of transnational information has increased, information exchange between worker representatives in different countries has increased, and communication between management and employee representatives from non-HQ countries has improved"* – An employee representative of a Finnish company in the service sector

*"Communication and understanding between employer and employees has improved. The company also has a better understanding of the positions of unions in different countries."* – An employee representative of a Swedish company in the construction sector

*"We achieved mutual understanding on the situation at the different sites. Some employee-employer-questions which were blocked by local management have been resolved after the problem was addressed at the central management level"* – An employee representative of a German company in the steel sector

*"To have the top management at the meetings to ask direct question from. The central management is open and transparent and that helps national I&C bodies"* – An employee representative of a Swiss company in the agro-food industry

In addition to such soft achievements, a number of respondents also mentioned very concrete EWC initiatives and interventions to date, thus demonstrating a practical impact of the EWC work. This covered:

- EWC inputs into companywide operational processes (concrete examples included: using the EWC representatives to explain better to employees why certain company procedures (e.g. staff procedures) are important to the company; EWC initiative to regulate health and safety on a transnational basis; EWC supporting communication in integrating a new company in the case of the mergers).
- EWC provided training and information to build the capacity of its members to perform their roles more effectively).
- EWC helped in situations of restructuring (to address restructuring in a more socially responsible way, to extend the employment termination deadlines, to ensure benefits are maintained in cases of transfer of staff).
- Several case studies undertaken of concrete EWCs in the evaluation also demonstrate the achievements of EWCs:
- The EWC in the Ardagh group is working well (according to both management and employee representatives) through collaborative discussions on key strategic matters, say over key matters, team joint working and collaboration, sharing of key strategic information, and increased trust and confidence in each other. The EWC took a joint initiative on the Code of Conduct and Compliance Hotline introduction across the company.
- The Elia EWC is an interesting case because it is only present in Belgium and Germany as it is a rather small multinational operating under Belgian law. It is a good example of how EWCs appear to be more effective in smaller multinationals present in only 2-3 countries.

#### **Case study findings: the experiences of Ardagh EWC**

The EWC in the Ardagh Group has achieved a number of successes since its establishment in 2012. The EWC has quarterly meetings. A local intranet EWC site for members has been established with closed forum and discussion groups being run. The EWC has facilitated an exchange of information on policies and procedures of common interest across the company. It has also fostered the intra-company culture of negotiation and debate to find solutions and to discuss the key performance indicators.

Information exchange between the EWC and management is taking place regularly, information is received on common policies, supported by a number of teleconferences to keep the EWC up to date on developments. Every quarter, the EWC receives an information package with the description of the bond report and financial data on the company. This leads to collaborative discussions on key strategic matters, as well as joint team working and

collaboration, sharing of key strategic information, increased trust and confidence in each other. Ultimately, the EWC helps to support the establishment of good industrial relations.

In concrete terms, the EWC had an influence on the development of the contents of the Code of Conduct and the Ardagh Compliance Hotline by providing comments, suggestions and reflections on how these could be further developed. The Select Committee was involved in an early stage to support the implementation process, fine-tune documentation etc. Besides that on a local level the EWC members discussed the proposals within their country works councils (e.g. DE, NL) or negotiation committees (e.g.. UK) or local shop stewards and gave the necessary feedback to the Select committee.

A number of key success factors are identified:

- The 2012 agreement for the Ardagh group EWC was negotiated as a result of the merger of two companies which previously had their own EWCs. Hence, there was a familiarity, experience and continuity in operating an EWC. The quality of the EWC agreement is recognised as a key building block for its subsequent work.
- There is support for the work of the EWC from the global management of the company which means a supportive environment for the EWC to operate. It also helps to ensure sufficient funding, regular flow of strategic information and high level management expertise for the work of the EWC (e.g. presentations at the EWC meetings).
- There is a solution-oriented culture of mutual respect and dialogue and recognition of the EWC's expertise in discussing strategic company matters.

