Chipping away at workers' participation rights

Introduction

European legislators, practitioners, and the courts have developed an approach to workers’ participation which is capable of accommodating a rich diversity of tradition. This integrative and innovative process is far from complete, and recent years have been marked by some worrying setbacks. This chapter takes stock of workers’ rights to information, consultation and board-level employee representation at both the national and transnational levels.

A review of over 40 years of legislation reminds us of the long legacy of information and consultation rights which has been enshrined in successive European employment law, company law, and health and safety legislation. However, recent crisis-induced changes in labour law have been undermining this legacy; the European Commission’s announced deregulation programmes threaten to further weaken workers’ rights, particularly in smaller companies which, already today, often fail to benefit from adequate participation structures. Strategies pursued by multinational corporations increasingly challenge workers’ representatives to coordinate their activities across borders. This year’s analysis of transnational information and consultation rights systematically integrates, for the first time, the analysis of SE Works Councils (SEWCs) into the ETUI’s longstanding analysis of European Works Councils (EWCs). Our examination of the sanctions provided for in the implementation of the Recast EWC Directive underscores the already vexing question of EWCs’ unequal access to justice. We map board-level employee participation in the EU and outline recent changes in national legislation. Turning to the transnational level, the chapter shows how the European Company (SE) and the application of the cross-border mergers Directive have opened up new arenas for cross-border cooperation and coordination amongst employee representatives. Finally, in a review of recent company law, we point out how the potential contribution of a stakeholder-orientation has been left underdeveloped.
Chipping away at workers’ participation rights

Information and consultation rights

Judging by the sheer amount and breadth of legislation on information and consultation rights, the involvement of employees clearly amounts to a long-standing European consensus. After all, these rights predate the EU in many of its member states, and this legacy has been successively taken up and expanded in European legislation since the 1970s. Moreover, the European Court of Justice has played a key role in developing a comprehensive and coherent body of case law, thereby filling at least some of the gaps left by European legislation.

As illustrated in Figure 7.1, the past four decades have seen an impressive proliferation of legislation harmonising information and consultation rights across Europe.

As early as the mid-1970s, EU company law established the right of employees or their representatives to be informed and consulted in the event of a transfer of undertakings or collective redundancies.

The collective redundancies Directive was amended in the late 1990s, and in 1994 over a quarter century of debate about the feasibility and desirability of transnational information and consultation rights culminated in the adoption of the European Works Councils Directive. 1991 saw collective information and consultation rights enshrined for the first time in labour law, included under the employer’s obligation to inform employees of the conditions applicable to the contract or employment relationship. Altogether, between 1989 and 1993 no fewer than 14 Directives were adopted in the area of health and safety legislation, most of them spawned by the groundbreaking 1989 Framework Directive on Health and Safety. In this period, two framework agreements in the area of Health and Safety were signed by the European Social Partners as well. Clearly there is a consensus that workers’ involvement is crucial to ensure the success of occupational health and safety.

New Directives passed at the end of the 1990s included information and consultation rights in European labour law regulating part-time and fixed-term work; it was in 2002 that the General Framework for informing and consulting workers at last laid down a minimum standard for workers’ involvement at company level across the EU.

Company law designed to increase company mobility, such as the European Company Statute and the European Cooperative Society, provided for new institutions for transnational information and consultation and even board-level participation rights. The revised transfer of undertakings Directive and the takeover bids Directive also affirmed the long-standing right of employees to be informed and consulted at key milestones of the company’s existence. In this period, five further health and safety Directives on exposure to specific risks, which included information and consultation rights, were adopted.

The current decade starting in 2005 has seen something of a slowdown in legislative activity. The Directive on temporary and agency work, which implements a Social Partner agreement, includes information and consultation rights, as do two health and safety Directives adopted during this period. Company law on cross-border mergers and the Recast EWC Directive of 2009 include provisions on information and consultation.

Whether in the area of company law, labour law, or health and safety legislation, this clearly demonstrates that the relevance and importance of workers’ voice is broadly recognised in Europe.

However, despite the existence of an extensive body of legislation, information and consultation rights remain

---

**Figure 7.1** Forty years of EU legislation on information and consultation

1975-1985
- Transfer of undertakings
- Collective redundancies
- Health & safety
- Labour law
- Company law

1985-1995
- European Works Councils
- Framework Directives
- Health & safety
- Manual handling
- Workplace
- Carcinogens
- Manual handling
- Mobile construction sites
- Health & Safety
- Pregnant workers
- Safety and health signs
- Personal protective equipment
- Noise
- Manual handling of loads
- Health and Safety
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
- European Social Partners
Information and consultation rights

During the ongoing crisis, recent labour law reforms and reforms of collective bargaining systems have served to undermine information and consultation rights. In particular, crisis-induced labour law reforms of collective redundancy procedures have taken their toll on information and consultation rights. In Spain, for example, the labour law reforms of 2010 and 2012 drastically simplified and reduced the period of consultation of workers’ representatives in the event of collective redundancy. This clearly contravenes provisions of the 1998 collective redundancies Directive which explicitly emphasise the need for quality consultation and hence the fact that adequate time is required for a well-informed consultation. A shortening of the procedure places the emphasis on making workers redundant as quickly as possible, rather than on facilitating qualitative solutions, such as alternatives to collective redundancy or accompanying social measures that might include redeployment or retraining. This position was confirmed by a judgement of the Spanish Supreme court in the Talleres López Gallego case of 20 March 2013, which also emphasised that adequate consultation procedure takes time and that mass redundancies require proper information and consultation of workers with a view to developing an appropriate social plan.

In 2011, six trade unions brought Hungary’s draft labour code before the ILO for review, claiming that it failed to comply with international labour standards. The labour code vaguely mentioned that collective redundancies could be justified by ‘employers’ operations’, whereas ILO Convention 158 and Recommendation 166 specify that collective redundancies can be justified only by ‘reasons of an economic, technological, structural or similar nature’. The ILO, in its response, reaffirmed that, in the context of information and consultation procedures, the employer must give specific reasons for collective redundancies (ILO 2011).

Reforms adopted in France on 14 May 2013 undermine the rights enjoyed by workers in the event of collective redundancy by allowing the conclusion, in severely ailing companies, of individual job security agreements whereby the employer agrees not to dismiss the employee for the duration of the collective agreement (at most two years). The worker, in return, agrees to changes in his/her working time and remuneration, thereby modifying the individual contract of employment. Redundancy is in this way turned into an individual measure, thereby quite obviously circumventing the collective redundancies Directive.

In the United Kingdom, the revised implementation of the EU collective redundancies and transfer of undertakings Directives allows consultations by the new employer that took place prior to the actual transfer to count for the purposes of subsequent collective redundancy consultation. This means that any pre-transfer consultation will be part of the 30- or 45-day collective consultation period compulsory under UK law on collective redundancies, thereby substantially reducing the information and consultation obligations of the new employer.

Slowly but surely, a 40-year legacy of workers’ rights is being torn to shreds. Its repair is a matter of urgency.
The European Commission’s longstanding deregulatory approach towards EU social legislation has recently gathered pace (see timeline in Figure 7.2). In 2010, the Fitness Check programme was piloted in the field of employment and social affairs; three Directives which contained (rather different) provisions on information and consultation were placed under scrutiny: collective redundancies, transfers of undertakings, and the framework Directive on information and consultation.

The Fitness Check aimed to identify excessive administrative burdens, overlaps, gaps, inconsistencies and/or obsolete measures; it also sought to assess the cumulative impact of legislation, using a highly controversial methodology based on a cost/benefit analysis. The findings, which were intended to provide a basis for drawing policy conclusions, clearly state that those three EU Directives on information and consultation are broadly fit for their purpose, i.e. are deemed generally relevant, effective, coherent and mutually reinforcing. The benefits they generate are likely to outweigh the costs.

At the same time, the analysis did identify some important shortcomings in the actual implementation of the legislation at national level. The study concluded, however, that ‘it may be more opportune to pursue non-legislative action at national level to improve the practical effectiveness of the existing I&C legislation’ (Deloitte final report of July 2012).