#### **Case study findings: the experiences of Elia Group EWC**

- The Elia Group's EWC is characteristic of the recent move by many medium-sized transnational companies to set up an EWC, following the adoption of the Recast Directive. While the interviewees stated that the Recast Directive had no influence on the company's decision to set up an EWC, what emerges from this particular case is that the EWC was seen as an instrument to bring together employees from two countries with a different work culture.
- The company is characterised by good and honest relationships between management and staff representatives. On this basis, EWC operations have so far been carried out with ease.
- The annual cost of EWC operations constitutes 0.006% of Elia Group's annual turnover, which is below the 0.008% average for EWCs established after adoption of the Recast Directive.
- External legal experts took part in the negotiation process, bringing clarification to the notions on "information" and "consultation". Trade Union experts are now involved in the company's EWC activities, ensuring that all members are aware of their rights while providing more general guidance to this fairly young structure.
- The information exchange process is perfectly transparent, and thus the information that has so far been shared has been clear to all EWC representatives. The members invest the time needed to prepare for the meetings and to structure discussions around clear and open questions to the management.
- The agreement provides for the possibility to hold extraordinary meetings. While no such meetings have yet taken place due to restructuring events or decisions, the steering committee customarily holds informal post-meetings and debriefs to pick up on certain points raised during the plenary meetings in order to bring further clarifications to all members for the sake of transparent communication and information exchange.
- EWC employee representatives consider that information exchange has been fair and frank and has created conditions which are conducive to sound social dialogue.
- The right to training without loss of wages is being used by the EWC members, and



this is facilitated by the fact that this right is already secured in both Belgian and German law. So far, training activities have focused on communication and cultural diversity. The aim is to strengthen mutual understanding between management and employees, but also between staff members from Belgium and Germany.

- Given the size of the company and the good relationships between management members and staff, there is willingness among the EWC members to implement practical changes to improve the effectiveness the proceedings. For instance, there is now a move to make English the common language in meetings in order to make savings on interpretation and translation. The use of English is also encouraged and facilitated by the fact that only two countries are represented.
- Switching to videoconferencing for EWC meetings has also been considered and this has so far not been met with any particular reluctance by the members. In fact, members have shown themselves quite keen to implement such changes in order to make meetings more lively and interesting. This again can be attributed to the size of the company and the close relationships between the management and staff representatives.
- One of the criticisms of the EWC is that bi-annual plenary meetings are insufficient to ensure continuity in the discussions.

### **8.3 A review of stakeholder views on how to strengthen the effectiveness of the work of EWCs**

Employer representatives, employee representatives and EU level social partners were asked to identify ways of enhancing the benefits of EWC activities and of reducing the costs of running them (see Table 57).

The views of employer representatives were rather homogenous overall, particularly as regards ways of reducing EWC operational costs. Conversely, views among the employee representatives interviewed were relatively diverse and occasionally conflicted with the views of employer representatives. Few EU-level social partners expressed their views on these particular subjects.

Across these three groups, many respondents expressed the view that savings should be made on translation and interpretation costs linked to EWC meetings and accompanying documentation. Responses were rather more varied regarding ways of enhancing the benefits of EWC activities.

*Table 57. A summary of suggestions provided to maximise the effectiveness of the EWCs*

	<b>Employer members</b>	<b>Employee members</b>	<b>EU social partners</b>
<b>Enhancing benefits</b>	Clarifying the role of members Keeping discussions focused Flexibility in the frequency of meetings for discussions to be in keeping with latest developments	Further specifying the rights and duties of members Strengthening employee representation Additional meetings to enhance trust between employer and employee representatives	Improving access to training Clarifying the role of external experts and the respective roles of EU and national trade unions
<b>Reducing costs</b>	Translation/interpretation: encourage the use of a common language Videoconferencing (instead of face-to-face meetings)	Videoconferencing to supplement (not replace!) face-to-face meetings, potentially as a way to increase the number of meetings	Translation/interpretation Videoconferencing (in addition to face-to-face meetings) Meetings in more "modest" venues

*Source: ICF interviews with Recast EWCs and European social partners.*

### **8.3.1.1 Recommendations to enhance the benefits of EWCs**

A number of employer representatives in Recast EWCs pointed out that discussions should focus on the most relevant and newsworthy topics to stimulate engagement among members and make EWC activities worthwhile for all. The need for flexibility regarding the frequency and scale of meetings depending on the intensity of transnational corporate developments was also mentioned.

Certain employer respondents also expressed the view that the EWC members should have a better understanding of their mandate so that communication between the different parties can be improved. This issue was particularly raised by the employer representatives of multinational companies operating in five or more countries.

A considerable number of employee representatives asked for changes to the legislation to enhance the benefits of EWCs. Overall, many argued that the legislation should be more prescriptive on the rights and duties of EWC members in a way as to ensure that employee representatives are consistently informed and consulted on all issues of transnational relevance. One particular employee representative of a large industrial services company pointed out that there should be a rule which guarantees the participation of staff representatives from all the countries in which a company has operations.

Elsewhere, another noteworthy contribution was made by an employee representative of a multinational insurance company who argued that trust and cooperation between all members would be enhanced if meetings were held more frequently. Openness in the relations between management and staff was more widely identified as an important factor for guaranteeing the success of EWC activities.

A number of the EU social partners interviewed have pointed out that training, in particular for employee representatives, was a critical element. An EU social partner in the construction industry argued that training was important to enable employee representatives to engage successfully in discussions in order to reach common agreements with management representatives.

Clarifying the need for external expertise and the respective roles of national and European trade unions were also identified by several EU social partners as important actions to enhance the benefits of EWCs.

### **8.3.1.2 Recommendations to reduce the costs of running the EWCs**

Translation was identified by the employer representatives as the main item for which costs could be reduced. This issue was raised by employer representatives in smaller multinational companies who favoured the use of a common language at meetings.

A considerable number of employer representatives suggested that EWC meeting costs could be substantially reduced through the use of videoconferencing. Many of them also pointed out that the use of this technology would enable EWC members to address relevant topics more frequently to keep the momentum of discussions and negotiations going.

A considerable number of employee representatives also identified translation and interpretation as costly items. However, the views of employee representatives occasionally conflicted with those of employer representatives as regards the achievement of cost reduction. There was some reluctance among employee representatives to replace face-to-face meetings with videoconferencing, arguing that meeting members in person is a more effective way of stimulating discussions and securing engagement.

Few of the respondents amongst the EU social partners made specific suggestions to reduce EWC costs. Overall, the views of certain EU social partners reflected those of other stakeholders (e.g. limiting the number of translations required, using

videoconferencing where appropriate, or organising meetings in more “modest” venues).

A case study undertaken in the evaluation shows how EWCs operate in companies with small number of employees to minimise the costs of the EWC operation.

**Case study findings: the EWC in Arctic Paper**

This is an interesting case of EWC in a relatively small company – compared to other multinational corporations – which implemented various solutions to keep down the costs of operating an EWC.

The cost of annual EWC operation of EUR 25,000 constitutes 0.003% of Arctic Paper’s turnover in 2014, which is below an average of 0.008% in other EWCs established after the adoption of the Recast Directive. The low costs of the Arctic Paper’s EWC can be attributed to a small number of countries represented in the body (reflecting the size of the workforce and its representation in relatively few countries). The translation of EWC meetings, which constitute the highest share of EWC costs, is also kept to a minimum. Although more than four countries are represented, translation is required only in three languages (Swedish, Polish, and German) because of the language capacity of employee side members. Additionally, outsourcing the translation services and having the meetings in Poland allow the company to run the EWC relatively cost effectively.