Turning to its latest initiative, the European Commission adopted the ‘Refit – Fit For Growth’ or ‘Regulatory Fitness and Performance Programme’ in August 2013 (European Commission 2013: 685). As part of its competitiveness-boosting plans, the European Commission intends to screen, repeal or withdraw legislation – in particular in the social field – that it deems no longer ‘fit for purpose’. Despite the fact that the Fitness Check unequivocally concluded that no legislative action was required on these particular information and consultation Directives, the European Commission apparently still sees a need for further examination and discussion of their scope and operation; this may lead to a proposal to consolidate them—following a consultation of the European social partners (European Commission 2013: 293).

However, it is doubtful whether these three Directives even lend themselves to consolidation, since not only does each Directive have a different legal basis (and thus different legislative procedures and competences) but also each is a piece of legislation dealing with a highly specific situation hardly lending itself to generalisation without losing the specificity of its provisions in terms of definition, scope and impact.

In addition to these three Directives, the Refit programme also covers a staggering range of other Directives dealing directly or indirectly with information and consultation rights. Alongside eight company law Directives, the Commission plans to evaluate labour law legislation on the information obligations for employers in relation to employment contracts, as well as on temporary agency work, part-time work and fixed-term work. Finally, the 1989 Framework Directive on health and safety and its more than 20 related Directives are also to be examined in the Refit programme.

Such large-scale and fundamental initiatives put massive pressure on workers’ information and consultation rights. What is particularly worrying is the risk that rights will be eroded across the board for small and medium-sized companies and workers’ participation rights (see Figure 7.3). Far from improving existing information and consultation rights, the Refit approach weakens workers’ rights to involvement in the improvement of working conditions and in health and safety protection; it diminishes their ability to contribute to safeguarding jobs and ensuring the development of tailor-made social measures at the company level.

Fitness Check and Refit: just more buzzwords?

The European Commission’s longstanding deregulatory approach towards EU social legislation has recently gathered pace (see timeline in Figure 7.2).

In 2010, the Fitness Check programme was piloted in the field of employment and social affairs; three Directives which contained (rather different) provisions on information and consultation were placed under scrutiny: collective redundancies, transfers of undertakings, and the framework Directive on information and consultation.

The Fitness Check aimed to identify excessive administrative burdens, overlaps, gaps, inconsistencies and/or obsolete measures; it also sought to assess the cumulative impact of legislation, using a highly controversial methodology based on a cost/benefit analysis. The findings, which were intended to provide a basis for drawing policy conclusions, clearly state that those three EU Directives on information and consultation are broadly fit for their purpose, i.e. are deemed generally relevant, effective, coherent and mutually reinforcing. The benefits they generate are likely to outweigh the costs.

At the same time, the analysis did identify some important shortcomings in the actual implementation of the legislation at national level. The study concluded, however, that ‘it may be more opportune to pursue non-legislative action at national level to improve the practical effectiveness of the existing I&C legislation’ (Deloitte final report of July 2012).

Turning to its latest initiative, the European Commission adopted the ‘Refit – Fit For Growth’ or ‘Regulatory Fitness and Performance Programme’ in August 2013 (European Commission 2013: 685). As part of its competitiveness-boosting plans, the European Commission intends to screen, repeal or withdraw legislation – in particular in the social field – that it deems no longer ‘fit for purpose’. Despite the fact that the Fitness Check unequivocally concluded that no legislative action was required on these particular information and consultation Directives, the European Commission apparently still sees a need for further examination and discussion of their scope and operation; this may lead to a proposal to consolidate them—following a consultation of the European social partners (European Commission 2013: 293).

However, it is doubtful whether these three Directives even lend themselves to consolidation, since not only does each Directive have a different legal basis (and thus different legislative procedures and competences) but also each is a piece of legislation dealing with a highly specific situation hardly lending itself to generalisation without losing the specificity of its provisions in terms of definition, scope and impact.

In addition to these three Directives, the Refit programme also covers a staggering range of other Directives dealing directly or indirectly with information and consultation rights. Alongside eight company law Directives, the Commission plans to evaluate labour law legislation on the information obligations for employers in relation to employment contracts, as well as on temporary agency work, part-time work and fixed-term work. Finally, the 1989 Framework Directive on health and safety and its more than 20 related Directives are also to be examined in the Refit programme.

Such large-scale and fundamental initiatives put massive pressure on workers’ information and consultation rights. What is particularly worrying is the risk that rights will be eroded across the board for small and medium-sized companies and workers’ participation rights (see Figure 7.3). Far from improving existing information and consultation rights, the Refit approach weakens workers’ rights to involvement in the improvement of working conditions and in health and safety protection; it diminishes their ability to contribute to safeguarding jobs and ensuring the development of tailor-made social measures at the company level.
In its Fitness Check and Regulatory Fitness and Performance Programme (REFIT), the European Commission targets small and medium-sized firms as particularly in need of relief from bureaucracy and administrative burdens. For anyone thinking that this would affect only a handful of companies and a fraction of the total European workforce, a look at the numbers may prompt a precautionary jolt: as shown in Figure 7.3, between 53 and 82% of the European workforce is employed in small and medium-sized enterprises.

It is equally important to realize that large multinational companies (MNCs) shape employment systems in many of these value chains (see Lakhani et al. 2013). At the same time, the coverage of smaller workplaces by workers’ representation structures is patchy at best. As can be seen in Figure 7.3, whether or not the workforces of small and medium-sized enterprises are in a position to benefit from an institutionalised form of employee representation varies widely by country, ranging from below 3% to over 90% coverage (Riedmann et al. 2009: 51).

In nine member states, workers’ representation structures were in place in just under 40% of workplaces employing between 50 and 199 employees. The picture for small enterprises, i.e., those employing between 10 and 49 employees, is even more fragmented: in 17 member states, no more than a third of such workplaces reported the presence of some form of worker representation. Even where representation structures do exist, research has found that even the most basic information rights are often flaunted. Despite the stipulations of the 2002 information and consultation Directive, between 20 and 26% of employees in SMEs (10-199 employees) reported that they did not receive from the employer basic annual information on economic, financial or employment issues. In cases where information was received, between 24 and 34% of SME employee representatives report that it was not timely and between 19 and 26% that it was insufficiently detailed for its purpose (Riedmann et al. 2009: 51-52).

Are SMEs falling through the cracks?

In its Fitness Check and Regulatory Fitness and Performance Programme (REFIT), the European Commission targets small and medium-sized firms as particularly in need of relief from bureaucracy and administrative burdens. For anyone thinking that this would affect only a handful of companies and a fraction of the total European workforce, a look at the numbers may prompt a precautionary jolt: as shown in Figure 7.3, between 53 and 82% of the European workforce is employed in small and medium-sized enterprises.

It is equally important to realize that large multinational companies (MNCs) shape employment systems in many of these value chains (see Lakhani et al. 2013). At the same time, the coverage of smaller workplaces by workers’ representation structures is patchy at best. As can be seen in Figure 7.3, whether or not the workforces of small and medium-sized enterprises are in a position to benefit from an institutionalised form of employee representation varies widely by country, ranging from below 3% to over 90% coverage (Riedmann et al. 2009: 51).

In nine member states, workers’ representation structures were in place in just under 40% of workplaces employing between 50 and 199 employees. The picture for small enterprises, i.e., those employing between 10 and 49 employees, is even more fragmented: in 17 member states, no more than a third of such workplaces reported the presence of some form of worker representation. Even where representation structures do exist, research has found that even the most basic information rights are often flaunted. Despite the stipulations of the 2002 information and consultation Directive, between 20 and 26% of employees in SMEs (10-199 employees) reported that they did not receive from the employer basic annual information on economic, financial or employment issues. In cases where information was received, between 24 and 34% of SME employee representatives report that it was not timely and between 19 and 26% that it was insufficiently detailed for its purpose (Riedmann et al. 2009: 51-52).

Bearing in mind that MNCs may in fact amount to a loose family of SMEs distributed across several countries, it is apparent that, even if the Commission’s deregulation initiatives actually target SMEs alone, workers’ rights in MNCs are in fact equally threatened.

If 60% of workplaces employing between 50 and 199 employees have no institutionalised workers’ representation, and only one in three employees in enterprises employing between 10 and 49 employees can rely upon the support of such representation, this is an alarming state of affairs indeed. If already the most elementary rights to information are not being met, this raises in earnest the question of what more damage will be inflicted by the European Commission’s REFIT agenda.
The prolonged depression in the EU has been reflected in companies’ strategic decisions. While SMEs were constrained by the lack of credit ensuing from the prolonged malaise in the banking sector, many European multinational companies (MNCs) reacted to uncertainties about future demand by either pursuing wait-and-see strategies or already heavily divesting their assets by way of precaution.