Booking flights months in advance and organising the meetings in smaller Polish cities but with good connection with Sweden and Germany (e.g. Poznan instead of Warsaw) is another example of efficiencies implemented. The employees would like to visit the mills in the other countries but understand the company’s policy to cut unnecessary expenses. Meetings organised in the mills could save the cost of renting the conference room, but on the other hand would require more time for employees to travel to the destination and would not reduce the costs of accommodation.

The efficiencies are the result of the company’s practice but also expert’s advice, who already during the negotiations made suggestions how to set up a cost efficient EWC.

The EWC is an additional forum to provide information about the company to the employees. It improved the trade unions’ understanding of the company’s decisions. Though, according to an employer representative, the same could be achieved by having meetings with the company board at the national level.

Half-day preparatory meetings among employees help to integrate them and agree the final agenda and questions for the management.

Also a good practice of the EWC are its inputs into restructuring decisions. The management provides information ahead of decisions being made which contributes to mutual trust and good cooperation with employees.

## **9 Conclusions and recommendations**

### **9.1 Conclusions on the effectiveness of the Directive**

#### **9.1.1 Effectiveness of new legal rules in the Directive (To what extent is the transposition of the new rules correct at the national level? What are the main issues which have emerged or remained as problematic / contentious?)**

According to the analysis in the evaluation (which does not represent the official position of the European Commission), most Member States have correctly transposed the rules of the Directive. Furthermore, 15 Member States have introduced provisions which are more favourable than those foreseen in the Directive. These relate to enhanced rights and means to perform the EWC representative duties and more extensive definitions of information, consultation and transnational matters.

Stakeholder views (including the 27 independent labour law experts, 52 national and 14 European social partners, 25 Member State representatives) confirm the positive assessment of legal transposition.

However, in 12 EEA countries provisions were assessed as not meeting the requirements of the Directive (either because of an absence of transposition or national legislation differing from the requirements of the Recast or lacking specificity). Only in 4 Member States at least one of the key substantive provisions of the Directive<sup>147</sup> was not transposed correctly. In 9 Member States, a relatively minor non-substantive provision (or part of such provision) was not transposed. Among such shortcomings in transposition were the failure to provide the right to training for the EWC representatives without loss of wages, the requirement to inform European social partners about the start of negotiations and provisions on the composition of the EWC.

#### **Recommendation 1**

There is scope for the European Commission to initiate dialogue with the responsible national authorities in relation to instances where, on the basis of available legal texts, the transposition of the Directive appears to be insufficient on key substantive aspects of the Directive. The assessments made in this evaluation about shortcomings in transposition should be clarified in dialogue with the national authorities and appropriate action taken.

Overall, the Directive has increased legal certainty in relation to the core activities of EWCs, such as the definition of effective information, consultation, the clarification of the definition of 'transnational matters' and the articulation between the national and European information and consultation procedures. Some uncertainties remain with regard to implementation on the ground which could to a certain extent be linked to a remaining need for further legal clarification (see also section 10.1.3).

The new rules of the Directive had an impact on the enforcement of rights in national courts. The evaluation identified 10 court cases linked to the provisions of the Recast Directive. These national court proceedings related to disputes over the establishment of an EWC, links between the national and European level information and consultation structures and in particular the timing of information and consultation, the definition of transnational matters and potential subjects for information and consultation, communication between the EWC and national level employees and enforcement rights.

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<sup>147</sup> Key substantive provisions were considered to relate to the opening and conducting negotiations, role of social partners and experts, contents of the subsidiary requirements, general principles and concepts of information and consultation and transnational matters, links between the levels of information and consultation of employees, role and capacity of employees' representatives and the adaptation clause.

## Recommendation 2

There is scope to consider improvements to the legal concepts through further clarifications and sharing of practical examples and best practices.

In principle, the Directive remains silent on which law shall be chosen to govern the negotiations or the national jurisdiction governing the EWC agreement (its existing rules only help to determine the relevant partner for workers representatives and define central management). This is left to the discretion of both sides and more prescriptive action could be taken to prevent possible misuses. This could include further specification in the legislation on this issue (e.g. stipulating that the national law of the company's European HQ should govern the EWC agreement; this could include guidance on how the location of the company's European HQ is to be determined, such as in relation to management structures or share of employees in the EU, etc.<sup>148</sup>).

## Recommendation 3

The general Directive on information and consultation of workers (Directive 2002/14/EC) goes further than the Recast EWC Directive as regards to defining 'consultation'. First, it provides for consultation 'with a view to reaching an agreement' while the recast EWC Directive 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 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'. Second, the general directive on I&C requires employers to provide a response and its reasons to an opinion. Those two elements could also be incorporated into the Recast Directive in order to strengthen its impact.

Furthermore, a number of stakeholders on the employee side remarked that more precise guidance could be given on the timing for information provision and the separation of information and consultation processes. This is due to the fact the Directive only stipulates that consultation should take place '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', which many on the employee side argue may be insufficient to ensure effective consultation. The rationale on the employers is often that information needs to remain confidential specifically for companies listed on the stock market. The latter should, in principle, already be addressed by requiring EWC members to respect such confidentiality.

Further guidance could be given on the basis of the experience of EWCs which have established internal rules on the precise processes of information and consultation (steps and timing involved). This could be enhanced with testimony from relevant EWC members on the beneficial impact of implementing such clear processes.

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<sup>148</sup> Some jurisprudence from national case law is available on this issue (see section 4.6.1 – Manpower case).

#### **Recommendation 4**

The issues of enforcement, sanctions and penalties are left to the national level implementation measures. As a consequence, provisions vary significantly and lead to arguments that in some cases sanctions are not sufficiently dissuasive. Further action could be taken to ensure that sanctions and enforcement procedures are sufficiently dissuasive (such as sharing of information on different national practices and their impact).

##### **9.1.2 Impact on the creation of new EWCs (Against the baseline 2009 situation, what is the impact on the creation of new EWCs? To what extent the new rules reduced the number of exceptions and derogations from the Directive?)**

Trends in the number of newly created EWC per year suggest that both the 94/45/EC and 2009/38/EC Directives brought about an impetus to complete EWC agreements before the transposition deadlines of the original and recast Directives. However, after an initial peak in 1996, the number of newly created bodies declined to an annual average of around 50 until 2009, and to around 20+ in the post-2009 period. There are around 1,000 multinationals with active EWCs, however, there are currently around 2,400 companies eligible to create an EWC.

58 EWCs have been newly established in line with the rules of the Recast Directive since June 2009. France (19%), followed by Sweden (12%) and the US (9%) hosts the largest number and share of Recast EWCs. Comparing to other information and consultation bodies, since June 2009 more EWCs have been created in 'building & woodwork', 'transport', and different service sectors.

The key factors supporting the creation of a new EWC were the need to comply with the legal requirements of the Recast Directive, the presence of company culture supporting worker information and consultation and the supporting national culture of worker information and consultation. The key factors preventing the creation of a new EWC were the lack of awareness of the legal requirements, management resistance, the lack of national culture of worker information and consultation (in the country of headquarters), practical barriers to communication between worker representatives (e.g. language difficulties) and the complexity of company structures which can make it difficult for employee representatives to determine whether an undertaking meets the requirements of the Directive.

Against the baseline situation (2009), on average, the companies with Recast EWCs are smaller in terms of number of employees and the average turnover than the EWCs established under the Article 13 and Article 6 rules. This affects the number of the EWC employee representatives which is smaller in the Recast EWC (16 delegates) than in the EWC operating under Article 13 and Article 6 (23 delegates). Recast EWCs operate a slightly more frequent programme of plenary EWC meetings than other types of EWCs.