Low levels of net FDI inflows and outflows reflect divestment decisions by European, North American, and Japanese MNCs. Many MNCs in Europe, choosing a strategy of focusing on core business and geographical areas, disposed of non-core businesses and assets. Re-shoring and relocation of foreign affiliates have become important elements of this divestment strategy, which has in turn contributed to a drop in the number of mergers and acquisitions in 2009-2012 (UNCTAD 2013).

MNCs in Europe and other developed regions thus slowed internationalisation by reducing their assets (both total and foreign). These short-term responses should be assessed in the context of longer-term restructuring trends. Technological change and institutional reforms initially allowed – and provided incentives for – the pursuit of Europe-wide production and market strategies. Internal resource constraints subsequently represented incentives to focus on core competencies, hence to restructure and shed activities (e.g. Meyer 2006).

These very factors are also likely to lead to a concentration of decision-making in headquarters, or to the increasing influence of company headquarters on decisions about what were once traditionally seen as matters best left to the subsidiaries.

Two trends are particularly worth highlighting. First, firms across sectors have increasingly unbundled their corporate functions. Business support activities, such as human resource management (HRM) and accounting, can thus be segmented and centralised. This in turn implies that key make-or-buy decisions are also made about corporate functions, thereby potentially also facilitating the outsourcing of business support activities.

At the same time, HRM integration remains problematic, as trade unions and other local actors are often able to prevent attempts at HRM in centralisation (Cooke 2007). Furthermore, decisions about subsidiaries’ market position, such as links with suppliers and customers, are increasingly centralised. This may prompt companies to concentrate decisions about developing local resources and skills, which is a key concern for unions at the local level. In this way, the significance of the centralised MNC level vis-à-vis the subsidiary level in shaping business strategy is simultaneously shifting and growing. In some cases, subsidiary management may be left without any discretion on business strategy.

This in turn raises important questions for EWCs and SEWCs as well as board-level employee representatives. As decision-making about such a wide range of internal processes becomes centralised and/or fragmented, local employee representatives have ever less with which to engage. At the same time, employee representatives at the European level continue to encounter difficulties in ensuring compliance with their right to transnational information and consultation.
Transnational information and consultation

EWC and SEWC: two of a kind

The right to transnational information and consultation was introduced by the EU to equip employee representatives to address the realities of multinational enterprises operating on a European scale. Just as companies are becoming more genuinely transnational in their organisation, processes and hierarchies, so should the information and consultation of employees keep pace with this development.

After nearly a quarter century of intermittent debate, the first EU legislation establishing a basis for transnational information and consultation as the essential European counterpart to national-level workers’ participation was the European Works Councils (EWC) Directive adopted in 1994. The passage of the EWC Directive sparked off an unprecedented wave of creation of EWCs: by the end of 1996 at least 522 of these bodies had been established, 399 of which were set up in 1996 alone (ETUI database of EWCs, see www.ewcdb.eu). The sheer numbers proved the pressing need for a genuinely transnational body for the implementation of information and consultation rights – and also proved beyond a doubt that decades of relying solely on companies’ willingness to negotiate had obviously led to nothing but an enormous backlog.

It should therefore have come as no surprise that when the first Community-wide corporate form – the European Company (SE) – was being developed, the need for an analogous body for transnational information and consultation rights would be perceived as indispensable. This is the SE-Representative Body foreseen in the standard rules, referred to here as the SEWC.

Both bodies for cross-border information and consultation of workers draw upon the same basic model: a transnational works council comprises employee representatives who are elected or nominated by the national workforces or their representatives. As the collective interest representation of the European workforce, EWCs and SEWCs meet with company management, are provided with information, and formulate opinions that are to be taken into account in the company’s decision-making process.

When the SE Directive 2001/86/EC was adopted, it contained some significant improvements over the EWC Directive of 1994. Clearly policy makers had learned their lessons from the early experiences with the EWC Directive, and laudably tried to fill at least a few gaps. Most importantly, for example, the definitions of information and consultation rights were more extensive and precise than they had been in the 1994 EWC regulations. The mutually reinforcing effect of the two Directives (Jagodziński 2012) was seen again in 2009, when the EWC Recast Directive was adopted; the new EWC legislation closed some of the gaps between SEWCs and EWCs. Indeed, it is one of the most marked features of this particular legislative field that the decades-old harmonising dilemma has been solved by procedural innovations: in this case, the primacy of negotiations backed up by the default application of increasingly robust rules. Where the harsh light of practice revealed that provisions were insufficient, they were – at least in part – strengthened at the next opportunity in a sort of legislative leapfrog from one Directive to the other.

Interestingly, however, the first proposals put forward to the social partners about a possible revision of the SE Directive contained rather few references to the Recast EWC Directive. This suggests that the hitherto rather positive – if only gradual – leapfrogging learning effect is not to be actively pursued in the future, presumably under the pressure of the deregulatory philosophy in the field of EU labour legislation (see Figure 7.2).
Despite the fact that EWCs and SEWCs share a basic legislative model of negotiating with the safety net of fallback provisions, the rules of the game of negotiated solutions are quite different for EWCs and SEWCs; the specific conditions of SEWC negotiations could be expected to result in qualitatively better outcomes than do EWC negotiations. Firstly, past analysis has shown that the fallback positions have a strong impact on the text of agreements (ETUC and ETUI 2013). It would therefore be reasonable to expect that SEWC Agreements would, across the board, reflect the more advanced and detailed fallback provisions contained in the SE legislation. Secondly, the trade unions were able to draw upon a long history of multinational negotiations based on the EWC Directive. After all, by 2001 an established EWC standard had already been de facto in place. Thirdly, SEWC negotiations were always initiated by the employer, rather than the employee side, and the employer had a clear interest in a rapid and smooth completion of the negotiations. This, together with the assumption that in many cases more attention was paid to the more contentious subject of board-level employee representation than to transnational information and consultation, would lead one to assume a better outcome to the SEWC negotiations.

The ETUI’s analysis of EWC and SEWC agreements sheds new light on the matter. To measure the quality of agreements, the points system developed by ETUI in 2013, which awards scores to individual agreements, was used. Available EWC and SEWC agreements were analysed according to identical criteria (see Figure 7.6). In order to account for the substantial difference in sample size between EWCs and SE Works Councils, the points system was complemented by a calculation of a standard deviation indicator, which shows the spread of values for both types of agreement: the higher the standard deviation value, the greater the spread between high and low scores, and hence the greater the variation in the quality of the provisions.

Overall, we found an almost identical scope and quality of information and consultation competences and basic facilities in EWCs and SEWCs. Contrary to expectations, the average scores for EWC agreements in both periods were slightly higher than those attained by SEWCs. On the other hand, the concentration of agreements around the average (the standard deviation value) was very similar for both types of agreement; indeed, the evolutionary patterns observed for both types of agreement are strikingly similar as well. Both types of transnational worker representation bodies have followed similar development patterns. They started with more diverse agreements, which were more broadly spread across the range (i.e. more agreements at the bottom and/or top end of our quality scale), and have gravitated over time towards more homogeneity, i.e. have become more standardised and close to what is considered the standard (average) practice. With regard to the latter, the EWCs have clearly benefitted from a great learning experience, while the SE-inspired recast of the EWC Directive in 2009 also made a strong impact (See also the next section).
Despite the similar character and quality of provisions of EWC and SE Works Council agreements (see previous page), the latter display, in some respects, better quality than the former. While EWC agreements provide, more frequently than SEWC agreements, for training opportunities for their members (Figure 7.7), it is the SEWC agreements which display more innovations and higher standards than the EWC agreements. SEWC agreements tend to slightly redefine and even expand the role of the SEWC. For example, individual SEWCs are by agreement entitled to 'give opinion/comment', 'initiate projects', 'make recommendations', engage in 'negotiations', and aim to 'reach consensus' far more frequently than are EWCs.