In quantitative terms, the Recast Directive has provided some impetus for the renegotiation of existing EWC agreements. 117 Article 13 and Article 6 EWCs agreements have been renegotiated since June 2009. However, an increase was observed in the proportion of EWCs operating under subsidiary rules (i.e. minimum conditions for the EWCs) since the introduction of the Recast directive (but data recording issues might affect the reliability of this finding). It is interesting to note that there were proportionally fewer EWCs negotiated in the transposition period of the Recast Directive compared to the number of EWCs negotiated in the transposition period of the original Directive (e.g. Article 13 agreements). This indicates less inclination on the part of companies to make use of the arguably less specific rules of the previous Directive. This could be explained by the fact that Article 13 provided greater flexibility in the absence of previous EU legislation in this specific field.



### **Recommendation 5**

There is scope to further support the creation of additional EWCs (as not all eligible companies have established EWCs) through the following actions.

More work to publicise the legal entitlements and the potential benefits of EWCs to company and employee representatives (for instance supported by European and national social partner organisations). To undertake such outreach and publicity work, the eligible companies without the EWCs would need to be reached. Currently, there is insufficient knowledge about such companies, although some initiatives to map these exist (e.g. ETUI database) and some European social partners (both cross-sectoral and sectoral) have knowledge of such companies. To address this knowledge gap, further action could be taken, such as updating existing databases of eligible companies without EWCs, involving the ETUI and/or European social partners. The figure of 2,400 potentially eligible companies has been estimated some time ago, but this is a 'moving target' because of significant restructuring processes.

It could also take the form of the establishment and maintenance of a European level contact point for companies/employees which would like to establish EWC and would like assistance, further guidance and signposting to existing legislation and EWC practice. Such contact points could be made public also by the national authorities in each of the Member States. The contact point at the European level could provide continuous support and assistance in the process of the creation of the EWCs (such service could be contracted out to external providers or agencies such as Eurofound entrusted with such task). Such assistance is currently often provided by European social partner organisations, but in some cases they also lack knowledge of all potentially eligible companies and/or the capacity to assist in each case. As an alternative to a contact point, a webpage signposting relevant European sectoral social partner organisations (or relevant national bodies) could also be envisaged, but this have to be linked to a resource for the signposted organisations to deal with any queries.

Exchange of practice (including at HR conferences) between the management of potential and existing EWCs about the work and benefits of existing EWCs should be reinforced.

More examples of EWC operating in small companies should be provided and peer learning between them encouraged by the European Commission through organisation of peer learning events and seminars.

DG EMPL budget lines are available to support projects which could lead to the establishment of EWCs in the set up phase.

#### **9.1.3 Impact on bringing a new impetus to information and consultation processes (see also section 9.1.1 and Recommendation 2)**

The majority of Recast EWC agreements reviewed (73% out of 37) contain definitions of information and consultation in line with the Recast Directive. But five of 37 Recast EWC agreements do not contain any definitions of information and consultation at all. Eight of 37 Recast EWC agreements included specific timing and items for information and consultation on transnational matters in the EWCs, thus going above the definitions contained in the Recast Directive.

The study findings indicate that the impact of the Recast on improving information flow in EWCs has been greater than its impact on improving consultation. Information is considered to be delivered in a timely fashion (e.g. in advance of a decision) in practice in the majority (70%) of cases. Most companies operating under the new rules have not experienced any technical difficulties in providing information to the EWC members.



There appears thus to be a good understanding among employers that EWCs should receive information on transnational matters first, but it does not necessarily mean that this always happens in practice. This is reflected in the answers given by the employee representatives interviewed, which show that around a quarter of EWCs are not informed (and consulted) first in restructuring situations.

The experiences of Recast EWCs in restructuring situations are diverse. They reveal that there are considerable differences among the companies examined in their practices and procedures for informing and consulting EWC members on restructuring plans or decisions. In some cases, EWCs have been able to wield some influence on the implementation of processes of restructuring (rather than actually changing restructuring decisions). This includes being able to delay lay-off or secure better packages for employees affected. Employee representatives continue to perceive in majority of cases that consultation only takes place once decisions have already been taken. The effectiveness of consultation processes depends on factors such as the clear differentiation between the information and consultation phases, the articulation of national and transnational information and consultation processes, the explicit possibility to organise extraordinary EWC meetings, the intensity of supportive relationships between management and staff in the EWC, and to a lesser extent, on the national legislation under which the agreement is enforced. In addition, the existence of strong local / national structures of worker information and consultation can help to ensure the involvement of EWCs in the transnational restructuring situations.

According to most employer and employee representatives, the consultation of EWC members has not led to any changes in the corporate decision-making on transnational matters (nor would it be desired by most national trade unions that the negotiation process is entirely transferred to the EWC level). The consultation of EWC members is however seen as positive by stakeholders to develop a common corporate vision. A number of practical achievements of the EWCs can also be identified, mostly relating to the soft values of better intercompany relations, better information flows and understanding, but also concrete initiatives of Recast EWCs (training to EWC members, framework agreements on specific issues, interventions in restructuring situations).

### **Recommendation 6**

There is scope to consider how to further improve information and consultation processes in EWC.

Sharing best practices and real life examples from existing EWCs on how EWC involvement in the corporate decisions made a positive contribution to the company operation and culture across the EU (this evaluation already identified a number of such examples). This could include information on how to organise and optimally implement information and consultation in specific restructuring situations (e.g. should whole EWC or enhanced steering group – involving affected countries – be involved). Some EWCs have drawn up process plans setting out distinct information and consultation steps which might be of interest to other EWCs (see also Recommendation 2). To achieve this, a series of seminars and peer learning events could be organised in order to share the EWC practices. In such events, the EWC representatives could be invited to share and discuss the examples of their work in improving the EWC information and consultation processes.

A clearer distinction between the information and consultation phases can help EWCs in influencing the decision making, as well as employer willingness to share relevant information. More precise guidance (in the form of very practice-oriented 'how to' guide) on the timing for information provision and the separation of information and consultation processes, based on the legal interpretations of the Recast Directive, the identified court cases and practices of the existing EWCs could be discussed via those

events/documentations.

A majority of Recast EWCs focus 'almost exclusively' on transnational matters. However, there are difficulties in some cases in relation to the interpretation of the notion of transnationality. As indicated above, experiences show that the extent to which EWCs can focus on transnational matters depends on the soundness of the interpretation of the concept and the determination of EWC leadership to keep the discussions to transnational issues. Issues appear to remain in relation to the precise definition of the concept of transnational matters.

### **Recommendation 7**

Despite the further clarification provided on the concept of transnational matters by the Recast Directive, in practice significant uncertainties and tensions remain regarding how this should be interpreted and whether sufficient information is available to employees to query claims by management that certain matters are not transnational. An exchange of practices and guidance on the results of relevant Court cases may be of value in this area. There is thus scope for the European Commission to provide further guidance on practical interpretation of the concept of transnationality based on existing jurisprudence and examples from existing EWCs. The guidance could include a non-binding compendium of examples of the national court decisions with respect to the interpretation of the transnational matters, examples of existing EWC interpretations of transnational matters (drawn for example from EWC agreements and assessments of the implications of such examples for the work of EWCs).

There has been a limited impact of the EWCs on the conclusion and quality of the transnational company agreements. Only a minority of EWCs have concluded such agreements. Also the European social partners interviewed rated the EWC impact in this area as insignificant. Only the national social partners had a slightly more positive view in this respect.

### **Recommendation 8**

Some EWCs play a role in relation to concluding transnational company agreements (although the EWCs do not have such explicit negotiations powers). This EWC role could be further clarified through an explicit reference to such a role in the EWC related legislation to provide legal clarity and certainty on this question.