The analysed SEWC agreements consistently provide for more frequent plenary meetings per year than do EWC agreements. 47% of SEWC agreements signed in 2001-2008 and 62% of SEWC agreements signed since 2009 provide for more than one annual meeting, compared to 14% of EWC agreements signed in 2001-2008 and 40% of EWC agreements signed since 2009.

Not surprisingly, SEWC agreements contain more precise and extensive definitions of information and consultation than do the pre-2009 EWC agreements. 81 SEWC agreements have by and large taken on the definitions laid down in the SE legislation, compared to 55 cases, i.e. 4.1% of pre-2009 EWC agreements. This is, of course, not surprising: since the 1994 EWC Directive contained no robust definitions – an omission repaired by the later Recast – so one can hardly expect contemporary negotiators to have included them. Indeed, that gap has been quickly filled in practice: it is striking that the number of EWC agreements signed since 2009 which take up the Recast EWC Directive’s definition of information and consultation has almost doubled to reach 103 cases, i.e. 57% of all EWC agreements. This rise in the quality of definitions of the core EWC competences demonstrates the remarkable influence of both the revised EWC legislation and, indirectly, the SE Directive and the signed SEWC agreements.

Interpretation and translation facilities are explicitly provided for in all SEWC agreements analysed. By contrast, only 63% (i.e. 950 of 1498) of EWC agreements provide for interpretation and/or translation during plenary meetings. However, it must be noted here that the sample of EWC agreements includes very early agreements, in which the provision of interpretation was not necessarily laid down in the agreements, but was practised nonetheless.

SEWC agreements are marked by less stringent confidentiality rules (or more permissive derogations from confidentiality obligations), thereby allowing EWC members to communicate effectively with national-level representation and supervisory board members. Clearly, the influence of German legislation (there are currently 66 SEWCs in German companies) on confidentiality has had a decisive impact on this issue. A growing number of EWC agreements, however, have been copying this solution from the SE arrangements since 2001.

While some deficiencies persist, the quality of EWC agreements has been consistently rising. This finding corroborates the 2013 analysis (ETUC and ETUI 2013: 101-102). All in all, however, with direct and indirect (via the 2009 Recast EWC Directive) feedback and influence of SE legislation, EWC agreements rose to the same levels in terms of quality as SEWC agreements, and have gradually surpassed them, at least as far as contractual guarantees (but not necessarily practice) are concerned.

**EWCs vs. SEWCs: similar yet different**

Despite the similar character and quality of provisions of EWC and SE Works Council agreements (see previous page), the latter display, in some respects, better quality than the former. While EWC agreements provide, more frequently than SEWC agreements, for training opportunities for their members (Figure 7.7), it is the SEWC agreements which display more innovations and higher standards than the EWC agreements.

SEWC agreements tend to slightly redefine and even expand the role of the SEWC. For example, individual SEWCs are by agreement entitled to 'give opinion/comment', 'initiate projects', 'make recommendations', engage in 'negotiations', and aim to 'reach consensus' far more frequently than are EWCs.

The analysed SEWC agreements consistently provide for more frequent plenary meetings per year than do EWC agreements. 47% of SEWC agreements signed in 2001-2008 and 62% of SEWC agreements signed since 2009 provide for more than one annual meeting, compared to 14% of EWC agreements signed in 2001-2008 and 40% of EWC agreements signed since 2009.

Not surprisingly, SEWC agreements contain more precise and extensive definitions of information and consultation than do the pre-2009 EWC agreements. 81 SEWC agreements have by and large taken on the definitions laid down in the SE legislation, compared to 55 cases, i.e. 4.1% of pre-2009 EWC agreements. This is, of course, not surprising: since the 1994 EWC Directive contained no robust definitions – an omission repaired by the later Recast – so one can hardly expect contemporary negotiators to have included them. Indeed, that gap has been quickly filled in practice: it is striking that the number of EWC agreements signed since 2009 which take up the Recast EWC Directive’s definition of information and consultation has almost doubled to reach 103 cases, i.e. 57% of all EWC agreements. This rise in the quality of definitions of the core EWC competences demonstrates the remarkable influence of both the revised EWC legislation and, indirectly, the SE Directive and the signed SEWC agreements.

Interpretation and translation facilities are explicitly provided for in all SEWC agreements analysed. By contrast, only 63% (i.e. 950 of 1498) of EWC agreements provide for interpretation and/or translation during plenary meetings. However, it must be noted here that the sample of EWC agreements includes very early agreements, in which the provision of interpretation was not necessarily laid down in the agreements, but was practised nonetheless.

SEWC agreements are marked by less stringent confidentiality rules (or more permissive derogations from confidentiality obligations), thereby allowing EWC members to communicate effectively with national-level representation and supervisory board members. Clearly, the influence of German legislation (there are currently 66 SEWCs in German companies) on confidentiality has had a decisive impact on this issue. A growing number of EWC agreements, however, have been copying this solution from the SE arrangements since 2001.

While some deficiencies persist, the quality of EWC agreements has been consistently rising. This finding corroborates the 2013 analysis (ETUC and ETUI 2013: 101-102). All in all, however, with direct and indirect (via the 2009 Recast EWC Directive) feedback and influence of SE legislation, EWC agreements rose to the same levels in terms of quality as SEWC agreements, and have gradually surpassed them, at least as far as contractual guarantees (but not necessarily practice) are concerned.
Transnational information and consultation

Figure 7.8 Ratios of renegotiated to new European Works Council agreements


Negotiations and renegotiations

Recital 7 of the Recast EWC Directive indicates that one of the goals of the new EWC legislation is to increase the proportion of European Works Councils established. Provisions to this end in the Recast EWC Directive include more precise obligations on employers to provide data on workforce distribution, and the obligation to inform social partners at the European level about the launch of negotiations (see also Jagodziński 2009).

Has the Recast EWC Directive, in the nearly five years since its adoption and nearly three years since its entry into force at national level, really boosted the number of newly created EWCs and agreements? Figure 7.8 shows how the number of newly established EWCs as well as renegotiated agreements.

The data shows that, despite the improved legal basis, the number of EWCs has not yet grown significantly. For several reasons, it may simply be too soon to expect a surge in numbers. Firstly, most trade unions warned against signing EWC agreements during the transposition period (May 2009 to June 2011), in order to avoid being covered forever by the old EWC legislation. Having slowed down the negotiating machinery, it has taken a bit of time to get it moving again. Secondly, the impact of the crisis and the ensuing restructuring initiatives pursued in many companies has deflected attention from institution building. Thirdly, it should be borne in mind that, because in most cases full use has been made of the three-year window for negotiation, there is a corresponding three-year time lag before any trend in initiating negotiations actually translates into signed agreements.

Indeed, some European Trade Union Federations (ETUFs) report higher than pre-2009 rates of request for new negotiations. However, with most of the largest companies already covered, new negotiation initiatives are currently being launched increasingly often in smaller companies (ca. 10,000 employees and fewer) where, for a number of reasons, negotiating conditions are often less favourable than in large companies. For example, the individual sites are usually smaller, employing perhaps only a few hundred people or less. This often means that the negotiators are less able to rely on the existence of a stable trade union network to support and coordinate EWC negotiations across sites. Furthermore, the company culture within medium-sized companies tends to be far more informal, so there is often less acceptance of what is perceived as overly formalised and expensive transnational negotiations which culminate in an actual written agreement.

Furthermore, several authors have pointed to other reasons why negotiations in companies have been slow to be launched: obstruction by management, inadequate and imprecise definitions, the absence of appropriate sanctions, lack of transparency on employee figures, and the lack of a company register at the EU level (Jagodziński et al. 2008; Whittall et al. 2008).

At the same time, recent years have seen a steady increase in renegotiation activities; today just over half of the negotiations are actually renegotiations. This demonstrates that employee representatives and trade unions are keen to build upon experience and make active use of their improved legal rights.
Transnational information and consultation

No conflicts — or just no access to justice?

One of the stated goals of the the Recast EWC Directive is to ‘resolve the problems encountered in the practical application of Directive 94/45/EC and remedy the lack of legal certainty resulting from some of its provisions or the absence of certain provisions’ (Recital 7, EWCD). The improved definitions of information and consultation are certainly important, if insufficient, steps towards this goal, as are a range of other improvements and clarifications. One other improvement of the EWC Recast Directive is the recognition of the obligation to equip EWCs with ‘the means required to apply duties arising from’ the Directive, and the recognition of the mandate of the EWC to ‘represent collectively the interests of the employees’ (Art. 10.1).

Clearly, these provisions also require the member states to provide EWCs with effective access to justice in case of conflict. Unfortunately, the national legislation implementing the Recast Directive largely fails in this regard. In terms of enforcement, apart from obliging the member states to provide for ‘effective, proportionate and dissuasive’ sanctions (Recital 36), the Directive goes no further in specifying member states’ obligations.

Furthermore, the evidence shows that the quality of EWC and SEWC agreements is steadily improving: agreements are increasingly more specific and coherent. EWCs and SEWCs have reason to be more self-confident, since both the wording of the Recast Directive and the debates held at the time of its adoption made clear that the EWC was to be an institution to be reckoned with. It has an explicit mandate to serve as the collective interest representation of the European workforce; it has the right to timely, topical and exhaustive information and consultation; and its deliberations are to be explicitly linked with the work of employee representation taking place at the national or local level.

At the same time, responses to the economic crisis have increased the pace and scope of restructuring within companies. Fuelled by their increased confidence in the purpose of the EWC, more and more EWCs are defending their companies. Fuelled by their increased confidence in the purpose of the EWC, more and more EWCs are defending their rights in court. The ETUI data on EWC-related litigation has revealed at least eleven court cases and judgments which have been initiated and/or completed since the adoption of the Recast EWC Directive in May 2009.

However, it must be noted that this number reflects only those conflicts in which the EWC found the resources and support of trade unions to initiate litigation, and in which the legal admissibility of the case was at least fairly clear. Anecdotal evidence strongly suggests that there are many more conflicts that, despite their gravity, did not make it to courtrooms, simply for lack of legal certainty and resources, both political and legal.

As a forthcoming ETUI study on enforcement provisions in EWC legislation shows, the member states have failed to address this issue with any rigour or consistency (Jagodzinski 2014 forthcoming). Most member states took no steps to adjust their existing provisions in order to ensure that EWCs have the necessary resources, such as legal standing and/or the capacity to act in court. The latter is an obvious prerequisite to accessing justice; it would seem that, in as many as nine member states (BG, CY, CZ, HU, IT, LU, MT, PT and SL), EWCs are deprived of any form of legal personality or similar conception that would enable them to take a complaint to a court of law.

Since the effectiveness of the EWCs hinges on their legal certainty and access to justice, it is essential that the European Commission carefully scrutinise implementation of these provisions of the Recast EWC Directive.

Figure 7.9 Minimum and maximum fines for breach of EWC regulations before and after implementation of directive 2009/38/EC in selected EU member states (eur) (1)

Note: ‘other’ refers to legislation other than EWC transposition.
The Recast EWC Directive requires the member states to provide for ‘dissuasive, effective and proportionate’ sanctions to apply in the event of infringement against the obligations laid down in the Directive. At least two questions are raised with regard to sanctions: firstly, how cheap or expensive is it to break the law? and, secondly, how much does the answer to this question vary across Europe?

The answer to the first question is rather sobering. Despite the fact that, since 2009, European information and consultation rights have been part of the EU Charter of Fundamental Rights, in some countries the fine for contravening the legislation is merely symbolic: clearly, fines of a few euros stand in no relation to the gravity of the transgression. Even the somewhat higher fines foreseen in some countries can hardly be considered sufficient dissuasive to violations of EWC rights by multinational companies which often enough boast multimillion annual turnover figures.

As for the second question, the legal reality of sanctions across the EU is quite complex; fines are often conditional, and there are specific exclusions and variations in applicability rules that are specific to each member state’s own particular sanctions philosophy and enforcement logic. However, a comparison of the lowest and highest available fines as stipulated by national law is at least a first step towards grasping this diversity. Figures 7.9 and 7.10 depict the strikingly wide range of minimum and maximum fines imposed for breach of EWC obligations in the EU member states.

That the principle of subsidiarity should leave ample room for member states to enforce EU obligations in line with their own particular regulation paradigm is beyond question. Yet the fact that the minimum and maximum fines range from 2 € to nearly 200,000 € does raise the question of whether such variation makes a mockery of subsidiarity. Surely a shared set of obligations cannot be ‘worth’ so much more or so much less in different member states. Furthermore, only six EU member states actually amended their penal provisions to bring them in line with the new sanctions obligations of the Recast EWC Directive.

As revealed in a forthcoming ETUI study on various aspects of EWCs’ access to justice (Jagodzinski 2014), these highly varying fines are only part of a broader problem that is amplified by striking differences in provisions concerning EWCs’ legal personality and their ability to take a complaint to court, the competent court to adjudicate in EWC matters, or the question of financing an EWC’s legal counsel, to name just a few issues.

It is thus imperative that the European Commission’s implementation review pay close attention to and critically examine the quality of national transpositions with regard to penal provisions and ensure that workers’ rights to information and consultation are equally well protected across the entire EU. Clearly, these rights are more than ‘administrative burdens’ for multinational companies (ETUC 2011 and 2013); they are essential to the exercise of fundamental workers’ rights and indispensable to the Recast EWC Directive’s frequently stated aim of increasing legal certainty and bolstering the role of the EWC.
Coupled to works councils or union-based institutions of worker representation, board-level employee representation constitutes an integral element of worker participation systems in many companies in Europe. While works councils and union-based institutions of worker representation are primarily concerned with day-to-day issues, board-level employee representatives focus on long-term strategic company decision-making.


A second significant tranche of legislation was adopted in five central and eastern European countries preceding their accession as EU member states in 2004: Czech Republic (1997); Hungary (1988), Poland (1992), Slovakia (1990) and Slovenia (1993).

Beyond these two principal periods, legislation dating from 1981 covering state-owned companies remains in place in Poland, as does German legislation from 1951 and 1952; Spanish legislation of 1985, which is coupled to bipartite agreements concluded in 1986 and 1993; Finnish legislation of 1990; and Croatian legislation enacted in 2010.

There is considerable variation between the national systems of board-level employee representation, particularly regarding their sectoral coverage, the workforce size threshold at which rules apply, and whether these arrangements are statutory or triggered by employees. A failure of Maltese governments to renew the mandates of board-level employee representatives after about 1990 resulted in the eventual elimination of the systems of board-level employee representation in Malta. The point remains, however, that prior to the post-2007 financial crisis board-level employee representation was in place in some form in nineteen European countries, as is illustrated in Figure 7.11.

Variations on a theme: board-level employee representation in Europe

Coupled to works councils or union-based institutions of worker representation, board-level employee representation constitutes an integral element of worker participation systems in many companies in Europe. While works councils and union-based institutions of worker representation are primarily concerned with day-to-day issues, board-level employee representatives focus on long-term strategic company decision-making.


A second significant tranche of legislation was adopted in five central and eastern European countries preceding their accession as EU member states in 2004: Czech Republic (1997); Hungary (1988), Poland (1992), Slovakia (1990) and Slovenia (1993).

Beyond these two principal periods, legislation dating from 1981 covering state-owned companies remains in place in Poland, as does German legislation from 1951 and 1952; Spanish legislation of 1985, which is coupled to bipartite agreements concluded in 1986 and 1993; Finnish legislation of 1990; and Croatian legislation enacted in 2010.

There is considerable variation between the national systems of board-level employee representation, particularly regarding their sectoral coverage, the workforce size threshold at which rules apply, and whether these arrangements are statutory or triggered by employees. A failure of Maltese governments to renew the mandates of board-level employee representatives after about 1990 resulted in the eventual elimination of the systems of board-level employee representation in Malta. The point remains, however, that prior to the post-2007 financial crisis board-level employee representation was in place in some form in nineteen European countries, as is illustrated in Figure 7.11.
Board-level employee representation

The post-2007 financial crisis has dramatically increased pressure on board-level employee representation in some countries. In Greece, Ireland and Spain, privatisation required by the Troika as a condition of financial support threatens the existence of board-level employee representation, since it is found only in state-owned enterprises in the first place. Indeed, it is likely that none of the mandates of the existing board-level employee representatives will ‘survive’ the dramatic privatisation programme in Greece. Defenders of board-level employee representation in Ireland are campaigning to revise the legislation to ensure that board-level representation remains in place even after privatisation. The outcome of this campaign remains to be seen. The point, however, is that the coverage of board-level employee representation is contracting in Ireland because of changes to the status of companies rather than direct legislative reform which would limit its scope of application.