There has been a significant improvement in ensuring the 'right' to training for the EWC representatives without a loss of salary. The occurrence of this 'right' in the EWC agreements has increased to 93% (from less than a third of the original Article 13 agreements having such a clause). Two-thirds of interviewed Recast EWCs employee representatives confirmed that employees had made use of their right to training without loss of wages. Among those who had requested training, the vast majority (80%) of EWC members noted that there had been no particular challenges in securing the training. However, it is interesting to note that the amount spent on training appears to have declined.

### **Recommendation 9**

The right to training without a loss of wages has been a success of the Recast Directive. As many Recast EWCs are in the early stages of the implementation of their operations, a further review in a few years by the European Commission may be required to assess the implementation of this right in more detail to determine how much and what kind of training has been funded.

European Commission could continue to finance projects with joint training for EWC members, especially coming from smaller (in terms of turnover) companies (see also

Recommendation 2).

The majority of respondents stated that the financial crisis had not really affected the Recast EWCs. In those cases where the economic context affected the work of the EWC, the management openly discussed the financial concerns of the company and asked the EWC members to respect some cost-cutting measures during the difficult times.

**9.2 Conclusions on the efficiency of the Directive (How did the new rules affect the costs and benefits for workers and for companies? Have the new rules simplified the administrative burden? If yes, how and why?)**

The quantifiable costs of the set-up of EWCs have declined when compared to the experience of Article 6 agreements under Directive 94/45/EC (from EUR 143,537 to EUR 119,207). These lower costs primarily result from the fact that fewer meetings were held with fewer representatives (and therefore associated meeting costs) – albeit over a longer period of time – in regard to EWCs established under the Recast Directive. This is linked to the size of companies negotiating new agreements rather than the new provisions of the Recast Directive.

Costs in the operation of Recast EWCs are similar to the EWCs established under Directive 94/45/EC and the main problems of the effective implementation of consultation in particular remain. Not much has changed in terms of EWCs influencing the company decisions on transnational matters, despite a greater legal clarity on these concepts. The total cost of a Recast EWC per year is EUR 240,000 (fixed costs + employee time) or 0.009% of the company turnover. This cost needs to be considered against the continuing challenges of most Recast EWCs to have a tangible impact on company decisions in relation to transnational matters.

Two thirds of employee side representatives in Recast EWC have accessed training. The right established by the Recast is considered to be beneficial but its impact on actual training received is difficult to assess as many EWCs are early in their period of establishment. Interestingly, the training costs reported by Recast EWCs are significantly lower than those measured among EWCs established under Article 6. This could partly be due to the fact that 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.

Employee and employer representatives (employee representatives to a greater extent) are positive about the benefits of their EWC. However, it is notable that the perceived benefits of having an EWC decreased among companies with the Recast EWC compared to EWCs established under Directive 94/45/EC. The highest decrease in perceived value of EWCs is in relation to their ability to affect the impact of restructuring situations on employees and their effectiveness in the exchange of information.

At the same time, the perception of costs also seems to have decreased, especially in the eyes of employers. Notable was a reduction in the employers' perceptions of the EWCs raising employee expectations in an unrealistic manner. Employers also considered EWCs less costly in terms of the EWCs leading to calls for transnational collective bargaining, and introducing unnecessary rigidities into employee and management relations.

**Recommendation 10**

Identified practices on how to maximise benefits and minimise costs should be more widely shared between the EWCs. These include:

- Exchange of good practice on the role, rights and duties of the EWC members

as suggested in previous recommendations to maximise the potential value of EWCs.

- The existing EWCs exploring effective ways in reducing meeting costs without undermining the benefits of face to face meetings and the ability to communicate with representatives from all different countries by learning from the experience of existing EWCs (e.g. on cost of different venues, potential to use telephone or videoconferences for certain types of meetings such as more regular steering groups; cost of language training versus cost of interpretation/translation etc.)



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