In contrast to the developments in Greece, Ireland and Spain, legislation enacted in France in June 2013 (Loi relative à la sécurisation de l’emploi) has extended the coverage of board-level employee representation to cover large private sector companies in addition to the state-owned and privatised companies that were already covered. This measure originated in a national cross-sectoral agreement concluded in January 2013 between employers’ associations and trade union confederations.

Within the New Member States of 2004 the emphasis is very different to that found in Western Europe insofar as the state, supported if not prompted by employers’ organisations, is concerned to weaken, if not eliminate, board-level employee representation. The revisions of the Companies Acts in Hungary and Slovenia, for example, introduced the possibility for companies to adopt monistic board structures coupled to weaker forms of employee representation on boards. Similarly, a new act on commercial corporations implemented in 2012 in the Czech Republic introduced the possibility for companies to adopt monistic board structures, while maintaining none of the previously existing legal provisions for board-level employee representation. In consequence, there will no longer be any obligation for Czech public limited liability companies to have employee representatives on their boards from 1 January 2014 when the new law comes into force. A Polish government proposal to eliminate board-level representation in privatised companies stalled in the parliamentary process after March 2011, but the number of employee representatives has fallen markedly from 618 in 2009 to 306 three years later.

Moving the goalposts? Changes to board-level employee representation

The post-2007 financial crisis has dramatically increased pressure on board-level employee representation in some countries. In Greece, Ireland and Spain, privatisation required by the Troika as a condition of financial support threatens the existence of board-level employee representation, since it is found only in state-owned enterprises in the first place. Indeed, it is likely that none of the mandates of the existing board-level employee representatives will ‘survive’ the dramatic privatisation programme in Greece. Defenders of board-level employee representation in Ireland are campaigning to revise the legislation to ensure that board-level representation remains in place even after privatisation. The outcome of this campaign remains to be seen. The point, however, is that the coverage of board-level employee representation is contracting in Ireland because of changes to the status of companies rather than direct legislative reform which would limit its scope of application.

In contrast to the developments in Greece, Ireland and Spain, legislation enacted in France in June 2013 (Loi relative à la sécurisation de l’emploi) has extended the coverage of board-level employee representation to cover large private sector companies in addition to the state-owned and privatised companies that were already covered. This measure originated in a national cross-sectoral agreement concluded in January 2013 between employers’ associations and trade union confederations.

Within the New Member States of 2004 the emphasis is very different to that found in Western Europe insofar as the state, supported if not prompted by employers’ organisations, is concerned to weaken, if not eliminate, board-level employee representation. The revisions of the Companies Acts in Hungary and Slovenia, for example, introduced the possibility for companies to adopt monistic board structures coupled to weaker forms of employee representation on boards. Similarly, a new act on commercial corporations implemented in 2012 in the Czech Republic introduced the possibility for companies to adopt monistic board structures, while maintaining none of the previously existing legal provisions for board-level employee representation. In consequence, there will no longer be any obligation for Czech public limited liability companies to have employee representatives on their boards from 1 January 2014 when the new law comes into force. A Polish government proposal to eliminate board-level representation in privatised companies stalled in the parliamentary process after March 2011, but the number of employee representatives has fallen markedly from 618 in 2009 to 306 three years later.
A further result of the post-2007 financial crisis has been high levels of company restructuring as enterprises have attempted to adjust to changed economic circumstances. Such restructuring is clearly associated with long-term strategic company policy and thus falls within the ambit of company boards.

Figure 7.13 reports the results from a large-scale survey of the activities and influence of board-level employee representatives based in 17 of the 19 countries where such representation is in place. The survey was conducted between 2009 and 2011, thereby allowing an examination of the influence exerted by board-level employee representatives on company restructuring during the crisis.

Overall, more board-level employee representatives reported that they were ‘not very influential’ or ‘not at all influential’ than reported having an influence on restructuring. Three points arise from this observation. First, it suggests that the capacity of board-level employee representatives to secure the protection of employees during corporate restructuring events is limited in practice. Second, the limited influence brought to bear on restructuring by board-level employee representatives brings into question the intensity of participation of board level representation.

The positive index scores reported by board-level employee representatives in the Netherlands, Ireland, Greece, and Spain suggest a greater degree of influence for employee representatives in these countries. The index scores reported by Germanic and Nordic board-level employee representatives are not as negative as those for their counterparts based in the Francophone countries and the New Member States of 2004. This clearly suggests that the more wide-ranging systems of participation which are characteristic of the Germanic and Nordic countries in effect allow board-level employee representatives to exert more influence in the overall restructuring process. That being said, nearly 23% of Germanic respondents and just over a quarter of Nordic respondents regarded themselves as either ‘very influential’ or ‘influential’ on the restructuring process.

There is clearly a positive correlation between the influence attained by board-level employee representatives during company restructuring and the composition of the board.

This relationship can be further assessed by reference to the three systems of board-level representation found in Germany. In practice, a direct relationship exists between the perceived influence of board-level employee representatives and the strength of their constitutional position on the board. To illustrate, in one-third codetermination 2.8 per cent of board-level employee representatives thought that they were ‘very influential’ on decisions to restructure compared to 5.5 per cent and 10.5 per cent in parity and Montan codetermination respectively.

The implications of the developments in the coverage of board-level employee representation during the post-2007 financial crisis and the survey results are straightforward: board-level employee representation is becoming more limited in coverage and many of the employee representatives that sit on company boards have been unable to influence the terms on which companies restructure. If, as repeated documents emanating from the European Commission make clear, board-level employee representation is a key element of workplace participation in Europe, it is clear that the time has come for the introduction of European legislation to stabilise the situation and allow board-level employee representatives to exert the influence that national legislation initially intended.
Board-level employee representation

The SE as a laboratory for workers’ participation

Figure 7.11 has vividly depicted that board-level employee representation (BLER) constitutes an important element of corporate governance in many EEA countries. However, at EU level there has never been a consensus on this issue. The most far-reaching initiative in this respect was a proposal from the European Commission for a fifth company law Directive in 1972, which aimed to impose a two-tier governance structure for companies with compulsory one-third employee representation (Conchon 2011: 32). The Directive, however, never saw the light of day, a fate which was nearly suffered by the European Company Statute. The compromise which finally enabled its adoption limits board-level employee representation to those SEs where such rights already existed before. This so-called ‘before and after principle’ is a key to understanding the relatively low number of SEs where workers are represented on the administrative or supervisory board.

Figure 7.14 indicates the number of SEs per country. Out of the ca. 2000 SEs registered in total, the ETUI’s SEEurope network has identified at least 104 SEs with a transnational information and consultation arrangement (usually an SE Works Council). 54 of these SEs have also negotiated board-level employee representation rights. 81 percent of them are headquartered in Germany, a country with a long tradition in BLER (on the dubious motives of some German companies hoping to ‘freeze’ employee board-level representation arrangements and/or reduce the board size by founding an SE see e.g. Keller and Werner 2008). Some authors have argued that the prospect of having employee representatives on the board amounts to a major blemish on the SE’s attractiveness, thereby explaining its lack of uptake in many countries (Ernst&Young 2009). As elaborated elsewhere (Cremers 2013), this argument fails to convince: the before-and-after principle ensures that companies without board-level employee representation need have no fear of its imposition. In fact, after over a decade of SE founding, there is not a single SE with board-level employee representation known where it did not exist before. For example, in the four Nordic countries, a total of only 14 SEs has been registered. It is hard to believe that the rarity of the SE in these countries is due to opposition to the board-level employee representation which is deeply embedded in their industrial relations systems. In Sweden for example, trade unions can appoint 2-3 representatives to the boards of limited companies employing 25 employees or more (Conchon et al. 2013).

It is far more likely that the real reasons for the relatively low attractiveness of the SE lie in its very construction, which apparently does not offer enough advantages for businesses in Europe.

Despite the limited number of SEs with BLER, their impact goes beyond their own company’s industrial relations: Firstly, at least in some member states, the SE has stimulated discussions about board-level employee representation in general and the role that employees should play in corporate governance. Secondly, board-level employee representation has indirectly spread via non-domestic employee board-level representatives, especially in German-headquartered SEs (see next page). This has had the knock-on effect that trade unions of their home countries had to rethink their general approach towards the issue of board-level employee representation and find ways to support their members. Thirdly, the compromise found in the SE Directive was and still is the key reference for all company law initiatives which (potentially) touch upon board-level employee representation, such as the Cross-Border Merger Directive (see Figure 7.16).
Board-level employee representation

What do we know about board-level employee representatives in SEs?

The European Workers’ Participation Competence Centre has identified at least 156 worker representatives on supervisory and administrative boards of SEs (EWPCC 2013). The vast majority of these sit on a supervisory board, but there are a few SEs which have a single board structure. Here, the employees are represented on the SE’s administrative board.

Depending on the legal construction prior to the establishment of the SE, the share of board-level employee representatives ranges from a single member to up to half of the board seats. However, in no SE can the worker side ultimately prevent a board decision from being taken as long as the representatives of the shareholders act in unison. Where half of the board consists of employee representatives, the chairman has a casting vote in the event of a tie (SE Regulation, Art. 50 (2)).

The selection procedure of the board members differs from one SE to another. In most cases, the SE agreements on worker involvement provide the SE Works Council with the decisive role in determining the employee representatives to the board (Rose and Köstler 2014: 99).

The most fundamental innovation brought about by the SE legislation was the possibility to internationalise the composition of the employee representation on company boards. In general, employee mandates on the board are allocated in proportion to the geographical distribution of the workforce across countries. The employee board-level representatives come from 16 different countries. 77 per cent of them come from Germany, which can be explained by the high number of SEs with board-level employee representation rights headquartered in Germany, and the commonly found concentration of the workforce in the home country. In many cases, the SE has thus indeed led to an internationalisation of the boardroom; experience with board-level employee representation has in this way been indirectly spread to countries in which such representation does not exist in the domestic corporate governance systems.

The European trade union movement has insisted from the beginning that board-level employee representatives must be understood to hold and act upon a genuinely European mandate to represent the interests of the entire European workforce (ETUC 2008).

This Europeanisation of board-level employee representation entails both opportunities and challenges. On the one hand, for workers outside the home country, an additional channel for interest representation is opened up, and a new arena emerges for international cooperation and articulation between workers’ representatives and trade unions across Europe.

On the other hand, it brings a number of new challenges, chiefly the increased need for coordination among the workers’ representatives and their unions, in order to ensure a joint understanding and a common approach. As a rule, there are only one or two representatives from countries other than the country in which the company has its headquarters. Furthermore, if these come from a country where board-level employee representation is unknown or practised differently, there is even more need to align the employee side. Different approaches to confidentiality can, in particular, be problematic, especially against the background of the individual liability of board members.

Furthermore, it should be borne in mind that the internationalisation of boards is no longer limited to the SE alone: the application of the Cross-Border Merger Directive (CBMD) for example, can also result in a board which includes employee representatives from different countries (see next page).
Break with tradition leaves everybody guessing

With the entry into force of the Cross-Border Merger Directive (CBMD) in December 2007, the ‘unique selling point’ of the European Company (SE) – that it alone enabled companies to merge easily across national borders – was made obsolete. Before the transposition of the CBMD, implementing a cross-border merger was a very difficult, burdensome and costly procedure.

By making available a company law instrument for mergers across different EEA countries, the CBMD, however, also significantly enlarged the potential scope for the Europeanisation of board-level employee representation.

A recent review of the CBMD commissioned by the EU provides the first ever European-wide data on its actual use. Between 2008 and 2012, the number of cross-border mergers (CBMs) increased by a staggering 173% from 132 to 361 transactions. Despite some methodological difficulties, the authors conclude ‘that the CBMD has been very effective in promoting economic activity between Member States’ (Bech-Bruun and Lexidale 2013: 975).

A recent review of the CBMD commissioned by the EU provides the first ever European-wide data on its actual use. Between 2008 and 2012, the number of cross-border mergers (CBMs) increased by a staggering 173% from 132 to 361 transactions. Despite some methodological difficulties, the authors conclude ‘that the CBMD has been very effective in promoting economic activity between Member States’ (Bech-Bruun and Lexidale 2013: 975).

Article 16 of the CBMD addresses the issue of board-level employee representation. In many cases, the negotiation-based approach of the SE Directive applies. The CBMD thus also offers opportunities to internationalise board-level employee representation. As for the SE, however, the rules apply only to companies in which board-level employee representation existed prior to the merger.

However, the CBMD falls far below the standard set by the SE legislation; for example, no EWC-type transnational information and consultation body is provided for. Furthermore, the company is allowed to directly apply the standard rules without any negotiations if it unilaterally so chooses. The employees are thus deprived of any say in their future representative structures.

This constitutes a break in the policy-making traditions in this area of law, whereby the primacy of company-based negotiations was the solution to the dilemma of not being able to find a one-size-fits-all legislative consensus. Indeed, the opportunity to jointly negotiate tailor-made representation structures that take the traditions and needs of the constituent parts of the company into account is widely acknowledged as one of the success factors of the EWC and SE legislation.

Little is yet known about the impact that the CBMD has and will have on worker involvement, and specifically on board-level employee representation. As is the case for the SE, there is no adequate European registration procedure which would allow the application of the Cross-Border Mergers Directive to be systematically monitored. Unfortunately, the EU-commissioned CBMD study also did not look at the impact on employee participation.

At least for German companies, recent research casts some light into the darkness (Bayer 2013). According to the study, mergers involving German companies and which are relevant for board-level employee representation constituted only a small minority (6%) of all cross-border mergers in the period 2007 to 2012. In total, 22 such mergers were identified which concerned 17 German companies in all (some companies were involved in several mergers).

As we are not aware of similar studies from other countries, the overall picture remains hazy. It also remains to be seen how the use of the Directive will develop further in the future. The above-mentioned CBMD study underlined that the increase in CBMs over the past years took place in an economic environment in which mergers and acquisitions had significantly decreased (Bech-Bruun and Lexidale 2013: 976). It is therefore likely that CBMs will increase in the future, thereby also increasing the likely impact on cross-border employee participation, especially in countries with relatively low thresholds for board-level employee representation.
The 2000s saw a burst of legislative activity in the area of European company law, as the European Commission sought ways to promote and enable company mobility by both harmonising corporate law in Europe and establishing the cornerstones of a new, genuinely European company law regime.

In the past five years, this proactive legislative activity largely fizzled out. In this way, the Commission gave up the opportunity to shape the European social dimension by strengthening the role of worker participation in Corporate Governance (Vitols 2013).

The financial crisis dramatised the failure of the shareholder-value model of corporate governance and highlighted the need to give stakeholders greater voice through company law. Workers in particular have a long-term interest in the sustainability of their companies, as opposed to many financial investors who pursue short-term financial profits. Changes in company law which could help increase the voice of stakeholders include: defining an obligation of company directors to take into account the interests of stakeholders, not just shareholders; strengthening workers’ participatory rights in addressing the implementation and consequences of restructuring situations such as takeovers and mergers; and obliging companies to provide comprehensive and detailed information on social and environmental performance (Vitols and Kluge 2011).

However, since the beginning of the 2010s only one new EU Directive for company law has been passed, namely, the Directive on supervisory review of remuneration policies in financial issues (2010/76/EU). Furthermore, new proposals on company law which have direct relevance for worker participation, such as the European Private Company and the European Foundation, have amounted to steps backwards in terms of worker participation; the workers’ rights defined in these proposals are weaker than the standards set in the Directive on Worker Involvement in the European Company (SE), particularly in the case of the European Private Company, for which a number of draft Directives have been discussed.

Also, the European Commission has not used reviews of the implementation of relatively new Directives, such as the Takeover Bids Directive and the Cross Border Mergers Directive, to propose the strengthening of workers’ participation in Europe. One such opportunity was provided by the study on the application of the EU Takeover Bids Directive, which provided evidence questioning the basic assumption of the Directive (that takeovers are generally positive for the economy) and which pointed out the lack of protection of workers’ interests in the case of takeovers.

Instead, as part of the REFIT initiative announced in 2013, the Commission will be scrutinising eight EU Company Law Directives, including the Directives on cross-border mergers, the division of public limited liability companies, and single member companies. In line with the doggedly deregulatory approach perpetuated with these initiatives, it seems unlikely that the European Commission will seek ways to increase the scope for a more participation by a company’s key stakeholder: its own employees. In the light of the devastating lessons of the financial crisis, this would be yet another opportunity lost.
In recent years a consensus has emerged that company sustainability is a multi-dimensional concept involving not only environmental issues but also social issues such as training, health and safety and human rights. However, at the same time it has become obvious that current progress on the road to sustainability is slow at best. For example, on the human resources front, demographic change combined with weak training efforts by companies has created a looming skills shortage for workers (OECD 2012). On the environmental front, the Carbon Disclosure Project has found that CO2 reduction commitments by large companies fall far short of what would be needed to meet the international commitment to limiting global warming to 2 degrees centigrade (CDP 2012).

This lack of progress raises the question of what catalysts can encourage companies to become more sustainable. From the workers’ point of view, can workers’ participation make a positive contribution here? Are companies with worker involvement more sustainable than companies without? An analysis of sustainability data for large European companies listed on the stock market (the STOXX 600 companies) indicates that worker representation is positively associated with better social and environmental performance by companies.

The first step in the analysis was to identify which of these 600 companies had a European Works Council (EWC) and/or Board-Level Employee Representation (BLER). Data was obtained from the ETUI’s EWC database and BoardEx. The second step was to examine data provided by ASSET4, a leading sustainability ratings agency, on the presence or absence of important environmental and social policies at these companies in 2012.

In almost all cases the analysis showed that companies with either form of worker representation performed better than those without. The best overall performance was achieved by the group of companies with both an EWC and BLER. For example, only 9% of companies with neither form of worker representation had a job security policy in 2012. In contrast, three times as many companies with an EWC (30%) and twice as many companies with BLER (17%) had such a policy. The highest proportion was reached by companies with both forms of representation (four times higher than the group of companies with neither form). Similar results were found for many other important sustainability policies. For example, companies with both an EWC and BLER were three times more likely to comply with ILO guidelines on health and safety, twice as likely to comply with either ILO or UN policies on human rights and more than 50% more likely to have emissions reduction targets than companies with neither form of representation.

This analysis suggests that worker participation is an important component which already contributes to sustainable companies along a number of dimensions. Furthermore, the strengthening of workers’ participation could be a significant contributor to making our companies even more sustainable.
In the last half decade, concern with the environmental and social impact of companies has increased significantly. In order to properly measure this impact, companies need to provide comprehensive and credible information on issues like training, health and safety, CO2 emissions reduction, and a host of other policies (Hojnik 2012).

In most EU member states, companies disclose this information on a purely voluntary basis. Although international frameworks for this so-called ‘non-financial’ reporting exist, such as the Global Reporting Initiative (GRI), these are mostly used by large companies listed on the stock market. Even among these companies, reporting is done on a selective basis, resulting in very patchy information even on very basic indicators (Centre for Strategy & Evaluation Services 2011). Figure 7.19 shows that only 60% of the largest 960 European listed companies provide information on CO2 emissions. Regarding social indicators, even fewer companies provide basic information; for example, only 33% report the injury rate for workers, while 25% report working days lost due to injury. The reporting rate among smaller and medium-sized companies is even lower.

In response to the pressure from the public and investors to receive better information from companies, in April 2013 the European Commission submitted a proposal for a Directive on the provision of nonfinancial and diversity information by large companies. From a stakeholder point of view, however, this proposal is much too weak. Firstly, the proposal allows companies to choose among different reporting standards, allowing them to use the weakest standard. Secondly, reporting would be on a ‘comply or explain’ basis, which leaves companies considerable leeway in choosing what items to provide information on. Thirdly, there are no requirements for independent auditing or trade union involvement in verifying the information provided; clearly this is needed to ensure confidence in the validity of the data. Finally, the threshold for reporting is too high, since the rules would apply only to companies with more than 500 employees.

In the interest of credible information for stakeholders, and in order to reliably measure progress towards company sustainability, the European Commission should be urged to require companies to provide detailed nonfinancial information on the basis of a common and comprehensive standard (such as GRI); to have this information audited; and to create a role for workers’ representatives to verify social information (Vitols and Kluge 2011).
Conclusions

It’s time to rebuild workers’ participation rights

This chapter has shown that the emerging European architecture of participation rights is being steadily dismantled. What was once a growing consensus about the importance of the workers’ voice has become the primary object of deregulation: whether it be the employment law reforms enacted in the wake of the crisis, the European Commission’s reheated deregulation agenda, or the missed opportunities in company law, the past five years have seen a rollback in the various kinds of forward-looking legislation previously designed to increase citizens’ engagement in the organisation of their working lives.

A hitherto shared European conviction that employees’ voice matters is being crowded out from several sides. Firstly, crisis-induced changes in labour law and collective bargaining systems have weakened employee representation, particularly in the event of collective redundancies. Secondly, the Fitness Check and the REFIT process – the most recent incarnations of the European Commission’s longstanding preoccupation with deregulation for deregulation’s sake – threaten to dangerously undermine employees’ rights to information and consultation, particularly in smaller companies.

This is only one among several reasons why we have taken a closer look at the state of employee representation structures in small and medium-sized enterprises (SME) across the EU. The empirical evidence shows that, while SMEs employ between half and two thirds of the total working population of the EU, institutionalised forms of worker participation are not widespread in such workplaces. Taken on its own, this representation gap in SMEs is already worrying enough; but if the European Commission follows through with its intention to curtail the rights of employee representatives in SMEs, where compliance and enforcement of existing rights is already extremely weak, then the impact on the majority of the European workforce will be tremendous. What justification can there possibly be for steps that are tantamount to a claim that workers in smaller companies deserve weaker rights?

In cases where such already disadvantaged SMEs are combined into MNCs, the problems of these smaller firms are compounded: information and consultation is inadequate at both the local and the cross-border level. That this dilemma should emerge at a time when multinationals’ internal decision-making and strategy definition is taking place in a constantly shifting and unpredictable landscape of local, national, divisional, European, and global processes raises the stakes even further. It is thus time for the EU to make its information and consultation legislation more coherent, flexible and responsive to the realities of today’s cross-border economy.

Turning to transnational information and consultation rights, in this year’s analysis for the first time, SE Works Councils (SEWCs) are systematically integrated into the ETUI’s longstanding analysis of EWCs. Until recently, under the glare of the Europeanisation of board-level employee representation in the European Company (SE), little attention was paid to the cross-border information and consultation processes foreseen in SE agreements. The analysis confirms that, despite their very different starting conditions, EWCs and SEWCs should be considered analogous institutions for the purposes of transnational information and consultation.

Furthermore, the monitoring of agreements signed over the years shows that as much effort is today being expended on renegotiation as on the negotiation of first-time EWC and SEWC agreements. That trade unions and employee representatives should expend such effort on the renegotiation of agreements is evidence of the usefulness of these institutions as well as of the impact exerted by the slow – but still incomplete – improvements in the legislative references. There is indeed – certain noble phrases in the Recast EWC Directive notwithstanding – still a long way to go until EWCs and SEWCs enjoy adequate access to justice and to the law.

Despite some changes in legislation, the coverage of board-level employee participation remains fairly widespread, although rights or coverage in this area have been curtailed in several countries (an exception being France where, on the contrary, some progress has been made). At the same time, the European Company (SE) and the application of the cross-border mergers Directive have opened up new arenas for cross-border cooperation and coordination amongst employee representatives: the resulting internationalisation of board-level representation offers new opportunities to develop this form of workers’ participation into a genuinely European instrument. Indeed, the application of the cross-border mergers Directive must be monitored carefully, to assist trade unions in optimally supporting their representatives on these boards as well as on the boards of SEs.

Finally, the potential contribution of a stakeholder orientation in corporate governance has been left woefully underdeveloped, as a review of recent company law and sustainability performance indicators shows. In the light of the recognition that the financial crisis was largely caused by a misguided reliance on shareholder value, the European Commission has missed the opportunity to strengthen the development of an alternative inclusion of stakeholder interests as a guarantor of long-term stability and social and environmental sustainability.

In the light of the challenges facing the European Union, its workers and its companies, it is clearly time to move forwards rather than backwards and to create a socially responsible and robust social dimension to the single market, one that is able to engage the interest, as well as the active commitment, of its citizens and its workers.